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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001062-DG
AND
NO. 2007-CA-001063-DG

J.B.; J.M. APPELLANTS

v.
ON DISCRETIONARY REVIEW FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NOS. 07-XX-00001 AND 07-XX-00002

M.S. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: J.M. appeals from two orders of the Logan Circuit Court: an order denying her Kentucky Rules of Civil Procedure ("CR") 60.02 motion to set aside an agreed order of paternity establishing Appellee, M.S., as the father of

M.A.S. ("the child"), born December 8, 2003; and an order denying her summary judgment motion against J.B. establishing him as the biological father of the child. Having reviewed the entire record, and finding no abuse of discretion or error by the trial court, we affirm.

M.S. and J.M. lived together for approximately eleven months during which time J.M. became pregnant and delivered a daughter in Springfield, Tennessee. At some point J.M. and the child moved out of M.S.'s home. On August 21, 2004, M.S. filed a paternity action in the Logan District Court naming J.M. as the defendant. In his petition, M.S. asserted that he was the father of the child and that his name appeared on the child's birth certificate. M.S. also signed and submitted to the court a voluntary acknowledgment of paternity under penalty of perjury. J.M. did not dispute that M.S. was the father of the child. The district court entered an agreed order of paternity testing on September 1, 2004, in which the court ordered a paternity test to be conducted on September 15, 2004.

The parties never conducted the court-ordered paternity test. Rather, on September 17, 2004, the parties signed an agreed order of paternity whereby M.S. was adjudged to be the father of the child. The case sat idle for more than a year when, on November 9, 2005, J.M. filed a motion to set aside the agreed order of paternity on the basis that she had recently learned that M.S. was not the biological father of the child. However, on January 25, 2006, J.M.'s November 9, 2005, motion to vacate the September 17, 2004, order of paternity was withdrawn and J.M.'s counsel was allowed to withdraw as counsel.

Ten months later, on November 10, 2006, J.M. filed an affidavit and paternity test stating that J.B. was the biological father of the child. Then, on December 4, 2006, J.M. filed another motion to vacate the agreed order of paternity, pursuant to CR 60.02. Attached to the motion were DNA test results concluding to a 99.99999% probability that J.B. is the child's father and a copy of J.B.'s affidavit stating that, according to the DNA Parentage Report, he is the biological father of the child. While the motion to vacate was pending before the district court, J.M. filed a separate complaint and summary judgment motion against J.B. on December 4, 2006, to establish J.B. as the father of the child. Thereafter, the court determined M.S. to be an indispensable party on December 13, 2006.

On January 17, 2007, the district court denied both J.M.'s motion to vacate the paternity order under CR 60.02 and her motion for summary judgment against J.B. J.M. appealed both decisions to the Logan Circuit Court. On April 17, 2007, the circuit court affirmed the district court on both matters. J.M. sought discretionary review to this Court. We granted discretionary review and consolidated the cases for briefing.

On appeal, J.M.'s main argument is that the trial court erred when it failed to grant her motions under CR 60.02 and summary judgment based upon the DNA evidence showing that J.B., not M.S., was the biological father of the child. The standard on appeal of a CR 60.02 motion is abuse of discretion. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327 (Ky. 1994). CR 60.02

allows a party to get relief from a judgment on grounds of "(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ; (c) perjury or falsified evidence; (d) fraud affecting the proceedings . . . ; (e) the judgment is void . . . ; or (f) any other reason of an extraordinary nature justifying relief." All motions under CR 60.02 must be made within a reasonable time. On grounds (a) through (c), the motion must be made within one year of the day the order was entered.

Here, the agreed order determining M.S. as the biological father was entered on September 17, 2004. J.M. filed her CR 60.02 motion after more than a year had lapsed. Thus, J.M. cannot proceed under subsections (a), (b), or (c) of CR 60.02. Further, as noted by the trial court, J.M.'s claim fails under subsection (d) as well because the only possible fraudulent activity in this case came from J.M., who failed to disclose that J.B. could possibly be the father of the child. At the time she and M.S. entered into the agreed order of paternity, J.M. was the only person who would have been able to provide this information. However, she chose to keep silent.

The judgment is not void; therefore, J.M. cannot prevail under subsection (e). That leaves subsection (f), which provides for review for a reason that is of an extraordinary nature. We agree with the trial court that there are no extraordinary facts warranting relief. J.M. concedes that she knew that J.B. could possibly be the child's biological father at the time the agreed order was entered,

but she failed to disclose this information or seek DNA testing. Likewise, we cannot allow J.M.'s claim to survive under subsection (f) because she waited over a year to file her motion to set aside the agreed order of paternity. J.M. had an opportunity before she signed the agreed order to get a paternity test to ultimately exclude M.S. as the child's biological father but chose not to pursue the test and signed the agreed order instead. M.S. was willing and able to participate in the paternity test prior to the entry of the agreed order but J.M. chose to sign the order anyway.

Moreover, J.M. has exceeded the reasonable time requirement of CR 60.02. J.M. had the results of the paternity test determining J.B. as the probable father as early as November 2005 but did not file a motion to set aside the agreed judgment until December 2006. We agree with the trial court that it is unreasonable to wait to file her motion more than a year after the results of the test were discovered and nearly eleven months after the original CR 60.02 motion was withdrawn.

J.M. does not dispute these facts, but instead relies almost exclusively on this Court's decision in *Crowder v. Commonwealth, ex rel. Gregory*, 745 S.W.2d 149 (Ky. App. 1988), to support her claim that the agreed order of paternity should be set aside. In *Crowder*, a default judgment was entered against Crowder naming him as the biological father. He sought to have the default judgment set aside but it was denied. He then opposed motions concerning child support for the next five years. After six years had passed, Crowder was told by a

reliable source that he was not the biological father and that the mother had used the pregnancy and paternity proceedings in an effort to regain a relationship with him. *Id*. at 150. A court-ordered paternity test determined that Crowder was not the father. However, the lower court denied Crowder's request for release from the prior judgment. This Court found that the lower court's decision in *Crowder* was an injustice and an abuse of discretion explaining, "[KRS 406.111] employs the mandatory 'shall.' Where the statutory diction is 'shall,' a court's use of discretion becomes an abuse of discretion. Thus, it was an abuse of discretion not to vacate the default judgment prospectively because, if for no other reason, the courts have no discretion to exercise in these instances." *Id*. at 151.

However, the facts in *Crowder* are distinguishable from the facts of this case. M.S., the non-biological father, has no desire to be removed as the legal father of the child in this case. In fact, he has cared for the child since her birth and was awarded primary residential custody in 2005. Even after discovering he was not the child's biological father, M.S. did not try to escape responsibility for the child. He considers himself the child's father and wants to continue caring for her. Moreover, the biological father, J.B., is not the movant in this action. As noted above, J.B. has never filed a motion to assert his rights to the child. In fact, J.M. is the moving party, who is attempting to assert the parental rights of J.B. According to *Crowder*, M.S. could have the agreed order set aside if the results from the paternity test determined he was not the father and he wanted to be relieved of the duties of parenthood. However, this is not the case and *Crowder* is not controlling.

In the recent case of *Hinshaw v. Hinshaw*, 237 S.W.3d 170 (Ky. 2007), the Supreme Court of Kentucky held that the common law of equitable estoppel is applicable in custody cases. We believe that M.S. satisfies the elements of equitable estoppel and the trial court's findings are consistent with the Supreme Court's determination in *Hinshaw*. The Court in *Hinshaw* determined that the mother's acts, language, and silence were aimed at misleading her ex-husband into believing he was the child's biological father. Since the ex-husband had relied on these representations in establishing a relationship with and supporting the child, the Kentucky Supreme Court found that the mother was estopped to raise the later DNA results to deprive her ex-husband of custody. These facts are similar to the case *sub judice*.

To assert equitable estoppel, a party must show the following elements:

> (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.

J. Branham Erecting & Steel Service Co. v. Kentucky Unemployment Insurance Commission, 880 S.W.2d 896, 898 (Ky. App. 1994), *citing Gray v. Jackson Production Credit Assoc.*, 691 S.W.2d 904, 906 (Ky. App. 1985). The district court's decision supports a finding based on the doctrine of equitable estoppel. (1) J.M. concealed the fact that M.S. was potentially not the father of her child at the

time she and M.S. signed the agreed order of paternity determining M.S. was the biological father; (2) J.M. testified, in a March 22, 2007, hearing in the trial court that she had wanted a paternity test before signing the agreed order but instead of getting the test, signed the agreed order; (3) there is no evidence to suggest that M.S. could have known he was not the father; (4) only J.M. could have known for certain that M.S. was potentially not the father but she intentionally kept silent and allowed M.S. to be identified on the birth certificate and be financially responsible for the child; and (5) to his detriment, M.S. relied on J.M.'s silence that he was the father of the child and has physically, emotionally, and financially supported the child from her birth to present day. As in *Hinshaw*, the law will not permit J.M. to challenge the status which he or she has previously accepted or created. *Hinshaw*, 237 S.W.3d at 174, *citing Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990). Therefore, J.M.'s arguments under CR 60.02 must fail.

We now turn to J.M.'s motion for summary judgment against J.B. In order to have standing to bring a cause of action, a plaintiff must show that she is the actual aggrieved party. In cases were someone seeks to enforce a constitutional right, the plaintiff must show that she has suffered some "injury in fact." In this case, the person whose constitutional rights are alleged to have been violated is J.B. It is inappropriate for J.M. to initiate a cause of action where the person for whom she is advocating is someone else. J.M. is the wrong movant; it is not her place to seek to enforce J.B.'s claims to his daughter. She has no standing to initiate the cause of action currently before this Court because there is no injury

she can point to that satisfies the injury in fact element of standing. J.M. is the only moving party in this case and without her there is no controversy to resolve. As pointed out by the circuit court, J. B. has never filed a pleading or made a motion to determine or assert his rights as the child's biological father. Likewise, J.M. had no standing to name J.B. as an appellant in this appeal.

Just as J.M.'s claims under CR 60.02 must fail because she has failed to put forth grounds for relief, J.M.'s motion for summary judgment must fail. As noted above, J.M. has no standing to assert any rights J.B. may have to the child. J.B. has yet to file any pleadings asserting his right to the child and J.M. is not entitled to name him as an appellant in this appeal as his interests are different than hers. Consequently, the trial court properly denied J.M.'s motion for summary judgment on her paternity action against J.B.

Accordingly, the orders of the Logan Circuit Court denying J.M.'s CR 60.02 motion and motion for summary judgment are affirmed.

ALL CONCUR.

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