

231

CLERK SUPREME COURT

Appellant.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant, Joseph Mendez, appeals from an adverse decision in a paternity action. Plaintiff, Laureen Slater, commenced the action on April 17, 1974, alleging the defendant had fathered her child Cory Lynn, subsequently born on May 15, 1974. Trial at law to the court resulted in a finding for the plaintiff.

On appeal defendant argues the trial court erred as follows: (1) in finding there was clear, satisfactory, convincing and competent evidence that the child was illegitimate, (2) in overruling defendant's objections to plaintiff's exhibit B, and (3) in finding the plaintiff had established by a preponderance of the evidence that defendant is the father of the child. We review the cause for correction of errors of law. The findings of fact of the court have the effect of a special verdict. Rule 4, Rules of Appellate Procedure. They are binding if supported by substantial evidence. Rule 14(f)(1), R. App. P. We affirm the trial court.

I. Illegitimacy. From March 1961 until January 1976 plaintiff was married to Keith Arnold Slater. The child, Cory, was conceived in the fall of 1973 and born on May 15, 1974. Because plaintiff was married at the time of the child's conception and birth a rebuttable presumption of legitimacy exists. *Craven v. Selway*, 216 Iowa 505, 246 N.W. 821 (1933). One of the four recognized methods of rebutting this presumption is to establish the absence of the husband by clear, satisfactory, and convincing evidence so as to preclude access to the mother. *Craven*, supra at 509. A wife is incompetent to testify as to her husband's nonaccess during the term of the marriage in an attempt to establish her own child's illegitimacy. *Wallace v. Wallace*, 137 Iowa 37, 114 N.W. 527 (1908). In this case two of the plaintiff's teenage children testified that they lived with their mother in Oelwein and didn't see their father, Keith Slater, from 1968 until August 1977. Plaintiff's father, who also lives in Oelwein, testified that he hadn't seen Keith since 1968 either. We conclude clear, satisfactory and convincing evidence supports the trial court's finding that the presumption of legitimacy had been rebutted by proof of nonaccess.

II. Admissibility of Plaintiff's Ex. B. Exhibit B was a copy of the January 16, 1976, decree which dissolved the marriage of Laureen and Keith Slater. Defendant's objections to reception of the exhibit were based upon (1) hearsay, (2) irrelevancy, (3) immateriality, and (4) defendant's nonparticipation in the dissolution proceeding and

resulting lack of opportunity to cross-examine therein. The decree was admitted into evidence and the plaintiff read from it the findings of the court that Keith had abandoned the family in 1968, never returned, and that plaintiff was awarded custody of the children of the parties; Keith, Mardy, Crystal and Ann. We agree that this decree should not have been received in evidence. See *Preston v. Turner*, 36 Iowa 671 (1873). However, because the matters complained of in the decree were merely cumulative of other substantial evidence in the record, this error was harmless.

III. Sufficiency of the Evidence to Establish Defendant as the Father of the Child

The trial court found the plaintiff had proven, by a preponderance of the evidence, that the defendant was the father of the child. The plaintiff testified she had intercourse with the defendant, to the exclusion of all others, during the period when conception must have occurred. Of course, she could not testify as to her husband's nonaccess. After the child's birth, according to the plaintiff, the defendant admitted to her that he was the father. Several witnesses testified that the defendant often gave presents to the child. The dark-complexioned child was present at trial and observed by the trial court judge. Also present and observed were the fair-skinned children of the plaintiff. A photograph of plaintiff's ex-husband was an exhibit. While the defendant did not appear at trial, several witnesses testified that he is dark-complexioned. Resemblance comparisons are allowed. *State v. Smith*, 54 Iowa 104, 6 N.W. 153 (1880). We conclude substantial evidence supports the trial court finding that the defendant is the child's father.

AFFIRMED.