IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

ALAN C. METZGER, Plaintiff	: :	
v.	:	No. 95-20,372
JOAN M. DAY WALTERS, Defendant	: : :	
v.	:	
LeROY L. WALTERS, Defendant	: :	

OPINION and ORDER

This opinion addresses the motions for summary judgment filed by LeRoy Walters and Joan M. Day Walters. Mr. and Mrs. Walters have asked this court to dismiss the petition for paternity filed by Alan C. Metzger, who is attempting to prove he is the father of Jabe A. Walters. Although blood tests show a 99.87 % probability Mr. Metzger is Jabe's father, the court must grant the motions due to the ancient presumption that a child born into a marriage is the child of the husband.

The presumption against paternity has come under attack by courts across the country as well as members of the Pennsylvania appellate courts. Although it is teetering on the edge of death, the presumption still maintains enough strength to prevail in this case. Burdened with this presumption, Mr. Metzger will be unable to prove he is Jabe's father, for the presumption can be rebutted only by showing that the husband was incapable of procreation or did not have access to his wife during the period of conception. Cairgle v. American Radiator Standard Sanitary Corp, 366 Pa. 249, 77 A.2d 439 (1951). Mr. Metzger has no such evidence; therefore, summary

judgment is appropriate under Pa.R.C.P. No. 1035.2.[1]

As a trial court, it is not our place to announce new law. We may not ignore controlling legal precedent even though we may disagree with it. Therefore, the court will reluctantly apply the presumption to Jabe Walters and grant the motions for summary judgment, which essentially brings an end to our role in this drama. But we do so under protest, combined with two impassioned pleas to the appellate courts. First, we ask that our decision be reversed because of the compelling facts of this case. Second, we ask that the presumption against paternity, along with its equally outdated cousin the doctrine of paternity by estoppel, be replaced with a flexible approach permitting trial courts to determine paternity by considering all of the facts of each case including, when appropriate, blood test results.

Factual Background

This case first came before the court in 1992, when Mr. Metzger filed a petition to establish the paternity of Jabe Walters. Mr. Metzger asked the court to order blood tests for himself, Mrs. Walters, and Jabe. The court issued the order but vacated it after Mrs. Walters raised the defense that Jabe was born during her common

[1] Mr. Walters also claims he is entitled to summary judgment under the doctrine of paternity by estoppel. That doctrine is not applicable to this case because it prohibits a man who has held himself out to be the father of a child from later denying paternity, and prevents a woman who has acquiesced in that behavior from later instituting a paternity action against a different man. Freedman v. McCandless, 539 Pa. 584, 591-92, 654 A.2d 529, 532-33 (1995); Jones v. Trojak, 535 Pa. 95, 634 A.2d 201 (1993). Here, however, Mr. and Mrs. Metzger are both asserting that Mr. Metzger is Jabe's father.

law marriage to Mr. Walters.[2] She also filed a motion for declaratory judgment to establish that a common law marriage exists. At a hearing held on 9 November 1992 Mr. and Mrs. Walters testified that on 1 January 1991 they declared they were married and agreed to live together as man and wife. Other witnesses supported their testimony. In the absence of contradictory evidence this court found that Mr. and Mrs. Walters entered into a common law marriage on 1 January 1991.

Jabe was born into that marriage on 10 August 1991. However, because he was conceived outside the marriage this court refused to apply the presumption that Mr. Walters is his father.

Testimony at the 9 November 1992 hearing showed[3] that Mrs. Walters engaged in sexual intercourse with both Mr. Metzger and Mr. Walters during the time Jabe was conceived. In early September 1990 Mr. Metzger invited Mrs. Walters to dinner, proposed marriage, and gave her a ring. She accepted the ring and the proposal. Mrs. Walters learned she was pregnant in November or December of 1990 and told Mr. Metzger she did not know who the father was. Between 1 January 1991, the date of the common law marriage, and 10 August 1991, the date of Jabe's birth, Mr. Metzger and Mrs. Walters had sexual intercourse on several occasions. Mr. Metzger maintained an interest in the unborn child throughout the pregnancy and accompanied Mrs. Walters to her physician's office at least once. Mrs. Walters kept

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[2] Pennsylvania recognizes common law marriages when there is proof that on a specific date two individuals explicitly agreed to enter into the legal relationship of marriage. Estate of Gavula, 490 Pa. 535, 417 A.2d 168, 171 (1980).

[3] These findings of fact are based on the testimony of Mr. Metzger, whom the court finds to be credible. To the extent that Mrs. Walters' testimony contradicts these findings, the court finds her testimony not credible.

him informed during this period and shared the sonogram picture with him. Mr. Metzger talked with her by telephone while she was in the hospital shortly after giving birth. He visited her and Jabe when they returned home. Several weeks after Jabe's birth he accompanied Mrs. Walters and Jabe to a park, where he held and fed the infant.

Mr. Metzger grew attached to the child and became convinced Jabe was his son. He urged Mrs. Walters to obtain blood tests to determine who the father was. Mrs. Walters did not do so. At some point during this period Mrs. Walters cut off contact with Mr. Metzger, which prompted him to file the petition to establish paternity.

Procedural History

On 25 January 1993 this court granted Mr. Metzger's request for blood tests. We acknowledged that Jabe was born into her marriage with Mr. Walters but we refused to apply the presumption of paternity because Jabe was conceived outside the marriage.

Mrs. Walters appealed our decision. The Superior Court affirmed in a memorandum opinion filed on 14 December 1993.[4] The court stated:

> [A]s the child in the present case was conceived prior to appellants' marriage, we agree with the trial court's disposition of the paternity issue. See Selm v. Elliot, 411 Pa. Super. 602, 602 A.2d 358 (1992) (presumption exists that where a child is conceived and born to a married woman, it is the child of the woman's husband). Accordingly, we affirm the Opinion of the trial court for the reasons stated therein. [Emphasis in original.]

[4] The opinion was filed to No. 00116 HBG 93. The panel consisted of Judges Del Sole, Ford Elliott, and Hofman.

Allocatur was denied by the Supreme Court on 26 October 1994 and blood tests were scheduled for 10 January 1995.

It would have been reasonable to assume that this ended the matter. Unfortunately, that was only the beginning of a long and tedious saga of meritless litigation.

On 9 January 1995 Mr. Walters filed an action captioned LeRoy L. Walters v. Alan C. Metger, No. 95-20,046. Mr. Walters sought an order preventing the blood tests or prohibiting the results from being introduced in a paternity trial, along with a declaration that he is conclusively determined to be Jabe's father. The court denied the request to stay the tests and dismissed the remainder of the action on 10 January 1995. Blood tests were completed. Mr. Walters then filed a motion for reconsideration on the basis that the court's original opinion misstated the date of the common law marriage and thus created an ambiguity that might have caused the Supreme Court's refusal to grant allocatur.[5] Mr. Walters also requested permission to amend his petition to assert that the child could have been conceived during the marriage. This motion was totally without merit because the primary issue addressed in the opinion was whether the presumption should apply to a child conceived before a marriage and born after it. There was no dispute over the date of the alleged common law marriage. Moreover, the memorandum opinion of the Superior Court clearly indicated the Superior Court understood the correct date of the marriage was 1 January 1991. This court therefore corrected its opinion and denied Mr. Walters'

[5] The correct date of the marriage, 1 January 1991, was stated four times, including in the final order. The court erroneously stated the date of 1 January 1992 in two places. See this court's opinion of 27 January 1995.

requests on 27 January 1995.

Mr. Walters appealed the court's orders of 10 January 1995 and 27 January 1995 and included with his own caption the caption of the original action between Mr. Metzger and Mrs. Walters. He requested that the judgment previously entered be reopened or stayed. Mr. Metzger filed a petition to quash the appeal on the basis that final judgment had already been entered by way of the Supreme Court's refusal to grant allocaur. The Superior Court quashed the appeal on 10 May 1995 and dismissed Mr. Walter's appeal regarding this court's disposition of the claims raised in his 9 January 1995 petition. Mr. Walters' petition for allocatur was returned on 13 June 1995 because it was filed late.

On 10 July 1995 Mr. Walters filed a petition to intervene in the paternity action. This court granted that petition after a hearing held on 31 October 1995. Mr. Walters then filed preliminary objections claiming the court lacked jurisdiction over the previously litigated issues because he had not been joined. The preliminary objections were dismissed and it should come as no surprise to learn that Mr. Walters appealed that order. The appeal was quashed on 3 July 1997 because the order was interlocutory and Mr. Walters had failed to secure certification of the order for appellate review.

In this court's opinion, the second and third appeals were totally without merit and served only to delay the proceedings. Unfortunately, Mr. Walters was rewarded for these unconscionable tactics because the controlling case law changed in the meantime, handing him a victory that this court hopes is only temporary.

Discussion

The issue in this case was–and still is–whether the presumption of paternity should apply to a child conceived outside marriage and born into a marriage. In 1993 we held that it should not, and we were affirmed by the Superior Court. We still feel our decision was right but for the reasons set forth below, we believe intervening appellate case law now requires us to apply the presumption.

1. The Presumption of Paternity: When it Applies

The presumption that a child born to a married woman is the child of the husband is one of the strongest presumptions in American law.[6] Traditionally, it could be rebutted only by clear and convincing evidence the husband was incapable of procreation or that he did not have access to his wife during the period of conception. Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1980); Cairgle v. American Radiator Standard Sanitary Corp, 366 Pa. 249, 77 A.2d 439 (1951). "Non-access" was defined as a physical separation of the husband and wife such that it was impossible for them to have had sexual relations.

A. *The Law in 1993*

In our opinion issued on 25 January 1993, this court reviewed Pennsylvania case law and found no clear authority as to whether the presumption applied to children conceived outside a marriage. There was no case on point and the relevant

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[6] Previously, the presumption was referred to as the "presumption of legitimacy." However, this phrase has now been rendered meaningless since the General Assembly eliminated the legal distinction between "legitimate" and "illegitimate" children, 23 Pa.C.S. § 5102(a). Therefore, the Supreme Court has announced that it will no longer use the phrase. See John M. v. Paula T., 524 Pa. 306, 571 A.2d 1380, 1383 n. 2 (1990).

cases seemed to contradict each other. Several cases stated that the presumption applies to a child born to a married woman, while others stated that it applies to a child conceived and born into a marriage.[7] We noted, however, that in the cases stating "born to a married woman," the child had also been conceived within the marriage; therefore, we concluded that this phrase was merely the result of imprecise language used by courts that had not considered the issue before us–namely, whether the presumption includes children conceived outside of marriage. We thus held there was no binding precedent.

We then examined at length the policy considerations behind the presumption and concluded they did not compel us to apply the presumption in this case. First, we considered the competing interests of the husband and the man claiming paternity. We reasoned that where a child was conceived in a marriage the outsider's interest could be accorded less weight because that person had intruded into and violated an existing marriage. However, when the child was conceived outside the marriage there had been no such intrusion. Indeed, in Mr. Metzger's case he was actually engaged to marry Mrs. Walters when Jabe was conceived. Furthermore, allowing the presumption to extend to children conceived outside marriage would permit a woman to deprive a man of the opportunity to be a father to his child simply by marrying another man before the child is born. It would give women the power to determine paternity by choosing a husband.

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[7] McCue v. McCue, 413 Pa. Super. 71, 604 A.2d 738 (1992) (stating "child born to a married woman"); Selm v. Elliott, 411 Pa. Super. 602, 602 A.2d 358 (1992) (stating "conceived by and born to a married woman"); John M. v. Paula T. and Michael T., 524 Pa. 306, 571 A.2d 1380, 1384 (1990) (stating "born to a married woman"); Jones v. Trojak, 402 Pa. Super. 61, 586 A.2d 397 (1990) (stating "conceived and born during a marriage").

Secondly, we considered the policy of protecting the marital unit. We noted that one way in which the presumption helped protect a marriage was by prohibiting evidence that the woman had been unfaithful to her husband. That policy consideration, however, is not relevant when the child was conceived outside of marriage. In such cases it would be obvious the woman had engaged in sex before marriage, although her husband might not know whether she had sex with a man other than himself. While many husbands–even today–may be troubled by the knowledge their wife slept with another man before the marriage, it is not likely to induce the same marital discord as when a husband learns his wife has committed adultery. In any event, these concerns are not applicable to the case before the court because Mrs. Walters admits sleeping with both men before her marriage.

Another way the presumption might help protect a marriage is by prohibiting the physical intrusion of another man demanding visitation rights with his child. While this can cause stress on a marriage, it does not necessarily destroy an existing family unit. In these days of divorce, unmarried parents, and blended families, it is all too common for children to live with an adult who is not their biological parent and have visitation with a birth parent. Moreover, in some cases according the biological father the rights and responsibilities of parenthood might even help strengthen the marriage because it relieves the husband of the financial responsibility for a child he did not father, thus eliminating any resentment he might otherwise harbor.

Lastly, we considered the effect that applying the presumption would have on the child. Although it would be easy to jump to the superficial conclusion that it is in Jabe's best interest to protect him from the disruption of introducing Mr. Walters into his life, we were not prepared to do that. Pennsylvania appellate courts have held that

ordinarily a biological parent is considered to be the best caretaker for his or her child. Baby Boy A. v. Catholic Social Services, 512 Pa. 517, 517 A.2d 1244, 1247 (1986). Although the biological link does not automatically create a good parent, there is nonetheless something mystical about the forces of nature that link a man or woman with the child they create. After an initial period of adjustment, Jabe might well realize immense benefits from a relationship with his biological father. It is entirely possible that a unique bond could form between father and son that becomes one of the most treasured aspects of Jabe's life.

The record shows that Mr. Metzger has a strong desire to assume his parental role. From the time he first learned Mrs. Walters was pregnant, he demonstrated an interest in the child that has never waned. The sincerity and strength of his commitment to Jabe was vividly demonstrated by his patience and persistence throughout the tortured procedural history of this case. For seven years Mr. Metzger fought with iron-clad resolve, undaunted by the best efforts of Mr. Walters and his attorney to thwart him. It is this court's opinion that Jabe would be extremely fortunate to have the opportunity to know the father who has demonstrated such commitment and love for him. We also noted other possible benefits, such as giving Jabe access to accurate information about his genetic background for health purposes, as well as knowledge of his cultural heritage, which could become a meaningful element in his life.

For all of these reasons, this court concluded that the policy considerations behind the presumption did not compel us to apply the presumption to cases in which a child was conceived outside marriage. Moreover, we felt very strongly that under the compelling facts of this case, in particular, justice demanded that we give Mr.

Metzger the opportunity to prove paternity. The Superior Court affirmed our decision and the Supreme Court denied allocatur.

B. ***The Law in 1999***

In recent years the presumption of paternity has been increasingly relaxed and modified by courts across the country to make it reflect the reality of modern families.[8] Pennsylvania, however, has dragged its heels, clinging to the old ways despite the dramatic changes that have occurred in our society.

Recently our Supreme Court re-examined the presumption in Brinkley v. King, 529 Pa. 241, 701 A.2d 176, 188 (1997). Although five out of the six justices hearing the case agreed the law needed to be modified, they could not agree on *how*. As a result, Brinkley is a plurality opinion from which it is difficult to ascertain in what ways–if any–it controls lower court cases. That question has split one 1998 Superior Court panel.[9] To make matters worse, another 1998 panel of Superior Court judges, while accepting Brinkley as binding, could not agree on the holding of the case.[10] In short, Pennsylvania law on the presumption of paternity is somewhat uncertain.

In light of this judicially created morass, this court is sorely tempted to conclude that there is no controlling case law requiring us to reverse ourselves and apply the presumption in this case. After all, our 1993 decision was affirmed, and the

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[8] See the discussion of Justice Newman in Brinkley v. King, 529 Pa. 241, 701 A.2d 176, 188 (1997) (Newman, J. and Castille, J., concurring and dissenting).

[9] Green v. Good, 704 A.2d 682 (Pa. Super. 1998).

[10] Cozad v. Amrhein, 714 A.2d 409 (Pa. Super. 1998).

"law of the case" doctrine permits us to stand by that decision if there is no intervening change in controlling case law. Com. v. Starr, 541 Pa. 564, 664 A.2d 1326 (1995). However, we resist the temptation to shrug off Brinkley and its troubled progeny because we could not do so in good conscience. Unfortunately, the one binding principle that seems to have emerged from the appellate cases decided since our original decision is that the presumption applies to a child born into an intact family. The court finds that such a family exists in the case before us. Jabe was born into an intact family unit, and that family unit has remained intact ever since. Ironically, although Brinkley limited the presumption in some ways, the case expanded its reach in others. Unfortunately, Mr. Metzger is now caught in its clutches.

Following is a summary of the intervening appellate case law.

Brinkley v. King, 529 Pa. 241, 701 A.2d 176 (1997)

In this case a child was conceived and born into a marriage in which the husband and wife were living together but not having sexual relations at the time of conception. The husband moved out of the residence four months before the child was born and filed for divorce after learning his wife was pregnant. The mother subsequently filed for support against the man who fathered the child but the trial court and the Superior Court applied the presumption, which she could not rebut. Chief Justice Flaherty, joined by Justice Cappy in an opinion announcing the judgment of the court, reviewed the presumption and held that because the purpose of the presumption is to preserve intact marriages, the presumption need not be applied when there is no existing intact marriage to protect. Brinkley at 180-81.

Justice Newman, joined by Justice Castille, filed an opinion concurring and dissenting. They agreed that "the presumption of paternity does not apply where its purpose is not served." Id. at 185. However, they wanted to expand the means of rebutting the presumption beyond non-access or inability to procreate. They especially advocated permitting blood tests to be introduced. Justice Nigro, concurring and dissenting, wanted to abolish the presumption of paternity entirely and "allow the trial court to determine paternity on a case-by-case basis, unburdened by the obligatory application of a presumption or an estoppel theory." Id. at 182. Justice Zappala, concurring, did not believe it was necessary to re-examine the policy considerations of the presumption because non-access was established by the wife's testimony that she did not have sexual relations with her husband at the time of the child's conception.[11]

Brinkley did not alter the presumption of paternity by estoppel. The court simply made clear that an estoppel analysis should be performed only after a court finds the presumption of paternity has been rebutted or does not apply. Id. at 180. Finding there was no intact marriage to protect, the Brinkley court refused to apply the presumption and remanded the case back for a paternity by estoppel analysis, to determine whether the husband or wife should be prohibited from denying the husband's paternity.

***Green v. Good*, 704 A.2d 682 (Pa. Super. 1998)**

The next case to address the presumption of paternity was Green, filed on 29

[11] This appears to be a clear expansion of the definition of "non-access," although Mr. Justice Zappala maintains it is not.

January 1998. In that case the child was conceived and born into a marriage. The child was conceived in May 1991, and the husband and wife had no sexual relations during that month. The husband, who had been on a tour at sea, returned during May to find his wife with her lover. The wife moved out of the residence but the husband and wife lived together again from November 1991 through February 1992, although they eventually divorced. The wife brought a claim for child support against the man who fathered the child but the trial court dismissed the complaint, finding that the presumption had not been rebutted.

The Superior Court reversed, holding that the presumption did not apply. Judge Del Sole, who wrote the leading opinion, found that Brinkley controlled because "four justices, a clear majority, agreed that the presumption should not be applied where there is no intact marital unit to protect." Id. at 683. Judge Tamilia, concurring, cautioned that Brinkley had "limited precedential value," noting that there are four separate opinions, none of which commanded a majority of the court's six members and citing Commonwealth v. Minor, 436 Pa. Super. 35, 647 A.2d 229 (1994), which states that non-majority decisions of the state Supreme Court are not binding. Judge Tamilia agreed with the result of the case, however, because he found that non-access was established. Judge Olszewski, concurring, declined to take a position on whether Brinkley was controlling but believed that existing Pennsylvania case law already encompassed the principle of examining whether there is an existing family unit. Green at 685.

Martin v. Martin, 710 A.2d 61 (Pa. Super. 1998)

In Martin, filed on 18 March 1998, the child was conceived in one marriage and born into another. At the time the child was born the husband and wife were not living together, although they resided together for a short period of time later. The wife filed for support against the husband, who asked the court to order blood tests. The court granted the request. The Superior Court affirmed, with Judge Cirillo and Judge Musmanno finding that Brinkley controlled. Citing Green, the court explained that "four justices, a majority, agreed that the presumption should not be applied where there is no intact marital unit to protect." Id. at 64, n. 2. Judge Popovich concurred in the result but did not file an opinion.

Amrhein v. Cozad, 714 A.2d 409 (Pa. Super. 1998)

In this case, filed on 1 June 1998, the child was conceived and born into a marriage that fell apart one year after the child's birth. The parties submitted to a blood test, which showed the husband was not the father. Judge Tamilia, in an opinion joined by Judge Hester, appeared to find Brinkley controlling, but surprisingly applied presumption anyway and excluded consideration of the blood test results. The court stated that although Brinkley expanded consideration of the presumption to permit a broader review where the family is not intact *at the time of the child's birth*, it did not abrogate the basic precepts for overcoming the presumption (non-access and inability to procreate) and did not substitute a blood test as a basis for rebutting the presumption. Amrhein at 411. The court found blood test results irrelevant because the child had been born into an intact family, even though that family was no longer intact. Judge Popovich dissented. Although he apparently also believed Brinkley

controlled, he felt the majority had misinterpreted the case.[12]

C. Conclusion on the Current Law

The above cases, although confusing and somewhat contradictory, nonetheless demonstrate to this court that Brinkley controls the case before us. A clear majority of the Supreme Court justices held that the presumption does not apply when the family is no longer intact. Furthermore, there is Superior Court authority that Brinkley is binding.[13]

Although it would be possible to construct an argument that Brinkley *prevents* courts from applying the presumption to non-intact families but does not *require* us to apply it to intact families, that argument would be strained and artificial. Brinkley did not abolish the presumption–it merely limited its reach in one instance. Therefore, the

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[12] This court agrees. The majority's interpretation is contrary to the explicit language of Brinkley, which directs courts to no longer blindly apply the presumption whenever a child is born into a marriage but instead, to inquire whether that marriage is still worth preserving. This inquiry centers around the state of the marriage at the time the issue comes before the court, as demonstrated when the Brinkley court stated: "In the case at bar, at the time of the complaint for support, there was no marriage." Id. at 181. See also Id. at 181, n. 8 ("Our view, as expressed today, would be that when the parties separated, the presumption of paternity was inapplicable . . . .").

[13] We recognize that one could quibble with this conclusion. As discussed above, the panel in Green was split on the issue. However, Judge Olszewski agreed with the principle in Brinkley. Moreover, in Martin the panel applied Brinkley, although the facts were very similar and it could be argued that therefore only the *result* was binding. Lastly, although the Amrhein panel found Brinkley binding, the majority opinion is, in this court's opinion, clearly erroneous. Nonetheless, we feel the three cases together indicate that we must follow Brinkley and apply the presumption to this case.

inescapable conclusion is that the focus of the inquiry as to whether the presumption applies is now solely upon whether the family into which the child is born is now intact.

This conclusion is supported by the fact that even before Brinkley the Pennsylvania appellate courts had begun to focus on the integrity of the child's family. See Judge Olszewski's concurrence in Green, which cites to Miscovich v. Miscovich, 455 Pa. Super. 437, 688 A.2d 726, 729 (1997), Dettinger v. McCleary, 438 Pa. Super. 300, 652 A.2d 383, 385 (1994), and Jones v. Trojak, 535 Pa. 95, 634 A.2d 201 (1993). All of these cases were reported after our 1993 decision, and are applicable now.

Moreover, we acknowledge that the appellate courts, after Brinkley, have articulated the presumption, somewhat consistently, as a child *born into* a marriage. This seems to indicate that conception outside of marriage is not relevant to the inquiry. However, we note that in Brinkley when the court described the law on the presumption as it existed at that time, the Supreme Court referred to John M. v. Paula T., supra, and erroneously stated the facts of that case, saying, "The child was conceived before the mother was married, but was born while the mother was married to and living with her husband." Brinkley at 178. But John M., as reported, indicates the child was conceived within the marriage. In fact, this court used that case in our 1993 opinion to distinguish Mr. Metzger's situation from that of the putative father in John M. We pointed out that Mr. Metzger had not intruded into a marriage when he engaged in sexual relations with Mrs. Walters, whereas John M. had an adulterous affair.

Although the Supreme Court's statement that the presumption applies to

children conceived outside a marriage might have been based on a misconception, that does not give this court license to disregard the holding.[14] We also note that the leading opinion in Brinkley included the very strong language that "the presumption is irrebuttable when a third party seeks to assert his paternity against the husband in an intact marriage." Id. at 179.

Finally, we realize that the child in Martin was conceived outside the marriage at issue, and the court did not appear to place much significance on that fact. However, we note that in Martin the presumption was inapplicable already because there was no intact marriage. It is possible that if the marriage was intact the court would have discussed that fact and possibly considered it important.

Despite all of the confusion and ambiguity of the appellate cases, this court nonetheless believes we are bound to apply the presumption in this case and we will do so. Saddled with the presumption, Mr. Metzger cannot prevail at trial, for it can only be rebutted through evidence that Mr. Walters was incapable of procreation or that he did not have access to Mrs. Walters during the period of Jabe's conception. Because Mr. Metzger can produce no such evidence, the court reluctantly grants summary judgment for Mr. and Mrs. Walters. However, we hope the appellate courts will not only reverse this decision but will use this case as an opportunity to replace the presumption with an approach more compatible with our times. At the very least, the Supreme Court needs to clarify the current law on the presumption in Pennsylvania.

We have already discussed why the compelling facts of this case lead to the

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[14] However, it is all the more reason for the Supreme Court to revisit the issue.

conclusion the blood tests should be admitted. For the remainder of this opinion the court will take the opportunity to explain why we believe that both the presumption and the doctrine of paternity by estoppel should be eliminated and replaced with a flexible approach allowing trial courts to balance a variety of factors to reach an appropriate decision under the facts of each case.

II. The Presumption of Paternity: An Idea Whose Time Has Come and Gone

Legal presumptions are barriers to the truth-determining process our legal system is meant to facilitate. They burden one party and benefit another, automatically and indiscriminately doling out major advantages and disadvantages that can swiftly put one party out of court. They turn a blind eye to the particular facts of each case, applying a prejudice completely at odds with a basic principle of our legal system: that everyone is equal under the eyes of the law. Presumptions are created and tolerated, however, because they embody certain policies our society considers important enough to unbalance the scales of justice and give one side a decided advantage. However, because of their power to shackle one party in the controversy they must be used only with the utmost caution, and only when they truly serve the purpose for which they were created. As soon as they lose their usefulness they should be abandoned. Otherwise, they grow into monsters and turn against their creator.

Such is the case with the presumption of paternity and the doctrine of paternity by estoppel. Once, both of these legal fictions served a legitimate purpose. In times past when divorce was uncommon, adultery was scandalous, scientific proof of paternity was impossible, and illegitimacy brought unsurmountable social and legal

stigma, these doctrines were the product of an enlightened society. Now, however, they are the mark of a legal system mired in the past, refusing to recognize the dramatic changes that have taken place. Acknowledging these changes does not mean we like them–only that we have the courage to face the forces altering our world and adjust our legal system accordingly. Otherwise, the very same presumptions that once made perfect sense and benefitted society become ridiculous and unjust.

Admirably, the Pennsylvania Supreme Court has recognized that the presumption of paternity should not be blindly applied in cases where there is no existing intact family to protect. What it has failed to realize, however, is that there are also other situations where the presumption should not be applied. The court has merely created one exception to the presumption of paternity. The presumption itself remains alive and well, as does the doctrine of paternity by estoppel, which the Supreme Court did not alter at all.

In limiting the sole focus of the presumption to whether the family is intact, our Supreme Court merely exchanged one blindfold for another. It is high time to follow the lead of many other states and remove the blinders altogether. It is time to permit trial courts to view, without obstruction, all aspects of a case to bring about a just result in each instance. Following are some of the reasons why this step is necessary.

The presumption against paternity and the doctrine of paternity by estoppel no longer serve to protect the marital bond in every case. In the past, permitting a married woman's virtue to be attacked in a paternity proceeding could bring unspeakable shame to a family and embarrassment to the husband. It was therefore justifiable to accord less weight to the rights of a third party man or to assume that the

husband would rather support the child of another man than to go through paternity proceedings. Unfortunately, adultery has now lost much of its stigma.

Similarly, in the past allowing an outsider to claim rights to a child born within a marriage inevitably meant disruption to the marriage. In these days of divorce and blended families, however, it has become all too common for children to live with one parent while maintaining a relationship with another. Families survive–and even thrive–in spite of the inconvenience.

Ironically, in some cases a family may actually be disrupted *by the application* of the presumption of paternity or paternity by estoppel. As the Superior Court pointed out in Green, "[O]nce a man attempts to refute his paternity and is met with the presumption, we delude ourselves if we believe clinging to the fiction can preserve the marriage." Green, supra, at 65. Justice Nigro echoes this sentiment, suggesting that "forcing a cuckolded husband, because of the presumption, to care for a child he knows is not his" could create "a situation which would strain both the marriage *and* the husband's relationship with the child." Brinkley, supra, at 182 (Nigro, J., concurring and dissenting.)

In some instances the very prospect of these two doctrines could cause families to split apart, as Judge Popovich points out in his Amrhein dissent: "[A]pplication of the presumption of paternity to a 'presumptive' father who suspects that his pregnant wife is not carrying his child might, at least, encourage him to separate before the child is born, so that later, upon the child's birth, he is not precluded by the application of a legal fiction from contesting paternity, thereby obligating him to support a child not of his own blood." Amrhein, supra, at 415-16 (Popovich, J., dissenting). The new approach announced in Brinkley, which focuses

solely on whether an intact family exists, only makes more attractive the option of leaving the marriage.

Societal changes have not only altered the effects of the two legal doctrines on the family, but they have also altered the impact on the individuals who comprise the family. With time, the doctrines have become more and more unfair to men, women, and children. Ironically, in a day when it is easy to obtain reliable blood tests and determine the truth, it has become more difficult than ever to rebut the presumption that keeps out this evidence. Traditionally, the presumption of paternity could only be overcome by clear and convincing evidence of a husband's inability to procreate or non-access, which was defined as no possibility of any contact whatsoever with the wife because of a vast distance that separated them. Judge Cirillo, writing for the Superior Court in Miscovich v. Miscovich, 455 Pa. Super. 437, 688 A.2d 726, 730 (1997) explains: "Advancements in technology, in all its forms, medicine to air travel, have muddled clear and convincing rebuttal, altering the substance of the presumption. The level of difficulty of rebuttal is raised, purely by advancements in technology, and the legislature and our courts must make necessary adjustments in the law." Responding to this problem, Justice Newman has suggested expanding the methods of rebutting the presumption to include the use of blood tests. Brinkley, supra., at 184-90. This approach would allow Mr. Metzger an opportunity to prevail at trial and would give this court the ability to deny the motions for summary judgment currently before us. However, while Justice Newman's approach is certainly an improvement, it does not go far enough because it preserves both the presumption of paternity and the doctrine of paternity by estoppel.

As long as these two doctrines remain, wives who commit adultery in secrecy

can easily trap their husbands into supporting another man's child–perhaps without ever knowing it. Just as regrettable, they deprive men of the opportunity to gain legal rights to their children. Although the United States Supreme Court has upheld a statute prohibiting a putative father from challenging a husband's paternity, Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), some state courts have found that such statutes violate their state constitutions and other states have expanded rights of putative fathers by statute.[15] Justice Newman suggests Pennsylvania has incorrectly balanced the competing rights of individuals involved in paternity disputes. In her Brinkley concurrence and dissent she states that denying a putative father the opportunity to challenge the husband's paternity and establish his own biological parentage essentially terminates his parental rights without due course of law. She writes, "I find that a parent or child's interests in determining paternity outweigh the Commonwealth's unavailing interest in preserving intact marriages . . . ."

One final negative effect the two doctrines have on the people involved is permitting–even encouraging–men to escape responsibility for the children they create. Men who have affairs with married women are free to act like cowbirds, which build no nests of their own. Instead, they deposit their eggs in the nests of other birds to be hatched and raised. In this day of concerted effort to hold men financially accountable for the consequences of their sexual activity, it is inexplicable that we still permit them to escape their responsibilities by hiding behind the myth they are not the fathers of the children they created.

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[15] See Justice Newman's discussion in Brinkley, supra, at 187.

The two doctrines also may encourage women to commit adultery, for they protect secret excursions from the marriage from ever being proven. In this day of common marital infidelity–which has even received a stamp of approval from the leaders of our nation–appears acceptable even to our nation's leaders–we would be well advised to ensure that women are not rewarded for committing adultery and that they, like the men, are forced to take responsibility for the consequences of their sexual activity.

The doctrines can also negatively affect the children they are designed to protect. Advances in medicine have revealed how valuable it can be to know one's genetic background. Additionally, many individuals develop a strong-rooted desire to know their biological parents, which if left unsatisfied haunts them for their entire lives. Moreover, in many cases a child will benefit immensely from knowing his or her birth parent, as this court believes is the case with Jabe and Mr. Walters.

In the past, it was highly difficult to prove paternity. It was therefore a reasonable goal to avoid paternity disputes by applying the two doctrines. However, science has now provided a highly reliable method of determining paternity. It now makes little sense to cling to the fiction that the husband is the father of every child born to his wife when we can scientifically establish the identity of the biological father. It is especially absurd in situations where the husband is eager to submit to the test or where, like the one currently before this court, the blood tests have already been taken. In such situations the trial court is placed in the ridiculous position of refusing to consider the most reliable evidence of paternity possible. Pennsylvania is one of a minority of states still prohibiting the use of blood tests to rebut the

presumption.[16] Utah, in fact, requires blood tests in any case where paternity is an issue and the results may conclusively rebut the presumption of paternity.[17]

This is not to say that courts should *never* prevent a third party man from asserting paternity or should *never* prevent a husband who has raised a child from denying paternity. On the contrary, sometimes such decisions are completely appropriate–but not always. And that is the point. Each case needs to be evaluated on its own facts. In determining paternity, trial courts should have the freedom to explore and consider all the factors in each instance: the competing interests of the putative and presumptive fathers, the state of the family, the welfare of the child, and the impact on society. This flexible approach was advocated by Judge Cirillo, writing for a Superior Court panel in Miscovich, supra, at 730-731. It was also suggested by Mr. Justice Nigro in his Brinkley concurrence and dissent:

> I believe that the better course of action in these cases is to allow the trial court to determine paternity on a case-by-case basis, unburdened by the obligatory application of a presumption or an estoppel theory. . . . The benefit of this approach is of course that the trial court is not precluded from considering test results representing, in essence, conclusive evidence of paternity, but is free to acknowledge the evidence, along with such concerns as the maintenance of an existing family unit, if any, and the promotion of the interests of the child, in the course of arriving at an equitable result.

Brinkley, supra, at 182. Justice Nigro further suggests that the "good cause" requirement

provides a workable standard for compelling blood tests. Judges Cirillo and

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[16] Although 23 Pa.C.S. § 5104 permits blood tests to overcome the presumption, Pennsylvania courts have refused to order them or allow them to be introduced unless the presumption is first rebutted through evidence of the husband's inability to procreate or non-access to his wife during the period of conception.

[17] See Justice Newman's discussion of other states' approaches in her Brinkley concurrence and dissent.

Musmanno applauded this approach in Martin, supra, at 64 n. 2, as did Judge Popovich in his Amrhein dissent.

In conclusion, it is time to remove our blinders and view the world as it is–not as we would like it to be. The changes that have taken place around us can no longer be denied. The law must change too. Clinging to outdated views will only cause injustice. The presumption of paternity and the doctrine of paternity by estoppel no longer belong in our legal system and should be discarded like worn out coats. Pennsylvania should join the majority of states that allow blood tests to prove and disprove paternity. By refusing to consider this highly reliable scientific evidence, we stubbornly choose to remain blinded to reality. As the old adage warns, there are none so blind as those who will not see.

O R D E R

AND NOW, this _____ day of March, 1999, the court finds that the presumption of paternity applies in this case. Mr. Metzger has admitted he has no evidence that Mr. Walters was incapable of procreation or that Mr. Walters had no access to Mrs. Walters during the period of Jabe's conception. Therefore, the motions for summary judgment filed by LeRoy L. Walters and Joan M. Day Walters are granted and the Petition to Establish Paternity is dismissed.

The court finds that the doctrine of paternity by estoppel is not applicable in this case; therefore, insofar as either motion for summary judgment relates to that doctrine, the motion is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
Janice Yaw, Esq.
David Irwin, Esq.
John Youngman, Jr., Esq.
Patricia Bowman, Esq.
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