IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 7, 2002 Session

LAZARETH ARDOIN v. TAMMY LAVERTY

Appeal from the Juvenile Court for Montgomery County
No. 103-29 John H. Hestle, Judge

No. M2001-03150-COA-R3-JV - Filed July 11, 2003

This appeal involves Lazareth Ardoin's attempt to obtain a judicial declaration that he is the father of a child whose mother was married to another man when the child was born. The trial court found that the twelve (12) month statute of limitations provided in Tenn. Code Ann. § 36-2-304(B)(2)(A) had long since run and dismissed the petition to establish paternity and visitation as untimely. We affirm the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., SP. J., joined.

Sharon T. Massey, Clarksville, Tennessee, for the appellant, Lazareth Ardoin.

Mark A. Rassas, Julia P. North, Clarksville, Tennessee, for the appellee, Tammy Laverty.

OPINION

Tammy and James Laverty were married on December 29, 1989, and remain married as of the date of appeal. Mr. Laverty is a career noncommissioned officer in the United States Army and is stationed at Fort Campbell. The couple have lived in Clarksville, Tennessee since 1994, where they own their own home. They have two children born during the marriage,[1] a son, born June 19,

[1]Mrs. Laverty also has two other children from a previous marriage. Their father, Mrs. Laverty's first husband, has custody of these children, and they are not involved in this case.

1991, and a daughter, born December 24, 1997. This case involves a dispute regarding the daughter's ("the child") paternity.

In December of 1996, Mrs. Laverty began a friendship with Lazareth Ardoin, a sergeant stationed at Fort Campbell. Eventually, the relationship became sexual, and it continued from approximately February through June 1997. During this time, Mrs. Laverty learned that she was pregnant. When she discovered she was pregnant, she told Mr. Ardoin that he was not the father of the child.[2] Nonetheless, Mrs. Laverty permitted Mr. Ardoin to accompany her to an ultrasound appointment. Mrs. Laverty and Mr. Ardoin continued to communicate by telephone until shortly before the child's birth.

On December 24, 1997, the child was born at Blanchfield Army Community Hospital at Fort Campbell. Mr. Laverty assisted his wife in the delivery room during the birth and handed out cigars to co-workers to celebrate.[3] Mr. Ardoin was not present at the birth, but testified that though he had been told by Mrs. Laverty that he was not the father of her child, he suspected differently and made an unsuccessful attempt to see the baby at the hospital.[4]

After the birth, Mrs. Laverty and Mr. Ardoin continued to talk by telephone every couple of days until 2000. During these conversations, Mrs. Laverty assured Mr. Ardoin that the child was not his. Despite Mrs. Laverty's denials concerning paternity, Mr. Ardoin had his doubts. Indeed, a mutual friend advised Mr. Ardoin that he was in fact the child's father. During the fall of 1998, Mr. Ardoin went through the military chain of command in an attempt to resolve the questions he had relative to the child's paternity. During this time, Mr. Ardoin was stationed at Fort Sam Houston in Texas receiving medical treatment.[5]

Between 1999 and 2000, Mr. Laverty was ordered on a twelve (12) month unaccompanied tour of Korea, although he was able to come home mid-tour for one month. During Mr.Laverty's absence, Mrs. Laverty and the child flew to Texas in June 2000 to visit with Mr. Ardoin and stay in his home. When Mr. Ardoin saw the child for the first time, he was convinced that the child was his. According to Mr. Ardoin, Mrs. Laverty admitted that he was the true father of the child. Mrs. Laverty denies making such a statement. Nonetheless, Mrs. Laverty, the child, and Mr. Ardoin traveled to Louisiana where they visited Mr. Ardoin's mother and extended family. The three then traveled back to Tennessee together, and Mr. Ardoin, Mrs. Laverty and the child stayed for one week

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[2]The parties agree that the relationship between Mr. Ardoin and Mrs. Laverty was sexual at the time of child's conception.

[3]Mr. Ardoin testified in both his deposition and at the hearing that he had no information to indicate that the Lavertys were not husband and wife, living together and having sexual relations during the period of conception through the date he filed his paternity petition.

[4]Mr. Ardoin testified that the baby was not in the regular nursery at first since it was hypoglycemic.

[5]Mr. Ardoin has a hereditary disease, sarcoidosis, and argues that the biological parentage of the child is important and necessary to determine if future medical care will be needed for her.

at the home of Mr. Ardoin's friend. During this time, Mr. Ardoin spent time with the child, even caring for her while Mrs. Laverty went to work. Mr. Ardoin and Mrs. Laverty resumed a sexual relationship during their time together.

When Mr. Laverty returned home from Korea in late July of 2000, Mrs. Laverty told him of the affair. Mr. Laverty filed for divorce approximately three weeks later. The Lavertys entered into a marital dissolution agreement that provided for Mrs. Laverty to have custody of the child and for Mr. Laverty to have custody of their son. During this time, the Lavertys never maintained separate households, but instead continued living together. Following counseling, the couple reconciled in November of 2000 and dismissed the divorce petition.

From all accounts, Mr. Laverty is an active, involved father with the child. On an average day, he awakens the child and gets her ready for school. He is usually home by 5:00 p.m. and enjoys playing outside with his children. Mr. Laverty often gets the child ready for bed. If he is away on military duty, he is sure to bring the child a present from his travels.

By October, 2000, Mrs. Laverty called Mr. Ardoin's Commanding Officer and asked him to stop Mr. Ardoin from contacting her. Mr. Ardoin had no contact with Mrs. Laverty or the child from October 2000, until April 2001, when he filed the petition to establish parentage.

The Lavertys filed a Motion to Dismiss, and a hearing was held in juvenile court on October 4, 2001. On January 28, 2001, the trial court found that the Lavertys were legally married and living as husband and wife at the time of the conception of the child, and that they had remained together through the date of the filing of the paternity petition. In addition, both the Lavertys filed sworn statements that Mr. Laverty was the father of the child. Pursuant to Tenn. Code Ann. § 36-2-304, the trial court further found that Mr. Ardoin had not filed his paternity suit within twelve months of the birth of the child as required by the statute and therefore dismissed the suit.

STANDARD OF REVIEW

We review the trial court's findings *de novo*, with a presumption of the correctness of the factual findings unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). No such presumption of correctness attaches to the trial court's conclusions of law. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

UNTIMELINESS OF PETITION

Under Tennessee law, a man is presumed to be the father of a child when, as in this case, "the man and the child's mother are married or have been married to each other and the child is born during the marriage. . . ." Tenn. Code Ann. § 36-2-304(a)(1).[6] This presumption may be rebutted "in an appropriate action," by a preponderance of the evidence. Tenn. Code Ann. § 36-2-304(b) specifically authorizes any man claiming to be a child's father to file suit to establish parentage regardless of the marital status of the child's mother:

> (b)(1) Except as provided in subdivision (b)(2), a presumption under subsection (a) may be rebutted in an appropriate action.
> (2)(A) If the mother was **legally married and living with her husband at the time of conception** and has **remained together** with that husband **through the date a petition** to establish parentage is filed and both the mother and the mother's husband file a sworn answer stating that the husband is the father of the child, **any action seeking to establish parentage must be brought within twelve (12) months of the birth of the child**. In the event that an action is dismissed based upon the filing of such a sworn answer, the husband and wife who filed such sworn answer shall be estopped to deny paternity in any future action.
> (3) The standard of proof in an action to rebut paternity shall be by preponderance of the evidence.

(emphasis added).

Although the Parental Act of 1997 reflects a legislative liberalization of the requirements imposed on biological fathers seeking legal recognition of their parentage, in no sense did the General Assembly retreat from its expressed policy favoring the importance of the traditional family unit. *Chilar v. Crawford*, 39 S.W.3d 172, 180 (Tenn. Ct. App. 2000). To that end, the legislature imposed a "small window" of time in which to bring suit in cases such as Mr. Ardoin's.[7] Statutes limiting the time for bringing lawsuits are enacted for the repose of society and are not disfavored. *Cherry v. Williams*, 36 S.W.3d 78 (Tenn. Ct. App. 2000). As the Tennessee Supreme Court

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[6] Tenn. Code Ann. § 36-2-304(a) states:

> A man is rebuttably presumed to be the father of a child if:
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> (1) The man and the child's mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce.

[7] In effect, Tenn. Code Ann. § 36-2-304(b)(2) creates a narrow exception to the general statute of limitations for an action to establish parentage contained in Tenn. Code Ann. § 36-2-306 [3 years beyond majority]. Op. Tenn. Atty. Gen. No. 99-099, May 4, 1999.

observed long ago, "The peace of society requires [that] rights shall be enforced in a reasonable time, and that they shall be barred if they are not." *Peck v. Bullard*, 21 Tenn. (2 Hum.) 41, 45 (1840).

Here, the petition to establish paternity was not filed until April 2001, when the child was almost three and a half years old. Following the hearing on the Lavertys' motion to dismiss, the trial court found that: (1) Mrs. Laverty was legally married and living with her husband at the time of conception of the child; (2) Mrs. Laverty has remained together with her husband through the date the petition to establish parentage was filed; and (3) both the Lavertys had filed a sworn affidavit stating that husband is the father of the child. Based upon these findings, the trial court found that Mr. Ardoin had one year from the birth of the child on December 24, 1997, in which to file his paternity petition pursuant to Tenn. Code Ann. § 36-2-304(b)(2)(A) and that Mr. Ardoin had waited too long to file his lawsuit.

At the June hearing, Mr. Ardoin argued that the one year statute of limitations was inapplicable since the Lavertys did not satisfy the "remained together" prong of the statute.[8] Mr. Ardoin argued that the Lavertys' marriage had been "erratic in nature" and that their marriage was a mere technicality as evidenced by Mrs. Laverty's back and forth relationships between her husband and Mr. Ardoin.

With respect to the meaning of "remained together," the following exchange occurred between counsel for Mr. Ardoin and the trial court at the June hearing:

> **Court**: You go on vacation for two weeks and leave your husband, is – and then you come back because you've gone on vacation with the kids, have you all left each other and not remained together. I mean, obviously remain together means
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> **Court** (cont.): more than being able to prove that one night they didn't spend with each other.
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> **Ms. Massey**: Agreed.
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> **Court**: So how much? That's - - the burden of proof is on you.

The trial court found that the Lavertys had "remained together." In support of this finding, the evidence showed that the Lavertys lived in no other residence other than their current home since

[8]Mr. Ardoin also advances the argument that he was not aware that the child might be his until April 2000. The statute provides that the one year statute of limitations runs from the date of birth of the child, not when the putative father becomes aware he might be the father. Moreover, the facts simply fail to support Mr. Ardoin's claims of ignorance. Mr. Ardoin was aware of the pregnancy as early as June of 1997, and actually accompanied Mrs. Laverty to her ultrasound appointment. He visited the hospital the day the child was born and made repeated phone calls to Mrs. Laverty questioning whether the child was his. In addition, he made inquiries through the military chain of command and even spoke directly with Mr. Laverty about the situation. *See David V.R. v. Wanda J.P.*, 907 P.2d 1025 (Okla. 1995) (stating that putative father was "on notice from moment he engaged in affair").

1994. At the time of conception, the Lavertys lived together and maintained a sexual relationship even during Mrs. Laverty's affair with Mr. Ardoin. Even at the height of their marital difficulties, they did not separate when Mr. Laverty filed a complaint for divorce. The trial court found that Mrs. Laverty's brief periods of marital indiscretion did not equate to separation sufficient to make an issue under the statutory requirement that she and her husband "remained together." We agree.

The rules of statutory construction which we must follow are well-settled. The purpose of statutory construction is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995) (citation omitted). Courts must restrict their review "to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent." *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998) (citing *Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 148 (Tenn. 1983)). The construction of a statute is a question of law subject to *de novo* review without a presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999).

The Parentage Act was a comprehensive bill dealing with topics formerly addressed in separate statutes. With regard to the provision at issue, the legislature's discussion addressed the purpose of the provision allowing a person who believes he is the biological father of a child born to a woman during her marriage to another man, which was a change in prior law. In that regard, it was explained in terms of a situation of which some legislators were aware:

> A gentleman and lady lived together, I think it was for two years, . . . and he fathered a child, he had no idea the woman was married and then in one of those miracles that do happen, the original spouse showed back up and the mother of the child by the second man said we are taking the child and you can no longer see him. The only father that the child knew for two years was this father and we think there needs to be some window of opportunity in which you can say 'yes, that's my child and I need to have some relationship with it. . . .'[9]

The discussion of the provision at the hearings on the bill centered on the appropriate length of time in which a person in that situation must come forward. Several legislators felt that only a "small window" of opportunity should be afforded a stranger to the marriage in which to file a paternity petition. The concern was the potential harm to the marriage, trauma to the child, and disturbance of the relationship which would have developed between the child and the mother's spouse. The original bill included a time frame of two years; after proposals of even shorter periods of time, one year was finally approved.

There is no discussion in the legislative history of the term "remained together." We note the twelve month statute of limitations requires (1) that the mother be living with her husband at the

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[9]Hearing before the Senate Judiciary Committee on May 13, 1997, concerning 1997 Tennessee Public Acts Chapter 477, House Bill 1073/Senate Bill 747.

time of conception and (2) that she has remained together with the husband through the date of the petition. The first requirement addresses the potential possibility that the husband is the biological father; the second obviously addresses the concern, as expressed by the legislators of damage to a marital relationship and disruption of child-parent bonds which have developed. In terms of the language of the statute, the word "remain" in the requirement that the mother has "remained together" with her husband simply refers back to the first requirement that the spouses be living together.

In one legislative hearing the witness described the bill as addressing two categories of situations. One involved "intact" marriages at the time of conception and "all the way through to the filing of the petition." The second involved the critical issue of establishing the obligation for support when there was no "intact" marriage at the time of conception. The legislative committee considering the bill was told that the Department of Human Services was seriously concerned that the marriage be "intact" since the putative father would be seeking to establish paternity and support the child. This concern was based on the Department's experience that a strained marriage may lead to divorce or non-support of the child born in this situation.[10]

The "remained together" and "intact marriage" language is a recognition of the rights of members of a family and the state's interest in protection of the family unit. *See* Traci Dallas, *Rebutting the Marital Presumption; a Developed Relationship Test*, 88 COLUM. L.REV. 369, 371 (1988).

We construe the requirement that the spouses have remained together through the filing of a petition to simply mean that the parties have continued to live together as a family. While it is true that "remained together" must mean more than simply a legal marriage in form, we do not believe the legislature intended for the courts to examine the day to day intimate relations of married couples. As the trial court indicated, short absences from home do not mean that the spouses are not living together. Similarly, even brief separations should not serve to destroy the statute of limitations where reconciliation has been accomplished and an intact family remains. Our construction is consistent with the legislature's concern that a third party not interfere with the established family, the stability of the marriage, any established parent-child relationship, and the ongoing support for the child.[11]

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[10]Because there is a presumptive father of a child born in wedlock, and because of the statute's provision that a husband filing an affidavit of paternity is estopped to later deny it, responsibility for support is not an issue.

[11]The trial court noted in its order that it was concerned about any potential loss of rights of the minor child if paternity were established. The court considered the possibility of appointment of a guardian *ad litem*, but did not find authority that would allow such to be done. The court further expressly found that the ruling was not based on the rights of the child, but was intended to comply with the law that the court believed was applicable.

Here, the Lavertys clearly satisfied all the requirements of Tenn. Code Ann. § 36-2-304(B)(2)(A), and the trial court correctly found that Mr. Ardoin's filing of the petition was well outside the applicable one year statute of limitations.

GENETIC TESTING & BEST INTEREST ANALYSIS

Mr. Ardoin argues that the trial court erred in denying his motion for paternity testing and by failing to consider the best interest of the child. The trial court determined that both issues were moot since it had dismissed the paternity petition as untimely. We agree. Parentage testing is mandatory in a contested paternity case, upon request of a party. Tenn. Code Ann. § 24-7-112(a)(1)(A). If the issue is raised in another proceeding, subsection (a)(2) gives the trial court discretion to determine whether to permit genetic testing. *Granderson v. Hicks*, No. 02A01-9801-JV-00007, 1998 WL 886559, at *3 (Tenn. Ct. App. Dec. 17, 1998) (no Tenn R. App. P. 11 application filed). Here, the paternity action had been dismissed, so there was no basis to order genetic testing. Because Mr. Ardoin waited too long to attempt to establish paternity, he is precluded from doing so. In that situation, there is no paternity case, and no beneficial purpose would be served by testing. Regarding best interest analysis under Tenn. Code Ann. § 36-6-106, there was no basis for the trial court to consider a change in custody since the paternity action was dismissed.

CONCLUSION

In conclusion, we affirm the trial court's decision dismissing the paternity petition and remand the case for any further proceedings which may be necessary. The costs of the appeal are taxed to Mr. Ardoin.

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PATRICIA J. COTTRELL, JUDGE