NO. COA14-327

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

GARRY MARTINOUS ROBINSON
and ANITA JO ROBINSON,
Petitioners,

FOR THE ADOPTION OF:
B.J.R.,
A Minor Child.

WILLIAM PHELAN PATE,
Plaintiff,

v.

Lincoln County
No. 13-SP-70
13-CVD-52

SHAUNASIE UNIQUE PERKINS,
GARRY MARTINOUS ROBINSON,
and ANITA JO ROBINSON,
Defendants.

Appeal by Plaintiff from an order entered 26 August 2013 by Judge Anna F. Foster in Lincoln County District Court. Heard in the Court of Appeals 10 September 2014.

Crowe & Davis, P.A., by H. Kent Crowe, for the Plaintiff-Appellant, William Phelan Pate.

Thomas B. Kakassy, for the Third-Party Defendant-Appellees, Garry Martinous Robinson and Anita Jo Robinson.

DILLON, Judge.

William Phelan Pate ("Plaintiff") appeals from an order adjudicating that his consent to his daughter's adoption was not required. For the reasons stated below, we affirm.

I. Background

Plaintiff and Shaunasie Unique Perkins ("Ms. Perkins") dated for about seven months from late 2011 to mid-2012, while both were attending high school and into the summer. The two engaged in sexual intercourse on a number of occasions. At some point during their relationship, Ms. Perkins became pregnant. She informed Plaintiff of her pregnancy.

In August of 2012, their relationship began to deteriorate when Ms. Perkins moved away to attend college and Plaintiff remained in high school.

On 7 January 2013, Ms. Perkins gave birth to a baby girl without informing Plaintiff. She authorized a direct discharge of the child to Garry and Anita Robinson, the prospective adoptive parents, and signed a consent form. The Robinsons took the child home with them the following day.

On 13 January 2013, after discovering that Ms. Perkins had given birth, Plaintiff filed an action for child custody, child support and genetic testing.

On 13 February 2013, the Robinsons filed a petition for adoption. On 21 February 2013, Plaintiff filed an objection to the adoption, contending that as the biological father his consent was required.

On 7 June 2013, the trial court entered an order for genetic testing. In early July of 2013, Plaintiff learned that the results from the testing proved him to be the father of the child.

On 26 August 2013, the trial court entered an order denying Plaintiff's motion to dismiss the adoption proceeding, concluding that Plaintiff's consent was not required. Plaintiff timely appealed from this order.

II. Jurisdiction

An order determining that a putative father's consent to an adoption is unnecessary is immediately appealable because a father's right to make decisions concerning the care, custody, and control of his children is fundamental, and the denial of his right to consent to an adoption deprives him of this fundamental right. *In re Schuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 459-60 (2004). Accordingly, we proceed to address the merits of Plaintiff's arguments.

III. Analysis

Plaintiff makes two arguments on appeal: He contends that his consent *is* required to allow the adoption of his child by the Robinsons to proceed pursuant to the General Statutes and, alternatively, pursuant to the State and federal Constitutions. We address each argument in turn.

A. Statutory Requirements

"The adoption of children is purely a statutory procedure and the only procedure for the adoption of minors is that prescribed by G.S. Chapter 48." *In re Daughtridge*, 25 N.C. App. 141, 145, 212 S.E.2d 519, 521 (1975) (internal marks omitted). Our Supreme Court has explained that by enacting Chapter 48,

> the General Assembly recognized the public interest in establish[ing] a clear judicial process for adoptions, . . . promot[ing] the integrity and finality of adoptions, [and] structur[ing] services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

In re Anderson, 360 N.C. 271, 275-76, 624 S.E.2d 626, 628-29 (2006) (internal marks and citations omitted).

Chapter 48 designates the class of unwed putative fathers whose consent to an adoption is required under the statutory scheme. In relevant part, Chapter 48 provides that an adoption petition may not be granted without the consent of any man who –

prior to the earlier of the filing of the adoption petition or the date of hearing under N.C. Gen. Stat. § 48-3-601 – has done three things: (1) acknowledge paternity; (2) communicate or attempt to communicate with the mother regularly; ***and*** (3) make reasonable and consistent support payments within his financial means for the mother or child or both. N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2013); *In re Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001).

In the present case, the trial court, relying on our Supreme Court's opinion in *Byrd*, ruled that Plaintiff failed to meet the third prong under this portion of the statute, concluding that Plaintiff "failed to satisfy the support requirement found in N.C. [Gen. Stat.] § 48-3-601(2)(b)(4)(II)" prior to the filing of the adoption petition, which occurred on 13 February 2013. Specifically, the district court found as follows: Plaintiff lived with his parents and worked part-time between February and August of 2012. He had a joint checking account with his father where he deposited the money he earned, and this account always had at least $1,000.00 on deposit. His basic needs were provided for by his parents, so the money in the bank account was his to spend. Though he spent money on dates with Ms. Perkins and did *offer* on occasion to provide

financial resources to her, he never *actually* provided money or any other tangible support. Likewise, he never offered any support to the Robinsons for the child prior to the filing of the adoption petition. Finally, though the trial court found that Plaintiff purchased two packages of infant diapers after the child's birth, the court also found that these packages were never delivered to the Robinsons. Plaintiff fails to challenge any of these findings. Thus, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991).

We conclude that the trial court's findings support its conclusion that Plaintiff did not provide "reasonable and consistent" payments of support commensurate with his ability to provide such payments. As our Supreme Court has held, the statute requires "actual, real and tangible support, and that attempts or offers of support do not suffice." *Byrd*, 354 N.C. at 196, 552 S.E.2d at 148. Accordingly, this portion of Respondent's argument is overruled.

B. Constitutional Protections

Plaintiff next contends that his substantive due process rights supplied by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina

Constitution were violated by the district court's determination that his consent to adoption was not required and that Chapter 48 is therefore unconstitutional as applied to him. Again, we disagree.

At the outset, we note that whether Plaintiff's child might be better off with the Robinsons than with Plaintiff is irrelevant to the core constitutional question in this case. *Cf. Adoptive Couple v. Baby Girl*, ___ U.S. ___, ___, 133 S. Ct. 2552, 2572, 186 L. Ed.2d 729, 752 (2013) (Scalia, J., dissenting) ("We do not inquire whether leaving a child with his parents is 'in the best interest of the child.' . . . [P]arents have their rights, no less than children do."). As our Supreme Court has explained,

> [a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). The issue presented by this case is whether Plaintiff, as an unwed biological father, enjoys that constitutionally paramount status.

At common law, a child born out of wedlock "was said to be

a *filius nullius*, the child of nobody." *State v. Robinson*, 245 N.C. 10, 13, 95 S.E.2d 126, 128 (1956). An unwed father had no legal *obligation* to support the child or its mother, *see State v. Tickle*, 238 N.C. 206, 209, 77 S.E.2d 632, 634 (1953); however, his *right* to the care, custody, and control of that illegitimate child was generally subjugated to the mother's paramount right. *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965).

Today, the state of the law is considerably different. *See, e.g.*, *Rosero v. Blake*, 357 N.C. 193, 199, 581 S.E.2d 41, 45 (2003). Unwed fathers and mothers are no longer on unequal footing with respect to their parental rights and obligations. *See id.* at 199-204, 581 S.E.2d 45-48. Both parents owe their children a duty of support, and the law protects their rights because it presumes that they will fulfill their obligations. *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961).

The United States Supreme Court, however, has held that not all biological fathers are entitled to the same substantive due process protections. *Lehr v. Robertson*, 463 U.S. 248, 263-64, 103 S. Ct. 2985, 2994-95, 77 L. Ed.2d 614, 627-28 (1983). "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships

more enduring." *Id.* at 260, 103 S. Ct. at 2992, 77 L. Ed.2d at 626. The *Lehr* Court was careful to distinguish the interest of fathers in *developed* parent-child relationships from the merely "inchoate" interest of fathers in *potential* parent-child relationships. The *Lehr* Court described the inchoate interest of a biological father who did not have a developed relationship with his child as follows:

> The significance of the biological connection is that it *offers the natural father an opportunity* that no other male possesses to develop a relationship with his offspring. *If he grasps that opportunity* and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 103 S. Ct. at 2993-94, 77 L. Ed.2d at 627 (emphasis added). The *Lehr* Court recognized that the inchoate interest of an unwed father to have an opportunity to develop a relationship with his child is entitled to some level of protection under the federal Constitution. *See id.* at 249-50, 103 S. Ct. at 2987, 77 L. Ed.2d at 619 (phrasing the question as "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child").

The *Lehr* case involved a putative father who did not have actual notice of the birth of the child or of the child's adoption. The *Lehr* Court concluded that "statutes that establish classes of biological fathers entitled to notice nevertheless may fail constitutional scrutiny (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are *beyond the control* of an interested putative father." *In re S.D.W.*, ___ N.C. ___, ___, 758 S.E.2d 374, 380 (2014) (citing *Lehr*, 463 U.S. at 263-64, 103 S. Ct. at 2994, 77 L. Ed.2d at 628) (emphasis added).

Our Supreme Court dealt with the notice requirements under Chapter 48 this past summer in a case involving a biological father who only became aware of the existence of his child after the mother had given birth and had placed the child with adoptive parents. *See In re S.D.W.*, ___ N.C. ___, 758 S.E.2d 374 (2014). The Court ultimately held that Chapter 48 was not unconstitutional as applied to him. *Id.* at ___, 758 S.E.2d at 381. The Court reasoned that the biological father's passivity in the face of a possibility of pregnancy constituted a failure to grasp the opportunity to develop a parent-child relationship, and concluded that proceeding with the adoption without his consent did not violate his due process rights. *Id.*

Specifically, the Court noted that the biological father was well aware that a pregnancy might result from his intimate relationship with the mother and that the child had been in the care of adoptive parents for over five months when the father finally began taking steps to assert his parental rights to the child. *Id.* at ___, 758 S.E.2d at 375-76. Further, the Court observed that the biological father exhibited "only incuriosity and disinterest" rather than taking the affirmative steps necessary to establish himself as a responsible father. *Id.* at ___, 758 S.E.2d at 380-81.

In the present case, Plaintiff does not argue that he did not have notice. However, like the biological fathers in *Lehr* and *S.D.W.*, Plaintiff had not developed an enduring relationship with his child such that his rights under the federal Constitution had sprung "full blown," in the words of the *Lehr* Court. Nevertheless, as the biological father of Ms. Perkins' child, he still had a constitutionally protected, inchoate interest in having an "opportunity [to develop a relationship with his child] *and* accept[] some measure of responsibility for the child's future[.]" *Lehr*, 463 U.S. at 262, 103 S. Ct. 2993, 77 L. Ed.2d at 627. Our Supreme Court in *S.D.W.*, in quoting this portion of *Lehr*, described this inchoate interest of an

uninvolved biological father as a "liberty interest in developing a relationship with [his] child[.]" ___ N.C. at ___, 758 S.E.2d at 381.

Plaintiff argues that Chapter 48 is unconstitutional as applied to him because the statutory scheme did not afford him an opportunity to develop a relationship with his child. Specifically, he argues that the requirement under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) that a putative father provide *actual* support excludes those fathers, such as him, who *attempt* to provide support but are prevented from doing so under circumstances that are beyond their control. We agree that a conclusion by a court that the consent of a biological father to the adoption of his child is not required under Chapter 48 due solely to circumstances beyond his control *where he has otherwise grasped the opportunity and accepted some measure of responsibility for his child* would result in the statute being unconstitutional as applied to him.

Here, though, we conclude that Chapter 48, as applied in this case to Plaintiff, is not unconstitutional. We recognize the efforts of Plaintiff and note that many of his actions – especially those taken prior to the child's birth - were consistent with his desire to "develop a relationship with [his]

child." *S.D.W.*, *supra*. Specifically, the trial court found that Plaintiff, a seventeen-year-old high school student, offered to marry Ms. Perkins while they were dating; that he and his mother offered money to Ms. Perkins during the pregnancy; that he hired an attorney shortly before the child's birth when it was obvious that Ms. Perkins was going to put the child up for adoption; that he contacted Ms. Perkins on a number of occasions during the pregnancy; that he openly acknowledged that the child was his; that at around the time of Ms. Perkins' due date, he and his mother called a number of hospitals to ascertain where the child was being birthed when Ms. Perkins had not notified him that she was in labor or where she anticipated delivering the child; and that within a week of the child's birth, he filed an action for genetic testing and child custody.

However, the trial court found that Plaintiff made very few efforts *after* the birth of his child to develop a parent-child relationship. For instance, the trial court found that the Robinsons gave Plaintiff *the opportunity* to visit the baby, which he took advantage of on only one occasion - in late January, a few weeks after the birth. The trial court found that he made no further attempt to meet with his child or provide support for her during February, March, April, May, or

June. Thus, during the child's first six months of life, besides filing papers with the court, Plaintiff largely remained "passive" in developing a relationship with his child, where his efforts consisted of a single visit in January and a single purchase of diapers, which he never delivered. *See generally S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 381 (emphasizing the unwed father's passivity towards his child during the relevant times). While filing court papers may be part of that which is involved in grasping the opportunity to develop a parent-child relationship in certain situations, we conclude that in this case Plaintiff failed to take many of the essential steps within his control to develop this relationship with his child. *See id.* (noting that the unwed father in that case failed to "grasp [the] opportunity" to take "the steps that would establish him as a responsible father"). Accordingly, we hold that Plaintiff "does not fall within the class of protected fathers who may claim a liberty interest in developing a relationship with a child, and thus he was not deprived of due process."[1] *Id.*

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[1] Plaintiff has not put forth any argument that the Law of the Land Clause under the North Carolina Constitution and the Due Process Clause under the federal Constitution are to be construed differently; and, therefore, we do not distinguish between them here. *See S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 378.

Plaintiff points to the trial court's finding that he did provide $100.00 to the Robinsons; however, the trial court found that this support was provided six months after the child was born, upon learning conclusively from the results of the court-ordered genetic test that he was the child's biological father. Furthermore, awaiting the test results did not excuse Plaintiff from failing to take certain steps – such as visiting the child and offering support for her care - that were available to him to develop a relationship during this time. Specifically, as was held in *Lehr* and *S.D.W.*, due process rights under the federal Constitution only spring when one has grasped his opportunity to develop a relationship with his child.[2]

IV. Conclusion

We do not believe that Plaintiff sufficiently grasped the opportunity that was available to him to develop a relationship

[2] By our opinion, we do not intend to create a bright-line test as to what one must do to "grasp the opportunity" sufficient to cause full-blown constitutional rights to spring from a putative father's inchoate interest. This determination must be made on a case-by-case basis as each case is fact-specific. Different putative fathers have different opportunities. However, we also do not intend our opinion to be construed to require a putative father who is awaiting the results of genetic testing to sign an affidavit of parentage or take other actions which would impose upon him an affirmative duty to care for the child even if the genetic testing results subsequently show that he is, in fact, not the biological father.

with his child such that the constitutionally protected paramount rights of parentage sprung fully from his inchoate interest in an opportunity to develop those rights. Accordingly, we believe that the district court did not err in adjudicating that Plaintiff's consent to the adoption of his biological daughter was not required.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.