No. 2005-1383

In the Court of Appeals
for the
Fifteenth District of Texas,
Eastwood, Texas

Margaret Stapleton,
Appellant

v.

Henry Apolonia,
Appellee

On Appeal from the 999th District Court
Tigua County, Texas

The Honorable Maynard Crebes

No. 2005-1383

In the Court of Appeals
for the
Fifteenth District of Texas,
Eastwood, Texas

Margaret Stapleton,
Appellant

v.

Henry Apolonia,
Appellee

On Appeal from the 999th District Court
Tigua County, Texas

The Honorable Maynard Crebes

Before Chief Justice GORDON, Justice EARNHARDT, and Justice WALLACE.

Opinion of the Court:

GORDON, J., Chief Justice: Margaret Stapleton appeals the trial court's ruling giving Henry Apolonia parental rights. Stapleton raises two issues on appeal.

Issues

First, should a sperm donor who had no physical contact with the mother of the child have standing to bring a Suit Establishing the Parent Child Relationship? Second, does the "parenting contract" entered into by the parties violate state law?

We affirm the trial court's ruling on the first issue and reverse the trial court on the second issue.

Background

Appellant Margaret Stapleton ("Stapleton") wanted to have a baby. She considered several different options including adoption and artificial insemination. The adoption agencies she contacted were not receptive to placing children with a single mother, and she then chose to pursue artificial insemination. After contacting several doctors, she found the cost associated with artificial insemination exorbitant and she could not fund the endeavour.

On August 1, 2001, she met with her long-time friend Henry Apolonia ("Apolonia") for dinner. At that dinner, she told Apolonia about her troubles in attempting to adopt a child along with the expense involved in trying to have a child through artificial insemination. Apolonia was supportive of her desire to have a child. Apolonia expressed his desire to have a child and suggested that the two of them have a child together. Stapleton was somewhat surprised by this suggestion but felt it was worth pursuing. Through numerous discussions, the parties talked about the practicalities of Stapleton becoming pregnant and Apolonia acting as the "father." Stapleton, however, did not want to engage in any sexual contact with Apolonia to achieve this goal nor did Apolonia desire any sexual contact. The parties ultimately agreed upon an at-home insemination of Stapleton utilizing Apolonia's semen that had been frozen.[1] On August 15, 2001, the parties attempted the insemination procedure and by September 30, 2001, they discovered their attempt was successful and Stapleton was in fact pregnant.

After the successful insemination, Apolonia offered to pay for the baby's pre-natal care and also offered to pay for the remodeling of Stapleton's study into a baby's room. In exchange for this money, Stapleton agreed to enter into a contract titled "Parenting Contract" with Apolonia declaring him to be the father of the child. Included within this Parenting Contract were terms regarding visitation and child support. Apolonia hired an attorney to draft the Parenting Contract and on October 1, 2001, they signed the agreement. Notable terms of the Parenting Contract include:

[1] Both Appellant and Appellee testified at trial that the frozen semen was not the result of sexual intercourse between Stapleton and Apolonia.

2. HENRY APOLONIA has provided his semen to MARGARET STAPLETON for the purpose of conceiving a child.

3. HENRY APOLONIA and MARGARET STAPLETON agree that the child born of his donated semen will be a child of whom he is the father.

4. Both parties agree that MARGARET STAPLETON will be the primary care provider of the child resulting from APOLONIA's donated semen.

. . .

11. HENRY APOLONIA agrees to provide financial support for the pre-natal medical care and future support of the child.

12. HENRY APOLONIA agrees to assist in paying for the remodeling of MARGARET STAPLETON's study which will be made into a nursery for the benefit of their child.

Between October 1, 2001 and the time the child was born on May 20, 2002, Apolonia made only two payments for the pre-natal services totaling less than five hundred dollars. As Stapleton did not have insurance, she paid over twenty thousand dollars out-of-pocket for the birth of her child. The last payment Apolonia made was on October 15, 2001. In addition, he made no payments towards the remodeling of the study which cost Stapleton over fifteen thousand dollars.

Stapleton did not hear from Apolonia before the child was born; in fact Stapleton did not hear from Apolonia again until December 13, 2003.[2]

On December 13, 2003, Stapleton received a letter from Apolonia requesting access to his child pursuant to their Parenting Contract. Stapleton did not reply to

[2] Apolonia was arrested and convicted of felony possession of methamphetamine, a state jail felony, and served eighteen months as a result. Apolonia's incarceration for state jail felony possession of methamphetamine began May 15, 2002 and was released in November 2003.

this letter because she believed Apolonia had breached their agreement by not making the required payments and therefore the agreement was not enforceable. Apolonia again requested access to his child on January 15, 2004 and Stapleton responded with a letter detailing her belief that he was in breach of their agreement and that she had no intention of allowing her son to be placed in the company of a convicted felon.

After receiving this letter, Apolonia went to Stapleton's home in a drunken rage demanding to see his son. Stapleton called the sheriff and Apolonia was arrested for public intoxication, assault, and trespassing.[3] After this arrest, Stapleton contacted an attorney to pursue full custody of the child without interference from Apolonia. The attorney suggested Stapleton contact Apolonia and seek a Termination of Parental Rights from Apolonia. Stapleton contacted Apolonia to see if he was amenable to this proposal, and Apolonia responded that he would see her in court. On January 19, 2004, Apolonia filed a Suit Affecting Parent-Child Relationship ("SAPCR") alleging that he was the father of the child pursuant to the Parenting Contract and that he was entitled to visitation.

During the trial, Stapleton argued that Apolonia lacked standing to bring the suit because he was merely a semen donor and not the biological father of the child as that term is defined in the Texas Family Code. Further, Stapleton argued, if Apolonia did have standing to bring the suit, he could not prevail on his claims that he was the child's father because he was relying upon the Parenting Contract to establish his parentage and Texas does not recognize parenting by contract. The trial court held that Apolonia had standing to assert a SAPCR and that he was entitled to visitation according to the agreement the parties entered into.

Discussion

Standard of Review

We review the trial court's decision *de novo*. Before we address the issue of the Parenting Contract, we must address the question of Apolonia's standing. Standing is a question of law and thus requires a *de novo* review. *In re: A.J.L.*, 108 S.W.3d 414, 420 (Tex.App.--Fort Worth, 2003), *see also Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447, 450 (Tex. 1995). When the issue presented for

[3] At the time of trial, those charges were still pending in County Court at Law number 1.

review is one of statutory construction, involving purely legal determinations, the proper standard of review is *de novo*. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Both issues will be reviewed *de novo*.

Standing

Appellant Stapleton argues that the trial court erred in holding that Apolonia had proper standing to bring suit because Apolonia was merely a donor under the Texas Family Code and thus lacks any legal standing to bring suit under Texas law. We disagree with the Appellant's interpretation of Texas law and hold that Apolonia has standing to bring a SAPCR.

Texas law states that: "[a]n original suit may be filed at any time by: a parent of the child [or] . . . a man alleging himself to be the biological father of a child filing in accordance with Chapter 160, subject to the limitations of Section 160.101, but not otherwise. . ." Tex. Fam. Code §102.003 (1), (8). Further, the Family Code section 160.102 (6) defines: a "donor" as an individual who produces eggs or sperm used for assisted reproduction, regardless of whether the production is for consideration. Here, we must address whether Apolonia is merely a sperm donor or the child's biological father and parent, and thus we must rectify the two pertinent statues. While the Family Code addresses chapter conflicts, we must determine if there is in fact, a conflict between the two statutes.[4]

Where the relevant statutes are clear and unambiguous, rules of statutory construction are inappropriate and the statute should be afforded its plain meaning. *Cail v. Serv. Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983); *Sims v. Adoption Alliance*, 922 S.W.2d 213, 215 (Tex.App.--San Antonio 1996, writ denied). Chapter 101 of the Family Code enunciates that a man presumed to be the father has standing to bring a SAPCR. *See In re: A.J.L.*, 108 S.W.3d at 420. Given the unique circumstances in which the child was conceived and the fact that both parties agreed that the child was a result of the joint collaboration, it is clear to this Court that contrary to any other terminology, Apolonia is the presumed father of the child.

Constitutional Equal Protection and Standing

[4] Texas Family Code states: "If a provision of this chapter conflicts with another provision of this title ... and the conflict cannot be reconciled, this chapter prevails. Tex. Fam. Code §160.002.

The Texas Family Code, if interpreted in such a way as to deprive Apolonia of standing to bring a SAPCR, would be unconstitutional as applied because it treats unmarried males differently than both unmarried females and married males in regard to the determination of parentage. *In re: T.E.T.*, 603 S.W.2d 793, 794 (Tex. 1980). In *T.E.T.*, Justice Steakley's dissent illustrates that the Texas Family Code makes gender-based distinctions when addressing determinations of paternity. *Id.* at 798-99 (Steakley, J., dissenting). The *T.E.T.* dissent expounds on how these gender-based distinctions often raise serious concerns of constitutional guarantees of equal protection and due process. *Id.* Expanding on Justice Steakley's observation that the Texas Family Code often raises constitutional challenges for an unwed father, there are other issues that may arise in paternity suits resulting from insemination. For example, in cases where the unwed mother attempts to terminate the father's paternity rights, courts have recognized that an unwed biological father has rights which are protected by the guarantees of the Texas constitution. *See generally, In re J.W.T.*, 872 S.W.2d 189 (Tex. 1993), *see also* Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men*, 9 Tex. J. Women & L. 53, 61 (1999). While few Texas courts have addressed the issue of paternity by insemination, we can evaluate how other jurisdictions have addressed similar circumstances.

In *C.O. v. W.S.*, the court held that an Ohio statute was an unconstitutional violation of the State of Ohio's equal protection guarantee when applied to the facts of that case. *C.O. v. W.S.* 639 N.E.2d 523, 524 (Ohio Misc. 1994). There the defendant mother and the plaintiff biological father/donor agreed prior to the procedure that the man would be the child's father and "male role model." *Id.* Despite the agreement, after the child's birth the mother refused the father/donor access to the child. *Id.* The Ohio statute at issue specified that in non-spousal artificial insemination situations the donor would not be legally recognized as the natural father of the child conceived as a result of the insemination and that the child would not be legally recognized as the natural child of the donor. *Id.* In its analysis of why the statute was unconstitutional as applied to the plaintiff, the court recognized that the intended purpose of the statute was to maintain the anonymity of the donor. *Id.* Further, it stated that the father/donor had not intended to remain anonymous to the child and as such applying the statute in this case would effectively rob the plaintiff of his constitutional right to due process. *Id.* While the

facts of the Ohio case and this case are somewhat different, the analysis of the statutory law and the constitutional law are applicable here.

The Due Process Clause and the Equal Protection Clause are not one-in-the-same; however, use of an analysis similar to that of the Ohio court is appropriate in this case. The Texas Constitution provides "equality under the law shall not be denied or abridged because of sex, race, color, creed, or natural religion." Tex. Const. art. I §3a. Analysis of the Texas Family Code section 160 in light of the Texas Constitution's guarantee of equal application of the law to all persons, regardless of sex, illustrates a violation of Apolonia's constitutional right of equal protection. *Accord Bell v. Low Income Women of Texas,* 95 S.W.3d 253 (Tex. 2002). Section 160.201(5) provides that a father-child relationship is established by the man's consenting to the assisted reproduction of his *wife* that results in the birth of a child pursuant to Subchapter H of the Texas Family Code. The mere confinement of the application of the father-child relationship in this statute to a married couple establishes how the statute discriminates on the basis of marital status. Appellant Stapleton contends that the Family Code clearly enunciates that there shall not be discrimination on the basis of marital status as stated in section 160.202. While this is true, we cannot easily dismiss the conflicting edicts announced by the discordant statutory provisions, i.e., section 160.202 and section 160.201 in light of the demands of the Texas Constitution's guarantees.

Under traditional equal protection analysis, we must determine whether the affected party warrants special constitutional protections afforded under the Texas Constitution. *Bell*, 95 S.W.3d 257. Texas courts traditionally apply a three-part evaluation in this analysis. *Id.* Courts consider: 1.) whether equality under the law has been denied, 2.) if equality has been denied, then it must be determined whether equality was denied because of a person's membership in a protected class of sex, race, color, creed, or national origin, and 3.) if so, then the challenged act or law cannot stand unless it has been narrowly-tailored to serve a compelling governmental interest. *Id. citing In re McLean*, 725 S.W.2d 696, 697 (Tex. 1987). Here, we have established that: 1.) the application of the Family Code to Apolonia violated his right to have the law equally applied to him and 2.) that the violation of his right was based on the inherent gender-based discrimination written into the Family Code. Finally, we find that the process in which the Family Code would permit the establishment of paternity for Apolonia is not narrowly-tailored to serve a compelling governmental interest. The Texas Family Code recognizes that in paternity cases the court is to first consider the best interest of the child. Here, a

finding that the government's interest is narrowly-tailored to keep a child from his father cannot be harmonized as being neither within the child's best interest nor constitutionally permissible.

Additionally, the record clearly shows that both of the parties contemplated the birth of a child by assisted reproduction and intended to be treated as the legal parents of that child. Likewise, the record establishes that Apolonia consented to the assisted reproduction of the child with the sole purpose, goal, and intention of becoming the father of any child resulting from the assisted reproduction. Simply by virtue of the fact that Apolonia happens to be an unmarried male, would deprive him of parental standing to sue for parentage in this case. *See generally,* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights,* 14 Cardozo L. Rev. 1747 (1993). A court ruling that would deprive Apolonia of his child is in obvious violation of the Equal Protection Clause of the Texas Constitution. Accordingly, we affirm the trial court's holding with respect to Apolonia's standing to bring a SAPCR.

The Parenting Contract

Having determined that Apolonia has standing to claim parental status, we must determine whether such claim is valid. Apolonia's assertion of parental status is based on the Parenting Contract entered into between the parties. The trial court found that the Parenting Contract was valid and enforceable. We disagree. The agreement entered into between the parties is void as against public policy; parties are not allowed to manufacture parental status merely by stating it in a contract that circumvents the purpose and effect of the Texas Family Code. Therefore, we reverse the trial court regarding the parenting contract.

Texas courts have precluded attempts to circumvent the provisions of the Family Code by contract. *In re E.S.S.*, 131 S.W.3d 632 (Tex.App.--Fort Worth 2004, no pet.). There, the Fort Worth Court of Appeals held that, despite a contract between the parties that purported to terminate an incarcerated father's parental rights, the Court struck down the agreement as contrary to public policy. *Id*. at 640. The Court recognized that it was the parties' intention to terminate the father's parental rights so that the child that was the subject of the suit could be adopted by the child's step-father. Nonetheless, the court held that the contract was void because it did not comply with the required findings for termination of parental rights under the Family Code. *Id*. The Court also recognized that "[w]hile

parties are generally free to contract, contracts which violate public policy as captured in statutory mandate are unenforceable." *Id*.

In *E.S.S.*, the facts in favor of upholding the contract were much more compelling than the facts in the present case. In *E.S.S.*, both the mother and the father were represented by counsel and voluntarily entered into an agreement to terminate the father's rights in exchange for allowing the father's mother and brother to exercise standard visitation with the child. In the present case, Stapleton was not represented by counsel when she signed the Parenting Contract with Apolonia.

Moreover, there was no question that both the parties in *E.S.S.* fully intended to forever terminate the father's parental rights. In fact, the trial court questioned the father extensively on the record and the father acknowledged that he was "freely and voluntarily" relinquishing his parental rights. *Id*. at 638. In the present case, however, Apolonia's and Stapleton's intentions were not clear. In addition to Apolonia continually waffling between whether he wanted to be the child's father or merely a donor with no parental status, Apolonia's other behavior demonstrated an attitude of indifference and carelessness to the entire process leading up to the child's birth. For example, after Stapleton became pregnant with the child, she went for a check-up and was informed by her doctor of several complications. Stapleton informed Apolonia of this fact and she was going to have to undergo an invasive procedure to correct the problems. In blatant disregard to the possibility of loss of the child, rather than attending the procedure or in any other way acknowledging the difficult situation, Apolonia opted to fly to Paris on a last-minute trip.[5]

The parties' intentions, however, are not the focus of this Court's inquiry. The express provisions of the Family Code are the focus. If a person cannot terminate parental rights by a contract that does not comply with the Family Code, a person should likewise not be able to manufacture parental rights by a contract that does not comply with the Family Code. Other Texas cases have likewise held that contracts attempting to circumvent statutory provisions are void as against public policy. *See e.g.*, *In re A.N.H.*, 70 S.W.3d 918 (Tex.App.--Amarillo 2002, no pet.) (holding that an agreed decree of divorce purporting to relieve an obligor of

[5] The parties testified at trial that Stapleton had informed Apolonia of the surgery and Apolonia testified as to his whereabouts at the time of the surgery.

child support if his visitation was prevented was void as against public policy); *Nelson v. Wilson*, 77 S.W.2d 287 (Tex.App.--Texarkana 1936, no writ) (holding that a contract purporting to exchange a child for property was void as against public policy); *Mulkey v. Allen*, 36 S.W.2d 198 (Tex.App.--Dallas 1931, no writ) (holding that contract attempting to allow a father to relinquish custody to a person in exchange for that person leaving property to the child was void as against public policy).

To allow a party to manufacture parental status merely by stating it in a contract circumvents the purpose and effect of the Family Code and undermines a court's discretion in determining the best interest of children. Such results are in clear violation of public policy. The Parenting Contract in this case attempts to set forth a visitation schedule, child support, and other items that are specifically set forth by the Family Code or are left to judge's discretion based on the child's best interest.

Here, the agreement was entered into well before the child was born, so there is no possible way it could have taken into consideration the child's best interests. By way of illustration, if the Agreement here were found to be valid and enforceable and the child were to develop some sort of special need, such as a serious disease, the Trial Court would be stripped of its discretion to require Apolonia to pay more child support pursuant to the Family Code to suit the child's special needs.

Apolonia argues that the provisions of the Agreement, other than the one purporting to grant him parental status, are unimportant and can be decided by the trial court at a later date. Such an argument concedes that there are several provisions in the Parenting Contract that are unenforceable or void as against public policy. Despite the apparent conflict, Apolonia maintains that this Court should uphold the provision of the Agreement conferring parental status upon him despite his own apparent admission that the other provisions of the contract regarding support and visitation can be worked out a later date.

Because this is a case of first impression in Texas, Apolonia asserts that this Court should look to other jurisdictions for guidance on the question of whether a contract, standing alone, can confer parental status contrary to the Family Code. As discussed herein, the authority upon which Apolonia relies is distinguishable.

Extra-Jurisdictional Analysis

Apolonia urges that a Colorado Supreme Court case that is closely analogous to the present case be considered by the Court as persuasive. *In re R.C.*, 775 P.2d 27 (Colo. 1989). *In re R.C.* involved an unmarried mother and an unmarried male who conceived a child by artificial insemination. The court there held that Colorado Family Code §19-4-106, which stated, "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived," did not apply when a "known" semen donor and an unmarried female recipient agreed that the known donor would have parental rights. *Id*. at 27, 30, and 35. The Colorado Court so held primarily based on its assumption that "The [state legislature] neither considered nor intended to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived." *Id*. at 35.

Since 1989, the year *In re R.C.* was decided, the Texas Legislature has had ample opportunity to amend Texas Family Code §160.702 pertaining to sperm donors' rights and has not made any exceptions for donors "known" to the mother. The definition of "donor" in §160.702 specifically states that a donor has no parental rights even if the sperm he donates to be used in assisted reproduction is donated "for consideration." Moreover, as discussed in *In re R.C.*, even as early as 1989, two other states - New Jersey and Washington - had enacted statutes "specifically addressing issues arising from agreements between donors and donees." *Id*. at 30, n.2. Obviously, had the Texas Legislature intended to carve out some sort of exception for "known" donors who enter into agreements to parent like the Colorado Supreme Court did in *In re R.C.*, it would have done so sometime in the past fifteen years. The fact that the Texas Legislature has had the opportunity to consider other means by which a person can become a parent pursuant to the Family Code is indicated by the Legislature's very recent enactment of a statute creating parental status to persons entering into certain gestational agreements. *See* Tex. Fam. Code §160.754, enacted H.B. 729, §2, 78th Leg., eff. Sept. 1, 2003.

Moreover, unlike Colorado's Family Code in 1989, §160.202 of the Texas Family Code specifically provides, "A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other." Therefore, for this Court to follow the Colorado court in applying different rules to a child who was conceived by sperm from an unknown donor versus a child who was conceived by sperm from a known donor would be in violation of the Texas Family Code's public policy. Even if this Court were to decide that the Texas Legislature should create an exception regarding known donors who agree to be fathers, it is nonetheless the Legislature's province, not this Court's, to do so.

Public Policy Analysis

Although Stapleton recognizes the strong public policy in favor of children being raised by both a mother and a father, there is an even stronger public policy in requiring parties to follow the provisions of the Family Code. There are numerous questions that arise: Where is the line to be drawn between when a contract can create parental status and when it cannot? If a poorly drafted contract has provisions involving child support and visitation that conflict with the Family Code, is that to simply be ignored despite the best interest of the child? Could a corporation or a completely unrelated individual contract to become a parent just by having the biological parents sign an agreement saying so? Are we to ignore the Family Code's provisions about the policy of protecting parties in artificial insemination cases from suing and being sued? *See* Tex. Fam. Code §160.702 and Official Comment.

In sum, a plethora of problems are sure to arise if this Court allows parties to manufacture and create parental status by virtue of a contract. The Family Code is designed primarily to protect children even in light of their parents' agreements and good intentions. Public policy dictates that contracts made outside of the Family Code, even if they appear to benefit the child as in *In re E.S.S.*, should not be enforced by the courts.

Therefore, we hold that the Parenting Contract cannot confer parental status upon Apolonia. The only means by which a person can gain parental status is by complying with the terms of the Texas Family Code. The trial court's judgment is affirmed as to the first issue and reversed as to the second issue.

Dissent:

Justice WALLACE, dissenting in the judgment.

I respectfully dissent from this Court's finding that Apolonia holds any legal standing to bring suit under Texas law. Chapter 160 of the Family Code contains the legislative authority and procedures for adjudicating parentage in Texas and, by its language, directs courts not to consider any other authority when there is a conflict between Chapter 160 and any other statute or law. Tex. Fam. Code §160.002. The majority's holding that Apolonia is characterized as a "father" or a "parent," under Family Code §§101 & 102, directly conflicts with Chapter 160's statutory definition of "donor." *Compare In re Marriage of Morales*, 968 S.W.2d 508, 511-12 (Tex. App.– Corpus Christi 1998) *with In re Sullivan*, 157 S.W.3d 911, 914-921 (Tex. App.–Houston [14th Dist.] 2005). The only provisions of the Family Code that apply to Donor Apolonia, are §160.702, which provides, "a donor is not a parent of a child conceived by means of assisted reproduction," and §160.102 (6), which defines "donor" as "an individual who produces eggs or sperm used for assisted reproduction regardless of whether the production is for consideration."

The Legislature set forth the only means by which a person can be considered a legal parent in a situation like the present case is according to the terms of Chapter 160. Further, the Legislature made the Family Code the dominant authority in the event of conflict with any other statute or rule. It is beyond the purview of this Court's authority to reach into the jurisdiction of the Legislature and confer standing on a mere semen donor and as such I respectfully dissent.