IN THE SUPREME COURT OF THE STATE OF NEVADA

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CINDY LEE, fka CINDY HERMANSON,	)	
Appellant,	)	S.C. CASE 25113 D.C. CASE 90-134515-D
vs.	)	
DAVID HERMANSON,	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

Respondent (David) has not disputed the accuracy of the Statement of the Case in Appellant's Opening Brief, on which Appellant (Cindy) is willing to rely.

STATEMENT OF FACTS

David has not disputed the accuracy of the Statement of Facts in Appellant's Opening Brief, on which Cindy is willing to rely.

A few quibbles are in order as to the "Statement of Facts" submitted by David. The case that resulted in the order by Judge Thompson at the heart of this appeal is not the action that David began without notice to Cindy in 1985. VIII ROA 1449; AOB at 7-8. As a "housekeeping" measure, that earlier, never-concluded matter was consolidated with the present action, but the case actually began with Cindy's complaint for divorce on December 13, 1990. I ROA 1; II ROA 374; VIII ROA 1481.

Finally, David gives no citation for his assertion that "it has been [David's position all along that the minor child has known [David] and only [David] to be the biological father." Respondent's Answering Brief (RAB) at 3. The assertion contradicts David's own statements that the child has consistently been informed since birth that David is not his father. I ROA 42; VII ROA 1225.

ARGUMENT

I. THE STANDARD OF REVIEW IS THAT OF SUBSTANTIAL EVIDENCE AND LEGAL ERROR

David has no argument on this point, which is therefore believed conceded. See State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984). Rather, his argument is that the court below did not make a legal error. RAB at 4.

Without citation to any authority, David asserts that there was no legal error in declaring him the child's father because no other man has appeared in the litigation. RAB at 4-5. The argument implies that there is a "vacuum" argument -- that naming David as the child's father is superior to there being no determination of paternity (at this time) at all.

David's argument echoes the one he made below, that he had a "right," by virtue of marriage, to claim any child born to Cindy as his own. VII ROA 1224.

II. THE DISTRICT COURT ERRED IN ELECTING TO APPLY A PROVISION OF THE CALIFORNIA EVIDENCE CODE TO THE ISSUE OF PATERNITY IN THIS NEVADA DIVORCE

Instead of answering Cindy's argument on this issue, David attaches a portion of the brief filed by his former counsel in the earlier appeal (that was dismissed on procedural grounds) with the notation that his "argument would only be a recitation of the same elements" stated in that brief. RAB at 5.

The problem is that the earlier brief was responding, not to the argument made in the Opening Brief in this appeal, but to arguments submitted by attorney Mark Jenkin in the earlier, attempted appeal, submitted when far less was known (the briefs are in volume three of this eight-volume record).

On the chance that this Court finds that David's method of argument is acceptable, the following responds to it, while attempting to disregard any portions of the referenced material that addresses matters not in the Opening Brief in this case.

Most of pages 12 and 13 of the attached argument are inapplicable, because constitutional arguments as referenced were not made in the opening brief, and because there

is now a record which discusses the California Evidence Code at some length. The assertion that there has been no attempt to distinguish the facts of this case from the facts of the cases David cited below is irrelevant in light of the Opening Brief on file in this appeal.

The argument on pages 14 and 15 of the incorporated brief had to do with whether the California code provision was "substantive" or "procedural." It is respectfully submitted that this issue is adequately addressed in the Opening Brief at pages 18-20.

Pages 16-17 of the incorporated brief are concerned with a procedural interpretation of the California code provision. Essentially, David argued that he was not required to file the acknowledgement of paternity that starts the clock running under that rule, since the parties were married. Again, this matter was addressed in the Opening Brief. AOB at 26-27.

Further, David did not address any reason why Cindy should not be able to similarly rely on marriage as tolling any procedural time limits, as would appear to be the rule in Nevada under our paternity laws and cases. It would make no sense to require the mother of children in a blended family to file court proceedings to prove non-paternity during a marriage, on the chance that the husband-stepfather might assert a right to her children upon divorce. This argument itself shows the dangers in attempting to engraft a single provision of foreign law onto our family law without considering all of the balances that might be built into the foreign statutory scheme elsewhere.

From a public policy perspective, it would seem appropriate to hold that a natural mother need not file a "pre-emptive" non-paternity action against a step-father during the course of a blended family marriage. Holding the opposite (requiring mothers in intact, blended families to file protective actions) would foster the sort of gamesmanship and duplicity that this Court has repeatedly criticized and refused to reward. See, e.g., Libro v. Walls, 103 Nev. 540, 746 P.2d 632 (1987) (extrinsic fraud by wife in not telling husband that he might not be the father of the child).

Pages 17-18 of the incorporated brief address constitutionality again. As noted in the Opening Brief, the California courts have held the provision in question to not be "irrebuttable," in order to not make it automatically unconstitutional. AOB at 23-24. That brief also noted

the narrow factual basis (which, it should be noted, is not found in this case) on which a plurality of the United States Supreme Court would find the California provision constitutional. See AOB at 27; Michael H. v. Gerald D., 491 U.S. 110 (1989), aff'g 236 Cal. Rptr. 810 (Ct. App. 1987). The incorporated materials also do not address the California cases holding that constitutional use of the provision is limited to defensive use by an intact family, making the presumption entirely inapplicable in this case. AOB at 28-30.

The matters on pages 18-19 are a response to arguments not made in the current Opening Brief. The matter as to the proper burden of proof as to David's sterility is set out in the Opening Brief at 26. See also AOB at 24-25 (asking court to find both presumption, and exceptions to that rule that are found in this case, to be anachronisms).

In sum, it is submitted that the entirety of the arguments raised in the incorporated brief were addressed in the Opening Brief, and it is further submitted that nothing in that incorporated brief is sufficient to support the order below. Since David has not seen fit to address the arguments in the Opening Brief directly, it appears that he has no refutation to the arguments presented in that brief.

David has not refuted the procedural arguments in Cindy's Opening Brief as to the applicability of Nevada law for this issue, or that the arguments she relied upon before Judge Thompson were inappropriately raised for the first time on Objection, thus preventing any actual evidence from being considered. See AOB at 18-20 & n.4, 20-22. Presumably, these matters may be treated as confessions of error. See Weber, supra.

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE FACTS OF THE CASE COULD SUPPORT ESTOPPEL AGAINST CINDY

The bulk of David's brief addresses the district court's conclusion that its decision could be reached under the alternate ground of estoppel. RAB at 5-9. Nothing in that section, however, refutes the points made in the Opening Brief.

Somewhat misleadingly, David makes a vague allusion to matters "established by the trier of fact, after extensive hearings, testimony, and an evidentiary hearing conducted during

the period commencing on March 25, 1991 [sic][1] through April 25, 1991 and during the Motion for Rehearing heard on or about September 24, 1994." RAB at 6.

As noted in the extensive Statement of Facts in the Opening Brief, however, there was no evidentiary hearing before the judge who entered the order that is the subject of this appeal. The Referee entered an order that was reversed by the district court judge, who entered the order in question based entirely on the arguments of counsel on the court's law and motion calendar. There is no greater weight to proceedings on the rehearing motion, since all later judges simply deferred to Judge Thompson's ruling without considering its merits, pending this appeal. See record page cites listed in AOB at 3. In short, there simply was no evidentiary hearing before the fact-finder in this case.

Unfortunately without any citation to the record, David asserts that there are five "factors prominent from this convoluted record." RAB at 6.

First, David notes the fact that he is listed on the birth certificate as the child's father, and adds: "Although later Appellant claimed this to have been some kind of fraud on behalf Respondent, [sic] the evidence before the trier was found reveal [sic] the contrary." RAB at 6.

As set forth in detail in the Opening Brief, 100% of the evidence of record shows that David, and only David, had anything to do with placing his name on the child's birth certificate, which act was contrary to Cindy's wishes, against her express instructions, and carried out by David while Cindy was under anaesthetic. See record page cites listed in AOB at 8-9. There is simply no evidence whatsoever to support the district court judge's written decision that Cindy had anything to do with James' name being on the birth certificate, or that she ever held David out as the child's father.

David's second "prominent factor" is his observation that Cindy did not present evidence that she "sought to have this error corrected." RAB at 6. Presumably, David means

[1] This appears to be an error; counsel can find no record of proceedings on that date.

that Cindy did not prove that she made an effort to have the birth certificate amended to remove David's name, although what he hopes to establish from the negative inference is unclear.

It is submitted that this is addressed above in the discussion as to burdens of going forward during marriage. In any event, there is no indication that there is anything that Cindy could have done to "have this error corrected" except what she did, which was file for divorce (at two different times) with specific assertions of non-paternity and a request for a judicial finding of that fact. II ROA 340, I ROA 1; record page cites listed in AOB at 12.

David's third factor is Cindy's receipt of welfare benefits. RAB at 6. As set out in the Opening Brief, David had no financial responsibility for any of this, and Cindy told each agency that David was not the father, although he had listed himself on the birth certificate. See record page cites listed in AOB at 11, 32-33. It is respectfully submitted that neither Cindy's poverty several years ago, nor the government's refusal to let her children go hungry, made David any kind of "father" to this child.

David's fourth factor is the length of the parties' relationship. RAB at 6. By David's reasoning, it is less important that the parties cohabited for only some nine months to two years during the marriage, than that they knew each other for 14 years. See record page cites listed in AOB at 10. This seems sufficiently insubstantial on its face that further argument on the point is not required.

David's fifth and last "prominent factor" is that the "child recognizes [David] as his father and relies on such relationship." RAB at 6-7. The only evidence in the record that could be taken to support this assertion is the CASA worker's notes that on one occasion several years ago during an observed visit, the child hugged David and appeared to get on well with him. IV ROA 753.

The record is entirely bereft of any indication that the child sees David as his father, or has any "reliance" on his relationship with David for anything whatsoever. As noted above, both parties testified that the child has always known that David is not his father, and the two had no contact for most of the child's life. See record page cites listed in AOB at 7-8, 9-13. No expert psychological evidence was ever presented by David to support his claim.

Next, David repeats the accepted proposition that a "trial court's decision must stand if supported by substantial evidence."[2] RAB at 7. He then argues that since the hearing before the Referee appears to have taken several hours, the district court's order (which was entered months later after rejecting the Referee's reasoning and recommendation) must have been based on substantial evidence.

It is respectively submitted that the assertion is a non-sequitur. David does not even assert what evidence he thinks exists, where it is hinted at in the record, or how it could be interpreted to support the decision appealed from. "Substantial evidence" requires there to be some evidence; David has shown none, and there is none. The district court was simply incorrect in his belief as to the facts of the case.

Finally turning to the doctrine of equitable estoppel, David asserts that it can and should be applied offensively to establish a parent-child relationship, since this Court has found it permissible to use the doctrine defensively to avoid payment of child support. See RAB at 8; Parkinson v. Parkinson, 106 Nev. 481, 796 P.2d 229 (1990). David did not attempt to distinguish or even discuss the citations in the Opening Brief cautioning against such offensive use.

Ignoring the factors of equitable estoppel as set out by this Court for use in this state (see AOB at 34), David sets forth the thumbnail sketch of the doctrine postulated by a Michigan intermediate court in Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. App. 1987). The three factors used in Michigan require a "mutual acknowledgement" of the parent/child relationship, active cooperation by the biological parent in fostering that relationship, and a willingness of the non-biological parent to pay support. Id.; RAB at 8. Without any citation to the record, or even explanation, David simply asserts that "all of this criteria [sic] as been fully met" by him. RAB 8.

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[2] Of course, the decision in question was not made by "the trial court," but by a district court judge on law and motion calendar, without an evidentiary hearing, on objection from a Referee's Recommendation.

David's position is nonsensical. There is no evidence of any "mutually acknowledged" parent/child relationship. Put another way, one hug does not make David a father. After a review of the Statement of Facts, it is impossible to honestly assert that Cindy "actively cooperated" with any such relationship being formed. The evidence, from both David and Cindy, is that she has done all in her power, from before the birth of this child to the present, to ensure that there is no parent/child relationship between her child and David, up to and including going underground for some years to get away from David. It is difficult to conceive of what else she could have done to establish her non-consent to David's treatment of James as his child.

The cases David cites all point to the same end -- where the biological parent misleads a putative father (usually a spouse) into believing he is the father of a child, and the child grows up with that father secure in that belief, some courts have chosen to preserve the relationship in spite of the biological facts. See RAB at 8-9.

In this case, as clearly set out by the record, David has always known that James was not his child. According to Cindy, that information was clear to David, and a precondition to their marriage. VI ROA 1063; VII ROA 1237; II ROA 361. Even according to David, however, he knew that he was unrelated to James no later than "shortly after the child's birth. I ROA 38. There is no evidence that Cindy ever stated differently to anyone, and she consistently denied ever having done so.

Since David, by his own admission, was on notice that he was not James' father by, at latest, shortly after the child's birth, there could not have been any "mistaken relationship" fostered by any wrongful hiding of information by Cindy. Any relationship that David wanted to establish with James would have been as a step-parent only. The record discloses not much of a relationship, as a step-parent or in any other way.

David asserts that it is not relevant that he beat Cindy for many years. RAB at 7. To the degree he wishes to ignore the many years that the parties had no contact (most of James' life) in determining whether he has acted as a "psychological parent," it certainly is relevant. The fact is, David spent a virtually insignificant amount of time with James while the child was

growing up. If Cindy wrongfully went into hiding, perhaps the reviewing court could choose to ignore that fact. Here, however, Cindy was a refugee from near-constant domestic violence, and her fleeing that abuse with a child unrelated to David cannot be seen as wrongful. David, by his own actions in being a wife-beater, eliminated any chance that the child could ever see him as a "father."

IV. NEVADA HAS NO LAW OF "EQUITABLE ADOPTION" OR OTHER SUCH THEORY THAT CAN BE USED TO THWART THE WISHES OF A NATURAL PARENT

David characterizes this issue as "the district court can grant custodial rights to a parent adjudicated not to be the biological parent." RAB at 9. He asserts that the Uniform Child Custody Jurisdiction Act (UCCJA), NRS 125A.010 et seq., in conjunction with the statutory provisions mandating that our courts look to children's "best interest," allow the district courts to make a parent out of him over the objections of James' mother. RAB at 9-15.

First, David cites no authority for his proposition that the language of the UCCJA somehow expanded the definition of "parent" under Nevada law, by allowing a jurisdictional contest to be filed by a person who claims rights to custody or visitation. Nothing in the known legislative history or cases interpreting the UCCJA would indicate any such purpose; the statute says that it was designed to avoid jurisdictional fights and promote cooperation with other states, etc. See NRS 125A.020. It is submitted that the UCCJA is entirely irrelevant to disposition of this appeal.

NRS 125.480 deserves closer scrutiny. That statute does indeed provide that the custodial placement of a child can be made with a non-parent, if both parents are disqualified. Of course, in this case, no one has even suggested that Cindy is disqualified as the custodian of this child, and David several times denied having any such intent in the proceedings below. Cindy has been the child's essentially sole caretaker for his entire life. It should be noted in passing that if the statute was somehow applicable to this case, David's lengthy and sordid history of domestic violence would essentially disqualify him in any event. NRS 125.480(4)(c).

There is no indication that NRS 125.480 was ever intended to be a mechanism for transforming non-parents into parents. Nevada has a law of parentage, Chapter 126 of the NRS, which David studiously ignores. David's position, that he is somehow included within the scope of statutes that speak to "parents" because they do not have the added words "and not step-parents that are not parents" is strained and unreasonable. It is respectfully submitted that the statutes should be read to mean what they say, and when they reference "parents," the statutes mean parents. See Joseph F. Sanson Investment v. 268 Limited, 106 Nev. 429, 795 P.2d 493 (1990) (if statute capable of two constructions, one of which is consistent with legislative intent, that construction will be adopted).

David includes a lengthy discussion of "psychological parentage," etc. See RAB at 12-15. The cases from which he quotes discuss third parties that have actually raised the children at issue over a "long period of time," and those cases disclaim that the legal reasoning employed can ever be at issue "by an absent inactive adult." AOB at 12, 15. This is remarkable, since it was clearly established below that David has had only intermittent and minor contact with James during his life, with no contact for years, and David never supported the child until these proceedings began.

David would apparently have this Court adopt a definition of "parent" that includes any adult that expresses an interest in a child, using the phrase "an adoptive parent or any other caring adult." RAB at 12. It is precisely this sort of expansion that the court in Nancy S. v. Michele G., 228 Cal. App. 3d 831, 840, 279 Cal. Rptr. 212, 219 (1991) warned of, when it recited the danger of exposing

> other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of step-parents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status.

The court wisely elected to leave any such expansion of the definition of "parent" to the legislature. Cindy stands on the strength of the citations set out at pages 36-38 of her Opening Brief which, it should be noted, David does not choose to address or refute at all.

Cindy does not dispute that courts in other states, with other laws, have reviewed facts showing that step-parents had acted as "parents" sufficiently that the courts elected to treat them as such. Rather, she submits that Nevada law does not provide for any such transformation of a non-parent into a parent, and even if it did, the facts of this case make David ineligible to enjoy any such status. An absent, abusive, non-supporting step-parent is in no position to claim an equitable right to anything, nevertheless "parenthood" of a child.

There is one point of agreement between the parties, but it leads them to different conclusions. David argues that this Court, "given the perplexity [sic] and ongoing nature of extended families must take the logical extension to adjudicate as fathers those that have held themselves out to do so [sic] in the absence of any other designated parent." RAB at 16.

Cindy, for her part, acknowledges that blended families are increasing in number. Marriages involving at least one previously-married partner who was married before now constitute more than half of marriages and an even larger percentage of divorces, and a substantial portion of those marriages involve at least one partner with children from the former union. M. Takas, "The Treatment of Multiple Family Cases Under State Child Support Guidelines" at 2 (U.S. Dep't of Health and Human Services 1991), citing V. Fuchs, How We Live; an Economic Perspective on Americans from Birth to Death (1983).

Cindy, however, does not believe that public policy would be served by allowing anyone that marries the mother of a child to claim that child as his own over the wishes of the natural parent. Such a holding could well place yet another obstacle in the path of those who would otherwise marry. In a sequential remarriage case, it could present multiple claimants to the status of "father" for a child, as warned by the court in Nancy S. v. Michele G., supra.

As disturbing as anything else in David's argument is its horrific paternalistic sexism. It should be noted that his view of parenthood has to do with "the absence of any other designated parent." RAB at 16. That is merely a variant of his argument below in 1991 that Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972) and Frye v. Frye, 103 Nev. 301, 738 P.2d 505 (1987) were inapplicable because they each involved a husband "who has no desire to maintain a parent-child relationship." II ROA 392.

At heart, David's argument boils down to "name me the child's father because I want to be the child's father." By his reasoning, his desire is the only relevant inquiry. That has nothing to do with constitutionality, the best interest of the child, the respective rights of David and Cindy, or theories of equitable estoppel. It has only to do with David's wish to have the court system make him the father he is not and never has been. "Parenthood by unilateral demand" has never been, and should never be, the law of this state. Obeying David's demand would constitute merely furthering an abuser's contact with, and control over, his long-suffering victims.

V. CONCLUSION

David is not the father of James. For all the reasons of fact, of law, and of equity stated herein, and in the Opening Brief, this Court should establish the truth, and prevent usurpation of our courts to further a lie. This Court should reverse the decision of Judge Thompson, as reiterated in the Decree of Divorce, and remand for entry of an order declaring the non-existence of a parent and child relationship between David and James, and correction of the child's birth certificate to reflect the facts as established by the DNA tests.

Respectfully submitted,
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