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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000112-ME

JOHN DRAPER — APPELLANT

v. — APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 07-J-00087

COMMONWEALTH OF KENTUCKY,
EX REL. SHANNON C. HEACOCK; and
SHANNON C. HEACOCK — APPELLEES

AND — NO. 2010-CA-000185-ME

SHANNON C. HEACOCK — APPELLANT

v. — APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 07-J-00087

COMMONWEALTH OF KENTUCKY,
EX REL. JOHN DRAPER; and
JOHN DRAPER — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: John Draper ("Draper"), the biological father of A.N.H., appeals from a November 30, 2009, order of the Barren Circuit Court which granted the motions of Shannon Heacock ("Shannon") to set aside earlier orders of paternity, child support, and joint custody. Shannon filed an appeal challenging the trial court's *sua sponte* order entered the same day directing that she reimburse Draper for $11,762.00 for child support he paid to her for A.N.H. For the reasons set out below, we reverse and remand to reinstate the original orders adjudging Draper to be the father of A.N.H., and ordering child support, temporary joint custody, and visitation of A.N.H.

The underlying facts of this action are not in dispute. Shannon and Jesse W. ("Jesse") Heacock were married on December 15, 1997, and have remained married since that time. During the early years of the marriage, Jesse served in the United States Army and competed in the sport of boxing. On August 21, 1999, Jesse suffered a closed head injury while boxing and lapsed into a coma. The record is not clear concerning Jesse's current condition. While no medical records were introduced, Shannon testified that Jesse came out of the coma several weeks later. She also stated that Jesse has significant mental and physical

impairments, but she maintains that he has shown some awareness of his surroundings and is able to respond to others.

For some time thereafter, Shannon took care of Jesse in their home. However, she began to date other men at some point. During the period from June of 2002, through July of 2004, Shannon and Draper lived together at Shannon and Jesse's marital home. On November 21, 2004, Shannon gave birth to a child, A.N.H. [1]

On March 16, 2007, the Barren County Attorney, on behalf of Draper and A.N.H., filed a paternity action against Shannon. A genetic test revealed a 99.995% probability that Draper was the father of A.N.H. Thereafter, on September 4, 2007, the family court entered a judgment determining that Draper is A.N.H.'s father. The court reserved the issues of custody, visitation, and child support for later adjudication. Subsequently, on January 4, 2008, the court entered a temporary support order requiring Draper to pay child support in the amount of $401.00 per month. This amount included current child support as well as retroactive support beginning October 1, 2007. The record indicates that Draper remained current on his child support obligation during the entire period it was in effect.

[1] The trial court found that Jesse is currently institutionalized. The record does not indicate when this occurred. However, the trial court found that Shannon and Draper maintained a cohabitation living arrangement from June 2002 through July 2004. The trial court also found that during this period, Shannon and Draper slept together in the same bed while Jesse occupied and slept in another room. From the trial court's findings, it is clear that Jesse was not institutionalized until after the birth of A.N.H.

On January 11, 2008, the trial court entered an agreed order granting temporary joint custody of A.N.H. to Draper and Shannon. However, the parties continued to have disputes over visitation after entry of this order. Both parties sought primary custody of A.N.H., and the trial court appointed a custodial evaluator to aid in this determination. On February 25, 2009, the trial court conducted an evidentiary hearing on the custody, visitation, and support issues. In her post-trial memorandum, however, Shannon argued that, based on the recently decided case of *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008), the trial court lacked subject-matter jurisdiction.

In response, the trial court reopened the evidentiary hearing to take proof on whether it had subject-matter jurisdiction over the matter. After reconsidering the evidence in the light of *J.N.R. v. O'Reilly*, the trial court entered an order on November 30, 2009, setting aside all prior custody, visitation, and support orders as void *ab initio* and dismissing Draper's paternity action on the grounds that it lacked subject-matter jurisdiction. However, the trial court also ordered Shannon to reimburse Draper for all child support he had paid under the temporary order, totaling $11,762.00. These appeals followed.

Analysis of *J.N.R. v. O'Reilly*

The parties agree that the determination of this case turns on applicability of the recent opinion by the Kentucky Supreme Court in *J.N.R. v. O'Reilly*. The facts of *J.N.R*. were as follows. J.G.R. filed a Petition for Custody and Support in the family court, alleging that DNA tests confirmed him to be the biological father of J.A.R ("the child"), a three-month-old baby boy who lived with his mother, J.N.R. ("wife"). At the time of the child's birth, the wife was married to J.S.R. ("husband"). The husband and wife jointly objected to J.G.R.'s petition, arguing that J.G.R. lacked standing to assert paternity of the child due to the statutory presumption that a child born to a married woman is presumed to be the child of her husband. *Id.* at 588.

After the family court refused to dismiss the petition, the husband and wife brought an action for a writ of prohibition with the Court of Appeals. This Court denied the writ, holding that the husband and wife had failed to show irreparable injury and lack of adequate remedy by appeal. On further appeal, a closely divided Supreme Court granted the writ. In the primary opinion, (now Chief) Justice Minton examined the statutory prerequisites for bringing a paternity petition. He first noted that Kentucky Revised Statute(s) ("KRS") Chapter 406 provides the district court with subject-matter jurisdiction over "an action brought under this chapter" to establish support for "children born out of wedlock." KRS 406.051(1). KRS 406.051(2) states that the circuit court and district court share concurrent jurisdiction over custody and visitation issues "in cases where paternity

is established as set forth in this chapter." Further, KRS 23A.100(2)(b) confers the general jurisdiction of the circuit court on a family court division of the circuit court for proceedings under the Uniform Act on Paternity. *Id.* at 590.

However, Justice Minton noted that subject-matter jurisdiction under Chapter 406 is specifically limited to "children born out of wedlock." KRS 406.011 defines who is included in the class of persons considered to be "born out of wedlock."

> A child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife. However, a child born out of wedlock includes a child born to a married woman by a man other than her husband where evidence shows that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child.

Based on this definition, Justice Minton concluded that a third party asserting paternity must establish that the marital relationship between the husband and wife ceased ten months prior to the birth of the child. Since this evidentiary threshold was not met, Justice Minton concluded that the family court lacked subject-matter jurisdiction to consider J.G.R's petition. *Id.* at 591. Justice Minton also found that the family court did not have subject-matter jurisdiction under KRS 403.270, since that Chapter deals exclusively with dissolution proceedings. *Id.* at 594.

Although four members of the Court joined in the result granting the writ of prohibition, only then-Chief Justice Lambert joined Justice Minton's opinion. Justices Cunningham and Scott concurred in result only. They concluded

that only parties to the marriage have standing to challenge the presumption of legitimacy under KRS 406.011. *Id.* at 596-600 (*Cunningham, J., concurring*).

The Limited Holding of *J.N.R.*

As an initial matter, there is some question concerning the precedential authority of Justice Minton's primary opinion in *J.N.R.* "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [four] Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Marks v. U.S.*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977). Moreover, a "minority opinion has no binding precedential value ...[and] if a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect." *Hudson v. Commonwealth*, 202 S.W.3d 17, 21-22 (Ky. 2006), citing *Fugate v. Commonwealth*, 62 S.W.3d 15, 19 (Ky. 2001).

Recently, in *Bailey v. Bertram*, 2010 WL 1641115 (Ky. 2010)(2009-SC-000210-MR), the Kentucky Supreme Court called into question the precedential value of *J.N.R. v. O'Reilly*. Since only one other justice joined in Justice Minton's primary opinion, the Court suggested that the opinion in *J.N.R.* is not entitled to stare decisis effect. *Id.* at 4, citing *Hudson v. Commonwealth*, 202 S.W.3d 17, 21-22 (Ky. 2006), and *Fugate v. Commonwealth*, 62 S.W.3d 15, 19 (Ky. 2001).

Unfortunately, this discussion in *Bailey v. Bertram* tends only to muddy the water rather than clarify it. *Bailey v. Bertram* is an unpublished case and may only be cited for consideration if there is no published opinion that would adequately address the issue before this Court. Kentucky Rule(s) of Civil Procedure ("CR") 76.28(4)(c). Moreover, while we recognize this Court is bound to follow precedents set by published opinions set by the Kentucky Supreme Court,[2] we also recognize that there are circumstances and facts in this case which distinguish it from those in *J.N.R.*

With the limited precedential value of *J.N.R.* and the distinguishable facts and circumstances of this case in mind, we are required to determine the question posed in this case of whether the pleading requirements set out in KRS 406.011 are a prerequisite for the family court to have subject-matter jurisdiction or for a third party to have standing to bring the paternity petition. As noted in Justice Minton's primary opinion in *J.N.R.*, subject-matter jurisdiction concerns the family court's "[j]urisdiction over the nature of the case and the type of relief sought[,] the extent to which a court can rule on the conduct of persons or the status of things." *J.N.R.*, 264 S.W.3d at 589, quoting BLACK'S LAW DICTIONARY (8th ed. 2004). Standing, on the other hand, is defined as a "sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy." *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 439 (Ky. 1994).

[2] *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986), citing Rule(s) of the Supreme Court ("S.C.R.") 1.030(8)(a).

In the case of the former, a judgment entered by a court without subject-matter jurisdiction is void *ab initio*. *See Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996). In addition, since subject-matter jurisdiction concerns the very nature and origins of a court's power to act at all, it "cannot be born of waiver, consent or estoppel." *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007) (internal quotation marks and citation omitted). In contrast, a challenge to standing must be made before the trial court or the issue is waived for appellate purposes. *Tabor v. Council for Burley Tobacco, Inc.*, 599 S.W.2d 466, 468 (Ky. App. 1980); *Hyde v. Haunost*, 530 S.W.2d 374, 376 (Ky.1975).

Although the plurality in *J.N.R.* concluded that these evidentiary requirements of KRS 406.021 were prerequisites for invoking the trial court's subject-matter jurisdiction, a majority of the Court did not agree with this analysis. In fact, two concurring justices and one dissenting justice specifically held that the elements are a prerequisite for a stranger to the marriage to have **standing** and do not implicate the trial court's subject-matter jurisdiction. *J.N.R. v. O'Reilly*, 264 S.W.3d at 600 (*Scott, J., concurring*), 606-07 (*Noble, J., dissenting*). Moreover, in the more recent opinion by the Kentucky Supreme Court in *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), the Kentucky Supreme Court revisited the distinction between standing and jurisdiction as applied to the de facto custodian provisions of KRS 403.270.

In *Harrison*, the maternal grandparents had been awarded temporary custody of their three grandchildren and they eventually petitioned the circuit court

for full custody of the children. The children's father opposed the petition and sought custody of the children. The parties stipulated that the grandparents did not qualify as de facto custodians. However, the court concluded that nonparents who are not de facto custodians but who have physical custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian; or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence. Citing KRS 403.420. *See also Moore v. Asente*, 110 S.W.3d 336, 339, 340 (Ky. 2003).

The trial court found that the grandparents had met their burden of showing that the father was not a fit custodian and awarded them full custody of their grandchildren. On appeal, this Court reversed, noting that KRS 403.420 had been repealed at the time the custody action was initiated. Consequently, this Court found that a nonparent's right to bring a custody petition was limited to the de facto custodian provisions of KRS 403.270. Under that section, a nonparent seeking custody of a child must first establish that the person is a de facto custodian as defined by KRS 403.270(1)(a). Once the court determines that the person is a de facto custodian, that person will be afforded the same standing as is given to a parent. This Court concluded that the statute sets out prerequisites for standing of a nonparent and for invoking the subject-matter jurisdiction of the trial court. Since the grandparents had stipulated that they did not qualify as de facto

custodians, this Court found that the trial court lacked subject-matter jurisdiction to consider their petition for full custody.

On further appeal, the Kentucky Supreme Court disagreed. In an opinion written by Chief Justice Minton, the Court emphasized that standing and subject-matter jurisdiction are not synonymous

> The key difference is that subject-matter jurisdiction involves a court's ability to hear a type of case while standing involves a party's ability to bring a specific case. Our predecessor Court quoted, with approval, an opinion of the New York Court of Appeals that held that "subject matter does not mean 'this case' but 'this kind of case.'" [Citing *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970), quoting *In re Estate of Rougeron*, 17 N.Y.2d 264, 270 N.Y.S.2d 578, 217 N.E.2d 639, 643 (1966).] As previously mentioned, however, standing focuses more narrowly on whether a particular party has the legally cognizable ability to bring a particular suit. Although the concepts bear some resemblance to each other, standing is distinct from subject-matter jurisdiction.

Harrison v. Leach, 323 S.W.3d at 705-706.

The Supreme Court went on to find that the trial court had subject-matter jurisdiction to consider the grandparents' petition, since it is a court of general jurisdiction and there was no family court division in that circuit. Furthermore, the Supreme Court noted that the father had never challenged the grandparents' standing before the trial court. The Court concluded that, unlike subject-matter jurisdiction, a challenge to a party's standing may be waived if not timely raised. *Id.* at 4.

We find no meaningful distinction between the statutory scheme at issue in *Harrison v. Leach*, and the scheme at issue in this case. There is no dispute that the family court division of the Barren Circuit Court has jurisdiction over paternity petitions. Furthermore, KRS 406.011, like KRS 403.270, sets out a presumption and the elements of proof necessary to rebut that presumption. KRS 406.011 establishes a presumption that a child born during lawful wedlock, or within ten (10) months thereafter, is the child of the husband and wife. However, KRS 406.011 also sets out an exception to that presumption, "where evidence shows that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child."

Given the similarities between these statutory schemes and the respective significance of the rights involved, we conclude that KRS 406.011 sets forth standing requirements for a third party to assert paternity of a child born during the lawful wedlock of a husband and wife. Unlike subject-matter jurisdiction, an objection to standing may be waived if not timely raised. *Harrison v. Leach*, *supra* at 707-708. Shannon failed to object until well after the paternity judgment was entered. Indeed, Shannon made affirmative representations acknowledging that Draper is the biological father of the child. She entered into agreed orders allowing him to have visitation with the child, and she accepted over $11,000.00 in child support from Draper under the temporary support order. Shannon did not challenge Draper's right to bring the action for nearly two years

after he brought the paternity petition. Under the circumstances, we must conclude that Shannon has waived any objection to Draper's standing to assert paternity.

In this case, the trial court reasonably concluded that it was bound by the primary opinion of *J.N.R.* and attempted to apply that rule. However, we conclude that the result in *J.N.R.* must be applied on the narrowest possible grounds because it was a plurality opinion. Furthermore, the more recent analysis in *Harrison v. Leach*, tends to undermine the reasoning of the plurality in *J.N.R.* Consequently, we find that this matter concerned Draper's standing to assert paternity rather than the subject-matter jurisdiction of the family court to address the petition. Since Shannon waived any objection to Draper's standing, we conclude that the family court erred by setting aside the paternity judgment as void and by dismissing Draper's petition. Therefore, we reinstate the judgment and remand for further proceedings on the remaining issues relating to custody, visitation, and support. Furthermore, since we are reinstating the paternity judgment, the issues raised in Shannon's appeal concerning recoupment of child support are now moot.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/APPELLEE JOHN DRAPER:

Benjamin D. Rogers
Glasgow, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLANT/APPELLEE SHANNON HEACOCK:

J.B. Hines
Brownsville, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEE COMMONWEALTH OF KENTUCKY:

Dennis Wilcutt
Glasgow, Kentucky