IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 1, 2002 Session

STATE OF TENNESSEE ex rel. NANCY SCHLEIGH v. STEVEN SCHLEIGH, JR.

Appeal from the Circuit Court for Knox County
No. 76880 Bill Swann, Judge

FILED OCTOBER 29, 2002

No. E2002-1237-COA-R3-CV

This is an action to enforce a child support order entered against Steven Schleigh in another state. After the State of Tennessee filed a petition seeking enforcement of the out-of-state order, Steven Schleigh denied he was the biological father of the minor child. The Referee entered an order requiring both Mr. and Ms. Schleigh to submit to DNA testing. When Ms. Schleigh did not comply with this order, the Referee recommended the case be dismissed. The Trial Court confirmed the findings of the Referee and dismissed the case. The State appeals. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J., and CHARLES D. SUSANO, JR., J., joined.

Paul Summers and Stuart Wilson-Patton, Nashville, Tennessee, for the Appellant State of Tennessee *ex rel.* Nancy Schleigh.

Roger D. Hyman, Powell, Tennessee, for the Appellee Steven Schleigh, Jr.

OPINION

Background

On April 8, 1986, Nancy Schleigh ("Mother") was granted an absolute divorce from Steven Schleigh ("Father") in the Circuit Court for Hartford County, Maryland. Mother was awarded custody of the parties' minor child who was born on December 12, 1980. Father was "charged generally with the support of the said minor child *of the parties*" (emphasis added), but no specific amount of child support was set forth in the judgment. Although not contained in the record, the State of Maine apparently issued an order in October of 1989 requiring Father to pay child support in the amount of $33.00 per week. When Father fell behind in his child support payments, the State of Maryland sought to register and enforce the Maine support order in the State of Tennessee. Upon receipt of this request, the State of Tennessee filed a petition seeking to enforce the interstate child support transmittal. Father was in arrears in the amount of $4,057.32 when the petition was filed.

After the petition was filed in the Knox County Circuit Court, Division IV, Father decided to deny he was the biological father of the minor child. As a result, on October 23, 1997, the Referee in the Knox County Circuit Court issued an Agreed Order for Genetic Testing. While this was called an "Agreed Order," there is nothing in the record to indicate Mother actually agreed to this testing.[1] It was, however, agreed to by the State and Father. In any event, the Agreed Order stated that the initiating agency in Maryland would arrange for all parties and the minor child to submit to DNA testing. The Referee issued a second order that same day requiring Father to pay $52.50 per week towards his current and arrearage child support obligations. Father eventually filed an Affidavit of Indigency and was appointed an attorney to represent him. The next document in the record is the Findings and Recommendations of the Referee. In pertinent part, the Findings state:

> This cause came to be heard . . . upon a Motion to dismiss by the counsel for the Defendant; and the Court after hearing the testimony of the Defendant, Steven Schleigh, Jr., and the statements of counsel, and it appearing to the Court that Steven Schleigh, Jr., has fully complied with the requirements set forth in the Agreed Order for Genetic Testing heretofore entered in this cause on November 17, 1997, but that the Petitioner, Nancy Schleigh has failed to cooperate with the scheduled DNA paternity testing, despite numerous opportunities, and despite a Court order specifically directing said DNA paternity testing; and it further appearing that this cause has been reset before the Court on numerous occasions, and that Steven

[1] On appeal, the State acknowledges that the attorney representing the State at that time should not have agreed to the entry of this "Agreed Order". Relying on Tenn. Code Ann. § 36-5-2307(c), the State argues it was not Mother's attorney and, therefore, could not bind her to this agreement. Due to our resolution of this case, we need not decide this issue and pretermit same.

> Schleigh, Jr. has appeared for Court on every occasion, but that there has been no response from Petitioner, Nancy Schleigh, nor any cooperation from her, and the Court therefore finding that because Petitioner, Nancy Schleigh, has failed to comply with the Orders of this Court, and the Court being of the opinion that Defendant's Motion to Dismiss is well-taken; it is therefore
>
> Found and Recommended that this cause should be dismissed with prejudice to the refiling of same.

The Findings and Recommendations of the Referee were confirmed by the Knox County Circuit Court Judge in July of 2001. The State then filed a motion to alter or amend the judgment. The State claimed, *inter alia*, that a Tennessee court did not have authority to modify the child support order which had been entered in another State and Father's only avenue of relief from the terms of that order was in the Circuit Court for Harford County, Maryland. The motion to alter or amend the judgment was denied by the Trial Court. The State appeals the dismissal of this action, arguing: (1) Father's alleged nonpaternity was not a defense to the enforcement of the out-of-state child support order; (2) even if Father is not the biological father, this still would be no defense to the amount of child support he already owed; and (3) Father still would owe the amount in arrears regardless of whether or not Mother had complied with the DNA testing Order.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

This is an action to enforce the out of state child support order pursuant to the Uniform Interstate Family Support Act, Tenn. Code Ann. § 36-5-2301, *et seq.* This Act explicitly provides that nonparentage is not a defense if parentage has already been determined by law. Specifically, the statute provides:

> **36-5-2315. Nonparentage as defense.** – A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under parts 20-29 of this chapter.

In light of the clear language of the statute, Father should not have been permitted to raise nonparentage as a defense to the enforcement proceeding.[2] Unfortunately, Father was allowed to raise this defense, resulting in the Referee's entering an "Agreed Order" requiring both parents to submit to DNA testing. This order, in turn, became the genesis of the dismissal of the case and this appeal. The Circuit Court for Harford County, Maryland had determined that the minor child was a child "of the parties", and, therefore, had determined that the minor child was the child of Father. The State argues, and correctly so, that Father had no right to contest paternity in this Tennessee UIFSA proceeding. *See* Tenn. Code Ann. § 36-5-2315. In short, even if the DNA testing had been done and it had shown that Father was not the biological father of the minor child, such a finding would have been of no use to Father in his defense of this enforcement proceeding. This being so, dismissal of the action, particularly upon what apparently was an oral motion to dismiss, was error.

We also are troubled by the fact that the record contains neither a written petition seeking to hold Mother in contempt for failure to comply with the order at issue nor a written motion to dismiss because of her failure to comply. Because no petition or motion was filed, Mother was given no opportunity to file a response setting forth any potential justification for her failure to comply with the order. Likewise, she was given no opportunity to raise a legal defense to being held in contempt. Also absent from the record is any specific order actually finding Mother in contempt. We cannot discern why Mother did not comply with the order and what attempts were made by her, if any, to comply.

Even if the record supported a conclusion that Mother was in contempt for failure to submit to the DNA testing, this case should not have been dismissed since Father's claimed nonparentage is not a defense to enforcement of the out-of-state support order. The child is the ultimate beneficiary of the child support payments made by Father. "[A]s a general rule, a custodial parent may not waive her minor child's right of support." *Huntley v. Huntley*, 61 S.W.3d 329, 335-36 (Tenn. Ct. App. 2001). Since the child is the ultimate beneficiary of this child support, we do not believe dismissal would have been an appropriate sanction even if there had been a proper finding of contempt related to a valid defense of Father's.

For the foregoing reasons, we reverse the Trial Court's dismissal of this action. Because our holding that Father's alleged nonparentage is not a defense to this enforcement action, it is unnecessary that we address the remaining issues raised by the State, and those issues are pretermitted. Because Father's nonparentage is not a defense to this action, on remand we also set aside the previously entered order requiring the parties to submit to DNA testing.

[2] This does not mean, however, that Father could not raise nonparentage as a defense in the Maryland Court, assuming that State would allow this defense to be raised a decade after the original order determining parentage was entered.

Conclusion

The judgment of the Trial Court granting Mr. Schleigh's motion to dismiss is reversed, and this cause is remanded to the Trial Court for such further proceedings as may be required consistent with this Opinion. The costs on appeal are assessed against the Appellee, Mr. Steven Schleigh.

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D. MICHAEL SWINEY, JUDGE