



Smith v. Barbour

605 S.E.2d 267 (2004) | Cited 1 times | Court of Appeals of North Carolina | December 7, 2004

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

Tony R. Smith (petitioner) filed a petition dated 19 February 2001 in Wake County seeking to legitimate K.O.S, now M.O.B. (the child).¹

The petition alleged, inter alia, that petitioner and Staci Barbour (respondent) are the biological parents of the child, who was born 6 November 1999. Attached to the petition was a "Confirmation of Birth" from the University of Nebraska Hospital in Omaha, Nebraska. This "Confirmation of Birth" stated that "[c]ertified copies of this birth certificate will be available in four weeks[.]"

Respondent filed a motion for change of venue dated 23 April 2001 and an answer dated 20 June 2001. In an order dated 18 September 2001, petitioner was allowed to amend his original petition to add Bilal Kanawati (Kanawati), respondent's former husband, as an additional party, and to attach a blood test indicating that petitioner was the biological father of the child. The trial court appointed a guardian ad litem on 18 September 2001 to represent the interests of the child. On 28 September 2001, respondent filed an answer to the amended petition, along with a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Respondent filed a renewed motion, dated 12 December 2001, to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The proceeding was transferred to a jury session of superior court on 20 December 2001. Respondent filed a second renewed motion, dated 21 February 2002, to dismiss the petition for lack of subject matter jurisdiction. Petitioner moved to amend his petition on 6 March 2002 and for summary judgment on 7 May 2002. In orders dated 6 June 2002, Judge Jones granted petitioner's motion to amend his petition to add a certified copy of the child's birth certificate, and granted petitioner's motion for summary judgment, declaring petitioner to be the legitimate father of the child. In orders dated 11 June 2002, Judge Bullock denied respondent's renewed motion to dismiss, and Judge Jones denied respondent's second renewed motion to dismiss. Respondent appeals the denial of her motions to dismiss, the granting of petitioner's motions to amend his petition and for summary judgment, and the denial of respondent's motions for a jury trial and removal of the guardian ad litem. Kanawati filed no appeal from the orders entered by the trial court.

Respondent contends that the trial court erred in denying her motions to dismiss the petition



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because the trial court did not have subject matter jurisdiction. She argues that N.C. Gen. Stat. § 49-14, governing civil actions to establish paternity, applies; however, we note that since this is a special proceeding to legitimate the child of a married woman, the appropriate statute is N.C. Gen. Stat. § 49-12.1 (2001). N.C.G.S. § 49-12.1(a) states in pertinent part:

The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor. (emphasis added)

Pursuant to N.C. Gen. Stat. § 49-10 (2001), "[a] certified copy of a certificate of birth of the child shall be attached to the petition." Respondent claims that since petitioner did not attach a certified birth certificate when he filed his petition, the trial court was without subject matter jurisdiction to hear the legitimation action and should have dismissed the petition. We disagree.

When petitioner filed his petition, he attached a "Confirmation of Birth," not a certified copy of the child's birth certificate. The "Confirmation of Birth" indicated the location of the child's birth, the child's birth date, and the mother's name. Later, the trial court permitted petitioner to amend his petition to include a certified copy of the child's "Certificate of Live Birth."

Respondent cites this Court's decision in *Reynolds v. Motley*, 96 N.C. App. 299, 385 S.E.2d 548 (1989) as controlling authority for the proposition that the trial court did not possess subject matter jurisdiction over a legitimation action where, as in our present case, a certified birth certificate was not filed with the petition. In *Reynolds*, our Court held:

G.S. § 49-14(a) provides, in pertinent part, that "[a] certified copy of a certificate of birth of the child shall be attached to the complaint." In the instant case, the record discloses that no such certified copies of the birth certificates of the alleged children- obligees were attached to the DCSE petition. Because this statutory prerequisite was not complied with, we are compelled to conclude that the North Carolina court was without subject matter jurisdiction to adjudicate defendant's paternity.

Id. at 304, 385 S.E.2d at 551.

There is no indication in *Reynolds* that the petitioner ever made an attempt to supply the necessary birth certificate. In contrast, in this case, while the birth certificate was initially missing, petitioner moved to amend his petition to add the birth certificate. Respondent, however, urges that the lack of subject matter jurisdiction could not be remedied through a motion to amend. This argument was rejected in *Darnell v. Town of Franklin*, 131 N.C. App. 846, 508 S.E.2d 841 (1998). In *Darnell*, the trial court had dismissed a petition on the ground that the petition lacked allegations necessary to establish subject matter jurisdiction. The petitioner in *Darnell* appealed, contending that the trial



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court should have allowed her to amend the deficient petition. In reversing the dismissal and remanding "the case with instructions that the petitioner be allowed to amend her petition as requested," *id.* at 850, 508 S.E.2d at 844, this Court held:

Petitioner argues that the trial court had subject matter jurisdiction over the case and that if the petition were deficient, she should have been allowed to amend her petition so as to establish her standing to bring the petition. We agree.

Although the petition was deficient . . . , the trial court retained the "inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." . . . Thus, while the trial court lacks the power to make an order granting relief where it lacks subject matter jurisdiction, it retains the power to make inquiry whether it has jurisdiction.

Id. at 848-49, 508 S.E.2d at 843 (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). This Court held, as part of the inquiry into the trial court's jurisdiction, that a pleading may be amended to show that jurisdiction exists: "As the record shows that petitioner can establish [subject matter jurisdiction], an amendment should be allowed in that regard to show that jurisdiction exists." *Darnell*, 131 N.C. App. at 850, 508 S.E.2d at 844.

In the case before us, respondent does not contend that the trial court would have lacked jurisdiction even if the birth certificate had been filed with the complaint. If the trial court would possess jurisdiction once petitioner remedied the petition's technical deficiency, under *Darnell*, the trial court could properly allow petitioner's motion to amend to add the birth certificate.

N.C.G.S. § 49-10, which governs the procedures to be followed in a petition filed pursuant to N.C.G.S. § 49-12.1, provides that a legitimation petition is to be filed in the "superior court of the county in which the putative father resides or in the superior court of the county in which the child resides[.]" Thus, the General Assembly has directed that our superior court maintains subject matter jurisdiction over legitimation proceedings. In this case, petitioner properly filed his petition in superior court. The "Confirmation of Birth" was attached to the petition when it was filed. We conclude that the trial court acted within its power in permitting petitioner to amend his petition to include the child's birth certificate. The amendment merely cured a procedural error and the failure to attach the birth certificate at the time the petition was filed does not amount to a jurisdictional defect. Because we find the amendment adding the birth certificate was not error, we need not address petitioner's contention that the "Confirmation of Birth" was an adequate substitute for the birth certificate.

Respondent next argues the trial court erred in denying her request for a jury trial. We disagree. Respondent relies on our Supreme Court's holding in *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985), to support her assertion that she was entitled to a jury trial. In *Locklear*, there



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was a dispute as to whether the lawful husband of the mother or another man was the father of the child born during the marriage.

Our Supreme Court noted in *Locklear* that [b]ecause of the strong presumption of legitimacy involved in cases like the one before [the court], the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected.

Locklear, 314 N.C. at 421, 334 S.E.2d at 52. However, the presumption of legitimacy of a child born during a marriage is rebuttable by competent evidence "resulting from a blood grouping test administered by a qualified physician or agency." *Guilford County ex rel. Gardner v. Davis*, 123 N.C. App. 527, 531, 473 S.E.2d 640, 643 (1996).

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the entry of summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

Swain v. Preston Falls E., L.L.C., 156 N.C. App. 357, 361, 576 S.E.2d 699, 702 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)), disc. review denied, 357 N.C. 255, 583 S.E.2d 290 (2003). Summary judgment is a means for bringing litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

Kessing v. Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). When the pleadings disclose no defense exists, summary judgment is appropriate. *Id.* at 534-35, 180 S.E.2d at 830. Thus, where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law, there is no reason to proceed with a jury trial.

In the case before us, DNA tests indicated a 99.999 percent probability that petitioner was the child's father. Further, Kanawati denied he was the father of the child. Petitioner, having adequately rebutted the presumption of legitimacy by providing conclusive evidence that he was the child's biological father, established that there was no remaining issue of fact to be determined. Respondent presented no evidence to the contrary beyond her assertion that "the . . . child [was] a legitimate child of [respondent's] marriage" to Kanawati. Thus, there was no dispute as to whether petitioner was the biological father and, therefore, the trial court did not err in ordering summary judgment in petitioner's favor.



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Respondent also argues that the trial court abused its discretion in denying her request to remove the guardian ad litem (GAL) appointed to represent the child. Respondent's argument is two-fold. Respondent first contends the GAL should have been removed because, as an employee of the Wake County Attorney's Office, the GAL had an inherent conflict of interest in representing the child in the legitimation proceeding because of the "economic interest in seeing that someone take financial responsibility for [the] child, so that there [would be] less likelihood that [the] child [would] become a burden on the social welfare system." Respondent presents no evidence in the record or transcript that the GAL was, in fact, an employee of the county attorney's office. The transcript contains only respondent's allegations that the GAL was an employee of the county attorney's office, and the record indicates only that the GAL's telephone number was that of a county office. N.C.R. App. P. 9(a)(1)(e) dictates that the record on appeal contain "so much of the evidence . . . as is necessary for an understanding of all errors assigned[.]" It is well established that the rules of appellate procedure are mandatory and an appellant's failure to follow the rules will subject an appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). Although we do not dismiss respondent's appeal in its entirety, we are nonetheless unable to review the merits of respondent's argument regarding the GAL's alleged conflict of interest.

Secondly, respondent argues that the GAL should have been removed because the GAL inadequately represented the child in the legitimation action. N.C.G.S. § 49-12.1 requires that a GAL "be appointed to represent the child if the child is a minor." In the case before us, the GAL filed an advisory opinion with the trial court. Respondent notes the absence of any additional reports and the failure of the GAL to appear at the summary judgment hearing as evidence of the GAL's lack of good faith in representing the child. Respondent's argument does not contain the specificity needed for meaningful appellate review. She does not direct this Court to any omission or action by the GAL that adversely impacted the proceeding, nor does she point to any inadequacy in the GAL's advisory opinion. Furthermore, the GAL's report is not in the record and, therefore, this Court has no basis to review the merits of respondent's argument. Respondent's assignment of error is overruled.

In her final argument, respondent contends that the trial court exceeded its statutory authority by considering the DNA evidence during the summary judgment proceeding. The DNA test was obtained by court order entered 8 August 2001 by the Wake County District Court (district court) in a related paternity action. This Court found that because the district court lacked subject matter jurisdiction over that paternity action, "it was error for the district court to order a paternity test[.]" *Smith*, 154 N.C. at 408, 571 S.E.2d at 877. While the district court previously erred in ordering the test in the prior paternity action, this does not affect the admissibility of the test in the legitimation proceedings. "The North Carolina Supreme Court has recognized that DNA profile testing is generally admissible as an established technique considered to be reliable within the scientific community." *Batchelder v. Boyd*, 108 N.C. App. 275, 280-81, 423 S.E.2d 810, 814 (1992) disc. review denied, 333 N.C. 254, 426 S.E.2d 700 (1993) (If a proper foundation is laid, DNA sampling may be admissible to rebut the presumption that the husband of a married woman is the child's father.).



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The trial court in a legitimation action may order a paternity test. See N.C. Gen. Stat. § 8-50.1 (2001). To have ordered an additional test would have been redundant where there was ample evidence supporting a proper foundation for the previous test. In addition, respondent had the opportunity to challenge the competency of the test and/or the foundation but declined to do so. Instead, respondent argued to the trial court that the test was "irrelevant, immaterial, and prejudicial." We are unpersuaded by respondent's argument and, therefore, we conclude the trial court did not err in admitting the results of the DNA test into evidence.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).

1. Petitioner also filed a paternity action on 23 February 2001. For a full discussion of those proceedings, see *Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002), cert. denied, ___ N.C. ___, 599 S.E.2d 408 (2004).

