

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

A.M.M. b/n/f Ricardo Vega-Hernandez,
Appellant-Petitioner

v.

Marisol Mayhuere Morales,
Appellee-Respondent



April 2, 2024

Court of Appeals Case No.
23A-JP-455

Appeal from the Marion Superior Court
The Honorable Marshelle Dawkins Broadwell, Judge

Trial Court Cause No.
49D16-2209-JP-7045

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] Ricardo Vega-Hernandez (Putative Father) appeals the trial court’s dismissal with prejudice of a paternity action that he filed as next friend of his putative daughter A.M.M. (Child). We reverse and remand for further proceedings.

Facts and Procedural History

- [2] On June 5, 2018, Marisol Mayhuere Morales (Mother) gave birth to Child in Tippecanoe County. Two days later, Mother and Jose Sanchez Gamboa (Father) signed a paternity affidavit. Father also signed Child’s birth certificate.
- [3] On May 27, 2020, in cause number 49C01-2005-JP-17190 (cause 17190), Mother filed a verified petition in Marion Circuit Court to establish paternity, child support, custody, and parenting time. Mother named Father as the respondent and averred that she resided in Marion County, that she did “not know of any person not a party to this proceeding that has physical custody, or claims to have custody or visitation rights, with respect to [Child],” that it was in Child’s best interest “that Mother be granted primary physical and legal custody[,]” and that Father was “deported to Mexico two (2) years ago” and “refuses to confirm his address.” Appellant’s App. Vol. 2 at 22. Mother attached the paternity affidavit to the petition, requested a hearing, and asked the court to establish paternity, adjudge Father to be Child’s biological father, and make a determination as to custody, parenting time, and support.

- [4] On August 14, 2020, the circuit court set a hearing for December 11, 2020. Notice of the hearing was given via publication. Mother appeared at the hearing with counsel, Father failed to appear, and the court took the matter under advisement. On December 29, 2020, the court issued an order that adjudicated Father as Child's biological father based on the paternity affidavit, awarded Mother sole legal and primary physical custody of Child, denied Father parenting time, and ordered him to pay child support.
- [5] On November 19, 2021, Putative Father filed a verified motion to intervene in cause 17190 and a petition for DNA testing. Putative Father averred that he believed in good faith that he was Child's biological father, that he had lived with Mother and Child from shortly after Child's birth until March 2021, that Mother was currently refusing him access to Child, and that it was necessary for him to intervene to establish his paternity of Child. He requested DNA testing and a hearing to establish paternity, custody, parenting time, and child support.
- [6] On December 16, 2021, Mother filed an objection to Putative Father's motion and petition that stated in pertinent part,

9. Indiana code § 31-14-5-3 requires that a paternity action be filed no later than two (2) years after the child is born. The child in this action was born on June 5, 2018. The parties and [Putative Father] acknowledged that a paternity affidavit was executed by Mother and Father at the time of the child's birth. The execution of the paternity affidavit, in and of itself, was

sufficient to establish paternity pursuant to I.C. § 31-14-7-3.^[1]

10. None of the exceptions to the statute of limitations as set forth in I.C. § 31-14-5-3(b) exist

....

14. Father's signature on the paternity affidavit, and inclusion on the birth certificate is clear and convincing evidence that Father is the biological father, and the paternity affidavit has not been rescinded or set aside under I.C. § 16-37-2-2.1.^[2] Therefore, even without adjudication, Father is the legal father of Minor Child pursuant to I.C. § 31-14-7-3.

15. Mother specifically objects to [Putative Father's] request for DNA Testing.

16. Mother ceased her relationship with [Putative Father], and this action is nothing more than an attempt by [Putative Father] to reinsert himself in Mother's life.

17. [Putative Father's] untimely attempt to disestablish paternity in Father is barred by the statute of limitations set forth in I.C. § 31-14-5-3 and is without a legal basis. Sharing a residence with Mother and the minor child for years *after* the birth of the child is not sufficient to set aside Father's paternity. Father's paternity has already been conclusively established by this Court.

¹ See Ind. Code § 31-14-7-3 ("A man is a child's legal father if the man executed a paternity affidavit in accordance with IC 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under IC 16-37-2-2.1.").

² See Ind. Code § 16-37-2-2.1(l) ("A paternity affidavit that is properly executed under this section may not be rescinded more than sixty (60) days after the paternity affidavit is executed unless a court: (1) has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit; and (2) at the request of a man [who is a party to a paternity affidavit and has timely requested an order for a genetic test], has ordered a genetic test, and the test indicates that the man is excluded as the father of the child.").

18. [Putative Father's] pleading does not allege facts sufficient to disestablish paternity in Father, nor warrant an order compelling the parties to submit to DNA testing.

Id. at 41-43.

[7] The circuit court did not rule on Putative Father's motion to intervene, "in essence denying it." *In re G.R.*, 863 N.E.2d 323, 325 (Ind. Ct. App. 2007). On December 19, 2021, the court denied Putative Father's petition for DNA testing. Appellant's App. Vol. 2 at 44. Putative Father did not appeal either of these rulings.

[8] On September 15, 2022, in cause 17190, Putative Father filed "Intervener's Verified Petition to Set Aside Paternity Order," which read in pertinent part as follows:

4. [Mother] correctly pointed out that [Putative Father] had missed the statute of limitations to bring a paternity action.

5. That [Mother's] position does not apply to a Verified Petition to Establish [P]aternity that is filed on behalf of the child by next friend.

6. That [Putative Father] has contemporaneously filed a Verified Petition to Establish Paternity on behalf of the child by next friend.

7. That as such, and upon determination that [Putative Father] is the biological father of the child, [Putative Father] seeks to set aside the paternity order under this cause.

Id. 45-46. On November 15, 2022, the circuit court denied the petition. Putative Father did not appeal this ruling.

[9] Also on September 15, 2022, in cause number 49D16-2209-JP-7045 (cause 7045), Putative Father, as Child's next friend, filed in Marion Superior Court (the trial court) a verified petition to establish paternity and request for DNA testing. Putative Father named Mother as the respondent and averred,

1. That this petition is being filed pursuant to IC 31-14-5-2. [This statute provides in pertinent part that a person less than eighteen years of age may file a petition for paternity if the person is competent except for the person's age; that a person who is otherwise incompetent may file a petition through the person's next friend; and that, with an exception not relevant here, a child may file a paternity petition at any time before the child reaches twenty years of age.]

....

4. This petition is pursuant to Ind. Code 31-14-5 *et seq.* as [Putative Father] believes he is the biological father of [Child].

5. That [Putative Father] seeks to have a DNA test completed to determine if he is the father of [Child].

6. Upon determination that [Putative Father] is the father of [Child] [Putative Father] respectfully request[s] that the court set this matter for a hearing and enter an order for custody, parenting time, child support and other relevant issues.

Id. at 27.

[10] On January 29, 2023, Mother filed a motion to dismiss Putative Father's paternity action in cause 7045. Mother recited the procedural history of cause 17190 and further asserted,

5. [Putative Father's] attempt[] to file this action as the next friend of the child is disingenuous, as any action brought by the next friend should be in the best interest of the child, and attempting to disestablish paternity in the person who signed the Paternity Affidavit, the birth certificate and who was adjudicated as the Father of [Child] is not in the best interest of the minor child.

6. [Putative Father] acknowledged in his Petition to Set Aside that his Motion to Intervene was barred by the statute of limitations pursuant to I.C. § 31-14-5-3.

7. Paternity has already been established, and the specific requirements to rescind or disestablish paternity as set forth in I.C. § 16-37-2-2.1 have not been met.

8. This matter should be dismissed as it fails to meet the requirements of I.C. § 31-14-5-6, in which "the child, the child's Mother and each person alleged to be the child's father" are necessary to adjudicate a paternity action.

9. Additionally, it is barred by res judicata. All necessary parties have been included in the Circuit Court Paternity Action, and [Putative Father] was denied the relief he requested and thus is continuing to attempt to improperly insert himself in Mother and the child's life.

10. Mother restates all of the allegations set forth in her Objection filed in the Circuit Court Paternity Action on or about December 16, 2021 as if fully restated herein.

Id. at 30. Mother attached pertinent filings from cause 17190 to her motion.

[11] On January 30, 2023, the trial court held a virtual status conference. The next day, the court issued an order summarily dismissing Putative Father’s action with prejudice. Putative Father now appeals this ruling.

Discussion and Decision

[12] Putative Father contends that the trial court erred in granting Mother’s motion to dismiss. The parties suggest, and we agree, that the dismissal was pursuant to Indiana Trial Rule 12(B)(6) for failure to state a claim. “A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it.” *Reinoehl v. St. Joseph Cnty. Health Dep’t*, 181 N.E.3d 341, 352 (Ind. Ct. App. 2021), *trans. denied* (2022). We accept the facts alleged by the plaintiff as true, consider the pleadings in the light most favorable to him, and draw every reasonable inference in his favor. *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 550 (Ind. Ct. App. 2014), *trans. denied* (2015). If “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” Ind. Trial Rule 12(B). Matters of which a trial court may take judicial notice, such as the court records from cause 17190, are not considered “matters outside the pleading” for purposes of Trial Rule 12(B)(6). *Moss v. Horizon Bank, N.A.*, 120 N.E.3d 560, 563 (Ind. Ct. App. 2019); *see* Ind. Evidence Rule 201(b)(5) (providing that a court may judicially notice “records of a court of this state”). “We will affirm a dismissal under Trial Rule 12(B)(6) only if it is apparent that

the facts alleged in the complaint are incapable of supporting relief under any set of circumstances.” *Snyder*, 20 N.E.3d at 550. We review the trial court’s ruling de novo, and we will affirm it “if it is sustainable on any basis found in the record.” *Reinoehl*, 181 N.E.3d at 352.

[13] We conclude that the trial court’s dismissal of Putative Father’s paternity action is not sustainable, for several reasons. First, although Father’s legal paternity “cannot be rescinded pursuant to Indiana Code Section 16-37-2-2.1, Indiana courts have held that paternity may be indirectly disestablished by establishing paternity in another man.” *Litton v. Baugh*, 122 N.E.3d 1034, 1040 (Ind. Ct. App. 2019) (citing *In re Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013), *trans. denied*, and *In re Paternity of N.R.R.L.*, 846 N.E.2d 1094, 1097 (Ind. Ct. App. 2006), *trans. denied*). Putative Father is time-barred from filing a paternity petition on his own behalf, Ind. Code § 31-14-5-3(b), but he is not time-barred from filing a petition as Child’s next friend. Ind. Code § 31-14-5-2(a); *In re Paternity of K.H.*, 116 N.E.3d 504, 511 (Ind. Ct. App. 2018) (noting that this Court has interpreted Ind. Code § 31-14-5-2(a) “to permit a putative father to file a paternity action as a child’s next friend”), *trans. denied* (2019);

R.J.S. v. Stockton, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008) (noting that “[t]here is no statutory definition of ‘next friend.’”).³

[14] Second, Putative Father’s paternity claim is not res judicata, as Mother asserts. “There are two branches of res judicata: claim preclusion—which has been raised in the present dispute—and issue preclusion.” *Matter of Eq. W.*, 124 N.E.3d 1201, 1209 (Ind. 2019). “Claim preclusion can be used to bar a successive lawsuit when a particular issue is adjudicated and then put in issue in a subsequent suit on a different cause of action between the same parties or their privies.” *Id.* (citation and quotation marks omitted).

Before a court can find that claim preclusion applies to bar a subsequent action, four essential elements must be met:

- (1) The former judgment must have been rendered by a court of competent jurisdiction;
- (2) The former judgment must have been rendered on the merits;
- (3) The matter now in issue was or might have been determined in the former suit; *and*

³ Indiana Code Section 31-14-5-9 provides, “A man who is barred under IC 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of a child; or (2) requesting a prosecuting attorney to file a paternity action.” There is no indication that Putative Father is barred under Indiana Code Article 31-19 from establishing paternity, so Section 31-14-5-9 does not prohibit him from filing a paternity action as Child’s next friend, even though he is time-barred from filing an action on his own behalf. As did the court in *Litton*, “[w]e respectfully invite the General Assembly to address this inconsistency.” 122 N.E.3d at 1045 n.7.

(4) The controversy adjudicated in the former suit must have been between the parties to the present action or their privies.

Id. (emphasis added).

[15] Putative Father’s paternity was not determined in Mother’s May 2020 paternity action because he was not a party,⁴ and by the time he sought to intervene in November 2021, it was far too late for him to establish paternity on his own behalf. *See* Ind. Code § 31-14-5-3(b) (providing that man alleging to be child’s father must file paternity action not later than two years after child is born, with certain inapplicable exceptions). Indeed, Child turned two less than two weeks after Mother initiated her action. Mother cites no authority for her suggestion that, under *res judicata* principles, Putative Father was required to appeal the circuit court’s denials of his time-barred petitions to intervene in her paternity action and was precluded from filing a separate paternity action as Child’s next friend.

[16] Third, Mother cites no relevant authority for the proposition that dismissal with prejudice was justified simply because Putative Father failed to name Father as a necessary party as required by Section 31-14-5-6. In fact, Trial Rule 12(B) provides, “When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of

⁴ Putative Father also notes that Child was not a party to Mother’s paternity action. Because Putative Father was not a party, we need not address Mother’s argument that Child was in privity with Mother in that action.

right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.” “Therefore, a Rule 12(B)(6) dismissal is typically without prejudice because the complaining party remains able to file an amended complaint.” *Keller v. Nationstar Mortg. LLC*, 226 N.E.3d 787, 789-90 (Ind. Ct. App. 2023).

[17] Fourth, and finally, Mother cites no authority for her contention that Putative Father was required to specifically aver in his petition that he is acting in Child's best interest, as is required of a next friend, *In re R.P.D. ex rel. Dick*, 708 N.E.2d 916, 918 (Ind. Ct. App. 1999), *trans. denied*. But, even assuming such a requirement, Putative Father should have been given an opportunity to amend his petition accordingly. We agree with Putative Father that the court must hold an evidentiary hearing on this issue on remand. *See id.* at 919 (stating that trial court was required to hold evidentiary hearing to determine whether paternity petition filed by mother as child's next friend was in child's best interest prior to addressing merits of petition, and that summary judgment proceeding would not have been appropriate).

[18] Accordingly, we reverse and remand with instructions to allow Putative Father to amend his petition to name Father as a necessary party and to hold an evidentiary hearing to determine whether the petition is in Child's best interest.

[19] Reversed and remanded.

Bailey, J., and Pyle, J., concur.

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