IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

D.H.,	:	
Plaintiff	:	
	:	
v.	:	No. 02-21,478
	:	
C.S. and J.S.,	:	
Defendants	:	

OPINION and ORDER

In this action, D.H. requests blood tests to determine whether he is the biological father of the child [Child]. The defendants, who have primary physical custody of the child, oppose the test. The child's mother [Mother] and the mother's husband [Husband] are both deceased.

The court concludes that neither the presumption of paternity nor the doctrine of paternity by estoppel is applicable in this case. Nor has D.H. somehow relinquished his claim of paternity for failing to raise it earlier. Therefore, there is no reason D.H. cannot obtain a blood test.

Facts

On November 12, 2002, D.H. filed a Petition to Establish Paternity with respect to Child. Counsel for both parties agreed a hearing was unnecessary, and stipulated to the following facts. The parties agreed the only issue before the court was whether the doctrine of paternity by estoppel prevents D.H. from obtaining paternity testing.

Husband and Wife were married on June 23, 1988. Child was born on September 27, 1998. At the time of Child's birth, the marriage was intact. Husband and Wife were separated from some time in 1996[1] through May 1998. Wife lived in Colorado for a large part of that time, while Husband lived in Pennsylvania. However,

[1] Wife filed a divorce complaint in Lycoming County on July 23, 1996.

Husband and Wife were together in Pennsylvania between December 26, 1997 and January 12, 1998. From January 13, 1998 until February 4, 1998, Wife was intimately involved with D.H. Therefore, Wife had sexual relations with both men during the window of time in which Child's conception was possible.

In May of 1998, Wife returned to Pennsylvania. Husband and Wife were reunited at the time of Child's birth, on September 27, 1998, and apparently remained together until their separation in late June 2002. Husband was listed as Child's father on her birth certificate. Both Husband and Wife always held Child out to be the child of Husband.

On July 8, 2002, Wife filed a custody complaint in Lycoming County against Husband. On July 11, 2002 she filed a Protection From Abuse action in Montour County against Husband. Both Husband and Wife died on July 13, 2002. A short time later the defendants obtained primary physical custody of Child.

DISCUSSION

There are two doctrines which may render blood testing to establish paternity irrelevant: the presumption of paternity and the doctrine of paternity by estoppel. These are two legal fictions. Both of them establish conclusively the paternity of a child, despite the biological reality.

The presumption of paternity embodies the fiction that a child born to a married woman is the child of the woman's husband. It has traditionally been one of the strongest presumptions known to the law. John M. v. Paula T., 571 A.2d 1380 (Pa. 1990). Several years ago, however, the Pennsylvania Supreme Court, in a plurality opinion, weakened the presumption somewhat. The court held the presumption should apply only when it will further the policy of protecting the family unit; when the family unit is no longer intact, the presumption will not apply. Brinkley v. King, 701 A.2d 176

(Pa. 1997). This holding was adopted by a majority in Fish v. Behers, 741 A.2d 721 (Pa. 1999).

The purpose behind the presumption of paternity is the preservation of families, the basic and foundational units of society. The presumption protects intact families by shielding them from unwarranted interferences from outsiders—even individuals who have had intimate relationships with a member of that family. Strauser v. Stahr, 726 A.2d 1052, 1055 (Pa. 1999). As the Supreme Court held in John M. v. Paula T., supra at 1388-89, "Whatever interests the putative father may claim, they pale in comparison to the overriding interests of the presumed father, the marital institution and the interests of this Commonwealth in the family unit. These interests are the cornerstone of the age-old presumption and remain protected by the Commonwealth today."

The doctrine of paternity by estoppel, on the other hand, is the legal determination that because of a man's previous conduct accepting a role as father, that man is deemed the father. He will not be permitted to later deny parentage. Nor will the child's mother, who has previously held out one man as the father of her child, be permitted to sue a third party for support, claiming the third party is the true father. Paternity by estoppel is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child." Fish, supra, at 723. In short, the law simply will not allow a person to attack a paternity position which he or she has previously accepted. John M. v. Paula T., 571 A.2d 1380, 1386 (Pa. 1990).

The analysis to follow in determining whether blood tests should be ordered is as follows: First, the court determines whether the presumption of paternity applies. In the case before the court, it clearly does not apply. Both parents are deceased. Therefore, there is no intact family unit to protect. Moreover, even before their deaths, Husband and Wife had separated and Wife had initiated a custody action and obtained a protection from abuse order against Husband.

If the presumption of paternity does not apply, or has been rebutted, then the court considers whether estoppel applies. The defendants argue the court should apply estoppel against D.H. because Husband and Wife would be estopped from denying Husband's paternity. It is no doubt true estoppel would apply against Husband or Wife, and to the defendants, as well. Adoption of M.T.J., 2002 Pa. Super. Lexis 3891, (Pa. Super 2002). However, that does not mean estoppel can somehow be magically transferred and applied against D.H. On the contrary, the theory behind estoppel—in all areas of the law—is to prevent a party from taking a position inconsistent with a position *that party* has previously maintained. C.T.D. v. N.E.E. and M.C.E., 653 A.2d 28, 31 (Pa. Super. 1995). As the Superior Court found in C.T.D., the conduct of a man and woman who have functioned as parents cannot estop a third party from asserting his paternity.

However, the Superior Court has found that a third party, due to *his own action or inaction*, might be effectively estopped from raising a claim of paternity.[2] In C.T.D., supra, a man waited two years after a child's birth to request blood tests or visitation, although he knew prior to the child's birth he might be the father. The Superior Court, in an extremely murky opinion, remanded the case back to the trial court to determine whether the third party "has failed to timely exert his parental claim." Id. at 64-65. The disturbing thing about the holding is that the court seems to be inventing a new sort of estoppel-like doctrine, without clarification of what it involves. In one spot, the court states the man's failure to act "might have effectively estopped him" from now raising a claim of paternity. Id. at 31. At another spot, the court framed the question as whether

[2] At the time of the hearing, the parties stipulated that the only legal issue to be addressed was whether the traditional doctrine of paternity by estoppel, which would apply to Husband and Wife, could prevent D.H. from obtaining blood tests. Defendants apparently were not aware of the case of C.T.D. v. N.E.E., 653 A.2d 28 (Pa. Super. 1994). Due to the importance of the legal issue raised in the case before this court, we will not find the defendants waived the argument D.H. has abandoned or relinquished his paternity claim. We note that both sides have been afforded full opportunity to file briefs and reply briefs on that issue.

the putative father "failed to timely exert his parental claim." Id. The court next describes the inquiry as whether the putative father "relinquished those rights through his actions." Id. And finally, in its closing paragraph, the court stated it was remanding the matter for a determination of whether the putative father's actions "amounted to an abandonment of his potential paternal responsibilities." Id. at 32. It appears the court has created a new doctrine, which is an unsavory mixture of estoppel, abandonment, and laches.

Fortunately, we do not have to try to stumble our way through this legal morass at the present moment, for the case before this court is vastly different from C.T.D. in one all-important aspect: Unlike the putative father in C.T.D., D.H. could not have successfully brought a claim for paternity because the presumption of paternity would have prevented him from ever getting out of the starting gate. Husband and Wife had an intact family from the time of Child's birth up until June of 2002. There is no question any such effort by D.H. to attack Husband's paternity would have resulted in failure. We note the Superior Court in C.T.D. accorded great weight to the fact that the putative father "allowed an *uncontested* father-child relationship to develop" between the child and the other man. Id. at 32 (emphasis added).

The defendants argue that another hearing is necessary to determine whether the presumption of paternity could have been rebutted at the time of Child's birth. However, the stipulation reached by the parties included a statement by the defendants' counsel stating there is no dispute regarding Husband's accessibility and his capability of procreation at the time of Child's conception, as there is no evidence he did not have sexual relations with Wife during the time of her conception and no evidence to support his inability to biologically father a child.

In a case such as C.T.D., where a putative father faces no barriers preventing him from obtaining blood tests, the putative father must act swiftly or lose his right to act if another man steps in and parents the child at issue. In a case such as that before

this court, however, where an earlier claim of paternity would certainly result in failure, we will not require a man to go through the futile legal motions, causing all participants time, money, and stress. To do so would undermine the doctrine of the presumption of paternity, which is intended to protect individuals in an intact family from such attacks. Dragging a husband and wife through such proceedings would draw attention to the alleged affair, causing certain strain on the marriage, as well as harming the family emotionally and financially. Therefore, we find that where it is clear the presumption of paternity would have applied, no hearing is necessary to determine whether the putative father should have raised his claim for paternity earlier. Rather, the clock begins to tick only after the family is no longer intact, or possibly after the man is aware the family is no longer intact. Here, D.H. filed his petition a mere three months after the deaths of Husband and Wife. This is not like the case of C.T.D., where the putative father sat around for two years and did nothing, while another man stepped forward, assumed paternal duties, and created an intact family with the child's mother. Here, the exact reverse occurred. D.H. waited until Husband was no longer alive, and then stepped forward to fill that paternal void.

The defendants also ask the court to consider the best interest of Child in determining whether blood tests should be ordered. They apparently believe that, assuming D.H. is Child's father, Child would be better off never knowing he exists. That is an issue which of course was not addressed at the argument and is certainly not clear, especially as Husband is dead and Child is presently without a legal father. However, even if we accepted that position, which we do not, it would not allow the court to ignore the law. As stated by the Superior Court, "There is no situation of more monumental importance, or more worthy of due process protection, than the creation of a parent-child relationship." Corra v. Coll, 451 A.2d 480, 488 (1982).

We also note that in Strayer v. Ryan, 725 A.2d 785, 786 (Pa. Super. 1999), the Superior Court found the trial court erred in basing its decision to order blood tests upon

an inquiry into the best interest of the child. While this court would be in favor of an approach focusing on the child's interest, unfortunately the Pennsylvania Supreme Court is not so inclined. Justice Nigro has consistently maintained that Pennsylvania should abandon the strict application of the presumption of paternity and the doctrine of paternity by estoppel. Fish v. Behers, 741 A.2d 721 (Pa. 1999); Brinkley, supra. Instead, he favors flexible, case-by-case approach to paternity issues, where courts weigh the competing factors in order to reach a just result in each case. Unfortunately, Justice Nigro has failed to convince a majority of the court to embrace this approach.

The Superior Court has followed the mandate of the Pennsylvania Supreme Court, as we also must. In Strayer, supra, the Superior Court held, "[W]here the facts do not give rise to any countervailing presumption of paternity or to a claim of estoppel, blood testing to establish paternity should be ordered." Id. The court also concluded,

> While we recognize that the right to paternity testing is not absolute and there may be strong family or societal reasons to deny paternity testing, such testing should be favored and a parent should be able to assert his legally protected interest in his or her child. The establishment of a parent-child relationship is important to both parent and child. A father and his child have the right to establish a kinship relationship and the child has a right to expect both financial and emotional support from his or her father. Furthermore, a child's biological history may be essential to his or her future health, and the child's cultural history may be important to his or her personal well being.

Id. at 788. Here, the defendants' case is especially weak because not only is there no intact family to disrupt, but the presumed father is deceased. The Commonwealth's interest in protecting intact families no longer applies to this case, and therefore no longer takes precedence over D.H.'s right to determine whether he is Child's father.

D.H. cannot be faulted for failing to come forward earlier, because the presumption of paternity would have guaranteed failure. Instead, he waited until Child no longer had an intact family, at which time he acted promptly. Given these circumstances and the existing law, we can see no reason why his request for blood testing should not be granted.

O R D E R

AND NOW, this _____ day of February, 2003, for the reasons stated in the foregoing opinion, the Petition to Establish Paternity filed by the plaintiff on November 12, 2002 is granted and it is ordered that the defendants shall cooperate in obtaining a paternity test to determine the paternity of the child. Lycoming County Domestic Relations shall conduct the paternity test. The results of the test shall be provided to the plaintiff and the defendants. The cost of the test shall be borne by the plaintiff.

To protect the privacy of the individuals involved, this file shall be sealed. The only document available in the public domain shall be this opinion and order.

BY THE COURT,

_____
Clinton W. Smith, P.J.

cc: Dana Jacques, Esq., Law Clerk
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