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JUNE 3, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF S.L.W.
In the Interest of S.L.W., a minor child)
By her Natural Guardian, A.W.,)
State of North Dakota, By and Through)
Barnes County Social Services Board and)
A.W.)
Plaintiff and Appellee,)
)
vs.)
A.K.,)
Defendant and Appellant.)

Supreme Court No. 20100006

Barnes County No. 07-R-00052

APPEAL FROM ORDER GRANTING GENETIC TESTING
BEFORE THE DISTRICT COURT,
BARNES COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JOHN T. PAULSON, PRESIDING
DATED NOVEMBER 30, 2008 AND
APPEAL FROM ORDER OF PATERNITY
BEFORE THE DISTRICT COURT,
BARNES COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JOHN T. PAULSON, PRESIDING
DATED NOVEMBER 4, 2009 AND
APPEAL FROM JUDGMENT AND DECREE
BEFORE THE DISTRICT COURT,
BARNES COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JOHN T. PAULSON, PRESIDING
DATED FEBRUARY 18, 2010

BRIEF OF THE STATE OF NORTH DAKOTA

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Statement of the Issues

[¶1] 1. Whether The District Court Erred By Ordering Genetic Testing.

[¶2] 2. Whether The Paternity Case Should Be Dismissed Based Upon The Statute of Limitations, Equitable Estoppel And/Or Laches.

[¶3] 3. What Is The Effective Date When Child Support Shall Be Ordered.

Statement of the Case

[¶4] The State of North Dakota accepts the Appellant's Statement of the Case.

Statement of Facts

[¶5] The State of North Dakota accepts the Appellant's Statement of Facts, except that the State objects to the last three sentences of the Appellant's Statement of Facts. These are irrelevant to this action.

Jurisdictional Statement

[¶6] The State of North Dakota accepts the Appellant's jurisdictional statement.

Standard of Review

[¶7] Issues involving the application and interpretation of statutes are questions of law fully reviewable by this Court. Rydberg v. Rydberg, 2004 ND 73, ¶10, 678 N.W.2d 534 *citing* Guardianship of Shatzka, 2003 ND 147, ¶5, 669 N.W.2d 295 (*quoting* Public Serv. Comm'n v. Wimbledon Grain Company, 2003 ND 104, ¶20, 663 N.W.2d 186). In construing a statute, we consider the entire enactment of which it is a part and, to the extent possible, interpret the provision consistent with

the intent and purpose of the entire Act. In the Interest of M.Z., 472 N.W.2d 222, 223 (N.D. 1991) *citing* Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585 (N.D. 1986).

[¶8] In determining legislative intent, the court may consider such matters as the objects sought to be obtained, the statute's connection to other related statutes, and the consequences of a particular construction. State v. Moen, 441 N.W.2d 643, 644 (N.D. 1989). Statutes must be construed logically so as not to produce an absurd result. Fireman's Fund Mortgage Corporation v. Smith, 436 N.W.2d 246, 247 (N.D. 1989).

[¶9] Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review. Fleck v. Fleck, 2010 ND 24, ¶13, 778 N.W.2d 572, *citing* Verhey v. McKenzie, 2009 ND 35, ¶5, 763 N.W.2d 113 (quoting Buchholz v Buchholz, 1999 ND 36, ¶11, 590 N.W.2d 215). A court errs as a matter of law if it does not comply with the requirements of the child support guidelines. Doepke v. Doepke, 2009 ND 10, ¶6, 760 N.W.2d 131 *citing* Torgerson v. Torgerson, 2003 ND 150, ¶6, 669 N.W.2d 98.

LAW AND ARGUMENT

[¶10] 1. The District Court Correctly Ordered Genetic Testing.

[¶11] On May 1, 2007, the Jamestown Regional Unit, [the Unit], a division of the North Dakota Child Support Enforcement Agency, commenced a paternity action under N.D.C.C. Chapter 14-20 seeking a judgment declaring the Defendant, A.K. [Biological Father] the father of the minor child S.L.W. (App. 7). The Plaintiff A.W. [Mother] executed an application for Assignment of Rights to Medical Support with the North Dakota Department of Human Services effective November, 2006. (App. 8).

[¶12] A default Judgment had been entered by Mother, the plaintiff, against C.W. [Husband] in their divorce judgment, Barnes County Civil No. 96-C-224 on July 17, 1996. (App. 67). A Judgment was entered disestablishing Husband's paternity of S.L.W. in Barnes County Civil No. 03-C-141 and 04-C-98 on March 11, 2005. (App. 64).

[¶13] In that action, the trial court found that Husband was not properly served in a timely matter pursuant to Rule 55 of the North Dakota Rules of Civil Procedure. (App. 65). The trial court further found that S.W., another child born to Mother was entirely excluded from the divorce judgment without explanation. (App. 65). The trial court found that Husband is a child sex offender, having

been convicted of Gross Sexual Imposition in 1996 of Mother's oldest child. (App. 65).

[¶14] In light of Husband's history of sexual abuse of children, the defective divorce judgment, and the genetic testing which showed Husband was not the biological father of the children S.W. and S.L.W., the parties agreed at trial that it was not in the best interest of the minor children that Husband be found to be the father of S.W. and S.L.W. (App. 66). The trial court determined that Husband was not the father of S.W. and S.L.W. (App. 66). The trial court ordered that Husband may bring a separate action against biological father to recover any child support paid to Mother for S.L.W. (App. 66).

[¶15] Biological Father argues that the judgment entered in Barnes County Civil No. 03-C-141 and 04-C-98 is invalid and Husband is the presumed and adjudicated father of S. L. W. Any attempt to impeach a judgment by matters which are foreign to the record in an independent action is a collateral attack on that judgment. Hamilton vs. Hamilton, 410 N.W.2d 508, 520 (N.D. 1987). Judgments rendered by courts of competent jurisdiction are presumed valid. Farrington v. Swenson, 210 N.W.2d 82, 84 (N.D. 1973). If the attack is not based on jurisdiction, but rather on mistake, it cannot be litigated collaterally. Olson v. Cass County, 253 N.W.2d 179, 182, 183 (N.D. 1977). Biological Father's attempts to overturn the district court's determination that Husband is not the father of S. L.W. are an impermissible collateral attack on that judgment.

[¶16] Even if collateral attack is inapplicable in this case, the presumption that Husband is a presumed father has been rebutted. This action was commenced in 2007 and is governed by N.D.C.C. Chapter 14-20, not Chapter 14-17 or other law in effect in 1995 as suggested by Biological Father.

[¶17] A man is presumed to be the father of a child if he and the mother of the child are married to each other and the child is born within the marriage. N.D.C.C. § 14-20-10(1)(a). Chapter 14-20 does not require that every alleged paramour of a mother be joined as a party in a paternity action. Rather, N.D.C.C. § 14-20-38 only requires the joinder of the mother and a man whose paternity is to be adjudicated.

[¶18] N.D.C.C. § 14-20-02(16) defines a presumed father as " a man whom, by operation of law under Section 14-20-10, is recognized as the father of child <u>until that status is rebutted or confirmed in a judicial proceeding</u>."[Emphasis added]. An adjudication rebuts a presumption of paternity. N.D.C.C. § 14-20-10(2). The presumption that Husband was the father of S. L. W. was rebutted by the 2004 decision in Barnes County Civil No. 03-C-141 and 04-C-98.

[¶19] The provision in N.D.C.C.§ 14-20-58, which deems that a support obligation established in a divorce judgment is an adjudication of parentage, did not become effective until 2005. N.D.C.C.§ 14-20-58(3). By that time, Husband's presumed paternity had already been rebutted. Chapter 14-17, the law in effect at that time, did not contain a similar provision, *See* <u>In the Interest of K.B</u>., 490

N.W.2d 715, 717 (N.D. 1992) (ex-husband referred to as presumed father after entry of divorce and custody determination). Even under current law, a divorce judgment does not constitute an adjudication of paternity if the paternity of the husband is disclaimed in the order. N.D.C.C. § 14-20-58(3)(b). Thus, by the time Biological Father was sued for paternity, there was no doubt that Husband was not an adjudicated father.

[¶20] Biological Father's reliance upon Gerhardt v. C.K., 2008 ND 136, 751 N.W.2d 702, is misplaced. In Gerhardt, the Court determined that the district court was not required to compel genetic testing in response to a post judgment motion by an adjudicated father. ¶12. Here, Husband is not an adjudicated father since his paternity has been disestablished.

[¶21] Biological Father's use of the word"termination" in his brief incorrectly describes the effect of the disestablishment order. When paternity is disestablished, prospective rights are not terminated; rather, it is a decision that such parental rights never existed. *See,* e.*g.,* N.D.C.C. § 14-20-02(3)(b)(" The term['Alleged Father'] does not include a man whose parental rights have been terminated **or** declared not to exist.") [Emphasis added].

[¶22] The Unit agrees that it is the Court's duty to ascertain Legislative intent when construing statutes. *See, e.g.*, State ex rel. Graham v. Hall, 73 ND 428, 15 N.W.2d 736 (N.D. 1944). The overriding public policy of the Uniform Parentage Act is to protect the interest of the child. In the Interest of K.B., 490 N.W.2d 715,

718 (N.D. 1992) Id. “We cannot condone a result that would leave the child without a legally established father and effectively preclude any possibility of establishing paternity in the future.” Id.

[¶23] If Husband had attempted to disestablish paternity after N.D.C.C. Chapter 14-20 supplanted Chapter 14-17, any effort to rebut his paternity as a presumed father would have to be brought within two year of the child’s birth. N.D.C.C. 14-20-42. If his action had been brought within that time frame, the Unit could not order genetic testing of a presumed father. N.D.C.C. 14-20-26(2). The district court could only order genetic testing after considering the best interests of the minor child and appointing a guardian ad litem. N.D.C.C. 14-20-43.

[¶24] Still, Husband’s presumption of paternity could have been rebutted under Chapter 14-20 without first adding Biological Father as a party. N.D.C.C.§§ 14-20-29 and 14-20-52(2) strongly favor genetic testing in an adjudication of paternity. The only exceptions are when tests are precluded under N.D.C.C. § 14-20-43 or when genetic testing is not appropriate because the action is not timely. *See* N.D.C.C. 14-20-42(rebuttal of presumption of paternity generally barred more than two years after child’s birth); N.D.C.C. 14-20-44(2) (challenge to acknowledged paternity generally barred after one year under N.D.C.C. 14-20-18).

[¶25] N.D.C.C. § 14-20-43 only allows a court to deny a motion for genetic testing if the proceeding involves a presumed father or to challenge the paternity of an acknowledged father. If a mother insists that her husband is the father of a

child, and does not name any other potential father, it may not even be possible to name another potential father until genetic tests are conducted and the results rebut the husband's presumption of paternity.

[¶26] Under Chapter 14-20, the proper time to determine whether a presumption of paternity should be rebutted is before genetic tests are conducted on the presumed father/husband, not after. Biological Father's position that he is a necessary party if Husband seeks to rebut the presumption of paternity is not supported by an examination of Chapter 14-20.

[¶27] In any event, Chapter 14-17 was the law in effect at the time of Husband's action to disestablish his paternity. Biological Father argues that the 2004 Order disestablishing Husband's paternity is erroneous. Under Chapter 14-17, the North Dakota Supreme Court expressed a strong preference for genetic testing despite the existence of a presumed presumption, often over the objections of the child support enforcement unit. *See* Rydberg v. Rydberg, , 2004 ND 73, 678 N.W.2d 534; K.L.B. v. S.B., 2003 ND 88, 662 N.W.2d 277. Given the status of state law and case precedent in 2004, it was appropriate for the district court to disestablish Husband's paternity.

[¶28] Husband was never an "adjudicated father" under Chapter 14-20 or Chapter 14-17, and his status as a "presumed father" was rebutted by court order before this action was commenced against Biological Father. Hence, it was appropriate for the district court to order genetic testing under N.D.C.C. § 14-20-

26.

[¶29] 2. The Statute Of Limitations, Equitable Estoppel And Laches Do Not Bar The Paternity Action.

[¶30] " … [T]he putative biological father may not use the statute as a shield to bar his obligations to his child or to deprive the presumptive father of his right to assert nonpaternity as a defense." In the Interest of K.B., 490 N.W.2d 715, 718 (N.D. 1992) *citing* In People in Interest of L.J., 835 P.2d 1265, 1267 (Colo. Ct. App. 1992).

[¶31] At the time of his action to disestablish his paternity in 2004, Husband was a presumed father. Chapter 14-17 was in effect at the time Husband brought his action to rebut the presumption that he was the father of S.L.W. N.D.C.C. § 14-17-05 provided that an action could be brought at any time to provide the existence of a father child relationship presumed under § 14-17-04. Rydberg, ¶17. Genetic tests were enough to rebut the presumption of paternity. ¶29. Thus, the statute of limitations was not a bar to Husband's successful rebuttal of the presumption that he was the father of S.L.W.

[¶32] This action is a proceeding to declare Biological Father's paternity, not to disestablish Husband's paternity. The intended beneficiaries of the statute of limitations are the child, the natural mother and presumed fathers by marriage, not a putative father. P.E. v. W.C., 552 N.W.2d 375, 379 (N.D. 1996).

[¶33] S.L.W. was a child who had no presumed, acknowledged or adjudicated father. A proceeding to adjudicate paternity of a child with no presumed, acknowledged or adjudicated father may be commenced at any time even when an earlier proceeding to adjudicate paternity has been dismissed based upon the application of a statute of limitation then in effect. N.D.C.C. § 14-20-41(2). The statute of limitations cannot be used as a bar to shield Biological Father from an establishment of paternity.

[¶34] Biological Father relies on Justice Kapsner's dissent in Rydberg to support his position on statute of limitations. However Rydberg involved a presumed father, not an alleged biological father who was attempting to use the statute of limitations as a shield. Rydberg, ¶38. In her dissent in Rydberg, Justice Kapsner pointed out that alleged biological fathers are not permitted to use a non-applicable statute of limitations to avoid support. ¶36.

[¶35] Biological Father also argues that the Unit, Mother and Husband should be equitably estopped from bringing a paternity action against any alleged father. N.D.C.C. 31-11-06 defines estoppel as when a party, by that party's own declaration, act or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission. Id.

[¶36] Estoppel is not favored and the burden of proving each element is on the party asserting it. Gorley v. Parizek, 475 N.W.2d 558, 560 (N.D. 1991) *citing* Johnson v. Northwestern Bell Telephone Co., 338 N.W.2d 622 (N.D. 1983).

[¶37] It is the reliance by the child, not the biological father, which would estop a presumed father from asserting that genetic testing rebuts the statutory position that the man married to the mother was the father of the child. Rydberg ¶¶48, 50.

[¶38] In State ex.rel. Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425, 432 (1998), the Nebraska Court stated that equitable estoppel cannot be raised against the mother of the child, since the claim in the case belonged to the minor child. Id. at 860. The child's claim cannot be defeated by operation of equitable estoppel arising from any conduct from the mother or the presumed father. Id.

[¶39] Nor can estoppel be raised against the Unit, a division of the State Child Support Enforcement Unit under the North Dakota Department of Human Services. The State Child Support Agency, a division of the Department of Human Services, is directed by the Legislature to act as the official agency of the state in the administration of the child support enforcement program. N.D.C.C. § 50-09-02(16). The local units must administer the child support enforcement program under the direction and supervision of the state agency in conformity with Title IV-D of the Social Security Act. N.D.C.C. § 50-09-03(5).

[¶40] N.D.C.C. § 50-24.1-02.1 gives the Department of Human Services a statutory right of assignment to seek reimbursement for medical assistance provided to needy persons from persons who have obligations to support those receiving the assistance. Mehl v. Mehl, 545 N.W.2d 777, 779 (N.D. 1996). The Child Support Enforcement Agency may only take action upon receiving referrals from Social Services or a direct application by a party. Here, Husband initiated the action to rebut the presumption of paternity. There was no application for services. After the disestablishment order was entered, the Unit was not authorized to establish S.L.W.'s paternity until a referral was received from Social Services.

[¶41] It is the child's rights that are asserted when the child support agency seeks reimbursement or future support for a child. Sprynczynatyk v. Celley, 486 N.W. 2d 230, 232 (N.D. 1992). Although a custodial parent may have a representational right to collect support on behalf of the child, the right to support really belongs to the child. Id.

[¶42] Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay. Williams County Social Services Board v. Falcon, 367 N.W.2d 170, 174 (N.D. 1985) *citing* Grandin v. Gardiner, 63 N.W.2d 128 (N.D. 1954). The mere delay or lapse of time does not of itself constitute laches, and the facts

and circumstances must be determined in each case. Id. *citing* Burlington Northern, Inc. v. Hall, 322 N.W.2d 233 (N.D. 1982); Strom v. Giske, 68 N.W.2d 838 (N.D. 1954).

[¶43] Laches and estoppel are rarely raised against minors. C.L.W. v. M. J., 254 N.W.2d 446, 451 (N.D. 1977).

[¶44] Even if laches were available, given the facts of the case, the equities of the father would not exceed those of the child who was the ultimate beneficiary. Falcon at 175 *citing* M.A.D. v. P.R., 277 N.W.2d 27 (Minn. 1979). In Falcon, the Court's research did not find any case that successfully raised laches as a defense in a paternity action. Id. at 176.

[¶45] It appears that this is still correct. *See, e.g.*, Tovsland v. Reub, 2004 SD 93, ¶29, 686 N.W.2d 392 ("…nor can the failure to ask for support at a given moment preclude that right at a subsequent time, no matter how much time has intervened." *citing* Rodgers v. Woodin, 448 Pa. Super. 598, 672 A.2d 814, 818 (1996)); Department of Human Services v. Bell, 711 A.2d 1292, 1295, 1296 (Me. 1998) ("We will not allow a carefully crafted policy to be defeated by the invocation of equitable defenses in circumstances where the Department has not affirmatively misled the father to believe he would bear no responsibility."); Payne v. Prince George's County Department of Social Services, 67 Md. App. 327, 338, 507 A.2d 641 (1986) ("it is one thing to penalize a person for sitting too

long on his own rights; it is quite another to penalize him because someone else sat on those rights." (*quoting* Green v. Green, 44 Md. App. 136, 150, 407 A.2d 1178 (1979)).

[¶46] Biological Father testified that Mother and Husband never contacted him and told him they were divorced. (Tr. 19). Biological Father never offered any evidence or testimony that he was affirmatively misled about his paternity or that he relied on such information. (Tr. 13-35). Biological Father failed to show he is entitled to the remedies of the statute of limitations, estoppel or laches.

[¶47] 3. The Date Of The Referral From Social Services Is The Appropriate Effective Date To Commence Biological Father's Child Support Obligation.

[¶48] A parent's obligation to support his or her child is required by law. N.D.C.C. § 14-09-08. An individual who is legally responsible for supporting a child is liable for the reasonable value of physical and custodial care or support which has been furnished to the child by any person, institution, agency, or county social service board. N.D.C.C. § 14-08.1-01.

[¶49] The legislature has clearly given state agencies that provide assistance to needy persons the right to be reimbursed for that assistance from persons who have support obligations to those receiving the assistance. Ramsey County Social Service Board v. Kamara, 2002 ND 192, ¶13, 653 N.W.2d 693, *citing* Mehl v. Mehl, 545 N.W.2d 777, 779 (N.D. 1996); *see also* N.D.C.C. § 50-09-06(2).

[¶50] The referral from Social Services to Child Support for enforcement occurred in November, 2006, when S.L.W. began receiving government services. The district court appropriately ordered Biological Father's child support obligation to commence as of November, 2006. While Biological Father correctly interprets the general rule from Geinert and its progeny regarding the effective date of ongoing child support, those cases have never been held to bar reimbursement to the State pursuant to N.D.C.C. 14-08.1-01 for prior periods when public assistance was expended on behalf of the child.

CONCLUSION

[¶51] The district court correctly ordered genetic testing in this matter which showed that Biological Father could not be excluded as the father of the minor child S.L.W. The statute of limitations, equitable estoppel, and laches do not bar adjudication of Biological Father's paternity. Based upon the provision of government services to S.L.W., November, 2006 was the appropriate date to commence Biological Father's child support obligation. The district court's decision should be upheld.

Dated this 3rd day of June, 2010.

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IN THE
SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF S.L.W.		
In the Interest of S.L.W., a minor child	)	Supreme Court No. 20100006
By her Natural Guardian, A.W.,	)	
State of North Dakota, By and Through	)	Barnes County No. 07-R-00052
Barnes County Social Services Board and	)	
A.W.	)	
Plaintiff and Appellee,	)	
	)	**AFFIDAVIT OF SERVICE**
vs.	)	**BY E-MAIL**
A.K.,	)	
Defendant and Appellant.	)	

STATE OF NORTH DAKOTA)
:ss
COUNTY OF STUTSMAN)

The undersigned, being first duly sworn, says that she is over the age of 18 years and not a party to this action and, on the 3rd day of June, 2010, she sent by e-mail:

BRIEF OF THE STATE OF NORTH DAKOTA

The e-mails were addressed as follows:

Kathleen K. Trosen, ID #05365
TROSEN LAW FIRM
P.O. Box 378
Fessenden, ND 58438
kathleentrosen@yahoo.com
Attorney for Appellant

Each address shown is the respective addressee's last reasonably ascertainable e-mail address.

Further, I deposited in the mailing department of the United State Post Office at Jamestown, North Dakota, a true and correct copy of the above document filed in the above captioned action since e-mail or facsimile transmission service is not possible to the following individual:

A.W.
213 6th St.
Sanborn, ND 58480

Said copy of the above document was securely enclosed in an envelope with postage duly prepaid, via U.S. Mail.

To the best of your affiant's knowledge, information, and belief, such address as given was the actual post office address of the party intended to be served.

That the above document was duly mailed in accordance with the conditions of the North Dakota Rules of Civil Procedure.

____
Jennifer J. Sortland

Subscribed and sworn to before me this 3rd day of June, 2010.

____
Gladys Tanata
Notary Public
Stutsman County, North Dakota