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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002487-MR

HARVEY LOUIS BRIGGS, SR. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 99-FC-004853

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
TANYA LYNETTE DAVEY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Harvey Louis Briggs, appeals from an order of the Jefferson Family Court denying his motion to vacate a prior order requiring the payment of child support arrears. Finding no abuse of discretion, we affirm.

On January 15, 1997, Tanya Lynette Davey gave birth to a son, Antonio Louis Briggs, in Jeffersonville, Indiana. It is undisputed that Appellant was present at the hospital for the birth of the child and was listed on the child's birth certificate as the father. Further, the day after the child's birth, he signed a voluntary Acknowledgment of Paternity pursuant to Indiana Code Chapter 16 §63.

In September 1999, Davey filed a petition in the Jefferson Family Court for child support. On March 13, 2000, Appellant was ordered to pay $572.67 a month in child support, as well as $21,761.46 in arrears.

In January 2003, Davey filed a motion for DNA testing.[1] In both June and September 2004, Appellant filed motions seeking a decrease in his child support obligation and, in the September motion, Appellant also requested DNA testing. Again, in October 2004, Appellant sought a reduction in child support as well as DNA testing. However, he specifically requested that his visitation rights be maintained. Thereafter, on October 29, 2004, the family court entered an agreed parenting schedule between the parties.

On January 23, 2006, Appellant moved the family court to declare that he was not the legal father of Antonio. In support of his motion, Appellant submitted the results of a DNA test specifically excluding him as the biological father.[2] However, Appellant requested that the court continue to allow him

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[1] The family court denied the motion on the grounds that it was filed by Davey and not by Appellant.

[2] The record does not reflect that the court ever entered an order for DNA testing. In fact, there is a notation in the court's docket indicating that it denied the motion for testing on February 17, 2006.

visitation. As a result, on February 17, 2006, the parties entered into a second agreed parenting order. Interestingly, the following day, Appellant filed a motion to terminate child support based upon the DNA results.

Apparently, the parties were unable to cooperate with regard to visitation and Appellant filed a motion to terminate his parental rights. Following a hearing, the family court entered an order on August 4, 2006, setting aside the 1997 Acknowledgment of Paternity based upon the DNA results and a finding that Appellant had never acted in a paternal role with the child. The court noted,

> In light of the evidence presented at the hearing, it would no longer be in the child's best interest for the Respondent to be declared his father. Pursuant to 60.02, the judgment is permitted to be set aside if the judgment's prospective effect would no longer be equitable. It is clear that in the case at bar, the judgment's prospective effect would not be equitable to anyone involved, and could potentially be harmful to Antonio, both mentally and physically.

In August of 2007, Appellant filed a CR 60.02 motion to vacate the March 2000 child support order, arguing that he should not be obligated to pay the child support arrears. The court denied the motion, ruling:

> There is no question that once the Acknowledgment of Paternity was set aside, Respondent was not obligated for current or future child support. However, Kentucky law provides that arrears may not be set aside except in instances of fraud or misrepresentation. *Calfee v. Comm.,* 230 S.W.3d 601 (Ky. 2007). Respondent has not proved fraud on the part of the Petitioner . . . .

The family court subsequently denied Appellant's CR 59.05 motion to alter, amend or vacate. This appeal ensued.

Appellant argues on appeal that the family court erred in denying his CR 60.02 motion to extinguish his child support obligation. Relying upon the holdings in *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006) and *Calfee v. Commonwealth of Kentucky, Cabinet for Health and Families,* 230 S.W.3d 601 (Ky. App. 2007), Appellant contends that there was sufficient evidence of fraudulent conduct on Davey's part to warrant vacating the child support arrearage.

In response, the Commonwealth argues that Appellant failed to allege fraud in his CR 60.02 motion, rather arguing only that relief was warranted under subsections (e) and (f).[3] It was not until he filed his CR 59.05 motion that Appellant claimed fraud for the first time. The Commonwealth asserts the that the family court's denial of the CR 59.05 motion was proper because "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Guillion v. Guillion,* 163 S.W.3d 888 (Ky. 2005).

Kentucky has a long-standing public policy prohibiting the recoupment of excess child support payments unless benefits not utilized for actual support have cumulated. *Calfee, supra*, at 604. *See also Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986). However, in *Denzik v. Denzik, supra*, our Supreme Court held that a husband could recover child support payments made to his former wife where the support obligation had arisen as a result of the wife's fraudulent claim that the husband was her child's biological father. *Id.* at 114. Thus, since *Denzik*,

[3] CR 60.02(e) and (f) provide for vacating a judgment or order where "a judgment is void . . . or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application," or for "any other reason of an extraordinary nature justifying relief."

if the mother is found to have engaged in fraud or misrepresentation, even child support obligations that have already accrued may be modified. *See Wheat v. Commonwealth*, 217 S.W.3d 266, 270 (Ky. App. 2007). The *Denzik* Court set out the six factors that must be proven: (1) a material misrepresentation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon and (6) causing injury. *Denzik, supra,* at 110 (C*iting United States Parcel v. Rickert,* 996 S.W.2d 464 (Ky. 1999)).

Appellant contends that he introduced evidence showing that (1) Davey told him that he was the father; (2) Davey obviously had more than one sexual partner at the time Antonio was conceived; (3) Appellant was excluded as the biological father by DNA testing; and (4) Davey utilized the services of both Indiana and Kentucky to obtain orders of child support for her benefit and to Appellant's detriment. Further, he claims that in an affidavit he attached to a March 2006 motion to terminate child support he stated that Davey told him she knew the identity of Antonio's father.

However, Appellant conceded that he was aware Davey had multiple sexual partners at the time the child was conceived, but still signed the voluntary acknowledgement of paternity. We agree with the family court that Davey's request for DNA testing certainly implies that she believed someone other than Appellant could have been the child's biological father. And one may speculate whether Davey knew or had reason to know from the beginning that Appellant was not the biological father. However, Appellant has not presented sufficient

evidence that Davey made any misrepresentations to him or acted fraudulently in any manner to encourage him to voluntarily sign the acknowledgment of paternity form. Clearly, the facts herein are markedly distinguishable from those in both *Calfee, supra* and *Denzik, supra*. Accordingly, we conclude that the family court properly found that Appellant did not prove fraud on the part of Davey to warrant setting aside his obligation to pay the child support arrears.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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