RENDERED: MAY 30, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002428-ME

J.I. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 07-J-502251

J.B. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Appellant J.I. appeals from an order of the Jefferson Circuit Court, Family Division, dismissing his paternity action for lack of jurisdiction. For the reasons stated, we affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

A.D.S., the minor child, subject of this action, was born on May 15, 1998, in Jeffersonville, Indiana. In January 1998, J.I. (Appellant) and J.B. (Appellee/mother) entered into a personal relationship, which was five and one-half months prior to the child's birth. Beginning in June 1998, until February 2002, J.I. and J.B. lived together. In October 2001, they married, and in September 2002, they divorced in Jefferson County, Kentucky (Case No. 02-CI-501825). The property settlement agreement in that dissolution action made no mention of a minor child born of the couple. Furthermore, the Decree of Dissolution, entered on September 12, 2002, states "[t]here were no children born of the marriage." Although Appellant acknowledged paternity on the child's birth certificate, and therefore, contends he is the "legal father," it is uncontroverted that Appellant is not the biological father of the child in this paternity action.

Appellant filed a verified petition for the establishment of paternity on May 3, 2007. Appellee filed her answer on July 16, 2007. In her answer, she characterized her appearance as a "special appearance" and claimed that the family court did not have jurisdiction to decide the issues raised in Appellant's petition.

Although the Appellant asserts that no formal motion to dismiss was filed, the Appellee counters that Appellee made a motion to dismiss at a case management conference on August 15, 2007. Thereupon, the court ordered the parties to submit memorandums of law. At that time, the Appellee asked the court whether a formal motion to dismiss was required. The court indicated that a formal motion was not necessary, and Appellant's counsel did not object.

Following both parties' submission of memorandums of law, the court issued its September 15, 2007, order which dismissed the action. The order held, without indicating precise reasons, that the court did not have the requisite jurisdiction to adjudge Appellant as the child's legal father. This appeal followed.

The issue here is whether or not the Jefferson Family Court has jurisdiction to decide the case. Appellant informed the family court, in his petition, that Appellee and he had executed a Paternity Affidavit when A.D.S. was born and that they followed the requirements set forth in Indiana Code ("IC") 31-14-7-3 and IC 16-37-2-2.1. IC 31-14-7-3 states "[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." Because Appellant allegedly executed such an affidavit and his name is on the birth certificate, it appears that Appellant is already the "legal father" under Indiana law.

IC 16-37-2-2.1 provides explicit instructions for establishing a paternity affidavit. One requirement is found under IC 16-37-2-2.1(e) wherein:

> A paternity affidavit executed under this section must contain or be attached to all the following:
> (1) The mother's sworn statement asserting that a person described in subsection (b)(1)(B) is the **child's biological father**.
> (2) A statement by a person identified as the father under subdivision (1) attesting to a belief that he is the **child's biological father.**

[Emphasis added.]

Clearly, in the situation at hand, Appellant and Appellee had been less than truthful in executing the supposed paternity affidavit because they knew Appellant was not the biological father of A.D.S. Furthermore, the statute itself, in IC 16-37-2-2.1(i), provides the legal mechanism for rescinding a paternity affidavit:

> 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 . . .

[Emphasis added.]

Thus, if the parties executed the paternity affidavit, as stated by the Appellant, they did so with the knowledge that the Appellant was not the biological father. This Court would find it extremely troubling to recognize Appellant as the "legal father" under the Indiana statutes because we also know that **he is not the biological father**.

Next, since we are not able to confer the status of "legal father" upon Appellant under the Indiana statutory scheme, we must consider the Kentucky statutes, KRS 213.046 and KRS 406.021, which Appellant suggests in his Petition are the corollary of the above-cited Indiana statutes.

Initially, we point out that KRS 406.021(1) allows a paternity complaint to be made "upon the complaint of the mother, putative father, child, person, or agency substantially contributing to the support of the child." We will not address the second prong concerning whether or not the Appellant was

substantially contributing to the support of the child as that is not argued here. But we will consider the term "putative father." "Putative father" is not defined in KRS Chapter 406, but "putative" is defined in the dictionary as "supposed, reputed." Funk & Wagnall's Standard Dictionary (2d ed. 1993). Here, the record is replete with information that demonstrates Appellant is not the putative father of this child. For instance, when he began dating the child's mother, she was already pregnant; when the child was born, he was not married to the mother; when he married the mother, he became the step-father; and, when he was divorced, his divorce decree states that "there were no children born of the marriage."

Second, Kentucky has a genetic testing presumption (KRS 406.011), as well as the marital presumption. Generally, case law reflects that paternity determinations are a function of biological connection to the child. 16 Louise E. Graham & James E. Keller, *Kentucky Practice - Domestic Relations Law* § 23.5 (3d ed. 2008). Therefore, KRS 406.021(1) does not give Appellant standing to file a complaint. Appellant cannot be considered the "putative" father because neither presumption fits his relationship to the child. At most, his only status, during the parties' marriage, was that of step-father, which has no bearing in Chapter 406.

Moreover, KRS 406.021(4) says that "[v]oluntary acknowledgment of paternity pursuant to KRS 213.046 shall create a rebuttable presumption of paternity." Notwithstanding that KRS 213.046 provides that voluntary acknowledgment-of-paternity forms have the same weight and authority as a judgment of paternity, Appellant has already admitted he is not the biological

father of A.D.S., so the presumption of paternity has been rebutted. Finally, KRS 406.021 goes on to say that "[t]he action shall be brought by the county attorney or by the Cabinet for Health and Family Services or its designee upon the request of complainant authorized by this section." Thus, Appellant, in this jurisdiction, must bring the action through the above government entities. The paternity statutes were designed to determine the biological father of a child in order to establish and enforce the biological father's duty to support his children. These statutes as adopted in Kentucky contain no definition and make no provision for the status of "legal father." Hence, the Appellant does not have the ability to be named the "legal father" under Kentucky statutes.

Next, where *in personam* jurisdiction is at issue, the applicable long-arm statute for paternity actions in Kentucky is KRS 454.210(2)(a)(8), which states as follows:

> (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> (8) Committing sexual intercourse in this state which intercourse causes the birth of a child when:
>
> (a) The father or mother or both are domiciled in this state;
> (b) There is a repeated pattern of intercourse between the Father and mother in this state; or
> (c) Said intercourse is a tort or a crime in this state[.]

In this case, the statute is not applicable because the Appellant is **admittedly** not the biological father of this child. The statute specifically requires a repeated pattern of intercourse between the father and mother in this state, which results in

the birth of the child. This case does not represent these factors. Appellant is not the biological father, and therefore, the statutory language conferring personal jurisdiction is not applicable. Moreover, Appellant's line of reasoning would result in the ludicrous proposition that any time a person has sex with another person in the Commonwealth of Kentucky, they could sue that person for paternity of *any* child.

Undoubtedly, Appellant's suggestion that jurisdiction is conferred because Appellee was both domiciled and engaged in sexual intercourse in Kentucky resulting in the child's birth, is fallacious. The child's conception did not result from the Appellee and Appellant's relationship. The child's biological father is someone else. Chapter 406, the Uniform Act of Paternity, is about determining the biological father of a child. Interestingly, the respondent herein is not a putative father but the mother, whose biological relationship with the child is unquestioned.

For his contention that KRS 454.210(2)(a)(8) confers jurisdiction, the Appellant relies on *Davis-Johnson ex rel. Davis v. Parmelee*, 18 S.W.3d 347 (Ky. App. 1999). He quotes the following language:

> KRS 454.210(2)(a)(8) provides for personal jurisdiction over some nonresidents. A nonresident may be subject to a paternity action in Kentucky if two conditions are met. First, the child must have been conceived in Kentucky. Second, the act of intercourse causing conception must meet one of three subconditions: (1) it must have occurred while either party was a Kentucky domiciliary. . . .

Yet the Appellant's own selected quotation defeats his reasoning. Note the words, "[s]econd, the **act of intercourse causing conception**." [Emphasis added.] The parties, by Appellant's own admission, did not have a relationship until Appellee was already pregnant. As noted before, the child in question was born five and one-half months after the parties' relationship began. Thus, the act of intercourse causing the child's conception occurred before the two parties were involved. Additionally, the *Parmelee* Court's decision was based on a factual scenario where there was no doubt as to the biological parentage of the child in that situation or where it occurred– the two parties therein had engaged in a sexual relationship in Kentucky that resulted in the conception of the child whose paternity was at issue there.

We would be remiss not to address Kentucky's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) found in Chapter 403 because, according to the Verified Petition, Appellant is seeking the status of "legal father" in order to establish visitation with A.D.S. (a custody issue not a support issue). KRS 403.822 is the exclusive jurisdictional basis for making child custody determinations in Kentucky courts. KRS 403.822(1) states "a court of this state shall have jurisdiction to make an initial child custody determination only if:

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state[.]

Additionally, paragraph (2) states that "Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state."

KRS 403.800(7) defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding." According to Appellant, the child has been in Texas since spring 2003, therefore Kentucky is not the child's "home state" and cannot exercise jurisdiction under this statutory proviso.

We affirm the decision of the family court that it lacked requisite jurisdiction to adjudge the paternity of the subject child because J.I., the Appellant, acknowledged that he is not the biological father thus obviating any possibility of the long-arm statute conferring personal jurisdiction. Similarly, because Kentucky's paternity statutes have no designation for the status of "legal father," and since Kentucky is not the home state of A.D.S., the family court also lacked subject matter jurisdiction to adjudicate this case.

ALL CONCUR.

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