[J-58-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: ADOPTION OF: S.A.J.	: No. 163 MAP 2002
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	: Appeal from the Order of the Superior
	: Court, entered March 19, 2002, at No.
	: 899MDA2001, reversing and remanding
	: the Judgment of the Court of Common
	: Pleas of Berks County, Orphans' Court
	: Division, entered May 2, 2001 at No.
APPEAL OF: S.S.	: 76828.
	:
	: 812 A.2d 1230 (Pa. Super. 2002)
	:
	: ARGUED: May 13, 2003

DISSENTING OPINION

MR. JUSTICE LAMB **Decided: December 17, 2003**

I am compelled to disagree with the result reached by the majority affirming the Superior Court's reversal of the trial court's order to vacate. For the reasons explained below, I would affirm the trial court's decision to vacate its adoption decree because of the lack of notice.

It is first necessary to review the facts that led the trial court to vacate its adoption decree. Mother's husband (Husband) filed a petition seeking to adopt S.A.J. on November 16, 2000. Attached to the petition for adoption was Mother's consent to the adoption along with B.W.'s consent to the adoption, in which B.W. stated that he had been named by Mother as the biological father, suggesting to the court that he was the biological father of S.A.J. In fact, the petition for adoption, which was verified by Husband, read as follows:

"The natural father of said child is [B.W.]. He has had no contact with the child. He has not paid any financial support for the child. He has signed a Consent to give up his rights to said child. This Consent is attached . . . ." Trial Ct. slip op. at 5. (citing Petition for Adoption, Paragraph 9). Relying on B.W.'s consent, the trial court signed the proposed adoption decree. Upon the filing of Appellant's Petition to Vacate, the trial court determined that Appellant had been previously named as the father of the child by Mother in a 1990 support action and that Mother had admitted that Appellant was S.A.J.'s father in a 1989 custody action filed by Appellant. The trial court noted that Appellant "was not named, mentioned, or served with any notice of the termination of parental rights proceeding or the adoption proceeding." Trial Ct. slip op. at 3.[1] Further, the trial court noted that Mother hired an attorney different from the one who represented her in the custody and support actions in 1989 and 1990. Id. at 9. The trial court concluded that Mother's selection of new counsel was motivated by a desire to conceal from the court her prior assertion of Appellant's paternity, and possibly even his existence as a putative father. Id. at 11-12. Mother could not utilize the attorney who knew Appellant was a putative father if she was to avoid apprising the court of Appellant's existence. Id. In the view of the trial court, Mother and Husband deliberately concealed Appellant's existence and named a putative father who would consent to termination of his alleged parental rights in order to allow the adoption to proceed. Id. at 12. Apparently, Mother and Husband decided that it was acceptable to leave Appellant out of the proceedings.

The majority opinion states:

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[1] The adoption decree was based on B.W.'s consent since the trial court believed him to be the biological father of S.A.J. The trial court's act in vacating the adoption decree is, I believe, effective as a sua sponte order, regardless of whether S.S. had the procedural right to challenge the decree, because the trial court discovered that there may be a biological father whose parental rights have not been terminated.

> We concur with the interpretation of the majority of the Superior Court that "Mother and Husband, acting under the reasonable belief that [Appellant] had officially renounced his claim to [Child] by denying paternity at the support hearing, had the only other potential father, B.W., consent to the Petition for Adoption."
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> . . . Mother's explanation as to why she obtained B.W.'s consent and not Appellant's is logical. While Appellant argues that the court would have directed that notice be given to him if Mother and Husband had disclosed his existence, this is conjecture, and Appellant cannot be heard to complain when Mother took him at his word.

Majority slip op. at 16-17.

I respectfully disagree. The process of drawing inferences from the facts before it was the unique province of the trial court, which concluded that Mother's action in using a different attorney evidenced her intent to purposefully avoid informing the court about Appellant's existence. In the instant case, the termination of the alleged biological father's parental rights, and ultimately the adoption, were based on the consent of B.W., without any notice to Appellant, whose existence, because of Mother and Husband's deception, was never revealed to the trial court. The trial court thus concluded that:

> the biological mother and adoptive father took pains to conceal such information from this Court, and from the man who it appears is the biological father of this child.
>
> It should be clear that the issue before this Court is not the worthiness of [Appellant] as the father. [Appellant] may, in the end, prove to be unworthy of having a relationship with this child, but, properly done, he would have had his day in court in a termination proceeding. Not ever having been given that opportunity, his rights were denied him. He was thwarted all opportunity to present his side of the case and thus the Court has no option but to vacate its judgment.

Trial Ct. slip op. at 13. This language contradicts the majority's claim that Appellant's argument, that the court would have directed that notice be given to him if Mother and Husband had disclosed his existence, is conjecture. See quote from majority opinion, supra, p. 2.

Additionally, Mother also failed to tell the court about the existence of a third man who could possibly be the biological father of S.A.J. Mother and Husband desired to proceed with the adoption without Appellant's interference. Nonetheless, the notice requirements in this convoluted scenario are not a matter of convenience for Mother and Husband. The trial court concluded that Appellant's failure to receive notice deprived him of constitutional and statutory rights. Trial Ct. slip op. at 3-5. As the majority states: "Pursuant to the Adoption Act, the consent of parents of a child under 18 is required, unless parental rights are terminated." 23 Pa.C.S. §§ 2711(a)(3), 2714. Majority slip op. at 17.[2] Therefore, the court would have to determine that his parental rights had been terminated prior to the adoption. The effect of the decision today would appear to be to empower one party to the matter, here the Mother and Husband, to decide in advance of the judicial proceedings that another party with a potential interest is undeserving of notice or an opportunity to be heard. I would not interfere with the fact-finding function of the trial court, which found that Mother and Husband deceived the court with the result of depriving Appellant of the notice and opportunity to be heard. The trial court was legitimately concerned that if Appellant turned out to be the biological father, the adoption would be subject to challenge. In my view, the trial court's response to these difficult and complex facts was reasonable and well within its sound discretion.

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[2] Additionally, I note that an adoption can not take place unless the rights of the biological father have been terminated, either by consent or by involuntarily termination. In fact, the Adoption Act was amended in order to conform to this Court's decision in Adoption of Walker, 360 A.2d 603 (Pa. 1976), which held that the former provision requiring only the consent of the mother of an illegitimate child for adoption was unconstitutional. The Adoption Act, 23 Pa.C.S. 2101 et seq., governs not only adoptions, but also, inter alia, proceedings prior to the petition to adopt. Included in the proceedings prior to the petition to adopt is the involuntary termination of parental rights. 23 Pa.C.S. §§ 2511-2513. The instant case required such termination or consent from Appellant. Cf. Trial Ct. slip. op. at 13 (finding that Appellant was entitled to a termination proceeding).

Additionally, in concluding that Appellant is judicially estopped from challenging the adoption decree, the majority relies, in large part, on Appellant's denial of paternity. However, the majority does not discuss the circumstances of said denial as found by the trial court:

> [Appellant] testified that he availed himself of the limited visitation granted in [the July 21, 1989, and April 27, 1990] custody orders[3], and Mother's testimony did not contradict [this]. The visitation came to an unusual end shortly following Mother's filing of her petition for child support. At the conference held on May 8, 1990[, Appellant] had denied paternity and requested a blood test. [Appellant] testified that he would gladly have paid support if the child was his; however, he testified, after the birth of the minor child Mother had made several comments to [him] intimating that he might not be the biological father of the child. Because of Mother's statements, [Appellant] testified, he was in doubt enough to request, through counsel, a blood test to determine paternity. (As a practical matter the only way for a doubting father to obtain a court order for blood tests from the Domestic Relations Office of Berks County is to deny paternity.)

Trial Ct. slip op. at 6 (footnote added). During her testimony, Mother denied that she suggested to Appellant that he was not the father. But Mother also testified that she had sexual relations with B.W. around the time of the conception of S.A.J., and that the biological father could have been another man. Id.

I would note that the question of whether such denial alone results in estoppel has not been decided by the majority in this case. In the instant case, Appellant failed to follow through on the paternity determination, voluntarily withdrew his custody action, and engaged in other dilatory behavior resulting in the majority's conclusion that Appellant is

[3] "[W]hen [Appellant] filed a complaint for custody of the minor child on May 17, 1989 asserting . . . that he was the father of the minor child, Mother in her reply admitted . . . the assertion that [Appellant] was the father of the minor child. In fact, two custody orders were entered by agreement of the parties, dated July 21, 1989, and April 27, 1990, providing [Appellant] with limited visitation with this very young infant." Trial Ct. slip op. at 6.

judicially estopped from interfering with S.A.J.'s stable family situation by challenging the decree of adoption.

As explained supra, I believe that it was well within the province of the trial court to vacate the adoption decree in this situation, even though Appellant's conduct may ultimately result in termination. Nonetheless, nothing in this dissenting opinion should be construed to suggest that Appellant is a worthy father, and after being given the opportunity to be heard, any parental rights that he may have might very well be terminated. I share the concern of the majority that permitting the trial court to vacate the adoption decree will potentially disrupt the stable family situation that Child has experienced over the past twelve years to the detriment of S.A.J. See Majority slip op. at 15. However, my great concern in that respect does not mean that I may disregard Appellant's constitutional and statutory right to notice of the termination of his parental rights.

For the forgoing reasons, I respectfully dissent.