

Children's Law Center of Indiana



Paternity

11/17/2006

In **Paternity of J.A.P. v. Jones**, 857 N.E.2d 1 (Ind. Ct. App. 2006), the Court reversed and remanded the trial court's order with instructions to recalculate the amount of retroactive child support owed to the child. On August 16, 1993, when the child was 10 years old, Mother, as next friend, filed a Verified Petition to Determine Paternity and Compel Support. After one failed attempt at service of Father, the case lay dormant until January 9, 2001, when the trial court sua sponte issued a Trial Rule 41(E) sixty-day notice requesting that the parties should show cause why the action should not be dismissed for failure to prosecute. On February 15, 2001, the State responded requesting that the case be placed in "off status pending location of [Father]." The chronological case summary reflects an entry on March 9, 2001 stating, "This matter is now placed in the off status." The record shows no further procedural developments until, on April 7, 2004, (16 days shy of the child's twenty-first birthday) the State issued an alias summons, service of which was effected on Father on April 14, 2004. On July 19, 2004, genetic testing was completed and the results showed a 99.927% probability of paternity. The trial court deemed the original Petition which was filed August 16, 1993, to have been dismissed on February 15, 2001 and that the case had been reinstated on April 7, 2004. The trial court ordered that paternity was established; that Father shall pay support commencing on April 9, 2004 and concluding on April 30, 2004, the day before the child's twenty-first birthday; that "a Nunc Pro Tunc Order shall be deemed to have been entered on February 15, 2001, dismissing the Verified Petition to Establish Paternity pursuant to Trial Rule 41(E);" and that "the issuance of the alias summons on April 7, 2004, sufficed as a reinstatement of the action under Trial Rule 41(F)." Mother appealed.

The trial court's finding that Mother intentionally withheld information from the IV-D office is clearly erroneous. Id. at 11. The trial court's inference that Mother intentionally hindered the Title IV-D office in its search for Father was unreasonable and clearly erroneous. Id. at 7. The Court noted that Mother testified at the hearing that she told her IV-D case manager that her only knowledge of Father's whereabouts was the location where he briefly worked in the late 1980's; that Mother testified that her case manager was aware that Mother had worked with Father's brother at the same location; and that, even though the trial court found that Mother also had contact with Father's nephew, the record supported a determination that Father's nephew had little contact with Father. The Court agreed with Father's contention that the trial court was free to accept or reject Mother's testimony in whole or in part, but stated that nonetheless the applicable standard of review required that the trial court's findings be supported by evidence or reasonable inferences. The Court stated that, in its evaluation of the record, the Court failed to find that the only piece of evidence -- the omission on the Parent Locator Form -- reasonably inferred intent by Mother to prevent the Title IV-D office from finding Father. The Court observed that the record

indicates that Mother completed the Form in conjunction with a meeting with the IV-D case manager, during which more specific information about Father was discussed, and that Mother provided other information about Father on the Parent Locator Form, including a detailed physical description, his last known residence, and the high school he attended. *Id.* at 6-7.

The trial court's entry of a Nunc Pro Tunc Order dismissing the Petition in 2001 was improper. *Id.* at 8, 11. **Accordingly, the Court reversed the trial court's T.R. 41(E) dismissal of the petition, although it acknowledged that the facts of this case would ordinarily constitute an affirmation of a T.R. 41(E) dismissal.** *Id.* at 9. Regarding a nunc pro tunc order, the Court noted (1) that it is an entry made now of something which was actually previously done, to have effect as of the former date; (2) that it may be used to either record an act or event not recorded in the court's order book or to change or supplement an entry already recorded in the order book; (3) that the purpose of the order must be to correct an omission in the record, which actually occurred, but was omitted by inadvertence or mistake; (4) that the trial court's record must indicate that the unrecorded act or event indeed occurred, and a written memorial must form the basis for establishing the error or omission to be corrected by the nunc pro tunc order; (5) that to provide a sufficient basis for the order, the supporting written material (a) must be found in the record, (b) must be required by law to be kept, (c) must show action taken or orders or rulings made by the court, and (d) must exist in the records of the court contemporaneous with or preceding the date of the action described; and (6) that it cannot be used as the medium whereby a court can change its actual ruling, actually made, however erroneous or under whatever mistakes of law or fact such ruling may have been made. The Court held that the trial court's chronological case summary did not sufficiently support the conclusion that the trial court actually dismissed the Petition in 2001, as would be required to provide a basis for the nunc pro tunc order. *Id.* at 7-8.

Despite its finding that the nunc pro tunc order dismissing the case was improper, the Court stated that although in such circumstances it normally would decline to review the substance of the ruling, here, "the absurdity of the delays in prosecuting this case prompt us to acknowledge that T.R. 41(E) dismissal would have been entirely proper even though the dismissal of paternity actions is not typically encouraged." *Id.* at 8. The Court noted that the purpose of this rule is "to ensure that plaintiffs will diligently pursue their claims," and "the failure to prosecute a matter for more than ten years, the length of inactivity in the present case, is egregious." *Id.*

The trial court erred in its conclusion that the Petition was reinstated in 2004, and consequently erred in failing to order retroactive child support for the child to August 16, 1993, the date the Petition was filed. *Id.* at 11. I.C. 31-14-11-5 states, "The support order ... (2) must include the period dating from the filing of the paternity action." The Court stated: "Now that we have determined that the trial court's nunc pro tunc dismissal of the Petition was improper, the statute would seem to mandate that Father pay child support retroactive to August 16, 1993, when the Petition was originally filed." *Id.* at 9. Regarding the trial court's statement, "[t]he doctrine of fairness does not allow this [c]ourt to require [Father] to pay support at any time [earlier] than April 7, 2004," the Court agreed with Mother that by applying the "doctrine of fairness," the trial court was in essence applying the doctrine of laches. The Court stated that the doctrine of laches is an equitable defense that may be

raised to stop a person from asserting a claim that he would normally be entitled to assert, based on the rationale that, because the person who is asserting the claim delayed for an unreasonable length of time to assert the claim, he has waived the right to assert his claim when the delay prejudices the person against who he would assert it. The Court held that, in this case, despite the inexcusable delay in establishing the child's paternity, the apparent acquiescence by Mother to the status quo, and the undoubted prejudice to Father, "it would not be appropriate to apply the doctrine of laches." Id. at 10. The Court noted that (1) it has previously refused to apply laches in such proceedings because it would not penalize a child for his or her parent's delay in pursuing child support; (2) here, the blame for the delay in establishing the child's paternity could not be placed wholly on Mother in that it was not her obligation to served Father with the Petition; (3) here, the local Child Support enforcement Division was grossly and inexcusably negligent in its duties and lack of compliance with Indiana Trial Rules, (4) just as a child should not be punished for a parent's delay in seeking support, a child should not be punished for the State's delay in prosecuting a paternity suit. Id.

The Court also found that contrary to Father's contentions, the child will be benefited by the payment of back support in that (1) she can use the money to pay her existing college debts or pursue other college courses; (2) Mother will not be inappropriately rewarded for delaying the establishment of paternity because the monies will go directly to the child; and (3) the amount of additional retroactive child support to be paid may be greater than the amount of assistance previously provided only intermittently to Mother and the child by the State, and the amount of arrearage retained by the State legally may not exceed the total amount which was previously paid to the family as assistance. Id. at 10-11.