No. 24120 - William L., III, v. Cindy E.L.

Maynard, Justice, dissenting:

I dissent because I believe the rule of equitable estoppel, stated in the syllabus point of the majority opinion, should not be applicable to the facts of this case.

Originally set forth in Syllabus Point 3 of *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989), this rule states:

> A trial judge should refuse to admit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.

The rule is based on this Court's determination that "the best interests of the child is the polar star by which decisions must be made which affect children," *Michael K.T.*, W.Va. at 405, 387 S.E.2d at 872, and "the law favors the innocent child over the putative father in certain circumstances."

Id. Although I believe the basic premise that the best interest of the child should be the cynosure in cases affecting children, I do not believe that this premise mandates the use of the above-stated rule in many cases where the presumption of paternity is sought to be rebutted by the use of *conclusive* blood tests.

At the outset, I note that cases like the instant one present the Court with especially difficult choices because the competing interests involved often concern two innocent parties. In such cases, more so than in others, a Solomonic wisdom is called for, and this Court's scholarship coupled with compassion in its constant struggle to approach such wisdom is admirable. Nevertheless, I believe that the rule formulated by the Court in *Michael K.T.* and utilized here, sweeps too broadly so as to bring about grossly unjust results.

In its use of this rule, the Court attempts to weigh the interests of the innocent child against those of the putative father and finds the interests of the child preeminent. In *Michael K.T.*, the Court relied heavily

on the reasoning of the court in *Commonwealth ex rel. Gonzalez v. Andreas,* 245 Pa.Super. 307, 369 A.2d 416 (1976). In that case, the putative father was denied the use of blood tests to disprove his paternity of a child he had supported financially for approximately three years before denying paternity and six years before finally requesting blood tests. The court concluded that the putative father was equitably estopped from denying paternity. The *Andreas* court explained:

> In short, equitable estoppel, reduced to its essence, is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely upon that conduct to his or her detriment.

Andreas, Pa.Super. at 311-312, 369 A.2d 418.

The court then applied this doctrine to cases in which paternity is sought to be disproved.

> Absent any overriding equities in favor of the putative father, such as fraud, the law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized. Relying upon the

> representation of the parental relationship, a child naturally and normally extends his love and affection to the putative parent. The representation of parentage inevitably obscures the identity and whereabouts of the natural father, so that the child will be denied the love, affection and support of the natural father. As time wears on, the fiction of parentage reduces the likelihood that the child will ever have the opportunity of knowing or receiving the love of his natural father. While the law cannot prohibit the putative father from informing the child of their true relationship, it can prohibit him from employing the sanctions of the law to avoid the obligations which their assumed relationship would otherwise impose.

Id., Pa.Super. at 312, 369 A.2d at 419.

Stated succinctly, the reasoning of the Court seems to be that by assuming the responsibilities of paternity, the putative father induced the child to reasonably expect continued love, affection, and financial support. By doing this, the putative father knew or should have known that the child would rely on the putative father's support to the child's detriment. Apparently, the detriment is that by taking on himself the care and support

of the child, the putative father foreclosed any possibility that the natural father would have assumed that role. I believe there are several problems with such reasoning in cases like the instant one. These problems were cogently set forth by the Court of Appeals of Virginia in *NPA v. WBA,* 8 Va.App. 246, 380 S.E.2d 178 (1989).

In *NPA,* the court was asked to "decide whether a husband (WBA) who is not the biological father of his wife's child can be required to support the child after divorce when he has reared and supported the child for the five years since birth under the false belief that he was the child's father." *NPA,* Va.App. at 248, 380 S.E.2d at 179. The wife argued that the husband should be equitably estopped from denying his duty to support the child. "Assuming without deciding that child support by estoppel exists as a basis . . . to prohibit a husband from terminating his support commitment to his wife's illegitimate child," *id,* Va.App. at 253, 380 S.E.2d at 182, the court determined that the requirements for equitable estoppel did not exist under the facts of the case. The court explained:

> Although the husband had assumed the role of father for the child's entire

> life, he did not knowingly misrepresent to the child that he was his natural father. Throughout the husband's relationship with the child, he acted under the mistaken belief that he was the child's natural father and supported the child. That he might have had a question or doubt as to his paternity at the child's birth, does not establish an intent to falsely represent himself to the child as the natural father. Furthermore, the child suffered no detriment by having been cared for and supported during the five year relationship where no legal duty to do so existed. In fact, the child has received the benefit of the husband's love and support. The husband's voluntary support of the child during the marriage based upon his mistaken belief that he was the child's father does not deprive the wife or the child of his cause of action against the biological father for child support.

Id., Va.App. at 253-254, 380 S.E.2d at 182 (citations omitted).

I concur with the court's reasoning in *NPA,* and I believe this reasoning applies in the instant case. Here, the parties were married in 1984, and the child was born in January 1987. The parties separated in November 1991. The appellant filed for divorce a short time later and alleged that the child's paternity was uncertain. According to his disputed testimony, the

appellant denies ever talking about the child's paternity or mentioning blood tests until the divorce. This is in contrast to the facts in *Andreas* where the parties were not married until six months after the child's birth, and the wife was already the mother of two illegitimate children. In light of these facts, the *Andreas* court noted that the putative father "had both sufficient opportunity and motivation for questioning the paternity of the child before he decided to marry appellee[.]" *Andreas,* Pa.Super. at 313, 369 A.2d at 419. Further, the putative father in *Andreas* did not move to disprove paternity through the use of blood test evidence until four years after the separation and three years after first denying paternity when the child was almost seven years old. The court concluded that the putative father lacked diligence in instituting his action.

I believe, therefore, that our rule of equitable estoppel is not applicable in the instant case. I emphasize that it is *not* my contention that equitable estoppel is never applicable where a putative father seeks the admission of blood test evidence to rebut the presumption of paternity. It is my belief, however, that blood test evidence which *conclusively*

excludes a man as the father of a child should be admitted where there is evidence that the putative father had no reason, at an earlier point in time, to question the paternity of the child. I believe that this is only fair.

Also, as noted above, this Court's purpose in utilizing the equitable estoppel rule in cases like the present one is to protect the best interests of the child. These interests involve much more than financial support. They also include love, affection, and all the intangibles involved in a father's nurturing of a child. It is, therefore, the Court's desire that the putative father will continue to show the child love and affection even after it becomes apparent that he is not the child's biological father. In a perfect world that is what should happen. This Court, however, simply by the entry of a court order, cannot compel the giving of love and affection any more than it can change the weather. The Court's poor powers in this area are limited to ensuring continued financial support. Such financial support is, of course, beneficial to the child, but falls far short of what constitutes the child's best interests. Sadly,

once a putative father goes to court to avoid any financial obligation, the odds are that he is not prepared to continue in a caring relationship with the child. By mandating that the putative father continue to provide financial support, the Court is likely to engender bitterness and resentment, a result which is completely contrary to what the Court intends.

Finally, in *Michael K.T.*, this Court stated that "*absent evidence of fraudulent conduct which prevented the putative father from questioning paternity,* this Court will not sanction the disputation of paternity through blood test evidence if there has been more than a relatively brief passage of time." *Michael K.T.*, W.Va. at 405, 387 S.E.2d at 872 (emphasis added). I believe that fraudulent conduct exists in every case where a wife gives birth to a child cognizant of the fact that paternity is uncertain, yet remains silent while her husband innocently assumes the care of the child. In such cases the burden should be upon the wife to show that her husband was put on notice that he may not be the child's biological father before he undertook or continued to undertake the care of the child. In matters

such as these, the law should reward trust where reason for distrust is absent.

In conclusion, I believe that the Court disposes of this case with a rule that sweeps too broadly and thus, in some instances, produces harsh and unfair results. I believe that this is one such instance. Therefore, I respectfully dissent.