Circuit Court for Montgomery County
Case No. 143182FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2179

September Term, 2018

G.B.

v.

MONTGOMERY COUNTY OFFICE OF CHILD SUPPORT

Arthur,
Shaw Geter,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: October 16, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

This appeal is from a July 2018 Order of the Circuit Court for Montgomery County establishing child support to be paid by appellant. He complains that the court erred (1) in refusing, on three occasions, to conduct a genetic test that he hoped would show that he was not the father of the child, (2) in establishing the amount of child support, and (3) in awarding the child support retroactively to the filing of the complaint. Finding no reversible error, we shall affirm the Circuit Court's judgment. For the sake of the child's privacy, we shall refer to the child as "the child," rather than by name, and use initials for the parents (G.B. for appellant and S.J. for the mother).

BACKGROUND

The parents were married in April 2012. The marriage was not a blissful one for very long. The couple stopped having sexual relations in October, and they separated in December. The child was born in early July 2013. Three weeks later, S.J. filed for divorce, custody of the child, and other relief. During the divorce proceeding, the parties filed a consent motion for genetic testing to determine whether G.B. was the father of the child. He contended that, until served with S.J.'s Complaint, he was unaware that she had become pregnant and given birth to the child. In February 2014, the court (Judge Callahan) held what is referred to as a "best interest" hearing, determined that a genetic paternity test was not in the child's best interest, and therefore denied the motion.

Following that denial, G.B. and S.J. negotiated and signed a Marital Settlement Agreement. The Agreement is dated March 26, 2014. In that Agreement, appellant

clearly recognized and agreed that he was the father of the child. In an introductory explanatory statement, the parties expressed their desire to settle all questions of custody "of their child," and they did so. Several times throughout the Agreement, both parties were denominated as "the parent."[1] The Agreement provided that S.J was to have legal custody and primary physical custody of the child, subject to access by appellant at specified times. Appellant agreed to attend a specified "parenting class." Nothing is said in the Agreement about child support, other than that (1) S.J. would maintain health insurance coverage for the child, so long as it could be obtained through her employment, (2) uninsured medical expenses incurred on behalf of the child were to be divided equally between the parties, and (3) appellant would supply all necessary furniture and supplies for the child at his home.

In April 2014, the court entered a judgment of divorce, in which the Agreement was incorporated, but not merged. No award of periodic child support was made in the judgment. No appeal was taken from that judgment.

[1] The Agreement required appellant, a former member of the military, to provide the mother with a "Dependent Military ID Card" for the benefit of "the Child." Military regulations permit such a card to be issued for the benefit of a child but define "child" as a legitimate child, illegitimate child, stepchild, or an adopted child *of the sponsor*." (Emphasis added). *See DOD Identity and Eligibility Documentation Requirements* (Updated December 2018). Notwithstanding that the Agreement recites that "one child was born as a result of their marriage" and that the Agreement otherwise refers to "the child," without any explanation, Section 5 of the Agreement speaks of several children, not just the child at issue here. It states that the well-being of "their children" is the paramount consideration of "both parents" and thrice refers to "each child."

In October 2015, S.J. and the child moved to Texas. In January 2017, through a Texas child support agency, S.J. initiated a child support case against appellant. Pursuant to the Uniform Interstate Family Support Act (UIFSA), the Texas agency forwarded a petition to the Montgomery County Office of Child Support (MCOCS), which, in March 2017, filed this action to establish child support. Unfortunately, MCOCS was unable to obtain service on G.B. until January 2018. In his answer to the petition, appellant denied paternity of the child and again requested genetic testing, to which MCOCS objected.

On April 27, 2018, the court, again through Judge Callahan, held a "best interest" hearing. Appellant argued that, since the judge's decision four years earlier, two cases had been decided – *Davis v. Wicomico Bureau*, 447 Md. 302 (2016) and *Faison v. Murray*, 235 Md. App. 76 (2017) – that, in his view, required a different result, namely that he had a right to genetic testing to determine his paternity, and that that right was not subject to a best-interest-of-the-child analysis. Judge Callahan found those cases distinguishable and, based on the case she had relied upon in her earlier ruling – *Mulligan v. Corbett*, 426 Md. 670 (2012) – she again denied the motion.

Undeterred, appellant tried twice more to persuade the court to order genetic testing, once before a magistrate just prior to trial and then before the court on the day of trial, both times without success. The trial judge (Judge Albright) declined to review Judge Callahan's two prior rulings.

The issue then turned to child support. The setting of child support was presented first to a court magistrate. S.J. offered evidence that she earned $105,769 as an employee

of the U.S. Treasury Department, that she paid $1,124 per month for child care and $154 for health and dental insurance for the child. G.B. produced evidence showing Medicare wages for 2017 of $95,946 plus health benefits of $1,448 and $136 per month in disability benefits from the Veterans Administration. The magistrate found S.J.'s gross monthly income to be $8,814 and that she paid $1,152 per month for work-related childcare expenses, which the magistrate found to be reasonable. The magistrate found G.B.'s gross monthly income to be $8,252. On those findings, the magistrate recommended monthly child support of $1,704, retroactive to April 1, 2017 – the first month after the UIFSA petition was filed. The arrearage amounted to $23,856, which the magistrate recommended be paid at the rate of $170 per month. G.B. filed exceptions which, after a hearing, the court denied and entered an order consistent with the magistrate's recommendations.

GENETIC TESTING

The issue is whether G.B. was entitled by law to genetic testing in order to determine whether he is the father of the child. In this appeal, he claims that right as a matter of Federal and Maryland Constitutional law. He claims that State law that would allow the court to deny him that right because the child was conceived and was born while he and S.J. were married denies both him and the child equal protection of the laws in violation of the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. We shall conclude that he has failed to preserve that issue, but to get to that point, we need to explain the basis of his Constitutional argument.

Whether and under what circumstances a man alleged (by himself or others) to be the father of a child is entitled to genetic testing to establish or disestablish his alleged paternity is no less confusing than the great labyrinth designed by Daedalus for King Minos at Knossos. Cases have gone this way and that, some with dissents, depending in part on whether the mother and the alleged father were married when the child was conceived but not when it was born, or when it was born but not when it was conceived, or whether the alleged father acknowledged paternity in an affidavit, or acknowledged paternity in some other way, or in either event had second thoughts later, and, mostly, on which of two sets of statutes in different Articles of the Code, some of which changed over time, were held to apply.

We start, and shall end, with the two sets of statutes, as they existed when the challenged decisions were made. One set is located in Title 5, Subtitle 10 of the Family Law Article (FL). Those statutes apply with respect to children "born out of wedlock." *See* FL § 5-1002. The relevant statutes in the Estates and Trust Article (ET) are found in §§ 1-206 and 1-208. In both sets, the term "out of wedlock" has been synthesized with and used to determine whether a child is "legitimate" or "illegitimate," those terms – particularly the latter – being a grossly unfair aspersion on the child but ones that the law, to its shame, continues to recognize.

ET § 1-206(a) declared that "[a] child **born or conceived** during a marriage is presumed to be the legitimate child of both spouses." (Emphasis added). It continued that, except as provided in § 1-207, which deals with adopted children, "a child born at

any time after the child's parents have participated in a marriage ceremony with each other . . . is presumed to be the legitimate child of both of them for all purposes."[2] Section 1-208(b) stated the converse:

> "A child born to parents who have **not** participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
> (1) Has been judicially determined to be the father in an action brought under the statutes that relate to paternity proceedings;
> (2) "Has acknowledged himself, in writing, to be the father;
> (3) Has openly and notoriously recognized the child to be his child; or
> (4) Has subsequently married the mother and has acknowledged himself
> (5) orally or in writing, to be the father."

(Emphasis added). [3]

Those sections in ET establish underlying bases for determining the "legitimacy" of a child born in or out of wedlock but not the procedure for doing so. Those procedures are set forth in the Family Law Article, some provisions of which were not entirely consistent with provisions in ET. One diversion involved the scope of the presumption of legitimacy. As noted, § 1-206 declares a child "born or conceived" during a marriage to be the legitimate child of both spouses. FL § 5-1027(c) stated that there is a rebuttable presumption that the child is the legitimate child of the man to whom his or her mother

[2] In 2019, that language was amended to read "presumed to be the legitimate child of both parents." *See* 2019 Md. Laws, Ch. 197, effective June 1, 2019. We see no meaningful relevance to that change in language.

[3] That section also was amended by Ch. 197, but not in any way that affects this case. The amendments were intended to recognize same-sex marriages and, in § 1-208, substituted "who did not give birth to the child" for "father."

was married "at the time of conception." In this case, that distinction is irrelevant; G.B. and S.J. were married both when the child was conceived and when the child was born, and, as a result, he is presumed under both statutes to be the father of the child.[4]

The subject of blood or genetic tests where there is no presumption of legitimacy is dealt with in FL § 5-1029. Section (b) provides, in relevant part, that, on motion of the Child Support Enforcement Administration or a party, the court "shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child" and that the laboratory report of the test shall be received in evidence if a definite exclusion is established.

Mulligan v. Corbett, supra confirms that that that provision applies only when the child is born to a mother who was unmarried at conception and birth, because in that situation there is no presumption of legitimacy and no need for a best-interests analysis before ordering blood tests. 426 Md. at 698. *Mulligan* involved a self-proclaimed father of a child conceived while the mother was married to another man. The self-proclaimed father who sought genetic testing that could have the effect of "de-legitimating" the presumptively legitimate child. The Court held that genetic testing is not required in that situation; he must first show that testing is in the child's best interest. *Id.* at 699 ("If a

[4] Apart from that, the distinction no longer exists. Section 5-1027(c) also was amended in 2019 to provide that "[t]he provisions of Title 1, Subtitle 2 of the Estates and Trusts Article regarding presumptions of parentage apply in an action under this subtitle. *See* 2019 Md. Laws, Chs. 438 and 438.

self-proclaimed father seeks blood testing in order to delegitimate a presumptively legitimate child, he must first show that blood testing is in the best interests of the child."

We see no relevant distinction between that situation, of a self-proclaimed father seeking to de-legitimate a presumed legitimate child, through blood or genetic testing, and a presumed father seeking to do the same thing. In both instances, unless and until the presumption is appropriately rebutted by other means, he is not entitled to blood or genetic testing unless the court finds that such testing is in the child's best interest.

At the trial level, as we noted, G.B. argued that *Mulligan* was effectively overruled by *Davis v. Wicomico Co. Bureau, supra,* 447 Md. 302 and *Faison v. Murray*, *supra*, 235 Md. App. 76, both of which involved a child or children conceived and born to an unmarried mother. In this appeal, G.B. has abandoned that argument, which has no merit in any event. He urges instead that if, as is the case, he would have a right to genetic testing without regard to the child's best interest if he was **not** presumed to be its father, but not where he **is** the presumed father, he and the child are being denied equal protection of the law. His point is that a statutory presumption based solely on whether he was married to the mother when the child was conceived and born is not a Constitutionally acceptable basis for denying him and the child the one best opportunity to determine who is the child's father.

That is an issue that has not been addressed in prior Maryland cases; at least, none are cited by G.B. Although he claims that he did, the record before us reveals that he never raised that argument before the trial court – not in the divorce case and not in this

proceeding. His exception to the magistrate's determination that he was the father was based solely on his view of *Davis* and *Faison*. No mention of or even allusion to equal protection was made in his exceptions or in argument before Judge Albright.

His argument was that, in light of Davis and *Faison* and the ability of genetic testing to conclusively establish or exclude parentage, "the best interest determination is an antiquated and unnecessary presumption." He acknowledged that he was asking the court to "depart[] from established law" but urged that "it is the correct direction in which to go" and "the next logical step in the evolution of those two cases." That is not even close to an argument that the distinction constitutes a denial of equal protection of the laws, and there is no way we reasonably could expect Judge Albright to have perceived otherwise.

In light of this conclusion, we need not address whether (1) G.B.s failure to appeal from the judgment of divorce, which incorporated Judge Callahan's interlocutory refusal to order genetic testing, also precludes our reaching the issue based on *res judicata* or (2) having formally acknowledged his paternity in the settlement agreement and consented to the incorporation of that agreement into the divorce judgment, he has waived his right to raise the issue in this appeal.

Child Support

G.B. makes three complaints regarding the calculation and imposition of child support: first, that the magistrate (and the court) erred in using G.B.'s 2017 W-2

statement to calculate his income; second, that they erred in accepting S.J.'s evidence that she was spending $1,152 per month for work-related child care for the child; and third, that the court erred in establishing an arrearage of $23,856, dating back to the filing of the UIFSA petition for child support and directing that G.B. discharge that arrearage at the rate of $170 per month.

The hearing before the magistrate was in May 2018. Several documents regarding G.B.'s income were placed in evidence. They included his 2017 W-2 form, which showed gross income for that year of $95,946; a report for the fourth quarter of 2017 showing wages of $26,294; and a report for the first quarter of 2018 showing wages of $33,607 (which, if extrapolated, would amount to over $134,000 for the year). The W-2 form included all wages paid for the year, including overtime pay. Notwithstanding evidence that, as of April 2018 – just a month before the magistrate's hearing – G.B. had shifted from the night shift to a day shift, the magistrate decided to use the 2017 W-2 amount in calculating G.B's income. We find no error in her doing so or in the court's following that recommendation. Indeed, G.B.'s attorney, in response to a question from the magistrate, acknowledged that "the $95,000 figure plus the health benefits" would be G.B.'s gross income.

FL § 12-204 sets forth the child support guidelines and what may or must be included in determining the proper amount of child support. Subsection (g)(1) requires that "actual child care expenses incurred on behalf of a child due to employment or job search of either parent shall be added to the basic obligation and shall be divided between

the parents in proportion to their adjusted actual incomes." Subsection (g)(2) provides, in relevant part, that child care expenses shall be "determined by actual family experience, unless the court determines that the actual family experience is not in the best interest of the child."

S.J. testified that the child, then nearly five years old, had been in extended day care for more than a year. She said that she paid $1,123 per month for that service. G.B. complains that there was no testimony from the Texas day care center regarding the reasonableness of its charges or the quality of care provided and that he was therefore precluded from cross-examining such a person regarding any special educational needs that justified that expense. S.J.'s testimony sufficed to justify allowance of the amount she claimed. G.B. had the opportunity to cross-examine her, which, through counsel, he did, as well as to summon his own witnesses.

G.B.'s final complaint concerns the retroactive application of the child support order to April 1, 2017, the beginning of the first month after the UIFSA petition was filed. FL § 12-101(a)(2) provides that, "[u]nless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading filed by a child support agency that requests child support, the court shall award child support for a period from the filing of the pleading that requests child support." Obviously, the court did not make a finding of inequitable result in this case. G.B. complains that it should have done so because delays in serving him with the petition made it inequitable to extend the arrearage that far back.

As noted, the divorce judgment, which was entered in April 2014, contained no provision for child support; none was requested by S.J. S.J. testified that, about two weeks after the child was born, she sought child support through the Maryland Child Support Enforcement Administration in the District of Columbia, where she thought G.B. was then living, but that action was dismissed in 2015 because G.B. was no longer residing there. No further attempt to obtain child support was made until January 2017, when she sought relief through the Texas agency. The Maryland petition was filed on March 6, 2017.

After several futile attempts to serve G.B., the sheriff filed a *non est* return on April 25, 2017. In September 2017, the clerk issued a notice of contemplated dismissal pursuant to Rule 2-507. MCOCS filed a motion to defer dismissal, noting that it had discovered a new address for G.B. in College Park. The court granted that motion. A summons was reissued in December 2017 and was served on G.B. on January 3, 2018. There is no evidence in the record that G.B. was evading service but there also is no evidence of precisely what efforts, if any, MCOCS or S.J. made between April and December 2017 to locate him. Counsel for MCOCS argued to the court that "[w]e tried to serve him as best we can, and finally we did," but he offered no details.

Once service was made, the court promptly scheduled a hearing on the petition for March 28, 2018. On March 23, G.B. who had meanwhile filed his motion for genetic testing, moved to postpone that hearing until June or July 2018. The court granted the motion to defer but set the hearing for May, which is when it occurred. Appellee argues

that, because G.B. sought and received that short two-month deferral, he waived his right to challenge the retroactive application. We reject that argument. It was entirely reasonable to proceed first with the motion for genetic testing.

The court balanced G.B.'s argument that S.J. had "slept on her rights" against the fact that (1) she did make some effort, both in 2015 and in March-April 2017, to obtain child support, and (2) notwithstanding his written acknowledgment that he was the child's father, which was incorporated into the divorce judgment, G.B. made no contribution whatever to the child's expenses for four years. Determination of whether a retroactive award would be "inequitable" lies in the discretion of the trial judge, and we do not disturb the exercise of that discretion unless we find an abuse of it.

Although we question the relevance of G.B.'s failure to pay any child support prior to the filing of the UIFSA petition when neither the Settlement Agreement nor the divorce judgment required that he do so, the court could properly have credited S.J.'s attorney's statement that MCOC tried to serve G.B. as best it could and tacitly concluded that S.J. did not "sleep on her rights."

The record shows that G.B. had at least three different addresses during the relevant period. A UIFSA document shows an address in Severn, Maryland. In 2015, S.J. believed he was living in the District of Columbia, which may have been the case for some period. His 2016 tax return showed an address in College Park. He was eventually served at an address in Fort Washington, Maryland which, in his testimony before the magistrate, he said was his address. We find no abuse of discretion in making the support

retroactive to the filing of the UIFSA petition or in the order that the arrearage be amortized at the rate of $170 per month.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.