[J-236-98]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TIMOTHY STRAUSER,	:	No. 44 M.D. Appeal Docket 1998
	:	No. 45 M.D. Appeal Docket 1998
Appellant	:	
	:	
	:	
v.	:	Appeal from the Order of Superior Court
	:	entered 12/4/97 at No. 1010HBG96,
	:	reversing order entered 11/25/96 in the
APRIL R. STAHR,	:	Court of Common Pleas of Juniata County,
	:	Civil Division, at No. 172-1996
Appellee	:	
	:	
STEVEN STAHR,	:	
	:	
Intervenor	:	ARGUED: November 17, 1998

DISSENTING OPINION

MADAME JUSTICE NEWMAN DECIDED: MARCH 30, 1999

For the reasons set forth below, I respectfully dissent. While I agree that the "presumption of paternity" attaches to the facts of this case, I disagree that it is irrebutable. Rather, this presumption should be open to rebuttal by reliable blood test evidence.

April and Steven Stahr have been married since April 4, 1992 and they continue to be married, reside together and have never been separated. The couple has three children, all born during the marriage. The custody dispute that underlies this suit involves the youngest of these three children. The record indicates that April Stahr, at one time, acknowledged that Mr. Strauser, not her husband, was this child's father and allowed Mr. Strauser frequent visits with the child. April, the child and Mr. Strauser even

submitted to voluntary blood tests, which show a 99.9% probability that Mr. Strauser is the child's father. Mr. Strauser filed a complaint against April Stahr seeking partial custody of his daughter after April began to interfere with his visitation with the child. April's husband, Steven, intervened in the action and requested that the complaint be dismissed because of the presumption that he was the child's father. The trial court overruled Mr. Stahr's objections, admitted the blood test evidence and ordered a hearing to determine what custody arrangement was in the best interests of the child. The Stahrs filed their appeal of this determination before the trial court could hold the custody hearing.

The core issues involved in this appeal are whether the trial court erred in refusing to dismiss Mr. Strauser's complaint based on the "presumption of paternity" in favor of Mr. Stahr and whether the court erred in admitting genetic blood test evidence to rebut that presumption. In order to determine whether the presumption of paternity attaches to a particular case, we must first decide if the case properly advances the purpose of the presumption. Brinkley v. King, 549 Pa. 241, 260-61, 701 A.2d 176, 185-86 (1997). Here, I agree that the presumption of paternity applies because the purpose of the presumption is indicated in the facts before us -- specifically that the Stahrs' marriage is currently, and at all relevant times has been, intact. Id., (Newman J. concurring and dissenting statement)(purpose of presumption is limited to preservation of the marriage).

Next, we must address whether the presumption may be rebutted. Id. The Majority posits that in this case, where the marriage is intact, "public policy" requires that the presumption be irrebutable. I disagree. It is generally not for this Court to make

such assertions of "public policy" unless such policy is clear. See, e.g., Muschany v. United States, 324 U.S. 49, 66 (1945)("public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest"); Mamlin v. Genoe, 340 Pa. 320, 324,17 A.2d 407, 409 (1941)("in our judicial system the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of the law.").

Here, the Majority's conclusion that "public policy" requires an irrebutable presumption in favor of Mr. Stahr is erroneous because it is in direct conflict with the plain language of the Uniform Act on Blood Tests to Determine Paternity (the Act). 23 Pa.C.S.A. § 5104(c). Instead, the legislature has codified the "public policy" of this Commonwealth and clearly and expressly provided that a court may compel interested parties to submit to blood testing, and that such blood testing can rebut the presumption of paternity. 23 Pa. C.S.A § 5104 (c) and (g)[1]. Moreover, as I stated in Brinkley:

> We would be both naive and remiss to perpetuate the strength of this

[1] Sections 5104 (c) and (g) state as follows:

> (c) Authority for test.--In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order if the rights of others and the interests of justice so require.
>
> (g) Effect on presumption of legitimacy. --The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.

> presumption and ignore the results of reliable scientific tests;
>
> * * *
>
> Pennsylvania is fast becoming one of only a minority of states that does not accept the results of blood tests that disprove the husband's paternity to rebut the presumption. Approximately two-thirds of the states currently have statutes permitting blood tests to be considered in the determination of paternity. HOMER H. CLARK, JR., 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 340 (2d ed.1987). We should join the majority of states and accept these reliable scientific tests to rebut the presumption that a child born to a married woman is her husband's child.

Brinkley v. King, 549 Pa. at 188, 701 A.2d at 264.

Thus, for the reasons I have set forth here and in Brinkley, I believe that the trial court did not err in refusing to dismiss Mr. Strauser's custody complaint solely on the basis of the presumption of paternity and did not err in admitting the blood test evidence. Accordingly, I would reverse the decision of the Superior Court and reinstate the decision of the trial court so that the court can conduct a hearing to determine the best interests of the child involved.

Mr. Justice Castille joins this dissenting opinion.