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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002008-OA

MICHAEL BROWN — PETITIONER

v. ORIGINAL ACTION
REGARDING WARREN CIRCUIT COURT

HONORABLE THOMAS R. LEWIS, JUDGE
WARREN CIRCUIT COURT — RESPONDENT

AND

JONI MARIA EASTER (NOW FURLONG) — REAL PARTY IN INTEREST

OPINION AND ORDER

GRANTING CR 76.36 RELIEF IN PART

* * * * * * * *

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Before the Court is a petition for writ of prohibition and for writ of mandamus. The response of the real party in interest, Joni Maria Easter (now Furlong)(hereinafter "Furlong") was filed on September 1, 1999. Further, petitioner, Michael Brown (hereinafter "Brown"), filed a motion for intermediate relief, which came before the Honorable Joseph R. Huddleston, and which was passed to this panel by his order entered August 30, 1999. The Court has considered the motion, the petitions and the response thereto and ORDERS the motion be GRANTED. The petition for writ of mandamus is DENIED. The

petition for writ of prohibition is GRANTED. The Court has determined that the doctrine of *res judicata* bars Furlong from re-litigating the issue of Brown's paternity. Therefore, Brown cannot be required to submit to genetic testing.

This original action requests that the Court prohibit the respondent trial court from enforcing its order entered August 11, 1999, which requires the parties and the child, Kalan Brown (hereinafter "Kalan"), to submit to DNA testing; and that this Court direct the respondent trial court to recuse itself, to appoint a Special Judge and to transfer the matter to the Family Court. Brown contends the trial court is proceeding without jurisdiction because the matter initiated by Furlong seeks to attack a previous judgment of paternity that is *res judicata*. He further contends that he has no adequate remedy at law, including by appeal, because Furlong's goal is the suggestion that Brown is not Kalan's natural father, a suggestion which would immediately and irreparably affect Kalan and his relationship with Brown.

Kalan was born in 1989. In 1993, the Warren District Court entered an Agreed Order declaring Brown's paternity of Kalan. The same year, Brown filed a petition for the custody of Kalan in the Warren Circuit Court. In those proceedings, Furlong questioned Brown's paternity of Kalan. However, in his Trial Report,[1] the Domestic Relations Commissioner made the following finding and recommendation to the trial court:

[1]Although the Report found that "The marriage of the parties is irretrievably broken ...," Furlong's response advises the Court that she and Brown were never married.

> By Agreed Order entered in Warren District Court Case No. 93-J-00204 on June 25, 1993, Warren District Judge Henry J. Potter, Jr. determined that Michael Brown is the father of Kalan M. Brown. The Commissioner is bound to follow that determination.

No Exceptions were filed and the trial court confirmed the Commissioner's Report. No appeal was taken from that decision.

The decision awarded Brown sole custody of Kalan. In July, 1999, Furlong filed a motion for change of custody in which she alleged that paternity was declared without her full consent and that she believed Brown is not Kalan's natural father. Furlong invoked CR 60.02(a), relying on the problems she was experiencing in 1993,[2] and contending she was not involved in the discussions which led to the signing of the Agreed Order Of Paternity. She prayed for DNA testing and for the dissolution of the Agreed Order and asserted that to not order Brown to submit to DNA testing would be against public policy "due to the great possibility that Petitioner is not the parent of the minor child."

In this original action, Furlong does not respond to Brown's *res judicata* argument. She takes issue with his challenge to the jurisdiction of the trial court by pointing out that the proceeding pending before it is not a mere paternity case since the ultimate issue is the care and custody of Kalan. She also contends that Brown has not met the prerequisites for the issuance of a writ. She argues he has an adequate remedy if the trial court determines he is not Kalan's natural father

[2]The Commissioner's Report includes a discussion relating to Furlong's "serious problem with alcohol."

because his ability to seek redress by appeal will not be affected by his compliance with the testing order. We disagree. Not only do we find that Brown and Kalan would be irreparably harmed by complying with the testing order, we are also of the opinion that the respondent trial court's decision is in error.

The record appended to Brown's original action and to Furlong's response thereto does not shed light regarding whether the respondent trial court based its order of genetic testing on an implied finding that *res judicata* did not, or should not, apply or on an entirely different finding. The record only shows that Brown raised the issue of *res judicata* in his memorandum responding to Furlong's motion to change custody, but that Furlong's own memorandum, which post-dates Brown's, is silent in that regard.

This Court now issues a writ of prohibition based on its determination that the proceeding currently pending before the respondent trial court, although titled a request for change of custody, is in fact and in effect, an attempt at re-opening the issue of Brown's paternity that is now barred by *res judicata*. The concept of *res judicata* has long been established and applied in this Commonwealth. In order to set the stage for this discussion, we shall borrow the same language upon which Brown relies, which was excerpted from our decision in Napier v. Jones, By and Through Reynolds, Ky. App., 925 S.W.2d 193 (1996):

> The general rule for determining the question of *res judicata* as between parties in actions embraces several conditions. First there must be identity of the parties. Second, there must be identity of the two causes of

> action. Third, the action must be decided on the merits. In short, the rule of *res judicata* does not act as a bar if there are different issues or the questions of law presented are different. City of Louisville v. Louisville Professional Firefighters Assn, Ky., 813 S.W.2d 804, 806 (1991)(quoting Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970)).

Id. at 195.

Brown states that our appellate courts have not yet issued a reported decision that is dispositive of the specific issue raised in this original action, which we determine to be whether the doctrine of *res judicata* may be invoked by someone who was a party to a prior, unappealed from, and now final custody determination that included a challenge to, and an adjudication of paternity, so as to bar a party to the same prior action from reopening the paternity issue in a subsequent proceeding. Brown relies on Commonwealth, ex rel. Hansard v. Shackleford, Ky. App., 908 S.W.2d 671 (1995), where this Court ruled that a finding of paternity resulting from an earlier proceeding is not binding on a child unless the child was a party to the prior action. The case does not decide whether the mother of that child would be barred from bringing a second paternity action following a prior adjudication of the matter.

Brown also cites Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997), where the Supreme Court held that the mother of a child who had stipulated in a Property Settlement Agreement incorporated into the final divorce decree that her daughter was born of the marriage was precluded from re-litigating the paternity issue in a subsequent action

filed against a third party (the putative father), by virtue of application of the principle of collateral estoppel. Brown cites Moore chiefly to advise this Court regarding the practical effect that a determination Brown is not Kalan's biological father would have on Kalan's future life, based on the precedent established by the case.

This Court reads in Moore other useful language of assistance to the resolution of the inquiry at hand. The Moore court relies on a decision issued by the Minnesota Court of Appeals in Markert v. Behm, 394 N.W.2d 239 (Minn. App. 1986). In that case, just one year after she had alleged during the parties' divorce proceedings that her husband was the natural father of her daughter, the child's mother filed a paternity action seeking to determine that another man was the father. The Minnesota court applied the principle of *res judicata* (as well as those of collateral and equitable estoppel) to bar the re-litigation of paternity.

In the instant case, the identity of the parties and of the causes of action is established. The adjudication of custody resolved the entire action pending before the trial court and, therefore, was a final judgment on the merits. See, Moore, supra at 319-20; Markert, supra at 242. Further, the issue of paternity was litigated twice previously on the merits. An Agreed Order of Paternity was entered by the district court. Subsequently, in the custody proceedings, Furlong, who was represented by counsel, raised the issue of paternity. The trial court considered her argument, rejected it and issued a decision

from which she filed no Exceptions and, subsequently, no appeal. This Court held in Spears v. Spears, Ky. App., 784 S.W.2d 605, 607 (1990), that in such context, "the issue is not one of due process, but one of finality of judgments."

However, in Spears, supra at 607, this Court also held that the doctrine of *res judicata* should not be applied in such a manner as to "work an injustice." We must answer this question now.

In the current proceedings, Furlong makes no argument that she did not have "a realistically full and fair opportunity to present [her] case" to the circuit court. See, Moore, supra at 318-19 (quoting Sedley v. City of West Beuchel, Ky., 461 S.W.2d 556, 559 (1970)). Rather, she makes the bare allegation she was not involved in the discussions leading to entry of the Agreed Order of Paternity in the district court, an argument that she must have made in the custody proceedings, or that she should have made in those proceedings or in an appeal.

In addition, CR 60.02 requires that a motion to set aside a prior judgment be made within a reasonable period of time.[3] In Cain v. Cain, Ky. App., 777 S.W.2d 238, 239 (1989), we upheld a motion pursuant to CR 60.02 to compel genetic testing filed twelve years after the parties' divorce because the filing occurred within only two years of the date when the party seeking to reopen paternity learned that the child's mother had made statements disputing it. This case refers to Crowder v.

[3]We note that Furlong invokes CR 60.02(a), which has a one-year limitation.

Commonwealth, Ky. App., 745 S.W.2d 149 (1988), where a motion pursuant to CR 60.02(e)-(f) was filed six years after entry of a default judgment of paternity but promptly after the movant learned of the mother's admission she knew he was not the father.

We find that a period of six years is not reasonable in this case. If Furlong's argument is that she did not give her full consent to Brown's paternity in 1993, it is unreasonable to not challenge it until 1999, in the absence of any allegation of incapacity, or other exceptional circumstances in the interim, which prevented her from learning, or becoming aware, of the problem.

Furthermore, Furlong does not claim that the adjudication of Brown's paternity was obtained by fraud (CR 60.02(d), or that certain facts of an extraordinary nature justify relieving her of it (CR 60.02(f)).[4] Those are the grounds underlying the successful challenges to paternity mounted in Cain and Spears, supra.[5] It is also significant to stress that in Cain, paternity was not challenged in the divorce proceedings, and it does not appear that it was in Spears either.

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[4]In some jurisdictions, in a case like this one where paternity has been decided for "more than a relatively brief passage of time," only evidence of fraudulent conduct could overcome the rule of *res judicata* and open the door to blood testing. See, Amber Dawn E. v. Cleo A.E., 190 W.Va. 543, 547, 438 S.E.2d 886, 890 (1993).

[5]We are mindful that, in Spears, the results of blood testing performed in a separate district court action preceding a motion to reopen in circuit court a previous adjudication based on the marital presumption of paternity, provided in part the overwhelming evidence justifying relief pursuant to CR 60.02(d) and (f).

In conclusion, it is clear to this Court, based on its consideration of the matter as presented by the record and the parties' arguments, as well as its review of the relevant reported authorities discussed hereinbefore, that the posture of this matter is entirely consistent with all three prongs of the concept of *res judicata* as set out in Napier, supra. Further, there are no known or alleged equities sufficient to overcome *res judicata* and to defeat its application so as to justify the blood tests sought by Furlong. We hold that Furlong is barred as a matter of law by the earlier final proceedings from re-litigating the issue of Brown's paternity and that she has failed to make any showing that the application of *res judicata* to the case will "work an injustice." Our decision includes the preclusion of genetic testing, since that procedure is used to determine paternity.

Accordingly, the respondent trial court is hereby PROHIBITED from enforcing its order entered August 11, 1999, ordering the parties to submit to DNA testing.

GUIDUGLI AND SCHRODER, JUDGES, CONCUR.

EMBERTON, JUDGE, CONCURS IN RESULT ONLY.

ENTERED: September 24, 1999

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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