IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RAYMOND JOSEPH DOHERTY,
Petitioner/Appellant,

v.

GIOVANAH LEXUS LEON AND DOMINIQUE LEON,
Respondents/Appellees.

No. 2 CA-CV 2019-0124-FC
Filed July 28, 2020

Appeal from the Superior Court in Pima County
No. SP20180482
The Honorable Cathleen Linn, Judge Pro Tempore

AFFIRMED

COUNSEL

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Counsel for Petitioner/Appellant

Child and Family Law Clinic, Tucson
By Paul D. Bennett, a clinical professor appearing pursuant to Rule 38(c), Ariz. R. Sup. Ct., and Nancy Sjostram, Bethany Munson, Dakota Francis, and Wayne Koelemeyer, students certified pursuant to Rule 39(c), Ariz. R. Sup. Ct.
Counsel for Respondent/Appellee Dominique Leon

OPINION

Chief Judge Vásquez authored the opinion of the Court, in which Presiding Judge Staring concurred and Judge Brearcliffe specially concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this appeal, we are asked to consider the trial court's application of two competing presumptions in a paternity action. For the reasons that follow, we affirm the court's denial of Raymond ("Ray") Doherty's "request for adjudication of paternity" based on the court's determination that the marital presumption outweighed the genetic-testing presumption under the circumstances of this case.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Clark v. Kreamer*, 243 Ariz. 272, ¶ 10 (App. 2017). In early 2015, Giovanah and her then-girlfriend Dominique moved to Tucson where they were introduced to Ray and his fiancée Melanie. The two couples soon developed a friendship, and in July, Melanie approached Giovanah and Dominique who were "trying to have a family" about conceiving a child with Ray's sperm. Over the course of several conversations, Giovanah, Dominique, and Ray agreed to the sperm donation with the understanding that Ray "was helping a same-sex couple," he would not have "any parental rights," and "in return [Giovanah and Dominique would] not go after him for child support." Melanie delivered three donations of Ray's sperm and Giovanah became pregnant.

¶3 In December 2015, Dominique and Giovanah moved into Ray and Melanie's apartment, but only stayed for "two weeks" because the couple was "scared" and "uncomfortable" when Ray would get "angry" and "mean" after drinking. Thereafter, the couple "lost contact" with Ray and Melanie. The following month, Giovanah and Dominique married, and in April 2016, Giovanah gave birth to their son J.L. Dominique "is named" on J.L.'s birth certificate as the second parent. Six months later, however, Giovanah was arrested and incarcerated, and Dominique was solely responsible for J.L.'s care.

¶4 In May 2017, after an argument with Giovanah, Dominique contacted Ray and Melanie because she was concerned about her position as J.L.'s parent. Ray reassured her they were going to help her maintain her parental rights and keep J.L. safe from Giovanah. Over the next year, Ray, Melanie, and Dominique remained friends, and Dominique allowed Ray and Melanie to babysit J.L. on numerous occasions. Throughout that time, Ray and Melanie consistently referred to Dominique as J.L.'s "momma."

¶5 In January 2018, without Dominique's knowledge or a court order, Ray had J.L.'s blood drawn for a DNA test that confirmed Ray is J.L.'s biological father. Three months later, Ray and Melanie contacted the Department of Child Safety (DCS), claiming J.L. was unsafe in Dominique's care, and refused to return J.L. to Dominique. DCS placed J.L. with Dominique's parents but ultimately determined the allegation was unsubstantiated and returned J.L. to Dominique. Thereafter, Dominique ceased all contact with Ray and Melanie, and Ray subsequently filed a petition for paternity, legal decision-making, parenting time, and child support.

¶6 After an evidentiary hearing, the trial court issued an under-advisement ruling determining Ray was not a legal parent of J.L. and denying his petition. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

The Trial Court's Under-Advisement Ruling

¶7 Ray argues the trial court erred by ruling that he is not J.L.'s legal parent even though he is the biological father. Specifically, he maintains: (1) the "court's rejection of [his] biological paternity violates [his] fundamental rights under the Arizona and United States Constitutions"; (2) the court erred in determining the marital presumption was controlling because its "decision has the effect of converting the marital presumption into an irrefutable presumption"; (3) the court's decision expands the legal definition of legal parentage and, thus, invades the legislature's domain; and (4) the court failed to "consider [J.L.'s] best interests."[1] Because these arguments overlap, our discussion of them does so as well. We review de novo a trial court's legal conclusions, *see In re Estate of Newman*, 219 Ariz. 260, ¶ 13 (App. 2008), constitutional issues, *see*

[1]At no time has Ray contested Giovanah's parentage, either below or on appeal.

State v. McGill, 213 Ariz. 147, ¶ 53 (2006), and issues of statutory construction and interpretation, *see Danielson v. Evans*, 201 Ariz. 401, ¶ 13 (App. 2001). We, however, "review findings of fact under a clearly erroneous standard." *Strait v. Strait*, 223 Ariz. 500, ¶ 6 (App. 2010).

¶8 First, we disagree with the underlying premise of Ray's argument—that when the genetic-testing presumption applies, it controls over the marital presumption under both the state and federal constitutions and Arizona statutes. Specifically, he maintains that "[a]lthough the marital presumption exists for married couples, same and opposite sex, it does not protect them from challenges to paternity from the natural parents."

¶9 "[T]he constitution permits states to distinguish between the rights of differently situated parents." *In re Pima Cty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 93 (1994). "[P]arents with an existing parental relationship, either in fact or law, are entitled to the highest constitutional protection." *Id.* A biological putative father, however, "must first take steps to establish a parent-child relationship before he may attain the same protection," *id.* at 94, the first of which is to establish paternity, *see* A.R.S. § 25-401(4) ("Legal parent does not include a person whose paternity has not been established pursuant to [A.R.S. §]§ 25-812 or 25-814."). This is so because a married couple's "rights and responsibilities relating to their child begin at birth, or before, and primarily relate to custody and support, which automatically vest." *Pima Cty. No. S-114487*, 179 Ariz. at 94; *see also McLaughlin v. Jones*, 243 Ariz. 29, ¶¶ 19, 23, 33 (2017) (determining marital presumption under § 25-814(A) "affords a benefit of marriage" that extends to same-sex couples). Contrary to Ray's argument that "biological parents are entitled to parental rights whether they want those rights or not," a biological father who is not married to the biological mother "has no immediate right to custody and no corresponding, legally enforceable responsibility to provide support unless paternity is judicially established." *Pima Cty. No. S-114487*, 179 Ariz. at 94; *see also* A.R.S. § 25-803(C). As such, the trial court's order did not "sever" Ray's parental rights, as he contends; instead, it determined that he failed to establish them in the first place.

¶10 Additionally, despite Ray's suggestion to the contrary, there is no hierarchy among the statutory presumptions in a paternity action. Section 25-814(C) provides that "[i]f two or more presumptions apply, the presumption that the court determines, on the facts, is based on weightier considerations of policy and logic will control." In this case, the trial court found that the marital and genetic-testing presumptions were both established. Having made that determination the court weighed the two presumptions, which is precisely what the statute requires.

¶11 We agree with the trial court's finding that Dominique had established the marital presumption and that it was not rebutted, factually or as a matter of law. As to the nature and scope of that presumption, we find *McLaughlin*'s discussion of the rights afforded same-sex couples in relation to those afforded couples of the opposite sex to be instructive. Same-sex couples are entitled to "'the same terms and conditions' of marriage," which means all of the "statutory benefits linked to marriage." *McLaughlin*, 243 Ariz. 29, ¶¶ 15-16 (quoting *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2605 (2015)). Our supreme court recognized that another panel of this court had concluded that "a female same-sex spouse could not be presumed a legal parent under § 25–814(A)(1) because the presumption is based on biological differences between men and women and *Obergefell* does not require courts to interpret paternity statutes in a gender-neutral manner." *Id.* ¶ 8 (citing *Turner v. Steiner*, 242 Ariz. 494, ¶¶ 15-18 (App. 2017)). And, it acknowledged that the presumption of paternity under § 25-814(A)(1) "refers to a father's legal parental rights and responsibilities rather than biological paternity." *Id.* ¶ 11. Therefore, the court recognized that as written, the statute applies only to husbands in opposite-sex marriages, it does not apply to wives of biological mothers. *Id.* ¶ 12. "However, in the wake of *Obergefell*, excluding [wives in same-sex marriages] from the marital paternity presumption violates the Fourteenth Amendment." *Id.* ¶ 13. "Because the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords." *Id.* ¶ 21.

¶12 Ray argues, however, that the trial court invaded the domain of the legislature "by applying . . . non-existent statutory concepts to this paternity proceeding." He maintains the legislature has yet to "enact a statute providing for artificial insemination" that mandates "parental rights . . . attach to a married couple to the exclusion of a biological parent." But, the absence of such a statute undermines rather than bolsters Ray's position. None of the four presumptions of paternity listed in § 25-814(A) condition their application on the manner of conception. "We presume the legislature says what it means," *Chavez v. Ariz. Sch. Risk Retention Tr., Inc.*, 227 Ariz. 327, ¶ 9 (App. 2011), and had the legislature intended to limit the presumptions only to natural conception and not artificial insemination, it would have said so. Indeed, Ray's interpretation is inconsistent with the "purpose[s] of the marital paternity presumption[, which] is to ensure children have financial support from two parents," *McLaughlin*, 243 Ariz. 29, ¶ 29, and to "promote[] the family unit," *id.* ¶ 31. More broadly, "[t]he legislature declared that the general purpose of Title 25 is '[t]o promote strong families.'" *Id*. (first alteration added, second alteration in *McLaughlin*) (quoting A.R.S. § 25-103(A)(1)). That purpose applies equally to a child conceived by artificial insemination. *See State ex rel. Dep't of Econ. Sec. v. Pandola*, 243 Ariz. 418, ¶ 6 (2018) ("When 'statutes relate to the same subject or have the same general purpose . . . they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law.'" (alteration in *Pandola*) (quoting *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970))); *Riepe v. Riepe*, 208 Ariz. 90, ¶ 23 (App. 2004) (explaining court cannot interpret statute to include limitations legislature has not expressly stated). Here, the court's under-advisement ruling neither denied Ray a fundamental right to parent J.L. nor invaded the legislature's domain in applying § 25-814 to determine J.L.'s parentage. *See McGill*, 213 Ariz. 147, ¶ 53; *Danielson,* 201 Ariz. 401, ¶ 13.

¶13 Our reasoning is supported by decisions from California and Colorado, which have similarly adopted paternity presumptions for both a married spouse and biological parent consistent with Arizona's paternity presumption statute.[2] *Compare* § 25-814, *with* Cal. Fam. Code § 7611, *and* Colo. Rev. Stat. § 19-4-105. For example, the California Supreme Court explained that when a court is presented with two presumptions, it is to weigh policy and logic on the facts considering the "developed . . . relationship" between a non-biological parent and a child, as such a relationship "should not be lightly dissolved," explaining that the "social relationship is much more important, to the child at least, than a biological relationship of actual paternity." *Nicholas H. v. Kimberly H.*, 28 Cal. 4th 56, 65 (2002) (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 124 (Ct. App. 1994)); *see also Freeman v. Freeman*, 53 Cal. Rptr. 2d 439, 447 (Ct. App. 1996) ("[B]iology is not the predominant consideration in determining parental responsibility . . . ."). The Colorado Supreme Court similarly weighs policy and logic but has explicitly required its trial courts to focus on a child's best interests in resolving the competing presumptions because a paternity action threatens a child's stability, especially if "a child has established

[2] Although these jurisdictions follow the Uniform Parentage Act (UPA), we find their analysis persuasive as they are similarly faced with competing presumptions that they must resolve by weighing policy and logic on the facts. *See Ban v. Quigley*, 168 Ariz. 196, 199 (App. 1990) (looking to UPA jurisdiction as persuasive authority to resolve prospective paternity action).

strong family ties with one parent." *N.A.H. v. S.L.S.*, 9 P.3d 354, 361-64 (Colo. 2000).[3]

¶14 Ray nevertheless argues that "[t]he trial court's decision has the effect of converting the marital presumption into an irrefutable presumption," and it failed to consider the best interests of J.L. We disagree.

¶15 In its under-advisement ruling, the trial court found that Dominique had established the marital presumption and that Ray had established the genetic-testing presumption under § 25-814(A)(1)–(2). The court then recognized that under § 25-814(C), "[b]ecause both the marital and genetic testing presumptions apply in this case, [it] must determine which presumption, on the facts, is based on weightier considerations of policy and logic, and will control." The record reflects that the court considered all of the evidence in making its ruling. It concluded, in part, that because Giovanah and Dominique both expressed a desire to raise J.L. together as a married couple, as well as to work on their marriage, public policy favored giving additional weight to the marital presumption. The court explained that despite Ray's financial stability, Dominique "ha[d] always provided a portion of the financial support for the child," aspired to increase her education to better provide for J.L. in the near future, and both

[3] Although statutorily different, numerous other jurisdictions similarly look to preserving the familial structure when faced with competing paternity presumptions. *See D.I. v. I.G.*, 262 So. 3d 651, 657-58 (Ala. Civ. App. 2018) (no standing to establish paternity when "presumed father wishes to persist in his status as the legal father" because of statute's intent to "maintain[] the integrity of the family unit and the father-child relationship that was developed therein" (quoting Ala. Code § 26-17-607 cmt.)); *A.S. v. K.C.W.*, 923 N.W.2d 325, 332-33 (Minn. Ct. App. 2018) (considering child's best interests as well as "child's existing relationships with the presumed fathers and the traditional significance of marital and blood relationship" in resolving conflicting paternity presumptions); *Vargo v. Schwartz*, 940 A.2d 459, ¶¶ 9-10 (Pa. Super. Ct. 2007) (presumption that child born during marriage is child of married couple "one of the strongest presumptions known to the law" and "unrebuttable" when "mother, her husband, and the child comprise an intact family wherein the husband has assumed parental responsibilities for the child" (quoting *Strauser v. Stahr*, 726 A.2d 1052, 1053-54 (Pa. 1999))); *cf. TL ex rel. TL v. CS*, 975 P.2d 1065, 1067, 1069 (Wyo. 1999) (stating there will be "circumstances arising where a biological father should not be permitted to allege paternity and disrupt an established, presumptive father-child relationship").

mothers had "supportive famil[ies]" who were willing to help with J.L. The court also determined it was not "a realistic expectation that the four would co-parent" J.L. as Ray had suggested, nor was it realistic to expect Ray and Giovanah, the two biological parents, to co-parent as they had never been a family unit and "ha[d] no commonality or relationship."

¶16 As to Ray's argument that the trial court failed to make a best-interests finding, § 25-814(C) does not expressly require one. As previously noted, it states: "the presumption that the court determines, on the facts, is based on weightier considerations of policy and logic will control." § 25-814(C). Assuming without deciding that these considerations include a determination of the child's best interests, the court did so in this case.[4] In addition to its other related findings, the court also expressly found that "it is in the best interest of the child that the marital presumption control in this case" because it would permit Dominique, the "parent with the strongest history with the child," to have parental rights. Thus, Ray has not shown any error of law made by the court in applying § 25-814(A) and (C). And although Ray essentially asks us to reweigh the court's factual findings, we will not do so. The trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004); *see also Strait*, 223 Ariz. 500, ¶ 6 (we will accept court's factual findings on appeal unless clearly erroneous).

Equitable Estoppel

¶17 Ray argues the trial court erred in determining that he was "equitably estopped from asserting his fundamental parenting rights to the child." We review the court's decision to apply equitable estoppel for an abuse of discretion. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65 (App. 2008); *see also Woodworth v. Woodworth*, 202 Ariz. 179, ¶ 23 (App. 2002) ("Abuse of discretion is an exercise of discretion that is 'manifestly unreasonable, or exercised on untenable grounds, or for

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[4]Ray's petition included his requests for legal decision-making and parenting time under A.R.S. § 25-403. That statute provides that "[i]n a contested legal decision-making or parenting time case, the court shall make specific findings on the record about . . . the reasons for which the decision is in the best interests of the child." But given the trial court's ruling on the paternity issue, it was not necessary for the court to address the other requests.

untenable reasons.'" (quoting *Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40 (App. 1982))).

¶18 "Equitable estoppel 'precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting in reliance thereon.'" *McLaughlin*, 243 Ariz. 29, ¶ 39 (quoting *Unruh v. Indus. Comm'n*, 81 Ariz. 118, 120 (1956)). Equitable estoppel requires: (1) conduct that induces another to believe in certain material facts, (2) acts resulting in justifiable reliance on the inducement, and (3) injury caused by the resulting acts. *Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 28-29 (App. 1995); *see also McLaughlin*, 243 Ariz. 29, ¶¶ 39-40 ("Nothing prohibits Arizona courts from applying equitable estoppel to preclude the rebuttal of a statutory paternity presumption under § 25-814(A).").

¶19 The trial court found the position Ray had taken during the proceedings was inconsistent with his position when he agreed to donate his sperm so that Dominique and Giovanah could start a family. He made that commitment with the understanding he would not have any parental rights. The court also found Ray's conduct before he initiated the paternity action was consistent with that commitment. "He took no action to assert parental rights until more than two years after the child's birth, and he took no action to try to find or contact Dominique or Giovanah after they left his home on December 30, 2015, nor did he register on the Arizona Putative Father's Registry or provide any child support to Dominique or Giovanah on a voluntary basis." Indeed, "He did nothing to attempt to find or contact Dominique or Giovanah from the time they left his home until Dominique initiated contact with him in May 2017." The court further found that "[i]n accepting Ray's sperm donation and using it to create the child, both Domin[i]que and Giovanah relied, profoundly, on their understanding that they were to be the child's parents, not Ray." And, "Domin[i]que relied on Ray's position when she signed the birth certificate, and soon became the primary caretaker for J[.L.], forming an intense parental bond with the child." Last, the court found that if Ray were not precluded from repudiating his prior position, "Dominique will suffer injury by losing her position as a parent and her claim to legal decision-making and parenting time."

¶20 The record supports the trial court's findings. Dominique testified that Ray agreed she and Giovanah would accept his sperm donation under the conditions that he was solely assisting them to "have a family," that he would not be "involved [as] a father," and that he would not have any parental rights. Dominique explained that in return, she and Giovanah agreed that if a child were born, they would not seek child support from Ray. The two couples discussed the arrangement several times, "probably three times a week" for weeks.

¶21 Ray argues the trial court essentially imposed a requirement that he "opt-in" to establish his parenthood, and his "failure to obtain a written agreement" with Giovanah, in part, "equitably estopped him from asserting his parentage." Ray mischaracterizes the court's ruling and Arizona law. Nothing in the record suggests the court's findings about the parties' agreement was based on anything other than the weight of their testimony and its assessment of their credibility.[5] The court did not determine Ray was required to have a written agreement to establish his parental rights. The court simply concluded that the evidence did not support Ray's position. It found that Ray had agreed to donate his sperm "but not to take on any parental rights or responsibilities."

¶22 Ray is correct that the Arizona legislature has not created an "opt-in" by written agreement requirement. But, as discussed above, the trial court likewise did not impose such a requirement. And contrary to his argument, Ray's status as the biological father did not automatically establish his parental rights. Ray was required to take legal steps to establish a parent-child relationship before he would be entitled to constitutionally protected parental rights. *See Pima Cty. No. S-114487*, 179 Ariz. at 94.

¶23 In sum, the record supports the trial court's findings that Ray was equitably estopped from asserting the genetic-testing presumption and seeking parental rights because

> (1) that assertion is inconsistent with his previous agreement that Dominique and Giovanah would have . . . and raise the child as his parents, rather than Ray; (2) Dominique and Giovanah relied on Ray's previous position; and (3) injury would result to Dominique, Giovanah, and [J.L.] if the Court were to allow him to change his prior position.

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[5]Notably, the trial court's only reference to the lack of a written agreement related to "Dominique and Giovanah [who] did not enter into a written agreement between themselves explicitly stating the non-biological parent would have the same rights, responsibilities and obligations of the biological parent."

We therefore conclude the court did not abuse its discretion in determining that Ray was equitably estopped from asserting the genetic-testing presumption, *see Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65; *Woodworth*, 202 Ariz. 179, ¶ 23 (quoting *Torres*, 135 Ariz. at 40).

Attorney Fees

¶24 Ray requests his attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. Having reviewed the record as to the financial resources of both parties and having considered the reasonableness of the parties' positions throughout the proceedings, in our discretion, we deny Ray's request. *See* § 25-324(A). And because Ray is not the prevailing party, he is not entitled to his costs. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 13 (App. 2007) (prevailing party entitled to costs upon compliance with Rule 21). Although Dominique did not request fees on appeal, as the prevailing party, she is entitled to her costs upon compliance with Rule 21(b).

Disposition

¶25 For the reasons stated above, we affirm.

B R E A R C L I F F E, Judge, specially concurring:

¶26 I concur in the result on the grounds of, and in the opinion's reasoning as to, equitable estoppel.