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~~NO. 08-222111~~

FILED

IN THE COURT OF APPEALS OF THE STATE OF KANSAS JUN 18 2009

CAROL G. GREEN  
CLERK OF APPELLATE COURTS

NICK A. ESTRADA  
Petitioner-Appellant

v.

MONICA R. ESTRADA  
Respondent-Appellee

BRIEF OF APPELLANT

Appeal From The District Court  
Of Wyandotte County, Kansas  
The Honorable Wayne R. Lampson, Judge  
Division Number 6  
District Court Case No. 2001 DM 921

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### **NATURE OF THE ACTION**

This is an appeal from the judgment entered by the District Court of Wyandotte County, Kansas. The nature of the case is this is a post-domestic case. The parties were divorced on July 26, 2001. One child was born of this marriage. Respondent filed a motion to establish a child support order on April 11, 2006. Petitioner Mr. Estrada then filed a motion to set aside the finding of paternity in the divorce decree and the property settlement agreement. The parties have stipulated that Mr. Estrada is not the biological father of the child.

### **STATEMENT OF ISSUES**

1. Did the trial court err in failing to set aside that portion of the divorce decree finding the respondent to be the father of the minor child?
2. Did the Court err in failing to appoint a Guardian Ad Litem for the minor child in this case?

### **STATEMENT OF FACTS**

The parties were married on June 21, 1997. (R. II, 4.) About 14 months after the parties married, a child was born. M.R.E. was born on August 11, 1998. (R. II, 4.) Petitioner testified that prior to the marriage he had a vasectomy. (R. II, 4.) Petitioner testified he was surprised when the respondent became pregnant but "I was in love and I just wanted to believe he was mine." (R. II, 6.) Mr. Estrada testified, "I was thinking he was mine and I didn't want to end my marriage, and I was in love." (R. II, 6.)

Mr. Estrada eventually found out he was not the biological father of the minor child. (R. II, 11.) The parties had an argument the day before the child's second birthday and

respondent told petitioner that Sean Estrada was really the child's father. Respondent then told petitioner the birthday party would be held for the minor child at the house of his real father the next day. (R. II, 11.) The real biological father of the child, Sean Estrada, was the ex-boyfriend of the respondent. Sean Estrada had a long relationship with respondent until she began to date Nick Estrada. (R. II, 8.) Apparently respondent had an affair with her ex-boyfriend approximately six months after she married the petitioner Nick Estrada. (R. II, 11.) Nick Estrada testified he was no relation to Sean Estrada. (R. II, 7.) Nick Estrada told the court he considered himself to be enemies with Sean Estrada, the former boyfriend. (R. II, 11.) Sean Estrada did not like Nick Estrada because Nick Estrada married Sean Estrada's ex-girlfriend. (R. II, 11.)

Mr. Estrada testified when he found out he was not the biological father of the child he left his wife that same day and moved in with his aunt. (R. II, 12.) Mr. Estrada eventually filed for divorce and the parties were divorced on July 26, 2001. (R. I, 14-16.)

Mr. Estrada went to Marcus Potter, an attorney in Kansas City, Kansas, to represent him in relation to the divorce. (R. II, 13.) Mr. Estrada told Mr. Potter that he, Nick Estrada, was not the father of the minor child and did not want to pay child support. (R. II, 13.) Mr. Estrada also told Mr. Potter who the real father was. (R. II, 13.) Mr. Estrada testified that he told Mr. Potter he wanted a divorce because his wife had an affair after only six months of marriage. (R. II, 14.) Mr. Estrada believed Mr. Potter to be a competent lawyer. (R. II, 14.)

Mr. Potter structured a divorce decree and property settlement agreement wherein the parties agreed Mr. Estrada was not receiving visitation and further Mr. Estrada would not pay child support. (R. I, 8.) The agreement did provide for joint custody of the minor

child and residential custody was placed with respondent. The agreement contained a provision that Mr. Estrada would be required to maintain the minor child on his health insurance. Though the parties agreed Mr. Estrada was not receiving visitation, the agreement allowed for visitation. Mrs. Estrada did not have a lawyer but signed a voluntary entry of appearance and both parties signed the property settlement agreement. (R. I, 18).

Some time after the divorce respondent apparently remarried and came to Nick Estrada asking him to sign a consent of natural father to adoption of the minor child. (R. I, 81.) This was on May 14, 2002 and Nick Estrada signed the consent of natural father to adoption of the minor child. The adoption was however never finalized.

Some time after that, Mr. Estrada testified he met respondent in a bar. They had both been drinking. (R. II, 21.) The respondent wrote out on some type of scratch paper in the bar an agreement in which Mr. Estrada promised to pay \$200.00 a month in child support for the minor child and Mr. Estrada could then claim the child on taxes every other year. The parties signed this agreement in the bar and it is dated October 4, 2003. (R. I, 83.) Mr. Estrada testified he never made a child support payment and he only signed this piece of paper because he had been drinking and wanted to have sex with respondent. (R. II, 21.) Respondent in her memorandum claims Mr. Estrada made several payments to her of \$200.00. (R. I, 58.)

Respondent also claimed in her memorandum Mr. Estrada had exercised visitation with the minor child. It should be noted, however, respondent never testified under oath as to this matter or any other matters. She did not take the witness stand to refute the testimony of Mr. Estrada at the hearing in this case. Mr. Estrada testified the minor child

never had a father/son relationship with him after he left the home in August of 2000. (R. II, 16.) He testified he never really had any significant contact with the minor child after August, 2000. (R. II, 16.) Mr. Estrada testified the minor child had a relationship with his biological father Sean Estrada and it was a father/son relationship. (R. II, 17.) Mr. Estrada said the respondent admitted to him the minor child had a father/son relationship with Sean Estrada. (R. II, 17.)

The divorce was finalized on July 26, 2001. (R. I, 14.) The respondent made no effort to collect child support until she filed her motion to establish the child support order on April 11, 2006. (R. I, 17.) Respondent requested that Mr. Estrada pay her the sum of \$611.00 per month for child support. (R. I, 19). At the time she filed the motion to establish child support she was unemployed. (R. I, 23.) Mr. Estrada testified he was surprised when she did that and did not know she could file for child support. (R. II, 20.)

After respondent filed her motion, petitioner determined that Marcus Potter had been indefinitely suspended by the Kansas Supreme Court. He went to another attorney who promptly filed a motion requesting DNA testing and a Ross Hearing. (R. I, 46.) That motion was eventually amended to ask the Court to set aside the judgment finding Mr. Estrada to be the father in the divorce decree. (R. I, 52.) Mr. Estrada's lawyer also filed a motion asking for the appointment of a guardian ad litem for the minor child. (R. I, 65.) The motion asking that the paternity finding in the divorce decree be set aside was based upon K.S.A. 60-260 (b)(6). (R. I, 52.)

The hearing on the motions filed by the parties was held on February 7, 2008. At the time of the hearing, the parties stipulated the petitioner Nick A. Estrada was not the biological father of the minor child. (R. II, 7.) At that time, the Court took the matter under

advisement and the Court indicated “You will get my opinion by the end of next week in written form sent to both parties.” Almost a year later, on January 30, 2009, the Court – clearly confused about the evidence – filed a memorandum decision finding:

Petitioner is barred under the concept of collateral estoppel to now have the Court find that he is not the legal father of the minor child. Mr. Estrada signed a valid separation agreement, at a time he was represented by counsel, and he is bound by those actions. In his testimony he admits that he knew he was not the father, but signed the documents in the hopes he would be able to have sex with the respondent later that day. This Court does not find such actions to be excusable neglect. For these reasons, the Court finds that the Divorce Decree remains as ordered and that the respondent, through her attorneys, can seek the establishment of a proper amount of child support.

The petitioner Nick A. Estrada then perfected this appeal.

### **ARGUMENT**

I THE COURT ERRED IN FAILING TO SET ASIDE THE PORTIONS OF THE PROPERTY SETTLEMENT AGREEMENT AND THE DIVORCE DECREE FINDING PETITIONER NICK A. ESTRADA TO BE THE FATHER OF THE MINOR CHILD HEREIN.

#### **Standard of Appellate Review**

The standard of review in this appeal on this issue is whether or not the trial court abused its discretion. Wilson v. Wilson, 16 Kan. App. 2d 651, 827 P.2d 788 (1992)

#### **ANALYSIS**

The respondent in her memorandum filed in the trial court below relied heavily on Wilson v. Wilson, 16 Kan. App. 2d 651, 827 P.2d 788 (1992). The Wilson case is clearly distinguishable from the case at bar for a number of reasons. The parties in the Wilson case divorced in 1979. In 1982 Mr. Wilson remarried and determined he was sterile. That year he filed a motion for blood tests. The court denied the motion. In 1988, the mother filed a motion to increase child support. Mr. Wilson again contended he was not the father

and requested blood tests. At that time, his motion for blood testing was allowed and the blood test determined he was not the biological father. He then filed a motion to set aside the judgment and decree that determined him to be the father of the minor child and also he requested the order for child support be set aside. The trial court sustained his motion whereupon the mother appealed. The Court of Appeals ruled the father did not have a good reason to wait six years to file a motion to set aside the judgment. The Court of Appeals did not rule six years was per se too long a time, but rather the court said in Wilson at 16 Kan. App. 2d. 661:

“We have considered whether Michael had a valid reason for waiting six years to raise the issue. The other side of the question is whether such delay has prejudiced any of the other parties”.

In Wilson the court expressed concern the minor child would be left fatherless and without support. Wilson 16 Kan. App. 2d at 654. In the present case, if the finding of paternity is set aside, the minor child M.R.E. would not be left fatherless. His real biological father, Sean Estrada, maintains a father/son relationship with the minor child. Mr. Estrada testified the respondent told him the minor child was over to Sean Estrada’s house all the time. (R. II, 17.)

In the Wilson case, the minor child was raised to believe Mr. Wilson was the biological father. In this case the minor child has been raised to believe Mr. Sean Estrada is his biological father. It appears the real father in the Wilson case was never identified.

Further, in the present case the respondent is not prejudiced in relation to child support. The respondent has the right to establish a child support order against Mr. Sean Estrada. She also has the right to seek a judgment against Mr. Sean Estrada for back child support all the way back until the time the child was born. Therefore, in terms of the

monetary issue involved, the respondent is not prejudiced if the court sets aside the judgment herein as requested by petitioner Mr. Nick Estrada. The minor child is not prejudiced because he already enjoys a relationship with his real father Sean Estrada. Therefore, neither the respondent nor the minor child will suffer prejudice if Mr. Nick Estrada is found to not be the legal father of the minor child.

Mr. Estrada contends he acted within a reasonable time. The divorce decree was filed July 26, 2001. (R. I, 14.) Respondent filed her motion on April 11, 2006. (R. I, 17.) Mr. Estrada filed his motion for DNA testing and a Ross Hearing on May 15, 2006. (R. I, 46).

The case of In Re The Marriage Of Thompson 17 Kan. App. 2nd 47 832, P.2d 349 (1992) is probably more on point than the Wilson case. In Thompson the parties were divorced in 1982. Mr. Thompson was in the military. The trial court made a child support order of \$250.00 per month. Mrs. Thompson made no effort to collect the child support until 1990. Approximately eight and one-half years after the divorce, on February 5, 1991, Mr. Thompson filed a motion to set aside the child support order of August 26, 1982. The court found even after that length of time the judgment regarding the child support should be set aside pursuant to K.S.A. 60-260(b)(6), The court distinguished the Wilson case and noted that Mr. Thompson took prompt action to set aside the judgment once it became apparent that Mrs. Thompson was intending to enforce the child support order. The court noted that Mrs. Thompson had not made any effort to enforce the child support order for seven years. The court said at Wilson 17 Kan. App. 2nd 56:

Here, David took prompt action to set aside the judgment once it became apparent that Elizabeth was attempting to enforce the child support order, although she did not do so for a period of seven years after the last

payment was received from the military allotment. Elizabeth had the right to compel support payments under the Uniform Reciprocal Enforcement of Support Act, and we hold that she may not, because of her failure to act, preclude our finding that David took action to set aside the judgment rendered without notice to him within a reasonable period of time.

In the present case the respondent made no effort at all to collect child support for a period of almost five years. No reason has ever been given for her failure to enforce a child support order during that time. It was only when she became unemployed that she attempted to collect child support from Mr. Estrada. (R. I, 28.)

In the present case, once Mr. Estrada became aware Mrs. Estrada could seek child support and that he, Mr. Estrada, could challenge the finding of paternity, he then took prompt action and hired a lawyer to request blood tests and set aside the portion of the divorce decree finding him to be the father. (R. I, 46.)

A determination of "reasonable time" under K.S.A. 60-260(b)(6) depends on all the circumstances, including the time from when an entry of judgment was made until the time of the motion, the time at which parties seeking relief became aware of grounds for any motion, and any changes the parties may have made in reliance on judgment, and all other relevant factors. Jones v. Smith, 5 Kan. App. 2d, 252, 616 P.2d 300 (1980).

In the present case, there was nothing else Mr. Estrada thought he had to do to protect himself once the divorce was final in 2001. Mr. Estrada thought he would never have to pay child support after the divorce. (R. II, 20.) Mr. Estrada testified he was shocked and surprised when he found out the respondent filed a motion in court requesting child support. (R. II, 21.) Mr. Estrada is not a lawyer. At the time of the divorce, he worked as a clerk in the post office. (R. II, 5.) He is not trained in the law in any way. Mr. Estrada told Mr. Potter, his lawyer, that he – Nick Estrada - was not the

father of M.R.E. (R. II, 14.) Mr. Estrada told Mr. Potter who the real father was. (R. II, 14.) Mr. Estrada believed Mr. Potter was a competent lawyer. (R. II, 14.) Mr. Estrada testified he told Mr. Potter all the facts and circumstances he knew about the case. (R. II, 15.) Mr. Estrada testified what he wanted in the divorce proceeding were the divorce itself and an order that he not pay child support. (R. II, 15.) Clearly the divorce decree and property settlement agreement do not require Mr. Estrada to pay child support. The present case is therefore similar to the Thompson case in that like the Thompson case, no good reason was given by the ex-wife for failing to collect or attempting to collect child support for a long period of time. Further, Mr. Estrada, as did Mr. Thompson, acted quickly after he realized that his ex-wife was attempting to collect child support. Obviously Mr. Potter should have asked the court to make a finding in the divorce decree that Mr. Estrada was not the father of M.R.E. He failed to do that for some unknown reason. Possibly he was not aware such a finding could be made. Mr. Potter structured an agreement in line with what the parties wanted at the time which was Mr. Estrada would not receive visitation and would not pay child support. In effect, Mr. Potter was guilty of malpractice. Mr. Estrada respectfully suggests he should not be held responsible for the mistakes of his lawyer. He had no reason to believe Mr. Potter was anything but a competent lawyer. Upon learning to his surprise that his ex-wife could attempt to collect child support, and upon learning there could be a legal finding that he is not the father of the child Mr. Estrada acted promptly.

In respondent's memorandum at the trial level, respondent contended the petitioner's argument really should be made pursuant to K.S.A. 60-260(b)(1) which allows a judgment to be set aside for a mistake. The time limitation for filing a motion pursuant to that section of the statute would be one year. Respondent argues and petitioner agrees

the grounds in K.S.A. 60-260(b) are mutually exclusive. Petitioner agrees that a party cannot circumvent the one year limitation on relief based on the first ground in K.S.A. 60-260(b) by invoking the general catch all. In Re Marriage of Leedy, 279 Kan. 311, 109 P.3d 1130 (2005). In Leedy Mr. Leedy was asking the court to set aside three years worth of child support based upon a mistake in materials provided by his ex-wife to establish what the child support order should be. The court concluded that a mistake had been made in the information provided by his ex-wife and the child support order had been incorrect. Mr. Leedy was seeking relief pursuant to K.S.A. 60-260(b)(6). That was the statute he relied on in his argument. The Supreme Court of Kansas held that K.S.A. 60-260(b)(6) was not applicable but the court found Mr. Leedy was entitled to relief under K.S.A. 60-260(b)(3). The court ruled the trial court's decision could be upheld under K.S.A. 60-260(b)(3) even though neither the moving party nor the trial court had relied upon that section. See Leedy at 579 Kan. 323. See In Re Estate of Hessenflow, 21 Kan. App. 2d 761, 909 P.2d 662 (1995).

Obviously at the trial level as well as in this appeal Mr. Estrada has relied upon K.S.A. 60-260(b)(6) with his theory being that Mr. Potter, his lawyer, committed malpractice in failing to include in the divorce decree a finding that Mr. Estrada was not the father of the child despite the fact the child was born during the marriage. If this court gives serious consideration to respondent's argument the proper grounds were pursuant to K.S.A. 60-260 (b)(1) then Mr. Estrada strongly urges the court to find he acted within a reasonable time. Mr. Estrada contends that, as in the Thompson case, he acted promptly after his ex-wife made an attempt to collect child support from him and he discovered it was possible for a trial court to make a finding that he was not the father of the child. His

actions in that regard were certainly well within one year from the time the respondent in this case filed her motion to establish a child support order. Perhaps more importantly Mr. Estrada acted promptly to hire a lawyer and file appropriate pleadings well within one year of the time he discovered his lawyer's mistakes.

The broad language of K.S.A. 60-260(b)(6) gives the courts ample discretion to vacate judgments whenever such action is appropriate to accomplish justice. Jones v. Smith, 5 Kan. App. 2d 252, 616 P.2d 300 (1980). The statute, K.S.A. 60-260(b)(6), is to be liberally construed to preserve the delicate balance between conflicting principles that litigation be brought to an end and that justice should be done in light of all the facts. In Re Marriage of Laine, 34 Kan. App. 2d 519, 129 Pac.3rd 802 (2005). It is obvious the intent of the legislature was to provide some mechanism through which the courts can provide equity and relief when it makes sense and when it is appropriate. In the present case Mr. Estrada asks the court to consider what respective positions the parties will be in if the trial court's decision remains undisturbed:

Sean Estrada, who committed adultery with Mr. Nick Estrada's wife after she had been married about six months, will continue to enjoy a father/son relationship with his son M.R.E. Sean Estrada will also have the luxury of not ever having a legal obligation to pay child support at any time for his son.

The respondent committed adultery with Sean Estrada when she was a newlywed. She then initially lied to her husband about the paternity of the minor child. After admitting to Nick Estrada he was not the father of the child, she then agreed not to request child support and signed legal documents to that effect. She then did nothing to collect child support for almost five years until, when unemployed, she then filed a motion to collect

child support from Nick Estrada whom she knew not to be the real father of the child. She admitted to Mr. Nick Estrada that Sean Estrada had a real father/son relationship with M.R.E. At one point she asked Nick Estrada to sign a consent to adoption knowing that Sean Estrada and not Nick Estrada was the real biological of the minor child and it was Sean Estrada who should probably give consent. If the trial court's decision is affirmed she will receive a substantial amount of child support for a long time from Nick Estrada even though everyone agrees Nick Estrada is not the biological father of the minor child.

Mr. Nick Estrada married his wife because he was in love with her. He divorced her because of the adultery. He went to a lawyer believing the lawyer to be competent and trusted the lawyer. The lawyer essentially committed malpractice in how the divorce decree and property settlement agreement were drafted. Promptly upon learning his ex-wife could legally ask for child support and that a legal finding could be made that he was not the father of the child, Mr. Estrada quickly hired a lawyer who filed appropriate pleadings. If the trial court's decision is affirmed, Mr. Estrada will have to pay a very substantial child support order for a very long time for a child that everyone agrees is not his.

The petitioner Mr. Estrada respectfully suggests to the court that equity and justice will not be done if the trial court's decision is left intact. Mr. Estrada respectfully suggests the portion of the divorce decree finding him to be the father of the child should be set aside.

**II. THE TRIAL COURT ERRED IN FAILING TO APPOINT A GUARDIAN AD LITEM FOR THE MINOR CHILD.**

**Standard of Appellate Review**

The standard of appellate review on this issue is whether or not the trial court abused its discretion. In Re Marriage of Ross, 245 Kan 591, 783 P.2d 331 (1989).

## **ANALYSIS**

In the present case, Mr. Estrada filed a motion for appointment of guardian ad litem. (R. I, 55.) This was filed on November 21, 2006 well prior to the hearing that occurred on February 8, 2008. The trial court never really ruled on the motion. No guardian ad litem was ever appointed. As set out previously in this brief, although respondent never testified under oath, there has been some disagreement between the parties as to the extent of the involvement of Mr. Estrada in the life of M.R.E.

Before considering the issue of paternity in a situation like this, the trial court must first consider the interest of the child. This requires the appointment of a guardian ad litem to represent the child in a full evidentiary hearing. The issue of paternity is to be considered only if the trial concludes, from the hearing, the requested action is in the best interest of the child. In Re Marriage of Ross, 245 Kan. 591, 783 P.2d 331 (1989). In the Wilson case, the trial court failed to appoint a guardian ad litem. The trial court was initially reversed on that issue because the trial court failed in that case to appoint a guardian ad litem. See Wilson at 16 Kan. App. 2nd 654.

It is clear in the Wilson case the appellate court gave serious consideration to the relationship between the father and the minor child when deciding whether or not to set aside the finding in the divorce decree that Mr. Wilson was the legal father of the child. Wilson 16 Kan. App. 2nd 654.


If the court feels there is an issue as to the relationship between the father and child in the present case on appeal, then the petitioner Mr. Estrada suggests the proper result

would be to remand the case to the trial court and have a guardian ad litem appointed to determine the nature and extent of the relationship between Mr. Estrada and the minor child. Mr. Estrada would further suggest and request if the trial court finds no father/son relationship between Mr. Estrada and the minor child then the trial court should be directed to set aside the finding of paternity in the original divorce decree and property settlement agreement.

**CONCLUSION**

The petitioner Mr. Estrada respectfully requests the court to set aside that portion of the divorce decree and property settlement agreement finding him to be the father of the minor child herein. In the alternative, Mr. Estrada respectfully requests the court to remand the case to the trial court for proceedings after appointment of a guardian ad litem.

Respectfully submitted

  
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**AFFIDAVIT**

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  )     ss.  
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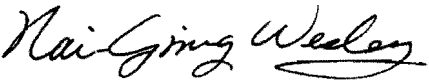
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**vs.**  
**Monica R. Estrada, Respondent/Appellee**

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