

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re the Matter of:

County of Dakota and

Victoria Louise Reily,
a/k/a Victoria Louise Darnell, Plaintiffs,

Respondents,

Vs.

Edward Lee Blackwell, Defendant,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. COMPETING PRESUMPTIONS OF PATERNITY REQUIRE AN EVIDENTIARY HEARING IN ORDER TO DETERMINE WHICH PRESUMPTION CONTROLS BASED ON THE WEIGHTIER CONSIDERATIONS OF POLICY AND LOGIC

The issue was raised in Appellant's Notice of Motion and Motion and Memorandum of Law [Appellant's Appendix A3 and A5] submitted prior to the January 5, 2011 District Court hearing.

The trial court issued summary judgment in favor of Respondent, and adjudicated Appellant as the father of the minor child [App. A76], without holding an evidentiary hearing to address the competing presumptions of paternity of Respondent's former spouse and Appellant.

Apposite Authority:

"Parentage Act"

Minn. Stat. § 257.55 Subd. 1(a)

Minn. Stat. § 257.55 Subd. 2

Minn. Stat. § 257.57 Subd. 2(1)

Minn. Stat. § 257.62 Subd. 5(b)

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In re Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. App. 1994)

Kelly v. Cataldo, 488 N.W.2d 822 (Minn. Ct. App. 1992)

II. WHETHER THE TRIAL COURT'S FAILURE TO JOIN AS A THIRD PARTY THE FORMER SPOUSE OF THE MOTHER WAS PREJUDICIAL ERROR.

The issue was raised in Appellant's Notice of Motion and Motion and Memorandum of Law [App. A4 and A5] submitted prior to the January 5, 2011 District Court hearing.

The trial court issued summary judgment in favor of Respondent, refusing to join a third party presumed to be the father of the minor child, and adjudicated Appellant as the father of the minor child [App. A75], without holding an evidentiary hearing to address the competing presumptions of paternity.

Apposite Authority:

"Parentage Act"

Minn. Stat. § 257.55 Subd. 1(a)

Minn. Stat. § 257.55 Subd. 2

Minn. Stat. § 257.57 Subd. 2(1)

Minn. Stat. § 257.62 Subd. 5(b)

Minn. Stat. § 257.62 Subd. 5(c)

In re Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. App. 1994)
Kelly v. Cataldo, 488 N.W.2d 822 (Minn. Ct. App. 1992)

III. WHETHER THE TRIAL COURT'S VERBATIM ADOPTION OF THE DAKOTA COUNTY ATTORNEY'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DEMONSTRATED A LACK OF AN INDEPENDENT JUDICIAL EXAMINATION OF THE FACTS.

The District Court adopted verbatim the Findings of Fact and Conclusions of Law submitted by the Dakota County Attorney. [App. A56-74] and [App. A75-96]. The Order for Judgment and Judgment included the signature of the County Attorney. Appellant's attorney contacted Dakota County court administration in order to request a hearing date for the Motion for Stay of Judgment, and was advised that this decision was listed in the database as an agreement between the parties.

Appellant's attorney sent a letter on February 25, 2011, to Judge Sovis addressing this issue and requesting guidance from the court. [App. A97].

Apposite authority:

Bliss v. Bliss, 493 N.W.2d 583 (Minn. Ct. App. 1992)
Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. Ct. App. 2005)

STATEMENT OF THE CASE

The child was born on March 22, 1999 [App. A77]. At the child's birth, the Respondent mother was married to John Melner Reily, Jr., later determined not to be the biological father of the child. Respondent mother and the child resided with her husband until their marriage was dissolved on March 17, 2006, pursuant to the Judgment of the court dated March 7, 2006 [App. A39]. Respondent and Mr. Reily were awarded joint physical custody of the child [App. A 48]. Respondent and her former husband moved in together as a family unit in September, 2007, and continue to reside in the same household at the present time with the minor child [App. A 18]. Appellant and Respondent mother resided together with the minor child from July of 2006 until September of 2007 [App. A 17] although there is no evidence Appellant held the child out to be his own, which would create a presumption of paternity under Minn. Stat. Sec. 257.55 Subd. 1 (d).

Dakota County commenced a paternity pursuant to Minn. Stat. Sec.257.57 subd.2(1). Genetic testing was subsequently ordered and conducted, which established that Appellant is the natural/biological father of the minor child, who is now twelve (12) years of age. The genetic testing is not in dispute by Appellant. [App. A 16].

Dakota County brought a motion for summary judgment to have Appellant's parentage established, and for an award of child support. [App. A1]. Appellant filed a responsive motion with a Memorandum of Law and Affidavit of Appellant contending that summary judgment was not appropriate due to the competing presumptions of paternity between Respondent's husband and Appellant. [App. pp. A 3; A 5; and A16].

Dakota County District Court Judge Michael V. Sovis held a motion hearing on January 5, 2011, and granted Dakota County's motion, issuing an Order adjudicating the Appellant as the child's father and ordering on-going and past owed child support. [App. A76 and A 83-95].

STATEMENT OF THE FACTS

Respondent married John Melner Reily, Jr. on March 23, 1991 and they were not divorced until March 17, 2006. [App. A39]. The minor child [REDACTED] was born on March 22, 1999, and the child was given Respondent's spouse's surname. [App. A42]. Respondent and her husband have two joint children who are being raised with the child. [App. A41]. The minor child has been in the care of the Respondent mother and her husband and now former husband for a large majority of his young life, which continues to the present. [App. A18]. The Reily's divorce decree, entered pursuant to Stipulation of the parties, indicated that Mr. Reily was claiming that he was not the minor child's biological father; however, the presumption of a parent/child relationship was not negated by this single statement in that dissolution decree. In fact, Mr. Reily was granted joint physical custody of the minor child in the decree. [App. A48].

No Recognition of Parentage was executed with regard to the minor child nor has there been a previous court order establishing Appellant's paternity. Genetic testing was not conducted until after Dakota County served Appellant with a Summons and Complaint in September 2010, when the child was eleven (11) years old.

Appellant has had inconsistent contact with the minor child throughout the child's life. Since September of 2007, he has seen [REDACTED] two times for 2-3 hours each time. [App. A19]. After Respondent and Appellant commenced residing together in 2006, he began to voluntarily provide for [REDACTED] health insurance and, for most periods of time, dental insurance, through his

place of employment. He has also provided \$400.00 per month in cash assistance to Respondent Victoria Louise Reily since 2008. [App A 79].

Appellant does not dispute that he is the biological father of the minor child.

ARGUMENT

I. COMPETING PRESUMPTIONS OF PATERNITY REQUIRE AN EVIDENTIARY HEARING IN ORDER TO DETERMINE WHICH PRESUMPTION CONTROLS BASED ON THE WEIGHTIER CONSIDERATIONS OF POLICY AND LOGIC.

“A man is presumed to be the biological father of a child if:

(a) he and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 280 days after the marriage is terminated by death, annulment, declaration of invalidity, dissolution, or divorce, or after a decree of legal separation is entered by a court. The presumption in this paragraph does not apply if the man has joined in a recognition of parentage recognizing another man as the biological father under section 257.75, subdivision 1a.” Minn. Stat. § 257.55, Subd. 1(a).

John Reily is a presumed father of the minor child, because he was married to the mother of the child at the time of the child's birth and no recognition of parentage was signed to indicate that he was not the child's father. Appellant is also a presumed father of the minor child as a result of genetic testing. Paternity presumptions must be rebutted by “clear and convincing” evidence. Minn. Stat. § 257.55, Subd. 2.

“Effective August 1, 2006, the legislature removed genetic testing from the list of presumptions contained in Minn. Stat. § 257.55, Subd. 1 (2004).” T.D.C. v. D.E.A. v. J.S.C., A06-2426 (unpub. Minn. Ct. App. 2007). [App. A 11]. The court concluded that there was no merit to the argument that the paternity statute indicates a preference for adjudication of a

genetic father [App. A 12], and concluded that a paternity adjudication must be supported by the facts of each case [App. A 13]. If genetic test results indicate a paternity probability of 99% or greater, an evidentiary presumption exists that the alleged father is the biological father. Minn. Stat. Sec. 257.62 Subd. 5(b). However, such a determination does not preclude the adjudication of another man as the legal father when conflicting presumptions exist. Minn. Stat. Sec. 257.62 Subd. 5(c). “A child’s best interest is a valid policy factor in resolving a conflict between competing paternity presumptions”. In re Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. App. 1994). There is no hierarchy of preference when there are competing presumptions of paternity. Kelly v. Cataldo, 488 N.W.2d 822, 826 – 27 (Minn. Ct. App. 1992).

Summary judgment may be appropriate in a paternity action. Johnson v. Van Blaricom, 480 N.W.2d 138, 140 (Minn. Ct. App. 1992). However; as with all civil cases, when summary judgment is reviewed on appeal, the reviewing court must determine whether there are any genuine issues of material fact and whether the trial court erred in applying the law. *Id.* Evidence is to be reviewed in the light most favorable to the party against whom summary judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

Rule 56.01 of the MN Rules of Civ. Proc. Provides that a party seeking to recover upon a claim may move for summary judgment with or without supporting affidavits. Rule 56.03 provides that judgment may be rendered “if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law....”. Rule 56.05 goes on to provide that “(s)upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is confident to testify to the matters stated therein....When a

motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial.....". Appellant provided a factual basis for denial of Respondents' motion for summary judgment. No affidavits with firsthand knowledge of the facts of this case were presented in support of the motion.

The ex-husband, and presumed father, John Reily, was not present at the hearing. Although Respondent mother was personally present at the January 5, 2011, hearing, the Dakota County Attorney did not present sworn statements or elicit testimony from the Respondent. All of the information conveyed to the court through the County Attorney was hearsay and not based on any sworn statements submitted to the District Court. Despite this lack of testimony, the Findings in this matter included the following statement, "[t]hat although Victoria Louise Reily, a/k/a Victoria Louise Darnell, was married at the time of conception, on or about June or July 1998, she did not have sexual intercourse with her husband during this period." [App. A78 at paragraph 14]. The Findings also state that, "[a]ny presumption that John M. Reily may be the father of the minor child, ██████ is rebutted by clear and convincing evidence. The presumption that John M. Reily is the father of the minor child is founded on the weightier considerations of policy and logic." [App. A79 at paragraph 21]. That finding actually supports in part a formal adjudication of Mr. Reily as the father of this child – not Appellant. In any event, the findings are unsupported by any evidence, as no evidence was provided regarding Mr. Reily. Nothing was provided to refute the statements in Appellant's affidavit. The findings flow in a logic pattern that demonstrates that the genetic testing alone was used to determine this matter. No consideration of policy or logic was included in the findings. The court weighed only the genetic testing to improperly determine paternity in this case.

II. THE TRIAL COURT'S FAILURE TO JOIN AS A THIRD PARTY THE FORMER SPOUSE OF THE MOTHER WAS PREJUDICIAL ERROR.

Respondent mother's former husband, John Reily, should have been joined as a party under Rule 19.01 of the Minnesota Rules of Civil Procedure. It was prejudicial error when the trial court failed to join the former spouse of the mother as a third party. Minn. Stat. Sec. 257.57 Subd. 1(b) provided an opportunity for Respondent Victoria Reily's former husband, John Reily, to bring an action to set aside the presumption of paternity arising out of his marriage as follows:

...for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c), only if the action is brought within two years after the person bringing the action has reason to believe that the presumed father is not the father of the child, but in no event later than three years after the child's birth....

For whatever reason, he did not do so. His action to do so is now time barred. This issue was raised explicitly in Appellant's Memorandum of Law in Support of Motion to Deny Summary Judgment and join John Melner Reily, Jr. as a party Defendant.

Respondent and the minor child resided with Mr. Reily after the child was born, and there has never been an attempt to have Mr. Reily's non-paternity established. The County Attorney indicated that Respondent and her husband did not have a sexual relationship at the time that the child was conceived, and if this is true, Mr. Reily must have known then that he was not the child's biological father. Despite this knowledge, the child was given Mr. Reily's surname and resided with the Reily family a large majority of his life, and up until the present time.

III. THE TRIAL COURT'S VERBATIM ADOPTION OF THE COUNTY

ATTORNEY'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
DEMONSTRATES A LACK OF INDEPENDENT JUDICIAL REVIEW OF THE
FACTUAL CIRCUMSTANCES OF THIS CASE.

The adoption by a court of a party's findings and conclusions is not reversible error *per se*. Bliss v. Bliss, 493 N.W.2d 583, 590 (Minn. Ct. App. 1992), citing Sigurdson v. Isanti County, 408 N.W.2d 654, 657 (Minn. 1987). When a trial court adopts a party's findings however, "the trial court must scrupulously assure that findings and conclusions --whether they be the court's alone, one or the other party's, or a combination -- are always detailed, specific and sufficient enough to enable meaningful review by this court." Bliss at page 590. When a court does a verbatim adoption of a party's proposed findings and conclusions, "it raises the question of whether the court independently evaluated the evidence." Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. Ct. App. 2005).

The Court clearly rubber stamped the Dakota County Attorney's Findings of Fact, Conclusions of Law, Judgment and Order for Judgment. The County Attorney's signature (which predates the judicial signature) is on both the proposed findings, and the Judge's final Order. The findings are not sufficiently detailed to make a determination regarding the conflicting presumptions of paternity regarding Mr. Reily, and instead are conclusory statements unsupported by any evidence submitted at the time of the summary judgment hearing. The "fact" that Ms. Reily and Mr. Reily did not have a sexual relationship when the child was conceived was not introduced through any testimony or affidavit of Respondent Ms. Reily. The "fact" that Appellant held the minor child out as his own is unsupported by the record. Even if such facts were supported by the record, they are wholly insufficient to assess and determine paternity without an evidentiary hearing and joinder of Mr. Reily as a party.

Mr. Reily was not personally present at the hearing and no weighing of the policy or logic involving his parent/child relationship with this minor child occurred. When Appellant's attorney contacted the Court Administrator to schedule a hearing, this office was advised that the Judgment had been issued as an uncontested matter. Further questioning indicated that the County Attorney's findings had been placed in a signing box, and had been signed by the judicial officer as though the parties had not had a contested hearing. This was noted to the trial judge by letter dated February 25, 2011. [App. A97].

The final judgment in this matter was a verbatim adoption of the County Attorney's proposed order, and lacks sufficient detailed judicial findings to demonstrate that the court did an independent evaluation of the evidence presented.

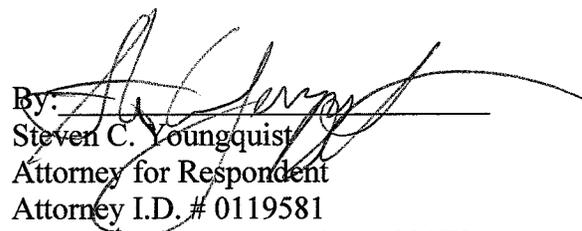
CONCLUSION

Summary Judgment is not appropriate when there are competing presumptions of paternity and there are material factual disputes regarding the policy and logic to be applied. Respondent's ex-spouse should have been added as a party and an evidentiary hearing held. In addition, there was apparently no independent review by the District Court of the issues presented at the contested motion hearing requesting summary judgment.

Dated: April 6, 2011

Respectfully Submitted,

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