[J-185-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RUTH FISH,	:	No. 27 W.D. Appeal Dkt. 1998
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court, entered February 6, 1997 at No.
	:	957PGH95, reversing the Order of the
v.	:	Court of Common Pleas of Allegheny
	:	County, Family Division, entered May 9,
	:	1995 at No. FD-94-04408.
ROBERT BEHERS, JR.,	:	
	:	690 A.2d 1171 (Pa. Super. 1997)
Appellee	:	
	:	SUBMITTED: September 22, 1998
	:	

OPINION OF THE COURT

MR. JUSTICE CASTILLE **DECIDED: DECEMBER 3, 1999**

The presumption of paternity and the theory of estoppel and their application are the issues before this Court in this appeal. In accordance with our decision in Brinkley v. King, 549 Pa. 241, 701 A.2d 176 (1997), we hold that the presumption of paternity is inapplicable under the facts of this case. However, because we agree with the Superior Court that appellant is estopped from asserting that appellee is the father of her child, we affirm the decision of the Superior Court.

Appellant's son was born on June 2, 1989, at which time appellant was married to David Fish. At the time of the child's conception, appellant was involved in an extramarital affair with appellee and had ceased having sexual relations with her husband. Early in the

pregnancy, appellant told appellee that he was the father of her child and that she planned to have an abortion, and he persuaded her not to abort.

When appellant's son was born, appellant and her husband were still married, and she did not inform him that he was not the child's father. Appellant listed her husband as the father on the child's birth certificate. Appellant, her husband, the child, and the couple's two older children continued to live as an intact family for the next three years, during which time the husband treated the child as his son. He supported the child emotionally and financially and claimed the child as a dependent on the couple's joint income tax returns. At times, he expressed doubt whether he was the child's father, but appellant assured him that he was the father. In June of 1992, when the boy was three years old, appellant finally revealed to her husband that he had not fathered the child. He requested blood tests which revealed that he was not the child's biological father. Two months later, in August of 1992, he left the marital residence and filed a divorce action. Appellant and her husband were divorced in December of 1993, at which time they entered into an agreement whereby the husband would support the couple's two older children but not the son.[1]

On April 29, 1994, appellant filed the instant child support action against appellee. Appellee filed preliminary objections, arguing that appellant must overcome the presumption that her husband was the child's father before blood testing could be ordered and that appellant was estopped from asserting that he was the child's father because she held her husband out as the father for the first three years of the child's life. On June 30, 1994, the trial court ordered the matter to a hearing before a hearing officer on the issue of estoppel. On September 7, 1994, the hearing officer found that appellant was not

[1] In October of 1992, the husband filed a support action against appellee alleging that appellee was the child's father. The trial court dismissed the action, finding that the husband was estopped from claiming that appellee was the father's child because, despite suspicions that he did not father the child, he continued to raise and treat the child as his own. The husband did not appeal.

estopped from proceeding with a support action against appellee. On May 9, 1995, the trial court affirmed. On appeal, the Superior Court reversed and held that appellant was estopped from asserting that appellee was the child's father.[2]

In Brinkley v. King, 549 Pa. 241, 250, 701 A.2d 176, 180 (1997), this Court set forth the analysis required to determine the paternity of a child conceived or born during a marriage:

> [T]he essential legal analysis in these cases is twofold: first one considers whether the presumption of paternity applies to a particular case. If it does, one then considers whether the presumption has been rebutted. Second, if the presumption has been rebutted or is inapplicable, one then questions whether estoppel applies. Estoppel may bar either a plaintiff from making the claim or a defendant from denying paternity. If the presumption has been rebutted or does not apply, and if the facts of the case include estoppel evidence, such evidence must be considered.

Hence, we must first determine if the presumption of paternity applies to the instant case. The policy underlying the presumption of paternity is the preservation of marriages. The presumption only applies in cases where that policy would be advanced by the application; otherwise, it does not apply. Id. at 250-51, 701 A.2d at 181. In this case, there is no longer an intact family or a marriage to preserve. Appellant and her husband have been divorced since December of 1993. Accordingly, the presumption of paternity is not applicable.

Having concluded that the presumption is inapplicable, we must turn to a determination of whether appellant is estopped from asserting appellee's paternity. A party may be estopped from denying the husband's paternity of a child born during a marriage

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[2] The Superior Court also declared the agreement between appellant and her husband providing that the husband would support only the couple's two older children and not this child to be a nullity because parents may not bargain away the rights of their children. See Nicholson v. Combs, 550 Pa. 23, 34, 703 A.2d 407, 412 (1997). We agree with this conclusion.

if either the husband or the wife holds the child out to be the child of the marriage. See, e.g., John M. v. Paula T., 524 Pa. 306, 319-20, 571 A.2d 1380, 1387 (1990). In Freedman v. McCandless, 539 Pa. 584, 591-92, 654 A.2d 529, 532-33 (1995), we stated:

> Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father. As the Superior Court has observed, the doctrine of estoppel in paternity actions is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child."

In Jones v. Trojak, 535 Pa. 95, 105-06, 634 A.2d 201, 206 (1993), this Court discussed the issue of estoppel where the mother of a child sought support from a third party, not her husband, whom she claimed was the father of the child:

> [U]nder certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the father of the child. John M. [v. Paula T.], 524 Pa. at 318, 571 A.2d at 1386. These estoppel cases indicate that where the principle is operative, blood tests may be irrelevant, for the law will not permit a person in these situations to challenge the status which he or she has previously accepted. Id. However, the doctrine of estoppel will not apply when evidence establishes that the father failed to accept the child as his own by holding it out and/or supporting the child.

Here, appellant continually assured her husband that he was the child's father, she named him as the father on the child's birth certificate, the child bears the husband's last name, the child was listed as a dependent on the couple's income tax returns, and the child was otherwise treated as a child of the marriage which remained intact until three years after the birth of the child when appellant informed her husband that he did not father the

boy. The child continues to believe that the husband is his father, and the husband, during the child's first three years of life, formed a father-son relationship with the child. Following appellant's separation from her husband and continuing at least until the September 1994 hearing on the issue of estoppel (at which time the child was five years old), he continued to treat all three of her children equally, and appellant and her husband continued to hold the child out to the community as the child of their marriage. This evidence amply shows that appellant and her husband accepted the husband as this child's father and does not indicate that the husband failed, during the marriage, to accept the child as his. Thus, the doctrine of estoppel applies.

The father-son relationship with appellant's husband is the only such relationship this child has known. The alternative – forcing the child into a relationship with appellee, a man whom he does not know – is not in the best interests of this child. As this Court stated in Brinkley, 549 Pa. at 249-50, 701 A.2d at 180:

> Estoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.

Accordingly, appellant, due to her conduct, is estopped from asserting that appellee is the child's father.

The decision of the Superior Court is affirmed.

Mr. Justice Saylor did not participate in the consideration or decision of this matter.

Mr. Justice Nigro files a dissenting opinion which is joined by Madame Justice Newman.

Madame Justice Newman files a dissenting opinion.