[Cite as *In re K.M.C.*, 2021-Ohio-1612.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY, OHIO

IN THE MATTER OF	:	
	:	
K.M.C.,	:	Case No. 20CA14
	:	
A MINOR CHILD.	:	
	:	
	:	DECISION AND JUDGMENT
	:	ENTRY
	:	

APPEARANCES:

Susan Gwinn, Athens, Ohio, for Appellants June Campbell and Thomas Campbell.

Laura A. Knab, Marietta, Ohio, Appellee Jeri Lynn Campbell.[1]

Smith, P.J.

{¶1} June Campbell and Thomas Campbell, "Appellants," appeal the "Decision and Journal Entry on Objections to Magistrate's Decision" of the Washington County Common Pleas Court Juvenile Division, entered April 10, 2020. Appellants' deceased son, Benjamin Campbell, was married to the mother of the minor child subject of this appeal, K.M.C. In 2016 and 2019, Appellants sought custody of K.M.C. and other minor children born of the marriage. Appellants assert the trial court erred by dismissing their 2019 action as to K.M.C.,

[1] Appellee has not participated in this appeal.

arguing that they are entitled to application of the presumption of paternity codified in R.C. 3111.03(A). Upon review of the record, we find Appellants' argument has merit. Accordingly, we sustain Appellants' sole assignment of error and reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} Jeri Lynn Campbell, "Appellee," is the mother of K.M.C., and twins M.E.C. and M.L.C. Appellee was married to Benjamin Campbell on July 27, 2009. K.M.C., the minor child subject of this appeal, was born on August 26, 2009. The twins were born in September 2012. Benjamin Campbell is listed as the father of all three children on their birth certificates.

{¶3} Appellants are the biological parents of Benjamin Campbell. Tragically, Benjamin Campbell was killed in an industrial accident in 2013. On May 27, 2016, Appellants filed a Motion for Change of Parental Rights and Responsibilities (Custody) and Memorandum in Support in the Washington County Juvenile Court. Appellants alleged a litany of examples in which they considered Appellee to be negligent. They also indicated Appellee needed "mental help." Appellants alleged fear for the safety of the children. Appellants were granted temporary custody.

{¶4} Eventually the parties reached an agreement. In a January 17, 2017 Amended Journal Entry, Appellee was designated the residential custodial parent

of the above minor children. Appellants were granted visitation. Appellants exercised visitation time as ordered pursuant to local rule.

{¶5} On October 28, 2019, Appellants filed a "Motion for Modification of Parental Rights and Responsibilities and a Motion for 75(N) Temporary Ex Parte Orders" for custody of the three minor children. On October 29, 2019, the Washington County Juvenile Court magistrate issued an order granting temporary custody to Appellants and allowing for supervised visitation with Appellee. The matter was set for a hearing on November 21, 2019. On November 22, 2019, Appellee filed a "Motion to Vacate the Ex Parte Temporary Order." Appellee also filed a "Motion to Dismiss Motion for Modification of Parental Rights and Responsibilities and a Motion to Terminate Grandparent Visitation." On November 22, 2019, the Magistrate entered a temporary order which modified the order of October 29, 2019 to allow for unsupervised visitation with Appellee.

{¶6} On December 13, 2019, the court heard all pending motions. On that same date the magistrate issued an order finding as follows:

> This matter came on for a temporary orders hearing on December 13, 2019. * * * It was discovered, and undisputed, through testimony that June and Thomas Campbell were not the biological paternal grandparents of [K.M.C.] and that her bio-father was not properly served. IT IS THEREFORE ORDERED that the case regarding [K.M.C. dob 8/26/2009)] is dismissed, as are any temporary orders issued with regard to [K.M.C.].

{¶7} On December 18, 2019, the Magistrate's Decision and Judgment Entry reiterated the above in its "Findings of Fact." The decision stated in its "Conclusions of Law," as follows: "June and Thomas Campbell are not relatives of [K.M.C.], therefore, the Court lacks the authority to grant them visitation pursuant to R.C. 3109.11." The magistrate further ordered that the grandparent visitation previously ordered on January 17, 2017 be terminated. The Juvenile Court judge further adopted the Magistrate's Decision and ordered it entered as a judgment of record.[2]

{¶8} On December 30, 2019, Appellants filed a motion to set aside the order regarding K.M.C. and requested a stay of the matter. Also, Appellants filed "Objections to the Magistrate's Decisions and Request for Transcript." On January 28, 2020, Appellants filed a "Memorandum in Support of Objections." On April 10, 2020, the Juvenile Court filed its "Decision and Judgment Entry on Objections to Magistrate's Decision." The trial court found that after making an independent review of the matter and the objections, the objections should be overruled. The court adopted and affirmed the Magistrate's Decision of December 18, 2019 with regard to K.M.C. and to the twins.

{¶9} This timely appeal followed.

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[2] Regarding the other two minor children, on December 18, 2019, the magistrate by separate entry also found that "after weighing the evidence, it does not appear at this early stage of the proceedings that removing the children from the mother is in their best interest" and revoked the previous temporary orders regarding the twins and ordered that the parties revert to the prior journal entry of January 17, 2017.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THAT BENJAMIN CAMPBELL WAS NOT THE FATHER OF K.M.C. AND, HENCE, HIS PARENTS WERE NOT ENTITLED TO VISITATION AS GRANDPARENTS.

A. STANDARD OF REVIEW

{¶10} The trial court dismissed K.M.C. from Appellants' action for modification of parental rights. The record reveals that Appellee and Appellants' son Benjamin Campbell were married in July 2009. K.M.C. was born in August 2009. Appellants argue that despite Appellee's testimony to the contrary, because Appellee and their son were married at the time of K.M.C.'s birth, Appellants' son was the presumptive father of K.M.C., and they continue to be the presumptive grandparents. In support of this argument, Appellants direct us to R.C. Chapter 3111, which governs parentage, and specifically, R.C. 3111.03, presumptions as to father and child relationship.[3] Appellants request this court to remand the matter for further consideration of their entitlement to grandparent visitation and/or custody of K.M.C. Because Appellants' argument necessitates interpretation and review of a statute, we are presented with a question of law which we review de novo. *See Sarchione-Tookey v. Tookey*, 4th Dist. Athens No. 17CA41, 2018-Ohio-

[3] We begin by noting that when an appellee fails to file an appellate brief, App.R.18(C) authorizes the appellate court to accept an appellant's statement of facts and issues as correct and reverse a trial court's judgment if the appellant's brief "reasonably appears to sustain such action." *Matter of H.H.,* 4th Dist. Meigs No. 18CA6, 2018-Ohio-2636, fn 2. In the interests of justice, we have fully reviewed the record and have considered arguments contrary to those made by Appellants.

2716, at ¶ 25. *See also Clifford v. Skaggs,* 4th Dist. Gallia No. 17CA6, 2017-Ohio-8597, at ¶ 39; *Hayslip v. Hanshaw,* 2016-Ohio-3339, 54 N.E.3d 1272, ¶ 12 (4th Dist.).

B. LEGAL ANALYSIS

{¶11} R.C. 3111.03(A) provides that "[a] man is presumed to be the natural father of a child under any of the following circumstances: (1) The man and the child's mother are or have been married to each other, and the child is born during the marriage * * *." *See Matter of A.B.,* 2019-Ohio-90, 128 N.E.3d 694, ¶ 13 (4th Dist.). The presumption of paternity found in R.C. 3111.03 was created by the legislature for the benefit and protection of the children of the marriage from the stigma of illegitimacy. *See State v. Crawford,* 6th Dist. Fulton No. F-06-017, 2007-Ohio-2254, at ¶ 8. *See also Hamilton v. Burke,* 4th Dist. Gallia No 89CA689, 1990 WL 9953, *2 (Feb. 7, 1990). While it originally appeared that the courts and the Ohio General Assembly "wanted to preserve the intact family and to avoid rendering illegitimate a child who was previously legitimate," *see Franklin v. Julian,* 30 Ohio St.2d 228, 283 N.E.2d 813 (1972), in 1982 the Ohio General Assembly codified R.C. 3111.04, which allows "the natural father of a child to file an action to determine the existence of a father-child relationship. Therefore, it would appear that the legislature was more concerned with the existence of the natural parent-child relationship than the marital status of the parents."

Broxterman v. Broxterman, 101 Ohio App.3d 661, 665, 656 N.E.2d 394 (1st Dist. 1995) ("In adopting a form of the Uniform Parentage Act, Ohio has recognized the importance of a child knowing the identity of his or her biological father").

{¶12} The issue of K.M.C.'s paternity was brought to the forefront at the parties' hearing on competing motions on December 13, 2019. According to the transcript of the hearing, Appellee's direct testimony revealed the following:

> I had met Tom and June [Appellants] through my husband [Benjamin Campbell] and he took me in cause I moved to Ohio and did not have a legal guardian, and June had taken me to court to get custody of me so I could go to school, and start school back, and two weeks after I thought I was pregnant with my daughter [K.M.C.], and I was. [K.M.C.'s] father is not Ben's birth child and they all know this, and they had called and talked to [K.M.C.'s] birth father or wrote him and told him that he was not allowed to be around me because he caused stress and they were afraid of my miscarried [sic] and that they would call the police if he came around me because I was 17, and he was 23 at the time. And him and I had been together 4 years prior, and him and I split up and I found out I was pregnant and Ben and I were pretty excited.

{¶13} On cross-examination, K.M.C.'s paternity was again discussed:

Attorney Woodburn: Okay. You had mentioned that [K.M.C.'s] biological father is not Ben. Who is her biological father?

Appellee: Chris Barnett.

* * *

Attorney Woodburn: And does [K.M.C.] know that Chris Barnett is her father?

Appellee: Yes.

* * *

Attorney Woodburn: When did you tell your daughter that Chris was her birth father, or her biological father?

Appellee: After Tom and June took the kids from me in 2016.

{¶14} The hearing transcript later reveals that after a lunch break, the magistrate stated as follows:

> The court is just going to briefly discuss what happened in chambers a few moments ago. Some testimony was given by the mother earlier in court which indicated that the biological father of the child was not in fact Benjamin Campbell but was a Chris (inaudible) * * *. So, at this point the court is not * * * confident that if we even have the legal right to proceed with regard to any sort of grandparent visitation or anything in that manner. * * * So as far as the court is concerned it is going to rescind any order made with regard to K.M.C. * * *.

{¶15} At this point, Appellants' attorney asked that it be reflected in the record that Benjamin Campbell's name was placed on the birth certificate of K.M.C. Appellants did not offer additional evidence on the issue of paternity. As set forth above, the trial court adopted the magistrate's decision finding that it was "discovered and undisputed" that Appellants were not the biological grandparents of K.M.C. The language of the appealed-from entry states in particular:

> With regard to the case involving K.M.C., the parties failed to properly attempt service on the biological father, *an individual whom is known to all parties,* neither during the initial filing in 2016 nor the current filing of 2019. The Court was unaware of

> this fact until the hearing on December 13, 2019, and thus acted appropriately when dismissing the case upon learning of the misrepresentation previously made to the Court. Obviously, the parties are free to file a custody action for K.M.C. again *with proper service on all parties.*

{¶16} It is obvious the magistrate was troubled, as our we, by a very unfortunate fact pattern. The only father K.M.C. has ever known died in 2013. Appellee's revelation in open court regarding K.M.C.'s paternity seems unequivocal. Appellants did not dispute Appellee's testimony but have chosen to argue the presumption. And, the putative father has not intervened in these proceedings or the earlier ones occurring in 2016 and 2017.

{¶17} A decision of the First District Court of Appeals in *Broxterman, supra,* has provided some guidance. In *Broxterman,* the appellate court was asked to determine the right of the legal custodians of a minor child to bring a paternity action in domestic relations court after parentage had been previously determined in a final decree of divorce. Ultimately, the appellate court remanded the case for a determination of whether allowing the grandparents in that case to bring a paternity action was in the minor child's best interests.

{¶18} The *Broxterman* court commented that the case presented very complex procedural and legal issues. We find that to be a fair assessment of the issues facing the trial court, and this court, in this matter. *Broxterman* observed:

> The syllabus of I*n re Gilbraith*, 32 Ohio St.3d 127, 512 N.E.2d 956 (1987), holds:

> 'The doctrine of res judicata can be invoked to give conclusive effect to a determination of parentage contained in a dissolution decree or a legitimation order, thereby barring a subsequent paternity action brought pursuant to R.C. Chapter 3111.'

Broxterman, 101 Ohio App. 661, 663-664.

{¶19} While discussing res judicata in *Phillips v. Rayburn*, 113 Ohio App. 3d 374, 680 N.E.2d 1279 (4th Dist.1996), our own court observed:

> In Ohio, res judicata encompasses both estoppel by judgment and collateral estoppel. *State ex rel. Kirby v. S.G. Loewendick & Sons, Inc.,* 64 Ohio St.3d 433, 437, 596 N.E.2d 460, 463 (1992). Estoppel by judgment prevents a party from relitigating the same cause of action after a final judgment has been rendered on the merits as to that party. *Krahn v. Kinney,* 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062 (1989). Collateral estoppel prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a previous suit. *Thompson v. Wing,* 70 Ohio St.3d 176, 183, 637 N.E.2d 917, 923 (1994).

Phillips, 680 N.E.2d 1279, 1283.

{¶20} We further noted in *Phillips, supra*:

> As the Ohio Supreme Court stated in *Broz v. Winland,* 68 Ohio St.3d 521, 629 N.E.2d 395 (1994): " 'The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be "heard" in the due process sense.' " *Id.* at 523, 629 N.E.2d at 397, quoting *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 200–201, 443 N.E.2d 978, 985 (1983).

{¶21} The *Broxterman* court found that the grandparents, as

custodians, had stepped into the shoes of the minor child's mother, who was originally granted custody and who was bound by the finding of paternity in a divorce decree. The *Broxterman* court held that the grandparents, being in privity with the mother, were barred by res judicata from relitigating the paternity issue on their own behalf. The court further proceeded to consider the issue as to whether the grandparents could bring the paternity action on the minor child's behalf. In doing so, the court paused to consider the policy considerations of the Uniform Parentage Act. The First District court observed:

> In adopting a form of the Uniform Parentage Act, Ohio has recognized the importance of a child knowing the identity of his or her biological father. However, there are other interests involved, and they may be different in the context of a divorce than they are in a paternity action in which there has been no marriage. The state, for example, has a strong fiscal interest in seeing to it that children are supported by their parents and not by the state. *Johnson v. Adams*, 18 Ohio St.3d 48, 52, 479 N.E.2d 866, 869 (1985). In this case, Mark Broxterman, the marital father, has been ordered to pay child support. If he is excluded as the natural father after genetic testing, and the natural father cannot be located, whose interest, and what policy, is being served? The Dayton Law Review article suggests that in cases where the nonmarital father is not the one bringing the paternity action, it is in the state's interest to maintain the marital presumption of paternity to ensure support. 16 U. Dayton L.Rev. at 517-518. For the same reason, in a case such as this, where the whereabouts of the biological father are described as "unknown," it would seem only logical that it is also in the child's best interest to maintain the marital presumption of paternity. In addition to economic issues are social ones. A host of questions arise from the possibility of

> stripping Mark Broxterman of paternity over Joshua. What if Joshua's natural father wants nothing to do with Joshua? What if Joshua wants to continue to consider Mark Broxterman as his father? What if Joshua is too young to understand the importance of the decision at the present time? What if the Custodians are, as Mark Broxterman maintains, acting out of spite? * * *

{¶22} The *Broxterman* court further observed:

> The Ohio Parentage Act is to promote the best interests of the child. 16 U. Dayton L.Rev. at 55. This is consistent with the general principle that, in matters relating to custody and care, a court must give primary consideration to the child's best interest, whether it be in matters of divorce, ***custody of children born out of wedlock, * * * adoption proceedings, * * * or juvenile court proceedings, * * *. (Internal citations omitted.)

{¶23} A somewhat more recent decision of the Seventh Appellate District, *In re K.R.,* 7th Dist. Jefferson No. 10JE9, 2010-Ohio-6582, at ¶ 12, cited the Supreme Court of Ohio's *Gilbraith* decision as well:

> In our estimation, the same considerations underpinning res judicata as a doctrine of general significance apply with equal force in parentage actions, and there is, accordingly, no sound policy reason for denying effect to the doctrine in such cases. The establishment and maintenance of the various aspects of the relationship between parent and child is a particularly intricate, sensitive and emotional process with which courts should be reluctant to interfere. In those cases where, by force of events, judicial intervention occurs, where the matter of parentage is determined with finality and in the absence of fraud, and where that determination is not later vacated, either on direct appeal or pursuant to a recognized legal remedy such as that set forth in Civ.R. 60(B), the policy of this state requires, in sum, that the parent-child relationship be shielded from the unsettling effects of further judicial inquiry, and that relitigation

> of parentage be barred, as a general rule, in any subsequent actions, including those initiated under R.C. Chapter 3111. *In re Gilbraith,* 32 Ohio St. 3d 127, 131.

{¶24} In this case, the parties litigated the issue of custody of K.M.C. beginning in 2016. The record reveals that when Appellants filed an initial motion for custody on May 27, 2016, the complaint listed Benjamin Campbell as the children's deceased father, thus leading to the implication that Appellants were the biological grandparents of all three children subject of the underlying proceedings. That custody litigation was resolved in 2017. The first paragraph of the January 17, 2017 amended entry resolving the custody dispute states:

> This cause came on for hearing on 17 November 2016 on the Petition for Custody of June Campbell and Tom Campbell (paternal grandparents) for custody of the minor children herein. *Both parties appeared with counsel before the Court and an agreement was* recited into the record. Whereupon, the parties *agree as follows:*
>
> 2. The Petitioner/grandparents (June and Tom Campbell) shall be granted the 2015 Standard Parenting Policy for visitation as if they were a non-residential parent * * *.

{¶25} Appellee did not raise the issue of K.M.C.'s paternity and Appellants' lack of a biological relationship to K.M.C. after her husband died in 2013. The parties apparently had a functioning relationship and agreed on many aspects of K.M.C.'s and the twins' rearing until sometime in 2016. By her own testimony, only after Appellee became embroiled in a custody battle with Appellants in 2016

did Appellee find it necessary to inform K.M.C. that Benjamin Campbell was not her biological father. Nevertheless, Appellee "agreed" in the original November 2016 custody proceedings and documented in the January 17, 2017 entry that Appellants were the biological grandparents of K.M.C. The court's decision of that date became a final appealable order which Appellee did not appeal. *See, e.g. In re R.L.H.,* 8th Dist. Cuyahoga No. 100327, 2014-Ohio-3411, at ¶ 16. *See also*, *Nelson v. Pleasant,* 73 Ohio App.3d 479, 597 N.E.2d 1137 (4th Dist. 1991) ("[Res judicata] has been applied to hold that a determination of parentage in an agreed dissolution decree or legitimation order will bar a subsequent paternity action").

{¶26} Mindful, therefore, of the principles of res judicata and the important policy considerations of the Uniform Parentage Act, in sum, we find that the magistrate erred by failing to find Appellee was barred from raising a question as to K.M.C.'s paternity, as the issue was previously litigated and agreed upon by Appellee in 2017. While undeniably the evidence demonstrates that the parties misrepresented the paternity issue to the court, strong policy considerations support our result. Appellee testified that after her husband's death in 2013 she contacted K.M.C.'s biological father. However, the record does not reflect any steps of his or his parents towards responsibility for K.M.C.'s physical, mental, or financial needs in 2013 or at any time since. There is no evidence in this record that the supposed biological father has attempted to establish any relationship with K.M.C.

By contrast, the evidence at the hearing demonstrated both that Benjamin Campbell was excited at the prospect of K.M.C.'s birth and that his parents have functioned as the biological grandparents of K.M.C. since her birth and have provided for the child's wellbeing since 2016. What interest is served now by stripping K.M.C. of the presumption that Benjamin Campbell is her father and depriving her of the only paternal grandparents she has ever known?

{¶27} Furthermore, assuming res judicata did not apply in this matter, we would be constrained by the clear language of R.C. 3111.03(B) to find that Appellants were entitled to the benefit of the presumption that they are the biological grandparents of K.M.C. by virtue of their son's marriage to Appellee at the time of K.M.C.'s birth. As set forth above at paragraph 11, R.C. 3111.03(A)(1) provides that "[a] man is presumed to be the natural father of a child" [if] "[t]he man and the child's mother are or have been married to each other, and the child is born during the marriage * * *." However, that presumption may be rebutted. Prior to 1992, the language of the presumption, R.C. 3111.03(B), provided that the presumption of paternity due to marriage could be rebutted by "clear and convincing evidence." *See* 1990 S.B. 3. Thereafter, in 1992, the plain language of R.C. 3111.03(B) was amended to provide that the presumption may be overcome only by "clear and convincing *evidence that includes the results of genetic testing*." 1992 S.B. 10, effective July 15, 1992. (Emphasis added.) Clearly, Appellee was

required to rebut the presumption of paternity based on her marriage to Benjamin Campbell with evidence that includes genetic testing. She has not done so.

{¶28} In *Strack v. Pelton,* 70 Ohio St. 3d 172, 175, 1994-Ohio-107, 637 N.E.2d 914, the Supreme Court of Ohio found a husband's Civ.R. 60(B) motion for relief from divorce judgment which determined paternity on the ground that genetic test conclusively determined he was not father to be untimely. In summarizing the difficult decision, the Court observed:

> We are not unaware that our decision in effect declares as static a state of facts that reliable scientific evidence contradicts. Nonetheless, there are compelling reasons that support such a decision. * * * In *Knapp v. Knapp,* 24 Ohio St. 3d 141, 493 N.E.2d 1353, 1356, this court declared, "[f]inality requires that there be some end to every lawsuit, thus producing certainty in the law and public confidence in the system's ability to resolve disputes. Perfection requires that every case be litigated until a perfect result is achieved. For obvious reasons, courts have typically placed finality above perfection in the hierarchy of values." Finality is particularly compelling in a case involving determinations of parentage, visitation and support of a minor child.

Strack, 70 Ohio St. 3d 172, 175.

{¶29} For the foregoing reasons, Appellants' assignment of error is sustained. The judgment of the trial court is reversed. The matter is remanded for proceedings consistent with this opinion.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and costs be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court Juvenile Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J., & Wilkin, J., concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.