[J-60-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IVONNE V. FERGUSON,	:	No. 16 MAP 2005
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered July 22, 2004 at No. 1430
v.	:	MDA 2003 which affirmed the Order of the
	:	Dauphin County Court of Common Pleas
	:	Domestic Relations Division entered
JOEL L. MCKIERNAN,	:	August 11, 2003 at No. 1259 DR 1999
	:	
Appellant	:	855 A.2d 121 (Pa. Super. 2004)
	:	
	:	ARGUED: May 17, 2005

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: December 27, 2007**

I respectfully dissent from the majority's conclusion appellee can bargain away her children's right to support from their father merely because he fathered the children through a clinical sperm donation. The majority concludes this is possible because the parties intended "to preserve all of the trappings of a conventional sperm donation … [and] negotiated an agreement outside the context of a romantic relationship …." Majority Slip Op., at 17. To this, I say, "So what?" The only difference between this case and any other is the means by which these two parents conceived the twin boys who now look for support. Referring to Joel McKiernan as "Sperm Donor" does not change his status — he is their father.

It is those children whose rights we address, not the rights of the parents. Do these children, unlike any other, lack the fundamental ability to look to both parents for support? If the answer is no, and the law changes as my colleagues hold, it must be for a reason of monumental significance. Is the means by which these parents contracted to accomplish conception enough to overcome that right? I think not.

The paramount concern in child support proceedings is the best interest of the child. Sutliff v. Sutliff, 528 A.2d 1318, 1322 (Pa. 1987). Parents are permitted to enter child support agreements where they negotiate, bargain, and ultimately establish valid child support payments. See generally Knorr v. Knorr, 588 A.2d 503, 504-05 (Pa. 1991). While "[p]arties to a divorce action may bargain between themselves and structure their agreement as best serves their interests," id., at 505 (citing Brown v. Hall, 435 A.2d 859 (Pa. 1981)), the ability of parents to bargain child support is restricted:

> [Parents] have no power … to bargain away the rights of their children …. They cannot in that process set a standard that will leave their children short. Their bargain may be eminently fair, give all that the children might require and be enforceable because it is fair. When it gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of the court's wide and necessary powers to provide for that best interest.

Id. (internal citations omitted).

I agree, as did the Superior Court, with the trial court's fundamental recognition that "it is the interest of the children we hold most dear." Ferguson v. McKiernan, 855 A.2d 121, 124 (Pa. Super. 2004) (quoting Trial Court Opinion, 12/31/02, at 9). This Court possesses "wide and necessary powers to provide for [a child's] best interest." Knorr, at 505. "[P]arents have a duty to support their minor children even if it causes them some hardship." Sutliff, at 1322 (citation omitted).

The majority, with little citation to authority, relies on policy notions outside the record, such as "the evolving role played by alternative reproductive technologies in contemporary American society," Majority Slip Op., at 14, and hypothetical scenarios concerning reproductive choices of individuals. Id., at 14-15. These musings are thought-provoking, but are ultimately inapplicable to this case of enforceability of a private contract ostensibly negating a child's right to support — a contract our jurisprudence has long ago held to be unenforceable. This case has little or nothing to do with anonymous sperm clinics and reproductive technology.

Speculating about an anonymous donor's reluctance is irrelevant — there is no anonymity here and never has been. There was no effort at all to insulate the identity of the father — he was a named party to the contract! This is not a case of a sperm clinic where donors have their identity concealed. The only difference between this case and any other conception is the intervention of hardware between one identifiable would-be parent and the other.

The majority also references the Uniform Parentage Act (UPA). Our legislature has not adopted the UPA. This Court has held, "it is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt." Benson ex rel. Patterson v. Patterson, 830 A.2d 966, 967 (Pa. 2003) (quoting Garney v. Estate of Hain, 653 A.2d 21 (Pa. Super. 1995)). The "legislature … has taken an active role in developing the domestic relations law of Pennsylvania," id., at 968, and because it has not adopted the UPA, this Court should not consider it; the subject matter is within that body's purview. If anything, the failure to enact it speaks of rejection of its principles, not acceptance of them.

Indeed, it is not our place to legislate, yet the refusal to recognize a traditional and just right to support because of "evolving" notions (which are not directly applicable

to the facts) is surely legislation from the Court. To deny these children their right to support from their father changes long-standing law — if the legislature wishes to disenfranchise children whose conception utilizes clinical procedures, it may pass such a law, but we should not. The legislature can best undertake consideration of all the policy and personal ramifications of "evolving" notions and "alternative reproductive technologies in contemporary American society." Majority Slip Op., at 14.

While conception is accomplished in ways our forbearers could never have imagined, and will in the future be accomplished in ways we cannot now imagine, that simply is not the issue with a private contract between these identifiable parents. We do not have anonymity — we have a private contract between parents who utilized a clinical setting to accomplish those private aims, the creation of a child. The issue is not anyone's ability or future reluctance to utilize anonymous sperm banks — the issue is the right of these two boys to support, and whether there are compelling reasons to remove that right from them. The children point and say, "That is our father. He should support us." What are we to reply? "No! He made a contract to conceive you through a clinic, so your father need not support you." I find this unreasonable at best.

This private contract involves traditional support principles not abrogated by the means chosen by the parents to inseminate the mother, and I would apply the well-settled precedent that the best interest of the children controls. A parent cannot bargain away the children's right to support. These children have a right to support from both parents, including the man who is <u>not</u> an anonymous sperm donor, but their father.

I would affirm the Superior Court, as the agreement here is against the public policy and thus unenforceable.