STATE OF MICHIGAN

COURT OF APPEALS

SUSAN COZZITORTO, Plaintiff-Appellee,	UNPUBLISHED September 5, 2000
v	No. 218311 Kent Circuit Court
ANTONIO COZZITORTO, Defendant-Appellant.	LC No. 97-000461-DM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant Antonio Cozzitorto appeals by delayed leave granted. He challenges the trial court's orders denying his requests to conduct a blood test[1] and a related evidentiary hearing so that he could prove that he was not the father of Susan Cozzitorto's baby in this divorce action. We remand.

I. Basic Facts And Procedural History

The parties married in 1992 and Susan Cozzitorto gave birth in January 1996, while she and Antonio Cozzitorto were still married. From 1992 to 1996, the Cozzitortos separated on a number of occasions, including a lengthy period preceding the baby's birth. During this last separation, Susan Cozzitorto lived in Michigan and Antonio Cozzitorto lived in North Carolina. However, approximately eight months before the child's birth, Susan Cozzitorto visited Antonio Cozzitorto in North Carolina, at which time they had sexual relations. Despite their reunion, Susan Cozzitorto filed for divorce in North Carolina during the visit. About eight months later, Antonio Cozzitorto was present when Susan Cozzitorto gave birth, despite his claimed doubts about the child's paternity. However, according to Susan Cozzitorto, not only did Antonio Cozzitorto generally accept her baby as his child, he insisted that she induce labor a month early so he could be present at the baby's birth.

[1] The parties refer to a "DNA blood test." We understand this term to mean a test that would compare Antonio Cozzitorto's DNA with the child's DNA by taking samples of their blood, rather than testing that would merely compare their blood types to exclude Antonio Cozzitorto as the baby's father.

Subsequently, Susan Cozzitorto filed a complaint for divorce in Kent County in which she alleged that Antonio Cozzitorto is her child's father. In his answer, Antonio Cozzitorto acknowledged that a child had been born during their marriage, but "questioned" the child's paternity "due to the fact that the parties had numerous separations during the possible time of conception." The trial court entered a temporary order for support, custody, and visitation, in which it awarded the parties joint legal custody, gave sole physical custody to Susan Cozzitorto with reasonable visitation for Antonio Cozzitorto, and ordered him to pay child support.

Antonio Cozzitorto then filed a motion asking the trial court to order a blood test that would establish the baby's paternity. He asserted that he had doubts concerning whether he was the baby's father because "the parties had numerous separations and were not living together during the possible time of conception of the subject child." He argued that it would make the most sense to determine paternity at the outset of the case. Susan Cozzitorto, however, objected to conducting such a test. She argued that Antonio Cozzitorto's unsubstantiated allegation that the parties were not together at the time of conception was insufficient to justify a blood test to upset the presumption that Antonio Cozzitorto was the baby's father.

Initially, the trial court agreed that Antonio Cozzitorto was entitled to know whether he fathered the child. The trial court also concluded that the child was too young to be traumatized by the test and the related questions about paternity. Thus, the trial court ordered Antonio Cozzitorto ordered to pay for the tests. However, Susan Cozzitorto moved for reconsideration, arguing that Antonio Cozzitorto had failed to rebut the presumption that the child was his. In its May 16, 1997 order granting the motion for reconsideration,[2] the trial court reasoned that the presumption that a child born in wedlock is legitimate is strong and Antonio Cozzitorto's allegations were weak "with little factual basis to support them." Furthermore, according to the trial court, Antonio Cozzitorto had acknowledged the child as his own for more than a year. As a result, the trial court ruled that Antonio Cozzitorto was estopped from denying paternity.

Following the trial court's ruling on the motion for reconsideration, Antonio Cozzitorto withdrew the answer he had filed in the action. Susan Cozzitorto proceeded pro confesso even though the trial court did not hold a hearing to determine if she met the prerequisites for proceeding in that manner. Instead, Susan Cozzitorto testified before a friend of the court referee that the allegations in her complaint were still true, she was not pregnant, and she still wanted a divorce. The trial court ultimately entered a judgment granting the divorce, which awarded Susan Cozzitorto custody of the child and required Antonio Cozzitorto to pay support.

Antonio Cozzitorto then hired a new attorney and filed a timely motion to set aside, alter, or amend the divorce judgment and to stay enforcement of the child support, parenting time and related

[2] We note that two judges presided over this case in the circuit court. However, the judge who entered the order granting the motion for a blood test was the same judge who granted the motion for reconsideration.

provisions of the judgment pending the results of a court-ordered blood test confirming that he was the baby's father. As a result of a recently adopted Kent Circuit Court administrative order, which allocated some judicial duties to referees as part of the reorganization that created the family court, a family court referee heard Antonio Cozzitorto's motion. At the hearing on the motion, Antonio Cozzitorto argued that the trial court's order granting reconsideration, in effect reversing its earlier ruling on the motion for a blood test, deprived him of an evidentiary hearing on "non-access at the period of conception." By declining to order a blood test to confirm paternity, he also claimed, the trial court prevented him from gathering the "best evidence" of paternity. Further, he contended, the doctrine of estoppel did not apply in this case because he had filed his original motion "about one year after the birth of the child" and case law had established that estoppel did not bar a paternity challenge brought even two years after a child's birth. Finally, Antonio Cozzitorto sought to introduce an April 6, 1998 letter from the University of Alabama that reported "swab test" results performed on saliva indicating that he was genetically excluded as the child's father.

Susan Cozzitorto objected to the test results as "immaterial and irrelevant" for purposes of this post-judgment hearing, which was not intended to be an evidentiary hearing. Moreover, Susan Cozzitorto asserted that Antonio Cozzitorto could not have taken a saliva sample from the child in March because he had not seen the child since December. Accordingly, she accused Antonio Cozzitorto of perjury.

The referee refused to examine the letter reporting the swab test results because Antonio Cozzitorto had not laid a proper foundation for it. The referee likened Antonio Cozzitorto's decision to withdraw his answer to the complaint to agreeing to the terms of the divorce judgment. The referee indicated that he was unwilling to release Antonio Cozzitorto from the judgment simply because he regretted it.

When Susan Cozzitorto filed a motion in the trial court to enter an order conforming to the referee's decision, Antonio Cozzitorto responded by moving to strike the motion. The trial court conducted a hearing on May 29, 1998 concerning these competing motions and indicated that it would sign Susan Cozzitorto's proposed order "so the record can be complete." However, the trial court expressed concern about the degree of authority delegated to the referee pursuant to the Kent Circuit Court administrative order authorizing the referee to handle the matter. As a result, the trial court instructed the parties to challenge, in briefs, the new administrative process.

The trial court's decision prompted Antonio Cozzitorto to move to set aside the May 29, 1998 order. Having failed to obtain a favorable ruling on his motion to set aside, alter, or amend the judgment in order to obtain a blood test to determine paternity, he also moved for an evidentiary hearing on paternity after a blood test had been performed. Antonio Cozzitorto appended the saliva swab test results to his motion. When the trial court held a hearing on this round of motions, it asked Antonio Cozzitorto whether the May 29, 1998 decision should be treated as law of the case and whether this Court offered the proper forum for reversing its previous ruling. Antonio Cozzitorto responded that his motion was appropriate under MCR 2.612. Ultimately, the trial court denied his motions after conducting an "independent analysis," and reasoning in pertinent part:

I look at 2.612, subsection (C), specifically, the grounds found in subrule 1 A, B and C, and acknowledge that was made within one year of the entry of the judgment of divorce.

But what is it that the defendant told me or wishes to make representation that wasn't already known or couldn't have been discovered at the time – at a time prior to the entry of this judgment of divorce?

Well, he can't claim the birth of the child was a surprise for that neglect in making inquiry with regard to paternity was in some manner, in my opinion, excusable or the product of mistake or simple inadvertence.

I have no newly discovered evidence which could not have been discovered by the father any time during which his suspicion was generated from the beginning of the birth of the child until certainly one year before the complaint was filed.

And I cannot say under the circumstances here, that knowing that the child was born under circumstances of which were known to him and under circumstances which he knew to exist at the time that he signed a stipulation to proceed and signed a subsequently entered judgment, are product of any kind of fraud.

In sum and substance, if this were a matter presented to me for review, I do believe [the trial court's May 16, 1997] opinion in retrospect, in which he reversed himself and denied the blood test, has a strong legal basis but, independent of that, I don't know that any of the three grounds have been met to my satisfaction.

The resulting July 15, 1998 order stated:

The Court finds that none of the grounds found in Michigan Court Rule 2.612 have been met.

The Court further finds that the Motion of the Defendant, filed subsequent to the entry of the Judgment of Divorce, mirrors the Motion filed by Defendant and heard by [the trial court] in 1997.

The Court duly notes that the Stipulation to proceed to Judgment, dated June 30, 1997, was signed by counsel for Defendant subsequent to the re-determination by [the trial court] wherein he denied the Motion for DNA testing. Also, the Judgment entered March 20, 1998, was signed by both attorneys and both parties. It is to be noted that said Judgment refers to the Defendant as the father of [the child] and calls for the payment of child support. The Stipulation to proceed withdraws the answer of Defendant.

> The Court's study of the pleadings of Defendant concerning the current Motion for DNA testing does not set forth any facts which were not known or could not have been discovered at the time of the first Motion for DNA testing.
>
> The Court further finds that there are no facts evidencing excusable neglect nor any facts which would give rise to a valid claim of fraud.

II. Motion For A Blood Test And Judicial Estoppel

A. Standard Of Review

We review a trial court's decision to reconsider an earlier ruling, effectively reversing that earlier ruling, for an abuse of discretion. See *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

B. The Trial Court's Ruling

In granting Susan Cozzitorto's motion for reconsideration, the trial court reversed itself and disallowed the blood tests Antonio Cozzitorto requested, relying on *Guise v Robinson*, 219 Mich App 139; 555 NW2d 887 (1996), overruled by *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999). The trial court cited *Maxwell v Maxwell*, 15 Mich App 607, 617; 167 NW2d 114 (1969), for the proposition that "there still remains a 'strong, though rebuttable, presumption of legitimacy.'" Relying on *Guise*, *supra* at 143-146, and *Soumis v Soumis*, 218 Mich App 27, 33-35; 553 NW2d 619 (1996), the trial court concluded that Antonio Cozzitorto was "estopped" from claiming that he was not the father, because he had "since the child's birth" acknowledged the child as his own.

The trial court correctly observed that there is a strong legal presumption that "children born during a marriage" are legitimate, which may only be rebutted by "clear and convincing evidence." *Atkinson v Atkinson*, 160 Mich App 601, 605; 408 NW2d 516 (1987). The trial court then erroneously treated Antonio Cozzitorto's "motion for paternity blood testing" as the evidentiary hearing regarding paternity and, consequently, prematurely applied the presumption that he was the child's father. However, there was no "palpable error" in the underlying order, as required under MCR 2.119(F)(3), to merit reversing the earlier motion to grant the testing. As we explain below, it was the second ruling, not the original order, that was erroneous.

C. The Procedural Sequence

There is no reasonable way to construe the trial court's initial hearing on the motion to permit a blood test as an evidentiary hearing. At that stage, Antonio Cozzitorto had to move the trial court to order blood testing because Susan Cozzitorto refused to allow the child to undergo testing voluntarily. As a result, the first hearing on the blood test issue involved *only* whether blood testing was appropriate. Although Susan Cozzitorto attempted to offer evidence of airline tickets showing her visit to North Carolina, and family photos, the hearing never actually developed into an evidentiary hearing. The trial court's initial ruling was, therefore, limited to determining whether blood testing was appropriate. After considering any potential harmful effects on the child, and assigning any and all costs

to Antonio Cozzitorto, the trial court properly allowed the testing under this first ruling. Simply put, Antonio Cozzitorto had a right to have the DNA blood-testing performed because he had a right to rebut the strong presumption of paternity with the best possible evidence. *Serafin v Serafin*, 401 Mich 629, 635-636; 258 NW2d 461 (1977); *Atkinson*, *supra* at 606-607.

Had Antonio Cozzitorto already obtained the DNA test evidence and then requested an evidentiary hearing, the strong presumption of paternity clearly would have applied at that stage and he would have had the burden of rebutting the presumption. By reversing its initial decision, the trial court prevented Antonio Cozzitorto from obtaining the potential best evidence of nonpaternity and from proceeding to the evidentiary hearing stage where he could have offered any other evidence he had to establish that he was not the child's father.

In *Shepherd v Shepherd*, 81 Mich App 465, 470-471; 265 NW2d 374 (1978), this Court held that the trial court committed error requiring reversal when it denied the putative father the right to blood tests to determine paternity. We reasoned that the trial court's decision rendered the putative father in that case "totally unable to present his potential best evidence required to overcome the presumption of legitimacy." *Id*. at 470. The instructions for remand to the trial court noted that "[s]hould such tests disclose nonpaternity, then that portion of the judgment pertaining to support for the minor child, Daniel, is reversed," but "[s]hould such test results inconclusively disclose paternity, the judgment of divorce is affirmed." *Id*. at 471.

Although we do not adopt these specific instructions for remand, we have quite enough evidence here to demonstrate that he trial court abused its discretion by granting the motion for reconsideration without having sufficient evidence of paternity. Not only did it reverse its earlier, proper ruling, the trial court applied the presumption in favor of paternity without first holding an evidentiary hearing. Because the question of paternity has not yet been established, we hesitate simply to reverse the trial court's order granting reconsideration. If, indeed, there is competent evidence that Antonio Cozzitorto's is the child's father then we would affirm the trial court's conclusion on the paternity issue, effectively affirming the divorce judgment as a whole, albeit for different reasons. We do not, however, have any such evidence on the record at this time, making remand necessary. On remand, the trial court must permit the blood test and hold an evidentiary hearing to allow the parties to establish the child's paternity.

In light of the way we resolve this issue, and because we have essentially granted the remedy Antonio Cozzitorto seeks, we need not address the other issues he raises in his appeal.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck