AS MODIFIED: JUNE 22, 2010
RENDERED: JUNE 17, 2010
TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000738-MR

TREVOR ANDREW SMITH; AND
BETHANY SMITH — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-000973-OA
JEFFERSON CIRCUIT COURT NO. 08-J-506574

ELEANORE GARBER, JUDGE, JEFFERSON
FAMILY COURT

AND

ANDREW CAHILL (REAL PARTY IN INTEREST) — APPELLEES

OPINION OF THE COURT BY JUSTICE NOBLE

AFFIRMING

This matter originated in a suit by Andrew Cahill in Jefferson Family Court seeking to establish paternity and obtain custody of T.E.S., a minor child born to Bethany Smith, the former wife of Trevor Smith. The Smiths sought a writ of prohibition from the Court of Appeals enjoining the family court from ordering genetic testing. The Court of Appeals denied the writ. Because the family court was acting within its jurisdiction to order genetic testing in such cases, this Court affirms.

I. Background

On July 16, 2004, T.E.S. was born to Appellant Bethany Smith, the former wife of Appellant Trevor Smith. Appellants were first married on

October 26, 2002. In December, 2003, they filed a verified joint petition for dissolution of marriage. In the petition, they alleged that at the time of the petition, Bethany Smith was pregnant with the child of a man other than her husband. They further alleged that they had separated as of July, 2003, and that the child had been conceived sometime in October, 2003. Appellants' divorce was finalized on February 19, 2004. Then on July 15, 2004 they remarried, just prior to T.E.S.'s birth the next day.

That marriage also failed, and the Appellants divorced again in September 2007. In that dissolution, Bethany and Trevor Smith were awarded joint custody of T.E.S. Soon thereafter, however, Bethany Smith informed Andrew Cahill, the Appellee/Real Party in Interest in this matter, that he was in fact T.E.S.'s father. In December 2008, Appellee filed a petition in Jefferson Family Court to establish paternity and seek custody of T.E.S. After overruling motions to dismiss the petition, Jefferson Family Court Judge Eleanore Garber ordered genetic testing to resolve Andrew Cahill's claim of paternity.

Attempting to block the genetic testing, Appellants sought a writ of prohibition from the Court of Appeals against Judge Garber and real party in interest Andrew Cahill. The Court of Appeals denied the writ in a 2-1 opinion. Appellants now appeal to this Court, urging us to find that the Jefferson Family Court is acting outside of its jurisdiction.

II. Analysis

Kentucky's family courts have been granted jurisdiction to handle all "[p]roceedings under the Uniform Act on Paternity, KRS Chapter 406." KRS

23A.100(2)(b). The section of the Act entitled "Applicability," KRS 406.180, specifies that the chapter applies to "cases of birth out of wedlock." As a result, to invoke the family court's jurisdiction under KRS 406, a petition must allege that the underlying birth occurred out of wedlock.

The only description of an out-of-wedlock birth in Chapter 406 is provided in KRS 406.011, which states that "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." Presumably, "child born out of wedlock" also includes its ordinary meaning—that is, a child born to an unmarried woman—in addition to the example. The necessary elements for determining that a child is born out of wedlock, other than in the case of an unmarried woman are (1) that the child be by a man other than the mother's husband and (2) that there is *evidence* that the *marital relationship* between husband and wife *ceased* ten months before the child was born.

KRS 406.011 establishes a presumption of paternity when a child is born during a marriage: if born *during lawful wedlock* or *within ten months thereafter.* If strictly construed, this statute gives Trevor Smith the presumption that T.E.S. is his child, no matter how ridiculous that assumption may be, if based only on the fact that the child was born one day after Trevor's second marriage to Bethany. And, he would have this presumption even though the Appellants both made the judicial admission that Trevor is not the father of T.E.S. in their first divorce petition, which could be offered in rebuttal

of the presumption in the second divorce. However, the question of paternity was not raised during the second divorce action, and the trial court granted joint custody to the Appellants.

In fact, Appellee Andrew Cahill was not informed that he was the alleged father of the child until after the second divorce was final, and he had no opportunity to raise the question of whether the child was born out of wedlock until the allegation was made, though one can reasonably presume that he knew that the possibility existed from his previous contact with Bethany Smith. However, the actions of Appellants could reasonably have led to the belief that the child was not his, under this on-again, off-again fact pattern.

The question for the Court to decide is thus *who* can raise the question of paternity, and *when or how* must the issue be raised?

While Cahill is an obvious party to raise the question of paternity once he was informed that the child was his, the dilemma in this case is that he was not able to do so until after both divorces between Appellants were final. His only possible option was, therefore, an original paternity action. Obviously, both the Appellants could have raised the paternity question in the second divorce as they did in the first, but neither did. In fact, both of them let the trial court believe T.E.S. was Trevor's child, and he has remained in a parenting role with T.E.S. since birth, having been given joint custody in the second divorce.

The primary question concerns Cahill's status and his ability to seek relief in Jefferson Family Court. In an extremely divided Opinion, this Court

grappled with these issues in *J.N.R. v. O'Reilly,* 264 S.W.3d 587 (Ky. 2008). Two members of the Court held that the putative father had failed to plead that the marriage of husband and wife ceased ten months prior to the birth of the child in question, and that there was no evidence that the relationship had ceased. Therefore, the trial court lacked subject matter jurisdiction and the putative father had no standing because he could not establish that the marriage had ceased ten months prior to the birth of the child.

Two other justices were of the firm opinion that the putative father had no standing because he was an interloper to the marriage, and that the statutory language of KRS 406.011 limited who could challenge paternity to the wife or husband, finding strong public policy in preserving existing marriages and families if neither party wished to raise the paternity issue (as was the case with Appellants in their second divorce).

Two other justices argued for a common sense reading of the term "marital relationship" as used in KRS 406.011, as contrasted with "marital relations" which generally refers to sexual relations. Those justices found that the marital relationship entailed more than mere sexual relations, including ideas such as fidelity and common purpose. Under that theory, when a woman entered into an affair with another man during the marriage, and became impregnated by that man, the marital relationship had ceased, allowing proof of paternity by a man other than her husband in the divorce action in Family Court in order to determine paternity.

The final view expressed was that the issues were procedural, and that the Court was doing impermissible fact-finding. Central to that view was the notion that the trial court did have subject matter jurisdiction generally to decide the question of jurisdiction, and specifically over paternity matters in Family Court; and that as a putative father, J.G.R. did have standing to pursue a paternity determination. Also, that justice held that there was ample evidence in the record to create a question of paternity, including evidence of the mother's acknowledgement of J.G.R. as the biological father of the child and a DNA test establishing paternity, which he referenced in his pleadings.

While the decision in *J.N.R.* clearly did not give much guidance, it did frame the issues presented in the case before the Court at present. Since no action was pending, did Cahill have the standing to bring an original paternity action to establish his paternity status and thus challenge the grant of joint custody to Trevor? Did the Jefferson Family Court have subject matter jurisdiction to hear his original paternity petition when it had already vested custody in another "father"?

The wrinkle in this case that points out the problem with a strict construction of the statute is that at one point in time, there was a prior judicial admission (in the first divorce action) that Trevor was not the father of T.E.S. Are we to ignore a judicial fact in order to make a strict construction of obviously debatable statutory language the rule? In the final analysis, is this a statutory construction case, or a case about policy?

Both Trevor and Bethany waived any contest of paternity by not raising it in the second divorce. *Hinshaw v. Hinshaw*, 237 S.W.3d 170 (Ky. 2007) But what about Cahill?

In looking at whether the family court judge had jurisdiction to hear this case, it is apparent that the family court, since its constitutional enactment, does have jurisdiction over a paternity action. Cahill fits the statutory requirement that a paternity action may be brought, regarding a child born out of wedlock, by the putative father. He has standing to bring this action, since his is not a bare claim or fishing expedition. KRS 406.021. When Cahill filed his paternity suit, the trial court then had to determine if there were allegations and evidence sufficient to raise the question of whether the child was born out of wedlock, the primary allegation in a paternity suit. To make that determination, the court is required to review the prima facie evidence that supports the allegations. Cahill began his claim by stating that the *mother* of the child had identified him as the father, that he had opportunity to be the father, and that the Appellants had made a judicial admission that Trevor was *not* the father of T.E.S. in the first divorce action.

These were sufficient evidentiary grounds to invoke the subject matter jurisdiction of the family court. The family court judge rightfully found that she had jurisdiction to go forward, and consequently ordered paternity testing to establish biological paternity. Since this case came to the Court on a writ action, the paternity case has not advanced to a sufficient degree to know definitively whether the evidence will support a finding that the marital

relationship ceased ten months before the birth of T.E.S., but there is evidence in the record that Appellants stated in their joint petition for dissolution that they "separated" in July 2003 (which for purposes of divorce is construed as no longer having sexual relations), and the child was not conceived until October 2003.

Short of a divorce, proof of separation is the clearest evidence one can present that the marital relationship has ceased. In *J.N.R.*, the plurality emphasized the distinction of two prior cases where a birth was held to be out of wedlock because of the very fact that the couple had separated. *Id.* at 591 (citing *Montgomery*, 802 S.W.2d 943, 944 (Ky. App. 1990); *Bartlett v. Commonwealth*, 705 S.W.2d 470 (Ky. 1986)). Certainly, Appellants now sing a different tune, which would require the trial court to judge the credibility of the testimony. But the allegation and evidence of separation certainly further satisfies whatever possible jurisdictional requirements KRS 406.011 might entail.

However, another possible jurisdictional question is whether, having determined the custody of T.E.S. by granting joint custody to the Appellants, there has already been a "paternity" determination for this child. Neither Bethany nor Trevor raised paternity as an issue in the second divorce. In granting joint custody, the trial court relied on the presumption of paternity that a child born during the marriage is the child of the parties. Until and unless that judgment is modified according to law, Bethany and Trevor are the legal parents of T.E.S.

Where does that leave Cahill? He has his own claim, which has never been litigated, through no fault of his.

Certainly, everything that needed to be done in the divorce action was done. The parties were divorced, property divided, and custody was determined. Does Cahill now have a legal right that would allow him to in some way collaterally attack the final custody decree? Certainly there is a distinctive difference between this case and *J.N.R. v O'Reilly* in that there is no concern about supporting the sanctity of the marriage since Trevor and Bethany are once again divorced.

This is a difficult and weighty issue that truly is grounded more in equity than in law or procedure, and its answer becomes a matter of policy going forward. On one hand, an argument can be made that a paternity action filed subsequent to a final divorce action that found another man to be the legal father of the child comes too late in the process. The only father the child has ever known is Trevor, and he clearly wishes to maintain that relationship since he sought joint custody of the child in the second divorce. On the other hand, Cahill has been denied parenting of his biological child, and has personal rights toward his "own flesh and blood" that are recognized by all at a visceral level. He joined the legal fray as soon as he had a reasonable basis to do so, and clearly wants to have a relationship with the child and support him if he is his biological father, or he would not have voluntarily sought this status. There is an inherent injustice in denying his suit under these facts.

Cahill has shown that he could proceed, and that the trial court would otherwise have jurisdiction. Through Appellants' sworn affidavits from their divorce proceeding in December 2003, he has established that "[we] are not living together and we have lived apart continuously since we separated on or about July 2003," in reference to Bethany and Trevor. This means they separated 12 months prior to the birth. They stated further, "There is no likelihood of a reconciliation. The marriage is irretrievably broken. We had differences that we could not work out and we filed this action." In other words, they admitted that their relationship had ceased. Notably, Bethany Smith also declared that "she [was] pregnant, however, the Co-Petitioner Trevor A. Smith [was] not the father. . . ."

While Appellants now contradict their own sworn affidavits, among other ways by insisting their relationship never ceased, that does nothing to negate the fact that Appellee made sufficient allegations, which are susceptible to being proved, and has presented the requisite evidence. Not only are these statements in their affidavits evidence, but they would be admissible evidence at trial under multiple hearsay exceptions. *See* KRE 801A(a)(1) (prior inconsistent statement); KRE 801A(b)(1) (admission by a party-opponent); KRE 803(8) (public records and reports). Whether Appellants' prior affidavits are to be believed over their current, contradictory claims is a matter appropriate for resolution at trial, not on a writ of prohibition petition.

It bears final note that if Bethany and Trevor had not remarried (and redivorced) there would be absolutely no bar to Cahill bringing this paternity

action, and there would be no dispute about jurisdiction, given that the final judgment in the first divorce action held that Trevor was not the father. At most, Trevor could also allege that he was the father, and participate in his own paternity action.

Given the unusual facts of this case, and recognizing the inherent, equitable rights of biological parents who are deprived of parenting through no fault of their own, the grant of joint custody to Trevor cannot prevent Cahill from going forward with his paternity action. This is a case which demonstrates the importance of leaving fact-finding and equitable orders to the sound discretion of the family court, which was largely founded to deal directly with such matters. The Jefferson Family Court thus has jurisdiction both legally and equitably to make the proper balancing of the rights of the parties and to determine the best interests of the child after fully developing the proof relating not only to paternity, but also to custody, visitation and support.

III. Conclusion

Because the Jefferson Family Court had jurisdiction to determine Andrew Cahill's paternity claim, the Court of Appeals' denial of a writ of prohibition is hereby affirmed.

Abramson, Schroder and Venters, JJ., concur. Minton, C.J., concurs in result only by separate opinion. Cunningham and Scott, JJ., concur in result only without separate opinion.

MINTON, C.J., CONCURRING IN RESULT ONLY: I continue to believe my opinion in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008), is a correct

exposition of the law; but I do concur in the result reached by the majority in this case. The unique facts here make this case distinguishable from *J.N.R.* for two interrelated reasons.

First, the parties in this case admitted in their first joint dissolution petition that Trevor was not the father of T.E.S. And, second, the parties admitted in that same joint petition that they had been separated since July 2003, a year before the birth of T.E.S. Accordingly, unlike *J.N.R.*, there is compelling evidence in this case that "the marital relationship between the husband and wife ceased ten . . . months prior to the birth of the child[,]" KRS 406.011, even though T.E.S. was born one day after Trevor and Bethany remarried.

Although the unusual facts of this case cast considerable doubt on the level of guidance the holding in this case will provide for future courts grappling with these types of issues, I concur in the result reached by the majority.

COUNSEL FOR APPELLANT, TREVOR ANDREW SMITH:

Grant M. Helman
Stuart A. Scherer
Helman & Rice
539 West Market Street
4th Floor, Old Portland Building
Louisville, Kentucky 40202-3308

James Russell Lloyd
J. Russell Lloyd, P.S.C.
600 West Main Street
Suite 100
Louisville, Kentucky 40202

COUNSEL FOR APPELLANT, BETHANY SMITH:

Ann Holland Houston
Bank of Louisville Building
510 West Broadway – Suite 805
Louisville, Kentucky 40202

APPELLEE, ELEANORE GARBER, JUDGE, JEFFERSON FAMILY COURT:

Honorable Eleanore Garber
700 West Jefferson Street, 5th Floor
Louisville, Kentucky 40202

COUNSEL FOR APPELLEE, ANDREW CAHILL (REAL PARTY IN INTEREST):

David J. Thompson, Jr.
1412 Bardstown Road
Louisville, Kentucky 40204

Supreme Court of Kentucky

2009-SC-000738-MR

TREVOR ANDREW SMITH; AND
BETHANY SMITH — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-000973-OA
JEFFERSON CIRCUIT COURT NO. 08-J-506574

ELEANORE GARBER, JUDGE, JEFFERSON
FAMILY COURT

AND

ANDREW CAHILL (REAL PARTY IN INTEREST) — APPELLEES

ORDER

On the Court's own motion, the Opinion of the Court by Justice Noble rendered June 17, 2010, shall be modified on page 6, lines 5 and 8, by changing the word from "O'Reilly" to "J.G.R." Pages 1 and 6 shall be substituted, as attached hereto, in lieu of pages 1 and 6 of the Opinion as originally rendered. Said modification does not affect the holding.

Entered: June 22, 2010.

CHIEF JUSTICE