IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

No. 24120

WILLIAM L., III,
Plaintiff Below, Appellant

v.

CINDY E.L.,
Defendant Below, Appellee

Appeal from the Circuit Court of Kanawha County
Honorable Herman G. Canady, Judge
Civil Action No. 91-C-4393

AFFIRMED

Submitted: September 16, 1997

Filed:

October 3, 1997

Michael C. Farber	Cindy E.L.
Sutton, West Virginia	Appellee
Attorney for the Appellant	Pro Se

This Opinion was delivered PER CURIAM.

CHIEF JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

"A trial judge should refuse to admit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child." Syl. pt. 3, Michael K.T. v. Tina L.T., 182 W. Va. 399, 387 S.E.2d 866 (1989).

Per Curiam:[1]

This action is before this Court upon an appeal from the final order of the Circuit Court of Kanawha County entered on October 1, 1996. The issue before this Court arose out of the divorce action between the appellant, William L., III,[2] and the

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[1]We point out that a per curiam opinion is not legal precedent. See Lieving v. Hadley, 188 W. Va. 197, 201 n. 4, 423 S.E.2d 600, 606 n. 4 (1992) ("Per curiam opinions . . . are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta. . . . Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published per curiam opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion.").

[2]We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P., 182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

appellee, Cindy E. L., and concerns the paternity of a child born during their marriage. Appellant contends that the circuit court erred in adopting the recommendation of the family law master that paternity test results would not be admitted into evidence and that the presumption of paternity would stand due to the long period of time during which the parties resided together as husband and wife and during which the child's paternity was not questioned.

This Court has before it the petition for appeal, the record as designated by the appellant,[3] the brief of appellant's counsel, and

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[3] The record before this Court reflects that appellant designated a transcript of proceedings held before the family law master on March 31, 1993. However, the index page of the designated record submitted by the circuit clerk to this Court notes that said transcript "is not a part of the Court file." In addition, a post-it note attached to the same index page and signed by a deputy circuit clerk states that "requests for additional designation were not responded to."

the brief of appellee, pro se. As discussed below, this Court is of the opinion that the circuit court did not err in adopting the recommendation of the family law master. Unfortunately, the record is sparse and the parties assert conflicting facts. Obviously, we are limited to the record before us. The result we reach in this case may have been different if we had a more complete record. Based upon this record, therefore, we affirm the final order.

I

The parties were married in 1984, and James L. was born in January 1987. The parties separated in November 1991, and appellant filed for divorce a month later. In his complaint, appellant alleged that the paternity of James L. was uncertain. Based upon this allegation, the parties were ordered to undergo blood testing to determine the paternity of the child. On September 10,

1992, a divorce decree was entered on the grounds of irreconcilable differences. All issues other than the divorce were bifurcated for determination at a later date.

Subsequently, the blood test results, which indicated that appellant was not the father of James L., were lodged in the court file.[4] Appellee objected to any admission of the test results until an in camera hearing could be conducted to determine whether their admittance was proper. On March 31, 1993, an in camera hearing was held. According to the family law master's order, appellee testified that at the time of the birth of the child, she asked the appellant to have blood tests and he refused. She stated that blood

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[4]The blood test results are not part of the record before this Court. However, it is undisputed by the parties and in the portion of the record that is before this Court that appellant is not the father of James L.

tests were also discussed with appellant two years later, and he again said no to testing. During this time, and until the separation, appellant acted as a normal father towards James L. and the parties' other children.

Appellee further testified about the identity of the biological father of James L. Appellee claimed that she last saw the biological father of James L. four years ago, and she did not remember his last name.[5] According to the family law master's order, appellant also testified at the in camera hearing. He denied ever talking about the child's paternity or mentioning blood tests until the divorce.

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[5]The family law master found the appellee's testimony to be "conflicting, often contradictory, first stating something, then denying it, and generally often not trustworthy."

Following the hearing, the family law master entered an order recommending that the paternity test results not be admitted because appellant had held himself out to be the father of James L. for a sufficient period of time making evidence disproving paternity not in the child's best interests. The recommendation was adopted by the circuit court as reflected in the final order.

II

On numerous occasions, this Court has set forth the applicable standard of review for a recommended order of a family law master. We have observed that such orders are reviewable by a circuit court pursuant to statute, W. Va. Code, 48A-4-16 [1997], W. Va. Code, 48A-4-20 [1993], and pursuant to this Court's Rules of Practice and Procedure for Family Law. We also recently stated in syllabus point 2 of Pearson v. Pearson, ____ W. Va. _____, 488

S.E.2d _____ (1997): "A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review application of law to the facts under an abuse of discretion standard." See also syl. pt. 1, Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841 (1995). In syllabus point 3 of Pearson, we noted that "[u]nder the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." See also syl. pt. 3, Stephen L. H. Finally, we stated in syl. pt. 1 of Pearson:

> 'In reviewing challenges to findings made by a family law master that were also adopted by a circuit court, a three-pronged standard of

> review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretation are subject to a de novo review.' Syl. Pt. 1, Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995).

Appellant contends that the paternity test results should have been admitted because the appellee has fraudulently and intentionally refused to identify the actual putative father, and therefore, the decision unjustly enriches her and allows the biological father to escape his financial obligation to the child. The issue of whether paternity test results disproving paternity should be admitted into evidence first came before this Court in the case of Michael K.T. v. Tina L.T., 182 W. Va. 399, 387 S.E.2d 866 (1989). In syllabus point 3, this Court held:

> A trial judge should refuse to admit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.

See also syl. pt.1, State ex rel. David Allen B. v. Sommerville, 194 W. Va. 86, 459 S.E.2d 363. In so holding, we recognized that "the law favors the innocent child over the putative father in certain circumstances." Id. at 872. Although we did not establish a finite period of time which must pass before blood test evidence is admissible, we did state that "absent evidence of fraudulent conduct which prevented the putative father from questioning paternity, this Court will not sanction the disputation of paternity through blood test evidence if there has been more than a relatively brief passage of time." Id.

As previously mentioned in note 3, supra, a transcript of the proceedings before the family law master is absent from the record. In the past, this Court has emphasized that designation of the record is important. State v. Honaker, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994). "[W]e take as nonexisting all facts that do not appear in the designated record and will ignore those issues where the missing record is needed to give factual support to the claim." Id. While the family law master's recommendation does relate some of the testimony presented at the in camera hearing, it does not lend factual support to the appellant's allegations. Absent a sufficient record to justify appellant's contentions, the family law master's findings of fact were not clearly erroneous.[6]

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[6]At this point, we note that appellant also contends that the circuit court erred in failing to appoint a guardian ad litem to

represent the child. The sparse record that is before this Court indicates that the error was not raised below. We have long since held that objections not made in the trial court and which are not jurisdictional in character will not be considered on appeal. See syl. pt. 1, State Road Commission v. Ferguson, 148 W. Va. 742, 137 S.E.2d 206 (1964). Because it appears that this issue was raised for the first time on appeal, it is not properly before this Court. However, we do not abandon our position as set forth in syllabus point 4 of Michael K.T., and clarified in syllabus point 5 of Cleo A.E. v. Rickie Gene E., 190 W. Va. 543, 438 S.E.2d 886 (1993), that a guardian ad litem should be appointed to represent the interests of the minor child in actions seeking to disprove a child's paternity. In fact, we urge trial judges to be cognizant of the importance of appointing guardians ad litem in these cases.

We note that the family law master found that appellant had assumed the role of father to James L. for more than a relatively brief passage of time as a normal father/child relationship existed for four years. The family law master further determined that appellant had also been on notice that he might not be the biological father for approximately four years before he acted to contest paternity. Although the appellant urges this Court to expand our interpretation of Michael K.T., we find that the decision in this case, as presented to this Court, preserves the best interests of the child.

This Court hereby orders that the final order of the Circuit Court of Kanawha County be affirmed.

Affirmed.