IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000418-MR

DATE 5-15-08 E.W.A. Grant D.C.

BILLY C. WILLIAMS — APPELLANT

V.

ON APPEAL FROM THE COURT OF APPEALS
CASE NUMBER 2007-CA-000589
SHELBY CIRCUIT COURT NO. 07-J-00020

THOMAS C. RATLIFF, JR., ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING AND REMANDING

This matter of right appeal is from the Court of Appeals' grant of a petition for a writ of prohibition[1]. In the court below, Appellee Thomas Ratliff Jr. ("Ratliff") sought and was granted a writ prohibiting the Family Court Division of the Shelby Circuit Court from ordering genetic testing in a paternity action brought by Appellant Billy C. Williams ("Williams"). The Court of Appeals held that because there was no finding by the family court that the child who was the subject of the paternity action was born out of wedlock, Williams lacked standing to rebut the presumption of Ratliff's paternity. On the record before this court, we must affirm the Court of Appeals. However, for reasons hereinafter set forth, we remand to the Family Court for further proceedings.

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[1] CR 76.36(7) allows an appeal as a matter of right from a judgment in any proceeding originating in the Court of Appeals.

Appellee Ratliff and Melissa Earlene Ratliff were married in Jefferson County, Kentucky on April 23, 1999. Melissa Ratliff filed a petition for dissolution of marriage in the Oldham Circuit Court on March 5, 2003, but a decree dissolving the marriage was never entered. On August 3, 2005, Melissa Ratliff gave birth to Constance Aradia Farley ("Constance"). On October 28, 2005, an action was filed in the Henry Family Court by the Cabinet for Families and Children through Melissa Ratliff to establish that Williams was Constance's father. The complaint was verified and stated that "the alleged father of the child is Billy Williams." Nearly a year later, on September 2, 2006, Melissa Ratliff died. On October 6, 2006 a motion was made by the Henry County Attorney to amend the complaint to add Thomas Ratliff as a defendant in the paternity action. On December 14, 2006 an order was entered by the Henry Family Court dismissing the action and noting that since Melissa was married at the time of her demise, Constance's paternity was not in question. Thereafter, on January 5, 2007, Appellant filed a petition in the Family Court of Shelby County to establish his paternity of Constance and to be awarded her "care custody and control."

On February 19, 2007, an order of the Shelby Family Court was entered compelling the genetic testing of Appellant, Appellee and the infant Constance. The Family Court's order was based on its conclusion that nothing in the Uniform Act on Paternity (KRS Chapter 406) prevented Williams from qualifying as a "putative father."[2] This determination is key since a "putative father" is among the limited class of persons

[2] In the original model Uniform Act on Paternity (1960), the definition of the phrase "child born out of wedlock" included a child "born to a married woman by a man other than her husband." Unif. Act on Paternity § 1 (2001). The General Assembly declined to include this portion of the definition when it adopted the Commonwealth's version of the Uniform Act on Paternity in 1964. Kentucky's divergence from the original U.A.P. is noted in the model act's official comment.

permitted to seek a determination of paternity under KRS 406.021(1). The Family Court concluded that in light of Melissa Ratliff's death and the relatively young age of Constance, genetic testing would be in the best interests of the child. Appellee brought this original action seeking to prohibit enforcement of the Family Court's genetic testing order.[3]

Upon review, the Court of Appeals agreed with Ratliff's assertion that "putative father" is a specialized legal term, defined as "[t]he alleged biological father of a child born out of wedlock."[4] Where a term has acquired a specialized meaning, courts are required to apply that meaning when interpreting a statute.[5] Relying on the absence of a judicial finding that Constance had been "born out of wedlock" as defined in KRS 406.011, the Court of Appeals held that Williams had not established that he was a "putative father" and was not, therefore, among the class granted standing to bring a paternity action under KRS 406.021(1).[6] Accordingly, the Court of Appeals granted the writ prohibiting enforcement of the Shelby Family Court's order and this appeal followed as a matter of right.

Kentucky Revised Statutes, Chapter 406, by the plain language, is limited in application to instances of births out of wedlock. KRS 406.011 sets forth the terms of the Commonwealth's statutory presumption of paternity:

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[3] CR 76.36(1).

[4] Black's Law Dictionary (7th ed. 1999).

[5] Payton v. Norris, 42 S.W.2d 723 (Ky. 1923).

[6] "Paternity may be determined upon the complaint of the mother, putative father, child, person, or agency substantially contributing to the support of the child."

> "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.*" (Emphasis added.)

Under this statute, when read in conjunction with KRS 406.021(1), two means are provided for one claiming to be the father of a child to assert his status as the father. One claiming to be the father of a child born to an unmarried woman may petition the court to establish his paternity and thereafter be heard on his claim. One other than the husband who claims to be the father of a child born to a married woman must establish that the "marital relationship" between the husband and wife ceased ten months prior to the birth of the child. One claiming under this provision may be heard, and providing probability is shown, obtain genetic testing. One claiming to be the father of a child born to a married woman without also proving that the marital relationship between the husband and wife ceased ten months prior to the birth of the child may not be heard on his claim as he is unable to establish standing under the statute.

Kentucky case law establishes that the presumption of paternity "can be overcome only by evidence so clear, distinct and convincing as to remove the question from the realm of reasonable doubt."[7] A review of the record herein shows that Appellant Williams presented no evidence to the Family Court that Constance was a child "born out of wedlock" as that term is defined or that the marital relationship between the Ratliffs had ceased ten months prior to Constance's birth.[8] In essence,

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[7] Montgomery v. McCracken, 802 S.W.2d 943, *quoting* Simmons v. Simmons, 479 S.W.2d 585, 587 (Ky. 1972).

[8] In Appellant's brief he attempts to bolster his argument by introducing affidavits and other documents that were not presented to the Family Court. This practice violates

Williams asked the Family Court to do on his behalf what he would not or could not do for himself—rebut the presumption of paternity. Williams presented no competent proof that he qualifies as a putative father or that the marital relationship had ceased at least ten months before Constance's birth. As such, the presumption of paternity was not rebutted and the Family Court exceeded its authority when it ordered genetic testing.

Williams argues that Ratliff is not entitled to a writ since he failed to show that he lacks an adequate remedy by appeal or that great injustice and irreparable injury will befall Ratliff if the writ is not granted. However, a writ is the proper remedy where a substantial miscarriage of justice will result and correction of a lower court's error is necessary and appropriate in the interest of orderly administration of justice.[9] Furthermore, the substantial miscarriage of justice need not be accompanied by a showing of great and irreparable injury.[10] Here, a miscarriage of justice would have occurred if the duly-enacted statutory presumption of paternity was not observed. Moreover, upon the occurrence of genetic testing without observance of the statutory presumption, any injury resulting therefrom would be irreparable.

The family court ordered genetic testing of the Appellee and Constance without any substantive evidence supporting the Appellant's claim of paternity or any showing that Constance was born out of wedlock. While the family court's desire to

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CR 76.36(5), and is prejudicial to the Appellee. These documents were not considered by this Court in reaching its decision.

[9] Independent Order of Foresters v. Chauvin, 175 S.W.3d 610 (Ky. 2005); Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 610 (Ky. 2005); Hoskins v. Maricle, 150 S.W.3d 1, 20 (Ky. 2004); Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961).

[10] Independent Order of Foresters, 175 S.W. 3d at 616-17; The St. Luke Hospitals, Inc. v. Kopowkski, 160 S.W.3d 771, 775 (Ky. 2005).

expeditiously and conclusively determine the issue of paternity is admirable, its order for genetic testing was improper. As a matter of public policy and proper statutory interpretation, to require genetic testing based on nothing more than a petitioner's "say-so" is contrary to the framework for litigation of paternity issues established by the General Assembly. Kentucky law does not afford genetic testing to anyone and everyone who is willing to file a petition.

In this case, even though the mother is deceased and the public policy interest of promoting marital harmony no longer exists, Williams must first show that Constance was born out of wedlock as the phrase is defined in KRS 406.011, and thereafter make at least a showing of probability of paternity before the genetic testing step will be required. As the Family Court was of the opinion that no such requirement existed, no preliminary showing was made. In the interest of giving Williams a fair opportunity to be heard, we will remand this cause to the trial court with directions to allow Williams thirty days in which to amend his petition and support it with evidence sufficient to establish a probability that he is the father of Constance. Upon motion of either party, the Family Court shall hold an evidentiary hearing. Upon the Family Court's conclusion that Williams has made the required showing of probable paternity, Appellant's claim may go forward and genetic testing required. Otherwise, Williams' claim shall be dismissed with prejudice by the Family Court.

All sitting. Lambert, C.J., and Cunningham, Minton, Noble, and Scott, JJ., concur. Abramson, J., files a separate opinion concurring in part and dissenting in part in which Schroder, J., joins.

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OPINION BY JUSTICE ABRAMSON

CONCURRING IN PART AND DISSENTING IN PART

I concur with the remand of this case for further proceedings regarding Williams's claim of paternity as to Constance. I dissent from those portions of the majority opinion which would require Williams to establish first that marital relations between Melissa Ratliff and Thomas C. Ratliff, Jr., ceased ten months prior to Constance's birth. My dissent in J.N.R. and J.S.R. v. Honorable Joseph O'Reilly, Judge, Jefferson Family Court, and J.G.R., Real Party in Interest, ___ S.W.3d ___ (Ky., April 24, 2008) details what I find to be the proper construction of the relevant paternity statutes. In this case, the Ratliffs' divorce decree which has been pending for over two years when Constance was born and Melissa Ratliff's paternity action expressly naming Billy Williams as Constance's father constituted a sufficient showing for the Family Court to determine that the marital relationship had ceased in the relevant timeframe;

that Williams is a "putative father"; and that genetic testing is appropriate.

Schroder, J., joins.