IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDERSON,

Petitioner,

v. CASE NO.: SC00-59

CATHY ANDERSON,

Respondent.
_____/

ON REVIEW FROM CONFLICT CERTIFIED
BY THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

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PRELIMINARY STATEMENT

Michael Anderson seeks review of the ruling that he must pay child support for fifteen years after the dissolution of his marriage for a child that is not his. He sought relief from the support obligation in the final dissolution within a year after that order, based on DNA testing that showed his former wife had lied to him when repeatedly telling him he was the father of the child.

Petitioner, Michael Anderson, refers to himself as "Michael," as the Second District did in its opinion in this case.

Michael Anderson refers to Respondent, Cathy Anderson, as "Cathy," as the Second District did.

Michael Anderson refers to the record on appeal by the prefix "R Vol./page number."

STATEMENT OF THE CASE AND FACTS

The Second District's opinion sets out the basic facts of the case, which Michael Anderson supplements and provides record cites for. Michael and Cathy had stopped dating when she called to tell him she was pregnant and that he was the father of the child (R V3/11-14). They were married and the child, M., was born in May 1994 (R V3/15-16). Cathy petitioned for divorce in October 1995 (R V1/1).

Prior to a June 1996 hearing, Cathy's sister told Michael that Cathy had previously been married and had a son from a relationship (R V3/22). Michael testified that when he confronted Cathy after the hearing, she denied having been married and having a son from a prior relationship (R V3/34). Michael had obtained a copy of the prior marriage certificate (R V3/25). Cathy testified that she told him she had been married to the man in question (R V3/112, 124).

During this conversation, Cathy and Michael agree that, in response to direct questioning from Michael, she assured him M. was his child (R V3/35, 113). Cathy said if Michael did not believe her, he could check it (R V3/35).

Michael testified he had no doubt the child was his (R V3/42). He instructed his counsel at the time that there was no need to pursue her standard request for paternity testing (R V3/72-73).

Michael testified he had no inkling the child was not his, and no doubts that she was his (R V3/42, 167).[1]

The trial court entered an amended final judgment in December 1996 (R V1/146). As the Second District noted, Michael testified that Cathy interfered with his visitation (R V3/42). Michael testified he had considered doing a paternity test, but could not afford the $900 he had been quoted and was in no rush because he had no doubt the child was his (R V3/167). Michael submitted himself and the child for DNA testing in March 1997 (R V1/181; V3/42). The test revealed, "the alleged father, MICHAEL LEE ANDERSON, is excluded as being the father of the child, M. M.A." (R V1/181; V2/303-305)(original emphasis). Michael has not seen the child since (R V3/42).

In May 1997, less than a year after the judgment, Michael sought relief from paying child support, filing a motion for relief from the judgment and a petition to modify the judgment (R V1/178, 190). At the evidentiary hearing before the Master, Cathy continued to claim Michael was the father and that she "never had sex with anybody else" (R V3/111, 153).

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[1] The transcript at 167 misstates his initial response as he still had "a" doubt instead of "no" doubt, but the subsequent question and answer that he had no doubts clarifies this typographical error, as does the Master's factual recitation of his testimony that he testified he had "no doubt" that M. was his daughter (R V2/297). The initial question and response about inkling at R V3/42 was also misread by Cathy in her brief below. Michael stated, "I didn't have any inkling then." The transcript reflects several instances where opposing counsel asked Michael compound questions and it appears Michael was answering part of a question or an earlier question. In any event, these do not affect the legal issue presented.

The Master's report recited that no information came to Michael's attention after the judgments that he did not have before the judgments were entered (R V2/297). As discussed below, Michael contends this is incorrect, as the difficulties he encountered with visitation occurred after, and his knowledge from the DNA test came after. Based on his conclusion that Michael had no new information, the Master found he could not challenge the alleged fraud perpetrated upon him by Cathy (R V2/298). The Master's order denied both the Rule 12.540 motion and Michael's petition for modification of the judgment (R V2/298). The circuit court denied Michael's exceptions to the Master's report and he appealed to the Second District (R V2/315, 316).

The Second District affirmed but certified conflict, holding that its decision was "legally, and nearly factually, indistinguishable from" *DeRico v. Wilson,* 714 So. 2d 623 (Fla. 5th DCA 1998). The Second District noted it had previously recognized conflict with *DeRico* in its decision in *D.F. v. Department of Revenue,* 736 So. 2d 782 (Fla. 2d DCA 1999), which is pending before this Court as Case No. 96,288.

ISSUE ON APPEAL

Where a wife repeatedly told her husband he was the father of a child who was less than three years old at dissolution, must the former husband pay support for an additional fifteen years where, within one year of the dissolution, he moves to terminate payments when DNA tests show he is not the father?

SUMMARY OF ARGUMENT

A husband should be entitled to rely on his wife's affirmative statement to him that he is the father of a child born during the marriage. When the true answer to that direct question is "I don't know," but the wife answers unequivocally that the child is his, the wife has made a misrepresentation to the husband.

After Cathy interfered with his visitation rights, Michael obtained a DNA test. To his surprise, the test conclusively showed he was not the father. He moved promptly to be relieved of the remaining fifteen years of his child support obligation. His motion should be granted.

Michael has not seen the child since the DNA test. The child will remain legitimate. There is no policy reason to maintain the facade that Michael is the father. Perhaps when Michael's request for relief is granted, it will facilitate a relationship between the child and the child's father.

ARGUMENT

Where a wife affirmatively told her husband he was the father of a child who was less than three years old at dissolution, the former husband should not be forced to pay support for an additional fifteen years where, within one year of the dissolution judgment, he moves to terminate payments when DNA tests show he is not the father.

Only three years ago, this Court quoted the "well-settled rule of law in this state" that "a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted." *Daniel v. Daniel,* 695 So. 2d 1253, 1254 (Fla. 1997).

Cathy Anderson lied to Michael Anderson when she told him she was pregnant with his child while they were separated. Cathy and Michael then married. After Cathy filed for divorce, she again lied to him when he asked her directly if the child was his. She said "yes," when the true answer was "no." At best for Cathy, giving her the benefit of the doubt, the true answer was "I don't know." Assuring Michael he was the father when the true answer was "I don't know" was a lie.

Thus, either way, Cathy's statement to Michael was a misrepresentation that warranted setting aside the support obligation of the dissolution judgment. Michael moved to do so

after he learned Cathy had made a misrepresentation to him, and within one year of the dissolution judgment.

In *Daniel,* the husband knew at the time of the marriage that his wife was pregnant with the child of another man. 695 So. 2d at 1254. Yet this Court held that he did not have a continued obligation to provide child support once he and his wife divorced. Here, Michael Anderson did not know the child was not his when he married, and did not know she was not his when they divorced. Yet under the ruling below, he will be required to provide child support for fifteen additional years. In other words, Michael is worse off than Mr. Daniel, who knew the truth going in. Michael was lied to and is being penalized.

Cathy Anderson's response boils down to arguing that Michael should have caught her lying sooner. She argues that because he said she denied being candid about her prior marriage, he should have concluded she lied to him on the parentage of the child. First, this ignores her testimony that she told Michael of that marriage. Second, not surprisingly, she cites no case law supporting this position, that sanctions rewarding a misrepresentation on a separate critical issue.

Cathy's argument also ignores that she made a misrepresentation to Michael in response to his direct question, on whether he was the child's father. Cathy's best case scenario is to assume that she did not know who was the true father of the child. That still makes her response to his direct question -- that Michael was the father -- a misrepresentation. The true

answer would have been "I don't know." If Cathy had given the true "I don't know" answer, then perhaps she could argue Michael should have been charged with responsibility with going forward to obtain a parentage determination at that time.

Given Cathy's definitive answer that Michael was the father of the child, he was entitled to rely on his wife's statement in not challenging parentage during the dissolution proceeding.

Family Law Rule of Procedure 12.540 provides Fla. R. Civ. P. 1.540 shall govern relief from judgments, decrees or orders. Rule 1.540(b)(3) provides for relief from judgments for fraud, *misrepresentation, or* other misconduct of an adverse party (emphasis added). Cathy's unequivocal statement that Michael was the father was a misrepresentation or a fraud.

As a recent appellate decision noted, Rule 1.540(b) does not contemplate only affirmative misrepresentations by an adverse party, but includes omissions. *Crowley v. Crowley,* 678 So. 2d 435, 438, n.1 (Fla. 4th DCA 1996), citing *In re Adoption of a Minor Child,* 593 So. 2d 185, 190 (Fla. 1991).

Rule 1.540 does not limit relief to instances of "fraud," but includes "misrepresentations." This Court has long held that even an innocent false representation warrants, for example, recission of a contract. *See Robson Link & Co. v. Leedy Wheeler & Co.,* 154 Fla. 596, 18 So. 2d 523 (1944); *Langley v. Irons Land & Development Co.,* 94 Fla. 1010, 114 So. 769 (1927); *see also Billian v. Mobil*

Corporation, 710 So. 2d 984, 990 (Fla. 4th DCA 1998), *review denied,* 725 So. 2d 1109 (Fla. 1998).

Contrary to the statement in the Master's report, all of the information known to Michael at the time he filed for relief was not known to him at the time of the final judgment. The most important information not known to him was the result of the DNA test, which conclusively showed the child was not his daughter. Another fact not know to him at the time of the final judgment was Cathy's subsequent interference with his visitation rights. Such interference was a reasonable basis to prompt Michael to seek confirmation that he was the father. As he testified, to his surprise, the DNA test proved he was not (R V3/41).

The Second District stated its decision expressly and directly conflicted with the Fifth District's opinion in *DeRico v. Wilson,* 714 So. 2d 623 (Fla. 5th DCA 1998). The Second District offered no analysis for disagreeing with *DeRico*, other than stating that it agreed with Judge Harris's dissent. The Second District noted the *Anderson* case "is legally, and nearly factually, indistinguishable from *DeRico*." First, *DeRico* is the better approach to this issue. Second, Michael Anderson's case presents a stronger argument than in *DeRico*, both legally and factually, for not holding him responsible for an additional fifteen years of support payments for a child that is not his.

In *DeRico,* there were three children born during the marriage: Arthur, Jr. in 1988, Travis in 1989, and Nya in 1992. The 1994

dissolution judgment required Mr. DeRico to pay child support for the three children. 714 So. 2d at 624.

In 1996, the parties agreed to a DNA parentage test as to Nya that showed Mr. DeRico was not the biological father. An April 1996 blood test of Travis rendered the same conclusion (there is no reference to any agreement for a blood test regarding Travis). Mr. DeRico moved the trial court to terminate child support obligations as to Nya and Travis. 714 So. 2d at 624.

The trial court denied Mr. DeRico's request and he appealed. The Fifth District reversed, citing this Court's decision in *Daniel* and the language quoted above. The Fifth District noted there was no issue as to the children's legitimacy since, because they were born during a valid marriage, they would remain legitimate. 714 So. 2d at 624, citing *Daniel,* 695 So. 2d at 1255.

The Fifth District held Mr. DeRico was not required to pay further child support payments and was entitled to a refund of support payments as to Nya and Travis paid since filing his petition. 714 So. 2d at 624.

Judge Harris's dissent said the case may present an exception to the rule this Court stated in *Daniel* that a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child.

Judge Harris focused on the trial court's determination that although the wife had been unfaithful, she did not know the children were not her husband's until she learned of the DNA results. He felt this distinguished between a wife who was unsure

of the identity of the father because she knows she had been faithful but remained silent, and a wife who knows or has reason to know that the husband is not the father, but leads him to believe he is. He noted the trial court found, based on this distinction, that there was no fraud committed on the husband.

First, the purported distinction is not valid. A wife who has been unfaithful at least has reason to know that the husband may not be the father of the child. The dissent ignores that even when the wife claims she does not "know" if the children are not her husband's, she commits a misrepresentation by omission. The wife is uniquely positioned to know that when she has had an affair, such a child may not be her husband's. An omission of a material fact entitles a party to relief from a judgment. *See Crowley; In Re Adoption.* Also, the dissent's approach would permit a wife in this situation to control the outcome with her own self-serving, unchallengeable testimony that she did not "know."

Second, the Andersons' situation differs materially from the DeRicos'. There is no suggestion Mrs. DeRico unequivocally assured her husband he was the father of the children in response to his direct questioning. Here, Cathy Anderson affirmatively told Michael that he was the father.

Judge Harris said the trial court apparently applied the principles that a divorce decree that establishes the paternity of the child is a final determination and is res judicata in any future proceedings. He went on to admit that an affirmance "appears grossly unfair" regarding the younger child (the mother

was living with the father, but getting support from her former husband). Judge Harris concluded by stating, "but I am unable to suggest a reasonable exception to the exception." 714 So.2d at 626, n. 5.

Even if the *DeRico* dissent were correct in assuming the existence of a prior judgment obliterates this Court's policy statement in *Daniel*, the dissent did not focus on when a father should be relieved from paying support for a child that is not his. In *DeRico,* the father moved to modify more than a year after the dissolution judgment. 714 So. 2d at 624. The dissent does not address the fact situation in the Andersons' case.

The Second District's reliance on the *DeRico* dissent ignores the differences in the two cases. Michael Anderson did move to modify and for relief within one year of the judgment, and did so based on Cathy's misrepresentation.

There is no suggestion in *DeRico* that prior to the dissolution judgment the husband asked the wife if either of the children in question were his. By contrast, it is undisputed that Michael asked Cathy, and she stated unequivocally that the child was his. This was a false statement. As noted, even giving Cathy the benefit of the doubt that she did not know who the father was, her unequivocal statement that Michael was the father was false, when the true answer would have been "I don't know." Thus, contrary to the situation in *DeRico*, Cathy's statement was a fraud or a misrepresentation, either of which warrants relief under 1.540(b)(3).

If Michael had not asked and Cathy had not lied, the facts would be different and closer to the apparent facts in *DeRico*. Michael's case presents a much stronger case than *DeRico*.

Even if Michael had not asked and Cathy had not lied, under *DeRico* he would be entitled to relief from child support payments over the next fifteen years for a child that is not his. The unarticulated "public policy" concerns in the dissent were not adopted by the majority in *DeRico*. This is likely because they cannot be reconciled with this Court's holding in *Daniel,* that a husband in these circumstances has no legal duty to provide support to a minor child that is neither his natural nor adopted child.

Under *DeRico* and *Daniel*, such a child born during marriage remains legitimate. The only thing that changes is that a man who is not the father is no longer required to pay child support for a child that is not his. The mother will be free to seek child support from the father.

The unarticulated policy concerns make no sense in the context of a dissolution. At that point, the husband and wife are separating and they will no longer be maintaining a single family unit with the child. If the husband affirmatively inquires, as Michael did here, he is entitled to know if the child may not be his.

Michael has not seen the child since the DNA tests showed he was not the father (R V3/42). Thus, holding him financially responsible for fifteen years for a child that is not his will not mean he has any personal relationship with the child. Indeed,

terminating his financial obligation may lead to establishing a relationship between the child and her natural father that is both financially and personally supportive.

When a wife makes an affirmative allegation in a petition or otherwise in the dissolution proceeding that her husband is the father, the husband should be able to rely upon such an affirmative statement. Even if Michael Anderson had not asked, he would be entitled to relief under the rationale of *DeRico.* Here, he did ask and was assured by his wife that the child was his. This was a misrepresentation.

As noted, the Master's statement that Michael had no new factual information is wrong. However, even if correct, Michael would still have been entitled to relief. There is no suggestion in *DeRico* that the husband had any new information after the dissolution judgment (before getting the DNA tests). Rule 1.540(b)(2) permits relief for a judgment for newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing. Rule 1.540(b)(3) provides a separate ground for relief when there has been fraud or misrepresentation. Cathy's best case scenario is that she committed a misrepresentation.

Michael had the DNA test done in March 1997, after encountering child visitation problems and when he was able to locate a testing facility that he could afford (for less than $300, as contrasted with the original price he had been given of approximately $900). A ruling that penalized Michael for waiting

a short period of time until he could afford to have the testing done presents serious public policy issues: those who do not have the money for such testing would be sentenced to a 15-year term of unwarranted child support payments.

For the foregoing reasons, the Second District's judgment should be reversed, consistent with *Daniel* and *DeRico.* Michael addresses a few additional points, which although not mentioned by the Second District, Cathy had raised below.

Cathy attempted to criticize Michael for taking the child for a DNA test, and argued that in *DeRico,* the test on Nya was performed by the agreement of the parties. First, *DeRico* does not suggest that was a relevant factor. Second, *DeRico* makes no mention of any agreement to test Travis, which occurred three months later.

Third, Cathy had already told Michael in response to his question during the dissolution that Michael was the father and that he could "check it" (R V3/35). Thus, she had authorized him to take the child for a test. The DNA test was a simple procedure: using cotton swabs in the child's mouth and Michael's mouth (R V3/41).

Lefler v. Lefler, 722 So. 2d 941 (Fla. 4th DCA 1998), reversed the trial court's refusal to permit a former husband to obtain a blood test to determine if he is the biological father of a child born during the marriage.

As discussed above, Michael believes Cathy misinterpreted some of his trial testimony below in arguing that he acknowledged he had some doubt regarding the child during the dissolution proceedings. Even if a husband has a "doubt" about the parentage of a child during dissolution, he should be able to rely on his wife's unequivocal response to a direct question that the child is his. Otherwise, our courts will reward concealment and misrepresentation.

The facts in the Andersons' case differ significantly from the case law Cathy attempted to rely on below where the husband had ordered blood tests before the final dissolution, but the results were inconclusive. The husband there went forward without further testing and signed a stipulation that he was the father of the child. *Lathrop v. Lathrop,* 627 So. 2d 1317 (Fla. 2d DCA 1993). *Lathrop* also predates *Daniel.*

As noted, Michael filed a supplemental petition to modify the support obligation, as well as the Rule 12.540 motion for relief. The Master's order denied both the Rule 12.540 motion and Michael's petition for modification of the judgment (R V2/298). *DeRico* and *Lefler* appear to have proceeded solely on petitions for modification. Thus, even if Michael were not entitled to relief under Rules 12.540 and 1.540 (which he is), his request should be granted under his petition to modify.

CONCLUSION

A husband who does the "right thing" and marries a woman who says he is the father of an unborn child, and then is affirmatively reassured by the wife during the dissolution that he is the father, should not be penalized for fifteen years of child support payments because he did not catch his wife's lies sooner.

Michael Anderson requests this Court reverse the opinion of the Second District and remand for entry of a judgment in his favor (including repayment of support payments made since he filed his petition. *See DeRico,* 714 So. 2d at 624.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: THOMAS D. CASPER, ESQ., One Urban Centre, 4830 W. Kennedy Boulevard, Suite 750, Tampa, Florida 33609, Attorney for Respondent, this 9th day of February, 2000.

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