FOURTH DIVISION
January 19, 2012

No. 1-11-1097

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK PAVIA, Petitioner-Appellant, v. LINDA SUE MARSHALL a/k/a LINDA SUE TOWNSEND, Respondent-Appellee,	))))))))))	Appeal from the Circuit Court of Cook County, Illinois, Domestic Relations Division. No. 93 D 79511 Honorable Martha A. Mills, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices PUCINSKI and STERBA concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when as part of its order denying the alleged biological child's motion to vacate a non-paternity order entered in 1993, it found that at the time the order was entered, the child was neither a party to the action, nor represented in the action.

¶ 2 In 1993, petitioner-appellant, Patrick Pavia (hereinafter Patrick) obtained an order of non-parentage as to the minor child, Destinee Grace Pavia (hereinafter Destinee), born to the respondent-appellee, Linda Sue Marshall a/k/a Linda Sue Townsend (hereinafter Linda). Patrick

died in a car accident on October 2008, and his brother Allen Pavia (hereinafter Allen) was named as the administrator of Patrick's estate. A year after Patrick's death, Destinee, now an adult, filed a motion to vacate the non-parentage order. The circuit court denied Destinee's motion. In doing so, however, it specifically found that Destinee was neither a party to nor represented in any way in the non-paternity action at the time the non-parentage order was entered. Allen appeals the circuit court order, even though it was entered in his favor, contesting that part of the court's order finding that "Destinee was not party to the non-parentage order." For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following undisputed facts and procedural history. Linda gave birth to Destinee on June 11, 1991, in DuPage County, Illinois. On June 11, 1993, Patrick filed a petition to establish non-parentage and other relief, naming Linda as the only respondent and alleging that he was not Destinee's biological father. On September 9, 1993, Patrick filed a motion for default judgment, alleging that on July 27, 1993, Linda was "personally served" with a summons and his petition seeking to establish non-parentage, but failed to file an appearance or respond to that petition. In support of his motion seeking default judgment, Patrick attached a copy of the parentage summons entered by the clerk of the circuit court on June 11, 1993. This document was signed by Deputy Sheriff Randy Joyner, and revealed that Deputy Joyner served Linda with the summons on July 27, 1993.

¶ 5 On December 14, 1993, the circuit court entered a default judgment of non-paternity in the cause, specifically adjudging Patrick not to be Destinee's natural father. In that order, the

circuit court also instructed that the order be sent to Linda by certified mail within 13 days. This order remained unchallenged for over 15 years.

¶ 6 On October 9, 2008, Patrick died in an automobile accident. He died without any testamentary documents, and as such, on October 30, 2008, his brother, Allen, was named as independent administrator of Patrick's estate. On November 5, 2008, the circuit court entered an order declaring heirship in the probate proceedings, naming Geraldine Pavia, Patrick's mother, and Allen and Michael Pavia, Patrick's brothers, and his heirs.

¶ 7 On November 13, 2009, Destinee filed a motion to vacate the December 14, 1993, default non-paternity order. In that motion, Destinee contended that the default order was invalid on two grounds. First, she argued that the court did not have jurisdiction to enter the default judgment of non-paternity against her because pursuant to section 36/201 of the Uniform Child-Custody Jurisdiction and Enforcement Act (750 ILCS 36/201 (West 1992)), only that state which is the child's home state within six months immediately before the commencement of a parentage action has exclusive jurisdiction.[1] In her motion, Destinee alleged that on June 11,

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[1]That section reads in pertinent part:
"§ 201. Initial Child-Custody Jurisdiction.
(a) Except as otherwise provided in Section 204, a court of this State has jurisdiction to make an initial child-custody determination only if:
(1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
(2) a court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under Section 207 or 208, and:
(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State

1992, her mother, Linda, moved her to Stanton, Tennessee, and that between 1992 and 1994, when the non-paternity action was commenced and the default judgment entered, she lived in Tennessee. Destinee therefore argued that Tennessee, and not Illinois, had exclusive jurisdiction to determine Patrick's paternity. In support of this argument, Destinee attached a sworn affidavit by Linda attesting to the fact that she moved to Tennessee with Destinee "with the intent to make it [their] fixed and permanent home sometime before Destinee's first birthday on June 11, 1992," and that the state of Tennessee remained Destinee's and Linda's domicile between June 11, 1992, until Destinee was approximately five years old.

¶ 8 Second, in her motion to vacate, Destinee further argued that the default order was invalid as to her because Patrick had failed to name her as a respondent or third-party to his petition for non-parentage. Moreover, Destinee argued that because in the non-paternity action, her interests and that of her mother were not the same, the circuit court should have appointed a guardian *ad litem* to represent her. Since no guardian *ad litem* was appointed, Destinee

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other than mere physical presence; and
(B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under Section 207 or 208; or
(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).
(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.
(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination." 750 ILCS 36/201 (West 1992).

contended, her interests were not represented in the non-paternity action, and the default order of non-paternity should not be applicable to her.

¶ 9 On December 14, 2009, Allen filed a motion to strike and dismiss Destinee's motion to vacate the default order arguing that it was insufficient in law pursuant to circuit court Rule 13.4(d)(i)(B), which requires petitions to be verified and to state with specificity the statute or authority relied upon for the relief sought.

¶ 10 In response, on February 23, 2010, Destinee's attorney filed an amended motion to vacate the default order, reiterating the arguments raised in the original motion to vacate but containing a specific reference to section 2-1401 of the Illinois Code of Civil Procedure (Code of Civil Procedure) (735 ILCS 5/2-1401 (West 2008)) as the statutory basis of Destinee's motion to vacate the default order.

¶ 11 On May 26, 2010, Allen filed a combined motion to dismiss (735 ILCS 5/2.619.1 (West 2008)) Destinee's amended motion to vacate. Allen argued that Destinee failed to comply with section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)), since her motion to vacate failed to meet the necessary factual and legal hurdles for vacating an order entered more than two years after its original entry. In addition, Allen argued that the facts alleged by Destinee's pleading affirmatively disproved that Destinee or Linda exercised due diligence in objecting to the non-paternity order.

¶ 12 Destinee responded to this motion by arguing that her motion was sufficient in law and fact, reiterating that the default order was invalid because she was never named a party to the non-paternity litigation, and because here interests in that proceeding were different from Linda's

and were not represented. In addition, Destinee contended that she could not have acted "more diligently" in pursuing the motion to vacate the non-paternity order because, at the time that order was entered, she was only two-years old, lived in a different state, and was not represented by a guardian *ad litem*.

¶ 13 On October 13, 2010, the circuit court entered a written order denying Destinee's motion to vacate the non-paternity default judgment order. In doing so, the court found that the order "was valid when entered, and remains a valid order as to Linda."[2] The court, however, also found that "Destin[ee] was neither a party to nor represented in any way in this action at the time of the entry of the default or non-parentage orders in 1993."

¶ 14 On November 12, 2010, Allen filed a motion to reconsider, asking the court to vacate that portion of its order, finding that Destinee was not a party to, nor represented in the non-parentage action. Allen argued that these findings were not relevant to the issues presented to the court and that the court had no basis for making such findings as no evidentiary hearing was ever conducted. Allen further argued that, if permitted to stand, Destinee could use these findings in filing a petition for parentage in the probate division. The circuit court disagreed and denied Allen's motion to reconsider and vacate that portion of its findings. Allen now appeals the denial of his motion to reconsider.

¶ 15 II. ANALYSIS

[2]The parties appear to be in disagreement as to whether a hearing was held on this matter. The record reveals that the matter was last continued on September 21, 2010, with a hearing on petitioner's motion to strike tentatively set for October 25, 2010 at 1:30 p.m. The written order denying Destinee's motion to vacate the non-paternity order, however was entered on October 13, 2010.

¶ 16 Our standard of review with respect to the denial of a motion to reconsidered is well-settled. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law. [Citation.]" *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 96 (2004). Therefore, generally a motion to reconsider is "addressed to the trial court's sound discretion." *Duresa*, 348 Ill. App. 3d at 96. However, where, as here, no new facts or changes in law are alleged, and the motion to reconsider raises only the question of whether the trial court erred in its previous application of existing law, we review the denial of such a motion *de novo*. *Duresa*, 348 Ill. App. 3d at 96; see also *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 433 (2005) ("The standard of review for *** a motion to reconsider that only asks a court to consider again its application of the law to the case as it existed at the time of judgment, is *de novo*"); see also *River Village I, LLC v. Central Ins. Companies*, 396 Ill. App. 3d 480, 492 (2009); *Compton v. Country Mutual Insurance Co.*, 382 Ill. App.3d 323, 330 (2008) (the *de novo* standard applies when the denial of a motion to reconsider is based on the trial court's application of existing law); *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002) ("the standard used to review the trial court's application of existing law, namely, its application of law to the facts presented, always remains *de novo*"); *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 577 (2000) (" 'a motion to reconsider *** [that] raises the question of whether the judge erred in his previous application of existing law *** is not reviewed under an abuse-of-discretion standard.' [Citation.] As with any question regarding the application of existing law, we review the denial

of such a motion *de novo*").

¶ 17 In the present case, Allen challenges only the circuit court's finding that Destinee was not a party to, nor represented in the non-paternity action at the time the default order of non-paternity was entered. He contends that the non-paternity default order should equally apply to Linda and Destinee. Allen points out that Destinee was represented in the non-paternity proceedings by her legal guardian, Linda, and that therefore under the Illinois Parentage Act of 1984 (the Parentage Act) (750 ILCS 45/7(c) (West 2002)), the appointment of a guardian *ad litem* was unnecessary to make Destinee a party to the proceedings, or to make the default order applicable to her. We disagree.

¶ 18 We initially acknowledge that Allen is correct that the Parentage Act does not require the appointment of a guardian *ad litem*. The statute specifically provides that "[i]f any party is a minor, he or she *may* be represented by his or her general guardian or a guardian *ad litem* appointed by the court." (Emphasis added.) 750 ILCS 45/7(c) (West 2002).

¶ 19 However, our courts have repeatedly held that in the context of paternity actions, where the interests of the parent and the child are not aligned, it is the better practice for the court to appoint a guardian *ad litem* to ensure that the minor's interests are represented. See e.g., *Madji v. Palmer*, 175 Ill. App. 3d 679, 685 (1988) (citing *Roth v. Roth*, 52 Ill. App. 3d 220, 226 (1977) ("Where a trial court has notice that a minor's interests are not properly represented, it is the duty of the trial court to appoint a guardian *ad litem* to safeguard and protect those interests"); *Mcdonlad v. McGowan*, 163 Ill. App. 3d 697 (1987) (holding that appointment of guardian *ad litem* was proper since "there [wa]s a potential conflict" between the putative father's interests

and those of the minor); *C.f. In re marriage of Nienhouse*, 355 Ill. App. 3d 146, 152 (2004) (holding that appointment of guardian ad litem was not necessary because, *inter alia*, "the trial court had no notice that the minor's interests were not properly represented").

¶ 20 In the present case, the record is undisputed that Destinee was not a party to the non-paternity litigation. Patrick's petition for non-paternity did not name Destinee as a party, but rather named only Linda as the respondent. The subsequent summons were served only upon Linda, and the non-paternity order was entered by default only after Linda failed to respond to it. That order, too, nowhere named Destinee as either a party to or respondent in the action.

¶ 21 Moreover, since Linda did not challenge the non-paternity petition, the circuit court properly concluded that her interests and that of Destinee were not aligned, since by her silence, Linda, either consciously or inadvertently, chose to forego Destinee's statutory right to her putative father's physical, emotional and financial support. In coming to this conclusion, we find the decisions in *Liesman*, 218 Ill. App. 3d 427 (1991) and *In re M. M.*, 416 Ill. App. 3d 416, 422 (2010), instructive.

¶ 22 In *Liesman*, the appellate court held that a minor was not barred from bringing a paternity action where his mother had previously brought a paternity action that was dismissed by the circuit court with prejudice. Central to the *Liesman* holding was its determination that there was no privity between the child and his mother in the earlier action because the child was not named as a party and because of the differing interests of the child and the unwed mother. See *Liesman*, 218 Ill. App.3d at 441. The *Liesman* court pointed out that the public policy of the Parentage Act is to recognize " 'the right of every child to the physical, mental, emotional and monetary

support of his or her parents.' " *Liesman*, 218 Ill. App. 3d at 440 (quoting Ill. Rev. Stat.1989, ch. 40, par. 2501.1.) The *Liesman* court further explained that this policy would be frustrated if the child was construed as a party in a proceeding in which the child was not definitely of record, and that such a finding of privity would undermine "the child's express statutory right to independently seek a determination of paternity." *Liesman*, 218 Ill. App.3d at 440.

¶ 23 Similarly, in *In re M. M.*, 416 Ill. App. 3d 416, 422 (2010),[3] our appellate court recently held that a minor was not estopped from challenging the putative father's paternity even though her mother was present when the putative father admitted his paternity, since at the time, she was not being represented by a guardian *ad litem.* *In re M.M.*, 401 Ill. App. 3d at 422. In that case, the minor child sought to challenge the paternity of a man who signed both a voluntary acknowledgment of paternity and her birth certificate, but was later found not to be her biological father based upon DNA testing results. *In re M.M.*, 401 Ill. App. 3d at 422. The presumed father argued that the child was estopped from brining the action to declare the nonexistence of their relationship because the child's mother was present at the time he signed both the voluntary acknowledgment of paternity and the birth certificate. *In re M.M.*, 401 Ill. App. 3d at 422. The minor, on the other hand, argued that she was neither a party to nor in

[3]Procedurally we note that this cause arose out of the State's petition for the adjudication of wardship of the minor based upon allegations that the minor was abused or neglected by her biological parents. *In re M. M.*, 416 Ill. App. 3d 417. After DNA testing established that the presumed father was not the biological father, the guardian *ad litem* filed a complaint for declaration of nonpaternity to be consolidated with the pending petition for adjudication of wardship. *In re M. M.*, 416 Ill. App. 3d 417. After entertaining arguments on the guardian ad litem's request, the circuit court first found that the child had standing to bring the complaint and then entered an order of non-paternity. *In re M. M.*, 416 Ill. App. 3d 417. The putative father appealed. *In re M. M.*, 416 Ill. App. 3d 417.

privity with either the presumed father or her biological mother in the "cause of action," and was therefore not barred from challenging that judgment. *In re M.M.*, 401 Ill. App. 3d at 422. The appellate court agreed with the minor and found that she was not a party to the signing of the voluntary acknowledgment of paternity. *In re M.M.*, 401 Ill. App. 3d at 422. The appellate court specifically noted that the minor was not represented by a guardian *ad litem* at the time of the signing and recognized "the differing interest of the minor and the mother" in a parentage case. *In re M.M.*, 401 Ill. App. 3d at 422. Accordingly, the court found that because the minor was not represented by the guardian *ad litem* when the mother and the presumptive father signed the voluntary acknowledgment of paternity she was not in privity with them and therefore was not estopped from challenging the putative father's paternity. *In re M.M.*, 401 Ill. App. 3d at 422.

¶ 24 Just as in *Liesman*, and *In re M.M.*, here, the circuit court properly concluded that Destinee was neither a named, nor represented, party in the non-parentage action since her interests and those of her mother were not aligned. As already noted above, Linda's inaction, *i.e.*, her decision not to respond or challenge Patrick's petition to establish non-parentage, deprived Destinee of her statutory right to the emotional, physical and monetary support of her putative father. See *Liesman*, 218 Ill. App. 3d at 440. Accordingly, the circuit court properly concluded that without the benefit of a guardian *ad litem*, Destinee's interests were not represented in the non-paternity proceedings, and the default judgment order of non-paternity was inapplicable as to her.

¶ 25 For the reasons articulated above, we affirm the judgment of the circuit court.

¶ 26 Affirmed.