

Third District Court of Appeal

State of Florida, July Term, A.D., 2010

Opinion filed July 28, 2010.

Not final until disposition of timely filed motion for rehearing.

No. 3D08-775

Lower Tribunal No. 03-25223

Juan Carlos Aulet,
Appellant,

vs.

Jinny M. Castro f/k/a Jinny M. Aulet,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Eugene J. Fierro, Judge.

Christy L. Hertz; Greene Smith and Cynthia L. Greene, for appellant.

Carrera & Amador and Juan M. Carrera and Carmen G. Amador, for appellee.

Before SHEPHERD, ROTHENBERG, and LAGOA, JJ.

LAGOA, J.,

The appellant, Juan Carlos Aulet (“former husband”), appeals from the trial court’s order dismissing his petition to disestablish paternity and terminate child

support filed pursuant to section 742.18, Florida Statutes (2007). The trial court dismissed the petition because of the former husband's failure to meet several of the requirements set forth in subsection 742.18(1), including his failure to include with the petition scientific tests administered within ninety days prior to the filing of the petition. We affirm the trial court's order.

The former husband and the appellee, Jinny Castro ("former wife"), were divorced in December 2003. Pursuant to the terms of the final judgment and settlement agreement, the former husband was named as the father of the parties' three minor children. The husband subsequently had two separate DNA tests performed on one of the children, the first of which had a report date of April 5, 2007, and the second of which had a report date of May 1, 2007. Both tests concluded that there is a zero percent chance that the former husband is the father of the child upon whom the tests were conducted.

On September 28, 2007, the former husband filed a Verified Petition for Disestablishment of Paternity, Termination of Child Support Obligation, and Challenge of Acknowledgement of Paternity pursuant to section 742.18. Section 742.18 provides, in relevant part:

(1) This section establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child. To disestablish paternity or terminate a child support obligation, the male must file a petition in the circuit court having jurisdiction over the child support obligation. The petition must be served on the mother or

other legal guardian or custodian of the child. If the child support obligation was determined administratively and has not been ratified by a court, then the petition must be filed in the circuit court where the mother or legal guardian or custodian resides. Such a petition must be served on the Department of Revenue and on the mother or legal guardian or custodian. If the mother or legal guardian or custodian no longer resides in the state, the petition may be filed in the circuit court in the county where the petitioner resides. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required, or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.

(c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due

(2) The court shall grant relief on a petition filed in accordance with subsection (1) upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since

the initial paternity determination or establishment of a child support obligation.

(b) The scientific test required in paragraph (1)(b) was properly conducted.

(c) The male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

(d) The male ordered to pay child support has not adopted the child.

(e) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock.

(f) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

(g) The child was younger than 18 years of age when the petition was filed.

(emphasis added).

In the petition, the former husband asserted under oath the existence of newly discovered evidence relating the paternity of the child. He also alleged that he had two DNA tests conducted, both of which showed that there was a zero percent chance that he is the father of the child, but that “[t]he two paternity tests were taken more than 90 days prior to the date of this Petition because the Former-Wife has refused the Former-Husband access to the subject minor child . . . since May, 2007.”

The petition did not attach an affidavit, pursuant to subsection 742.18(1)(b), stating that the former husband did not have access to the child to perform the DNA tests within the ninety-day period. Nor did the petition request the trial court to order the child to be tested.

The former wife filed a motion to dismiss, arguing that the petition should be dismissed because the former husband failed to comply with several mandatory requirements of subsection 742.18(1), including the requirement that the petition include the results of scientific tests “administered within 90 days prior to the filing of such petition.” § 742.18(1)(b), Fla. Stat. (2007). The former husband responded that subsection (1)(b) serves only as a time limitation to presenting a valid DNA test.

The trial court granted the former wife’s motion to dismiss finding, among other things, that the “clear and unambiguous language” of subsection 742.18(1)(b) “mandates that the administration of the test and the filing of the petition cannot be more than ninety days apart” and that “this was not done here.” As to the former husband’s claim that the DNA tests had not been administered within ninety days prior to his filing of the petition because he did not have access to the child, the trial court concluded that “[t]his is altogether irrelevant because the ninety-day period begins to run *after* the test is administered . . . when access to [the child], logically, would have been achieved.”

On appeal, the former husband seeks reinstatement of his petition, arguing that the trial court erred as a matter of law in its interpretation of section 742.18.¹ Specifically, the former husband asserts that the existence of scientific DNA testing – no matter when performed relative to the filing of a petition for disestablishment of paternity – is not an element of the cause of action of disestablishment of paternity, and therefore, the absence of allegations of compliance or non-compliance with the ninety-day time period stated in subsection (1)(b), cannot support a motion to dismiss. As support for his argument, the former husband relies upon the fact that the statute provides that a father may file a petition without including a DNA test when he suspects that he is not the father but does not have access to the child to permit testing performed prior to the filing of the petition. See § 742.18 (1)(b), Fla. Stat. In such a case, the court may order the child tested. Id. The former husband also relies upon the fact that the statute does not specifically provide that a petition would be “legally insufficient” if filed beyond the ninety-day period. We disagree with the former husband and affirm the trial court’s dismissal of his petition.

¹ The former husband also raises a constitutional challenge to the statute, claiming that the ninety-day provision set forth in subsection (1)(b) impermissibly encroaches upon the Florida Supreme Court’s rulemaking authority. Because the ninety-day provision is intimately intertwined with the substantive right that was created by the legislature’s enactment of the statute, see Massey v. David, 979 So. 2d 931 (Fla. 2008), we find no merit to this argument and affirm on this basis without further discussion.

We find the language of section 742.18 to be plain and unambiguous. As such, we do not need to resort to rules of statutory construction to determine legislative intent. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992 (Fla. 2010); Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209 (Fla. 2009). Subsection (1)(b) states that the petition must include “results of scientific tests . . . administered within 90 days prior to the filing of such petition.” If the father does not have access to the child, he “may file a petition requesting the court to order the child to be tested.”² Subsection (2)(b) then states that a trial court shall grant relief upon a finding of several factors, including that the “scientific test *required* in paragraph (1)(b) was properly conducted.” (emphasis added). Therefore, contrary to the former husband’s argument, the plain language of the statute makes clear that scientific testing is indeed a mandatory requirement for a trial court to consider and grant a petition to disestablish paternity. See Johnston v. Johnston, 979 So. 2d 337, 338 (Fla. 1st DCA 2008) (“[Section 742.18] clearly establishes the necessary allegations, requisite trial court findings, and conduct that would prohibit disestablishing paternity.”) This Court has already held that when the petitioner relies upon tests administered prior to the filing of the petition, the mandated test must also comply with the ninety-day provision. See State, Dep’t of Revenue v. Brinson, 953 So. 2d

² As noted earlier, although the father claimed he did not have access to the child ninety days before he filed the petition, he did not ask the trial court to order the child tested.

38 (Fla. 3d DCA 2007) (noting that section 742.18 “requires the man to file a court petition within ninety days of obtaining a paternity test”). In other words, once a man receives the results of a scientific test confirming he is not the father, he must choose to act on those results within ninety days of the date the test was administered. We note that sitting on results disputing paternity also goes to the element of “newly discovered evidence.” Accordingly, the trial court did not err in granting the motion to dismiss for failure to comply with the statute. Cf. State, Dep’t of Revenue v. Young, 995 So. 2d 1080 (Fla. 1st DCA 2008) (where father’s letter and motion did not comply with section 742.18(1), the trial court departed from the essential requirements of the law in treating them as a petition for disestablishment under the statute and ordering scientific tests).

The dissent concludes that the ninety-day provision is a statute of limitations, “subject to equitable tolling, waiver, or other defenses.” Based on this conclusion, the dissent would reverse the trial court’s dismissal and remand for reconsideration on the merits. That relief, however, was not sought below or on appeal by the former husband. The former husband never argued below that the former wife waived the ninety-day requirement, or that equitable tolling should apply to allow him to rely upon the tests administered more than ninety days before the filing of the petition. Instead, the former husband’s argument is that there is no time limit to a father’s *filing* of a petition to disestablish paternity, merely a ninety-day restriction on the validity of a DNA test, when one is relied

upon. In his motion for reconsideration of the order, the former husband specifically argued that section “742.18 is not a statute of limitation for when a disestablishment of paternity case must be filed. The statute provides that if you are asking the court to rely upon a paternity test, the paternity test can not be older than 90 days from the date of filing the case.” Respectfully, the dissent would award relief upon a basis that was neither preserved nor presented on appeal.

For the reasons stated, we affirm the trial court’s order dismissing the former husband’s petition.

SHEPHERD, J., concurs.

ROTHENBERG, J. (dissenting).

I respectfully dissent from the majority's affirmance of the order dismissing Juan Carlos Aulet's ("former husband") Verified Petition for Disestablishment of Paternity, Termination of Child Support Obligation, and Challenge of Acknowledgment of Paternity ("Petition for Disestablishment of Paternity"), filed pursuant to section 742.18, Florida Statutes (2007).

I. FACTS AND PROCEDURAL HISTORY

The former husband and Jinny M. Castro ("former wife") were divorced in December 2003. Pursuant to the terms of the final judgment and the settlement agreement, the former husband was named as the father of the three minor children born during the marriage, and ordered to pay monthly child support of \$666.00 per child, the children's private school tuition, medical and dental insurance, and fifty percent of the children's out-of-pocket medical expenses.

On February 23, 2007, the former wife filed a Verified Emergency Motion for Contempt and Other Relief, seeking to compel the former husband to pay the children's private school tuition and his share of the out-of-pocket medical expenses, as required by the settlement agreement. While the motion for contempt was pending, in March 2007, the former husband learned that the former wife had told several people that he was not the biological father of the parties' youngest

child. To confirm the former wife's claim, DNA tests were administered on the child on April 5, 2007, and May 1, 2007. The tests determined that there is a zero percent chance that the former husband is the child's biological father.

The former wife's motion for contempt remained pending following the former husband's confirmation that the former wife had been unfaithful during the marriage and had lied both to the former husband and the trial court during the divorce proceedings in 2003.³ The motion for contempt eventually was heard on September 18, 2007, by a general magistrate, who found the former husband in contempt for failing to pay the three minor children's private school tuition and out-of-pocket medical expenses.

Within ten days of entry of the contempt order, on September 28, 2007, the former husband filed his Petition for Disestablishment of Paternity, acknowledging that the initial DNA test was administered more than ninety days prior to the filing of the petition. In response, the former wife filed a motion to dismiss, asserting in part that the former husband failed to file his Petition for Disestablishment of Paternity within ninety days of the administration of the first DNA test, as required by section 742.18, which provides in pertinent part:

³ In describing the former wife's behavior, the term "chutzpah" comes to mind. "In Hebrew, chutzpah is used indignantly, to describe someone who has overstepped the boundaries of accepted behavior with no shame." <http://en.wikipedia.org/wiki/Chutzpah>. Moreover, "chutzpah" is defined as "brazenness; gall." The American Heritage Dictionary of the English Language 242 (1973).

(1) This section establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child. To disestablish paternity or terminate a child support obligation, the male must file a petition in the circuit court having jurisdiction over the child support obligation. . . . The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required, or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.

(Emphasis added).

Following a hearing, the trial court entered an order granting the former wife's motion to dismiss. The sole issue on appeal is whether the trial court's dismissal of the former husband's petition for Disestablishment of Paternity was error.

II. ISSUES

The former husband asserts two grounds for reversal of the trial court's order: (1) the ninety-day provision enacted by the Legislature in section 742.18(1)(b) impermissibly intrudes upon the Florida Supreme Court's rulemaking

authority in violation of the separation of powers clause of article II, section 3 of the Florida Constitution; and (2) the failure to comply with the ninety-day provision should not serve as an absolute bar for relief from child support obligations where paternity testing conclusively establishes that the obligor is not the biological father of the child. While I remain unpersuaded by the former husband's first argument, his second argument has merit. I would, therefore, reverse the order under review.

A. The former husband's constitutional challenge.

Article II, section 3 forbids one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." Article V, section (2)(a) of the Florida Constitution, however, expressly grants the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts." Thus, generally the Legislature is empowered to enact substantive law while the Florida Supreme Court has the authority to enact procedural law. Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000). We therefore must determine whether section 742.18 creates substantive rights or it is a procedural statute that impermissibly encroaches on the rulemaking authority of the Florida Supreme Court.

In Massey v. David, 979 So. 2d 931, 936 (Fla. 2008), the Florida Supreme

Court addressed whether section 57.071(2),⁴ which sets forth time limits for filing a written report when seeking expert witness fees, “is a procedural statute that impermissibly encroaches on [its] rulemaking authority.” In finding that the statute does not encroach on its rulemaking authority in violation of article II, section 3, the Florida Supreme Court explained:

[W]here a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. If a statute is clearly substantive and “operates in an area of legitimate legislative concern,” this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. Caple [v. Tuttle’s Design-Build, Inc.], 753 So. 2d [49, 53 (Fla. 2000)] (quoting VanBibber v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983)). However, where a statute does *not* basically convey substantive rights, the procedural aspects of the statute cannot be deemed “incidental,” and the statute is unconstitutional. Moreover, where this Court has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. Finally, where a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the

⁴ Section 57.071(2) provides:

Expert witness fees may not be awarded as taxable costs unless the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness which summarizes the expert witness’s opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. Such report shall be filed at least 5 days prior to the deposition of the expert or at least 20 days prior to discovery cutoff, whichever is sooner, or as otherwise determined by the court.

procedural mechanisms of the court system, those requirements are unconstitutional.

Massey, 979 So. 2d at 937 (citations omitted) (emphasis in original).

Prior to the enactment of section 742.18 in 2006, see Ch. 2006-265, § 1, at 2818-23, Laws of Fla., a challenge to a paternity determination in a final judgment of dissolution of marriage must have been pursued under Florida Rule of Civil Procedure 1.540. Rule 1.540, however, provides that a motion seeking relief from judgment must be filed within one year after the judgment was entered where the motion seeks relief on the basis of fraud, misrepresentation, or other misconduct of an adverse party. Thus, section 742.18 “created a new cause of action in situations where a male could challenge a paternity determination based on ‘newly discovered evidence,’ rather than allegations of fraud, as previously required.” Johnston v. Johnston, 979 So. 2d 337, 338-39 (Fla. 1st DCA 2008) (quoting § 742.18(1)(a), Fla. Stat. (2006)).

In enacting section 742.18, the Legislature therefore created a new substantive right. Further, as the procedural aspect of section 742.18, specifically the ninety-day provision, is “intimately intertwined” with the substantive right created by the statute, the statute does not impermissibly intrude upon the Florida Supreme Court’s rulemaking authority. Thus, the former husband’s constitutional challenge lacks merit.

B. Whether the ninety-day provision in section 742.18(1)(b) is jurisdictional.

If the ninety-day provision in section 742.18(1)(b) is a statute of limitations provision, it is subject to equitable tolling and waiver. However, if this provision is jurisdictional, it would preclude the trial court from exercising jurisdiction over the former husband's petition as the former husband concedes that the first DNA test was administered more than ninety days prior to the filing of his petition. Because the Legislature did not specify that the ninety-day provision in section 742.18(1)(b) is jurisdictional, and the statute provides no language indicating the Legislature's intent to limit a party's ability to disestablish paternity, where it is indisputable that he is not the biological father of the child, to ninety days of the paternity testing, regardless of the circumstances, I conclude that the ninety-day provision is a statute of limitations provision, subject to equitable tolling, waiver, or other defenses that could be raised by a party attempting to disestablish paternity.

Section 742.18 does not specify that the ninety-day provision contained in subsection (1)(b) is jurisdictional, and the statute does not provide guidance as to this issue. The two separate Senate Staff Analyses for CS/SB 438—one prepared by Judiciary Committee and the other prepared by the Children and Families Committee—also fail to address whether the ninety-day provision was intended as a jurisdictional time limit or a statute of limitations.

A review of other statutory provisions with time limits, however, reflects that the Legislature has provided jurisdictional language where its intent was to

enact jurisdictional time limitations. For example, subsection (2) of section 72.011 sets forth a sixty-day limit for contesting the legality of a tax assessment after it becomes final, and subsection (5) provides that the requirements of subsection (2) “are jurisdictional.” Further, subsection (2) of section 194.171 sets forth a sixty-day limit for challenging tax assessments in circuit court, and subsection (6) provides that the requirements of subsection (2) “are jurisdictional.” See also Hall v. Leesburg Reg’l Med. Ctr., 651 So. 2d 231 (Fla. 5th DCA 1995) (holding that the statute limiting the time to contest a tax assessment was jurisdictional).

Courts also have treated other time limits in statutes as statutes of limitations where the statutes do not state that the time limits provided are jurisdictional. For example, in Bridges v. City of Boynton Beach, 927 So. 2d 1061, 1064 (Fla. 4th DCA 2006), the court treated the 180-day limit in section 112.3187(8)(b) in which to institute a public sector whistleblower action as a statute of limitations: “[U]nder the statute of limitations contained in the Whistleblower’s Act, Bridges had to file his action within 180 days of his termination. He failed to do so, and the trial court correctly dismissed his suit on statute of limitations grounds.” See also Pierson D. Constr., Inc. v. Yudell, 863 So. 2d 413 (Fla. 4th DCA 2003) (holding that sixty-day limit in section 713.22(2) to institute action to enforce lien treated as a statute of limitations). Cf. Hernandez v. Kissimmee Police Dep’t, 901 So. 2d 420 (Fla. 5th DCA 2005) (holding that the forty-five-day limit in section 932.703(3) to file forfeiture complaint was not jurisdictional where the statute

provides that trial court may extend the forty-five-day period to sixty days for “good cause”).

As the language of the statute and the legislative staff analyses do not indicate that the ninety-day limit in section 942.18(1)(b) was intended as a jurisdictional time limit, I would conclude that the ninety-day period in section 742.18(1)(b) is a statute of limitations. Because the trial court treated the ninety-day provision as jurisdictional, this case should be reversed and remanded for reconsideration on the merits. Accordingly, I respectfully dissent.