STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SHIPLEY,

Plaintiff-Appellant,

v

WENDY SHIPLEY, a/k/a WENDY STANLEY,

Defendant-Appellee.

UNPUBLISHED
October 20, 2000

No. 224104
Macomb Circuit Court
LC No. 98-002557-DZ

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court ruling that plaintiff is not the equitable parent of defendant's minor son. We affirm.

Defendant's son was born on January 21, 1991. It is undisputed that plaintiff is not the biological father of the child and that the child was neither conceived nor born during the parties' marriage. The parties were married on October 11, 1991, and a consent judgment of divorce was filed on August 26, 1998. The parties had two daughters during the course of their marriage, and the consent judgment of divorce awarded plaintiff sole physical custody of the two daughters. With regard to defendant's son, the consent judgment of divorce provided in relevant part:

> The parties acknowledge the vital role Plaintiff has been responsible for as the psychological father in the life of the minor child of the Defendant Wife, and as such, shall have reasonable rights of parenting time with the minor child every other weekend to coincide with the weekends Plaintiff has with his minor children. Plaintiff shall be entitled to five (5) consecutive weeks with [defendant's son] during the summer break to coincide with the time he spends with the other children. The parties will alternate the parenting time of [defendant's son], including holidays, to coincide with the other children.

On November 16, 1998, defendant moved to change physical custody of the two daughters to herself. On March 1, 1999, plaintiff moved for a change of custody and parenting time regarding defendant' son, contending that he was the equitable parent of the child. Defendant responded by requesting that

the court terminate plaintiff's parenting time with her son. On July 22, 1999, defendant moved for supervised visitation of plaintiff with the parties' children and that the request of plaintiff's termination of parenting time for defendant's son be referred to the Friend of the Court. On August 2, 1999, the circuit court entered a consent order enforcing plaintiff's parenting time with regard to defendant's son as set forth in the consent judgment of divorce.

Shortly thereafter, plaintiff attempted to subpoena the school records of defendant's son, and defendant moved to quash the subpoena. Although the motion to quash was denied, the court directed that the parties brief the issue of plaintiff's alleged status as an equitable parent. In an opinion and order filed October 26, 1999, the circuit court ruled that the doctrine of equitable parenthood does not apply to this case because the son was not conceived or born during the course of the parties' marriage. Plaintiff then moved for reconsideration of this ruling, and that motion was denied in a written opinion and order filed on November 24, 1999.

Plaintiff first argues that he is the equitable parent of defendant's minor son and that, as such, he is entitled to the rights of a natural parent. The equitable parent doctrine was adopted in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987), and provides:

> a husband who is not the biological father of a child born or conceived during the marriage to the mother may be considered the natural father of the child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

The equitable parent doctrine was adopted by our Supreme Court in *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999), as set forth in *Atkinson*, and the Court specifically noted that "[b]y its terms, this doctrine applies, upon divorce, with respect to a child born or conceived during the marriage."[1] We hold that the circuit court correctly relied upon *Van* in ruling that plaintiff is not an equitable parent under this doctrine because it is undisputed that defendant's son was neither conceived nor born during the parties' marriage. Consequently, the equitable parent doctrine simply does not apply by its terms to the undisputed facts of this case, and regardless of whether the parties were married after the child's birth, plaintiff cannot avail himself of the equitable parent doctrine in order to claim any parental rights to defendant's son.

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[1] Plaintiff relies on *Hawkins v Murphy*, 222 Mich App 664, 673; 565 NW2d 674 (1997), where this Court stated that the fact that the child was not born during the marriage should not preclude a finding that the defendant was the equitable parent of the child. Because our Supreme Court has clearly directed in *Van, supra* at 320, that the equitable parent doctrine applies by its terms upon divorce to a child born or conceived during the marriage, we conclude that this statement in *Hawkins* is no longer controlling precedent.

Plaintiff also argues that defendant was barred by the doctrines of res judicata and collateral estoppel from relitigating the issue of plaintiff's parental rights to defendant's minor child.

The doctrine of res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata applies to bar a second action when: (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id*. A judgment of divorce is a final judgment entitled to preclusive effect under the doctrine of res judicata. *In re Quintero Estate*, 224 Mich App 682, 690; 569 NW2d 889 (1997).

Likewise, collateral estoppel precludes relitigation of an issue in a subsequent cause of action between the same parties when the prior proceeding culminated in a valid final judgment, and the issue was actually and necessarily determined in the previous proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Collateral estoppel cannot be based on questions that might have been litigated, but were not, and the parties must have had a full and fair opportunity to litigate the issues in the first action. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989); *McCoy v Cooke*, 165 Mich App 662, 666; 419 NW2d 44 (1988). A question has not been actually litigated until it has been put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined. *Kowatch, supra* at 168. Just as a judgment of divorce is considered a final judgment entitled to preclusive effect under the doctrine of res judicata, by analogy, a judgment of divorce is also a final judgment entitled to preclusive effect under the doctrine of collateral estoppel. *Quintero, supra* at 690.

Plaintiff argues that his equitable parent status was determined by the consent judgment of divorce.[2] He contends that he and defendant agreed at that time that he would be considered the child's parent and that the judgment of divorce conferred equitable parent status upon him. Contrary to plaintiff's argument, the consent judgment of divorce did not determine that plaintiff was the child's equitable parent. Rather, it merely provided that plaintiff should be allowed "parenting time" with the child. Consequently, because this issue was not litigated before the entry of the consent judgment of divorce, collateral estoppel did not preclude the litigation of this issue subsequent to the entry of the judgment of divorce. *McMichael, supra* at 727; *Kowatch, supra* at 168.

Although the equitable parent issue was not determined in the consent judgment of divorce, res judicata would nevertheless have operated to bar the parties from subsequently raising this issue if it *could have been raised* before the entry of the judgment of divorce, but was not. *Dart, supra* at 586. It would have been unnecessary and premature for either party to raise the equitable parent issue before the entry of the judgment of divorce. At that time, plaintiff sought visitation rights with defendant's child,

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[2] To the extent that plaintiff also contends that the parties consented to plaintiff's status as an equitable parent in an order filed August 4, 1999, we simply note that the doctrines of res judicata and collateral estoppel would not apply because that order is not a final judgment that would have such preclusive effect.

and defendant concurred in the allowance of such visitation. Therefore, the visitation provisions of the judgment of divorce were agreed upon by both parties. Neither party could have been aware that plaintiff would later seek legal custody of the child or that defendant would attempt to terminate plaintiff's visitation rights. The issue of what legal rights, if any, plaintiff possessed with respect to defendant's son did not arise until plaintiff attempted to subpoena the child's school records nearly one year after the judgment of divorce was entered. Because the issue simply did not arise before the entry of the judgment of divorce, it could not have been determined at that time. *Id.* at 586. As such, the doctrine of res judicata did not bar the litigation of the equitable parent issue subsequent to the entry of the judgment of divorce.

The trial court's order ruling that plaintiff is not the equitable parent of the child is accordingly affirmed.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra