NO. COA01-707

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

LORIA JENNIFER SANTOS,

Plaintiff/Appellee,

v. Catawba County
No. 96 CVD 569

VESPERTINO SANTOS,

Defendant/Appellant.

Appeal by defendant from order entered 23 March 2001 by Judge J. David Abernethy in Catawba County District Court. Heard in the Court of Appeals 24 June 2002.

Sigmon, Sigmon and Isenhower, by C. Randall Isenhower, for plaintiff-appellee.

Charles R. Brewer for defendant-appellant.

TIMMONS-GOODSON, Judge.

Plaintiff filed a complaint on 6 March 1996 seeking an absolute divorce and custody of the two minor children "born to the marriage union between the Plaintiff and the Defendant, . . . to wit: Leslie Loria Santos, born April 22, 1988, and Adam Vespertino Santos, born November 22, 1992." Defendant admitted in his answer that the two children named above were born to the marriage. He counterclaimed for custody of the two children. On 21 January 1997, he entered into a consent order in which the parties agreed

to joint custody of the children, with defendant having the children every weekend.

On 3 August 1999 plaintiff filed a motion in the cause seeking child support from defendant. On 24 March 2000 the court filed an order requiring defendant to pay the sum of $445 per month as child support for the two children commencing 5 May 2000 and the sum of $375 for plaintiff's attorney's fees.

On 24 April 2000 defendant filed a motion in the cause seeking change of custody. On 1 June 2000 he filed a motion pursuant to Rule 60 to set aside the order of support, alleging, *inter alia*, that his attorney failed to advise him of his withdrawal from the case and to instruct defendant to appear in court for the hearing. The court denied the Rule 60 motion on 23 June 2000. Defendant did not appeal from this order.

On 27 September 2000 plaintiff filed a motion seeking to hold defendant in civil contempt for failing to comply with the support order. On 10 January 2001 defendant filed a motion in the cause seeking paternity testing, alleging upon "information and belief" and "representations made to him by the Plaintiff" that the younger child may not have been fathered by him.

The court heard the motion for blood grouping tests on 15 February 2001 and rendered an order denying the motion. The court filed a written order on 23 March 2001 finding the issue of paternity had previously been judicially determined.

On 19 March 2001, the court held the show cause hearing on plaintiff's motion for contempt. At the conclusion of the hearing,

the court rendered an order allowing the motion. The court filed an order on 23 March 2001 in which it found that defendant failed to make any payments to the centralized support office since the date of the support order despite having the ability to make such payments. The court held defendant in indirect civil contempt.

Defendant filed notice of appeal from the contempt order but not from the order denying his motion for paternity testing.

Defendant's sole contention on appeal is that the court erred by holding him in contempt without allowing blood grouping and paternity tests sought by him.

The law is settled in this state that once paternity is judicially established, the issue may not be litigated again. *See, e.g., Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 211, 450 S.E.2d 554, 557 (1994); *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981). The facts of *Withrow* are remarkably similar to the present case. The male defendant in that case filed an answer admitting that a child was born of the marriage and counterclaimed for custody of the child and visitation rights. *Id.* at 68, 280 S.E.2d at 23-24. The judgment of divorce also provided that one child was born of the marriage. Nearly five years later, the defendant filed a motion in the cause seeking blood grouping tests based upon an allegation that he had been told by the plaintiff the child was not his. This Court held that the defendant's attempt to raise the issue of paternity was barred by *res judicata*. *Id.* at 71, 280 S.E.2d at 26.

We find *Withrow* is controlling and binding in the present case. Defendant admitted paternity of both children in his answer and counterclaimed for custody and visitation. He signed a consent order admitting paternity of the two children. Consequently, he is barred from raising the issue of paternity again.

The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).