NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
CHANCERY DIVISION, FAMILY PART
DOCKET NO. FD-07-0775-08

S.K.,

Plaintiff,

v.

P.D.,

Defendant.

APPROVED FOR PUBLICATION

March 16, 2020

COMMITTEE ON OPINIONS

Decided: March 29, 2019

Kecia Clarke, attorney for State of South Carolina on behalf of plaintiff (Essex County Counsel, attorneys).

Anthony J. Marinello, attorney for defendant (Cohen & Marinello, LLC, attorneys).

PASSAMANO, J.S.C.

This matter comes before the court on defendant's application to disestablish paternity, terminate child support, and vacate child support arrears. The court has considered the parties' written submissions, the prior orders entered in this matter, and oral argument of counsel. Following are the court's findings of fact and conclusions of law.

I.

The parties, although never having married, had engaged in a physical relationship. In April 2003, during their relationship, a child was born to plaintiff. In May 2003, the parties signed a Certificate of Parentage (COP) concerning the child. The COP lists plaintiff as the child's mother and defendant as the father. In the COP, defendant states as follows:

> I certify and acknowledge that I am the natural father of the child named above. I have read and have had read to me, the notice regarding the legal rights and obligations resulting from acknowledging paternity and I understand its contents. I certify the above information is true.

The parties' relationship ended before the child reached her first birthday. Following that, plaintiff moved out of state with the child. Defendant has had virtually no contact with the child since then. There is no contention that defendant and the child have any relationship with one another.

A.

On October 2, 2007, the court, in addressing an application for child support, entered an order stating that "[d]efendant failed to appear. Certificate of Parentage signed. Not sure [if] defendant received notice of today's hearing (multiple apartment numbers listed on the petition.) Address to be verified. Relist upon proper verification." The matter was then relisted for November 20, 2007. On the relisted hearing date, the court found that defendant had been

"properly served … and failed to appear." The court then established "[p]aternity based on COP" and set child support in the amount of $62 per week, with an additional $20 per week for arrears. The support obligation was set in accordance with the Child Support Guidelines.[1] Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A, www.gannlaw.com (2019).

Defendant failed to pay his support obligation and on June 19, 2008, the court entered an order for issuance of "A BENCH WARRANT for the arrest of the obligor . . . ." A Warrant for Failure to Appear issued that same day.

On July 31, 2008, the court entered an order that was consented to by defendant. The order confirmed defendant's ongoing child support obligation and noted arrears of $3496. Under the July 31, 2008 order, defendant was released conditioned on his making a lump sum payment of $200 "on or before [August 7, 2008]." On August 7, 2008, the court entered a further order allowing defendant an extension of time to make the lump sum payment. As he had done with the July 31, 2008, order, defendant consented to the August 7, 2008, order.

[1] Over time, the support obligation increased due to cost of living adjustments. See R. 5:6B (Cost-of-Living Adjustments for Child Support Orders).

Defendant's defaults continued and on July 29, 2010, the court entered an order stating, in part, that the bench warrant for failure to appear was to "remain in effect." Subsequently, defendant appeared and satisfied in full his outstanding arrears. His payment was confirmed in an order dated August 4, 2011, which states that "[defendant] satisfied full amount of arrears." Since then, defendant has not made his child support payments.

B.

On May 4, 2016, defendant filed an application seeking to disestablish paternity and for genetic testing. That application was dismissed on August 25, 2016, without prejudice, as "neither party [had] appeared for [the] hearing." By way of application filed on October 10, 2017, defendant again sought an order to compel genetic testing, disestablish paternity, and vacate his support obligation. The notices for that application were sent on November 27, 2017. On December 20, 2017, the court entered an order requiring genetic testing and suspending "enforcement of [defendant's] child support obligation … until further order of the court." At that time, defendant was $22,748.41 in arrears.[2]

[2] Counsel confirmed at oral argument that all of the arrears in this case are owed to plaintiff, not to any governmental agency. Meanwhile, defendant received an award from a personal injury suit. His counsel turned over to the New Jersey Family Support Payment Center three checks totaling $33,000

On August 3, 2018, defendant filed another application in which he stated that he sought "[d]ismissal of [his] child support obligation because [he is] not the father of the child in question. The plaintiff has failed to take a paternity test (see my Certification attached)." Defendant states in the certification that he is asking the court to "vacate all arrears and vacate my child support obligation . . . ." The court on November 1, 2018, entered an order noting that genetic testing had been ordered on December 20, 2017, but it did "not appear the order was ever communicated to the Plaintiff." Since the court found that by November 1, 2018, all parties were aware of the December 20, 2017, order, it was "appropriate to go forward to testing." The matter now before the court is the final disposition of the October 10, 2017, application.

Laboratory Corporation of America (LabCorp) performed the genetic testing and issued a report dated December 6, 2018 (Report). The Report shows a 0.00% probability that defendant is the child's natural father. Based on the results, LabCorp concluded that defendant is "excluded from paternity . . . . [Defendant] is not the biological father of the child . . . ." The Report confirms that defendant provided his sample on December 21, 2017, the day after the court entered its order providing for testing and suspension of

---

from that award. In addition to his support obligation in this case, defendant has a support obligation in a separate matter. The question of how the monies being held are to be applied to defendant's obligations is not before the court.

defendant's support obligation. Plaintiff and the child provided samples on December 3, 2018.

On December 12, 2018, the court heard argument on defendant's application. Following that, the court set a schedule for further argument and directed that the parties submit legal authority on the issues of terminating defendant's support obligation and vacating arrears. The court heard final argument on March 20, 2019. Both parties were present for the March 20, 2019, argument; defendant was present in person and plaintiff appeared telephonically.

Since the court finds that the facts set forth herein are not in dispute and are sufficient for determination of the matters at issue, no plenary hearing is necessary. Harrington v. Harrington, 281 N.J. Super. 39, 46 (App. Div. 1995) (a plenary hearing is necessary only if the court must resolve material factual disputes).

Having considered the facts and argument of counsel, and for the reasons set forth herein, the court grants that part of defendant's application seeking to disestablish paternity and terminate his ongoing support obligation. The court denies that part of defendant's application seeking to vacate arrears.

II.

A.

The court first considers defendant's request to disestablish paternity and terminate his support obligation. Since the genetic testing confirmed defendant is not the child's biological father, the court grants defendant's request to disestablish paternity.

With respect to the ongoing support obligation, the court notes that the "right to child support belongs to the child and 'cannot be waived by the custodial parent.'" Pascale v. Pascale, 140 N.J. 583, 591 (1995) (quoting Martinetti v. Hickman, 261 N.J. Super. 508, 512 (App. Div. 1993)). "[A] parent cannot bargain away a child's right to support because the right to support belongs to the child, not the parent[.]" Dolce v. Dolce, 383 N.J. Super. 11, 18 (App. Div. 2006); J.S. v. L.S., 389 N.J. Super. 200 (App. Div. 2006). In J.S., the Appellate Division stated that:

> The purpose of child support is to benefit children, not to protect or support either parent. Our courts have repeatedly recognized that the right to child support belongs to the child, not the custodial parent. See, e.g., Pascale v. Pascale, 140 N.J. 583, 591 (1995); Patetta v. Patetta, 358 N.J. Super. 90, 94 (App. Div. 2003); Martinetti v. Hickman, 261 N.J. Super 508, 512 (App. Div. 1993). "The custodial parent brings the action on behalf of the child and not his or her own right." Martinetti, supra, 216 N.J. Super. at 512. Thus, the right to child support cannot be waived by the custodial parent. Pascale, supra, 140 N.J. at 591.

[Id. at 205.]

In addition to the limits on a custodial parent's right to waive child support, there are situations where a support obligation may be imposed on a person who is not a biological parent. See Miller v. Miller, 97 N.J. 154, 167 (1984); Monmouth Cty. Div. of Soc. Servs. ex rel. L.R.R. v. D.J.D., 344 N.J. Super. 74 (Ch. Div. 2001).[3] As the right to support belongs to the child, the court believes that it is appropriate to consider whether there would be any basis to continue support notwithstanding any position that plaintiff may take.

In D.J.D., the court outlined the circumstances under which a third party may be liable for child support. In doing so, the court held that:

> It is firmly established that the natural or biological parent of a child is always to be considered the primary recourse for child support "because society and its current laws assume that the natural parent will support his or her child." Miller v. Miller, 97 N.J. 154, 169 (1984). An exception may exist when a person voluntarily establishes an in loco parentis relationship with a child. Cumberland County Bd. v. W.J.P., 333 N.J. Super. 362, 365-366 (App. Div. 2000). In order for this duty of support to attach, however, it is not enough that the person merely accepts the obligation of support. Camden County Board of Social Services v. Yocavitch, [251 N.J. Super. 24, 31-32 (Ch. Div. 1991)]. There must also be some "positive action" by the obligor that interferes with the natural parent's support obligation, Miller v. Miller, supra at 170, or "a

[3] Any Chancery Division opinions cited herein are persuasive, not binding, authority.

> voluntary and knowing course of conduct" with respect to the child which constitutes an affirmative representation of parenthood. M.H.B. v. H.T.B., [100 N.J. 567, 576 (1985)].
>
> [344 N.J. Super. at 79-80.]

In this case, although defendant consented to two orders concerning his support obligation, not only had he sought genetic testing in an earlier application, but the record shows that payments made by him were under circumstances where he was facing arrest. Moreover, as detailed in Part I of this opinion, the parties never married, defendant has had virtually no contact with the child for most of the child's life, and no party has contended that defendant has a relationship with the child. Based on all the facts of this case, the court finds that defendant had not engaged in a course of conduct that would warrant continuing his support obligation. For these reasons, the court grants that part of defendant's motion seeking to terminate his ongoing support obligation.

i.

With respect to the effective date of the termination, "[n]o payment or installment of an order for child support . . . shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification." N.J.S.A. 2A:17-56.23a; J.S., 389 N.J. Super. at 207. Use of a retroactive modification date is discretionary, not mandatory.

J.S., 389 N.J. Super. at 207. In J.S., the Appellate Division held that "the trial court properly terminated defendant's child support and child-related expenses prospectively from the date of the DNA results, though the judge could have granted relief as of the date defendant's motion was filed." Ibid.

In this case, defendant filed an application in 2016 that was dismissed for lack of prosecution. Defendant filed again on October 10, 2017. The notices for that application were served on both parties on November 27, 2017, and an order for genetic testing and suspending enforcement pending further order was entered on December 20, 2017. On August 3, 2018, defendant filed an application seeking to have the court finalize the matters addressed in the December 2017 order, which anticipated a further order.

As noted above, on December 20, 2017, the court entered an order that provided for genetic testing and suspended enforcement of defendant's support obligation pending further order. The LabCorp Report shows that on December 21, 2017, defendant provided his sample for testing. The Report also shows that plaintiff and the child did not provide their samples until December 3, 2018. There is no evidence in the record, and plaintiff does not contend, that defendant was responsible for the delay in having the testing completed.

The court finds that it is appropriate to terminate defendant's obligation effective November 27, 2017. The court denies any request to use the October 10, 2017, filing date as the effective date for termination. First, use of the filing date is discretionary, not mandatory. J.S., 389 N.J. Super. at 207. Second, while defendant may not have caused the delay in testing, neither did he take prompt steps to seek enforcement. The court notes that at oral argument, plaintiff's counsel questioned defendant's motives in bringing his application. In particular, counsel questioned the timing of his request and how that might relate to his personal injury case. While the court is not making any determinations on defendant's motives, the record is sufficient for the court to decide, as an exercise of discretion, not to terminate the support obligation back to the filing date. The notice date is an appropriate date for termination. It is close to the filing date but imposes some cost to defendant for not having moved more quickly to bring the matter to a final resolution.

The court also denies any request by defendant to use the May 4, 2016, filing date as the effective date for termination. The order entered on that application shows that it was dismissed for lack of prosecution. Defendant has not pointed to any authority that would allow the effective date for termination of child support to be based on a prior filed application that was not pursued.

For these reasons, the court terminates defendant's support obligation, effective November 27, 2017. Moreover, the court notes that at oral argument on March 20, 2019, plaintiff's counsel indicated that plaintiff would consent to terminate defendant's support obligation effective November 27, 2017.

B.

The court next considers that part of defendant's application seeking to vacate arrears. In support of his request, defendant's first argument is that arrears should be vacated due to his showing that he is not the child's biological father, that he and the child have had virtually no contact, and there is no relationship with the child. Second, defendant argues that he is entitled to relief based on principles of equity. Having considered both arguments, the court denies defendant's request.

i.

As concerns his first argument, defendant has not pointed to any authority that supports the position that arrears may be vacated due to lack of a relationship and because genetic testing shows an obligor is not a child's biological father. While arrears were vacated in Monmouth County Division of Social Services on Behalf of Hall v. P.A.Q., 317 N.J. Super. 187 (App. Div. 1998), the Appellate Division in that case was considering circumstances far different from those now before this court.

In this case, defendant signed the COP on May 3, 2003. By doing so, defendant acknowledged paternity of the child. Under New Jersey law, the COP was "determinative for all purposes" with respect to paternity. N.J.S.A. 9:17-53a. Consistent therewith, the court, after finding that defendant had been "properly served" and "failed to appear," entered the November 20, 2007, order establishing paternity "based on [the] COP." The court then set child support using the Child Support Guidelines. See R. 5:6A (stating generally the Guidelines "shall be applied when an application to establish or modify child support is considered by the court").

In contrast, paternity in P.A.Q. was established by default, without a certificate of parentage. In seeking to vacate the arrears, the defendant in that case argued that "the allegations in the complaint and the 'proofs' relied upon for entry of judgment were insufficient." P.A.Q., 317 N.J. Super. at 193. In considering those arguments, the Appellate Division found that "the complaint contains no 'statements' accusing defendant of being the biological father of L.I.H. Certainly, it contains no 'facts [concerning defendant's parentage] made on personal knowledge admissible in evidence to which the affiant is competent to testify.'" Id. at 193. The Appellate Division further found that there was "no evidence that the mother was present or that counsel for MCDSS (Monmouth County Division of Social Services) presented a certificate of

parentage or even told the Child Support Hearing Officer that one existed." Id. at 195.

In light of the deficiencies in the complaint and the lack of evidence concerning paternity, the Appellate Division found that "the complaint was insufficient to invoke the jurisdiction of the court." Id. at 193. The Appellate Division then held that "as far as we can tell, default was improvidently entered." Id. at 193-96. Consequently, relief from the support order was found to be appropriate under Rule 4:50-1(f). Ibid.

The holding in P.A.Q. does not support defendant's position. The jurisdictional deficiencies that justified relief in that case do not exist in this case. Here, paternity was established based on the COP, which was determinative of the issue. N.J.S.A. 9:17-53a. In addition, the court found that defendant was noticed and had defaulted. The facts before this court do not present a situation where a child support order was "improvidently granted." P.A.Q., 317 N.J. Super. at 193-96.

The facts of this case are more akin to those that were before the court in D.J.D. In that case, the defendant had not sought "genetic testing either before signing the Certificate of Parentage or before a child support obligation was imposed upon him by the court. Rather, he simply assumed that he was D.D.'s father based upon his relationship with L.R.R. and the fact that she did not tell

him otherwise." 344 N.J. Super. at 81. In finding that it would not be appropriate to vacate the arears, the court held that in signing a certificate of parentage, the defendant had done so at "his peril." Ibid. The court went on to hold that:

> When a man fails to demand genetic testing and voluntarily accepts the obligations and benefits of parenthood by signing a Certificate of Parentage, it is he, and not the child or the taxpayers who provide funding for public assistance, who should bear the financial consequences if it is later determined that he is not the biological father.
>
> [Ibid.]

As in D.J.D., defendant in this case signed the COP at his own peril and the effect of doing so was determinative on paternity. N.J.S.A. 9:17-53a.

Defendant has not established a basis to vacate arrears due to the lack of a relationship between him and the child and the fact that it has now been established that he is not the child's biological father. As such, his request is denied.

ii.

The court also denies defendant's request to vacate arrears on equitable grounds.

In support of his request, defendant argues that plaintiff would be unjustly enriched were she to be paid the arrears. The court disagrees. In J.S.,

the Appellate Division considered a situation where a mother had received child support from a man later determined not to be the child's biological father. In finding that denying a request for a return of the monies did not result in unjust enrichment, the Appellate Division held that:

> We are not persuaded by defendant's argument that he should be entitled to recoup his money from plaintiff either because of her deceit or because she has been unjustly enriched by her use of the money to care for her child. As the Court has explained, "[b]ecause the responsibility to support runs from parent to child, not parent to parent, the custodial parent was not 'unjustly enriched' by receiving sums and considering them [] payments for the support of their children." Pascale, supra, 140 N.J. at 592.
>
> [J.S., 389 N.J. Super. at 205-06.]

As detailed in J.S., the argument that plaintiff would be unjustly enriched runs counter to the principle that the right to child support belongs to the child, not the parent. Ibid. The court denies defendant's request to vacate arrears on the basis of unjust enrichment.

The court also finds defendant has failed to show an equitable basis to vacate arrears. Indeed, the court finds that defendant's request actually runs counter to principles of equity. The court reaches this result for two reasons.

First, "[e]quity follows the common law precept that no one shall be allowed to benefit by his own wrongdoing." Neiman v. Hurff, 11 N.J. 55, 60 (1952). That defendant has engaged in wrongdoing is not in dispute; he

defaulted on his court ordered support obligation. The benefit he seeks from that wrongdoing is shown by the fact that had he paid his support obligation he would not be able to recover those payments from plaintiff. J.S., 389 N.J. Super. at 205-06.

Had defendant not engaged in that wrongdoing, plaintiff would have received the monies and she would not have to return them, notwithstanding that it has now been established that defendant is not the child's biological father. Ibid. In this case, defendant failed to pay his support obligation and the arrears at issue are the result of that failure. As such, vacating the arrears would leave defendant in a better position than he would have been had he timely paid his support obligation. In other words, vacating the arrears would allow defendant to benefit from his own wrongdoing. Equity does not provide for such a result. Neiman, 11 N.J. at 60.

Second, a party seeking relief in equity "must come with clean hands." Woodward v. Woodward, 41 N.J. Eq. 224, 225 (Ch. 1886). In this case, the arrears at issue resulted from defendant having violated a court order that required him to pay child support. Defendant does not have clean hands with respect to the arrears, which exist only because of his own violations of court orders.

Lastly, the court notes that the effect of vacating the arrears would be to place the parties in the same financial position as they would be if defendant had paid his support obligation and then recovered the payments from plaintiff. That result would run counter to the ruling in J.S., wherein the Appellate Division held that support payments could not be recovered. 389 N.J. Super. at 205-06.

For these reasons, the court denies defendant's request to vacate arrears on equitable grounds.

III.

An order will issue in accordance with this opinion.