ORAL ARGUMENT – 04/04/01
00-0386
TX DEPT OF PROT. & REG. SERVICES V. SHERRY

COLEMAN: A father is more than a provider of DNA. He is, or should be, a provider of love, training and support from the time of a child's birth. Charles Sherry may, or may not, have biologically fathered CSC. But he was nowhere to be found for the first 3-1/2 years of her life. The Beaumont CA wrongly held that this court's JWT decision bars the application of §160.007 of the Family Code to respondent because he could never bring himself within the class of individuals that JWT protects.

ABBOTT: Is there any evidence indicating that he knew that paternity action had occurred prior to the time he sought paternity?

COLEMAN: I cited in my brief one exchange in the testimony _____: Did you take any action? And he answered: no, we had an agreement...

ABBOTT: What was the time of that? When did he know?

COLEMAN: He gave that exchange which suggested by inference that he knew at the time of paternity the suit was happening, but he agreed not to take any action. But then he later testified that he never knew until much later.

ABBOTT: Under the legislative scheme, under your argument if somebody truly is the father and they are not put on notice the possibility of a paternity action, why should they be barred from coming back and trying to establish paternity 5 years later?

COLEMAN: Let me put it this way. Section 160.264 says that any person who has sexual relations with a woman is deemed to have knowledge that pregnancy of a child may result. The legislature I think wisely has chosen to put the obligation on the man to assert any paternity interests that may come about as a result of a relationship, rather than permitting the man simply to sit back and rest and put away his paternity rights in a lock box as it may be and wait for someone to give him notice. The right that was created in JWT by this court is a right that must be asserted at or near the time of birth. It is not something that continues on indefinitely as many other constitutional rights are until they are affirmatively taken away through notice and hearings and other due process.

HANKINSON: Before you go any further on you constitutional argument, can you direct me where in the record that the TC ever ruled on the validity of the paternity suit that was brought?

COLEMAN: I think that the TC actually didn't specifically make that finding. I have also searched the record. The TC found that he had no standing to bring any suit. All of the issues were briefed to the CA and it was the holding of the CA that JWT barred the application of §.007.

HANKINSON: Is it your position though that the issue relating to the paternity suit is properly before the court on appeal?

COLEMAN: I think so as a holding of the Beaumont CA.

HANKINSON: My second question then is, I am unable to find anywhere in the record as well where the constitutional claim was ever made in the TC by Mr. Sherry. Have I just missed it or was that claim not raised in the TC?

COLEMAN: I think it was raised at best inferentially and he claimed that he had a constitutional right.

HANKINSON: But there's no place where in a pleading or during the course of the hearing that he actually asserted that right. In fact, his lawyer seemed to concede the point that he could not bring the paternity suit.

COLEMAN: There is a point in the proceeding where that is in fact true. And I do agree that I don't think it's in the pleadings specifically.

HANKINSON: Then why doesn't Dreyer control in this case that in fact there's been a waiver of the constitutional claims since it was never raised in the TC?

COLEMAN: I think it very well may.

O'NEILL: If we were to rule for Mr. Sherry, how have we violated the sanctity of the family since both the parents are now deceased?

COLEMAN: The death of the parents in this case complicates the case. But I think the case could easily be cited on the basis of had Mr. Sherry brought his claim in January, 1995, when CSC was living in a stable and nurturing relationship with two live-in parents, we believe that at that point JWT would have still afforded him no protection. Subsequent to that fact, both parents have died, but the issue legally is not whether the constitution would come in and protect Mr. Sherry's right to assert paternity once both parents are dead, but whether the legislature could reasonably have weighed the various interests at issue, including those of scientific certainty, stability of families and finality of judgments and set up a scheme that balances those interests.

O'NEILL: But what do we do here when we're supposed to look at the best interest of the child under authority of family, or _____ family unit is no longer an issue. Is the only other option that the child be orphaned?

COLEMAN: The child was orphaned only because Mr. Sherry never asserted his rights at a time when he could have asserted them.

If there had not been a hiatus in custody, Mr. Sherry would easily have sought continued custody under the family code, he could have, and in fact, has sought to adopt CSC. Those are options that are available to Mr. Sherry under the family code and can be pursued. But the legislature has said that finality of judgments in stability of families as a policy are very important, and that in some instances they will outweigh our interests and scientific certainty. And that is why they have cutoff successive paternity suits in .007, and have strictly limited the ability to interfere where there is a presumed father under 110(f).

The legislature has made these policy decisions and has set it out in the family code. And we believe that this court can only say that Mr. Sherry is entitled to proceed with paternity suit if JWT instructs that .007 is in fact unconstitutional. Otherwise, it's within the legislature's _____.

O'NEILL: Would you agree that a policy concern in this case may not make much sense, or may not _____?

COLEMAN: I can see the equity concerns in this particular case. But the issue before this court really is not one of weighing the equities of a particular case, but whether application of the statute is unconstitutional. And the only claim that can be made as to constitutionality is that in JWT. And Mr. Sherry simply can't bring himself within the protections afforded by that decision.

PHILLIPS: But could there be a different constitutional balance when there is no parent alive, than there is when you already have a stable family relationship?

COLEMAN: I don't think so. I think that JWT protected his rights at or near the time of birth. He made no effort to assert those rights and CFC grew to the age of 3 years within a loving, stable, nurturing family. The father died. The parents then died. We believe that before Charles Canon died, that that JWT right had been extinguished and that the constitution doesn't resuscitate it simply because those parents subsequently died.

ENOCH: You're arguing JWT, but it seems to me the issue in JWT for all of its language simply, and the bottom line, just says a man has standing to assert paternity. The argument that was made in JWT is well but you have all of these other facts out there, that's relevant. But in truth all those facts are what determines whether or not he can later come - it's like a determination in merits. You determine standing by having litigation over whether or not the facts justify standing. But in fact, JWT creates a constitutional right in a man to assert paternity, and the only way you can determine if they are not committed to paternity is to give them standing to bring litigation and then you will debate the facts of whether or not they've established all these other facts. Isn't that the problem in this case? You can't really get to the plaintiff saying that Mr. Sherry has no standing unless you give him the right to bring his complaint in court to attempt to establish those facts that would otherwise allow him to proceed on a claim of paternity.

COLEMAN: I would disagree with that assessment of JWT. I think that it really does - that it's not a general constitutional right to assert paternity. But that it is limited. And I think that Justice Hecht's concurrence in that decision makes that clear, that even though the court has granted standing in this limited number of cases, that they may very well all lose on the merits. And so I don't think it's an ultimate decision on the merits of whether there should be custody or whether there should be a determination of paternity.

ENOCH: There's no practical application of the rule but for you allow the man to proceed in the hearing. You must allow him to proceed in the hearing. Ultimately, he may not establish I guess to right to bring a hearing, but the hearing is already occurred.

COLEMAN: I would still disagree with that. I think that the underlying right to bring the lawsuit depends on the finding of those three factors at or near the time of birth. Acceptance of responsibility and a diligent and continuous effort to establish and maintain a relationship with a child, those are threshold issues before you can even bring this suit, or before you can maintain the suit.

ENOCH: Constitutional interest that's at issue is the opportunity to bring that claim, isn't it? The whole issue here is the opportunity to bring the claim, and you may ultimately decide that he cannot go forward on this claim later because these facts aren't established. But you cannot refuse to allow him to make the claim.

COLEMAN: Well it's the right to bring and maintain the claim. So if a claim is brought by an individual who can't satisfy those factors, then the TC is obligated under §1.10(f) of Ch. 160, to dismiss that suit because the individual simply cannot bring it. We think the legislature has set out a tier. And the highest tier is when there has been an adjudication of paternity and the legislature has said you cannot bring a successive paternity suit. The second tier is that where there is a presumed father and the legislature has strictly construed a man's ability to bring a suit in those instances. And in the third tier is where there is no presumed father and there has been no adjudication. And in that instance, the legislature permits the suit to be brought anytime during the minority of the child. But the legislature has clearly weighed these competing interests and has made a decision and has chosen that scientific certainty is a very important factor, but it is not the only factor that should be considered. And that is made absolutely clear in the legislature's choice to permit, when a suit is brought, a father to make an acknowledgment of paternity, and to allow a judgment on that acknowledgment without blood testing or any kind of genetic determination.

O'NEILL: Can't hear question.

COLEMAN: It would go down through determination of paternity and then the court would subsequently have to determine custody and conservatorship.

O'NEILL: And in doing that, the focus would be the best interest of the child.

COLEMAN: Yes.

O'NEILL: Where's the harm done?

COLEMAN: I think the harm ultimately is that if Mr. Sherry can bring this suit, then other individuals where the equities are not so balanced would be able to bring suits in cases where there are loving, stable relationships, and harm would be to the society's interest in stable relationships. Not necessarily in this case, but in general cases and other cases, that we think the legislature has waived those, have made a choice, and has not violated the constitution in doing so.

HANKINSON: If this were to go back down and there was an adjudication of Mr. Sherry's paternity, then what is the legal effect of the prior order adjudicating Mr. Canon's paternity particularly since the child is still receiving financial benefits as a result of that adjudication? Do we have two legal fathers? I mean you can't terminate his rights now that he is dead. What is the legal effect?

COLEMAN: Well it would be basically unprecedented. Certainly the social security admin. could seek to cut off those rights. It is unclear to me, and I've taken a look at this and have not finally determined to my own satisfaction whether the subsequent determination would undercut or whether there would simply be competing paternity determinations, which Justice Gammage talked about in his dissent in JWT.

* * * * * * * * * *

RESPONDENT

HANKINSON: Was there actually an adjudication on your petition for paternity in the TC?

PETIT: There was a denial of standing. There was an order stating that we had no standing to proceed.

HANKINSON: But that was under the general standing provision of the family code. Sections 9 & 11. And you pled in the alternative for the paternity action and then for managing conservatorship. So was there never an adjudication?

PETIT: Our case was dismissed.

HANKINSON: And where in the TC was the constitutional claim raised? Where will I find it in the TC record?

PETIT: You won't find it in any pleadings. You would find it I think in the record.

HANKINSON: Well I've read the record, and I don't - where will I find it in that record since

I haven't been able locate it. In fact, all I see is the discussion of standing and the TC ruling on standing. I find no place where any mention was made by anyone of a constitutional claim.

PETIT: I believe the way that we proceeded was that we appealed the case directly to Beaumont and perhaps we should have done it in a motion for new trial or something like that. It was not done.

HANKINSON: So it was not raised in the TC?

PETIT: Not in pleadings. I'm sure it wasn't in the pleading. It's my understanding that there was mention made of the claim both under the US constitution and the State constitution.

HANKINSON: If I look at it and I don't find it anywhere, do you agree then that this court's decision in Dryer concludes our considering the constitutional claim on appeals, since Dryer says that it must be raised in the TC, or it's waived?

PETIT: I really don't because of the basic nature of this issue. And I think that one of the interesting things about Justice Hecht's opinion in Dryer was that he seemed to reserve the right to bring a bill of review.

HANKINSON: You've already brought the bill of review and you've lost the bill of review.

PETIT: Well of course the problem with the bill of review is, we were not a party to the proceeding...

HANKINSON: I've got very explicit language in Dryer that the holding of this court that says if you don't raise this constitutional claim in the TC, it's waived and it can't be raised on an appeal for the first time. And I need your help if you want us to get to this issue for you to tell us how to reach it since it doesn't seem to meet anything raised in the TC.

PETIT: I'm not sure I can help you. I'm not sure that I can tell you specifically if it was raised in the TC.

HANKINSON: And you don't have any other legal argument to make that would tell us why we should ignore Dryer or why we should overrule Dryer?

PETIT: I'm not sure that you would be ignoring Dryer because of the basic nature of this claim. Because of the fundamental nature of the claim.

BAKER: So you're arguing it's a fundamental error?

PETIT: Yes.

BAKER: Based on what?

PETIT: The denial of the most fundamental right that there is, that being between parent and child.

BAKER: This is the same type of claim that was raised in Dryer.

PETIT: Well it is, but you might conclude that this case is basically the flip side of Dryer if you were looking at it basically from this situation.

BAKER: Is just the fact that it's a constitutional consideration does that make it a fundamental error under our jurisprudence? There are cases that say over the past couple of decades that fundamental error really really doesn't exist anymore except under extremely limited circumstances. And as I recall it doesn't include the failure to preserve a constitutional issue.

PETIT: I know that there is law to that effect. My argument is that this is such a fundamental right, that ...

BAKER: It is based on a constitutional claim as Justice Hankinson suggest, that it also needs to be preserved as any other error does.

PETIT: In speaking of Dryer, in the Dryer case you had a situation where you have a marriage, where you have a viable family. And the folks went through a divorce. Mom is appointed managing conservator of the children. You have boilerplate language in the divorce decree where you have both the folks involved in this case before the court. The mother in Dryer and the Dryer facts got upset later on and said, no what I am going to do is I'm going to go back and I am going to bring a suit in the best interest of the children, even though I said to begin with I wanted my husband to be named as the father of these children. I'm going to go back and I'm going to try to sue someone else that's a better source of child support to be named as the father of the children.

So what we have here as opposed to Dryer is a situation that I think the court could consider from the flip side of what Charles Sherry's rights would have been had the mother attempted to cut him off, had actually given him notice under this case - to terminate his parental rights.

HANKINSON: The record seems to indicate that Mr. Sherry actually knew about this child from the time she was born.

PETIT: He knew about the child. He had a relationship with the child. That is in the record.

HANKINSON: And he knew about the child from the time she was born, and yet the record does not reflect that he did the things that JWT says needs to be done from the time of the child's birth - _____responsibility, actively involved, and so on and so forth from the child's birth, not from the time he moved in with the mother after Mr. Canon died.

PETIT: The record I think is fairly clear that the mother had a relationship with two men. The record is clear that this little girl's middle name...

HANKINSON: I understand. But the record does not reflect that he was actively involved in the child's life, or that he assumed any financial responsibility for her until after Mr. Canon died, and after he moved in with the mother, which was when the child was 3-4 years old.

PETIT: I don't know to what extent he did. I know that there was a relationship to a certain extent, because when this order was created, when this order was entered in an AG's proceeding by both folks being brought into court because mom had received state aid, and the AG was out there trying to collect this state aid. The record is clear that mom was deeply involved in drugs. You have a Dryer situation to the extent that the mother is out here making decisions on a part of a child that may or may not be in the best...

HANKINSON: But Mr. Sherry knows about all this. He knows the child is there, and he believes the child is his from the very beginning.

PETIT: That's correct. From the very beginning. He does not know that they have been to court and that there is this order...

HANKINSON: Here's the problem I have. If he knows all of that and we look at the factors in JWT, which are the factors that we would look to to make sure that there is no infringement of his constitutional right, he's aware of those things during the early years, which is within the time period that the legislature says that he would need to act, then why do we have a problem? It seems to me it's all circular and that in fact the way the legislature has orchestrated this scheme does take into account his interest and does protect them. It seems to me if you meet the JWT factors, then he's got everything he needs to know to be in there and be involved and establish his paternity early on. If it doesn't, and then he's within the scheme. It takes him right back to within the time period that the scheme would allow for him to establish his paternity.

PETIT: But in distinguishing JWT, where you had a viable family relationship, here you do not...

HANKINSON: Why wasn't it incumbent upon him to establish a viable family relationship if he believed the child was his and he knew the child existed? He stood by and let another man accept financial responsibility for the child.

PETIT: To a certain extent that's possible.

HANKINSON: But he did didn't he?

PETIT: The record is not clear on that.

HANKINSON: We've got an order that shows that the AG adjudicated his paternity and that he agreed to reimburse the AG for almost $1,200 and retroactive support.

PETIT: That's correct.

HANKINSON: So where was Mr. Sherry during all of that?

PETIT: That's a good question. I agree with you.

HANKINSON: I need to understand your constitutional argument that why his rights are violated in the face of that sequence of events: his knowledge and his standing by and letting another man accept financial responsibility for the child.

PETIT: I agree with that and what I would like to - I think that it might be helpful to look at it from the standpoint of what would have happened if the mom - if we had the Dryer situation, and Charles Sherry was alleged to have been the father of the child in a proceeding, and then the effort was made to cut him off. Whether he was known or not, there are so many factors that figure in there. The proponent there, the person seeking to terminate these parental rights, which this court and the US SC have held to be of constitutional import. She would have had to jump through hoops in many ways. She would have had to give him notice. If she was unable to give him notice there would have had to have been an affidavit showing due diligence to give him notice. There would probably have had to have been an ad litem appointed who would have had to look for him. And only after a lot of investigation could he have been cutoff.

HANKINSON: What would be the legal effect of success of paternity orders in this particular case? We have an order adjudicating Mr. Canon's paternity, and it would seem to me a court couldn't terminate his parental rights if he's dead. If your client were to prevail and have his paternity established as well, then what is the legal effect of that?

PETIT: The argument that I would make would be that the subsequent order would govern.

HANKINSON: So it wipes out the first order?

PETIT: It wouldn't wipe out the first order unless it in fact said that it would wipe out

the first order.

HANKINSON: What are you going to ask the TC to do? What's it going to look like and how is it going to impact the earlier order?

PETIT: What we are going to ask the TC to do and what we did ask the TC to do is provide paternity testing, and if that's positive, to move forward.

HANKINSON: Then what happens if - let's say it is positive, then what happens?

PETIT: If it was positive there would be an order creating the parent/child relationship between Charles Sherry and his child. The other order I really don't know what would happen.

HANKINSON: Is the adoption proceeding still pending?

PETIT: No it is not.

HANKINSON: What is the legal effect on the fact that a pleading was filed in the adoption matter by Mr. Sherry in which he claimed that he admitted that he was not the biological parent of the child, and in fact, that the child had no living parent, and that's why he was seeking to adopt?

PETIT: That's a ground for adoption.

HANKINSON: I understand but that's a judicial admission on his part.

PETIT: Well that's correct. But in seeking every possible form of relief for someone that of course was the reason that that was done. The effect of that I don't think amounts to a wavier under these circumstances.

HANKINSON: Wouldn't adoption be the appropriate way for him to proceed at this point in time? Why isn't that an appropriate option for him? He went to the court to take best interest _____ consideration and whether or not he really is the biological father.

PETIT: That is a possibility. The legislature changed the time frames on adoption that tightened it up. And I'm not sure that Sherry would qualify as a petitioner to adopt at that time, because the child has been out of his possession for such a long period of time. And that would be his only way to get there as far as standing.

BAKER: The CA decided this case on the constitutional argument alone. Assume that this court finds that that argument wasn't preserved, meaning we have to reverse the CA's opinion. Is there anything else that you argued below that would support another ground for the CA's action to give you standing?

PETIT: If you look at it not strictly from a constitutional standpoint, you could look at it strictly from the standpoint of the bar statute, which would be 160.007, which is the one that says that the suit cannot be brought once the parent/child relationship is established between a man and a child. And argue that in this particular set of facts that the bar would apply only to litigants in the case who had been litigants below. That could be the only way that you could get there without a constitutional _____.

HECHT: What happened to the adoption case?

PETIT: It was dismissed.

HECHT: By the plaintiff?

PETIT: Yes.

OWEN: Why?

PETIT: Because of the change in the time. The time frame was tightened up somewhat that would also result in denying standing to Sherry, we think, possibly.

HANKINSON: I'm not sure what the timing is. But the adoption proceeding was filed within 3 months after the time that Ms. Welch died.

PETIT: No, not the adoption.

HANKINSON: Wasn't it filed in Sept. 1998?

PETIT: No, it was filed in Sept. 1999. Because I do remember this. I remember in finding the new law on the adoption, and I felt like that gave us a problem.

PHILLIPS: If you were to prevail under the constitutional grounds, the CA didn't give give any reasons, it just cited _____. And we would probably prefer to cite a standard. How would you claim a constitutional right? Clearly if both the parents are still alive, Mr. Sherry would have waived his right under this situation, would he not have under JWT?

PETIT: If both parents were alive yes. If there was the viable relationship here...

I think the best way to articulate it is simply to say that the bar provided in the bar statute does not apply in cases where - you could limit it, you could say to where either parent is living.

PHILLIPS: What's the constitutional rationale behind such a distinction?

PETIT: One of the considerations would be the degree to which technology has changed, the certainty with which biological paternity can be established now.

PHILLIPS: JWT really struck the balance the wrong way, is that what you're saying, or are you saying that family rights disappear if there is no family, so the balance is _____?

PETIT: In trying to put this in a context that JWT reached, I suppose a strong argument can be made that JWT is not in point simply because of the viability of the family. Which you had in JWT and which you don't have here. And the fact that right after the JWT decision, the legislature came back and they changed the threshold talking about alleged fathers may bring their action but from the standpoint of someone in Charles Sherry's position, they didn't go far enough.

* * * * * * * * * *

REBUTTAL

HANKINSON: Mr. Coleman, where is the child now and what is her current custody arrangement?

COLEMAN: It's my understanding the child is now with an adult son of Mr. Canon. He was placed with a married adult son of Mr. Canon who has other children and she is living