2023 IL App (4th) 220537

NO. 4-22-0537

FILED
February 17, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re J.M., a Minor-Appellant	)	Appeal from the Circuit Court of Tazewell County No. 21JA34
(The People of the State of Illinois, Petitioner-Appellee, v. Jessa R. and Skyllar M., Respondents-Appellees).	)	Honorable David A. Brown, Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Turner and Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 During proceedings to adjudicate the minor, J.M., neglected, J.M.'s guardian *ad litem* (GAL) filed a "Petition to Declare the Non-Existence of a Parent-Child Relationship" (disestablishment petition) pursuant to section 204(a)(1) of the Illinois Parentage Act of 2015 (Act) (750 ILCS 46/204(a)(1) (West 2020)). In this petition, the GAL sought to rebut the presumption that respondent, Skyllar M., was J.M.'s "parent." Skyllar was married to another woman, Jessa R., who is the biological mother of J.M. The trial court denied the petition, and the GAL appeals. The GAL contends that the court's prior adjudication of J.M.'s biological father as one of J.M.'s legal parents precluded the finding that Skyllar M. was his parent. We affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Jessa and Skyllar

¶ 4 Prior to Jessa's marriage to Skyllar in February 2020, Jessa had a child, K.P. In 2019, the Illinois Department of Children and Family Services (DCFS) took custody of K.P. due to bruising on "several parts" of K.P.'s body that was inflicted by "other than accidental means." (Skyllar later admitted to DCFS that she abused K.P.) After J.M. was born on January 28, 2021, DCFS took him into protective custody. On February 2, 2021, DCFS sought temporary custody and guardianship of J.M. At that temporary-custody hearing, Skyllar informed the court that J.M.'s birth resulted through artificial insemination. Skyllar also asserted she was J.M.'s "presumed parent" because she was legally married to Jessa. (Section 204(a)(1) of the Act (750 ILCS 46/204(a)(1) (West 2020)) provides that parentage is presumed if a "person" and the mother were married when the child was born.) On March 10, 2021, Jessa and Skyllar divorced, although DCFS reported that they remained together romantically.

¶ 5 B. Michael S.

¶ 6 At the temporary-custody hearing, Jessa named Michael S. as J.M.'s biological father, which DNA testing later confirmed. On January 19, 2022, over Skyllar's objection, the court entered a written order finding Michael to be J.M.'s "biological and legal" father. Skyllar did not appeal that order. (The appellate court was split on the issue of whether a parentage order by itself is appealable. See our discussion *infra* ¶ 17.) On April 13, 2022, Michael surrendered his parental rights.

¶ 7 C. Proceedings on the Disestablishment Petition

¶ 8 On January 13, 2022, the GAL filed the disestablishment petition based on the DNA results confirming that Michael was J.M.'s biological father. On April 12, 2022, Skyllar filed an answer asserting (1) she was J.M.'s presumed parent pursuant to the Act because she

was married to Jessa when J.M. was born, (2) the GAL was statutorily prohibited from using DNA findings to challenge Skyllar's status as a parent, (3) Michael was seeking to surrender his parental rights, and (4) J.M.'s best interests necessitated two parents. In reply, the GAL asserted, *inter alia*, that the trial court had found and incorporated into an order, since the filing of the disestablishment petition, that Michael was J.M.'s biological and legal parent. The GAL argued that a child can have only two parents.

¶ 9 At the hearing on the disestablishment petition, Skyllar's attorney made a proffer that, if Skyllar were called to testify, she would testify as follows:

> "[Skyllar] was legally married to [Jessa] and *** they decided they wanted to have a child, and *** they got in contact with a friend, [Michael]. [Michael] came to their residence. [Michael] provided a sample of his semen in a cup that was gathered by [Skyllar] and taken into a separate room [where] [Skyllar] implanted it in [Jessa] to conceive a child. There was no sex between [Jessa] and [Michael]. There was no intention between [*sic*] any of the three parties that [Michael] was to be a parent. All intention at that point *** between this legally married couple was that they would conceive a child together."

The parties accepted this proffer as evidence. Skyllar then argued that "this is *** a case of artificial insemination." Article 7 of the Act governs assisted reproduction and is hereinafter referred to as the "assisted-reproduction statute." See 750 ILCS 46/art. 7 (West 2020). Under that statute, Skyllar maintained that Michael, as a "donor," was not legally considered to be a parent.

¶ 10 On May 24, 2022, the trial court entered its written order agreeing with Skyllar. The court found (1) Jessa's pregnancy occurred through "assisted reproduction"; (2) Michael was a "donor"; (3) there was no written legal agreement among Michael, Skyllar, and Jessa;

(4) Skyllar was an "intended parent"; and (5) the court must determine parentage based on the parties' intentions at the time of Michael's donation. The court determined that "[u]nder the unique facts and circumstances presented by this case," Jessa and Skyllar "intended to create a child," and Michael "did not intend some type of parent-child relationship with the child." Accordingly, the court found the disestablishment petition "misplaced." The court opined that granting the petition would "undermine the purpose and intent of the legislature in creating the assisted reproduction" provisions of the Act and that every assisted reproduction would "potentially be at risk" of a declaration of non-parentage if the petition was granted.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Only the State (which was not a party to the disestablishment petition but is a party to the neglect proceedings) filed an appellee's brief. After this case was designated ready for decision, we discovered that the GAL inadvertently failed to give Skyllar and Jessa proper notice of the appellate proceedings. Accordingly, we ordered the GAL to serve notice on both parties, and then we entered a briefing schedule. Because neither Skyllar nor Jessa filed appellee's briefs after having received proper notice, and because the State agrees with the GAL's arguments, we will treat this appeal according to the standards set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). In *Talandis*, our supreme court provided three distinct, discretionary options a reviewing court has in the absence of an appellee's brief: (1) serve as an advocate for the appellee and decide the case when justice requires, (2) decide the merits of the appeal if the record is simple and the issues can be easily decided without the aid of an appellee's brief, or (3) reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error supported by the record. *Thomas v. Koe*, 395 Ill. App. 3d 570, 572-73 (2009).

Here, the record is simple, and we can decide the case without the aid of additional appellees' briefs.

¶ 14 Preliminarily, we address the timeliness of our decision. Although the subject of this appeal is the trial court's order denying the GAL's disestablishment petition, both the GAL and the State assert that this matter is accelerated pursuant to Illinois Supreme Court Rule 311(a) (eff. July 1, 2018) because the juvenile neglect proceeding involves child custody. Rule 311(a) provides, in pertinent part, that except for "good cause shown," the appellate court shall issue its decision within 150 days following the filing of the notice of appeal. Ill. S. Ct. R. 311(a) (eff. July 1, 2018). Here—if Rule 311(a) applies—the 150-day period to issue our decision expired on November 21, 2022. However, on November 4, 2022, this court ordered the GAL to file an amended docketing statement because the original docketing statement failed to advise all parties to the proceedings below of the appeal. The GAL filed an amended docketing statement on November 4, 2022. However, this court struck the amended docketing statement as noncompliant and ordered the GAL to file a second amended docketing statement. The second amended docketing statement was filed on November 10, 2022. This court then entered a briefing schedule. Briefing was completed on December 15, 2022, and oral argument was held on January 25, 2023. Thus, if Rule 311(a) is applicable, we find good cause for issuing our decision after the 150-day deadline.

¶ 15 The GAL and the State both contend that the trial court's finding that Michael was J.M.'s biological and legal father overcame the rebuttable presumption that Skyllar was J.M.'s parent. At oral argument, this court raised the issue of the State's standing, as the State was not a party to the disestablishment petition. The State argued that the trial court, without objection, allowed it to participate in the arguments below. The State then cited, with leave of

court, *In re N.C.*, 2014 IL 116532, as additional authority. In *N.C.*, our supreme court held that the State has standing to raise parentage issues in a neglect proceeding in the best interests of the minor. *N.C.*, 2014 IL 116532, ¶ 47.

¶ 16 A. Jurisdiction

¶ 17 Although neither party raises the issue, we have an independent duty to examine our jurisdiction. *In re Marriage of Gaudio*, 368 Ill. App. 3d 153, 156 (2006). The trial court denied the GAL's disestablishment petition, and the GAL filed a notice of appeal within 30 days but before the court adjudicated J.M. neglected and entered a dispositional order. The appellate court has held that a finding of parentage by itself is not a final and appealable order. *In re Marriage of Dee J.*, 2018 IL App (2d) 170532, ¶ 3; *Gay v. Dunlap*, 279 Ill. App. 3d 140, 144 (1996); *Baldassone v. Gorzelanczyk*, 282 Ill. App. 3d 330, 333 (1996). However, in *In re Armani S.*, 2020 IL App (1st) 200616, ¶ 20, which was an abuse-and-neglect proceeding, the court held that Illinois Supreme Court Rule 304(b)(1) (eff. Mar. 8, 2016) gives the reviewing court jurisdiction over such appeals. Rule 304(b)(1) provides that an order entered in a "guardianship or similar proceeding" that finally determines the right or status of a party is immediately appealable without a special finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). The court in *Armani S.* reasoned that an order finally determining the putative father's status was immediately appealable. *Armani S.*, 2020 IL App (1st) 200616, ¶ 20. The First District in *In re R.J.*, 2022 IL App (1st) 211542, ¶ 34, again opined that a determination of paternity of an alleged ward of the court during an abuse-and-neglect proceeding arises within a "guardianship" proceeding. Both the GAL and the State cite *Armani S.* in their jurisdictional statements.

¶ 18 In *Armani S.*, the order at issue concerned the parentage of the biological father, who was named during, and as part of, the juvenile court's neglect proceedings. *Armani S.*, 2020

IL App (1st) 200616, ¶¶ 8, 20. Here, the order at issue in our case was entered under the Act. Arguably, proceedings to disestablish parentage are separate from neglect proceedings. However, in *N.C.*, 2014 IL 116532, ¶ 45, our supreme court held that section 6-9(1) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/6-9(1) (West 2012)) contemplates the circuit court resolving parentage issues in neglect proceedings under the Juvenile Court Act. Specifically, the court held that a party's parentage can be challenged in a neglect proceeding brought under the Juvenile Court Act. *N.C.*, 2014 IL 116532, ¶ 70.

¶ 19 We elect to follow *Armani S.* In *Gay*, we held a paternity ruling is not final for purposes of appeal until the trial court has ruled on requested relief directly tied to a paternity finding, such as child support and birth expenses. *Gay*, 279 Ill. App. 3d at 144. *Gay* arose as an action for adjudication of paternity and child support. *Gay*, 279 Ill. App. 3d at 142. Thus, in *Gay*, the issue of guardianship of the minor was not involved. Here, guardianship and adjudication of wardship in DCFS was the relief sought by the neglect petition filed as the initial pleading in this case. Those issues underscore the urgency of a resolution of parentage.

¶ 20 B. Construction of the Act

¶ 21 To resolve the issue presented by this appeal, we must construe the Act. The primary rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature. *Village of Buffalo v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 591, 595 (1989). The court must give the statutory language its plain and ordinary meaning. *Village of Buffalo*, 180 Ill. App. 3d at 595. "If the language of the statute is plain, clear, and unambiguous, and if the legislative intent can be ascertained therefrom, it must prevail and will be given effect by the courts without resorting to other aids for construction." *Village of Buffalo*,

180 Ill. App. 3d at 595. Statutory construction presents a question of law for which our review is *de novo*. *Lucas v. Taylor,* 349 Ill. App. 3d 995, 999 (2004).

¶ 22 The Act governs the establishment of the parent-child relationship. *Armani S.*, 2020 IL App (1st) 200616, ¶ 34. Relevant to our facts, the following statutory provisions apply. Section 201(a)(1) of the Act (750 ILCS 46/201(a)(1) (West 2020)) provides that a parent-child relationship between a woman and a child is established by the woman giving birth to the child. Thus, Jessa is J.M.'s parent. Section 204(a)(1) (750 ILCS 46/204(a)(1) (West 2020)) provides that parentage is presumed if a "person" and the mother were married when the child was born. At the temporary-custody hearing, Skyllar explained to the trial court that she was legally married to Jessa when J.M. was born. Then, in response to the court's direction, Skyllar produced the marriage certificate. Thus, Skyllar was J.M.'s presumed parent.

¶ 23 After the DNA test confirmed Michael to be J.M.'s biological father, the GAL filed the disestablishment petition. Section 205 of the Act (750 ILCS 46/205 (West 2020)) sets forth a means to declare the nonexistence of a parent-child relationship, and subsection (a) provides that such an action may be brought by the "child" (750 ILCS 46/205(a) (West 2020)).

¶ 24 At the hearing on the disestablishment petition, Skyllar asserted that her parent-child relationship was governed by the assisted-reproduction statute. Pursuant to section 103(d) of the Act (750 ILCS 46/103(d) (West 2020)), "assisted reproduction" means a "method of achieving a pregnancy through an artificial insemination" but "does not include any pregnancy achieved through sexual intercourse."

¶ 25 Article 7 of the Act governs children of assisted reproduction. Section 702 (750 ILCS 46/702 (West 2020)) provides that, with exceptions inapplicable here, a "donor is not a parent of a child conceived by means of assisted reproduction." "Donor" is defined as an

"individual who participates in an assisted reproductive technology arrangement by providing gametes and relinquishes all rights and responsibilities to the gametes so that another individual or individuals may become the legal parent or parents of any resulting child." 750 ILCS 46/103(i) (West 2020). A "gamete" is either a sperm or an egg. 750 ILCS 46/103(k) (West 2020). Section 703(a) (750 ILCS 46/703(a) (West 2020)) provides that any individual who is an "intended parent," as defined by the Act, is the "legal parent" of any child resulting from assisted reproduction. Section 703(a) further provides that "if" the donor and the intended parent have been represented by independent counsel and have entered into a written legal agreement before artificial insemination occurs, in which the donor relinquishes all rights and responsibilities to the resulting child, the "intended parent" is the "parent" of the child. 750 ILCS 46/703(a) (West 2020). Section 103(m-5) (750 ILCS 46/103(m-5) (West 2020)) defines "intended parent" as a person "who enters into an assisted reproductive technology arrangement *** under which he or she will be the legal parent of the resulting child." Section 703(d) (750 ILCS 46/703(d) (West 2020)) provides that, if the donor and the intended parent did not have a written legal agreement prior to artificial insemination, a court of competent jurisdiction shall determine parentage "based on evidence of the parties' intent at the time of donation."

¶ 26 Here, the trial court found (1) the assisted-reproduction statute governs the parent-child relationship between Skyllar and J.M., (2) Michael was a "donor," and (3) Skyllar was an "intended parent." The court further found that the parties did not have a written agreement in which Michael relinquished all rights and responsibilities to any resulting child. Consequently, the court determined the facts surrounding J.M.'s conception based on Skyllar's attorney's offer of proof, which was accepted as evidence by the parties.

¶ 27 The difficulty, as the GAL and the State see it, is the trial court had already determined Michael to be J.M.'s biological and legal father. The State relies on *In re Parentage of John M.*, 212 Ill. 2d 253, 264 (2004), for the proposition that DNA results showing that the presumed father is not the biological father rebut the presumption of parentage. The State thus concludes that the DNA results showing Michael to be J.M.'s biological father overcame the presumption that Skyllar was J.M.'s parent. *John M.* is distinguishable. In *John M.*, the husband of the minor's biological mother sought to prevent a third party from establishing his parentage. *John M.*, 212 Ill. 2d at 256. *John M.* did not involve parentage through artificial insemination. The State also relies on *In re A.A.*, 2014 IL App (5th) 140252, ¶ 28, where the appellate court held that a presumption arising from a signed acknowledgement of paternity can be rebutted by DNA results establishing that another man is the child's biological father. *A.A.* is also distinguishable because the issue there did not involve artificial insemination. This distinction is crucial, because where a child is born to a woman in a same-sex marriage, a biological father will necessarily always be present. Where, as here, the pregnancy occurred by artificial insemination, the legislature intended parentage to be determined only under the assisted-reproduction statute. Section 701 (750 ILCS 46/701 (West 2020)) specifically provides that article 7 does not apply to the birth of a child conceived through sexual intercourse. The prior finding that Michael was the legal father cannot override the operation of the assisted-reproduction statute.

¶ 28 In denying the GAL's disestablishment petition, the trial court found the GAL's argument was "misplaced" because the court recognized that the assisted-reproduction statute, rather than other provisions of the Act, governed the issue of Skyllar's parentage. Another way of looking at the court's order is that the GAL failed to overcome the presumption that Skyllar

was J.M.'s parent where she was his intended parent under the assisted-reproduction statute. The issue is whether that finding is supported by the record.

¶ 29 There is no dispute that Jessa's pregnancy with J.M. resulted through artificial insemination rather than sexual intercourse. Because the parties did not have a written legal agreement in which Michael relinquished his rights to the resulting child, the trial court correctly determined parentage based on the parties' intent at the time of donation pursuant to section 703(d) of the assisted-reproduction statute. The GAL argues the court "had absolutely no evidence of [Michael's] intent at the time of the sperm donation." The GAL also asserts Michael's participation in the court proceedings never showed an intention not to be a father to J.M. We disagree. Skyllar's attorney made a proffer, which the parties accepted as evidence at the hearing on the disestablishment petition. That unrebutted evidence was that "[t]here was no intention between [*sic*] any of the three parties that [Michael] was to be a parent. All intention at that point *** between this legally married couple was that they would conceive a child together." Nothing in Michael's behavior during the proceedings contradicted this evidence. He submitted to DNA testing only in response to a court order and a contempt finding for failure to comply with that order. Once Michael was determined to be J.M.'s biological father, he surrendered his parental rights in open court. The GAL maintains that the record is silent regarding Michael's reasons for surrendering his parental rights, but that surrender is consistent with Skyllar's evidence that he did not intend to be a parent at the time of donation.

¶ 30 The GAL further argues that Skyllar never asserted her status as an intended parent under the assisted-reproduction statute, but that is incorrect. She informed the court at the temporary-custody hearing—her earliest opportunity to do so—that J.M. was born through artificial insemination, and she objected to the trial court's order finding Michael to be the

biological and legal father. (The State's assertion that Skyllar "remained silent" when the court asked if anyone objected to the order finding Michael to be the legal father is contradicted by the record. Skyllar's attorney objected on her behalf.) The GAL argues that Skyllar never appealed the order finding Michael to be the legal father. However, as noted, the appellate court districts were split as to whether such an order was appealable.

¶ 31 The State contends the trial court's findings under the assisted-reproduction statute were erroneous because Skyllar failed to comply with the Act. Specifically, the State argues that, in the year before the court determined Michael to be the legal father, Skyllar failed to seek a legal adjudication of parentage. Section 201(a)(2) provides that a parent-child relationship between a woman and a child is established by an adjudication of the woman's parentage. 750 ILCS 46/201(a)(2) (West 2020). The State also argues that section 703(c) required Skyllar to seek an adjudication of parentage. However, section 703(c) provides that an "intended parent may seek a court order confirming the existence of a parent-child relationship prior to or after the birth of the child" based on compliance with the requirement of a donor's written relinquishment of all rights and responsibilities to the resulting child. 750 ILCS 46/703(c) (West 2020). Section 703(c) is inapplicable here, as the parties had no such written agreement. In the absence of a written agreement, the court determines parentage in an assisted-reproduction case based on evidence of the parties' intent when the donation occurred. 750 ILCS 46/703(d) (West 2020). As this is an assisted-reproduction case, we determine that the court properly proceeded under section 703(d).

¶ 32 The State next argues Skyllar's parentage claim pursuant to the assisted-reproduction statute is barred by *laches*. *Laches* is the "neglect or omission of a complainant to assert a right, taken in conjunction with a lapse of time and other circumstances

causing prejudice to any adverse party." *In re Marriage of Simmons*, 355 Ill. App. 3d 942, 954 (2005). *Laches* is an affirmative defense. *PNC Bank National Ass'n v. Kusmierz*, 2022 IL 126606, ¶ 28. As such, the elements of *laches* must be pleaded by the party asserting it. *Harden v. Desideri*, 20 Ill. App. 3d 590, 600 (1974). *Laches* cannot be raised for the first time on appeal. *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 44. Here, the State did not file a response to the GAL's disestablishment petition and so did not plead the affirmative defense of *laches*. Accordingly, we deem this argument forfeited.

¶ 33 Lastly, the State and the GAL argue the disestablishment petition should have been granted because the public policy of this State is that a child has only two parents. Section 102 of the Act provides that the parent-child relationship, including support obligations, "extends equally to every child and to his or her parent or to each of his or her 2 parents." 750 ILCS 46/102 (West 2020). The GAL and the State argue that, after the finding that Michael was the legal father, J.M. impermissibly had three parents. This reasoning is flawed because pursuant to section 702 of the assisted-reproduction statute, a donor is not a parent. Here, the trial court found that Michael was a "donor." The evidence supported that determination where it showed that, when Michael donated his sperm, the parties intended that Jessa and Skyllar would be J.M.'s parents. Accordingly, we hold the court properly denied the disestablishment petition.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment.

¶ 36 Affirmed.

Decision Under Review:	Appeal from the Circuit Court of Tazewell County, No. 21-JA-34; the Hon. David A. Brown, Judge, presiding.
Attorneys for Appellant:	Peter J. Lynch, of Hasselberg, Rock, Bell & Kuppler LLP, of Peoria, for appellant.
Attorneys for Appellee:	Stewart J. Umholtz, State's Attorney, of Pekin (Patrick Delfino, Edward R. Psenicka, and Pamela S. Wells, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People. No brief filed for other appellees.