2015 IL App (3d) 140560-U

Order filed June 3, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

SARA WILLIAMS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Petitioner-Appellee,	)	Fulton County, Illinois,
	)	
v.	)	Appeal No. 3-14-0560
	)	Circuit No. 08-F-125
DANIEL L. COON	)	
	)	Honorable
Respondent-Appellant.	)	Heidi Benson,
	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice McDade and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it retroactively applied the 2014 version of section 6.5 of the Parentage Act. The trial court's grant of a directed verdict in favor of petitioner is reversed and the matter is remanded for further proceedings.

¶ 2 Petitioner, Sara Williams, and respondent, Daniel Coon, engaged in sexual intercourse that resulted in a pregnancy when Sara was under the statutory age to consent to a sex act. Daniel, Sara, and their newborn child, resided together as a family for the first six months of the child's life. Daniel and Sara separated in 2008. The Illinois Attorney General filed a complaint

for support in the circuit court when the child was six months old. For a period of time, Sara informally allowed Daniel regular visitation with their child. However, in 2013, Daniel filed a petition requesting court-ordered visitation in case No. 08-F-125. At the time the trial court held the contested visitation hearing in 2014, the applicable statute had been amended to prohibit any father from receiving court-ordered visitation, absent consent from the child's mother, if the court received clear and convincing evidence that the child had been conceived as a result of a criminal act. The trial court applied the 2014 statute retroactively and denied Daniel visitation due to Sara's refusal to consent to such visitation in 2014. We reverse.

¶ 3 BACKGROUND

¶ 4 Daniel was born March 5, 1984, and Sara was born March 21, 1991.[1] The parties' daughter, A.W., was born June 18, 2008, when Daniel was 24 years old and Sara was 17 years old. On November 6, 2008, the Illinois Attorney General filed a "Complaint for Support" against Daniel, and on behalf of Sara.

¶ 5 The "Complaint for Support," verified by Sara, alleged Daniel's obligation to pay support for A.W.'s care resulted from his "Voluntary Acknowledgement of Paternity [VAP] pursuant to 410 ILCS 535/12."[2] On December 1, 2008, when the court entered an order regarding the "Complaint for Support," Daniel and Sara resided together in an apartment. Therefore, the trial court reserved the issue of child support, without ordering Daniel to pay a designated amount for child support.

[1] The trial court record does not contain Sara's birth date. However, respondent's appellate brief asserts that his research of Fulton County records revealed Sara's birth date was March 21, 1991.

[2] A copy of the VAP is not part of the record on appeal.

¶ 6 On March 16, 2009, the Illinois Attorney General filed a "Petition for Modification of Child Support," on behalf of Sara, alleging Daniel should begin paying child support since he no longer resided with Sara and A.W. On June 8, 2009, the trial court ordered Daniel to pay Sara child support in the amount of $111 every other week.

¶ 7 On November 8, 2013, Daniel filed a *pro se* "Petition for Visitation." Thereafter, Daniel and Sara each retained separate attorneys, who both entered their appearances on behalf of their respective clients on December 2, 2013. On February 25, 2014, the trial court ordered the parties to engage in mediation in order to facilitate an agreeable custody arrangement and visitation schedule pursuant to local court rules. Subsequently, based on an agreement reached during mediation, the court entered an "Agreed Custody Order" granting Sara sole custody of A.W. on April 30, 2014. Daniel filed a "Second Amended Petition for Visitation" on May 9, 2014, alleging facts similar to those in his original petition.[3]

¶ 8 On June 4, 2014, the trial court conducted a hearing on the contested issue of visitation. Daniel testified that he and Sara dated approximately two years prior to A.W.'s birth in June 2008. Daniel stated he and Sara had been living together in an apartment when Sara became pregnant at age 16. They continued living together at that apartment throughout Sara's pregnancy and for approximately six months after A.W.'s birth. When A.W. was six months old, the parties ended their relationship and Sara and A.W. moved into Sara's mother's home. Daniel testified he continued to visit with A.W. every other weekend for a while pursuant to an informal agreement between Daniel and Sara. After a dispute with Sara and her relatives, Sara denied Daniel the agreed visitation with his daughter and he "lost contact" with Sara and A.W. for a period of time.

[3] Daniel's attorney filed an "Amended Petition for Visitation" on April 7, 2014, containing the same allegations that Daniel alleged in his *pro se* petition for visitation.

¶ 9 During cross-examination conducted as part of the hearing on visitation, Daniel admitted he was 23 years old when he engaged in sexual intercourse with Sara, who was then 16 years old. Following Daniel's testimony, Sara moved for a directed verdict based on Daniel's admission that "he engaged in sexual intercourse with [Sara], *** while she was 16, which is prior to the age of consent in the State of Illinois, and while [Daniel] was seven years older than her." In response, Daniel's counsel claimed the statute was unconstitutional because it was not gender neutral.

¶ 10 On June 27, 2014, the court entered a written order granting Sara's request for a directed verdict and denying Daniel's petition for visitation. That order included the following language: "[D]ue to [Sara's] and [Daniel's] age upon conception[,] clear and convincing evidence was presented that [Daniel] committed an act of non-consensual sexual penetration for the conduct of [Daniel] fathering the child in question. Further, [Sara's] age (sixteen) at the time of conception prevented her from being able to consent to said conduct." Accordingly, the court granted Sara's request for a directed verdict pursuant to the 2014 version of section 6.5 of the Illinois Parentage Act of 1984 (the Parentage Act). 750 ILCS 45/6.5 (West 2014).

¶ 11 On July 18, 2014, Daniel filed a timely notice of appeal along with a notice pursuant to Supreme Court Rule 19, challenging the constitutionality of the statute. Ill. S. Ct. R. 19 (eff. Sept. 1, 2006).

¶ 12 ANALYSIS

¶ 13 On appeal, Daniel requests this court to reverse the trial court's ruling allowing Sara's request for a directed verdict and finding in her favor at the close of Daniel's case. Daniel contends the trial court erroneously applied the 2014 version of section 6.5 of the Parentage Act (750 ILCS 45/6.5(a)(2) (West 2014)) to determine the outcome of his 2013 request for visitation

by issuing a directed finding in favor of Sara. Alternatively, Daniel submits, if this court determines that the 2014 version of the statute was correctly applied by the trial court, then the amendment itself violates the equal protection clauses of both the United States and Illinois constitutions because it is not gender neutral.

¶ 14 We review a trial court's decision on a motion for a directed verdict or finding *de novo. Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 24. Similarly, we review *de novo* whether an amendment to a statute will be applied prospectively or retroactively as a matter of statutory construction. *Deicke Center v. Illinois Health Facilities Planning Board*, 389 Ill. App. 3d 300, 303 (2009).

¶ 15 The amendment to section 6.5 of the Parentage Act was approved by the legislature on August 16, 2013, and the language of the statute provides the amendment became "Effective: January 1, 2014." Thus, Daniel initiated his request for visitation when the previous version of section 6.5 was in effect. However, the amended statute became effective prior to the contested hearing on the issue of visitation, which took place before the trial court on June 4, 2014.

¶ 16 Where the legislature has not specified whether a statute is to be applied retroactively, as in this case, Illinois law provides that any amendments to the statute that are procedural may be applied retroactively, while those that are substantive may not. 5 ILCS 70/4 (West 2014); *Deicke Center*, 389 Ill. App. 3d at 303; *People v. Atkins*, 217 Ill. 2d 66, 72 (2005). The case law provides that a statutory amendment is substantive when it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Caveney v. Bower*, 207 Ill. 2d 82, 91 (2003). Consequently, we begin by examining the difference in the language of both versions of the statute.

¶ 17 In this case, when Daniel filed his initial "Petition for Visitation" on November 8, 2013, the language of section 6.5 of the Parentage Act provided:

> "§ 6.5 Custody or visitation by sex offender prohibited.
>
> (a) A person found to be the father of a child under this Act, and who has been *convicted of* or who has *pled guilty to* a violation of Section 11-11 (sexual relations within families), Section 12-13 (criminal sexual assault), Section 12-14 (aggravated criminal sexual assault), Section 12-14.1 (predatory criminal sexual assault of a child), Section 12-15 (criminal sexual abuse), or Section 12-16 (aggravated criminal sexual abuse) of the Criminal Code of 1961 for his conduct in fathering that child, shall not be entitled to custody of or visitation with that child without the consent of the mother or guardian." (Emphasis added.) 750 ILCS 45/6.5 (a) (West 2008).

¶ 18 In contrast, the language of the amended version of the statute that went into effect on January 1, 2014, and before the date of the visitation hearing, provided:

> "§ 6.5 Custody or visitation prohibited to men who father through sexual assault or sexual abuse.
>
> (a) This Section applies to a person who has been found to be the father of a child under this Act and who:
>
> (1) has been convicted of or who has pled guilty or nolo contendere to a violation of Section 11-1.20 (criminal sexual assault), Section 11-1.30 (aggravated criminal sexual assault), Section 11-1.40 (predatory criminal sexual assault of a child), Section 11-1.50 (criminal sexual abuse), Section 11-1.60 (aggravated criminal sexual abuse), Section 11-11 (sexual relations within families), Section 12-13 (criminal sexual assault), Section 12-14 (aggravated criminal sexual assault), Section 12-14.1

(predatory criminal sexual assault of a child), Section 12-15 (criminal sexual abuse), or Section 12-16 (aggravated criminal sexual abuse) of the Criminal Code of 1961 or the Criminal Code of 2012, or a similar statute in another jurisdiction, for his conduct in fathering that child; or

(2) at a fact-finding hearing, is found by clear and convincing evidence to have committed an act of non-consensual sexual penetration for his conduct in fathering that child.

(b) A person described in subsection (a) shall not be entitled to custody of or visitation with that child without the consent of the child's mother or guardian." (Emphasis added.) 750 ILCS 45/6.5 (West 2014).

¶ 19 A comparison of both versions of section 6.5 of the Parentage Act reveals that the amended version *added* a provision which substantively *reduced* the burden of proof necessary to defeat a father's request for visitation in the absence of a criminal conviction based on proof less than beyond a reasonable doubt concerning the circumstances of conception. This new provision allowed proof by "clear and convincing evidence" and broadened the category of fathers who could be prohibited from exercising visitation when a mother refused to consent to a father's request. The newly-broadened category of non-convicted fathers affected by the amendment now included Daniel.

¶ 20 Applying the 2013 version of the statute, we note the trial court could not have properly granted the directed finding in favor of Sara since it was undisputed that Daniel had not been convicted of one of the criminal offenses enumerated in the version of section 6.5 of the Parentage Act effective in 2013. Based on this fact, we conclude the amended 2014 version of the statute substantively altered Daniel's ability, as a non-

convicted father, to have the trial court determine whether visitation would be in the child's best interests on the merits of petition for visitation. Therefore, we conclude the amended statute was not simply procedural. Here, the 2014 version of the statute included substantive changes, which the trial court should not have retroactively applied to defeat Daniel's 2013 petition for court-ordered visitation by directed finding before reaching the merits of the child's best interests.[4]

¶ 21 For these reasons, we reverse the trial court's decision granting a directed finding in favor of Sara and denying Daniel visitation with his child. The matter is remanded for further proceedings regarding whether it is in A.W.'s best interest to have scheduled visitation with her father. Since we have decided the matter on these grounds, we find it unnecessary to reach the constitutionality of the statute.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Fulton County is reversed and remanded.

¶ 24 Reversed and remanded.

[4] These visitation rights arose out of Daniel's unchallenged VAP and both parents' judicial admissions as to Daniel's paternity on December 1, 2008, when the first court order was entered in the instant case. See *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1111-12 (2008).