IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SHEALYN MCGOVERN,

Appellant,

v. Case No. 5D19-1525

JACQULYN CLARK,

Appellee.

_____/

Opinion filed June 12, 2020

Appeal from the Circuit Court
for Orange County,
Alan S. Apte, Judge.

David Scott Glicken, of The Glicken Law Firm, Orlando, for Appellant.

No Appearance for Appellee.

ORFINGER, J.

In this dissolution of marriage action, Shealyn McGovern appeals the trial court's order of dismissal, which determined that it lacked subject matter jurisdiction to adjudicate any issues related to two children, M.P.M. and E.S.M., because they were born before the parties married, had not been adopted by Ms. McGovern, and had no biological relationship to her. We reverse.

The facts are largely undisputed. Ms. McGovern and Jacqulyn Clark were in a committed relationship when they began planning to start a family together. Pursuant to their plan, in 2012, Ms. Clark gave birth to M.P.M., who was given Ms. McGovern's last name. The parties continued to reside together as a family, and in March 2013, Ms. Clark gave birth to E.S.M., who was also given Ms. McGovern's last name. A few months later, in May 2013, Ms. McGovern and Ms. Clark were legally married in New Hampshire. After Ms. McGovern and Ms. Clark married, Ms. Clark gave birth to G.E.M. in 2014 and I.A.M. in 2015. The children's birth certificates list only Ms. Clark as the mother and do not indicate a father. However, all four children were conceived and born while the parties were in a committed relationship and raised together as siblings, with the same parents, as an intact family.

The parties separated in early 2018, and shortly thereafter, Ms. McGovern filed this dissolution of marriage action, naming all four children as children common to the parties. Her complaint asked the trial court to address timesharing and child support issues for all four children. In response, Ms. Clark filed a motion to dismiss all issues related to the four children, arguing that Ms. McGovern has no biological or legal ties to any of them. According to Ms. Clark, although the children were born during the parties' marriage, Ms. McGovern lacked any parental rights as a matter of law to G.E.M. and I.A.M. because she had not adopted them and there was a biological father whose rights have not been terminated. Regarding M.P.M. and E.S.M., Ms. Clark asserted that they were not "children of the marriage" because they were not born during the marriage, have not been adopted, and have no biological relationship to Ms. McGovern. Ms. Clark recognized that Ms. McGovern was seeking to establish parentage as a "reputed" parent

of M.P.M. and E.S.M. just as an unwed father might seek to legitimize a child born out of wedlock by marrying the child's mother to establish parentage as a matter of law pursuant to section 742.091, Florida Statutes (2018). However, she claimed that the statute did not apply because Ms. McGovern was not biologically related to the children.

Following a hearing, the trial court denied Ms. Clark's motion to drop G.E.M. and I.A.M. from the case, determining that they were children of the marriage since they were born during Ms. McGovern and Ms. Clark's legally valid marriage. This ruling has not been appealed. However, the trial court granted Ms. Clark's motion to dismiss the issues pertaining to M.P.M. and E.S.M., concluding that it did not have subject matter jurisdiction over the two children born prior to the marriage because Ms. McGovern has no biological connection to the children and did not adopt them after the parties married. As such, these children were not "children of the marriage." In reaching this conclusion, the trial court reasoned:

> As to M.P.M. and E.S.M., Petitioner argues that although the children were conceived and born prior to the marriage, they are nonetheless legally her children since she and Respondent married after the children were born. Section 742.091, Florida Statutes, provides:
>
> > If the mother of any child born out of wedlock and the reputed father shall at any time after its birth intermarry, the child shall in all respects be deemed and held to be the child of the husband and wife, as though born within wedlock...
>
> Petitioner correctly notes that the statute does not state that the "reputed father" must be the child's biological father. However, it appears to the court that that is a natural conclusion. If not, there would be no need for stepparent adoptions. A single woman who conceived a child, via in vitro fertilization or otherwise, could simply marry and her husband would automatically become the child's father. Yet that is not the case. In order to become the child's parent, the man would have to adopt the child, even if the biological father

> were deceased or a sperm donor. The statute was enacted not to permit automatic parental rights in stepparents, but to legitimize children born out of wedlock upon the marriage of their parents.
>
> Petitioner also relies on *In the Matter of the Adoption of D.P.P., etc. G.P. v. C.P.* (Fla. 5th DCA 2014). ln *D.P.P.*, C.P. and G.P. were unmarried women in a committed relationship from 2005 to 2012. In 2007, they decided to have a child, and C.P. conceived a child via in vitro fertilization. C.P. and the child both took G.P.'s surname and both women raised the child. In 2011, G.P., with C.P.'s approval, legally adopted the child. When the relationship soured a year later, C.P. moved for relief from the final judgment of adoption, claiming that the court never had subject matter jurisdiction because G.P. was not qualified to seek a step-parent adoption under the adoption statute. The trial court held that it did lack subject matter jurisdiction and thus the final judgment of adoption was void. The appellate court reversed, holding that the court had subject matter jurisdiction since the circuit courts have exclusive jurisdiction over all adoption matters. "[A] challenge to subject matter jurisdiction is proper only when the court lacks authority to hear a class of cases, rather than when it simply lacks authority to grant the relief requested in a particular case." *In re Adoption of D.P.P.*, 158 So. 3d 633, 636-37 (Fla. 5th DCA 2014). This case, however, is also distinguishable from the case at bar, since here Petitioner never adopted the children. Had she done so, there would be no question of her parental rights.
>
> While the cases cited by the parties are not exactly the same as the case at bar, factually, the legal principles in those case nonetheless dictate what the court must do. Children born during a marriage are considered children of the marriage, and so G.E.M. and I.A.M. are subject to this court's jurisdiction in the dissolution proceeding. However, because M.P.M. and E.S.M. were born prior to the marriage, and since Petitioner has no biological connection to the children and did not adopt the children after the parties married, those children are not considered children of the marriage and do not fall under the jurisdiction of this court.

Ms. McGovern appeals this order of dismissal. We review the order of dismissal as a "partial final judgment" pursuant to Florida Rule of Appellate Procedure 9.110(k) because it dismissed claims entirely independent from other pleaded claims. See Jensen v. Whetstine, 985 So. 2d 1218, 1220 (Fla. 1st DCA 2008); see also Johnson v. Johnson, 88 So. 3d 335, 339 (Fla. 2d DCA 2012) (indicating that child custody jurisdiction is a separate determination from dissolution of marriage jurisdiction).

Our review of the trial court's ruling that M.P.M. and E.S.M. did not fall under its jurisdiction is de novo. See Schaffer v. Ling, 76 So. 3d 940, 941 (Fla. 4th DCA 2011). Likewise, we review a trial court's interpretation and application of a statute de novo. See e.g., B.Y. v. Dep't of Child. & Fams., 887 So. 2d 1253, 1255 (Fla. 2004) ("The standard of appellate review on issues involving the interpretation of statutes is de novo."); In re Guardianship of J.D.S., 864 So. 2d 534, 537 (Fla. 5th DCA 2004) ("Because this case involves the application of statutory law, and is a pure question of law, the standard of review is de novo."). The statute must be given its plain and ordinary meaning when its language is clear and unambiguous. See Maloy v. Seminole Cty., 264 So. 3d 370, 372 (Fla. 5th DCA 2019). When employed in a statute, words of common usage should be interpreted in a plain and ordinary sense. State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980); Martin v. State, 207 So. 3d 310, 317 (Fla. 5th DCA 2016), approved, 259 So. 3d 733 (Fla. 2018).

"Marriage triggers legal rights, responsibilities, and benefits not afforded to unmarried persons . . . ." Cohen v. Shushan, 212 So. 3d 1113, 1126 (Fla. 2d DCA 2017) (quoting Nat'l Pride At Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 150 (Mich. Ct. App. 2007), aff'd, 748 N.W.2d 524 (Mich. 2008)). There is a strong presumption of legitimacy of a child born to an intact marriage.[1] Simmonds v. Perkins, 247 So. 3d 397,

[1] "[T]he presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child." Dep't of Health & Rehab. Servs. v. Privette, 617 So. 2d 305, 307 (Fla. 1993). Under Privette, a legitimate child has a right to maintain that status both factually and legally if doing so is in the child's best interests. Id. Thus, "there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy even after the legal father is proven not to be the biological father." Id. at 309. The burden of proof required to overcome this presumption is equivalent to that needed to terminate the legal father's parental rights because the proceedings "will have the effect of vesting parental rights in

398 (Fla. 2018); Dep't of Heath & Rehab. Servs. v. Privette, 617 So. 2d 305, 308 (Fla. 1993). There is no presumption of legitimacy for a child born before marriage, but the subsequent marriage of the mother and the "reputed father" legitimates the child. § 742.091, Fla. Stat. (2018) (providing that if "mother of any child born out of wedlock and the reputed father shall at any time after its birth intermarry, the child shall in all respects be deemed and held to be the child of the husband and wife, as though born within wedlock"). The parties and the children are, by statute, given the same status that they would have had if the child had been born during the marriage. See I.A. v. H.H., 710 So. 2d 162, 164 (Fla. 2d DCA 1998). "[B]y enacting section 742.091 the legislature expanded the common law rule to include a child born prior to its mother's marriage to the reputed father."[2] Id. at 165.

"Legitimacy is the legal kinship between a child and its parent or parents." Restatement (Second) of Conflict of Laws § 287 cmt. a (Am. Law. Inst. 1971). A child may

---

the putative natural father and removing parental rights from the legal father." Id. at 309 n.7.

[2] Ms. McGovern contends New Hampshire law should control. The parties were married in New Hampshire. Same-sex marriage became legal in New Hampshire in 2010. See N.H. Rev. Stat. Ann § 457:1-a (2013). Under New Hampshire law, "[a]ny marriage of a same-sex couple contracted in this state on or after January 1, 2010 by a party residing or intending to reside in another jurisdiction is valid and legitimate as of the date of its solemnization." N.H. Rev. Stat. Ann. § 457:44 (2013). New Hampshire has a similar legitimation process as section 742.091, providing that "[w]here the parents of children born before marriage afterwards intermarry, and recognize such children as their own, such children shall be legitimate and shall inherit equally with their other children under the statute of distribution." N.H. Rev. Stat. Ann § 457:42 (2018). "The status of legitimacy is created by the law of the domicil of the parent whose relationship to the child is in question." Restatement (First) of Conflict of Laws § 137 (Am. Law. Inst. 1934); see also Restatement (Second) of Conflict of Laws § 72 (Am. Law. Inst. 1971) ("If one or both of the spouses are domiciled in the state, the state has a sufficient interest in the marriage status to give it judicial jurisdiction to dissolve the marriage."). Here, the parties (and the children) are domiciled, and have been domiciled, in Florida. Thus, Florida law controls.

enjoy legitimacy status either by birth into a legally valid marriage or through a process referred to as legitimation where the child, having been born illegitimate, may thereafter by operation of law become legitimate. Id. at cmt. b. Section 742.091 clearly is a legitimation statute that allows an illegitimate child to become legitimate when following the child's birth the "reputed" father and the mother of the child marry.

Chapter 742 does not define the term "reputed father." But we have recognized that "reputed" has been defined to mean "generally believed; widely believed although not necessarily established as fact." A.S. v. S.F., 4 So. 3d 774, 776 (Fla. 5th DCA 2009) (quoting Encarta Dictionary, http://encarta.msn.com/encnet/refpages/search.aspx?q=reputed). This Court has further recognized that the term "reputed father," as used in section 742.091, "*can* be interpreted to mean the individual generally or widely believed or considered to be the biological father of a particular child." Id. (emphasis added). However, section 742.091 does not *require* that the individual is the biological father—only that the person held out as the reputed father willingly assumed the responsibilities of parenthood. Knauer v. Barnett, 360 So. 2d 399, 403, 404 (Fla. 1978) (writing that under section 742.091, marriage by "reputed father" to mother of illegitimate child shall render child legitimate for all purposes, and factual proof of paternity is not required of person who willingly seeks to assume responsibilities of parenthood).

"[P]aternity and legitimacy are related, but nevertheless separate and distinct concepts." Daniel v. Daniel, 695 So. 2d 1253, 1254 (Fla. 1997). Legitimacy refers to the status of a child born to legally married parents, while paternity refers to the status of being the only one natural, or biological, father of a child. Id. at 1254–55; see Callahan v. Dep't of Rev. ex rel. Roberts, 800 So. 2d 679, 683 (Fla. 5th DCA 2001). This case does

not involve paternity. Instead, the question is whether M.P.M. and E.S.M. became *legitimate*, and thereby, "children of the marriage," by virtue of Ms. McGovern and Ms. Clark's subsequent marriage pursuant to section 742.091. To answer this question, Ms. McGovern was not required to prove a biological connection to M.P.M. and E.S.M. See J.A.I. v. B.R., 160 So. 3d 473 (Fla. 2d DCA 2015) (holding that possible biological father of minor child could not challenge child's paternity more than 60 days after mother's husband, who was also in relationship with mother at time of child's conception but did not marry her until several years later, filed voluntary acknowledgement of paternity, and thus possible biological father was not entitled to compel genetic testing of child, mother, and husband; husband acknowledged under oath that he was aware possible biological father claimed to be child's biological father); I.A., 710 So. 2d at 165 (holding that putative father had no cause of action to establish parental rights, where undisputed evidence established that mother's husband was child's reputed father; when mother and her husband married two months after child's birth, by law child was in all respects deemed to be husband's child, as though born within wedlock); see generally Fla. Fam. L. R. P. Form 12.951(b) (allowing disestablishment of paternity if, among others, "[s]ince learning that he is not the biological father of the child(ren), the petitioner has not . . . married the child(ren)'s other parent while known as the reputed father in accordance with section 742.091, Florida Statutes, and voluntarily assumed the parental obligation and duty to pay child support").

Consequently, we conclude that the trial court erred in determining that it is a "natural conclusion" that section 742.091 requires that the "reputed father" must be the child's biological father and dismissing all issues related to M.P.M. and E.S.M. in the

dissolution proceedings. Contrary to the trial court's determination, section 742.091 does not require a biological connection.

Ms. McGovern also challenges the constitutionality of the statute on appeal. However, we cannot determine whether the statute denies same-sex parties equal protection. "A constitutional challenge to the facial validity of a statute can be presented for the first time on appeal under the 'fundamental error exception,' whereas a dispute concerning a constitutional application of a statute to a particular set of acts must be raised at the trial level." Lamore v. State, 983 So. 2d 665, 668 (Fla. 5th DCA 2008) (quoting Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982)). We follow the general rule that the trial court must first consider the constitutionality of a statute. Dickinson v. Stone, 251 So. 2d 268, 271 (Fla. 1971). While this issue was raised below, the trial court did not make any ruling on the constitutionality of the statute as applied to Ms. McGovern. In addition, Ms. McGovern did not give the notice to the Attorney General or State Attorney required by Florida Rule of Civil Procedure 1.071.

For these reasons, we reverse and remand for the trial court to decide whether biology notwithstanding, Ms. McGovern met the requirements of section 742.091.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EVANDER, C.J., and EISNAUGLE, J., concur.