

IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00543 COA

JAMES JOHNIGAN AND SHAQUAYLA
SHALON DONALD, A MINOR, BY AND
THROUGH HER NEXT FRIEND, JAMES
JOHNIGAN APPELLANTS

v.

EARTHA TISDALE AND SAM TISDALE APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EDWARD C. PRISOCK

COURT FROM WHICH APPEALED: KEMPER COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS: WALTER T. ROGERS

ATTORNEY FOR APPELLEES: HELEN J. MCDADE

NATURE OF THE CASE: PATERNITY

TRIAL COURT DISPOSITION: NINE TO THREE VERDICT IN FAVOR OF TISDALES
FINDING JAMES JOHNIGAN WAS NOT THE FATHER OF THE MINOR CHILD.

MANDATE ISSUED: 9/2/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT:

James Johnigan, the putative father of Shaquayla S. Donald, brought an action seeking a declaration that he was the child's natural father and requesting exclusive custody, care and control of the child. The maternal grandparents Eartha and Sam Tisdale defended the suit in the Kemper County Chancery Court arguing that Johnigan was not the child's father. The jury held that Mr. Johnigan was not the child's natural father. Aggrieved, Mr. Johnigan appeals to this Court alleging the following errors: (1) the Tisdales failed to rebut the presumption of paternity created by section 93-9-27 of the Mississippi Code of 1972, by a preponderance of the evidence, (2) the trial court erred in overruling his motion in limine and thereby, permitting the jury to hear out of court statements of the deceased mother that another was the father of the minor child, and (3) the trial court erred in overruling his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. We reverse and remand.

FACTS

On March 15, 1992, at age nineteen, Tonya Donald gave birth to Shaquayla S. Donald. Tonya Donald was unmarried but had been in an ongoing relationship with James Johnigan since 1990, when she was a senior in high school and he was a sophomore. As a part of this relationship, Tonya and James engaged in frequent and unprotected sex. In fact, Ms. Donald and James Johnigan had a prior child, who died within two hours of birth. The two continued their relationship until August of 1994, when Ms. Donald was killed by her step-brother.

Preceding her death, Ms. Donald held James Johnigan out to be Shaquayla's father. During prenatal counseling, Ms. Donald told the attending nurse that the baby's father was in high school but would help her throughout the pregnancy. James Johnigan was present when Ms. Donald gave birth to Shaquayla. He provided clothes and gifts for the child. James Johnigan's mother, Laura Johnigan, often cared for the child when the couple went out on dates. The Johnigans received several photographs of Shaquayla from six months to twenty-one months of age from Donald. Written on the back of these photographs were inscriptions such as, "To Grandmama Laura and Papa James," "To Grandmama Laura and Grandpa J.J., from your precious baby Shaquayla," and "To my Grandparents J.J. and Laura." James Johnigan was given a photograph of Shaquayla with "To my daddy, from your

precious baby girl Shaquayla" written on the back.

After Ms. Donald's death, Shaquayla lived with both the Johnigans and the Tisdales. The Johnigans claimed that Shaquayla lived with them at least three weeks of each month. The Tisdales admit that she lived with the Johnigans at least three days of every week. Mrs. Tisdale admits asking James Johnigan to sign a form, as the child's father, authorizing her to receive social security benefits on behalf of Shaquayla. The two families continued to provide joint care of Shaquayla until July of 1995, when the Tisdales refused to allow James Johnigan to visit with the child. Mrs. Johnigan inquired as to the change in customary visitation by the Tisdales and was told that "all the lawyers said that we don't have to give her (Shaquayla) back to ya'll." Mrs. Johnigan answered, "Fine. Then we'll get us a lawyer." James Johnigan filed a petition to establish paternity in July of 1995.

After bringing the paternity suit, James Johnigan moved the court to order DNA paternity testing. The court granted the motion and ordered that James and Shaquayla submit to blood/genetic testing by Medical Genetic Consultants, Inc./Legal Genetics. The DNA test revealed a 99.88% probability that James Johnigan was Shaquayla's natural father. This test result was placed into evidence during the trial.

During the trial, James Johnigan testified that he had had an ongoing relationship with Ms. Donald, which included frequent unprotected sexual relations. He testified that Ms. Donald told him that the child was his and that he had always accepted her as his own. He told the jury that Mrs. Tisdale asked him to sign the social security form as Shaquayla's father so that she might receive benefits on behalf of the child. On cross-examination, Mrs. Tisdale admitted asking James Johnigan to sign the form and admitted holding him out as the child's natural father to the Social Security Administration. A copy of the form was placed into evidence.

Other testimony came from Mrs. Johnigan and her sister Mrs. Pauley. Mrs. Johnigan testified that she and her husband were told by Ms. Donald that James Johnigan was the child's father. She testified that she provided clothes and gifts for the child as well as frequent care in her home. Mrs. Johnigan testified that Ms. Donald gave her and her husband the pictures previously mentioned in this opinion. Mrs. Pauley testified that both Ms. Donald and Mrs. Tisdale had previously stated that James Johnigan was Shaquayla's father.

Except for admitting that Ms. Donald and James Johnigan had an ongoing relationship since 1990, most of the Tisdale's testimony was in direct conflict with the Johnigan's. Mr. and Mrs. Tisdale testified that Ms. Donald told them that James Johnigan was not the child's father. They stated that she told them Shawn Kelley was Shaquayla's father. The Tisdales told the jury that Ms. Donald met Shawn Kelley when she went to Virginia for National Guard training. According to the Tisdales, Ms. Donald left for Virginia on March 15, 1991, and did not return to Kemper County until August 17, 1991. They said that they had never met or spoken with Shawn Kelley but understood from Ms. Donald that he was in the military. The Tisdales claimed that Kelley sent money to assist with Shaquayla's birth and sent Ms. Donald a set of wedding rings. However, to their knowledge Ms. Donald never wore the rings. This same testimony was given by Michelle Junior, Ms. Donald's best friend, and still a close friend of the family.

Johnigan presented rebuttal testimony from Ms. Martha White, the coordinating nurse at the Kemper County Health Department. Ms. White testified that according to Ms. Donald's medical records she

was in Kemper County in June of 1991, and began receiving prenatal care in July of 1991. Ms. White also testified that Ms. Donald's medical records indicated that the baby's father was in high school but would help her with the pregnancy. A nurse's notes in the records also indicated that Ms. Donald planned to join the army after the baby's birth.

On a nine to three vote, the jury held that James Johnigan was not the father of Shaquayla Donald. Johnigan moved the court for a J.N.O.V. or, in the alternative, a new trial. The court denied the motion, and James Johnigan perfected this appeal to this Court.

I.

THE TISDALES FAILED TO REBUT THE PRESUMPTION OF PATERNITY CREATED BY SECTION 93-9-27 OF THE MISSISSIPPI CODE BY A PREPONDERANCE OF THE EVIDENCE.

In this state, genetic tests establish a rebuttable presumption of paternity. Section 93-9-27 of the Mississippi Code of 1972 states:

(1) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If an expert concludes that the blood or other tests show the probability of paternity, such evidence shall be admitted.

(2) There shall be rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-eight percent (98%) or greater. This presumption may only be rebutted by a preponderance of the evidence.

On James Johnigan's motion the court ordered the parties to submit to DNA paternity testing. The tests revealed a 99.88% probability that Johnigan was the natural father of Shaquayla Donald. The Tisdales testified that Ms. Donald told them that a Shawn Kelley was the child's father, not Johnigan. From the testimony, the jury determined that Johnigan was not the natural father. James Johnigan contends that the Tisdales failed to overcome the rebuttable presumption of his DNA paternity tests by a preponderance of the evidence.

The statute required the Tisdales to rebut the 99.88% probability that Johnigan is the child's father by a preponderance of the evidence. To accomplish this, the Tisdales were required to produce evidence of superior or greater weight, which was more convincing to the jury than that produced by Johnigan. *Gregory v. Williams*, 35 So. 2d 451, 453 (Miss. 1948). In other words, upon comparison the evidence offered by the Tisdales must be of a more convincing force and outweigh the probabilities produced by Johnigan. *Id.* Our review of the record does not indicate that the Tisdales reached this threshold.

The Tisdales introduced Ms. Donald's verbal statement that Johnigan was not the child's father. However, during her lifetime Ms. Donald raised the child as if Johnigan was her father. The child

spent holidays and traditional family gatherings with the Johnigan family. Ms. Donald sent pictures to the Johnigan family with inscriptions indicating that the child was their son's daughter and their grandchild. Even after Ms. Donald's death, her parents continued to allow James Johnigan and his family to provide care and housing to Shaqualya for extended periods of time. Moreover, Mrs. Tisdale admitted to asking Johnigan to sign official social security forms as Shaqualya's father to enable her to receive benefits.

In an effort to rebut James Johnigan's claims as Shaqualya's father, the Tisdales told the jury that a man named Shawn Kelley was the child's father. According to the Tisdales, Ms. Donald met Kelley when she was in Virginia at National Guard training. They claimed that a relationship ensued, and Ms. Donald became pregnant. They claimed that she was in Virginia from March 15, 1991 and did not return to Kemper County until August 17, 1991. However, Ms. Martha White, the coordinating nurse for the Kemper County Health Department, testified that Ms. Donald's medical records indicated that she visited their office as early as June 25, 1991. The medical records indicated that Ms. Donald began prenatal care on July 17, 1991. Therefore, contrary to her parent's testimony, she was not in Virginia from March until August but in Kemper County, Mississippi. The attending nurse noted in the medical records that Ms. Donald's estimated date of delivery would be March 10, 1992. Considering that the gestation period for humans is nine months, Ms. Donald would have had to conceive some time in June of 1991, because Shaqualya was born on March 15, 1992.

Furthermore, Ms. Donald told the attending nurse that the baby's father was in high school but would help her through the pregnancy. James Johnigan was in high school during this time and in Kemper County.

Although the parents claimed that Shawn Kelley was the child's father, they presented no evidence that such a person even existed. The Tisdales had never seen nor spoken to this Shawn Kelley. The most they could offer was that he sent Ms. Donald money one time during the pregnancy and a set of wedding rings, which she never wore.

In *Grimsley v. Tyner*, 454 So. 2d 482 (Miss. 1984), the mother and putative father acquiesced in the parentage of an infant child and blood tests indicated a 99.6% probability of paternity. The jury held that Grimsley was not the child's father. On appeal, the supreme court found that the mother and father had acquiesced that Grimsley was the child's natural father. *Id.* at 484. In the present case, prior to her death Ms. Donald acquiesced to the fact that James Johnigan was the father of her child. After her death, Ms. Donald's parents engaged in the same acquiescence. Ultimately, Ms. Donald, Shaqualya's mother, and the Tisdales, Shaqualya's grandparents, collectively and individually engaged in acts sufficient to show acquiescence that James Johnigan was Shaqualya's father. Such acquiescence when coupled with a 99.88% probability of paternity does not negate by a preponderance of the evidence the presumption that James Johnigan is the child's father. Therefore, the judgment of the lower court is reversed, and the case is remanded for a new trial. Due to our reversal on this assignment of error, we do not reach Johnigan's remaining assignments.

THE JUDGMENT OF THE KEMPER COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED AGAINST THE APPELLEES.

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**