2015 IL App (5th) 140581-U

NO. 5-14-0581

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re PATERNITY OF A.B., a Minor	)	Appeal from the
	)	Circuit Court of
(Tim Mathews,	)	Williamson County.
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 13-F-128
	)	
Amy Clark,	)	Honorable
	)	Brian D. Lewis,
Respondent-Appellee).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing counts II, III, and IV based upon common law contract theories because petitioner lacks standing.

¶ 2 Petitioner, Timothy Mathews, sought a declaration of parentage, visitation, and child support with regard to A.B., the biological daughter of respondent, Amy Clark. Petitioner and respondent were involved in a romantic relationship for approximately six to eight months prior to A.B.'s birth on May 13, 2004, and approximately 18 months after A.B.'s birth. After the parties broke up, they orally agreed to visitation and child support, and A.B. considered petitioner her father until approximately May 26, 2013, when

respondent told A.B. that petitioner was not her father. In response to the petition to establish paternity, visitation, and support, respondent filed a motion to dismiss counts II, III, and IV brought under common law contract theories of promissory estoppel, fraud, and equitable estoppel respectively. Attached to respondent's motion was an affidavit in which she asserted petitioner was aware A.B. was not his daughter soon after A.B.'s birth when a fight ensued because respondent failed to put his name on A.B.'s birth certificate. During this litigation, DNA testing confirmed that petitioner is not the biological father of A.B. Count I, the paternity count, was denied. Petitioner now appeals from an order of the circuit court of Williamson County granting respondent's motion to dismiss counts II, III, and IV. The issue on appeal is whether the trial court erred in granting respondent's motion to dismiss without an evidentiary hearing. We affirm.

¶ 3 BACKGROUND

¶ 4 On August 16, 2013, petitioner filed a petition to establish paternity, visitation, and child support with regard to A.B. Petitioner claimed he has had regular visitation and provided regular support of A.B. since her birth in 2004. He asserted he was present at the hospital to witness A.B.'s birth, and after her birth, he and respondent continued to reside together in a committed, romantic relationship for 18 months. Following the parties' breakup, they orally agreed to visitation and support and continued to coparent, A.B. called petitioner "dad," petitioner's parents considered A.B. their granddaughter, and respondent encouraged and facilitated both petitioner's relationship as well as his parents' relationship with A.B. Petitioner alleged that prior to and following A.B.'s birth respondent told him he was A.B.'s father. However, on May 26, 2013, respondent

informed A.B. that petitioner is not her father. On May 27, 2013, respondent informed petitioner he is not A.B.'s father.

¶ 5 On August 16, 2013, petitioner filed a petition to establish paternity, visitation, and child support. In count I, petitioner sought a declaration of paternity and an order granting him visitation and setting child support. Count II (promissory estoppel), count III (fraud), and count IV (equitable estoppel) each prayed for relief in the form of an order establishing a parental relationship between petitioner and A.B. and visitation. The fraud and equitable estoppel counts also sought reimbursement for past financial support petitioner paid to respondent on behalf of A.B. and attorney fees and costs if DNA testing showed that petitioner was not, in fact, the biological father.

¶ 6 In response to the petition, respondent filed a motion to dismiss counts II, III, and IV. Respondent asserted that although count II attempted to state a cause of action in promissory estoppel, it was merely a request for a paternity determination, and petitioner has no standing to bring the action because he is not the biological father, a fact he was aware of prior to A.B.'s birth. With regard to count III, respondent alleged no action for fraud could lie because petitioner was advised he was not the father early in A.B.'s life, and any action he took thereafter "was of his own volition and he bears the expense he sustained in choosing to interact with a child who had no biological relationship with him." As to count IV, respondent asserted that although it attempted to state a cause of action for equitable estoppel, it too was merely a request for a paternity determination, which petitioner did not have standing to bring and was "vague, uncertain and does not state a cause of action."

¶ 7 Respondent attached a notarized affidavit to her motion to dismiss in which she said if she was called to testify she would testify petitioner is not the biological father of A.B. and that in May or June 2004, petitioner stated to her grandmother, "I know she is not my biological daughter but I have bonded with her and she is like mine." Respondent would also testify that she and petitioner had a fight on May 17, 2004, because she did not put petitioner's name on A.B.'s birth certificate. She explained, "My mother came over shortly thereafter and asked why we were fighting and I explained that I could not do that because he was not the father." Respondent said petitioner was present for the conversation between her and her mother. Respondent would further testify her friend, Kendra Cagle, was present at her apartment around September 2003, when respondent first learned she was pregnant. She and petitioner were no longer dating, but petitioner stopped by her apartment and she told him in front of Cagle who the father was, and it was not him.

¶ 8 A paternity test conducted in December 2013 eliminated petitioner as the biological father of A.B. The trial court heard arguments on respondent's motion to dismiss, after which it entered an order dismissing counts II, III, and IV. The trial court found it did not matter whether respondent's motion to dismiss was brought pursuant to section 2-615 or 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2012)) because the real issue was whether petitioner had standing to bring an action when he is not the biological parent of A.B. The trial court found petitioner without standing. Petitioner filed a timely notice of appeal; however, this court dismissed for lack of jurisdiction because the order was not final and appealable as count I remained

unresolved. Petitioner then filed a motion asking the trial court for a ruling on count I of his petition. Ultimately, the trial court denied count I and confirmed its ruling dismissing counts II, III, and IV. Petitioner now appeals from the order dismissing counts II, III, and IV without an evidentiary hearing.

¶ 9 ANALYSIS

¶ 10 The issue raised on appeal is whether the trial court erred in granting respondent's motion to dismiss without an evidentiary hearing. Petitioner contends he failed to present counteraffidavits to respondent's affidavit because he believed he was responding to a section 2-615 motion rather than a section 2-619 motion on affirmative matters. Petitioner insists the trial court erred in granting respondent's motion to dismiss without an evidentiary hearing because it denied him the opportunity to present evidence under the three common law theories alleged in his complaint and, given the opportunity to present evidence, the evidence would show it was in A.B.'s best interest to have him as a part of her life. Petitioner asks us to reverse and remand with instructions to conduct a best interest hearing regarding his visitation rights or an evidentiary hearing regarding standing. Respondent replies that the trial court correctly dismissed both estoppel counts and the fraud count for lack of standing after DNA testing conclusively showed that petitioner is not the biological father of A.B. We agree with respondent.

¶ 11 Because no evidence was presented, the standing issue presented here is purely a question of law, which we review *de novo*. See *In re Avery S.*, 2012 IL App (5th) 100565, ¶ 13, 972 N.E.2d 295. Section 601(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) provides that a custody proceeding may be commenced

by a parent (750 ILCS 5/601(b)(1) (West 2012)) or "by a person other than a parent *** but only if [the child] is not in the physical custody of one of his parents" (750 ILCS 5/601(b)(2) (West 2012)). Our supreme court has interpreted section 601(b)(2) as a standing requirement. *In re R.L.S.*, 218 Ill. 2d 428, 434-35, 844 N.E.2d 22, 27 (2006). While the Dissolution Act does not define the term "parent," the Illinois Parentage Act of 1984 (Parentage Act) establishes a "statutory mechanism that serves to legally establish parent and child relationships in Illinois." (Internal quotation marks omitted.) *J.S.A. v. M.H.*, 224 Ill.2d 182, 198, 863 N.E.2d 236, 245-46 (2007). Section 2 of the Parentage Act provides that a " 'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." 750 ILCS 45/2 (West 2012). In the context of a nonparent seeking custody, such as we have here, the threshold issue the trial court must decide before proceeding to a best interests determination is standing. *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917, 892 N.E.2d 1092, 1096 (2008).

¶ 12 Section 601(b)(2)'s requirement that nonparents are allowed to seek custody "*only if* [the child] is not in the physical custody of one of his parents" prevents unconstitutional state interference with parents' fundamental liberty interests unless interference is necessary to protect the health, safety, and welfare of the child. (Emphasis added.) 750 ILCS 5/601(b)(2) (West 2012); see *Wickham v. Byrne*, 199 Ill. 2d 309, 316-17, 769 N.E.2d 1, 5-6 (2002). Here, A.B. is in the physical custody of her mother, and petitioner is neither A.B.'s biological father nor her adoptive father. Nevertheless, petitioner asserts he has standing to bring an action to establish visitation with A.B. under common law

theories, arguing there has been a recent trend in Illinois to recognize such common law theories.

¶ 13 In support of his argument, petitioner relies on *Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868 (1996); *In re T.P.S.*, 2012 IL App (5th) 120176, 978 N.E.2d 1070; *In re Parentage of M.J.*, 203 Ill. 2d 526, 787 N.E.2d 144 (2003); and *DeHart v. DeHart*, 2013 IL 114137, 986 N.E.2d 85. However, all are distinguishable from the instant case.

¶ 14 For example, *M.J.* and *T.P.S.* are distinguishable because those cases involved children conceived by artificial insemination, and in both of those cases the courts expressly limited their holdings to cases involving children conceived by artificial insemination. *M.J.*, 203 Ill. 2d at 541-42, 787 N.E.2d at 152; *T.P.S.*, 2012 IL App (5th) 120176, ¶ 23, 978 N.E.2d 1070. *M.J.* recognized that the Illinois Parentage Act is unique because it confers the status of a legal parent on a husband consenting to the artificial insemination of his wife, noting that "section 3(a) provides for the establishment of a parent-child relationship by consent." *M.J.*, 203 Ill. 2d at 535, 787 N.E.2d at 149. Section 3(b) of the Illinois Parentage Act provides that the semen donor for the artificial insemination procedure "shall be treated in law as if he were not the natural father of a child thereby conceived." 750 ILCS 40/3(b) (West 2012); see *M.J.*, 203 Ill. 2d at 534, 787 N.E.2d at 148. In the instant case, A.B. was not conceived by artificial insemination, and the limited holdings of both cases do not apply here.

¶ 15 Likewise, *DeHart v. DeHart* is inapplicable because it involved an equitable adoption in the context of probate proceedings. For over 50 years, from the time the plaintiff was approximately two years old, the decedent proclaimed to the plaintiff and to

the world at large that he was his biological son. The decedent married the plaintiff's biological mother after she became pregnant out of wedlock in 1943. *DeHart*, 2013 IL 114137, ¶ 5, 986 N.E.2d 85. The decedent even gave the plaintiff a birth certificate indicating that the decedent was the plaintiff's father. *DeHart*, 2013 IL 114137, ¶ 3, 986 N.E.2d 85. When the plaintiff was 56, he acquired a certified copy of his birth certificate, which revealed decedent was not his biological father. When the plaintiff asked for an explanation, the decedent told him he married the plaintiff's mother and adopted him when he was two years old. The decedent continued to represent that the plaintiff was his son, and executed a will providing for the plaintiff. *DeHart*, 2013 IL 114137, ¶ 7, 986 N.E.2d 85. When decedent was 83, he met and married the defendant, who was almost 30 years younger, and subsequently signed a will in which he stated he had no children and bequeathed nothing to the plaintiff. *DeHart*, 2013 IL 114137, ¶¶ 8- 9, 986 N.E.2d 85. While our supreme court recognized an equitable adoption theory in that case, the unique facts and limited holding of that case make it inapplicable to the instant case. We agree with our colleagues in the First District that "equitable adoption is a concept in probate to determine inheritance and should have no application in the context of statutory proceedings of adoption, divorce proceedings, or parentage." *In re Marriage of Mancine*, 2014 IL App (1st) 111138-B, ¶ 2, 9 N.E.3d 550. Thus, we find petitioner's reliance on *DeHart* misplaced.

¶ 16 In *Koelle*, the biological mother defendant deceived the nonparent plaintiff for over eight years by telling him he was the biological father when, in fact, he was not, and in reliance thereon the plaintiff acted as the child's father. *Koelle*, 284 Ill. App. 3d at 781-

82, 672 N.E.2d at 870-71. The defendant was 20 years older than the plaintiff and was a maternal figure to the plaintiff due to the fact that she lived with the plaintiff's father in a romantic relationship during the plaintiff's adolescence. *Koelle*, 284 Ill. App. 3d at 780-81, 672 N.E.2d at 870. The parties had a sexual encounter initiated by the defendant when the plaintiff was 21 after the defendant supplied the plaintiff with tequila and told him she was unable to get pregnant. *Koelle*, 284 Ill. App. 3d at 781, 672 N.E.2d at 870. The actual father of the child was a wealthy married man and a client of the biological mother's advertising agency. *Koelle*, 284 Ill. App. 3d at 781, 672 N.E.2d at 870. When the plaintiff learned he was not the father of the "tequila baby," as the defendant referred to her child, he filed suit, seeking intentional infliction of emotional distress and visitation based upon equitable principles.

¶ 17 While our colleagues in the First District found that "awarding custody or visitation rights to a nonparent over the objection of a natural parent is permissible if it would be in the best interests of the child" (*Koelle*, 284 Ill. App. 3d at 784, 672 N.E.2d at 872) we point out that case was decided before *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, the Supreme Court held that parents have the fundamental right to make decisions regarding the care, custody, and control of their children. *Troxel*, 530 U.S. at 65-66. Since then, our supreme court has abrogated a line of pre-*Troxel* cases that held a fit parent's custody rights are subservient to the child's best interests. *In re R.L.S.*, 218 Ill. 2d at 447-48, 844 N.E.2d at 34. Furthermore, we point out that the egregious facts of *Koelle* are not present in the instant case.

¶ 18 Here, the parties were in a committed, romantic relationship, but the relationship deteriorated and the parties stopped living together when A.B. was approximately 18 months old. Petitioner did not adopt A.B., nor did he seek an order declaring him the father until now. Respondent never sought a court order for support, nor did she bind petitioner to support by any deceptive means. Petitioner's name was not placed on the birth certificate, and, according to the affidavit filed by respondent, this caused a fight. Respondent told petitioner he was not the father of A.B. in the presence of a witness both before and after A.B.'s birth. Petitioner did not file a rebuttal affidavit.

¶ 19 Under these circumstances, we find the trial court's dismissal of counts II, III, and IV proper. As discussed, the cases relied on by petitioner are all distinguishable and have no bearing on petitioner's claims. While we cannot help but be concerned about the effect of learning petitioner is not her father will have on A.B., we agree with the trial court that recognizing petitioner's common law contract claims of promissory estoppel, fraud, and equitable estoppel would allow him to circumvent the statutory standing requirements. Furthermore, we agree with respondent that to confer standing on petitioner would have far-reaching implications. As the law stands in Illinois, the decision of whether petitioner's relationship with A.B. would be in A.B.'s best interest is for the respondent to make as a fit parent, not a court. Under the facts of this case, petitioner has failed to convince us that the law should be expanded to confer standing on him.

¶ 20 For the foregoing reasons, we affirm the trial court's dismissals of counts II, III, and IV.

¶ 21 Affirmed.