GETTYSBURG NURSING HOME ASSOCIATES v. CROFT, C.P. Franklin County Branch, No. A.D. 1982-112

Assumpsit - Failure to plead within required time - Non-resident attorney - Pa. R.C.P. 126.

1. Where a plaintiff fails to file a response to new matter within twenty days of service because his attorney resides out of county, the Court may disregard such an error in procedure where the other party is not prejudiced.

2. A non-residence attorney practicing in Franklin County is subject to the same standards of practice as though he lived in the county.

Dennis M. Dunn, Esq., Attorney for Plaintiff
John M. Keller, Esq., Attorney for Defendant, E. Ray Croft
Robert C. Schollaert, Esq., Attorney for Defendant, Florence I. Croft

MEMORANDUM AND ORDER

EPPINGER, P.J., November 5, 1982:

On July 18, 1982, E. Ray Croft filed an answer containing new matter in these proceedings. Gettysburg Nursing Home Associates (Gettysburg) was given notice to plead to the new matter within twenty (20) days. The affidavit of service filed by E. Ray Croft's (Croft) attorney indicates that the new matter was served upon Gettysburg's attorney on July 22, 1982. Gettysburg's reply to the new matter was filed on August 23, 1982 at 10:29 A.M. twelve (12) days after the time directed in the notice to plead.

On the same day at 11:58 A.M. Croft filed a petition for a rule to show cause why judgment should not be entered against Gettysburg for failing to file the reply to new matter within twenty days. An answer to the rule issued pursuant to Croft's petition was filed. No evidence was taken and the matter was submitted to the Court on brief by counsel for the parties.

Croft does not contend that he has been prejudiced by the late filing, but relies on Gettysburg's failure to comply with the notice to plead within twenty days. Gettysburg's attorney gives as his reason for failing to file the pleading on time the fact that he resides in Delaware County. Our comment is that a non-resident attorney practicing in Franklin County is subject to the same standards for practice as though he lived in the county and if the distance between his home and Franklin County makes it impossible for him to do the work timely, then he should refuse the retainer.

However, Pa. R.C.P. 126 permits us to disregard any error in procedure which does not affect the substantial rights of the parties. This is just such a case. Croft has not been harmed by the late pleading, which was filed before his petition attacking the late filing.

ORDER OF COURT

November 5, 1982, E. Ray Croft's petition to enter judgment against Gettysburg Nursing Home Associates for failing to file a reply within twenty (20) days is denied.

VOSS v. VOSS, C.P. Franklin County, Branch, No. F. R. 1979-285-S
Support - Paternity - Statute of Limitations - Presumption of Legitimacy

1. The repeal of the criminal statute of limitations for support did not extinguish the civil right to support but only the ancillary criminal enforcement remedy.

2. The Pennsylvania Statute of Limitations for support actions is not violative of the Equal Protection Clause.

3. The presumption of legitimacy of a child born during marriage is not irrefutable.

4. Evidence of non-access, lack of sexual intercourse or impotency must be clear, direct, convincing and unanswerable, although it is not necessary that the possibility of access be completely excluded.

David W. Rahauser, Esq., Assistant District Attorney, Counsel for Plaintiff
Kenneth E. Hankins, Jr., Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., November 12, 1982:

This action was commenced on August 3, 1982, when Dolly Voss, plaintiff, filed a complaint for support against Herman K. Voss in Adams County. Plaintiff sought an order of support for

herself and her two children, Sherry Voss born February 5, 1975, and Todd Voss born December 10, 1971. On August 5, 1982, Judge Oscar F. Spicer of the Adams County Court of Common Pleas certified the action to Franklin County where the defendant presently resides. Mr. Voss appeared on August 27, 1982, before Robert J. Woods, Domestic Relations Hearing Officer for Franklin Count, and denied paternity of both children. Accordingly, a non-jury trial was held on September 16, 1982 to determine the issue of paternity.

The evidence presented at trial revealed that the parties were not married at the time of Todd's birth in 1971. Mrs. Voss testified that she had sexual relatons with no one other than the defendant from the time of her last menstrual cycle until her pregnancy with Todd was confirmed. Both before and after Todd's birth, Mrs. Voss stayed with Mr. Voss' parents for some time in 1971 and 1972 while Mr. Voss was in the service. Defendant periodically sent money home to his mother, who often gave some of the money to the plaintiff. According to plaintiff's testimony, defendant acknowledged to her that he was Todd's father.

Mr. Voss left for Korea in July of 1973. He returned to the states in January of 1974 for medical reasons and he and plaintiff were married on January 28, 1974, at the Washington County Courthouse in Hagerstown, Maryland. He returned to active duty in Korea on February 3, 1974.

Defendant returned to the United States on July 8, 1974, when he flew into the Oakland Army Base in California. He testified that he came to Pennsylvania on July 9 and saw his wife for the first time since leaving in February. Defendant and lived together as a family with Todd after Mr. Voss' return to Pennsylvania.

Sherry was born Februray 5, 1975, and was brought home from the hospital by plaintiff "under certain conditions," as testified to by Mr. Voss. He stated that he knew Sherry was not his child but he permitted his wife to bring her home to their marital residence providing that she would be totally responsible for keeping Sherry. He told his wife that he would not support another man's child.

Although the parties testified to various separations that occurred between them, the parties along with Todd and Sherry essentially lived together as a family unit until June 4, 1982. Plaintiff testified to many things defendant did that are normally asociated with being a father. He worked and provided for the

RESOLUTION OF
FRANKLIN COUNTY BAR ASSOCIATION
UPON THE DEATH OF ROBERT P. SHOEMAKER

WHEREAS, Robert P. Shoemaker, a member of this Association, died on December 6, 1982, at the age of 60.

WHEREAS, Bob was born in Rahway, NJ on July 1, 1922. He graduated from Waynesboro High School in 1940, and immediately attended Franklin and Marshall College from 1940 to 1943, at which time his education was interrupted by his service with the United States Army for the duration of World War II. He served in the Intelligence Corps in Sicily, Italy and North Africa. He returned to Franklin and Marshall College after his discharge in September of 1945, and graduated in 1946.

He then attended the University of Pennsylvania School of Law and graduated with his L.L.B. in April of 1948, at which time he returned to Waynesboro and opened his law office, and remained a sole practitioner until his death.

Bob was a man of facts, unbiased. He looked at all issues, all sides, before drawing a conclusion and giving an opinion.

He was a fair man, who loathed bigotry, was unbiased toward his fellow man, and unselfish in his time and labor for his clients.

The Franklin County Bar Association keenly feels the loss it has suffered and desires to preserve a record thereof, and thus bear testimony to the esteem in which he was held.

THEREFORE, BE IT RESOLVED, that the Franklin County Bar Association, in special meeting, assembled this 10th day of December, 1982, records an expression of its high regards for Robert P. Shoemaker, and for his service to his profession and his community and to express its deep sense of loss, as he will be sorely missed and deeply mourned by his family, friends, associates and clients.

IT IS FURTHER RESOLVED, that this Resolution be spread upon the minutes of the meeting and a copy delivered to his family.

December 10, 1982

E. Franklin Martin
Leroy S. Maxwell
Blake E. Martin

children, purchased clothing for them, disciplined them and played with the children in the normal fashion of a father.

After the June, 1982 separation, Mrs. Voss testified that she reeived a number of checks from Mr. Voss which were marked for the support of Todd. She has not received any support for Sherry since leaving the marital home with the children.

Mr. Voss first raises the defense of the statute of limitations as to the first child, Todd, who was born out of wedlock. The controlling statute is 42 Pa. C.S.A. Sec. 6704(e) which provides:

> "All actions to establish the paternity of a child born out wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father."

While it is true that plaintiff commenced this action well after the sixth birthday of Todd, obviously this does not bar her action, for the factual situation fits under the statutory exception of the reputed father who voluntarily contributes to the support of the child, thus justifying commencement within two years of such contribution.

The fact that no criminal proceeding was initiated by the plaintiff against the defendant is clearly of no consequence. In *Williams v. Wolfe,* Pa. , 443 A. 2d 831 (1982), the Supreme Court of Pennsylvania held that the repeal of the criminal statute of limitations never extinguished the civil right to support but only the ancillary criminal enforcement remedy. Moreover, an action commenced after the effective date of 42 Pa. C.S.A. Sec. 6704 is not barred by the running of 18 Pa. C.S.A. Sec. 4323(b), the criminal statute of limitations which was repealed in 1978. See also *Commonwealth ex rel. Johnson v. King,* Pa. Super. , 444 A. 2d 108 (1980).

The preponderance of the evidence presented at trial clearly established that defendant supported Todd with shelter, food and clothing to the time of the parties' separation in June of 1982. There also was credible evidence of voluntary payments made by him for the support of Todd after the separation. Therefore, plaintiff's complaint for support is indeed timely since it was filed within two years of the many contributions made by Mr. Voss for Todd's support.

Defense counsel also raises an equal protection argument challenging the constitutionality of 42 Pa. C.S.A. Sec. 6704(e). The Honorable George C. Eppinger, P.J. of this court, addressed that same specific issue in the cases of *Thomas v. Blizzard,* No. F.R. 1982-403S, and *Jones v. Smith,* No. F.R. 1982-300S, filed concurrently on October 29, 1982, and concluded that the statute of limitations for commencing actions to establish the paternity of children born out of wedlock is constitutional and not violative of the Equal Protection Clause of the U.S. Constitution. We concur in that decision and the rationale upon which it is predicated.

Parenthetically, we are constrained to observe that if Section 6704(e) were unconstitutional it would hardly enhance the legal posture of the defendant, for such a determination would foreclose any possibility of ever asserting the statute of limitations as a defense. In *Reachard v. Reachard,* 22 D&C 3d 288 (York Co. 1981), Judge Cassimates found the statute unconstitutional and ordered the defendant to file an answer or be deemed to have admitted paternity.

Defendant asserts as a second defense to plaintiff's claim for support a denial of paternity as to both children. Since the statute of limitations defense is without merit, we now address this alternative defense. As discussed above, with respect to Todd, the evidence presented by plaintiff was more than adequate to establish paternity. Mrs. Voss testified that she did not have sexual relations with anyone other than defendant from the time of her last menstrual cycle until her pregnancy with Todd was confirmed. After the child's birth, mother and child lived with the parents of defendant for some time while defendant was in the service. After the parties' marriage, Mr. Voss provided for Todd financially and participated in many activities with Todd which evidenced a typical father-son relationship. Both plaintiff and her sister-in-law testified that defendant's interest in Todd has continued despite the June 1982 separation of the parties. All of this evidence was not credibly rebutted by defendant or other witnesses who testified on his behalf. For all of these reasons, we find that plaintiff indeed established by a preponderance of the evidence that Herman Karl Voss is the natural father of Todd.

Plaintiff's claim for support of Sherry is clothed in the longstanding presumption of legitimacy for children born during marriage. As stated in *Commonwealth ex rel. O'Brien v. O'Brien,* 390 Pa. 551, 136 A. 2d 451 (1958) at page 555:

> "In actions brought by a wife against a husband for support of a minor child born during wedlock, paternity has already

BAR NEWS ITEM

CARLISLE—A one-day seminar on "Increasing Law Office Productivity (and Profits) Through Use of the New Computer Technology" will be held for lawyers and office managers in small and medium-sized law firms on January 22 at The Dickinson School of Law.

Compete registration information is available from the Continuing Legal Education Office at The Dickinson School of Law. Telephone: (717) 243-5529.

NOTICE OF ADVERTISING RATE CHANGES

To all Prospective Legal Notice Advertisers, and the General Public:

At special meeting of the Board of Directors of Franklin County Legal Journal, held on November 29, 1982, the Board accepted and adopted the recommendation of its Budget Committee, that certain of the legal notice advertising rates be increased for the near future, subject to later review by the Board.

The rates affected, and the changes made are as follows:

Fictitious Name Notices, from $14.25 per ad to $15.00 per ad, an increase of 75¢ per ad;
Advertisement of Grant of Letters in Decedents' Estates, from $19.00 per ad to $21.00 per ad, an increase of $2.00 per ad;
Other notices which are charged by the line, from 45¢ per line per insertion, to 50¢ per line per insertion, an increase of 5¢ per line per insertion.

All other advertising rates remain unchanged.

The above rate changes will become effective commencing with January of 1983, and will be applied to any and all notices within the prescribed classes which are published with the issue of the advance sheets of January 7, 1983 or thereafter.

DEBORAH K. HOFF,Esq., Secretary

12-10, 12-24, 12-31

been established in the eyes of the law by operation of the presumption of legitimacy of children born during wedlock."

This presumption, however, is not irrefutable and stands only until met with evidence which makes it clearly apparent that the husband was not the father of the child. *R.J.K. v. B.L.,* 279 Pa. Super. 71, 420 A. 2d 749 (1980). To successfully rebut the presumption of legitimacy, evidence of non-access or lack of sexual intercourse or impotency must be clear, direct, convincing and unanswerable although it is not necessary that the possibility of access be completely excluded. Evidence is held to be sufficient for rebutting the presumption only if it is of overwhelming weight. *Commonwealth ex rel. Ermel v. Ermel,* 259 Pa. Super. 219, 393 A. 2d 796 (1978). Either parent may testify as to non-access even though the effect of such testimony may be to bastardize the child. *Savruk v. Derby,* 235 Pa. 560, 344 A. 2d 624 (1975).

The defendant testified that after the parties were married in late January of 1974 and he returned to active duty on February 3, 1974, he had no sexual relations with his wife until July 9, 1974. During that period of time Mr. Voss was out of the country. The plaintiff essentially agreed with her husband's accounting of the dates which were also supported by military documents. Sherry was born 212 days after Mr. Voss' return to Pennsylvania. No evidence whatsoever was introduced by plaintiff to suggest that the birth was a premature one.

The often-cited case of *Commonwealth v. Young,* 163 Pa. Super. 279 60 A. 2d 831 (1948), discusses the length of gestation. According to the medical authorities consulted at that time, the normal duration of pregnancy in the human female is 280 days on the average. However, the period of gestation may be as short as 240 days or extend to 300 days or longer. At page 832 of the *Young* opinion, the Court recognized that a pregnancy may even be protracted to 334 days after coitus or 344 days after the menses.

While there are paternity cases which recognize an extension of the normal gestation period, very few recognize the possibility of a shortened gestation time period. In the case of *Commonwealth v. Boggio,* 204 Pa. Super. 434, 205 A. 2d 694 (1964), the Court held that the defendant was the father of a child born just 232 days after the day of alleged impregnation. However, there was also evidence presented in that case showing that the defendant had engaged in sexual relations with the plaintiff during the months preceding the named date and for the reason, the court refused to rule out the possibility of paternity merely because the child was born only 232 days after coitus.

The facts of the *Boggio* case and, therefore, the holding are inapposite to the present case. In the instant matter, since defendant was unquestionably out of the country for five months, he was successfully demonstrated to this Court that his access to plaintiff was for only a 212-day period preceding the birth of Sherry. Furthermore, no evidence was presented to suggest that plaintiff's pregnancy with Sherry was anything but a normal nine-month one. Coupled with the testimony concerning the special arrangement for plaintiff bringing Sherry to the marital home and the fact that defendant has only written checks for Todd's support since the June 1982 separation of the parties, we conclude that the defendant has successfully rebutted the presumption of paternity and is not the natural father of Sherry Voss, born February 5, 1975.

ORDER OF COURT

NOW, this 12th day of November, 1982, the complaint of Dolly Voss against Herman K. Voss, Jr. for:

1. Support of Todd Voss born December 10, 1971 is sustained, the paternity of the defendant having been established.

2. Support of Sherry Voss born February 5, 1975 is dismissed, the paternity of the defendant not having been established.

The Domestic Relations Division of this Court is directed to schedule a hearing to determine the support to be paid by the defendant for his son, Todd Voss.

Costs to be paid by the defendant.

Exceptions are granted the plaintiff and defendant.