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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000955-ME

N.H.

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 08-J-00159

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, ex rel. K.M.F.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: This is an appeal from Simpson Circuit Court regarding a paternity determination. Finding there were no marital relations between the husband and wife in this action for more than ten months around the birth of the child, we conclude that the Simpson Circuit Court had subject-matter jurisdiction over this paternity action.

BACKGROUND INFORMATION

Appellee K.M.F. and S.S. were married in April of 2006. In December of 2007, S.S. left the marital residence and marital relations between the couple stopped. A legal separation petition was filed in March of 2008 in Logan Circuit Court with K.M.F. and S.S. as the parties.

In January of 2008, during the time K.M.F. and S.S. were separated, K.M.F. had sexual relations with the appellant, N.H. K.M.F. became pregnant and gave birth to a child on October 12, 2008. On November 13, 2008, K.M.F. filed a paternity action to determine whether N.H. was the biological father of her child. DNA tests confirmed that he was. In January of 2009, K.M.F. and S.S. reconciled and began living together once again as husband and wife. In March of 2009, the separation petition was dismissed without prejudice due to the parties' lack of going forward with the action.

On February 23, 2009, a judgment of paternity and order of support was entered against N.H. He later filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to set the judgment aside arguing that K.M.F.'s child was not born out of wedlock as required by Kentucky Revised Statutes (KRS) 406.011 and, therefore, the court lacked jurisdiction. The court denied the CR 60.02 motion and this appeal followed.

STANDARD OF REVIEW

Whether or not a court had subject-matter jurisdiction over the case is a question of law. The standard of review for questions of law is *de novo*. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky. 1997). With this standard in mind, we will examine the issues.

DISCUSSION

A district and circuit court share concurrent jurisdiction over custody and visitation issues in cases where paternity is established as set forth in KRS Chapter 406. KRS 406.011 provides:

The father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child. 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.

Thus, pursuant to case- and statutory law, the Simpson Circuit Court has subject-matter jurisdiction over questions of paternity. N.H., however, contends that the marriage of K.M.F. and S.S. legally removes subject-matter jurisdiction over this paternity action since any child born while the two are married is presumed to be their child. He cites to a recent Kentucky Supreme Court case in support of his assertion.

In *J.N.R. v. O'Reilly*, 264 S.W.3d 587, 588 (Ky. 2008), the Court held that:

Kentucky's paternity statutes do not grant subject-matter jurisdiction to our courts to determine paternity claims where . . . there is no evidence or allegation that the marital relationship ceased ten months before the child's birth.

In the present case, all evidence points to the assertion that the marital relationship of K.M.F. and S.S. ceased in late November of 2007 and that K.M.F.'s minor child was born in October of 2008. There is no indication that during those eleven months, K.M.F. and S.S. had sexual relations. In fact, as set forth above, the two had filed for legal separation.

In this action, the parties contend (and there is no evidence to the contrary) that they did not reconcile until after the minor child was born. For these reasons, we believe this case is distinguishable from the *J.N.R.* case and find that the Simpson Circuit Court had subject-matter jurisdiction over this paternity action. Thus, we affirm the decision of the Simpson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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