

NO. 09-102104-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NICK A. ESTRADA
Petitioner-Appellant

v.

MONICA R. ESTRADA
Respondent-Appellee

FILED

SEP 18 2009

CAROL G. GREEN
CLERK OF APPELLATE COURTS

BRIEF OF APPELLEE

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

ADAM C. MANSFIELD, #22165
SRS Staff Attorney
P.O. Box 171248
Kansas City, KS 66117-0248
(913)279-7484
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

Nature of the Case	1
Issues to be Decided	1
Statement of Facts	1
Argument	3
The trial court was correct in finding that Petitioner is collaterally estopped from challenging the legal determination of paternity found in the divorce Decree.....	3
Standard of Appellate Review.....	4
<i>Stanfield v. Osborn Industries, Inc.</i> , 263 Kan. 388, 396, 949 P.2d 602 (1997), <i>cert. denied</i> 525 U.S. 831, 119 S.Ct. 84, 142 L.Ed.2d 66 (1998)....	4
Analysis	4
<i>Jackson Trak Group v. Mid States Port Authority</i> , 242 Kan. 683, 690, 751 P.2d 122(1988).....	4
The trial court did not abuse its discretion in denying Petitioner’s Motion to Set Aside Judgment pursuant to K.S.A. 60-260(b).....	5
Standard of Appellate Review.....	5
<i>In re Marriage of Leedy</i> , 279 Kan. 311, 314, 109 P.3d 1130 (2005).....	5
Analysis	6
<i>In re Marriage of Ross</i> , 245 Kan. 591, 598, 783 P.2d 331 (1989).....	6
<i>Neagle v. Brooks</i> , 203 Kan. 323, Syl. ¶ 5, 454 P.2d 544 (1969).....	6
K.S.A. 60-260(b)(1)	7
<i>Wilson v. Wilson</i> , 16 Kan.App.2d 651, 827 P.2d 788, <i>rev. denied</i> 250 Kan. 808 (1992)	7
The trial court did not abuse its discretion in failing to appoint a <i>Guardian Ad Litem</i>	8
Standard of Appellate Review.....	8
<i>In re Marriage of Ross</i> , 245 Kan. 591, 598, 783 P.2d 331 (1989).....	8

Analysis.....8

Wilson v. Wilson, 16 Kan.App.2d 651, 827 P.2d 788, *rev. denied* 250 Kan.
808 (1992).....8

Conclusion.....9

Certificate of Mailing10

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NICK A . ESTRADA
Petitioner-Appellant

v.

MONICA R. ESTRADA
Respondent-Appellee

BRIEF OF APPELLEE

NATURE OF THE CASE

The Respondent concurs with the Nature of the Action contained in Petitioner's brief.

ISSUES TO BE DECIDED

- 1. Was the Trial Court correct in finding that Petitioner was collaterally estopped from challenging the portion of the Divorce Decree finding petitioner to be the father of the minor child?**
- 2. Did the Trial Court abuse its discretion in failing to set aside the portion of the Divorce Decree finding petitioner to be the father of the minor child?**
- 3. Did the Trial Court abuse its discretion in failing to appoint a *Guardian Ad Litem*?**

STATEMENT OF FACTS

1. Nick A. Estrada and Monica R. Trevino (Estrada) were married on June 21, 1997. One child was born of the marriage on xx/xx/1998. (R. I, 7.)

2. Nick A. Estrada had a surgical vasectomy prior to the marriage. (R. II, 5.)
3. The parties were divorced July 26, 2001. (R. I, 14.)
4. Nick A. Estrada knew that he was not the biological father of M.R.E prior to the parties' divorce. (R. II, 12.)
5. Nick A. Estrada appeared in person, and was represented by counsel at the July 26, 2001 divorce hearing. The divorce decree established Mr. Estrada as the legal father of M.R.E. (R. I, 14.)
6. The property settlement incorporated into the divorce decree grants Nick A. Estrada joint custody and liberal visitation. It also states Mr. Estrada shall maintain health insurance coverage for M.R.E. The property settlement was signed by Mr. Estrada. (R. I, 8.)
7. On May 14, 2002, Nick A. Estrada signed a Consent of Natural Father to Adoption of Minor Child. This notarized consent stated that Mr. Estrada was the natural father of M.R.E. The adoption never occurred. (R. I, 81.)
8. On October 4, 2003, Nick A. Estrada signed a written agreement to pay \$200.00 a month in child support effective November of 2003. (R. I, 83.)
9. On March 13, 2006, the Clay County Prosecuting Attorney sent KC Metro SRS a UIFSA Child Support Transmittal #1 requesting a modification of the Divorce Decree in WY01D0921 to include child support due to Monica R. Trevino being enrolled in Medicaid through the State of Missouri. (R. I, 21.)
10. On April 11, 2006, SRS filed a Motion to Establish Child Support in WY01D0921. (R. I, 17.)
11. On May 15, 2006, Mr. Estrada appeared for the hearing on the Motion to Establish Child Support in Division 18 of the Wyandotte County District Court and filed a Motion for

DNA Testing and a Ross Hearing. A hearing on Mr. Estrada's motion was set for May 30, 2006. (R. I, 46.)

12. On November 13, 2006, a Journal Entry of Judgment from the May 30, 2006 hearing was filed. The result of this hearing was that both parties stipulated that Nick A. Estrada was not the biological father of M.R.E., and the case was referred to Division 6 of the Wyandotte County District Court for a Ross hearing. This hearing was set for November 21, 2006. (R. I, 49.)

13. On November 21, 2006, Mr. Estrada filed an amended Motion on Behalf of the Petitioner to Set Aside Judgment and a Motion for Appointment of *Guardian Ad Litem* and Request for Continuance. (R. I, 52.)

14. The result of the November 21, 2006 hearing was that both sides were to brief the issues before the court. Respondent filed her brief December 29, 2006 and Petitioner filed his brief March 30, 2007. (R. I, 57, 84.)

15. An evidentiary hearing was set for February 7, 2008. After this hearing the court took the case under advisement pending a written opinion. (R. II, 1, 29.)

16. On January 30, 2009, a Memorandum Decision was filed. This decision denied Petitioner's Motion to Set Aside Judgment and allowed Respondent to proceed with her Motion to Establish Support. (R. I, 93.)

ARGUMENT

I. The Trial Court was correct in finding that Petitioner is collaterally estopped from challenging the legal determination of paternity found in the Divorce Decree.

Standard of Appellate Review

The application of collateral estoppel is a question of law subject to *de novo* review.

Stanfield v. Osborn Industries, Inc., 263 Kan. 388, 396, 949 P.2d 602 (1997), *cert. denied* 525 U.S. 831, 119 S.Ct. 84, 142 L.Ed.2d 66 (1998).

Analysis

The Trial Court denied Petitioner's Motion to Set Aside Judgment and ruled that Petitioner is collaterally estopped from challenging the legal determination of paternity found in the Divorce Decree. In *Jackson Trak Group v. Mid States Port Authority*, 242 Kan. 683, 690, 751 P.2d 122 (1988), the Kansas Supreme Court stated:

Under Kansas law, collateral estoppel may be invoked where the following is shown: (1) a prior judgment on the merits which determined the rights of the parties on the issue based upon ultimate facts as disclosed by the pleading and judgment, (2) the parties must be the same or in privity, and (3) the issue litigated must have been determined and necessary to support the judgment. [citation omitted.]

In this case, all three factors are present:

- (1) The July 26, 2001 divorce decree constitutes a prior judgment on the issue of paternity. Mr. Estrada was represented by counsel, and he appeared in person at the divorce hearing.
- (2) The parties to this action are the same as the parties in the divorce.
- (3) In the divorce decree, Mr. Estrada was granted joint custody of M.R.E., and ordered to provide health insurance coverage. The issue of paternity was determined by the divorce decree and was necessary to support the judgment.

On May 14, 2002, Mr. Estrada signed a notarized Consent of Natural Father to Adoption of Minor Child. This Consent was based on Mr. Estrada's already established paternity of M.R.E.

On November 4, 2003, Mr. Estrada signed a private agreement to pay child support for M.R.E. and to claim M.R.E. on his taxes every other year. This agreement was also based on Mr. Estrada's already established paternity of M.R.E.

At the time of the divorce Mr. Estrada knew that he was not the biological father of M.R.E. When Mr. Estrada signed the Consent of Natural Father to Adoption of Minor Child he knew that he was not the biological father of M.R.E. When Mr. Estrada signed the private agreement to pay child support he knew he was not the biological father of M.R.E. All of these actions are based on the legal determination that Mr. Estrada is the *legal* father of M.R.E. The Trial Court was correct in finding that Mr. Estrada should now be collaterally estopped from challenging that legal determination. Petitioner makes no argument in his brief as to why the Trial Court was incorrect in applying the doctrine of collateral estoppel.

II. The Trial Court did not abuse its discretion in denying Petitioner's Motion to Set Aside Judgment pursuant to K.S.A. 60-260(b).

Standard of Appellate Review

"A ruling on a motion for relief from judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the Trial Court. The Trial Court's ruling will not be reversed in the absence of a showing of abuse of discretion." *In re Marriage of Leedy*, 279 Kan. 311, 314, 109 P.3d 1130 (2005).

Analysis

In denying the Petitioner's Motion to Set Aside Judgment the Trial Court considered Petitioner's actions and found that they failed to justify granting Petitioner relief from the prior judgment pursuant to K.S.A. 60-260(b). (R. I, 93.) "The test on appellate review of whether the Trial Court abused its discretion is whether no reasonable person would agree with the Trial Court. If any reasonable person would agree, appellate courts will not disturb the Trial Court's decision." *In re Marriage of Ross*, 245 Kan. 591, 598, 783 P.2d 331 (1989). Petitioner's appeal brief fails to make a single argument as to how this decision is an abuse of the Trial Court's discretion.

In its Memorandum Decision the Trial Court references Petitioner's justification for signing a private agreement to pay child support to the Respondent. On October 4, 2003, Petitioner signed a written agreement to pay \$200.00 a month in child support commencing in November of 2003 and to claim the minor child on his taxes every other year commencing in 2004. (R. I, 83.) Petitioner claims that this agreement should be disregarded because he only signed it in an attempt to have sex with the Respondent. "The Petitioner did this [signed a promise to pay child support] because he was desirous of having sexual contact with the respondent and he believed this would give him a better chance to accomplish this. The Petitioner never followed through with this promise to pay child support and he had no intent to do so at the time of the signing..." (R. I, 86.)

Petitioner's assertions show that he lacks the clean hands that relief under 60-260(b)(6) would require.

The broad language of K.S.A. 60-260(b)(6) authorizing relief for 'any reason justifying relief from the operation of the judgment' gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice. This power is not provided in order to relieve a party from free, calculated and

deliberate choices he has made. The party remains under a duty to take legal steps to protect his interests.

Neagle v. Brooks, 203 Kan. 323, Syl. ¶ 5, 454 P.2d 544 (1969). Petitioner has made free, calculated and deliberate choices. These choices include signing a Consent of Natural Father to Adoption of Minor Child and signing a private agreement to pay support for the minor child M.R.E. Based on Petitioner's free, calculated and deliberate choices the Trial Court declined to set aside the prior judgment and the Trial Court was well within its discretion to do so.

In addition, Petitioner should not be able to rely on K.S.A. 60-260(b)(6) when 60-260(b)(1) is the section of statute that best fits Petitioner's stated reasons for setting aside the order. 60-260(b)(1) allows the court to set aside a judgment based on mistake, inadvertence, surprise, or excusable neglect, but only if the motion to set aside is filed within one year from the entry of the judgment. Petitioner's arguments for setting aside the paternity finding in the Divorce Decree can best be described as mistake or inadvertence. In his brief, Petitioner claims that the clock should start running for his 60-260(b) motion when Respondent filed her motion to establish child support because he had no idea he might have a duty to pay child support prior to the filing of Respondent's motion. This claim is directly contradicted by Petitioner's own actions. As discussed above, Petitioner signed a private agreement to pay child support in October of 2003.

Any motion to set aside based on 60-260(b)(1) would be time barred one year after July 26, 2001, when the Divorce Decree was filed. Petitioner cannot use 60-260(b)(6) to get around the time restraints imposed by 60-260(b)(1). "Relief cannot be granted under 60-260(b)(6) if the real basis for granting the relief is one of the first three reasons listed in the statute and more than a year has gone by. In other words, the courts will not countenance the use of 60-260(b)(6) to avoid the limitations imposed on the use of the first three grounds for relief." *Wilson v. Wilson*,

16 Kan.App.2d 651, 658, 827 P.2d 788, *rev. denied* 250 Kan. 808 (1992). Even if the Court of Appeals were to find that Petitioner is not time barred under 60-260(b)(1), the Trial Court was well within its discretion to deny Petitioner's motion to set aside pursuant to 60-260(b)(6) as well.

III. The Trial Court did not abuse its discretion in failing to appoint a *Guardian Ad Litem*.

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, 598, 783 P.2d 331 (1989).

Analysis

The Trial Court did not appoint a *Guardian Ad Litem* before determining that Petitioner's Motion to Set Aside should be denied. Petitioner argues the Trial Court must first consider the interest of the child before considering the issue of paternity. Respondent does not deny that this is true, but in this case the issue of paternity was not yet under consideration. The issue before the Trial Court was whether or not the prior judgment should be set aside pursuant to K.S.A. 60-260(b). The Trial Court decided that the prior judgment should not be set aside, and never reached the issue of paternity. If the Trial Court had decided that the prior judgment could be set aside, then the issue of paternity would have come into play and a *Guardian Ad Litem* would have become necessary.

Wilson v. Wilson, 16 Kan.App.2d 651, 827 P.2d 788, *rev. denied* 250 Kan. 808 (1992), shows why it is first necessary to consider whether or not the order should be set aside. Mrs. Wilson filed a motion to increase child support, and Mr. Wilson's response was to deny paternity of the child. After the Court of Appeals remanded the case to the Trial Court for an evidentiary hearing

and the appointment of a *Guardian Ad Litem* the Trial Court determined paternity testing was in the best interest of the child. The paternity test revealed that Mr. Wilson was not the biological father of the child. The Trial Court then instructed Mr. Wilson to file a motion to set aside the Divorce Decree pursuant to 60-260(b), which the Trial Court subsequently granted. When the Trial Court's decision to set aside the Divorce Decree was appealed, the Court of Appeals found that the motion should not have been set aside and remanded the case for consideration of Mrs. Wilson's motion to increase support.

In the present case, it would be unnecessary to appoint a *Guardian Ad Litem* to consider the best interests of the child when the Trial Court has decided that the Divorce Decree should not be set aside. As *Wilson* demonstrates, even if a *Guardian Ad Litem* finds that it *is* in the best interests of the child to consider the issue of paternity, it has no bearing on whether or not the order should be set aside pursuant to 60-260(b). The Trial Court was correct in avoiding the unnecessary expense of appointing a *Guardian Ad Litem* before it was actually necessary to do so.

CONCLUSION

The Trial Court decision denying Petitioner's Motion to Set Aside Judgment should be upheld. Petitioner was determined to be the legal father of M.R.E., and has continually acted as the legal father of M.R.E. The Trial Court considered Petitioner's actions and decided that the prior order should not be set aside pursuant to K.S.A. 60-260(b), which was well within the Trial Court's discretion.

Respectfully submitted,

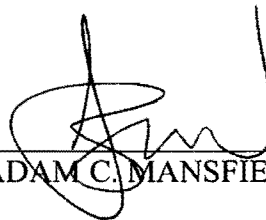


ADAM C. MANSFIELD, #22165
SRS Staff Attorney
P.O. Box 171248
Kansas City, KS 66117-0248
(913)279-7484
ATTORNEY FOR APPELLEE

CERTIFICATE OF MAILING

The undersigned hereby affirms that on the 18th day of September, 2009 two true and correct copies of the Appellee's Brief was deposited in the U.S. Mail, first class, postage prepaid and properly addressed to the following persons:

Michael Redmon
831 Armstrong
Kansas City, KS 66101



ADAM C. MANSFIELD, #22165