

THIRD DISTRICT COURT OF APPEAL OF FLORIDA

Pena v. Rodriguez

273 So. 3d 237 (Fla. 3d DCA 2019) · No. No. 3D18-0012 · Decided May 22, 2019

SUMMARY

The Third District Court of Appeal of Florida reversed a final judgment of paternity addressing parental responsibility, timesharing, and child support. The court held that the trial court violated the father's procedural due process rights by relying on counsel's proffer and other unsworn representations without receiving admissible evidence or providing a meaningful opportunity to present and challenge evidence. The case was remanded for a new adjudicatory hearing.

CASE DETAILS

COURT	Third District Court of Appeal of Florida
WRITING FOR THE COURT	Miller, J.; Fernandez, J.; Logue, J.
JURISDICTION	Florida
DECIDED	May 22, 2019
DOCKET	No. 3D18-0012
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	David Pena appealed a final judgment of paternity adjudicating parental responsibility, timesharing, and child support.
STANDARD OF REVIEW	Child-custody and parenting-plan determinations are reviewed for abuse of discretion; imputation of income for child-support purposes is reviewed for abuse of discretion; claims of deprivation of procedural due process are reviewed de novo.
PRECEDENTIAL VALUE	Published opinion; precedential Florida District Court of Appeal decision.
PARTIES	David Pena v. Leydis Rodriguez

TOPICS

procedural due process paternity child custody child support appellate procedure

PRACTICE AREAS

family law civil procedure constitutional law evidence appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court violated Pena's procedural due process rights by entering a final judgment determining parental responsibility, timesharing, and child support based solely on unsworn representations of counsel and without an evidentiary hearing.
2. Whether any alleged informal settlement or waiver justified the trial court's reliance on proffered evidence.
3. Whether the final judgment of paternity should be reversed and the matter remanded for a new adjudicatory hearing.

HOLDINGS

1. A trial court violates procedural due process when it relies solely on unsworn representations of counsel to adjudicate contested parental responsibility, timesharing, and child-support issues without allowing the opposing party a full, fair, and meaningful opportunity to present, examine, cross-examine, and rebut evidence.
2. The record did not establish a valid settlement or waiver that authorized the trial court to decide the contested issues without an evidentiary hearing, and a procedural due process violation constitutes fundamental error that may be raised for the first time on appeal.

KEY QUOTATIONS

“One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence.” (5)

“In the absence of a clear stipulation of counsel, argument of counsel alone does not constitute evidence from which the trial court can determine the propriety, vel non, of granting injunctive relief.” (5)

“Accordingly, the reliance upon the representations of counsel, in an evidentiary context, undermines procedural due process guarantees by divesting the opposing party of a full, fair, and meaningful opportunity to be heard.” (6)

FACTUAL BACKGROUND

David Pena and Leydis Rodriguez were the unmarried parents of a child born in 2010. They initially arranged an informal visitation schedule, and Pena provided intermittent child support, but their relationship later deteriorated. Although paternity was undisputed, the parties disputed parental responsibility, timesharing, and child support. At the final hearing, Rodriguez's counsel proffered the substance of her case, Pena was not sworn before addressing the court, and no evidence was formally presented before the trial court entered judgment.

PROCEDURAL HISTORY

Pena filed a petition for determination of paternity in 2017. After Pena failed to appear at court-ordered mediation, the trial court struck his pleadings and proceeded to a final hearing on the issues raised in Rodriguez's counterpetition. At the hearing, counsel proffered the substance of Rodriguez's case, and Pena addressed the

court without being sworn; no evidence was formally presented. The trial court then entered a final judgment addressing parental responsibility, timesharing, and child support.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the final judgment of paternity and remand for a new adjudicatory hearing.

CASES CITED

- Fazzaro v. Fazzaro, 110 So. 3d 49, 51 (Fla. 2d DCA 2013)
- Miller v. Miller, 842 So. 2d 168, 169 (Fla. 1st DCA 2003)
- Turnier v. Stockman, 139 So. 3d 397, 400 (Fla. 3d DCA 2014)
- Smith v. Smith, 872 So. 2d 397, 398 (Fla. 1st DCA 2004)
- Richardson v. Richardson, 442 So. 2d 1005, 1005 (Fla. 3d DCA 1983)
- Schwieterman v. Schwieterman, 114 So. 3d 984, 987 (Fla. 5th DCA 2013)
- A.B. v. Fla. Dep't of Children & Family Servs., 901 So. 2d 324, 326 (Fla. 3d DCA 2005)
- Beroes v. Fla. Dep't of Revenue ex rel. Palacios, 958 So. 2d 489, 492 (Fla. 3d DCA 2007)
- Verizon Bus. Network Servs., Inc. v. Dep't of Corr., 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008)
- Nationstar Mortg., LLC v. Weiler, 227 So. 3d 181, 184-85 (Fla. 2d DCA 2017)
- Slotnick v. Slotnick, 891 So. 2d 1086, 1089 (Fla. 4th DCA 2004)
- Little v. Streater, 452 U.S. 1, 5 (1981)
- Walters v. Petgrave, 248 So. 3d 1202 (Fla. 4th DCA 2018)
- Matter of SAJ, 942 P.2d 407, 410 (Wyo. 1997)
- Davis v. Alaska, 415 U.S. 308, 316-17 (1974)
- Goldberg v. Kelly, 397 U.S. 254, 269 (1970)
- Matrix Sys., Inc. v. Odebrecht Contractors of Fla., Inc., 753 So. 2d 652 (Fla. 3d DCA 2000)
- Brand v. Elliott, 610 So. 2d 37, 38 (Fla. 5th DCA 1992)
- State v. T.A., 528 So. 2d 974, 975 (Fla. 2d DCA 1988)
- Haywood v. Bacon, 248 So. 3d 1254, 1256 (Fla. 5th DCA 2018)
- Bielling v. Bielling, 188 So. 3d 980, 981 (Fla. 1st DCA 2016)
- Chiu v. Wells Fargo Bank, N.A., 242 So. 3d 461, 464 (Fla. 3d DCA 2018)
- Julia v. Julia, 146 So. 3d 516, 520-21 (Fla. 4th DCA 2014)
- Minakan v. Husted, 27 So. 3d 695, 699 (Fla. 4th DCA 2010)
- PDK Labs., Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004)

OPINION

PER CURIAM.

Third District Court of Appeal State of Florida Opinion filed May 22, 2019. Not final until disposition of timely filed motion for rehearing. _____ No. 3D18-0012 Lower Tribunal No. 17-4574 _____ David Pena, Appellant, vs. Leydis Rodriguez, Appellee. An appeal from the Circuit Court for Miami-Dade County, George A. Sarduy, Judge. Martinez-Scanziani & Associates Law, P.A., and Denise Martinez- Scanziani, for appellant.

Francisco J. Vargas, P.A., and Francisco J. Vargas; Giel Family Law, P.A., and Michael M. Giel, (Jacksonville), for appellee. Before FERNANDEZ, LOGUE, and MILLER, JJ. MILLER, J. The father, David Pena, appeals a final judgment of paternity adjudicating issues of parental responsibility, timesharing, and child support.

For the reasons set forth below, we conclude that the trial court improvidently relied upon proffered evidence in rendering the final judgment, thereby divesting the father of his procedural due process rights, thus, we reverse.

In 2010, the mother, Leydis Rodriguez, gave birth to a son. Although the mother was unmarried at the time, the father held himself out to be, and was recognized by all concerned as being, the natural father of the child.

Accordingly, the parties amicably arranged an informal visitation schedule and the father provided intermittent child support. The parents' relationship eventually deteriorated, and in 2017, the father filed a petition for determination of paternity.¹ Thereafter, the mother filed an answer and counterpetition.

Although paternity was not disputed, issues of parental responsibility, timesharing, and child support required resolution by the trial court. A court-ordered mediation was arranged, but the father failed to appear. Consequently, the trial court struck his pleadings and scheduled a final hearing on the remaining contested issues, as framed in the mother's counterpetition.

¹ The father is not an attorney and acted pro se in the proceedings below. ² At the final hearing, the trial court expended valiant, yet unsuccessful efforts to effect a mutually agreed resolution of the disputed issues.

The mother's counsel informally proffered the substance of her case. The father then addressed the court regarding his timesharing and employment history.² Thereafter, the proceedings concluded without a settlement or any presentation of evidence.

The trial court subsequently rendered a final judgment, adjudicating the issues of parental responsibility, timesharing, and child support. This appeal ensued. On appeal, the father contends the trial court erroneously relied solely upon proffered evidence in rendering its final judgment of paternity.

The mother asserts that a stipulation of settlement was tacitly reached, vitiating the necessity of presenting evidence. However, she commendably and properly confesses error as to “the final judgment’s provision granting [her] ultimate responsibility over all decisions affecting the child should the parties be unable to agree.” *Fazzaro v. Fazzaro*, 110 So. 3d 49, 51 (Fla.

2d DCA 2013). STANDARD OF REVIEW A “trial court has broad discretion in child custody matters, and its decision in that regard is [typically] reviewed for an abuse of discretion.” *Miller v. Miller*, 2 The father was not administered an oath prior to addressing the trial court. See § 90.605(1), Fla. Stat. (2018) (“Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation...”); *Houck v. State*, 421 So.

2d 1113, 1116 (Fla. 1st DCA 1982) (“An unsworn witness is not competent to testify.”) (citing *Crockett v. Cassels*, 95 Fla. 851, 116 So. 865 (1928)). 3 842 So. 2d 168, 169 (Fla. 1st DCA 2003) (citations omitted); see *Turnier v. Stockman*, 139 So. 3d 397, 400 (Fla. 3d DCA 2014) (“We review the trial court’s final judgment establishing a parenting plan for an abuse of discretion.” (citations omitted)); *Smith v. Smith*, 872 So.

2d 397, 398 (Fla. 1st DCA 2004) (stating a “trial court’s imputation of income,” for purposes of determining a parent’s child support obligation, is reviewed “for abuse of discretion” (citation omitted)). “An abuse of discretion appears when the record reveals a lack of competent, substantial evidence to sustain the findings of the trial court.” *Richardson v. Richardson*, 442 So.

2d 1005, 1005 (Fla. 3d DCA 1983) (citation omitted); see *Schwieterman v. Schwieterman*, 114 So. 3d 984, 987 (Fla. 5th DCA 2012). We review a claim of deprivation of procedural due process de novo. *A.B. v. Fla. Dep’t of Children & Family Servs.*, 901 So. 2d 324, 326 (Fla. 3d DCA 2005); see also *Beroes v. Fla. Dep’t of Revenue ex rel. Palacios*, 958 So. 2d 489, 492 (Fla.

3d DCA 2007) (discussing that where the issue was decided as a matter of law, and did not involve the resolution of any question of fact, review was de novo). LEGAL ANALYSIS “No State shall... deprive any person of life, liberty, or property, without due process of law...” Amend. XIV, § 1, U.S. Const.; see Art. I, § 9, Fla. Const. “The constitutional guarantee of due process requires that judicial decisions be reached by a means that ‘preserves both the appearance and reality of fairness.’” 4 *Verizon Bus.*

Network Servs., Inc. v. Dep’t of Corr., 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008) (citation omitted). Basic due process requires a party be provided notice and a meaningful opportunity to be heard, the denial of which constitutes fundamental error. See *Nationstar Mortg., LLC v. Weiler*, 227 So. 3d 181, 184-85 (Fla. 2d DCA 2017); *Slotnick v. Slotnick*, 891 So.

2d 1086, 1089 (Fla. 4th DCA 2004) (citation omitted). The guarantee of due process is implicated in determinations involving paternity and child support. See *Little v. Streater*, 452 U.S. 1, 5, 101 S. Ct. 2202, 2205, 68 L. Ed. 2d 627 (1981) (noting the federal due process clause ordinarily

guarantees an evidentiary hearing to a defendant in a paternity action); *Walters v. Petgrave*, 248 So.

3d 1202 (Fla. 4th DCA 2018) (reversing a final judgment establishing paternity, timesharing, and child support where the mother was denied her due process rights by being precluded from presenting her case-in-chief at the final hearing). “One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence.” *Matter of SAJ*, 942 P.2d 407, 410 (Wyo.

1997) (citation omitted). Of particular significance is the right to cross-examine, as “[t]he partiality of a witness is subject to exploration at trial, and is ‘always relevant as discrediting the witness and affecting the weight of his testimony’... the exposure of a witness’ motivation in testifying is a proper and 5 important function of the constitutionally protected right of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct.

1105, 1110, 39 L. Ed. 2d 347 (1974) (internal citation omitted); see *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” (citations omitted)).

In recognition of our binary, common law system of adversarialism, the argument or proffer of counsel, not rendered under oath, absent a clear stipulation, does not constitute admissible evidence. See *Matrix Sys., Inc. v. Odebrecht Contractors of Fla., Inc.*, 753 So. 2d 652 (Fla. 3d DCA 2000) (“In the absence of a clear stipulation of counsel, argument of counsel alone does not constitute evidence from which the trial court can determine the propriety, vel non, of granting injunctive relief.” (quoting *Brand v. Elliott*, 610 So.

2d 37, 38 (Fla. 5th DCA 1992))); *State v. T.A.*, 528 So. 2d 974, 975 (Fla. 2d DCA 1988) (“[R]epresentations by counsel not made under oath and not subject to cross-examination, absent a stipulation, are not evidence.” (citation omitted)).

Accordingly, the reliance upon the representations of counsel, in an evidentiary context, undermines procedural due process guarantees by divesting the opposing party of a full, fair, and meaningful opportunity to be heard. See *Haywood v. Bacon*, 248 So. 3d 1254, 1256 (Fla. 5th DCA 2018) (reversing a final judgment of 6 modification as to a parenting plan, holding it was a denial of due process to enter a final order without allowing the mother to complete a cross-examination and present rebuttal evidence at an evidentiary hearing to determine the best interest of the children); *Bielling v. Bielling*, 188 So.

3d 980, 981 (Fla. 1st DCA 2016) (reversing an order establishing a new parenting plan and suspending the father’s child support obligation, finding the trial court’s “entry of an order without

allowing the parties to complete presenting evidence and argument constituted a denial of due process.” (citations omitted)).

Here, the mother concedes that her presentation at the final hearing was restricted to the representations of counsel. Nonetheless, she contends the father waived an objection to the deficiency of the proceeding, as the court effectively negotiated an informal settlement between the parties.

Although we are cognizant of the efforts expended by the trial court in seeking an efficient and conciliatory resolution of the matter, we are unpersuaded by this argument, as the record reflects the father repeatedly expressed his vehement disagreement with the characterization of the proffered evidence and the informal procedure employed by the trial court at the final hearing.

In any event, “[a] denial of [procedural] due process constitutes fundamental error that may be raised for the first time on appeal.” *Chiu v. Wells Fargo Bank, N.A.*, 242 So. 3d 461, 464 (Fla. 3d DCA 2018) (citations omitted). 7 CONCLUSION We conclude the trial court deprived the father of procedural due process in relying solely upon the representations of counsel in support of its determinations of parental responsibility, timesharing, and child support.

See *Julia v. Julia*, 146 So. 3d 516, 520-21 (Fla. 4th DCA 2014) (holding that the wife was “denied a full, fair, and meaningful opportunity to be heard” at a final hearing, where the wife was not allowed to fully present her case); see also *Minakan v. Husted*, 27 So. 3d 695, 699 (Fla. 4th DCA 2010) (“Even if [a party’s] evidence would not have impressed the court, a party has the right to present evidence and to argue the case at the conclusion of all the testimony.” (citation omitted)).

Accordingly, we reverse final judgment of paternity and remand for a new adjudicatory hearing.³ Reversed and remanded. 3 In recognition of tenets of judicial restraint, we do not reach the remaining assignments of error. See *PDK Labs., Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring) (“[I]f it is not necessary to decide more, it is necessary not to decide more.”).