IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 11, 2014

ASHLEY PURDY v. MATTHEW C. SMITH

Appeal from the Juvenile Court for Wayne County
No. 2010JV39 James Y. Ross, Judge

No. M2012-02463-COA-R3-CV - Filed May 23, 2014

This case involves the difficult issue of disestablishment of paternity and its effect on child support arrears. Over a year after the trial court entered an order requiring the respondent to pay child support, he requested Rule 60 relief on the grounds that he was not the biological father of the child. Based upon the statutory prohibition against the retroactive modification of child support and the related caselaw, we must affirm the trial court's decision denying the respondent Rule 60 relief for any time period prior to the filing of his petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Matthew C. Smith, Gatlinburg, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter and Warren Jasper, Senior Counsel, for the appellee, State of Tennessee *ex rel.* Ashley Purdy.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Ashley Purdy ("Mother") gave birth to a child on July 25, 2009. On April 14, 2010, the State of Tennessee filed a petition on behalf of Mother against Matthew C. Smith to

establish paternity. Service was accomplished by certified mail,[1] and the summons ordered Mr. Smith to appear for a hearing on June 9, 2010. The return receipt was returned without a signature or any other notation. Another summons was sent to Mr. Smith by certified mail on June 16, 2010 instructing him to appear at a hearing on August 11, 2010. The record does not contain a return receipt. The court's order from the August 11, 2010 hearing states that, "being served," Mr. Smith failed to appear; the court ordered him to appear and stated that a default order of paternity would be entered if he failed to appear.

The matter was heard on September 8, 2010; Mr. Smith failed to appear at the hearing. In its October 13, 2010 order, the trial court made the following pertinent findings: "Father failed to appear for testing in March 2010; he further failed to appear for court on 8-11-10 and again today." The court proceeded to set child support by default based upon the statutory imputed income. The court entered a judgment of $7,956.00 in retroactive child support; current support was set at $663.00 per month, plus $43.33 toward retroactive support, for a total monthly support obligation of $706.33.

On December 21, 2010, the State filed a petition for contempt against Mr. Smith alleging that he had not paid child support as ordered and was $9,282.00 in arrears. A garnishment notice was sent to Mr. Smith's employer in February 2011. On March 18, 2011, the State filed a petition to enforce child support alleging that Mr. Smith now owed $11,271.00 in back child support.

Mr. Smith appeared at a hearing on May 11, 2011 and requested DNA testing. The court granted Mr. Smith time to obtain testing; he was ordered to provide the court with the results at a hearing on July 13, 2011. The case was reset for October 12, 2011, but neither Mr. Smith nor his attorney were available for the hearing, and the case was again reset. Mr. Smith was ordered to appear on December 14, 2011 or attachment would issue.

On December 1, 2011, Mr. Smith filed a motion to set aside the October 13, 2010 order setting child support on the ground that paternity testing showed he was not the child's father. According to the motion, Mr. Smith "did not willfully miss the court date when Default was granted."[2]

Mr. Smith failed to appear at the December 14, 2011 hearing to present the DNA

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[1] *See* Tenn. R. Civ. P. 4.04(10).

[2] Although the motion references an attached affidavit, the record on appeal does not contain this document.

evidence. The court reset the hearing for February 8, 2012 and ordered Mr. Smith or his attorney to appear at that hearing. On February 8, 2012, the hearing was rescheduled for May 9, 2012. Mr. Smith was ordered to appear in person or a default judgment would be entered. The hearing was subsequently rescheduled several times, but was ultimately set for August 15, 2012.

On July 14, 2012, Mr. Smith filed an amended motion to set aside the default judgment. The motion asserts that the original service of process was not sent to Mr. Smith's current address and that he became aware of the proceedings after his wages were garnished. In this motion, Mr. Smith also alleged that Mother "knew or should have known that [Mr. Smith] was not the biological father as she was not intimate with him at a time that would be consistent with the birth of the child and its conception." He asserted that Mother knew or should have known that the statements in the petition for paternity were false and that they were made "with reckless disregard as to their truth." Moreover, Mr. Smith alleged, Mother's refusal to take a DNA test was a willful action "consistent with the fraud that was/is being perpetrated on the court . . . ."

On August 15, 2012, the trial court heard the State's contempt motion and Mr. Smith's motion to set aside the default judgment. In an order entered on October 10, 2012, the court made detailed findings, including the following:

> *Upon a review of the facts, the Court determined the original service of process issued by the Clerk of the Court was sufficient under the Tennessee Rules of Civil Procedure to constitute actual and/or constructive notice in light of the fact the Respondent's obvious attempts to avoid being served by intentionally refusing to accept service of process, via certified mail, and/or willfully evading personal service of process, but knowing to appear,* and appearing, for court on May 11, 2011. The court record reflects the Clerk issued process, via certified mail-return receipt requested, to 328 Church Street, Gatlinburg, Tennessee 37738, and it was returned unclaimed on June 19, 2010. The court record reflects the Clerk re-issued service of process on June 16, 2010, via certified mail-return receipt requested, and the record does not reflect it was ever returned. Return on Service of Summons was made on March 22, 2011, by the Sevier County Sheriff's Department, and stated "Not Served, Gatee Bartes says no longer lives at residence–Stans Road, and Mary Beth Bareto states no longer lives at 328 Church." The exhibit(s) to the record establishes the address of 328 Church Street, Gatlinburg, Tennessee 37738, which was used for service of process, is the same as the Respondent's address on his Tennessee Driver's License and on file with the Tennessee Department of Motor Vehicles. The record establishes the Respondent signed the Order

> of May 11, 2011, and he gave 908 Stans Road, Gatlinburg, Tennessee 37738, as his address of residency.

(Emphasis added).

The trial court went on to find that, viewing the facts in the light most favorable to Mr. Smith and absent an allegation of fraud and/or intentional misrepresentation, his motion to set aside the October 2010 order should have been filed no later than 30 days after the May 11, 2011 hearing when he appeared in court and requested DNA testing. The court found no viable allegations of fraud or intentional misrepresentation and concluded that the October 2010 order was not voidable or void. Relying on Tenn. Code Ann. § 36-5-101(f)(1)[3] and related cases, the trial court held that it could not retroactively forgive the child support arrears and that statutory interest had to be imposed. Accordingly, the court entered a judgment against Mr. Smith for $23,472.02. While denying Mr. Smith's motion to set aside the default judgment, the court ordered that, in light of the DNA test results, the order be amended to reflect that Mr. Smith "is not the biological father of the subject matter child and, therefore, [Mr. Smith] will not have any future child support obligations under said order."

On appeal, Mr. Smith asserts that he was not properly served and that the trial court erred in denying his motion to set aside the default judgment as to past due child support and in ordering him to pay $23,472.02 in child support arrears because he is not the child's father.

STANDARD OF REVIEW

We review a trial court's decision on a Rule 60 motion, including a motion to set aside a default judgment, under an abuse of discretion standard. *Patterson v. SunTrust Bank*, 328 S.W.3d 505, 509 (Tenn. Ct. App. 2010); *J & B Invs., LLC v. Surti*, 258 S.W.3d 127, 132 (Tenn. Ct. App. 2007). It is well-established that, "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007) (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *Id.* Thus, under this standard, we give great deference to the trial court's decision. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

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[3]The court actually cited Tenn. Code Ann. § 36-5-101(a)(5), which concerns giving full faith and credit to child support orders from other states. In light of the context, however, and the court's later reference to Tenn. Code Ann. § 36-5-101(f)(1), the reference to subsection (a)(5) appears to be an error.

The burden is upon the party seeking to set aside a default judgment to demonstrate that it is entitled to relief. *Nelson v. Simpson*, 826 S.W.2d 483, 485 (Tenn. Ct. App. 1991). The party must show that it is entitled to relief under one of the grounds enumerated in Tenn. R. Civ. P. 60.02 and that "it has a meritorious defense to the plaintiff's suit." *Id.*; *see also* Tenn. R. Civ. P. 55.02. With respect to default judgments and the application of the abuse of discretion standard, this court has stated:

> Motions to set aside default judgments are not viewed with the same strictness that motions to set aside judgments after a hearing on the merits are viewed. Rather, such motions are construed liberally in favor of granting the relief requested. If there is a reasonable doubt as to whether to set aside a default judgment upon proper application, a court should exercise its discretion in favor of granting relief from the judgment.

Patterson, 328 S.W.3d at 510 (quoting *Decker v. Nance*, E2005-2248-COA-R3-CV, 2006 WL 1132048, at *2 (Tenn. Ct. App. Apr. 28, 2006)).

The trial court's findings of fact are presumed to be correct and will not be overturned unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). We review conclusions of law de novo with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

ANALYSIS

I.

We begin with Mr. Smith's assertion that he was not given proper service of process when the paternity action began.

The record in this appeal does not include a transcript or statement of the evidence for either of the hearings: the hearing at which the default judgment was granted and the hearing denying Rule 60 relief. Under Tenn. R. App. P. 24, it is the duty of the appellant to prepare a record "which conveys a fair, accurate, and complete account of what transpired in the trial court regarding the issues which form the basis of the appeal." *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005). Thus, it is the appellant's responsibility to provide the court with a transcript or a statement of the evidence "from which we can determine whether the evidence preponderates for or against the findings of the trial court." *Id.*at 894-95. If there is no transcript or statement of the evidence, "we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct." *Id.* at 895. Because Mr. Smith did not include a transcript or statement of the evidence in the record, we

must presume that the trial court's findings of fact are correct.[4]

With respect to the issue of adequate service, the trial court made pertinent findings of fact. The court found that Mr. Smith had made "obvious attempts to avoid being served by intentionally refusing to accept service of process, via certified mail, and/or willfully evading personal service of process, but knowing to appear, and appearing, for court on May 11, 2011." As discussed above, we must presume that these findings are correct. Based upon these findings, we find no error in the trial court's conclusion that the original service of process on Mr. Smith constituted actual or constructive notice.

II.

We now turn to the issue of whether the trial court erred in denying Mr. Smith's motion for Rule 60 relief from the default judgment.

Tennessee Code Annotated section 36-5-101(f)(1) provides that a judgment for child support "shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed . . . ." This provision "was enacted in 1987 to bring Tennessee in line with a federal statute that conditioned receipt of federal financial assistance on the adoption of procedures designed to improve the effectiveness of child support enforcement." *In re Christopher A.D.*, No. M2010-01385-COA-R3-JV, 2012 WL 5873571, at *3 (Tenn. Ct. App. Nov. 20, 2012). These requirements included guaranteeing that child support payments cannot be retroactively modified. *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991). Discussing the new provision, our Supreme Court commended the efforts of state and federal legislatures "to ensure that the nation's children receive adequate parental support." *Rutledge*, 802 S.W.2d at 607. The Court recognized that, while the new provision would promote this goal, it would also have harsh effects in some cases. *Id.* The Court further stated: "To permit the interposition of traditional equitable defenses to the enforcement of child support orders would obviously defeat the very purpose of the amendment, by creating a situation where exceptions could easily swallow up the rule."

In light of Tenn. Code Ann. § 36-5-101(f)(1), this court has consistently upheld "the prohibition against retroactive modification of child support in the face of equitable defenses." *See In re Christopher A.D.*, No. M2010-01385-COA-R3-JV, 2012 WL 5873571, at *4 (Tenn. Ct. App. Nov. 20, 2012) (citing cases upholding the prohibition); *State ex. rel. Letner v.*

[4]In his brief, Mr. Smith refers to "facts" that have no support in the record. Pursuant to Tenn. R. App. P. 13(c), we may consider only "those facts established by the evidence in the trial court and set forth in the record and any additional facts that may be judicially noticed or are considered pursuant to rule 14 [concerning post-judgment facts]."

Carriger, No. E2011-01853-COA-R3-CV, 2012 WL 3553400, at *3 (Tenn. Ct. App. Aug. 20, 2012); *In re Treasure D.I.*, No. E2011-01499-COA-R3-JV, 2012 WL 629363, at *3 (Tenn. Ct. App. Feb. 28, 2012). In *In re Treasure D.I.*, 2012 WL 629363, at *1, Eric Jackson believed that he was the father of the child at issue and signed a waiver declaring that he was the child's father and agreeing to pay child support. After the child was emancipated, Mr. Jackson learned that he was not the child's biological father; he filed a petition to forgive the child support arrearage that he owed. *In re Treasure D.I.*, 2012 WL 629363, at *1. The trial court denied the petition, and this court agreed that the trial court was "without authority to forgive any portion of [Mr. Jackson's] child support arrearage—even where later paternity testing establishes that [Mr. Jackson] is not the biological father of the Child—because such forgiveness constitutes an unlawful retroactive modification of a valid child support order." *Id.* at *3.

We recognize that our Supreme Court considered the issue of retroactive modification of child support in the case of *Hodge v. Craig*, 382 S.W.3d 325 (Tenn. 2012). In that case, however, the petition sought damages for an intentional tort—that the mother had intentionally misrepresented that Mr. Craig was the father of the child when she knew or should have known otherwise. *Hodge*, 382 S.W.3d at 341-42. The Court concluded that the trial court's damage award (in the amount of child support, medical expenses, and insurance premiums paid by the petitioner) was not a retroactive modification of child support for two reasons. *Id.* at 346-48. First, the damage award "did not have the effect of reducing or extinguishing any child support arrearage owed by Mr. Craig" because, when the judgment was entered, there was no evidence that he had a legal obligation to pay child support,[5] that he owed any child support when the mother began paying him child support, or that he had ever been delinquent in paying child support. *Id.* at 348. The second reason given by the Court was that the judgment "did not purport to change or modify Mr. Craig's child support obligations as they had existed following the January 2005 order relieving him of his responsibility to pay child support[;]" when the judgment was entered, he had no obligation to pay child support to the mother. *Id.* The Court held that Mr. Craig was entitled to recover the pecuniary loss he suffered as a result of the mother's intentional misrepresentations and that the trial court did not err in ascertaining his pecuniary loss by considering the amount of child support, medical expenses, and insurance premiums he had paid. *Id.*

This court was required to consider the impact of the *Hodge* decision in *In re Christopher A. D.*, 2012 WL 5873571, at *4. That case raised the issue of whether a trial court could retroactively modify a child support order based upon the father's understatement of his income. *In re Christopher*, 2012 WL 5873571, at *1. The trial court found that the father was not credible and that he had previously lied to the court concerning his income in

[5]Ms. Hodge was paying child support to him at that time.

order to avoid paying child support. *Id.* at *3. The court ordered the father to pay retroactive child support in accordance with the child support guidelines. *Id.* On appeal, we discussed the statutory prohibition on retroactive modification of child support and the cases upholding that prohibition in the face of equitable defenses. *Id.* at *3-4.

We then turned to the *Hodge* decision. *Id.* at *4. This court stated that, in *Hodge*, "Instead of a modification of child support, the relief granted was actually an award of damages in an intentional misrepresentation action." *Id.* at *6. We concluded that "the holdings in *Hodge* do not affect the application of the statute prohibiting retroactive modification of child support to the case before us." *Id.* The case before us in *In re Christopher* was not a claim for damages for misrepresentation, but a petition that specifically asked the court to retroactively modify child support. *Id.* In addition, the case did not involve misrepresentation of parentage. *Id.* at *7. The court stated that, "A child support order is not subject to challenge based on equitable defenses such as fraud, because to do so would 'defeat the very purpose of the amendment.'" *Id.* (quoting *Rutledge*, 802 S.W.2d at 607). Therefore, we held that the trial court lacked the authority to modify the father's child support obligation as to any period of time prior to the mother filing her petition to modify. *Id.*[6]

How do these principles apply to the present case? As detailed above, Mr. Smith made allegations, in his amended petition to set aside the October 2010 order, that Mother knew or should have known that he was not the biological father yet, with reckless disregard as to the truth of her statements, told the court that he was the father. The amended petition does not expressly allege that Mother intentionally misrepresented to Mr. Smith that he was the father (as was the case in *Hodge*). In its order denying Rule 60 relief, the court found "no viable allegation of fraud and/or intentional misrepresentation." Mr. Smith's petition asks the court to set aside the order establishing parentage and child support and does not include a prayer for damages.

In light of *Hodge* and the statutory prohibition against retroactive modification of child support, we must affirm the trial court's denial of Rule 60 relief because such relief would result in the retroactive modification of child support. We find this result harsh, but the statutes and case law require this result.

Although Mr. Smith cannot receive retroactive modification of child support, the trial court did grant Rule 60 relief as to any obligation to pay child support prospectively. Thus, Mr. Smith is relieved from any child support obligation as of the date his motion to set aside

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[6]We consider the case of *In re T.M.S.*, No. W2012-02220-COA-R3-JV, 2013 WL 3422975, at *2, 8 (Tenn. Ct. App. July 8, 2013), to be distinguishable on its facts in that the trial court failed to order DNA testing and the matter was remanded as a result.

the child support order was filed, December 1, 2011.

CONCLUSION

We affirm the judgment of the trial court. Costs of this appeal shall be assessed against the appellant, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE