

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT



2013 CU 0761

DONNA LASSERRE SEVERIO

VERSUS

MACK HILL

Judgment Rendered: SEP 13 2013


RHP 

On Appeal from the
18th Judicial District Court,
In and for the Parish of Pointe Coupee
State of Louisiana
Docket No. 43,631, Division B

The Honorable J. Robin Free, Judge Presiding

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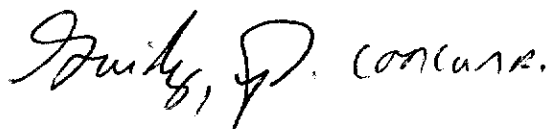
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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.



DRAKE, J.

In this appeal, the father of a minor child challenges the district court's denial of a peremptory exception raising the objections of nonjoinder of a party, no right of action, and no cause of action as to the maternal grandmother's motion for visitation rights to the minor child. For the reasons that follow, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

A minor child ("M.H.") was born to Defendant/Appellant, William Mack Hill, III, and Dara Renee Lasserre on November 11, 2008. The parties were subsequently married on January 17, 2009. Later, after the couple had physically separated, Mr. Hill instituted divorce and custody proceedings. In a stipulated judgment dated November 29, 2010, the district court awarded sole custody of the minor child to Mr. Hill.¹

Shortly thereafter, the minor child's maternal grandmother, Donna Lasserre Severio, filed a motion and order seeking visitation rights to the minor child. In response, Mr. Hill filed a peremptory exception raising the objections of nonjoinder of a party, no right of action, and no cause of action. Mr. Hill later amended his exception, adding a constitutional challenge to Louisiana Revised Statutes 9:344(D), prior to its amendment by 2012 La. Acts 763, § 2, effective June 12, 2012.

A bench trial was held in this matter on July 12, 2011. Prior to the introduction of evidence, the district court denied the exception raising the objections asserted by Mr. Hill. At the conclusion of the trial, the district court awarded the maternal grandmother, Mrs. Severio, periodic visitation with M.H.

¹ The parties were subsequently divorced by a judgment signed on June 13, 2011.

until November 6, 2011.² After the award of visitation rights expired, Mrs. Severio reasserted on March 29, 2012, her motion to set visitation rights. In response, Mr. Hill filed the peremptory exception raising the objections of nonjoinder of a party, no right of action, and no cause of action as to the maternal grandmother's motion for visitation rights to M.H. Mr. Hill also raised a constitutional challenge to the former version of Louisiana Revised Statutes 9:344(D), re-urging the same arguments he made at the July 12, 2011 bench trial.³

On October 9, 2012, a hearing was held regarding Mrs. Severio's motion to set visitation rights. The district court determined that there was no new evidence before the court and that the hearing was simply a "review." As such, the district court found that Mr. Hill's objections were not properly before the court. At the conclusion of the hearing, the district court reinstated Mrs. Severio's visitation rights.⁴ Mr. Hill now appeals the December 13, 2012 judgment of the district court that reinstated Mrs. Severio's visitation rights to M.H.

APPLICABLE LAW AND DISCUSSION

Nonjoinder of a Party, No Right of Action, No Cause of Action

Prior to its amendment by 1995 La. Acts 662, § 1, Louisiana Code of Civil Procedure article 641 provided that indispensable parties to an action are those whose interests in the subject matter are so interrelated that a complete and equitable adjudication of the controversy cannot be made unless they are joined in

² Mr. Hill appealed the July 12, 2011 judgment of the district court, which denied his exception and granted Mrs. Severio visitation rights, to this court. This court summarily dismissed Mr. Hill's appeal, holding that it was moot based on the fact that the judgment rendered by the trial judge was only effective until November 6, 2011. *Severio v. Hill*, 11-2211 (La. App. 1 Cir. 3/23/12) (unpublished) 2012WL996559.

³ The Attorney General for the State of Louisiana filed a memorandum in support of the constitutionality of the former version of Louisiana Revised Statutes 9:344(D). See La. C.C.P. art. 1880.

⁴ Although it does not form a part of the record on appeal, we also note that the minor child's mother, Dara Renee Lasserre Hill, filed a rule to modify child custody and visitation on October 30, 2012, in suit number 43,018, Division C, in the Eighteenth Judicial District Court for the parish of Pointe Coupee. There is currently an order in effect that grants Ms. Hill visitation with M.H. on the first and third weekends of every month. See *Tranum v. Hebert*, 581 So. 2d 1023, 1027 (La. App. 1st Cir.), writ denied, 584 So. 2d 1169 (La. 1991).

the action. The failure to join a party to an action may be noticed by an appellate court on its own motion. La. C.C.P. arts. 645 and 927(B); *See Blanchard v. Naquin*, 428 So. 2d 926, 927-28 (La. App. 1st Cir. 1983), *writ denied*, 433 So. 2d 162 (La. 1983).

A cause of action, when used in the context of the peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. *Everything on Wheels Subaru, Inc. v. Subaru South., Inc.*, 616 So. 2d 1234, 1238 (La. 1993). The function of an exception that raises the objection of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. *Ramey v. DeCaire*, 03-1299 (La. 3/19/04), 869 So. 2d 114, 118. No evidence may be introduced to support or controvert the exception raising the objection of no cause of action. La. C.C.P. art. 931. All facts pled in the petition must be accepted as true. *Blanchard v. Blanchard*, 12-0106 (La. App. 1 Cir. 12/31/12), 112 So. 3d 243, 248, *writ denied*, 13-0488 (La. 4/12/13), 111 So. 3d 1013. In reviewing the petition to determine whether a cause of action has been stated, the court must, if possible, interpret it to maintain the cause of action. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. *Livingston Parish Sewer Dist. No. 2 v. Millers Mut. Fire Ins. Co. of Texas*, 99-1728 (La. App. 1 Cir. 9/22/00), 767 So. 2d 949, 952, *writ denied*, 00-2887 (La. 12/8/00), 776 So. 2d 1175.

An action can be brought only by a person having a real and actual interest which he asserts. La. C.C.P. art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action, and its function is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Vincent v. Vincent*,

98-1346 (La. App. 1 Cir. 6/25/99), 739 So. 2d 920, 922; *see* La. C.C.P. art. 927 (A)(6). The exception is appropriate when the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with suit in a particular case. When the facts alleged in the petition provide a remedy to someone, but the plaintiff who seeks the relief for himself is not the person in whose favor the law extends the remedy, the exception should be sustained. *Vincent v. Vincent*, 739 So. 2d at 922. Whether a plaintiff has a right of action is a question of law; therefore, it is reviewed *de novo* on appeal. *Blanchard v. Blanchard*, 112 So. 3d at 249.

Grandparent Visitation Rights

The law in Louisiana regarding visitation rights of grandparents is set forth in Louisiana Revised Statutes 9:344 and Louisiana Civil Code article 136. Prior to June 12, 2012, Louisiana Revised Statutes 9:344 stated:

A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

B. When the parents of a minor child or children live in concubinage and one of the parents dies, or is incarcerated, the parents of the deceased or incarcerated party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

C. If one of the parties to a marriage dies or is incarcerated, the siblings of a minor child or children of the marriage may have reasonable visitation rights to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

D. If the parents of a minor child or children of the marriage are **legally separated or living apart for a period of six months**, the grandparents or siblings of the child or children may have reasonable visitation rights to the child or children during their minority, if the court in its discretion find that such visitation rights would be in the **best interest** of the child or children. (Emphasis added.)

Prior to June 12, 2012, Louisiana Civil Code article 136⁵ stated:

A. A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child.

B. Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or stepgrandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:

(1) The length and quality of the prior relationship between the child and the relative.

(2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.

(3) The preference of the child if he is determined to be of sufficient maturity to express a preference.

(4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.

(5) The mental and physical health of the child and the relative.

C. In accordance with Paragraph B of this Article, extraordinary circumstances may include when a parent is addicted to a controlled dangerous substance.

D. In the event of a conflict between this Article and R.S. 9:344 or 345, the provisions of the statute shall supersede those of this Article.

Since the current filing of Mrs. Severio's motion and order for visitation, the Louisiana Legislature has amended the laws regarding grandparent visitation rights. At the time Mrs. Severio initiated her suit for visitation, Louisiana Revised Statutes Annotated 9:344(D) did not require a showing of extraordinary circumstances to merit grandparent visitation rights, but merely required that the district court find, in its discretion, that such visitation would be in the best interest of the child. However, effective June 12, 2012, the Legislature amended Section 344(D) to require a showing of extraordinary circumstances, in addition to a consideration of the best interest factors, in order to obtain grandparent visitation rights. *See* 2012 La. Acts 763, § 2. Also, prior to the 2012 amendments, Louisiana

⁵ Article 136 was amended by 2012 La. Acts 763, § 1, effective June 12, 2012.

Civil Code article 136 allowed a relative seeking visitation, including a grandparent, a grant of reasonable visitation rights under extraordinary circumstances, in addition to a consideration of the best interest factors. *See* 2012 La. Acts 763, § 1.

An appellate court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court judgment that was correct under the law in effect at the time it was rendered. *Wooley v. AmCare Health Plans of Louisiana, Inc.*, 05-2025 (La. App. 1 Cir. 10/25/06), 944 So. 2d 668, 673.

In the absence of contrary legislative expression, substantive laws apply prospectively only. La. C.C. art. 6; La. R.S. 1:2. Article 6 requires a two-step inquiry: (1) did the legislature express its intent regarding retrospective or prospective application, and (2) if not, is the law substantive, procedural, or interpretive. Substantive laws establish new rules, rights, and duties or change existing ones. Procedural laws prescribe a method (remedy) for enforcing a substantive right and relate to the form of the proceeding or the operation of the laws. Interpretive laws merely establish the meaning the interpreted law had from the time of its enactment. *Wooley v. AmCare*, 944 So. 2d at 672-73; *see* La. C.C. art. 6.

Here, the legislature did not express its intent for the amendments to Section 344 or Article 136 to apply retroactively. Furthermore, the amendments to Section 344 and Article 136 are substantive laws, since these statutes establish additional conditions modifying the rights of family members to seek visitation of minor children. Thus, the amendments to Section 344 and Article 136 apply

prospectively only. We will therefore apply the former versions of these statutes to the appeal before us.

Assuming the parents of a minor child are legally separated or living apart for a period of six months, Section 344(D) required that the district court find, in its discretion, that such visitation would be in the best interest of the child. Article 136 allowed a relative, including a grandparent not granted custody of a child, the right to be granted reasonable visitation rights under extraordinary circumstances, in addition to a consideration of the best interest factors. In the event of a conflict between Article 136 and Sections 344 and 345, the former version of Louisiana Civil Code article 136 set forth that the provisions of the statute would supersede those of the civil code article. Therefore, the law required that the district court apply Section 344, which only required a showing that reasonable visitation rights would be in the best interest of the child.

Here, the district court heard testimony from numerous witnesses regarding whether or not visitation with Mrs. Severio would be in the best interest of M.H. Following the conclusion of evidence, the court stated: "I have looked at all of the factors involve[d] here, and based on all of the factors, I think it is in the best interest of this child to have a relationship with this grandmother." Based on our review of the record, we cannot say the district court abused its discretion in granting reasonable visitation rights to the minor child's grandmother, Mrs. Severio.

DECREE

Accordingly, we affirm the judgment of the district court. Costs of this appeal are assessed to Defendant/Appellant, William Mack Hill, III.

AFFIRMED.