Circuit Court for Baltimore City
Case No. 24-D-15-002851

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2260

September Term, 2017

JULIAN E. MORETON, ET AL.

v.

JAMES D. RATHELL

Graeff,
Leahy,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: October 15, 2018

This case arises from a custody dispute that was instituted when the minor child's mother passed away. On September 22, 2015, appellants, Dr. Julian Moreton and Mrs. Helen Moreton, the maternal grandparents of the child, filed a complaint for third-party custody. The complaint was filed against appellee, James Rathell, who believed that he was the father of the child when she was born on June 19, 2009, and signed an Affidavit of Parentage pursuant to Md. Code (2012 Repl. Vol.) § 5-1028 of the Family Law Article ("FL").[1] The complaint also listed Mr. Michael Stewart, who the Moretons believed was the biological father, as an interested party.

In an order dated December 27, 2016, after DNA testing, the Court found that Mr. Stewart is the child's biological father. Mr. Stewart, who is another appellant in this appeal, filed a crossclaim to vacate the affidavit of parentage and remove Mr. Rathell's name from the child's birth certificate. On August 9, 2017, the circuit court issued an order, the order at issue in this appeal, denying Mr. Stewart's crossclaim.

On December 11, 2017, the court issued a Custody Consent Order with the agreement of the parties. The Order provided, among other things, that the Moretons "shall have sole legal custody and primary physical custody of the minor child," with visitation to Mr. Rathell, as specified, and to Mr. Stewart, as agreed upon with the Moretons.

On appeal, the Moretons present the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the trial court err in requiring anything other than fraud, duress, or material mistake of fact to vacate the affidavit of parentage?

[1] Mr. Rathell was listed as the father on the child's birth certificate.

2. Did the trial court err in denying Mr. Stewart's crossclaim without holding an evidentiary hearing?

Mr. Rathell lists four questions presented, three of which address the Moretons' claims and a fourth that poses an additional question for this Court's review:

3. Did the Moretons waive their right to appeal by entering into judgment by consent in the trial court?

For the reasons set forth below, we answer Mr. Rathell's question in the affirmative, and therefore, we shall dismiss this appeal.

STATUTORY BACKGROUND

The claims raised by the Moretons primarily involve two statutory provisions. FL § 5-1028(a) provides that an "unmarried father and mother shall be provided an opportunity to execute an affidavit of parentage." FL § 5-1028(c)(1) provides that this affidavit "shall contain," among other things,

> (v) the signatures of the father and the mother of the child attesting, under penalty of perjury, that the information provided on the affidavit is true and correct;
>
> (vi) a statement by the mother consenting to the assertion of paternity and acknowledging that her cosignatory is the only possible father;
>
> (vii) a statement by the father that he is the natural father of the child;
>
> . . . .

Section 5-1028(d) provides:

> (1) An executed affidavit of parentage constitutes a legal finding of paternity, subject to the right of any signatory to rescind the affidavit:
>
> (i) in writing within 60 days after execution of the affidavit; or
>
> (ii) in a judicial proceeding relating to the child:
>
> 1. in which the signatory is a party; and
>
> 2. that occurs before the expiration of the 60-day period.

> (2)(i) After the expiration of the 60-day period, an executed affidavit of parentage may be challenged in court only on the basis of fraud, duress, or material mistake of fact.
>
> (ii) The burden of proof shall be on the challenger to show fraud, duress, or material mistake of fact.
>
> (iii) The legal responsibilities of any signatory arising from the affidavit, including child support obligations, may not be suspended during the challenge, except for good cause shown.

FL § 5-1029 addresses genetic tests. It states, in relevant part, as follows:

> (b) On the motion of the Administration, a party to the proceeding, or on its own motion, 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.

With this statutory background in mind, we address the facts of the case.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2015, after the sudden death of their daughter, Ms. Robin Ellis, the Moretons filed a Complaint for Third Party Custody of Ms. Ellis' daughter, the Moreton's grandchild, against Mr. Rathell and Mr. Stewart. Mr. Rathell was included in the Moretons' complaint because he was listed as the father on the child's birth certificate and because both Ms. Ellis and Mr. Rathell signed an affidavit of parentage after the birth of the child. The Moretons included Mr. Stewart in the complaint because they believed that he was the biological father of the child. The complaint stated that Ms. Ellis was never married to either man.

On December 3, 2015, Mr. Stewart filed a Request for Genetic Testing for Paternity pursuant to FL § 5-1029(b). He asserted that Ms. Ellis told him that he was the child's father.

Mr. Rathell filed a response objecting to Mr. Stewart's request for genetic testing and requested a hearing. He asserted that a paternity test was not necessary because he had executed an affidavit of parentage, which constituted a legal finding of paternity.

The circuit court held a hearing on July 19, 2016. During this hearing, Mr. Stewart testified that, in May 2015, Ms. Ellis told him that he was the child's father. He saw the child occasionally after that time. Mr. Stewart stated that he did not wish to obtain custody of the child because he believed it was in her best interest to remain with the Moretons. He explained that his request for genetic testing arose from Mr. Rathell's actions in removing the child from the Moretons' care. If genetic tests established that he was the biological father, he would not fight for custody, but he would want a relationship with the child. If it was determined that he was not the father, he would "walk away."

Mr. Rathell then testified regarding his relationship with Ms. Ellis. He testified that they had an ongoing relationship, which Mr. Rathell characterized as "on again, off again." They began living together "a few months prior" to the child's birth because Ms. Ellis informed him that he was the child's biological father.[2] When the child was born on June 19, 2009, Mr. Rathell was present at the hospital. He signed the affidavit of parentage given to him at the hospital, along with Ms. Ellis, because he believed that he was the

[2] Mr. Rathell testified that Ms. Ellis periodically would leave when "things got really rocky," and he knew that Ms. Ellis "had been seeing other people" prior to the child's conception. He had met Mr. Stewart years ago because Mr. Stewart frequented the bar at which Ms. Ellis worked.

child's father. He explained that Ms. Ellis had "spent a lot of time" convincing him that he was the father.[3]

A few months after Ms. Ellis moved in with Mr. Rathell and gave birth to the child, she and the child left and began living with the Moretons. Ms. Ellis occasionally resumed living with Mr. Rathell, but Mr. Rathell acknowledged that the child resided "primarily" with the Moretons until Ms. Ellis' untimely death.

Sometime after the child was born, Ms. Ellis brought the child's paternity into question. Mrs. Moreton testified that Ms. Ellis had "always told [them] that Michael Stewart was the father and that [Mr. Rathell] was not." Mr. Rathell also testified that Ms. Ellis occasionally would "raise the possibility or the suggestion" that he was not the father.

After Ms. Ellis' death, the child resided with the Moretons, except for a short period of time when Mr. Rathell removed the child from school and took her to his home in an attempt to assert custody. Mr. Rathell explained that he took this action because, after Ms. Ellis passed, the Moretons had limited his access to the child. He returned the child to the Moretons' care a few days later. The Moretons and Mr. Rathell then worked out a visitation schedule for Mr. Rathell so that he could continue to have contact with the child.

On September 12, 2016, the circuit court issued an order granting Mr. Stewart's request for genetic testing. In an accompanying memorandum, the court explained that FL § 5-1028 permits "unmarried parents to establish paternity through use of an Affidavit of

[3] When counsel for Mr. Stewart asked if it made him suspicious that the child was born less than nine months after Mr. Rathell's perceived time of conception, but the child was not born prematurely, Mr. Rathell admitted that he had not "run the math."

Parentage" and that the affidavit of parentage "may be challenged in court on the basis of fraud, duress or material mistake of fact." The court found that, based on Mr. Rathell's testimony, Ms. Ellis had signed the affidavit "knowing Defendant Rathell was not the only possible father," and therefore, she had "committed an act of fraud." The court concluded that, pursuant to FL § 5-1029, "where, as here, a potential father challenges paternity established by way of a fraudulent affidavit, the court must order genetic testing where testing is requested by a party with standing to make the request."[4]

On December 27, 2016, after the results of the DNA testing were reviewed, the court issued an order finding that Mr. Stewart is the child's biological father. It ordered that, for the court "to proceed further at this time, Defendant Stewart must file a crossclaim against Defendant Rathell for a Motion to Remove Defendant Rathell's name from the Minor Child's birth certificate and for the [c]ourt to vacate the Affidavit of Parentage."

On February 9, 2017, Mr. Stewart filed a "Crossclaim to Remove James D. Rathell's Name from the Minor Child's Birth Certificate and for the Court to Vacate the Affidavit of Parentage." On August 1, 2017, the court held a hearing on the crossclaim. Counsel for the Moretons argued that, "by operation of law, by not being the biological father, then Mr. Rathell should be removed from the birth record and the affidavit of parentage should be null and void." Counsel argued, and Mr. Stewart's counsel agreed, that the court should

[4] On October 3, 2016, Mr. Rathell noted an appeal from the order permitting genetic testing. This Court ultimately dismissed it as an improper interlocutory appeal. *See Rathell v. Moreton, et al.*, No. 1697, Sept. Term, 2016 (filed April 28, 2017).

"just proceed with the termination of parental rights by Mr. Rathell and proceed with substituting Mr. Stewart as the proper Defendant in the complaint for third-party custody."

Mr. Rathell's counsel argued that the genetic test, by itself, did not make Mr. Stewart the child's father. She argued that, to remove Mr. Rathell from the affidavit of parentage, there must be a finding of fraud or mistake, and Mr. Stewart, a third-party, did not have standing to challenge the validity of the affidavit of parentage. She further asserted that, to terminate Mr. Rathell's parental rights, there would need to be a hearing regarding the best interest of the child.

On August 9, 2017, the court issued a memorandum and order. Noting that the affidavit constituted a legal finding of paternity, the court stated that the issue "[w]hether a third party can rescind an [a]ffidavit of [p]arentage when that third party is found to be the biological father of a minor child subject to that affidavit is a matter of first impression for this court." It stated that vacating the affidavit of parentage "would effectively terminate the parental rights of the legal father," and parental rights cannot be terminated without specific factual findings.[5] The court further stated that a best interests of the child analysis was required in custody cases, and third-party custody cases required "a finding that the parent is unfit or that exceptional circumstances exist which warrant custody to be given to the third party." The court concluded: "While Mr. Stewart has presented undisputed scientific evidence which proves that he is the biological father of the Minor

[5] The court cited FL § 5-3B-22, addressing nonconsensual adoption, and FL § 5-323, addressing nonconsensual guardianship.

Child, that evidence alone is insufficient to satisfy the controlling statutes and case law." Accordingly, the court denied, without prejudice, the crossclaim to vacate the affidavit of parentage and remove Mr. Rathell's name from the birth certificate.

On December 11, 2017, pursuant to the agreement of the parties, the court issued a Custody Consent Order. The Order, which gave the Moretons sole legal custody and primary physical custody of the child, with specified visitation to Mr. Rathell, was entered on the docket on December 19, 2017, effectively ending the custody dispute as to all parties.

On January 11, 2018, the Moretons and Mr. Stewart filed a Notice of Appeal with this Court, challenging the August 9, 2017, order.

DISCUSSION

Before addressing the merits of the questions appellants present for review, we first address the issue raised by Mr. Rathell, i.e., whether this appeal is properly before this Court. Mr. Rathell asserts that it is not because appellants waived their right to appeal by agreeing to the Custody Consent Order, which resolved all issues in the case. As explained below, we agree with Mr. Rathell.

A consent order has been defined as "'an agreement of the parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing acceptance by the court.'" *Barnes v. Barnes*, 181 Md. App. 390, 408 (2008) (quoting *Long v. State*, 371 Md. 72, 82 (2002)). It "reflect[s] the agreement of the parties 'pursuant to which they have relinquished the

right to litigate the controversy.'" *Id.* at 408 (quoting *Hearn v. Hearn*, 177 Md. App. 525, 534 (2007)).

The general rule is that there is no right to appeal from a consent order. *Id.* at 411. The basis for this rule was explained in *Suter v. Stuckey*, 402 Md. 211, 224 (2007), as follows:

> The availability of appeal is limited to parties who are aggrieved by the final judgment. A party cannot be aggrieved by a judgment to which he or she acquiesced. The "right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal." The rationale for this general rule "has been variously characterized as an 'estoppel', a 'waiver' of the right to appeal, an 'acceptance of the benefits' of the court determination creating 'mootness', and an 'acquiescence' in the judgment."

(Internal citations omitted.) The Court further explained in *Suter* that "[t]he public policy of promoting settlement agreements by ensuring finality is another reason to disallow appeals from consent judgments." *Id.* at 225.

The Moretons do not dispute that the consent order here was issued pursuant to the agreement of the parties. Under these circumstances, the consent order precludes the appeal of the earlier order rendered in connection with the custody case. *See Globe American Cas. Co. v. Chung*, 322 Md. 713, 717 (1991) ("Where a party consents to a judgment in a case, the party ordinarily may not appeal and obtain review of an earlier adverse ruling in that case.").

The Moretons argue, however, that this case involves an exception to the general rule that appellate review will not be permitted when there has been a consent order. They

note that, in the situation where "'there was no actual consent because the judgment was coerced . . . an appeal will be entertained.'" *Barnes*, 181 Md. App. at 411 (quoting *Suter*, 402 Md. at 224 n.10). They proceed to argue that they were "effectively coerced into a 'consent' order because the Court had already made an error fatal to [their] case (not hearing [them] on the cross-claim to remove [Mr. Rathell's] name from the birth certificate)," which gave them "no possible outcome that was acceptable to them."

When there is a claim that a consent order is appealable because there was coercion precluding actual consent, the relevant question for this "narrow exception" is "whether in fact the decree was entered by consent." *Id.* Here, the Moretons do not claim that the order incorporates anything other than what was agreed upon. Indeed, at oral argument, counsel stated that it was issued after "hours of negotiation" while the Moretons were represented by counsel.

The Moretons cite no cases, nor has this Court found any, that support their contention that the facts here show that they did not consent to the terms of the consent order. Although the Moretons may not have been happy with the options left to them after the court's ruling denying the request to vacate the affidavit of parentage, it was their choice to appeal the ruling or agree to the terms of the consent order to resolve the custody issues in the case. Once they agreed to the consent order, they were not an aggrieved party and had no right to appeal. *See Globe American*, 322 Md. at 717 ("Where a party consents to a judgment in a case, the party ordinarily may not appeal and obtain review of an earlier adverse ruling in that case.").

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANTS.