RENDERED: APRIL 22, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000210-MR

KATHERINE D. BAILEY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-002238-OA
MARION CIRCUIT COURT NO. 08-CI-00191

HON. ALLAN RAY BERTRAM,
JUDGE, MARION CIRCUIT COURT; AND
DANIEL E. BAILEY, JR. — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellee, Daniel Bailey, petitioned the Court of Appeals to prohibit the Marion Circuit Court from ordering him to submit to paternity testing. Daniel argued that the trial court lacked jurisdiction to order the testing or, in the alternative, that the trial court was acting erroneously and enforcement of the order would cause great and irreparable injury. The Court of Appeals agreed on other grounds and issued a writ of prohibition. Appellant, Katherine Bailey, appeals as a matter of right from the opinion granting the writ. We now reverse.

I. Facts

The parties were married on May 25, 2005. One son, T.B., was born during the marriage on February 12, 2007 and Daniel was named as his father on the birth certificate. The parties later separated in September of 2007, and Daniel petitioned the Marion Circuit Court for dissolution of the marriage on May 28, 2008.[1]

In his petition, Daniel requested joint custody of T.B. Katherine, in her sworn answer, asked for an award of child support, that the parties be awarded joint custody (with Katherine being named the primary custodian), and acknowledged that T.B was born of the marriage and lived "in the custody of [Daniel] and [Katherine] during the marriage."

Thereafter, on September 16, 2008, Katherine sought an emergency protective order against Daniel. In response, Daniel filed motions for relief, including a motion for a mutual restraining order and for custody of T.B. On October 2, 2008, the Marion Circuit Court granted Daniel's motion for a mutual restraining order and set forth a time-sharing schedule for T.B. The matter was set for review on December 9, 2008.

On October 2, 2008, however, Katherine also filed a motion requesting paternity testing. Daniel objected at the hearing on grounds that the circuit court lacked jurisdiction to order the testing. The trial court ultimately granted the motion and ordered Daniel to submit to paternity testing.

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[1] The Marion Circuit Court does not have a family court division.

Daniel then petitioned the Court of Appeals for a writ of prohibition, arguing that the circuit court acted outside its jurisdiction in ordering the paternity testing, as KRS 406.051 vests the district court with sole jurisdiction over paternity matters. Daniel further asserted that KRS Chapter 406 only applies to children born "out of wedlock" and that T.B. does not fit within that definition. Alternatively, even if the court was acting within its jurisdiction, Daniel argued that it was acting erroneously and that great and irreparable injury would result to both him and T.B. if testing was ordered.

The Court of Appeals determined that the Marion Circuit Court had jurisdiction to determine paternity insofar as such determination is inextricably connected with its decisions as to custody and support. However, it also found that Katherine was equitably estopped from challenging paternity. Because it concluded that great and irreparable injury would result to Daniel and T.B. if paternity testing was required, the Court of Appeals granted the writ of prohibition.

II. Analysis

A. Standard of Review

The standard by which we review petitions for a writ was set out in *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004):

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or

> otherwise and great injustice and irreparable injury will result if the petition is not granted.[2]

Here, the Court of Appeals, given its conclusion that equitable estoppel was applicable, found the trial court was acting erroneously under the second prong of *Hoskins*.[3] In cases where a writ under the second prong has been granted, as here, we review the Court of Appeals' findings of fact – such as its determination that great and irreparable injury will result – for clear error. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). We review its decision to issue the writ for an abuse of discretion. *Id.*

However, "whether to grant or deny a petition for a writ is not [always] a question of jurisdiction, but [often] of discretion." *Hoskins v. Maricle*, 150 S.W.3d 1, 5 (Ky. 2004). "Because writs interfere with both the orderly, even if erroneous, proceedings of a trial court and the efficient dispatch of our appellate duties, the courts of this Commonwealth have periodically attempted to formulate a rule governing the discretionary choice between issuing a writ and relegating a petitioner to the right to appeal." *Id.* at 5-6.

B. The Contentions

On appeal, Katherine contends, *inter alia*, that as the Marion Circuit Court had jurisdiction to determine the paternity issue, and the presumption of paternity is rebuttable by the parties to the marriage, the Court of Appeals

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[2] There is an exception where "this Court will entertain a petition for prohibition in the absence of a showing of specific great and irreparable injury to the petitioner, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Hoskins*, 150 S.W.3d at 20.

[3] It did not, however, explicitly address the question of whether "an adequate remedy by appeal existed."

abused its discretion in granting the writ, thereby precluding Katherine from fully developing evidence by which to rebut the presumption upon appropriate considerations and findings. Daniel accepts that a circuit court in a jurisdiction without a family court has jurisdiction to make paternity decisions insofar as the determination is inextricably connected with its decisions on custody and support. He contends, however, that Kentucky's paternity statutes, in this instance, do not grant subject matter jurisdiction to *any* court since there is no evidence or allegation that the marital relationship ceased ten months prior to T.B.'s birth, citing to *J.N.R. v. O'Reilly*, 264 S.W.3d 587, 588 (Ky. 2008) (plurality opinion) ("We hold that Kentucky's paternity statutes do not grant subject-matter jurisdiction to our courts to determine paternity claims where, as here, there is no evidence or allegation that the marital relationship ceased ten months before the child's birth.").

Daniel further contends that Katherine cannot meet the threshold requirements for challenging Daniel's presumption of paternity, that Katherine is equitably estopped from challenging Daniel's paternity, and that Daniel and T.B. will otherwise be irreparably harmed and subjected to grave injustice should the prohibition of testing be lifted.

C. Circuit Court Jurisdiction

First, we agree that a family or circuit court (where there is no family court) has jurisdiction over paternity issues, insofar as such a determination is inextricably connected with the court's decisions on custody and support. *See Moore v. Commonwealth, Cabinet for Human Res.*, 954 S.W.2d 317, 320 (Ky.

1997) ("[P]aternity and the issues related thereto were necessary issues to the dissolution action which [the party] had a full and fair opportunity to litigate."); *Simmons v. Simmons*, 479 S.W.2d 585, 587 (Ky. 1972) (circuit court determined paternity of child in dispute between husband and wife in action of dissolution, based upon blood test); *Cain v. Cain*, 777 S.W.2d 238, 240 (Ky. App. 1989) (The Kenton Circuit Court "not only has the authority but the duty under KRS 406.081 to order the appropriate blood tests to determine whether [the former husband] is [the child's] father."); *see also Montgomery v. McCracken*, 802 S.W.2d 943 (Ky. App. 1990) ("It is uncontroverted that evidence adduced during the divorce proceedings excluded the mother's husband as being the father of the child.").

Here, the Marion Circuit Court did not have a family court. However, the judicial article was passed in 1976, many years before the advent of family courts. *See* Ky. Const. §§ 109-124 (effective January 1, 1976). The family court amendment, Section 112(6) was not effective until November 5, 2002. Section 112(5) provides in relevant part: "[t]he Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court." Thus, prior to the establishment of family courts in their various jurisdictions, the Circuit Courts historically handled actions for Divorce or Dissolution with *all* pertinent powers. Although KRS 406.051(1) explicitly grants the District Court "jurisdiction of an action *brought under this chapter*," (emphasis added), meaning *under* the Uniform Act of Paternity, such a grant does not deny the Circuit Courts their general jurisdiction power to make all necessary

determinations, including paternity in dissolution actions. *See Moore*, 954 S.W.2d at 320.

Now, Section 112(6) of the Kentucky Constitution reflects that a "Circuit Court division [designated as a family court] shall retain the general jurisdiction of the Circuit Court and shall have additional jurisdiction as may be provided by the General Assembly." KRS 23A.100(1)(a) confirms that "a family court . . . shall retain jurisdiction in . . . [d]issolution of marriage" cases and KRS 23A.100(2)(b) grants the family court *additional* jurisdiction in "[p]roceedings under the Uniform Act on Paternity, KRS Chapter 406."

Family Courts were necessarily granted this additional jurisdiction as to traditional paternity actions, as they now generally supplant the District Court in these matters. *See* KRS 23A.100(3) (Family Courts "shall be the primary forum for [such] cases.") This reordering of jurisdiction for Family Courts, however, did not deprive Circuit Courts – in jurisdictions without a Family Court – of their preexisting jurisdiction over matters pertinent to dissolution actions.

D. *J.N.R v. O'Reilly*

We turn next to Daniel's argument, ostensibly supported by *J.N.R.*, that the Marion Circuit Court was acting outside its jurisdiction, as KRS Chapter 406 does not grant subject matter jurisdiction to *any* court to determine paternity of a child born during a marriage where there is no evidence or allegation that the marital relationship ceased ten months prior to the child's

birth. In this regard, KRS 406.011, in pertinent part, provides:

> 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.

As the parties' marriage has yet to be dissolved, there is no question that T.B. was born during the marriage.

Although *J.N.R.*, *supra*, does ostensibly support the proposition asserted by Daniel, and purports to overrule *Montgomery* and other similar authority in so doing, only two (2) Justices concurred in the main opinion, with two (2) others concurring in result only, and three (3) Justices dissenting. "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. United States*, 430 U.S. 188, 193 (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)).

Here, a review of the plurality opinion in *J.N.R.*, patently discloses that the statement cited to by Daniel, as well as the purported overruling of *Montgomery* and other similar authority in *J.N.R.*, do not fall within the

concurrence of four (4) Justices within the narrowest confines of their separate opinions. This conclusion, however, does not resolve the underlying question.

E. Wedlock and the Rebuttable Presumption

Under common law, the terms "wedlock" and "out of wedlock" were fairly well understood:

> But it is insisted that under this section only children begotten and born of an illicit intercourse between a single man and a single woman are legitimated by the subsequent marriage of their father and mother, and that the section has no application to a state of case in which either the father or mother were married at the time the children were begotten and born as the result of an illicit intercourse with another man or woman. If this construction of the statute should be adopted, it would not, of course, apply to the facts of this case, and the result would be that the common law, which prevails in this state except in cases where it has been modified or abrogated by statutory enactment, would determine the status of these children, and under that law they would remain illegitimate notwithstanding the marriage of their parents.

Bates v. Meade, 174 Ky. 545, 192 S.W. 666, 667 (1917) (*citing Blackstone's Commentaries*, vol. 1, p. 455; *Kent's Commentaries*, vol. 2, p. 208). Now, however, the terms are defined statutorily by KRS 406.011, which, as aforementioned, states in relevant part:

> 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).

Although rebuttable ("presumed") between the parties to the marriage, the presumption of legitimacy:

> [C]an be overcome only by evidence so clear, distinct and convincing as to remove the question from the realm of reasonable doubt. [For we have said], that proof necessary to [illegitimatize] a child must go beyond a reasonable doubt and must be of a higher degree than that required to convict a person of even a minor criminal offense.

Simmons, 479 S.W.2d at 587 (internal citations omitted); *see also Hinshaw v. Hinshaw*, 237 S.W.3d 170, 172 (Ky. 2007) ("While acknowledging that KRS 406.011 creates a presumption of paternity, [the wife] correctly argues the presumption is rebuttable."); *Tackett v. Tackett*, 508 S.W.2d 790, 792 (Ky. 1974) ("Though the presumption of paternity and legitimacy is one of the strongest known to the law, it is not conclusive but is rebuttable [by the parties to the marriage] and may be overcome by factual evidence.").[4]

Here, the parties disputing paternity are husband and wife. Thus, the presumption is rebuttable. *See Moore*, 954 S.W.3d at 317; *Cain*, 777 S.W.2d at 239-40; *Montgomery*, 802 S.W.2d at 943.

Under such circumstances, genetic tests are undoubtedly admissible and informative on issues of paternity. KRS 406.091(3). Moreover, if appropriate within the context of the other evidence, "a chancellor is entitled to rely on the tests." *Simmons*, 479 S.W.2d at 587; *but see Hinshaw*, 237 S.W.3d at 174 ("Under these unique circumstances, equitable estoppel precludes Jacqueline from [using uncontroverted DNA testing to challenge] Ren's status as [the

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[4] *Tackett* was a dissolution action between a husband and wife with an issue of paternity.

child's] father, a status she created and accepted."). This then brings us to the issue of equitable estoppel.

F. Equitable Estoppel

In this instance, the Court of Appeals determined equitable estoppel to be applicable and, therefore, determined that the Marion Circuit Court was *acting erroneously*. Equitable estoppel is appropriately applied when the following elements are established:

> (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.

Gray v. Jackson Purchase Prod. Credit Assoc., 691 S.W.2d 904, 906 (Ky. App. 1985). However, it is not generally the province of an appellate court to make the findings of fact necessary for the application of equitable estoppel – such findings and weighing of the equities are the province of the trial court. "The thread which runs through CR 52 is that the trial court must render findings of fact based on the evidence. . . ." *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). Thus, an "appellate court should not engage in fact-finding or resolve conflicting evidence." Kurt A. Phillips Jr., et al., *Kentucky Practice, Rules of Civil Procedure Annotated*, Rule 52.01, p. 279 (6th ed. 2005) (*citing General Motors Corp. v. Herald*, 833 S.W.2d 804 (Ky. 1992)). "The appellate court is [simply] not authorized to 'substitute its judgment as to the credibility of the

witnesses and/or the weight of the evidence concerning questions of fact.'" *Caudill v. Commonwealth*, 240 S.W.3d 662, 664 (Ky. App. 2007).

Relying on *Hinshaw*, 237 S.W.3d 170, the Court of Appeals concluded that equitable estoppel was appropriate. *Hinshaw*, however, involved an appeal wherein the trial court had resolved all the appropriate findings and thereafter, "concluded equitable estoppel precluded [Appellant] from challenging [Appellee's] custody rights based on DNA testing." *Id.* at 172. In addition, "[t]he [trial] court, applying the best interests of the child standard, concluded the parties should share joint custody with [Appellee] designated as the primary residential custodian." *Id.*

To this point in this case, there have been no findings by the trial court. Moreover, although the evidence is yet to be heard, weighed, and evaluated by the trial court, Katherine asserts that Daniel made prior claims that he was *not* the father of the child and that the parties were *aware* from the time of the *birth* of the child that a third party was the biological father. Thus, absent appropriate findings on the material questions presented by the evidence, the application of equitable estoppel by an appellate court is inappropriate.

In *Hinshaw*, the parties lived together for four (4) years after the birth of the child. 237 S.W.3d at 173; *see also S.R.D. v. T.L.B.*, 174 S.W.3d at 502 (Ky. App. 2005) (challenge made six (6) years after divorce). In this case, the child lived in the family setting for seven (7) months. In addition, the Court in both *Hinshaw* and *S.R.D.*, had the benefit of the trial court's analysis of the child's best interest. *Hinshaw*, 237 S.W.3d at 172 ("Dr. Berla concluded that 'severing

[the relationship between Ren and [the child] would at the very least cause [the child] severe emotional and psychological harm.'"); *S.R.D.*, 174 S.W.3d at 504 ("Agreeing with Charney's recommendations, the court stated that 'there is no doubt that the best interest of the child is for the father-daughter relationship to continue in the same manner as it has to this point in time. Any disruption in that relationship, financial or emotional[,] would pose potentially serious ramifications for the child.'"). To date, these matters have yet to be addressed in a forum where, at least initially, the presumption of paternity can generally be challenged between the parties to the marriage.[5]

III. Conclusion

For the foregoing reasons, we conclude that the issuance of the writ was an abuse of discretion, and we therefore reverse the Court of Appeals.

All sitting. Abramson, Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Minton, C.J., dissents for the reasons expressed in his opinion in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008).

[5] We do not intend by this analysis to prejudge any issue the trial court may confront, whether it be equitable estoppel, admissions by pleadings, or allowable amendments thereto. The essence of this opinion is that these are matters which necessarily should be addressed by the trial court in its normal course and upon appropriate evidentiary consideration and findings.

COUNSEL FOR APPELLANT:

George G. Seelig
144 W. Main Street
Lebanon, KY 40033

COUNSEL FOR APPELLEE, HON. ALLAN RAY BERTRAM, JUDGE, MARION CIRCUIT COURT:

Hon. Allan Ray Bertram
One Courthouse
203 N. Court Street
Campbellsville, KY 42718

COUNSEL FOR APPELLEE, DANIEL E. BAILEY, JR.:

Susan Hanrahan McCain
Mattingly, Simms & Robinson PLLC
108 W. Main Street
Springfield, KY 40069

Daniel E. Bailey
6790 Calvary Road
Campbellsville, KY 42718