

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-432

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

IREDELL COUNTY DEPARTMENT of
SOCIAL SERVICES on behalf of
CAROLYN A. CAMPBELL,
Plaintiff,

v.

Iredell County
No. 98 CVD 1171

MELVIN T. (BOLLER) CLEMENT,
Defendant.

On Writ of Certiorari from order entered 13 February 2002 by Judge Wayne L. Michael in Iredell County District Court. Heard in the Court of Appeals 21 October 2002.

Thomas R. Young, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HUDSON, Judge.

Tracy N. McDonald gave birth to minor children, Candee T. McDonald and Brandee S. McDonald, on 28 September 1988 and Princeton D. McDonald on 9 August 1991. On 2 June 1998, Iredell County Department of Social Services (DSS) filed a complaint seeking to adjudicate defendant, Melvin T. (Boller) Clement, the father of the minor children. DSS also sought child support for the minor children. Defendant was served on 8 June 1998 by leaving a copy of the summons and complaint with "a person of suitable age

and discretion" at defendant's apartment. On 4 September 1998, the trial court adjudicated defendant the father of the minor children and ordered defendant to pay support and pay back past paid public assistance. Defendant did not appeal.

In October of 2001, the trial court ordered defendant to appear and show cause why he ought not be held in contempt for failure to comply with the support order and, in November of 2001, defendant appeared in enforcement court concerning support arrearages for the minor children. After a hearing, the trial court concluded that the previous order remained in effect and determined that defendant's arrearages amounted to \$1339.40.

On 3 December 2001, defendant "move[d] the Court for DNA tests," and for "cancellation of the existing child support Order," and for reimbursement of amounts paid. Two weeks later, defendant filed a Rule 60(b) motion stating that "Tracy McDonald committed fraud when she named the Defendant as the father of these children," that "[g]ood cause exists to justify relief from the operation of this judgment," and again requesting DNA testing of the three minor children and relief from the earlier orders. Judge Michael held a hearing on 4 February 2002. At the beginning of the hearing, DSS objected to the receipt of testimony on the grounds of res judicata. The trial court stated it would hear evidence and then consider DSS's position. Defendant testified that he first learned that he had been ordered to pay child support for the three minor children in the year 2000, when support was taken out of his paycheck. He further testified that the mother of the children

told him that she was two months pregnant with twins when he met her. DSS moved to dismiss the motion on grounds of res judicata and collateral estoppel after defendant rested. The trial court denied DSS's motion. Carolyn Campbell, the maternal grandmother of the three minor children subsequently testified that her daughter and defendant had lived together and that defendant was the father of the children.

In his 13 February 2002 order, Judge Michael indicated that the hearing was "upon motion of the Defendant for a DNA test," and he found and concluded that "[g]ood cause exists to justify allowing the Defendant to have the DNA tests[.]" He then ordered the three children and defendant to submit to paternity tests at defendant's expense. The order stated that DNA testing should be "arranged by the Iredell County Child Support Enforcement Agency as soon as possible." DSS appealed from the order and filed motions to stay enforcement and for injunctive relief. The trial court denied the motions on 1 March 2002. On 22 March 2002 this Court allowed DSS's petition for writ of certiorari to review Judge Michael's order and petition for writ of supersedeas to stay enforcement of the order.

The issue before this Court is whether the trial court erred by granting defendant's motion compelling DNA testing. We find *State of N.C. ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002) controls this case. In *Flaskrud*, the mother of a child born out of wedlock brought an action to enforce a support order against the adjudicated father, who had executed an

acknowledgment of paternity certifying that he was the natural father of the child. The adjudicated father filed a Rule 60(b) motion asking the trial court to set aside the order of paternity and the voluntary consent to support order. The adjudicated father also moved for an order compelling DNA testing to determine paternity. The trial court granted the motion to compel DNA testing to determine paternity, without setting aside the acknowledgment and order of paternity. Upon appeal, this Court held that the trial court was required to address the adjudicated father's motion for relief from judgment or order, thereby "reopen[ing] the issue of paternity," before granting his order compelling DNA testing. *Id.* at 712, 599 S.E.2d at 288.

Here, defendant filed a Rule 60(b) motion seeking relief from the judgment naming him the father of the three minor children and seeking "DNA tests." Like *Flaskrud*, the trial court ruled on defendant's motion for "DNA tests" without first addressing defendant's Rule 60(b) motion to reopen the issue of paternity. "[U]ntil the trial court addresses the defendant's Rule 60(b) motion, it is error for the trial court to grant his motion to compel DNA testing." *Id.* Accordingly, the trial court's order is reversed and remanded.

Reversed and Remanded.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).