CRAWFORD COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, PLAINTIFF-APPELLEE v. PAUL J. SPRAGUE, DEFENDANT-APPELLANT and EMERY EUGENE TAYLOR, ET AL., DEFENDANTS-APPELLEES

CASE NUMBER 3-97-13

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, CRAWFORD COUNTY

1997 Ohio App. LEXIS 5480

December 5, 1997, Date of Judgment Entry

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Juvenile Division.

DISPOSITION: JUDGMENT: Judgment reversed and cause remanded.

COUNSEL: STARKEY & STOLL, LTD. Geoffrey L. Stoll, Attorney at Law, Bucyrus, OH, For Appellant.

MONA L. COOK, Attorney at Law, Bucyrus, For Appellees, Ohio Dept. of Human Services and Crawford Co. CSEA.

KENDRICK & OLDENDICK, Helen M. Kendrick, Attorney at Law, Bucyrus, OH, For Appellees, Emery and Charlotte Taylor.

DOROTHY DUNBAR UTZ, Attorney at Law, New Washington, OH, For Appellee, Debra Marie Taylor Guardian Ad Litem.

JUDGES: HADLEY, J. BRYANT and SHAW, JJ., concurs in part and dissents in part.

OPINION BY: HADLEY

OPINION: OPINION

HADLEY, J. This appeal, submitted on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Local Rule 12. Pursuant to Loc.R.12(5) we elect to render decision by written opinion.

Paul J. Sprague ("appellant") is appealing the Crawford County Court of Common Pleas, Juvenile Division, decision dismissing his parentage action. For the following reasons, we reverse that dismissal and remand this case for further proceedings in accordance with this opinion.

The facts of this case arose as follows. Charlotte [*2] and Emery Taylor ("appellees") were married on July 9, 1989. In late 1991, appellees separated. While they were separated, Charlotte became involved in a sexual relationship with appellant in December 1991. As a result of her relationship with appellant, Charlotte became pregnant. Appellant and appellee ended their relationship in February 1992. On September 9, 1992, Charlotte gave birth to Debra Marie Taylor. Emery signed Debra's birth certificate alleging that he was Debra's father. n1 After Charlotte and Debra were released from the hospital, appellant visited Debra and acknowledged that he was her father. He later contacted the Crawford County Child Support Enforcement Agency on October 1, 1992, requesting blood tests to prove he was Debra's father. Appellant was informed that such tests could not be conducted until the child was six months old.

n1 Charlotte and Emery were still separated at the time Debra was born.

On December 15, 1992, Emery contacted the Crawford County Child Support Agency to inform them [*3] that he and Charlotte had reconciled.

On March 15, 1993, appellant filed a parentage action alleging that he was the natural father of Debra. However, appellant subsequently moved to dismiss his claim. n2 The trial court granted appellant's voluntary dismissal and dismissed his case without prejudice.

n2 It appears that appellant dismissed his claim because the Crawford County Child Support Enforcement Agency informed appellant that if he continued with his suit, he would have to pay all of Charlotte's hospital costs.

Appellant, the Crawford County Child Support Enforcement Agency and Ohio Department of Human Services filed a subsequent parentage action on April 26, 1996, again alleging that appellant was the natural father of Debra. The parties further requested the trial court to

order appellees to submit to genetic testing pursuant to R.C. 3111.08(B).

On April 29, 1996, the trial court granted appellant's request and ordered all parties to submit to genetic testing. Appellant and appellees voluntarily submitted [*4] to genetic testing on May 22, 1996. The results of those tests excluded Emery as Debra's father and revealed that appellant had a 99.79% chance of being Debra's father.

Appellees filed a motion to dismiss the complaint, to quash the results of the genetic testing, and for the appointment of a guardian ad litem on May 29, 1996. On June 5, 1996, appellees filed an objection to the admission of the genetic test results.

A pre-trial hearing was held on July 10, 1996. At that hearing, the parties stipulated that appellees were married at the time of conception and continued to be married; during their separation, Charlotte had a sexual relationship with appellant; Emery had signed Debra's birth certificate; and appellant has not had an on-going relationship with Debra.

On January 15, 1997, the magistrate granted appellees' motion to dismiss. n3 Appellant filed an objection on January 29, 1997. The trial court, on May 14, 1997, ratified the magistrate's decision. It is from that ratification and judgment that appellant is appealing his sole assignment of error.

> n3 We are troubled by the fact that the magistrate was the attorney for the Crawford County Child Support Enforcement Agency during appellant's first paternity hearing. Although appellant waived any objection to her hearing the motion to dismiss in his subsequent case, we feel that the magistrate should have recused herself as it does create an appearance of impropriety. Nevertheless, appellant did not object to her presence on the case nor did he raise it on appeal. Furthermore, such a matter is ultimately not resolved by this court. Therefore, we will not consider the issue at this time.

[*5]

ASSIGNMENT OF ERROR

The trial court erred in dismissing the complaint to establish paternity on public policy grounds, in contravention of legislative enactment.

In the present case, appellant filed an action to establish a father-child relationship pursuant to R.C. 3111.04. R.C. 3111.04 provides, in pertinent part:

(A) An action to determine the existence or non-existence of the father and child relationship may be brought by * * * a man alleged or alleging himself to be the child's father * * * *

Appellant further argues that conflicting presumptions of paternity were presented to the trial court pursuant to R.C. 3111.03(A) and therefore, the trial court erred in dismissing his action. R.C. 3111.03 lists various criteria courts use in determining the paternity of a child:

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage * * *

(6) A court or administrative body, pursuant to section 3111.09 or 3115.24 of the Revised Code or otherwise, has ordered that genetic tests be conducted * * * to determine [*6] **the father and child relationship and the results of the genetic tests indicate a probability of ninety-five per cent or greater that the man is the biological father of the child.**

(B) * * * A presumption that arises under this section can only be rebutted by clear and convincing evidence that includes the results of genetic testing[.] * * * If two or more conflicting presumptions arise under this section, the court shall determine, based upon logic and policy considerations, which presumption controls.

Therefore, we find that pursuant to R.C. 3111.03(A)(1), appellees are presumed to be the natural parents of Debra since they were married to each other and Debra was born during the marriage. However, we also find that the results of HLA genetic testing allowed under R.C. 3111.03(A)(6) n4 determined that not only did appellant have a 99.79% probability of being Debra's biological father, it excluded Emery Taylor as Debra's biological father. Although appellant's case was dismissed before a ruling was made on the admissibility of the genetic tests, we note that the Ohio Supreme Court has previously held that genetic tests are admissible to overcome the presumption of paternity [*7] contained in R.C. 3111.03(A)(1). *Hulett v. Hulett* (1989), 45 Ohio St. 3d 288, 292, 544 N.E.2d 257. Therefore, we hold that the trial court should have considered the genetic test results prior to ruling on appellees' motion to dismiss as such results are a separate presumption under R.C. 3111.03(A)(6). n5

> n4 Appellees argue that the test results should be stricken because they had not retained counsel prior to submitting to the genetic testing. We find this contention to be meritless as we will not engage in idle speculation as to whether or

not appellees would have submitted to genetic testing had they been represented by legal counsel at the time. The fact remains that appellees submitted to genetic testing on May 22, 1996 and are now bound by the results of those tests as they were properly conducted in accordance with R.C. 3111.03 and R.C. 3111.09.

n5 Furthermore, we find that Mr. Taylor's exclusion as a father through genetic testing is more than a conflicting presumption. We find such exclusion constitutes clear and convincing evidence that overcomes the presumption of paternity created under R.C. 3111.03(A)(1). See *Thompson v. Thompson*, 1995 Ohio App. LEXIS 3402 (Aug. 10, 1995), Highland App. No. 94CA859, unreported.

[*8]

Additionally, the Ohio legislature and the Ohio Supreme Court have both recognized that the presumptions created by R.C. 3111.03(A) are not irrebuttable. See R.C. 3111.03(B); *Hulett, supra*; *Johnson v. Adams* (1985), 18 Ohio St. 3d 48, 479 N.E.2d 866. Rather, they may be rebutted by clear and convincing evidence. *Id.*

Moreover, contrary to appellees' contention and the magistrate's holding, n6 the Ohio Supreme Court has held that "courts have no right or power to nullify a statute upon the ground that it is against the natural justice or public policy." *Joseph v. Alexander* (1984), 12 Ohio St. 3d 88, 90, 465 N.E.2d 448 citing *Probasco v. Raine* (1893), 50 Ohio St. 378, 391, 34 N.E. 536(further holding that in Ohio, the validity of an act passed by the legislature must be tested alone by the constitution). Therefore, we find that the trial court abused its discretion when it dismissed appellant's action on public policy grounds.

n6 Appellees and the magistrate contend that it is against public policy to allow a third-party to claim paternity of a child being raised by a husband and wife as their own.

[*9]

We further note that prior to 1982, former R.C. 3111.01 to R.C. 3111.03 provided that only an unmarried woman, her legal representative, or the executor of her estate, if deceased, had standing to bring a paternity action. Thus, it appears that the courts and Ohio legislature wanted to preserve the intact family and to avoid rendering illegitimate a child who was previously legitimate. See *Franklin v. Julian* (1972), 30 Ohio St. 2d 228, 283 N.E.2d 813. However, in 1982, the Ohio legislature amended R.C. 3111.03. n7 That section, now codified in R.C. 3111.04, allows the natural father of a child to file an action to determine the existence of a father-child relationship. Therefore, it would appear that the legislature was more concerned with the existence of the natural parent-child relationship than the marital status of the parents. See *Broxterman v. Broxterman* (1995), 101 Ohio App. 3d 661, 665, 656 N.E.2d 394 ("In adopting a form of the Uniform Parentage Act, Ohio has recognized the importance of a child knowing the identity of his or her biological father"). n8

n7 House Bill 245 amended former R.C. 3111.03.

[*10]

n8 We note that the Ohio legislature has distinguished an artificial sperm donor from a natural father of a child conceived through sexual intercourse regardless of the marital status of the parties. R.C. 3111.37 specifically provides that:

(A) If a married woman is the subject of non-spousal artificial insemination * * * the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination * * * *

(B) If a woman is the subject of non-spousal insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the child of the donor.

We further note that the Ohio legislature has expressly limited the rights of a putative father in adoption proceedings in R.C. 3107.07. No such limitations or distinctions are placed on putative fathers in establishing their parental rights pursuant to R.C. 3111.04.

Appellees urge this court to uphold the trial court's findings that R.C. 3111.04 [*11] is unconstitutional. However, we find this argument and the trial court's reasoning to be flawed in several ways.

First, to agree with the trial court and rule that a putative father should not be allowed to assert a paternity action when the mother is married to another would violate the equal protection clause under the Fourteenth

Amendment of the United States Constitution. To advocate such a position would be to advance a gender-based distinction as it would impermissibly discriminate between natural mothers and natural fathers.

"Gender-based distinctions must serve [important] government objectives and must be substantially related to achievement of these objectives in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban v. Mohammed* (1979), 441 U.S. 380, 388, 60 L. Ed. 2d 297, 99 S. Ct. 1760. We agree with appellees' argument that the state has an interest in preserving the integrity of families and fostering child rearing in harmonious family settings. However, the unquestioned right of a State to further such a desirable right is not in itself sufficient to justify a gender-biased distinction. *Id.* at 391. The distinction must be structured [*12] to reasonably further those ends. *Id.*

Allowing only mothers to seek a declaration of paternity could still potentially undetermine the state's interest in preserving family stability as the natural mother herself could seek a declaration of non-paternity in the presumed father and a declaration of paternity in the non-family natural father. See *Hulett, supra* (wife filed a paternity action to declare that another man, not her husband, was the biological father of the couple's son who had born and conceived during her marriage); *Broxterman, supra,* at 663 (holding that "Ohio law does not limit paternity actions to situations where a child is born out of wedlock"). Therefore, the state's interest in preserving family stability would not be reasonably furthered. n9 Additionally, we find such a gender-biased distinction fails to bear a substantial relation to the state's interest and therefore, appellees' argument must fail.

n9 We also note that natural mothers have been allowed to pursue parentage actions against putative fathers who are married to other women. See *Seegert v. Zietlow* (1994), 95 Ohio App. 3d 451, 642 N.E.2d 697 (single mother filed paternity action against married father whose wife was pregnant when the action was filed).

[*13]

Moreover, we note that all legislative enactments enjoy a presumption of validity and constitutionality. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St. 3d 360, 361, 653 N.E.2d 212; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St. 3d 193, 199, 551 N.E.2d 938. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, that statute will be presumed to be constitutional. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St. 3d 351, 352, 639 N.E.2d 31.

Appellees contend that R.C. 3111.04 violates their constitutional right to marital privacy. However, we disagree with appellees' contention. We feel that both the trial court and the appellees have taken great liberty in interpreting the meaning of "marital privacy."

The United States Supreme Court has held that encompassed in the realm of "marital privacy" is the fundamental right of an individual to marry, n10 the right to decide whether to bear children, n11 the right to choose whom to marry, n12 the right of a married couple to use contraceptives in the privacy of their own home, n13 [*14] the right to rear their children, n14 and the right to choose their child's education. n15 However, we are not aware of any United States Supreme Court case ruling that an individual has a fundamental right in keeping his or her marriage intact. If such a right existed, then every divorce law would theoretically be in danger of being unconstitutional. n16

n10 *Zablocki v. Redhail* (1978), 434 U.S. 374, 54 L. Ed. 2d 618, 98 S. Ct. 673.

n11 *Carey v. Population Serv. International* (1977), 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010.

n12 *Loving v. Virginia* (1967), 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010.

n13 *Griswold v. Connecticut* (1965), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678.

n14 *Wisconsin v. Yoder* (1972), 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526.

n15 *Meyer v. Nebraska* (1923), 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625.

n16 This is especially true in the typical divorce scenario where one spouse wants the divorce and the other does not.

On the contrary, the United States [*15] Supreme Court, in the interest of protecting the sanctity of the family, has solely limited a state's imposing on a family's right to make certain fundamental decisions within the family unit concerning matters of personal choice. We do not believe that a mother's refusal to acknowledge her child's natural father is a personal choice that falls under the protection of marital privacy.

Nevertheless, the United States Supreme Court has consistently held that "the rights to conceive and to raise

one's children have been deemed essential." *Stanley v. Illinois* (1972), 405 U.S. 645, 650, 31 L. Ed. 2d 551, 92 S. Ct. 1208 citing *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625. However, a putative father's parental right is not unlimited. It has been held that the mere existence of a biological link does not merit equivalent constitutional protection regarding parental rights. *Lehr v. Robertson* (1983), 463 U.S. 248, 261, 77 L. Ed. 2d 614, 103 S. Ct. 2985; *Caban, supra*, at 397. n17 Parental rights require a relationship with the child. *Id.*

n17 We note that these two cases dealt with an unwed father's right to his child in an adoption proceeding. Unlike in the present case, neither father in those two cases sought to legally claim his parental rights until an adoption proceeding was instituted. Moreover, Ohio adopts the United States Supreme Court's view on a father's rights to object to the adoption of his child in R.C. 3107.07(A). Under R.C. 3107.07(A), a father's consent to the adoption is unnecessary where he has failed to communicate with the child or to provide for the financial support of the child for at least one year prior to the filing of the adoption petition. In comparison, R.C. 3111.04 does not have any such requirements or limitations.

[*16]

In the present case, appellant tried to establish a relationship with Debra when she was just a few days old. n18 A week after she was born, appellant visited Charlotte and Debra at Charlotte's house. At that time, he acknowledged Debra as his daughter. He then filed a paternity action six months later. n19 Because the case was dismissed at such an early stage, it is unclear whether or not he had, or tried to have, additional contact with Debra. However, we do feel that appellant's actions in immediately attempting to establish his parental rights one week after Debra's birth and subsequently filing a paternity action six months after her birth amounts to more than a mere biological tie. He promptly attempted, albeit unsuccessfully, to establish a relationship with Debra upon her birth. We do not feel that now, three years later, he should be prevented from again seeking his parental rights.

n18 Compare with *Lehr v. Robertson, supra,* where the putative father had never sought to establish a legal tie with her until after she was two years old. The father in that case had never attempted to develop any custodial, personal, or financial relationship with his daughter until an adoption petition was filed two years after her birth by the child's mother and stepfather.

[*17]

n19 Appellant had been informed that genetic tests could not be conducted on Debra until she was at least six months old.

We further note that appellant could have chosen to deny that he was Debra's father. n20 Instead, appellant chose to accept his responsibilities and is now ready to provide Debra with financial and emotional support. n21 To deny appellant the opportunity to provide such support to his daughter would be unjust in this situation. n22

n20 We note that unfortunately, this type of scenario does occur in many situations where the woman gets pregnant out of wedlock.

n21 Again, we note that due to the early dismissal of appellant's case, the record is devoid of any evidence as to appellant's personal and financial situation at the time Debra was born as compared to his present situation.

n22 We find this especially true in the midst of public outcry over the number of "dead-beat dads" who refuse to financially support their children, muchless want to develop any form of a relationship with them. Charlotte could have filed a motion for child support compelling appellant to pay for Debra's expenses but she did not do so. Instead, appellant, on his own, has voluntarily expressed his willingness to support his daughter financially and emotionally.

[*18]

Even more troubling with appellees' position that a putative father should not be allowed to bring a parentage action when the mother is married to another man is the fact that under R.C. 3111.05 n23 and R.C. 3111.22, n24 a woman could still bring an action at anytime before the child turned twenty-three years of age. See *Park v. Ambrose* (1993), 85 Ohio App. 3d 179, 619 N.E.2d 469 (parentage action brought twenty years after a child had been born to a single mother); *Gilpen v. Justice* (1993), 85 Ohio App. 3d 86, 619 N.E.2d 94 (parentage action filed six years after the birth of a child). Men could potentially be at a disadvantage as they may not have been aware they even had a child yet still might be subject to pay back child support for a child years after their relationship with the mother had ended.

n23 R.C. 3111.05 provides:

> An action to determine the existence or non-existence of the father and child relationship may not be brought later than five years after the child reaches the age of eighteen.

n24 R.C. 3111.22 provides, in pertinent part,:

> **(B)(4) If an administrative officer issues an administrative order determining the existence of a parent and child relationship * * *, the administrative officer shall schedule an administrative hearing to determine,**
>
> *** * * the amount of child support any parent is required to pay * * * ***

[*19]

We firmly believe that a man should be required to support any children he has. However, we are concerned that if we were to adopt appellees' position, many putative fathers could potentially be viewed only as money-givers and not care-givers. See *Park, supra,* 85 Ohio App. 3d at 185 (court noted that the non-custodial parent is more than a money machine). Fathers have just as much interest in their children, and are just as good parents, as mothers. Therefore, the interest of fathers in establishing their paternity is just as great as that of mothers and children.

Additionally, we find appellees' reliance on *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 to be misplaced. That case, dealing with a California statute excluding the admission of genetic tests to rebut the presumption of a husband's paternity, held that "it is a question of *legislative policy and not constitutional law* whether California will allow the presumed parenthood of a couple desiring to retain a child conceived and born into their marriage to be rebutted." *Michael H., supra,* at 129-130 (emphasis added). Contrary to the magistrate's assertion, we believe the United States Supreme [*20] Court was advocating that each state could decide not only whether presumptions of paternity should be rebuttable but in what situations they are rebuttable.

Ohio has chosen to allow a husband's paternity to be rebutted regardless of whether the husband and wife remain married and desire to raise the child as their own. The Ohio legislature has chosen to give men in appellant's situation standing to bring a paternity action. Therefore, we must give deference to the Ohio legislature in the present case. Moreover, the Ohio Supreme Court has previously acknowledged the existence of the *Michael H., supra*, case in *Hulett, supra*, at 293. In deciding *Hulett, supra,* the Ohio Supreme Court noted that in *Michael H., supra*, the California legislature had expressly made the presumption of a husband's paternity irrebuttable whereas Ohio had not made a similar provision. *Hulett, supra,* at 293. Therefore, the Ohio Supreme Court allowed the admission of genetic tests to rebut the presumption that the husband was the natural father of the couple's child. Accordingly, we follow the Ohio Supreme Court's finding that a husband's paternity is rebuttable by a genetic test.

Finally, [*21] we must presume that when the Ohio General Assembly wrote R.C. 3111.04, they considered the possibility that a case such as this might arise. n25 However, they chose to give putative fathers an equal right to establish a relationship with his children.

> n25 We find this especially true in light of the fact that prior to 1982, only an unmarried woman, her legal representative, or her executor was allowed to bring a paternity action presumably to avoid a child's having to bear the stigma of being illegitimate.

Furthermore, we note that in the absence of an express exception to this right, we must presume that the legislature intended for a putative father to assert his parentage action even when the mother is married to someone else. n26 Even the Ohio Supreme Court has allowed a putative father to bring a parentage action when the mother was, and continues to be, married to another man at the time the child was conceived. See *Joseph, supra*. Both the Ohio legislature and the Ohio Supreme Court have spoken on [*22] this issue and therefore, we are bound to follow their determinations.

> n26 As previously mentioned, we note that the Ohio legislature did prohibit artificial sperm donors from asserting their parental rights. See R.C. 3111.37. Additionally, the Ohio legislature has prohibited putative fathers from asserting their parental rights in adoption proceedings if certain criteria has not been met. See R.C. 3107.07.

Accordingly, we find that R.C. 3111.04 is not unconstitutional. We therefore find that the trial court's dismissal of appellant's action was an abuse of discretion. Appellant's sole assignment of error is sustained.

For the reasons stated, it is the order of this Court that the judgment of the Crawford County Court of Common Pleas, Juvenile Division be, and hereby is, reversed at the costs of appellees for which judgment is rendered, and that the cause be, and hereby is, remanded to the trial court for further proceedings and for the execution of the judgment for costs.

Judgment reversed and cause remanded. [*23]

BRYANT and SHAW, JJ., concurs in part and dissents in part.

CONCUR BY: BRYANT (In Part)

DISSENT BY: BRYANT (In Part)

DISSENT:

BRYANT, J., separately concurs in part and dissents in part. The DNA tests in issue, the procedures followed to reach the results reported and the persons who administered those procedures have not been subjected to the judicial scrutiny of the trial court. The statutes in question do not establish the presumption of paternity conclusively. Therefore I do not agree with the majority's holding that any of those test results determine the matter of paternity as a matter of law.

Furthermore, although I concur in the opinion that the public policy analysis by the trial court is insufficient to support a finding of unconstitutionality of the statute in question, I neither concur in the remainder of the majority's gratuitous analysis nor believe it necessary.

To the extent I have not expressly concurred in the lead opinion, I dissent.

Because I believe it is incumbent on the trial court to rule on the admissibility of the DNA tests and if it admits any of the results in evidence, to consider the test results together with any other evidence received, I concur only in [*24] the judgment of reversal and remand for further proceedings.

SHAW, J., concurs in the foregoing separate concurrence and dissent.