IN THE COURT OF APPEALS OF IOWA

No. 7-913 / 07-0730
Filed January 30, 2008

Upon the Petition of
JENNIFER SWATEK BRIGGS,
Petitioner-Appellee,

And Concerning
DANNY JO SWATEK BRIGGS,
Respondent-Appellee,

ANDREW IVERSON,
Intervenor-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Intervenor appeals following the ruling that he had waived his right to contest the paternity of his biological sons. **REVERSED AND REMANDED WITH DIRECTIONS.**

Timothy Ament of Gartelos, Wagner & Ament, Waterloo, for appellant.

John Rausch, Waterloo, for appellee, Jennifer Swatek Briggs.

D. Raymond Walton of Beecher Law Office, Waterloo, for appellee, Danny Jo Swatek Briggs.

Heard by Eisenhauer, P.J., and Baker, J. and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BAKER, J.

In this appeal, we address a biological parent's claim to the paternity of twin boys. The district court ruled that he waived his right to establish paternity of the children. We reverse and remand.

Background Facts and Proceedings.

Jennifer Swatek-Briggs and Danny Jo Swatek-Briggs were married in 1994. Jennifer met Andrew Iverson in 1999 and began a sexual relationship that eventually resulted in Jennifer's pregnancy. Danny Jo and Jennifer conducted themselves publicly as if Danny Jo was to be the biological father. In June 2000, twin boys, Dylan and Dalton, were born. On September 13, 2005, Jennifer filed a petition seeking to dissolve her marriage to Danny Jo. After discovering he was the twins' biological parent, Andrew intervened in the dissolution action, asking the court to establish his paternity and to disestablish Danny Jo as parent.

Following a hearing on the petition and Andrew's intervention request, the court ruled that Andrew had waived his right to establish his own paternity by failing to timely attempt to determine the children's paternity. It further ruled that Jennifer should serve as the twins' physical caretaker. Andrew appeals from this order. He contends the court erred in finding that he had waived his right to seek paternity of the twins.

Scope of Review.

This matter was filed in equity and tried in equity. Furthermore the right of a parent to his or her child is a constitutional right. Therefore, our review is de novo. *Huisman v. Miedema*, 644 N.W.2d 321, 324 (Iowa 2002); *State v. Hallum*, 606 N.W.2d 351, 354 (Iowa 2000). Respectful consideration is given to the trial

court's factual findings and credibility determinations, but not to the extent where those holdings are binding upon us. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001).

Equitable Parenthood.

Andrew first claims the court erred in establishing equitable parenthood in Danny Jo. He directs this court to Iowa Code section 600B.41A.6, which essentially provides that under certain circumstances, even if the court determines that DNA test results exclude the established father as the biological father, it may dismiss the petition to overcome paternity and preserve the established paternity determination. However, Andrew concedes that the "trial court failed to even address this statute, ruling instead, that Andrew had waived his rights to parent the children." Therefore, we believe section 600B.41A(6) played no part in the court's decision and that the theory of equitable parenthood was not at issue. These issues are not preserved for appellate review. Rather, the court's ruling was premised on its conclusion Andrew *waived* his right to establish paternity, and we proceed to address that theory in the following section.

Waiver of Right to Establish Paternity.

> The district court found that Andrew
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> > knew of [Jennifer's] pregnancy, he knew that the children were born just slightly less than nine months after the last time he had sex with [Jennifer], and he knew that [Danny Jo's] paternity was inconsistent with the description [Jennifer] had given him of their relationship.

Based on these findings, it determined that Andrew waived his right to establish his own paternity. It therefore preserved Danny Jo's paternity by reason of

marriage at the time of the children's birth. Accordingly, we proceed to address Andrew's claim on appeal that the court erred in finding a waiver.

Generally speaking, "waiver is an intentional relinquishment of a known right." *Huisman*, 644 N.W.2d at 324. The essential elements of waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right. *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982).

> It is generally recognized that waiver concedes a right, but assumes a voluntary and understanding relinquishment of it, and it is an essential element of a waiver that there exists an opportunity for choice between a relinquishment and an enforcement of the right in question, so that voluntary choice is the very essence of a waiver.

Travelers Indem. Co. v. Fields, 317 N.W.2d 176, 186 (Iowa 1982).

Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. *Continental Casualty Co. v. G. R. Kinney Co., Iowa*, 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966). When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. *Id.* The party asserting waiver bears the burden of proof. *See Grandon v. Ellingson*, 259 Iowa 514, 521, 144 N.W.2d 898, 903 (1966).

In *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999), our supreme court found that a putative father of a child with an established father may have standing to challenge paternity under the Due Process Clause of the Iowa Constitution. It stated that

> [a]lthough we recognize a right for [the putative father] to petition the court to challenge paternity in this case, we also recognize this

> right can be lost by waiver, which may be the threshold question to consider before addressing paternity. If the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility, it may be lost.

Callender, 591 N.W.2d at 192. The court left it to the district court to determine whether the principles of waiver preclude a challenge in each particular case. *Id.* The court recognized time to be a critical element of this inquiry, as well as the efforts to establish a relationship. *Id.* Therefore, in light of these considerations, we review the relevant facts in the record.

Andrew and Jennifer last had sex in September of 1999, and after that time their romantic relationship ended. In October of that year, Jennifer took a pregnancy test. She informed Andrew that the test was negative. In November, however, she discovered she was pregnant and later that month informed Andrew of the pregnancy and that Danny Jo was the father. According to Jennifer, she was initially informed by her doctor that her due date was September 4, 2000. Jennifer claimed she was "very clear" to Andrew that he was not the father, and Andrew, based on the reported September 2000 due date, calculated that he could not have been the father. As it turned out, the twins were born approximately nine months after the two last had sex. Jennifer claimed they were early.

Because Danny Jo had a vasectomy in 1983, he knew he could not be the father. He and Jennifer, however, acted publicly as if he were going to be the

biological father, telling some people that she had been inseminated artificially.[1] Andrew was not aware that Danny Jo had undergone a vasectomy.

On the day the twins were born, Jennifer spoke to Andrew by telephone from the hospital and informed him of the births. She claimed she was merely calling to inform a friend who also happened to be there at a birthday party. Andrew first saw the twins about a week later when Jennifer called him to ask if he would accompany her and the boys to the mall.

At some time in 2003, Andrew was approached by Jennifer's uncle Robby, who questioned whether Andrew was actually the boys' father due to their physical similarities. Apparently having enough doubt to inquire further, Andrew questioned Jennifer again about the boys' parentage. She again denied that Andrew was the father. Andrew believed her and he pressed the issue no further.

Andrew did not learn of his paternity until Jennifer and Danny Jo's dissolution proceedings began and Jennifer asked him to take a paternity test. Upon learning that he was the father, he immediately hired legal counsel to assert his rights. Counsel filed an intervention in Jennifer and Danny Jo's dissolution proceedings and petitioned the court to establish Andrew's parental rights. He also initiated ongoing contact with his children. He bought them gifts, had the boys overnight in his home, spent the night at their home, met with their teachers, and decorated a bedroom in his house for the boys.

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[1] At trial Jennifer claimed it was Danny Jo's idea to use the artificial insemination story, while Danny Jo testified that Jennifer informed him that she had, in fact, been artificially inseminated and that he believed her.

There exists no dispute under either the facts in the record or the positions of the parties that Andrew had a right. There further does not appear to be any issue of whether he had actual knowledge that the twins were his. The two essential issues presented are whether Andrew had constructive knowledge that the twins may have been his and whether he voluntarily relinquished his right to claim to be their father.

On the issue of knowledge, it has been stated

> [w]aiver is an act of understanding that presupposes that a party has knowledge of its rights, but chooses not to assert them. It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of the party's rights or of all material facts upon which they depended. Where one lacks knowledge of a right, there is no basis upon which waiver of it can rest. Ignorance of a material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact.
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> A person makes a knowing and intelligent waiver when that person knows that a right exists and has adequate knowledge upon which to make an intelligent decision. Waiver requires a knowledge of the facts basic to the exercise of the right waived, with an awareness of its consequences. That a waiver is made knowingly and intelligently must be illustrated on the record or by the evidence.

Am. Jur. Estoppel, § 202.

We do not view this as a situation where Andrew was "content to let another man raise a child that was possibly his own" or took "an extended holiday from the responsibilities of parenthood." *Huisman*, 644 N.W.2d at 326. This is a situation where Andrew had no reasonable basis to believe he was the father of the twins.

"[Waiver] is largely a matter of intent which may be ascertained from a person's conduct." *Babb's Inc. v. Babb*, 169 N.W.2d 211, 213 (Iowa 1969).

Andrew's conduct is consistent with his lack of knowledge that he was the father. Although a friend of Jennifer, he took no special interest in the twins until it was determined that he was in fact the father. Upon learning the true state of affairs, he was galvanized into action. He took an immediate interest in them by pursuing a more personal relationship, and he immediately sought a legal determination of his rights. These actions were of a nature entirely distinct from his previous relationship with the boys, which could be characterized as a casual one through his friendship with their mother. These new interactions are entirely consistent with Andrew's position that it was not until the dissolution proceedings and subsequent DNA testing that he discovered he was, in fact, the boys' biological father. Waiver can be express, "shown by the affirmative acts of a party," or implied, "inferred from conduct that supports the conclusion waiver was intended." *Id.* We do not believe that waiver can be inferred from Andrew's actions.

This case can be distinguished from *Huisman*, in which the supreme court affirmed a trial court determination that the biological father had waived the right to establish his paternity. *Huisman*, 644 N.W.2d at 326. There, the biological father was told within days of the child's birth that he was the father but did not attempt to assert his rights for another seven years. *Id.* at 322. Rather, "he remained content to let another man raise a child . . . because it served his own need to keep his affair with [his son's] mother a secret." *Id.* at 326. In this case, however, Andrew had no such knowledge of his parentage. And while he did perhaps have some suspicion that he could have been the twins' father, he did act on that suspicion by making inquiries to Jennifer, only to be greeted with

strong and apparently convincing denials. There is no cover-up. The case for waiver was much stronger in *Huisman* than it is here.

Conclusion.

Accordingly, upon our de novo review, we conclude Andrew did not have a sufficient level of constructive knowledge that the children were his. Further, we do not find his actions were consistent with a voluntary relinquishment of his right to establish his paternity in Dylan and Dalton. We therefore reverse the trial court's determination on the issue of waiver. Andrew requests that we enter an order disestablishing Danny Jo as the father and establishing paternity in Andrew. We decline this request and remand for a new trial on the issue of whether Danny Jo can preserve his established paternity determination under the theory of equitable parenthood.

REVERSED AND REMANDED WITH DIRECTIONS.