

CASE NO. A11-336

STATE OF MINNESOTA
IN COURT OF APPEALS

County of Dakota and
Victoria Louise Reily,
a/k/a Victoria Louise Darnell, Plaintiffs,

Respondents,

v.

Edward Lee Blackwell, Defendant,

Appellant.

RESPONDENT DAKOTA COUNTY'S
BRIEF AND APPENDIX

YOUNGQUIST LAW OFFICE
Steven C. Youngquist
Attorney Reg. No. 119581
421-1st Avenue S.W., Suite 301W
Rochester, MN 55902
Phone: (507) 282-4434
Attorney for Appellant

ASSISTANT DAKOTA COUNTY ATTORNEY
Jean M. Mitchell
Attorney Reg. No. 0164689
Dakota County Northern Service Center
One Mendota Road W., Suite 220
West St. Paul, MN 55118
Telephone: (651) 438-4438
Attorney for Respondent Dakota County

LAKELAND LAW OFFICE
Ann Bottolene
Attorney Reg. No. 0325442
1509 Lacota Lane
Burnsville, MN 55337
Telephone: (952) 890-2405
*Attorney for Respondent Victoria Louise Reily,
a/k/a Victoria Louise Darnell*

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. ARE THERE COMPETING PRESUMPTIONS OF PATERNITY REQUIRING AN EVIDENTIARY HEARING?

There are no competing presumptions because the individual Respondent's ex-spouse was already legally determined not to be the father of the minor child. In the alternative, even if a presumption existed, an evidentiary hearing was not required for the trial court to grant summary judgment in favor of the Respondents.

Minn. Stat. § 257.55, subd. 2 (2011)

Nyman v. Thomas, 584 N.W.2d 421 (Minn. Ct. App. 1998)

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

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

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

No, the trial court's failure to join the individual Respondent's former spouse as a third party was not prejudicial error.

Johnson v. Van Blaricom, 480 N.W.2d 138 (Minn. Ct. App. 1992)

III. DID THE TRIAL COURT'S VERBATIM ADOPTION OF DAKOTA COUNTY'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DEMONSTRATE A LACK OF INDEPENDENT JUDICIAL EXAMINATION OF THE FACTS?

No, the trial court exercised independent judicial examination of the facts before issuing its order.

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

Brevik v. Brevik, A10-761 (unpublished Minn. Ct. App. 2011)

Sauter v. J.P. Wasemiller, 389 N.W.2d 200 (Minn. 1986)

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

STATEMENT OF THE CASE

Dakota County commenced a paternity action, pursuant to Minn. Stat. § 257.57, subd. 2(1), naming the Appellant as the sole defendant. [App. R-6]. The complaint specifically states the individual Respondent was married to another man at the time of the child's birth, but she only had sexual intercourse with the Appellant during the period of conception, and that the individual Respondent's divorce decree found that the individual Respondent's then spouse was not the father of D.J.R., the minor child in this case.

Genetic tests of the Appellant, individual Respondent and minor child were performed. The results indicated a 99.99% likelihood the Appellant was the genetic father of the minor child. The Appellant admits that he is the genetic/biological father of the minor child. [App. A-16].

Dakota County filed a motion for summary judgment dated November 29, 2011 with a supporting affidavit and memorandum of law [App. R-12]. A hearing took place on Dakota County's motion and the Appellant's responsive motion on January 5, 2011, before the Honorable Michael V. Sovis, Judge of Dakota County Court. Appearing at the hearing were the individual Respondent, Appellant's counsel, and counsel for Dakota County. The Appellant made no personal appearance. Both counsel for Dakota County and Appellant's counsel were asked to, and submitted, proposed orders to the Honorable Michael V. Sovis after oral arguments. The court found for the Respondents [App. A-75]

and adopted Respondent Dakota County's proposed order adjudicating Appellant to be the father of the minor child. This appeal followed.

STATEMENT OF THE FACTS

On March 22, 1999, the individual Respondent gave birth to D.J.R., the minor child and the subject of this paternity action. At the time of the child's birth, the individual Respondent was still married to John Melner Riley, Jr. However, the husband, J.M.R. was later determined not to be the father of D.J.R., pursuant to a Dakota County court order dated March 17, 2006 in court file number 19-F7-06-12785.

The individual Respondent and her then husband, John Melner Riley, Jr., were divorced on March 17, 2006 in the State of Minnesota. The Petition for Dissolution of Marriage and Order for Judgment, findings numbers 16 and 20 specified that there were two children born of the marriage, M.E.R., born August 26, 1991 and M.P.R, born January 21, 1995. The decree indicated that the child, D.J.R., born March 22, 1999, was the non-joint child of Victoria Louise Reily [App. A-29]. The Judgment and Decree does grant Respondent's ex-spouse joint physical custody of D.J.R., contrary to Appellant's assertion. In fact, the relevant paragraph states that "physical custody of the parties' minor child(ren) of the marriage is granted jointly to both parties (emphasis added). [App. A-48]. Custody was addressed only with regard to the joint children, M.E.R. and M.P.R.

After the child's birth, the individual Respondent and Appellant moved to Sacramento, California where they lived together with the child from September 2006 until October 2007. [App. R-11] [App. A-17]. The Appellant obtained and maintained

health and, later, dental insurance for the minor child. Since 2008, the Appellant voluntarily paid the individual Respondent \$400.00 each month for support of the minor child. Appellant also provided for all of the minor child's financial needs during the period they resided together, July 2006 through September 2007. By his own admission, the Appellant has maintained, abet sporadic, a relationship with D.J.R. [App. A-19]. Appellant admits he is D.J.R.'s biological father [App. A-17]. The exact nature and frequency of their relationship was never fully provided to the court as the Appellant never personally appeared for any of the court appearances.

ARGUMENT

STANDARD OF REVIEW

Minn. R. Civ. P. 128.02, subd. 1(d) requires the appellant to include "...the applicable stand of appellate review for each issue..." Appellant failed to include any standards of appellate review in his brief.

I. THERE WERE NO COMPETING PRESUMPTIONS OF PATERNITY.

There were no competing presumptions before the trial court. The issue of the individual Respondent's ex-spouse's paternity was previously litigated. The Judgment and Decree, dated March 17, 2006 found that the husband was not the father of the minor child, D.J.R. [App. A-42]. The matter had already been litigated and the individual Respondent is barred from relitigating the issue of paternity. Clay v. Clay, 397 N.W.2d 571 (Minn. Ct. App. 1986). That being the case, the only presumption of parentage that exists regards the Appellant because he held the minor child out as his for over twelve years and genetic test results indicate a 99.99% likelihood of parentage.

Even if the court were to consider Appellant's assertion that there are competing presumptions, there is guidance in Minnesota law which leads us to the trial court's determination that the Appellant be adjudicated the minor child's father.

Minn. Stat. § 257.55, subd. 2 contemplates that a parentage action may involve competing presumptions, "where two or more paternity presumptions conflict". The presumption, "which on the facts, is founded on the weightier considerations of policy and logic controls". In Re the Welfare of C.M.G., 516 N.W.2d 555, (Minn. Ct. App. 1994). Appellant refers to In Re the Welfare of C.M.G., id. to support his position. However, this case is easily distinguished because it involved two men who both wished to be adjudicated the child's father. The intervening man, believing he to be the child's genetic father, signed a Recognition of Parentage finding out three years later, from a genetic test, that he was not the genetic father. The court looked to the best interests of the child and held that the non-genetic man and child had bonded and, based on their mutual wishes, adjudicated him the father.

In this case, the Appellant held the child out as his own child, lived with him for over a year, obtained medical and dental insurance, and financially supported him for years [App. A-17]. The child knew the Appellant to be his father for the past twelve years.

Likewise, T.D.C. v. D.E.A. v. J.S.C., A06-2426 (unpublished Minn. Ct. App. 2007), [App. A-7] cited by the Appellant, can also be distinguished on the facts. The child in this case was raised to believe J.S.C was his father and lived with him for the first eight years of his life. When the paternity action was commenced, genetic testing

showed J.S.C. not to be the child's genetic father and J.S.C. moved to add a third party, D.E.A, to the action. The facts in T.D.C. v. D.E.A. v. J.S.C., *id.* the non-genetic father wanted to be adjudicated the child's father. The individual Respondent's ex-spouse in this case has already been declared not to be the father. Again, looking to the best interests of the child, the Appellate court affirmed the six specific findings of the trial court and adjudicated J.S.C the father. Also, see, Kelly v. Cataldo, 488 N.W.2d 822 (Minn. Ct. App. 1992).

The only potential presumption regarding the ex-spouse is that the minor child was born while he was married to the individual Respondent. Minn. Stat. § 257.55, subd. 2 provides that a presumption of paternity may be rebutted by clear and convincing evidence. The facts of this case rebut any presumption, if there even is one, that the individual Respondent's ex-spouse is the child's father. The judgment and decree in the dissolution found that the child was not a child of the marriage. There is no evidence that the ex-spouse ever held the child out to be his. Conversely, the Appellant held the minor child out to be his own and he has admitted parentage. Zentz v. Graber, 760 N.W.2d 1 (Minn. Ct. App. 2009). Therefore, any possible presumption regarding the ex-spouse is of minimal consequences. Nyman v. Thomas, 584 N.W.2d 421 (Minn. Ct. App. 1998).

Although the child has the ex-spouse's last name, that is not an indication of paternity. It may simply indicate that the individual Respondent wanted all three children to share the same last name.

In consideration of policy, and logically based on the facts, the Appellant, who is the genetic father, has openly acted as the father and is known by the minor child to be

his father for the past twelve years. Minn. Stat. § 257.55, subd. 2. Adjudicating the Appellant as the father is consistent with the policy of not unnecessarily impairing blood relationships and is logically based on the facts. In Re the Paternity of B.J.H., Child A.J.S. v. M.T.H., 573 N.W.2d 99 (Minn. Ct. App. 1998). The Appellant is the blood relation of the child as indicated by genetic testing. If this court finds for the Appellant, the minor child will have no legally established father as the former spouse has previously been found not to be the father and has a defense to payment of support. State of Georgia, ex rel, Brooks v. Braswell, 474 N.W.2d 346 (1991).

II. THE TRIAL COURT'S FAILURE TO JOIN AS A THIRD PARTY THE FORMER SPOUSE OF THE MOTHER WAS NOT PREJUDICIAL ERROR.

Appellant argues that it was the district court's responsibility, even duty, to sua sponte add the individual Respondent's ex-spouse to the paternity action. He further argues that because Minn. Stat. § 257.57, subd. 1(b) allows the ex-spouse to commence a paternity action, his failure to do so makes it incumbent that the district court take such action. Appellant cites no legal authority for such supposition.

Indeed, if the Appellant wished to have the ex-spouse included in the individual Respondent's action, he could have motioned the court to add him under Minn. R. Civ. P. 19.01, which allows for joinder of persons needed if they are essential to the issues before the court.

There was no factual evidence before the district court that the ex-spouse was the minor child's father. The district court had all the necessary factual information to make its decision. The presumption was rebutted by clear and convincing evidence. In the

Matter of the State of Minnesota, County of Douglas, ex rel., Mary Emma Ward Parent, on behalf of J.M.K. v. Carlson, 409 N.W.2d 490 (Minn. 1987).

III. THE TRIAL COURT’S VERBATIM ADOPTION OF THE DAKOTA COUNTY ATTORNEY’S FINDING OF FACT AND CONCLUSION OF LAW DOES NOT DEMONSTRATE A LACK OF JUDICIAL EXAMINATION OF THE FACTS.

“Findings of fact will not be disturbed unless clearly erroneous. Minn. R. Civ. P. 52.01” Bliss v. Bliss, 493 N.W.2d 583, (Minn. Ct. App. 1992). As in Bliss v. Bliss, id. the trial court adopted verbatim the respondent’s proposed order, however, such wholesale adoption is not reversible error, per se. The court in Bliss v. Bliss, id. acknowledges the common practice of a trial court’s adoption of one party’s proposed order. It appears the court was more concerned with the lack of detailed, specific and sufficient findings, which are necessary for meaningful review by an appellate court. The finding of facts in Judge Sovis’ order are numerous and specific and, on this point, meet the concerns expressed by the Bliss v. Bliss, id. (See also, Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. Ct. App. 2005).

Interestingly, the Bliss v. Bliss, id. court also raised the issue of why neither party, in post-trial proceedings, moved the trial court for a new trial or an amended findings of fact and conclusions of law instead of directly appealing their case. As the decision notes, although it is not required that the parties make such post-trial motions, it is clearly preferable that the trial court be given the opportunity to review, reconsider and clarify its findings and conclusions. Doing so is not only more efficient for the judicial system, but for the parties as well.

In the present case, the Appellant did not seek such post-trial remedies, choosing instead to immediately file an appeal. Had he done so, the trial court would have had the time for reflection and may have had the opportunity to correct any errors the Appellant complains of, thus, eliminating the need for appellate review. Sauter v. J.P. Wasemiller, 389 N.W.2d 200 (Minn. 1986). The appellate court reiterates the "...long standing rule that issues involving trial procedure and evidentiary rulings are subject to appellate review only if there has been a new trial motion that assigns these rulings as error." Brevik v. Brevik, A10-761 (unpublished Minn. Ct. App. 2011).

On appeal from summary judgment, the Supreme Court must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law. Johnson v. Van Blaricom, 480 N.W.2d 138 (Minn. Ct. App. 1992). See, also Dahlin v. Kroening, --- N.W.2d --- (Minn 2011), 2011 WL 1563754. Mere denial of paternity by a named defendant does not create a genuine issue of material fact, and, such party must demonstrate specific facts exist. Johnson v. Van Blaricom, 480 N.W.2d 138 (Minn. Ct. App. 1992). In the present case, the Appellant does not even deny he is the minor child's genetic father, which was confirmed by genetic tests. Taken together as whole, it appears there is no factual dispute between the Appellant and the Respondent. The parties basically agree with what events took place and when. The Appellant's dispute is with the application of the law by the trial court. However, the trial court had all the information it needed to grant the Respondent's request for summary judgment.

CONCLUSION

The trial court properly adjudicated Appellant to be the father of D.J.R.. There are no genuine issues of material facts, the Appellant has admitted he is the father and all other facts indicate his parentage. For the reasons described above, Dakota County requests the court to affirm the decision of the district court in all respects. The Appellant requests no relief.

Dated: May 6, 2011.

Respectfully Submitted:

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

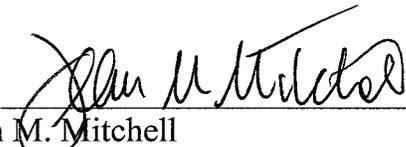
By: Jean M. Mitchell
Jean M. Mitchell
Assistant County Attorney
Attorney Registration #0164689
Dakota County Northern Service Center
One Mendota Road W., Suite 220
West St. Paul, MN 55118-4769
(651) 438-4438
Attorney for Respondent Dakota County

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for brief produced with proportional font. The length of the brief is 2,684 words of type and it was prepared using Microsoft Office Word 2007.

Dated: May 6, 2011.

Respectfully Submitted:

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: 

Jean M. Mitchell

Assistant County Attorney

Attorney Registration #0164689

Dakota County Northern Service Center

One Mendota Road W., Suite 220

West St. Paul, MN 55118-4769

(651) 438-4438

Attorney for Respondent Dakota County