21CA0143 Parental Resp Conc CLB 02-24-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA0143
Garfield County District Court No. 12DR23
Honorable Denise K. Lynch, Judge

In re the Parental Responsibilities Concerning C.L.B., a Child,

and Concerning Jesse T. Lafayette,

Appellee,

and

Holly Faye Bockenthien,

Respondent,

and

Jarrod Nay,

Intervenor-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE SCHUTZ
Dailey and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 24, 2022

Jill Edinger Law, LLC, Jill Edinger, Carbondale, Colorado, for Appellee

Coleman Law Office, P.C., Cassie L. Coleman, Josie L. Lewber, Glenwood Springs, Colorado, for Intervenor-Appellant

¶ 1 This is a proceeding to modify parental responsibilities for C.L.B., the child of Holly Faye Bockenthien (mother). Mother's husband, Jarrod Nay (husband), appeals the district court's order requiring that C.L.B. begin a reunification process with Jesse T. Lafayette (biological father). We reverse the order and remand the case for further proceedings.

I. Background

¶ 2 Mother and husband married in November 2008. They remained married and lived together off and on until November 2018 when mother died from an acetaminophen overdose. C.L.B. was born in June 2011 during a time when mother and husband were estranged and mother lived with biological father.

¶ 3 Mother left biological father in October 2011 when C.L.B. was four months old. She later reconnected with husband, and the two of them parented C.L.B. and their mutual child, who is C.L.B.'s half-sibling. C.L.B. had no contact with biological father and believed that husband was his father.

¶ 4 In January 2012, biological father moved for an allocation of parental responsibilities (APR) for C.L.B. under section 14-10-123, C.R.S. 2021, naming mother as C.L.B.'s other parent. Mother

objected to the APR, alleging that biological father had pending domestic violence and child abuse charges. She later moved for a default judgment, asserting that biological father had shown no interest in parenting C.L.B. and had stopped communicating with her and with the court.

¶ 5 The district court held an APR hearing in August 2013. Biological father did not attend the hearing. At the hearing, the court questioned mother regarding C.L.B.'s paternity:

> THE COURT: And Jesse Thomas Lafayette, who filed this . . . original petition for order of [APR] — is he the father of [C.L.B.?]
>
> . . . .
>
> [MOTHER]: Yeah.
>
> THE COURT: Could anybody else be the father?
>
> [MOTHER]: No.
>
> THE COURT: So, again, I'm not trying to pry but just so that the record is clear, for the 10 months prior to June 12 of 2011, were you having sexual relations with anyone other than Jesse Lafayette?
>
> [MOTHER]: No, sir.
>
> THE COURT: Okay. Do you have any questions or anything you want to put on the

record regarding the paternity of the child and the order for [APR]?

[MOTHER]: No.

¶ 6 After the hearing, the court allocated all parenting time and decision-making authority to mother and ordered biological father to pay her child support.

¶ 7 Six and one-half years later, in January 2020, biological father moved to modify APR to give him full custody and all decision-making authority. He attached a death certificate showing that mother died on November 6, 2018, and a birth certificate naming him as C.L.B.'s father. The district court ordered biological father to serve his motion on whomever had custody of C.L.B. Thereafter, husband moved to intervene in the case, asserting that he was C.L.B.'s presumed father and the only father the child had ever known. Husband also moved to dismiss the action for lack of subject matter jurisdiction under the Uniform Paternity Act (UPA) and to set aside all orders in the case because he was married to mother when the child was conceived and born, but he was not made a party to the case before the original order allocating parental responsibilities issued.

¶ 8 The district court granted the motion to intervene but denied the motion to dismiss, noting that husband was now a party to the action, which cured the alleged jurisdictional defect. The court also denied the motion to set aside the earlier orders in the case because "[t]his case has never been a paternity case" but rather an APR case. It then denied husband's motion to reconsider, finding that there was no reason to apply the UPA when the case was filed because C.L.B.'s "natural father" was "known and undisputed."

¶ 9 Husband appealed the district court's rulings, but his appeal was dismissed, on biological father's motion, for lack of a final order.

¶ 10 Thereafter, biological father sought and was granted leave to amend his APR motion to not request immediate custody and decision-making authority but to request instead a reunification plan to gradually restore his parental responsibilities.

¶ 11 A hearing was held, after which the district court found that it was in C.L.B.'s best interests to remain in husband's care — where he had been since he was a few months old — and not to uproot him from his psychological parent and the only home he has ever known. The court further found, however, that it must apply a

presumption in favor of modifying APR as biological father asked, and that husband must rebut that presumption by clear and convincing evidence that introducing biological father into C.L.B.'s life was not in the child's best interests. *See In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, 1134 (Colo. 2010).

¶ 12 The court referenced husband's testimony that introducing biological father into C.L.B.'s life at that time would cause emotional harm because C.L.B. had lost his mother just two years ago and learning that husband was not his father would be devastating to him and would disrupt the stability he had found since his mother's death. The county department of human services therapist who had treated mother, husband, and C.L.B. agreed that this was not the right time to introduce biological father into C.L.B.'s life and that doing so would cause damage. A second independent expert, who did not know the family, opined, however, that C.L.B. "needs to know about his biological father and needs to know now." The court referenced this expert's opinion that "the longer the disclosure is put off, the more harmful it will be to" C.L.B. and to his relationship with husband, whom he will resent for lying to him.

¶ 13 The court rejected husband's arguments that biological father was unfit because of an existing dependency and neglect case involving three of his other children; a domestic violence incident with mother; a twenty-four-year-old marijuana felony conviction; his abandonment of C.L.B.; or mother's allegation of sexual assault, which the court found not credible.

¶ 14 Accordingly, the court adopted the independent expert's multi-step plan to reunify biological father and C.L.B. "very slowly and carefully to minimize any negative impact on [C.L.B.]." Husband appeals this Order.

II. Subject Matter Jurisdiction

¶ 15 Husband contends that because the district court did not comply with the UPA when it determined biological father's paternity in 2013, it lacked subject matter jurisdiction to do so and therefore the APR modification order is void. We agree.

A. Legal Standards

¶ 16 We review de novo whether the district court had subject matter jurisdiction. *Egelhoff v. Taylor*, 2013 COA 137, ¶ 23. A judgment rendered without subject matter jurisdiction is void. *In re Support of E.K.*, 2013 COA 99, ¶ 8.

¶ 17 "When a paternity issue arises in a nonpaternity proceeding, the court must follow the procedures outlined in the UPA." *People in Interest of J.G.C.*, 2013 COA 171, ¶ 11; *see also People in Interest of O.S-H.*, 2021 COA 130, ¶ 40; *In re Marriage of Burkey*, 689 P.2d 726, 727-28 (Colo. App. 1984). "Failure to do so deprives the court of subject matter jurisdiction to decide paternity." *J.G.C.*, ¶ 11; *see also O.S-H.*, ¶ 40; *E.K.*, ¶ 9; *cf. Burkey*, 689 P.2d at 727-28 (order purporting to determine paternity in dissolution of marriage case was void for failure to comply with former UPA requirement that the child be made a party to the case).

¶ 18 The UPA requires, as relevant here, that the court make each man presumed to be the father and each man alleged to be the natural father parties "or, if not subject to the jurisdiction of the court, provide notice of the action in a manner prescribed by the court and an opportunity to be heard." § 19-4-110, C.R.S. 2021; *E.K.*, ¶ 10. The requirement that all presumed and alleged fathers be made parties or be given legal notice applies in nonpaternity proceedings in which paternity is determined. *See, e.g.*, *People in Interest of M.R.M.*, 2021 COA 22, ¶ 28 (dependency and neglect); *In re Marriage of Ohr*, 97 P.3d 354, 355-56 (Colo. App. 2004)

(dissolution of marriage). If all presumed and alleged fathers are not made parties or given legal notice, the court lacks subject matter jurisdiction to decide paternity. *M.R.M.*, ¶ 28; *J.G.C.*, ¶¶ 11-14; *E.K.*, ¶¶ 12-14.

¶ 19 A man is presumed to be a child's natural father under the UPA if he and the child's mother are or have been married to each other and the child was born during the marriage. § 19-4-105(1)(a), C.R.S. 2021. A man is also a presumed father if he acknowledges his paternity in writing with the court or registrar of vital statistics, but if another man is a presumed father at the time, the acknowledgement is effective only with the written consent of the presumed father or after the presumption has been rebutted. § 19-4-105(1)(e). Genetic testing showing a probability of 97% or higher that a man is the biological father of a child also creates a presumption of paternity. § 19-4-105(1)(f).

¶ 20 None of these UPA presumptions are conclusive, however, including the presumption based on biology. *N.A.H. v. S.L.S.*, 9 P.3d 354, 361-62 (Colo. 2000); *J.G.C.*, ¶ 21. Rather, all can be rebutted by clear and convincing evidence. § 19-4-105(2)(a); *J.G.C.*, ¶ 21. When two or more conflicting presumptions arise, "the

presumption which on the facts is founded on the weightier considerations of policy and logic controls." § 19-4-105(2)(a). In determining which presumption controls, the court considers:

> (I) The length of time between the proceeding to determine parentage and the time that the presumed father was placed on notice that he might not be the genetic father;
>
> (II) The length of time during which the presumed father has assumed the role of father of the child;
>
> (III) The facts surrounding the presumed father's discovery of his possible nonpaternity;
>
> (IV) The nature of the father-child relationship;
>
> (V) The age of the child;
>
> (VI) The relationship of the child to any presumed father or fathers;
>
> (VII) The extent to which the passage of time reduces the chances of establishing the paternity of another man and a child support obligation in favor of the child; and
>
> (VIII) Any other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or fathers or the chance of other harm to the child.

Id.; *see J.G.C.*, ¶ 22. "The inquiry is fact-intensive, but the court must focus on the best interests of the child and determine

paternity with that standard at the forefront." *J.G.C.*, ¶ 22; *see also N.A.H.*, 9 P.3d at 363; *O.S-H.*, ¶ 54; *Ohr*, 97 P.3d at 356.

¶ 21 A duly executed voluntary acknowledgement of paternity, such as on a birth certificate, shall be considered a legal finding of paternity on the earlier of sixty days after execution or on the date child support is determined by an administrative or judicial proceeding. § 19-4-105(2)(b). A legal paternity finding may be challenged only on the basis of fraud, duress, or mistake of material fact. § 19-4-105(2)(c); *see also People in Interest of J.A.U. v. R.L.C.*, 47 P.3d 327, 333 (Colo. 2002) (holding that challenges to paternity judgments must be brought within C.R.C.P. 60(b)'s six-month time limit).

¶ 22 However, these limitations on challenging paternity apply only when the court making the prior paternity determination followed UPA requirements. *See O.S-H.*, ¶¶ 39-49 (reversing and remanding paternity determination when the juvenile court did not address whether the birth certificate or prior adjudication in the case were entered in compliance with the UPA); *Burkey*, 689 P.2d at 727-28 (reversing and remanding dissolution judgment purporting to determine paternity "notwithstanding a party's prior admission as

to paternity" because the court failed to follow UPA requirements). If the court failed to require joinder of all known and presumed natural fathers, the court lacked subject matter jurisdiction to determine paternity, meaning that its order is void and can be challenged at any time. *See O.S-H.*, ¶ 40; *J.G.C.*, ¶¶ 7, 11; *E.K.*, ¶¶ 7-9; *Burkey*, 689 P.2d at 728.

B. Analysis

¶ 23 Although the district court raised paternity with mother during the 2013 APR proceedings, it did not apply section 19-4-105(1) to determine whether there were any other presumptive fathers. Had it done so, it would have learned that mother and husband were married at the time C.L.B. was conceived and born, and thus husband was a presumed father under section 19-4-105(1)(a). Because husband was a presumed father and was not made a party to the proceedings or given legal notice and an opportunity to be heard, the court lacked subject matter jurisdiction in 2013 to determine paternity of C.L.B. *See* § 19-4-110; *M.R.M.*, ¶ 28; *J.G.C.*, ¶¶ 4-7, 12-13; *E.K.*, ¶¶ 12-14.

¶ 24 The court's observation that this case "has never been a paternity case" does not absolve it of its responsibility to follow the

UPA. *See Burkey*, 689 P.2d at 728 (court purporting to determine paternity in a dissolution of marriage case was required to follow the UPA in doing so); *see also O.S-H.*, ¶ 40; *J.G.C.*, ¶ 11; *Ohr*, 97 P.3d at 356.

¶ 25 Biological father argues that the cases holding that a court lacks subject matter jurisdiction if it does not follow UPA requirements when determining paternity in a nonpaternity case are distinguishable because in those cases, competing presumptive fathers came forward and paternity was raised as an issue, whereas here the court did not know that husband was a presumed father. We are not persuaded. The court itself raised paternity as an issue in 2013 after biological father failed to attend the hearing on his APR motion. It questioned mother about whether anyone else could be C.L.B.'s father. Having raised paternity as an issue in the action, the court was required to follow the UPA in determining whether there were any other presumed fathers. *See* § 19-4-105(1); *Burkey*, 689 P.2d at 727-28; *cf. J.G.C.*, ¶¶ 2-7, 11-14, 23-25 (reversing ruling that paternity could not be established in a presumptive father who, by virtue of genetic testing, was excluded as the child's biological father and remanding for the court to give

legal notice to the person who the child's mother identified as a possible biological father and then conduct proceedings under the UPA to determine which man was the child's legal father).

¶ 26 *O.S-H.* and *J.G.C.* require a court to apply the UPA when — as occurred here in 2013 — "a paternity issue arises in a nonpaternity proceeding." *O.S-H.*, ¶ 40; *J.G.C.*, ¶ 11. They do not require, as biological father argues, that *a party* — specifically, a competing presumptive or alleged father — raise paternity as an issue for the UPA to apply in a nonpaternity proceeding. *See J.G.C.*, ¶¶ 11-13, 23-24.

¶ 27 We recognize this conclusion contemplates a burden on trial courts to ensure that all presumed fathers are provided legal notice of a paternity action. But this burden has already been imposed by the General Assembly:

> The court *shall* make the natural mother, each man presumed to be the father under section 19-4-105, and each man alleged to be the natural father parties or, if not subject to the jurisdiction of the court, provide notice of the action in a manner prescribed by the court and an opportunity to be heard.

§ 19-4-110 (emphasis added). In addition to being statutorily mandated, we conclude this burden is not undue. When presented

with a paternity issue, the trial court can simply require the natural mother to complete a paternity affidavit identifying all parties who may potentially be presumptive fathers. Indeed, many trial courts across the State of Colorado already follow this practice. Alternatively, the trial court may make an appropriate factual inquiry of the natural mother by which it elicits sufficient factual information to ensure that all potentially presumptive fathers are identified. But what a trial court may not do is elicit only limited testimony from the natural mother which does not fully develop the record in a manner that permits all potentially presumptive fathers to be identified and thereafter provided with appropriate notice of the action.

¶ 28 Biological father's argument that husband knew in 2012 about biological father's APR motion and did not seek to participate in the case is also unpersuasive. The plain language of the statute requires the court to either make a presumed father a party or, if the presumed father is not subject to the personal jurisdiction of the court, "provide notice of the action in a manner prescribed by the court and an opportunity to be heard," including notice by publication under C.R.C.P. 4(g) if the presumed father's residence is

unknown or he cannot be found. § 19-4-110; *cf. In re Marriage of Zander*, 2021 CO 12, ¶ 13 (if the plain language of a statute is clear, the statute must be applied as written). Husband's knowledge of the existence of the APR proceeding is insufficient. Rather, as C.L.B.'s presumed father, husband was entitled to legal notice *and* an opportunity to be heard by participating in the action. *See* § 19-4-110; *cf. People in Interest of A.B-A.*, 2019 COA 125, ¶ 63 (parent's actual notice of dependency and neglect action through communication with his caseworker was insufficient as a substitute for legal service).

¶ 29 That the court ultimately allowed husband to intervene in 2020 and become a party to the APR modification proceedings does not, as the court found, cure the jurisdictional defect. Rather, after husband was in the case, the court refused to address his motion to set aside the 2013 paternity determination and reconsider paternity under the UPA with him as a presumed father. *See* § 19-4-105(2)(a); *J.G.C.*, ¶¶ 21-22; *see also N.A.H.*, 9 P.3d at 359-60 (competing paternity presumptions may simultaneously arise in favor of different men and, if so, must be resolved under the UPA); *People in Interest of K.L.W.*, 2021 COA 56, ¶¶ 20-21 (process set

forth in section 19-4-105(2)(a) is mandatory and the court must weigh conflicting parentage presumptions and determine which controls because a child can have only one father).

¶ 30 Last, contrary to the district court's assertion that husband could not have been a presumed father in 2013 because C.L.B.'s "natural" father was known, biological father's position based on genetics or on having been named on the birth certificate is neither conclusive nor superior — when determining C.L.B.'s legal father — to husband's position as a presumed father by his marriage to C.L.B.'s mother. *See N.A.H.*, 9 P.3d at 360-62; *K.L.W.*, ¶ 17. Rather, no presumption is conclusive under the UPA, and the court is required to weigh the parties' competing presumptions under section 19-4-105(2)(a). *See N.A.H.*, 9 P.3d at 360-62; *O.S-H.*, ¶¶ 39-49; *J.G.C.*, ¶¶ 21-23; *cf. Ohr*, 97 P.3d at 355-56 (upholding dissolution court's determination — after weighing the competing UPA presumptions between the mother's husband and the child's biological father — that the husband was the legal father). And because this is a fact-intensive process involving multiple considerations, we reject biological father's argument that even if

the court was required to follow the UPA, its failure to do so was harmless.

¶ 31 We also reject biological father's attorney's assertion at oral argument that "natural father" under the UPA is synonymous with biological or genetic father. A parent-child relationship may be established between a child and the child's "natural father pursuant to" the UPA's provisions. § 19-4-104, C.R.S. 2021. And under section 19-4-105(1)(a), "[a] man is presumed to be the natural father of a child" if he was married to the child's mother when the child was born.

¶ 32 Thus, "natural father" under the UPA is not synonymous with biological or genetic father. *See O.S-H.*, ¶ 52 ("[A] person may gain the status of a child's natural parent by holding the child out as his own."); *In re Parental Responsibilities Concerning A.D.*, 240 P.3d 488, 490-92 (Colo. App. 2010) (rejecting argument that a presumptive father could not be a presumptive "natural" father under the UPA's holding out provision because he had admitted that he was not the child's biological father); *In Interest of S.N.V.*, 284 P.3d 147, 151 (Colo. App. 2011) ("[U]nder section 19-4-105, a

woman may gain the status of a child's natural mother even if she has no biological tie to the child.").

¶ 33 Accordingly, we vacate the APR modification order and remand the case for the court to determine paternity under the UPA and then reconsider an appropriate APR order in view of its paternity determination. Specifically, the court must weigh the parties' competing paternity presumptions and give each party the opportunity to rebut the other's presumption by clear and convincing evidence. If neither presumption is rebutted, the court must then determine based on the statutory factors which presumption is founded on the weightier considerations of policy and logic and therefore controls. *See* § 19-4-105(2)(a); *K.L.W.*, ¶¶ 17, 19-20, 41. The court must focus on C.L.B.'s best interests, which are at the forefront of its paternity inquiry. *N.A.H.*, 9 P.3d at 362-63; *O.S-H.*, ¶ 54; *K.L.W.*, ¶ 41; *J.G.C.*, ¶ 22. After determining C.L.B.'s legal father under the UPA, the court must then enter an appropriate order allocating parental responsibilities. The court should consider C.L.B.'s best interests relative to these issues at the time of the remand proceedings and give the parties an opportunity

to present new evidence on C.L.B.'s current circumstances. *See O.S-H.*, ¶ 54.

III. The *Troxel* Presumption

¶ 34 Husband also contends that the district court erred when modifying its parental responsibilities order by giving biological father the presumption required by *Troxel v. Granville*, 530 U.S. 57, 68 (2000), that, as a fit parent, he acts in C.L.B.'s best interests. Biological father argues that this issue was not preserved for appeal because it was not raised in husband's notice of appeal. We reject that argument. *See* C.A.R. 3(a), (d)(3) (providing that the content of a notice of appeal is not jurisdictional and a notice must set forth an "advisory" list of issues); *In re Marriage of Williams*, 2017 COA 120M, ¶ 24 (an appellant may argue issues not listed in the notice of appeal).

¶ 35 However, because of our disposition to vacate the APR order and remand the case for further proceedings under the UPA to determine C.L.B.'s legal father, we need not address this issue. The outcome of the remand proceedings will necessarily determine where the *Troxel* presumption lies. *See K.L.W.*, ¶¶ 15, 21 (noting that the purpose of a parentage proceeding under the UPA is to

establish the parent-child relationship, including determining which of a child's competing presumptive fathers will enjoy the rights of parenthood and which will be a nonparent without such rights); *see also N.A.H.*, 9 P.3d at 359 (noting "extraordinary importance of the outcome of a paternity proceeding" because it will determine who has the right to parenting time and to make decisions concerning the child).

IV. Conclusion

¶ 36 The order is reversed, and the case is remanded for further proceedings as instructed herein.

JUDGE DAILEY and JUDGE FOX concur.