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# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000077-ME

ANTHONY WAYNE HUGHES — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 00-FC-005672

TINA MARIE HUGHES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Anthony Hughes appeals an order of the Jefferson Family Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to terminate his support obligation for the child, R.L.H. We concur with the family court that the motion was not filed within a reasonable time period as required under the rule and, thus, we affirm the decision.

On July 25, 2000, Anthony filed for dissolution of his marriage to Tina Hughes. Two months later, but before dissolution was granted, Anthony submitted DNA for himself and R.L.H. to determine if he was her biological father. Anthony did not inform the court that testing was ongoing, nor did he put paternity into question at the dissolution hearing.

The dissolution of marriage decree was entered on December 11, 2000, naming four minor children of the marriage, R.L.H. being the youngest born on January 6, 1997. The order required Anthony to pay a total of $863.46 per month child support. The decree was entered while Anthony was serving on active duty with the United States Navy.

In April 2001, Anthony learned that R.L.H. was not his biological child. The results were then sent certified mail to Tina. Tina testified that in 2003 or 2004 she informed R.L.H. that Anthony was not her biological father. Anthony's biological children also testified that they were aware Anthony was not R.L.H.'s biological father.

Despite having knowledge that only three of the four children were biologically his, Anthony continued to pay the total amount set forth in the child support order and visited the children approximately one time per year. Anthony continued to pay child support. The youngest of Anthony's biological children was emancipated in 2010.

Because Anthony's salary has continued to grow substantially during the course of his naval career, and Tina was a full-time student, working part-time,

and receiving state assistance, on January 19, 2011, the Cabinet for Heath and Family Services (hereinafter the "Cabinet") filed a motion to intervene, establish, enforce and/or modify child support on behalf of Tina. In response, on June 8, 2011, Anthony filed a CR 60.02 motion to modify the child support order, moving to terminate the child support order averring that three of the four children were emancipated and the fourth was not his biological child.

The family court denied Anthony's CR 60.02 motion, finding that Anthony's CR 60.02 motion was not filed within a reasonable time and, therefore, he was estopped from seeking relief from his obligation. Additionally, in response to the Cabinet's motion to increase the child support, which was based on Anthony's increase in income of more than 15 percent, the family court ordered that the child support amount increase from $863.64 to $1,009 per month until R.L.H. reaches the age of majority.[1]

Appellate review of the denial of a CR 60.02 motion is based upon an abuse of discretion standard. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 829 (Ky. App. 2008). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Moreover, an appellate court should affirm the trial court unless there has been an abuse of discretion resulting in a "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

[1] Anthony is not seeking restitution of the amounts paid under the previous order.

When a motion is made under CR 60.02, a court has the authority, under certain terms, to relieve a party from a court's final judgment, order, or proceeding. In general, the grounds include mistake, newly discovered evidence, perjury or falsified evidence, fraud affecting the proceedings, a void judgment, or any other reason of an extraordinary nature justifying relief. Additionally, a motion must be made within one year following judgment for the first three provisions and within a reasonable time for the last three provisions.

In the case at bar, the trial court made a finding that the CR 60.02 motion was not filed within a reasonable time period. The trial court based its finding on the following time line: the petition for the divorce was filed in July 2000; in it, R.L.H. was listed as a child of the marriage; the decree was entered on December 11, 2000, and it ordered that the father, Anthony, was to pay child support, have joint custody, and allowed reasonable visitation; the parties, apparently unknown to the court, participated in voluntary genetic testing of R.L.H.'s paternity in September 2000 (two months after the filing of the petition and three months prior to the granting of the dissolution decree); and, lastly, the genetic testing determined that R.L.H. was not Anthony's biological child. Anthony learned about the test results in April 2001. During the dissolution process and following the entry of the decree, Anthony never contested paying child support for R.L.H., even though for most of that time period, he was aware that she was not his biological child.

Then, roughly ten years later, in June 2011, Anthony took legal action and filed a CR 60.02 motion to terminate his child support obligation. This motion was

filed only after the Cabinet for Health and Family Services had intervened on behalf of Tina and filed a motion to increase child support. Even at that point, Anthony still continued to pay child support for R.L.H. without complaint, although his youngest biological child's child support had ceased upon the child's eighteenth birthday in March 2010.

With regard to the reasonable time period of CR 60.02, the Kentucky Supreme Court stated in *Gross*, "[t]he 'reasonable time' requirement is a factor for the trial court to take into consideration. It may do so based on the record in the case." *Gross*, 648 S.W.2d at 858. This "is a matter that addresses itself to the discretion of the trial court." *Id*. The cases cited by Anthony to support his argument that CR 60.02 has been used to relieve someone from a child support obligation are not persuasive. These cases occurred in situations where the man learned that he was not the biological father. In the case at hand, Anthony has known since 2001 that he was not R.L.H.'s biological father but continued to act as her legal father. Accordingly, given the circumstances of this case, the family court did not abuse its discretion in finding that Anthony's CR 60.02 motion was not filed within a reasonable time nor was the trial court's decision a flagrant miscarriage of justice.

Finally, Anthony argues that because of the doctrine of paternity by estoppel, the family court erred in denying his CR 52.04 motion, which requested that the court make findings of fact on whether the doctrine was applicable.

The concept of paternity by estoppel is relatively new to Kentucky jurisprudence and was first acknowledged in *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 506 (Ky. App. 2005). This Court noted the essential elements of an estoppel claim:

> (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.

*Id*. at 506 (citing *J. Branham Erecting & Steel Serv. Co., Inc. v. Kentucky Unemployment Ins. Comm'n*, 880 S.W.2d 896, 898 (Ky. App. 1994)). Estoppel in the context of paternity may prohibit a man from obtaining relief from his child support obligations. *S.R.D*. at 508. In other words, a man may be deemed a child's legal father despite not being the child's biological father. *Id*. In the present case, as in *S.R.D.*, neither father was the biological parent but both were the legal parent. In *S.R.D.*, the Court defines the concept of a legal father by stating "[a]s defined by Black's Law Dictionary, a 'legal father' is simply '[t]he man recognized by law as the male parent of a child.'" *Id*. (citing *Black's Law Dictionary* 640 (8th ed. 2004)).

In this case, R.L.H. was fourteen when the CR 60.02 motion was filed. It is undisputed that R.L.H. knows that Anthony is not her biological father and that her mother and siblings were aware of this fact. It is also undisputed that Anthony never challenged his child support obligation until now. Thus, it is not

necessary to consider whether the doctrine of paternity by estoppel is implicated. Furthermore, although the family court did not specifically refer to the doctrine of paternity by estoppel, its opinion considered the relevant factors. We concur that the family court correctly ascertained that the legality of Anthony's fatherhood is sufficient in this case to allow for the payment of child support.

To summarize, Anthony knew that he was not R.L.H.'s biological father. Yet he continued to act emotionally and fiscally as her father for almost eleven years. Furthermore, R.L.H. knew that he was not her biological father but that he maintained his relationship with her. As always in cases involving children, the best interest of the child must prevail. *Boone v. Ballinger*, 228 S.W.3d 1, 12 (Ky. App. 2007). Consequently, adequate child support and supportive parenting from a legal, albeit not biological, father, is in R.L.H.'s best interests.

For the foregoing reasons, we affirm the decision of the Jefferson Family Court.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I do not agree that "the family court correctly ascertained that the legality of Anthony's fatherhood is sufficient in this case to allow for the payment of child support." R.L.H. was born two years after the parties separated and a DNA test has

established that Anthony is not R.L.H.'s father. Therefore, there is no dispute that Anthony is not R.L.H.'s father.

The facts of this case are unique. When the parties divorced, Anthony was serving our country in the Navy and had not received the results of the DNA test. The decree was entered by default judgment and Anthony first learned of the results in April 2001, after the decree of dissolution was entered and he was ordered to pay $863.46 per month for support of all four children. He paid that amount for all the children, including R.L.H., admittedly without objection. Tina accepted that amount without requesting an increase in child support and despite that his biological children became emancipated, Anthony did not request a decrease in child support during the following ten years.

The action that triggered the current dispute was the Cabinet's motion to intervene filed in 2011, when only R.L.H. was a minor. I believe that the emancipation of Anthony's biological children and the Cabinet's intervention were significant events to justify relief because "it is no longer equitable that the judgment should have prospective application." CR 60.02. I note that this case is procedurally similar to that in *Wheat v. Commonwealth, Cabinet for Health and Family Services*, 217 S.W.3d 266 (Ky. App. 2007). In that case, the order establishing paternity and child support was entered on May 9, 1985, and set aside pursuant to CR 60.02 in 1998. I believe the same relief based on justice is available to Anthony.

I conclude by noting that my opinion is based on notions of basic fairness. While serving our country, for sixteen years Anthony has supported his biological children and a child that all agree is not his biological child. Although the support payment for R.L.H. was relatively small when Anthony's biological children were not emancipated, he now must pay $1,009 per month for R.L.H. alone. He does not seek any restitution of the amounts paid but only the prospective relief provided for pursuant to CR 60.02.

I would reverse and remand.

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