in the various counts in these proceedings are denied. It is ordered that the costs be paid by the plaintiffs.

THOMAS v. BLIZZARD, and JONES v. SMITH, C.P. Franklin County, Branch, No. F.R. 1982-403-S; No. F.R. 1982-300-S

Paternity - Statute of Limitation - Equal Protection - Blood Tests

1. A six-year statute of limitations on paternity suits for children born out of wedlock does not violate the Equal Protection Clause of the U.S. Constitution.

2. The state has a legitimate interest in preventing prosecution of stale or fraudulent claims and the problems of proof in paternity suits allows for greater restrictions on these suits.

3. Blood tests do not prove paternity and do not negate the state's interest in avoiding stale or fraudulent claims.

John R. Walker, District Attorney, *Attorney for Plaintiffs*

E. Franklin Martin, Esq., *Attorney for Defendant, Charles D. Blizzard*

William F. Kaminski, Esq., *Attorney for Defendant, Michael T. Smith*

OPINION AND ORDER

EPPINGER, P.J., October 29, 1982:

These cases in which each defendant denied responsibility for the support of children born out of wedlock because the six year statute of limitations had run before the actions for support were filed were consolidated for argument.

In *Thomas v. Blizzard* the plaintiff gave birth to two children, one on February 21, 1966 and the other on December 2, 1972. Defendant denies that he is the father of either but did pay support for the first child in 1967. The complaint was filed June 7, 1982.

In *Jones v. Smith* the plaintiff gave birth to a child on September 10, 1975. Defendant denies paternity and has never paid support. The complaint was filed April 10, 1982.

All actions to establish the paternity of a child born out of wedlock must be commenced within six years of the child's birth. If the father has voluntarily contributed to the support

of the child, or acknowledged paternity in writing an action may be commenced at any time within two years of such contribution or the acknowledgement of paternity. 42 Pa. C.S.A. Sect. 6704(e). The exceptions do not apply in this case.

Plaintiffs contend that the six-year statute of limitations violates the Equal Protection Clause of the United States Constitution when it limits children's right to support if they are born out of wedlock and there is no such limit when the action is brought on behalf of children born of a marriage.

Plaintiffs rely on *Williams v. Wolfe*, Pa. Super , 443 A.2d 831 (1982). In that case, when the child was born, the defendant would have been subject to a criminal fornication bastardy charge for which there was a two-year statute of limitations. The Court held that the defendant was not protected by the two-year criminal statute and that an action could be brought under the civil statute with its six-year limitation period. The rationale was that the civil action was not barred because the repeal of the criminal statute of limitations never extinguished the civil right to support but only the ancillary criminal enforcement remedy.[1]

However, the opinion of the Court in *Williams* does not deal with the issue raised here. A concurring opinion by Judge Brosky does and points to other jurisdictions that have found that a limitation on the right to support for children born out of wedlock violates the Equal Protection Clause of the Constitution. He says: "To subject a child born out of wedlock to a limitations period, however reasonable, is to limit the child's unqualified right to receive support from his father." *Id.* at 836. The Judge recognizes, however, that this matter is for the attention of the Legislature, not for the Courts. *Id.*

In *Mills v. Habluetzel*, U.S. , 71 L. Ed 770, 102 S. Ct. (1982) the Court held that a Texas one-year limitation period for bringing paternity actions where children were born out of wedlock was unconstitutionally short. The Court indicated that a state which grants child support opportunities for legitimate children must also grant those opportunities to illegitimate children and the latter must be more than illusory, although not coterminous with the procedures accorded legitimate children.

The Court pointed out that paternal support suits brought on behalf of children born out of wedlock contain an element not present where the children are born to couples that are

married: proof of paternity. The Court reasoned that since the state has a legitimate interest in preventing the prosecution of stale or fraudulent claims and the problems of proof associated with the claims in these kinds of suits, the state may impose greater restrictions than where the child is born in wedlock. These greater restrictions take the form of a time limit within which support for a child born out of wedlock must be asserted or lost.

The United States Supreme Court considered and rejected the argument that since blood testing is more accurate than it has been in the past, its existence negates the state's interest in avoid the prosecution of stale or fraudulent claims. Blood tests do not prove paternity, they merely prove nonpaternity. The fact that a certain male is not excluded by these tests does not prove that he is the child's father, but only that he is a member of a limited class of possible fathers. [The evidentiary weight to be accorded to newer tests which claims to be able to not only prove nonpaternity but also to prove paternity with a high degree of probability is still a matter of academic dispute.]

Once a father has undergone the blood tests and is not eliminated from the group of possible fathers, he must turn to more conventional forms of proof. It is with respect to these that the state has a legitimate interest in preventing the prosecution of stale or fraudulent claims. A statute of limitations which is sufficiently long so that a real threat of loss or diminution of evidence, or increased vulnerability to fraudulent claims are present is justified.

In our view the Pennsylvania six-year statute of limitations gives sufficient time for the claim to be asserted, is related to the legitimate state interest and does not deny children born out of wedlock equal protection of the law as provided in the Fourteenth Amendment of the United States Constitition.

There are factors, as recognized in the *Mills* case, that encumber the mother's filing a paternity suit. These include financial difficulties caused by birth related loss of income, a continuing affection for the child's father, a desire to avoid disapproval of family and community or emotional strain and confusion that accompanies the birth of the child. We believe that before six years has passed, these problems have either lessened or been eliminated altogether and that, therefore, the statute is reasonable and constitutional. In a footnote, the

SHERIFF'S SALES, cont.

After the above adversed conveyance, the tract herein described fronts 165 feet, more or less, on the east side of Oller Avenue with a depth along the alley to the north of 140 feet to the alley in the rear and with a depth on the south of 97.6 feet, more or less.

Subject to all restrictions, reservations, covenants, conditions and easements, if any, effecting the same.

Being the same real estate conveyed to Terry D. Stevens and Doris J. Stevens, husband and wife, by deed of Carmer H. Barkdoll and Vivian R. Barkdoll, husband and wife, dated March 31, 1978 and recorded in Franklin County Deed Book 756, Page 588.

Together with all improvements existing thereon on March 31, 1978 or thereafter together with appurtenances thereto including but not limited to fixtures, machinery and equipment which on March 31, 1978 or thereafter were located on the above referred to real estate and which were permanently used as a necessary and intricate part of the flower and greenhouse business operated on the above referred to real estate.

BEING sold as the property of Terry D. Stevens and Doris J. Stevens, Writ No. DSB 1982-187.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 20, 1982 at 4:00 P.M. E.S.T. Otherwise, all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

Mills court noted statutes of limitation find their justification in convenience and necessity rather than in logic and are by definition arbitrary and so are left to legislative determination and control. *Id.* at 779, note 9.

ORDER OF COURT

October 29, 1982, it is ordered that the cases are dismissed as barred by the statute of limitations and that the costs be paid by the plaintiffs.

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[1]The opinion includes an excellent recitation of the evolution of the criminal and civil statutes of limitations in child support cases.

CRESSLER v. GENESCO, INC., C.P. Franklin County Branch, Vol. 7, Page 290

Equity - Easement by Implication - Termination by Non-Use-Notice of Easement - Width of Easement

1. Where a street is named as a boundary in a deed, and the street is neither a public highway nor dedicated to public use, the grantee of such real estate acquires an easement by implication.

2. A street named as a boundary does not have to be in existence at the time of a conveyance in order to create an easement by implication.

3. Non-use of an easement, no matter for what duration of time, will not extinguish an easement.

4. A grantee takes subject to an easement where the prior deed creating the easement was recorded and it is immaterial whether the grantees' own deed refers to the easement.

5. To determine the width of an easement of unspecified width, the Court must consider that the easement should be of such width as would be suitable and convenient for its reasonable use.