IN THE COURT OF APPEALS OF IOWA

No. 0-432 / 09-1509
Filed July 14, 2010

**IN RE THE MARRIAGE OF DARREN FINCH
AND VICTORIA FINCH**

**Upon the Petition of
DARREN FINCH,**
Petitioner-Appellant,

**And Concerning
VICTORIA FINCH
n/k/a VICTORIA SCHWENKER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Benton County, Nancy A. Baumgartner, Judge.

Darren Finch appeals from a district court order dismissing his petition to overcome paternity. **AFFIRMED IN PART AND REVERSED IN PART.**

Stephen B. Jackson Jr., Cedar Rapids, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Darren Finch appeals from a district court order determining his second petition to overcome paternity of a child born during his marriage to Victoria Finch, now known as Victoria Schwenker, is barred by the doctrine of issue preclusion. We affirm the judgment of the district court dismissing the petition but reverse its ruling awarding Victoria attorney fees.

I. Background Facts and Proceedings.

Darren and Victoria married in 1988. Three children were born during their marriage. The youngest child, C.F., was born in 1994. Darren was listed on the official birth certificate as her natural father. The parties divorced five years later. In a stipulated dissolution decree, Darren and Victoria agreed to share joint legal custody and joint physical care of the children. Darren was ordered to pay Victoria child support.

From 1999 until 2006, the children spent alternating weeks at each parent's house. That changed one night in September 2006 when C.F., who was twelve years old at the time, called her mother after Darren neglected to pick her up from a dance class. Victoria came to get her and asked whether she wanted to return to Darren's house. C.F. said no. Since then, she has had only one visit with Darren. He never asked her or Victoria to resume the joint physical care schedule or arrange other visitation.

In July 2007, Victoria filed a petition to modify the dissolution decree seeking, among other things, physical care of C.F. and a corresponding increase in child support. Darren filed an answer denying that there had been a substantial change in circumstances necessitating modification of the decree.

About one week prior to the modification trial, Darren filed a petition to overcome his paternity of C.F. under Iowa Code section 600B.41A (2007). The trial was continued and a paternity test was completed, which the parties agreed conclusively showed Darren was not C.F.'s biological father. Victoria nevertheless resisted Darren's petition to overcome his legally established paternity of C.F., as did C.F.'s guardian ad litem, who authored the following report to the court on the family's situation:

> I am . . . shocked that paternity testing was requested after all of these years, causing crushing feelings of further rejection [for C.F.] Regardless of whether it is permissible to do so, it is not right. Darren is C.F.'s legal father and emotional father. There was nothing to be gained by attempting to determine if he was her biological father after fourteen years of claiming to be her father other than a reduction in the responsibilities of parenthood. . . . Family is not determined solely by blood. Bailing out on being a father just as a child enters the turbulent years of adolescence is the epitome of cowardice.

A trial on Victoria's petition to modify and Darren's petition to overcome paternity was held in September 2008. Prior to the start of the trial, Victoria moved to dismiss Darren's petition, arguing in relevant part that he did not follow the statutory procedures required in section 600B.41 for admission of paternity test results. The district court took the motion under advisement and after the trial issued the following ruling:

> Darren has failed to follow the statutory requirements set out in Iowa Code sections 600B.41A and 600B.41. Darren, Victoria, and C.F. participated in genetic testing. The results of the genetic testing were offered as Petitioner's Exhibit 9 at trial. Darren did not call an expert witness to lay the foundation for admission of the exhibit. . . . He also failed to follow the requirements of section 600B.41 in that the expert did not report to the Court the results of the genetic testing. The lack of compliance with the statute and omission of expert testimony for foundation renders the results of the genetic testing inadmissible.

> The court also finds the equities in the case weigh against disestablishing Darren as C.F.'s father. C.F. was born and conceived during her parents' marriage. Darren and Victoria accused one another of extramarital affairs. Victoria admitted to an affair during an argument with Darren. Darren was aware that he may not be C.F.'s father, but allowed his name to appear on C.F.'s birth certificate. Darren was C.F.'s father as she grew up. C.F.'s custody and physical care was divided between her parents after their divorce in 1999. C.F. spent equal time in each parent's care until September 2006 when the shared care arrangement came to an abrupt halt.
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> . . . Judicial recognition of the fourteen year relationship between a father and a daughter, in these circumstances, is in the child's best interest. While the court recognizes that a judicial order cannot repair broken human relationships, I do find the equities of this case, viewed from the child's perspective, particularly compelling.
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> . . . At this point in time Darren must follow the statutory requirements set out in Iowa Code 600B to disestablish paternity. Because Darren did not comply with the statutory requirements, the genetic testing is inadmissible and cannot be considered by the Court. There is no other mechanism to disestablish paternity and therefore Darren's Petition to disestablish Paternity fails and is hereby dismissed.

After dismissing Darren's petition to overcome paternity, the court granted Victoria's petition to modify the joint physical care arrangement as to C.F. and increased Darren's child support obligation. Darren did not appeal that order. Instead, in April 2009 he filed a second petition to overcome his paternity of C.F., this time under section 598.21E, as well as section 600B.41A. He requested the district court order new blood or genetic testing and "upon such determination of the blood or genetic testing result disestablish [him] as the father of the minor child." Victoria filed a motion to dismiss the petition, arguing it was barred by the doctrine of issue preclusion because Darren's attempt to overcome paternity of C.F. had been decided adversely to him in the prior action.

Following a hearing, the district court entered a ruling granting Victoria's motion to dismiss. The court concluded Darren's first petition to overcome paternity under section 600B.41A had been dismissed on its merits, despite his arguments to the contrary. The court found the judge in that case

> did not admit the result of the genetic testing showing that Darren is not C.F.'s biological father, but she did not dismiss the petition solely on that ground. This was merely an evidentiary ruling based on Darren's failure to follow the procedural requirements for admission under 600B.41. She dismissed the petition on the merits. Her ruling clearly and unambiguously found that the equities of the case dictated that Darren's petition not be granted.

The court further found Darren could not proceed under section 598.21E because there was no action pending under chapter 598, as required by that subsection. In a subsequent order, the court granted Victoria's request for attorney fees in the amount of $850 pursuant to sections 598.36 and 600B.26.

Darren appeals both the dismissal of his second petition to overcome paternity and the court's award of attorney fees.

II. Scope and Standards of Review.

We review a district court's ruling on a motion to dismiss for the correction of errors of law. *Treimer v. Lett*, 587 N.W.2d 622, 624 (Iowa Ct. App. 1998).

III. Discussion.

A. Issue Preclusion.

The doctrine of issue preclusion applies when a party attempts to relitigate an issue that was raised and decided in a prior action. *Id.* at 625. In order for the prior determination to have a preclusive effect in subsequent litigation, the following four elements must be met:

> (1) the issue must be identical in the two actions; (2) the issue must be raised and litigated in the prior action; (3) the issue must be material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must be necessary and essential to the judgment.

Id. (citation omitted). Darren challenges only the second element, claiming he did not actually litigate the issue of whether his paternity of C.F. should be overcome in the first proceeding because the court dismissed that suit on evidentiary grounds. We begin our analysis of this issue with section 600B.41A.

Section 600B.41A(1) permits a father whose paternity has been legally established, as it was here by virtue of Darren's marriage to C.F.'s mother, *see* Iowa Code §§ 144.14(2), 252A.3(4), to overcome that legal presumption when genetic testing indicates he is not the biological father. *See Dye v. Geiger*, 554 N.W.2d 538, 539 (Iowa 1996). The genetic testing must be conducted in accordance with section 600B.41. Iowa Code § 600B.41A(3)(e).

Section 600B.41 "was intended by the legislature as an aid to permit parties in a paternity suit to admit reports of blood test results into evidence without requiring the testimony of the court-appointed expert." *In re Petition of Bruce*, 522 N.W.2d 67, 69 (Iowa 1994); *see also* Iowa Code § 600B.41(3) ("The testimony of the court-appointed expert at trial is not required."). To that end, section 600B.41(2) provides that

> [i]f a blood or genetic test is required, the court shall direct that inherited characteristics be determined by appropriate testing procedures, and shall appoint an expert qualified as an examiner of genetic markers to analyze and interpret the results and to report to the court.

Under a former version of the statute, this court interpreted that requirement to mean the examining expert must file its report directly with the court. *See State*

ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870, 873 (Iowa Ct. App. 1983). The report must also show "[v]erified documentation of the chain of custody of the blood or genetic specimen." Iowa Code § 600B.41(3).

In *Hodges*, we stated that while "it is clear the legislature intended to ease the burden on paternity litigants, we believe the procedures established in the statute must be adhered to in order for the blood test results to be admissible at trial." 342 N.W.2d at 873. Darren does not dispute that he failed to follow the statutory requirements for admitting the results of the genetic testing at the trial on his first petition to overcome paternity.[1] Instead, he argues the court's ruling dismissing his petition on that ground was an evidentiary ruling and not a ruling on the merits of his petition, and therefore the issue of Darren's paternity of C.F. was not "raised and litigated." Hence, Darren asserts he is not barred by the doctrine of issue preclusion from relitigating his action to overcome paternity.

Darren is correct that section 600B.41 "establishes a rule of evidence and is remedial or procedural rather than substantive." *Id.* He is incorrect, however, in arguing that the issue of his paternity of C.F. was not "raised and litigated" before the district court on his first petition to overcome paternity. The court began by finding Darren's "lack of compliance with the statute and omission of expert testimony for foundation renders the results of the genetic testing inadmissible." The court concluded that, with no other mechanisms to disestablish paternity, Darren's petition failed because of his failure to comply

[1] It appears from our review of the record that Darren attempted to simply admit a copy of the expert's report as an exhibit at trial, rather than having the expert file that report directly with the court. *See Hodges*, 342 N.W.2d at 873 ("The examining expert is required to make his report directly to the court rather than sending it to one of the parties.").

with the statutory requirements set out in Iowa Code chapter 600B. Darren's petition accordingly failed for a lack of proof.

An issue is properly "raised and litigated" when it is raised by the pleadings or otherwise "and is submitted for determination, and is determined . . . . A determination may be based on the *failure* of pleadings or *of proof* as well as on the sustaining of the burden of proof." *Bascom v. Jos. Schlitz Brewing Co.*, 395 N.W.2d 879, 884 (Iowa 1986) (quoting Restatement (Second) of Judgments § 27 cmt *d* (1982) (emphasis added)). We therefore conclude from the record that the issue of Darren's paternity was raised and litigated in the action on his first petition to disestablish paternity.

Furthermore, Darren's argument that the district court did not reach the merits of his first petition to overcome paternity is also incorrect. After concluding the results of the genetic testing were inadmissible, the district court additionally stated: "The court also finds the equities in this case weigh against disestablishing Darren as C.F.'s father." The court continued by engaging in an extensive analysis of why Darren's attempt to overcome paternity was not in C.F.'s best interests considering, among other things, her age, the length of time since Darren's paternity was legally established, and her previous relationship with him. As mentioned, the court ultimately concluded: "Judicial recognition of the fourteen year relationship between a father and a daughter, in these circumstances, is in the child's best interests."

Darren argues the "question of whether the disestablishment of [his] paternity was in C.F.'s best interest was <u>not</u> something" the court needed to

decide. While that may be true,[2] the "doctrine of issue preclusion applies even if the prior decision was wrong." *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 178 (Iowa 2006). "It precludes relitigation of an issue not because it was correctly decided, but rather to protect litigants from the vexation of relitigating issues and to promote judicial economy by preventing unnecessary litigation of issues previously decided." *Id.* at 177. Thus, regardless of whether the district court needed to reach the issue of C.F.'s best interests, the fact remains that the court denied Darren's request to overcome paternity on that ground, and he did not appeal its judgment. *See Gail v. W. Convenience Stores*, 434 N.W.2d 862, 863 (Iowa 1989) ("The res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact the judgment may have been wrong. . . ."). We accordingly conclude the district court was correct in determining Darren's second petition to overcome paternity under section 600B.41A was barred by the doctrine of issue preclusion.

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[2] Prior to 1997, in order to overcome paternity the court was required to find that doing so was in the child's best interest. *See* Iowa Code § 600B.41A(3)(g) (1995); *Dye*, 554 N.W.2d at 539 (listing the best interest of the child as a statutory factor to be considered in determining whether the petitioner satisfied his burden to overcome paternity). Paragraph "g" was eliminated from section 600B.41A(3) in 1997, and instead, the best interest requirement was added to the preservation of paternity section in section 600B.41A(6). *See* Iowa Code § 600B.41A(6)(a)(2). It thus appears the best interests of the child need not be considered in determining whether paternity should be overcome, although it is a consideration when the established father asks that paternity be preserved. *Compare id.* § 600B.41A(3)(a)-(f) *with id.* § 600B.41A(6)(a)(1)-(3); *see also Treimer*, 587 N.W.2d at 624 ("The procedure to overcome paternity is strictly statutory."). The wisdom of such a statutory scheme is not before us today. *See Parker v. Parker*, 916 So. 2d 926, 933 (Fla. Dist. Ct. App. 2005) ("The main issue affecting the child in a disestablishment suit is the psychological devastation that the child will undoubtedly experience from losing the only father he or she has ever known."); *Dye*, 554 N.W.2d at 541 (concurring in the "district court's wise observation that [the established father] 'assumed the role of father and assumed it long enough and under such circumstances that he should be bound by the undertaking'").

Darren nevertheless claims he should have been allowed to proceed with his second action to overcome paternity under section 598.21E, which was not raised in his first petition. We conclude otherwise. Section 598.21E(1) allows an established father to contest the paternity of a child "during an action initiated under this chapter." No action under chapter 598 was pending when Darren filed his section petition to overcome paternity. Section 598.21E is thus of no help to Darren.

B. Attorney Fees.

Darren finally claims the district court erred in awarding Victoria $850 in attorney fees under sections 598.36 and 600B.26. He argues neither of those statutes authorized an award of attorney fees in this case. We agree. *See Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993) (stating that subject to a rare exception not applicable here, a party generally has no claim to attorney fees in the absence of a statute or contractual provision allowing such an award).

Section 598.36 allows our courts to award reasonable attorney fees to the prevailing party in a proceeding seeking modification of an order or decree under chapter 598, while section 600B.26 allows our courts to award reasonable attorney fees to the prevailing party in a proceeding seeking modification of a paternity, custody, or visitation order under chapter 600B. Darren did not seek modification of any such orders. Instead, he sought to overcome his legally established paternity. We accordingly conclude the district court erred in awarding Victoria attorney fees under the above-cited statutes. For the same reasons, we deny her request for appellate attorney fees. *See Bankers Trust Co.*

v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982) (holding that a statute authorizing an award of attorney fees in the trial court also authorizes an award of attorney fees in the appeal).

IV. Conclusion.

We affirm the judgment of the district court dismissing Darren's second petition to overcome paternity on issue preclusion grounds but reverse its ruling awarding Victoria attorney fees.

Costs on appeal are assessed to Darren.

AFFIRMED IN PART AND REVERSED IN PART.