

IN THE COURT OF APPEALS OF IOWA

FILED.

SEP 25 1986

CLERK SUPREME COURT

STATE OF IOWA, ex rel. IOWA)
DEPARTMENT OF SOCIAL SERVICES,)
and SHEILA GREVE on behalf of)
TALONA JO GREVE, A Minor Child,)

Petitioners-Appellants,)

vs.)

ROBERT E. HALL,)

Respondent-Appellee.)

Filed September 25, 1986

6-168
85-1525

Appeal from the Iowa District Court for Audubon County (No. 17479)

- Keith E. Burgett, Judge.

Petitioners-appellants brought this action for child support pursuant to Iowa Code chapter 252A, asserting that the trial court erred in finding petitioner failed to prove respondent's paternity by a preponderance of the evidence. **REVERSED.**

Thomas J. Miller, Attorney General; Mark A. Haverkamp, Assistant Attorney General; and Patrick B. Byrne and Charles J. Maurer, Assistant County Attorneys, for petitioners-appellants.

James W. Mailander of Leed & Mailander, P.C., Oakland, for respondent-appellee.

Considered en banc.

SNELL, J.

On July 26, 1983, Sheila Watson, formerly Sheila Greve, gave birth to a girl, Talona Jo Greve. On October 3, 1983, a petition for support was filed alleging that Robert E. Hall was the father of Talona, and requesting that Hall be ordered to pay child support. Sheila was unmarried at the time of conception and at the time of Talona's birth. She eventually married Charles Watson in March of 1984. Hall has never been married.

Hall did not deny having intercourse with Sheila. However, he introduced evidence attempting to show that Sheila had sexual intercourse with other men during the time of the likely date of conception. Blood test results were admitted into evidence showing a 98.956 percent probability of paternity for Hall. The trial court found that petitioners failed to meet their burden of proof to establish paternity and dismissed the petition.

On appeal, the State contends that the trial court erred in evaluating the evidence and interpreting and applying the paternity blood test results.

This action is in equity. Iowa Code § 252A.6(1) (1985). Accordingly, our review is de novo. Iowa R. App. P. 4. We give weight to the factual findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7).

The petition for support was filed in this case pursuant to Iowa Code Chapter 252A. Under this chapter, a natural father of a child born out of wedlock is not liable for support unless he has acknowledged paternity or has been adjudicated to be the child's father. Iowa Code § 252A.3(9) (1985). A determination of paternity may be adjudicated in a proceeding under chapter 252A. Greenstreet v. Clark, 239 N.W.2d 143, 147 (Iowa 1976). "Paternity may be established by a preponderance of the evidence. Proof beyond a reasonable doubt is not required." State ex rel. Brown v. Middleton, 259 Iowa 1140, 1142, 147 N.W.2d 40, 41 (1966). We take judicial notice of the normal period of gestation. Moody

v. Christianson, 306 N.W.2d 775, 777 (Iowa 1981). The petitioner's unchaste conduct with other men than respondent is not a defense to this type of action unless it tends to show some other man may be father of the child. Id. "The material question to be determined is not 'what is the character of the prosecutrix?' but 'is defendant the father of her child?'" Id. (quoting State v. Johnson, 89 Iowa 1, 5, 56 N.W. 404, 405 (1893).

The child in the present case was born on July 26, 1983. Sheila testified that she dated Hall from late October of 1982 until February of 1983. It is undisputed that they had sexual relations throughout this period. Sheila admitted having sexual relations with Bill Coatney on October 24, 1982, but stated that her menstrual period started on that date. She testified that she had sexual relations with no one else in the months of September, October, and November of 1982. Bill Coatney testified on behalf of Hall that he had sexual intercourse with Sheila once sometime in September or October of 1982 and settled on around September 14 as the date. Sheila's husband, Charles Watson, testified that Sheila told him that she had intercourse with other men besides Hall during the critical period, but the only name he could remember being mentioned was Hall's. The only other witness who testified regarding Sheila's alleged promiscuity was Bill Coatney's wife. This testimony consisted of her suspicions regarding an affair between her husband and Sheila and her speculations regarding Sheila's behavior with other men.

Petitioner, Sheila, has the burden of proving that Hall fathered her child by a preponderance of the evidence which, on appeal, is reviewed de novo. Moody v. Christensen, 306 N.W.2d 775, 777 (Iowa 1981). A preponderance is defined as evidence that "should when fully and fairly considered produce the stronger impression upon the mind and be more convincing when weighed against the

evidence introduced in opposition thereto." Maybrier v. AM Servicing Corp. of Raytown, 161 N.W.2d 180, 184 (Iowa 1968).

Sheila more than adequately met this burden. The contrast to the paucity of evidence purporting to show somebody else as the father is stark. Sheila and Hall testified to frequent intercourse during the time of conception. After learning of her pregnancy, Hall proposed marriage to Sheila. Blood test results were admitted and according to legislative directive "shall be weighed along with other evidence of the alleged father's paternity." See Iowa Code § 675.41 (1985). These tests were certified by H. F. Polesky, Director of the Minneapolis War Memorial Blood Bank of Minneapolis, Minnesota, and showed a 98.956 percent probability that Hall fathered the child. According to AMA-ABA guidelines set up in 1976, blood test results of 98.956 fall into the category of "very likely" that Hall is the father. This is just a .144 percentage point from the category of "extremely likely." AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Fam. L. Q. 247, 262 (1976).

We recognize that blood test results which show a statistical probability of paternity are not conclusive, but are rather weighed along with other evidence of the alleged father's paternity. See Iowa Code § 675.41 (1985). However, results showing a high degree of probability that the respondent is the putative father are very persuasive. State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 210-12 (Iowa 1982); State ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870, 873 (Iowa Ct. App. 1983). The Iowa Supreme Court has held the burden of proof was met on less evidence than this. In State ex rel. Buechler v. Vinsand, 318 N.W.2d 208 (Iowa 1982), petitioner's evidence consisted of testimony that she had intercourse with respondent on one occasion and with no one else during the period of conception. Respondent denied it. Blood test results showed a plausibility of paternity greater than 98.059 percent. The court found the

petitioner to have met her burden. In another case, State v. Meyer, 381 N.W.2d 633 (Iowa 1986), the court found the parties had an ongoing sexual relationship lasting eight years, evidence to establish intercourse at the time of conception, though disputed by respondent, and an admission once of paternity. The blood test showed a 91 percent probability of paternity. The court found the proof sufficient.

In State ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870 (Iowa Ct. App. 1983), petitioner testified she had sexual relations with respondent and no one else during the time of conception. Respondent admitted neither this nor that he was the father. He offered testimony of other witnesses who claimed to have had sexual relations with petitioner during this period. On cross-examination, however, the witnesses were "not absolutely positive" that they had had sexual relations with the petitioner. They only "believed" that they had, or were "reasonably sure" that they had. The blood test results were specifically excluded from consideration because the procedural requirements of section 675.41 were not followed. Even on this vastly weaker quantum of evidence than was presented in the instant case, the court of appeals held that paternity was established.

Upon our de novo review, considering all of the admissible evidence, we find that petitioners have proved by a preponderance of the evidence that Hall is the father of Talona. We order Hall to pay \$150 monthly for Talona's support. Back support arrearages shall be computed at the same rate from the date of Talona's birth without interest.

REVERSED.

All judges concur except Donielson and Hayden, JJ., who dissent.

I respectfully dissent. I do not believe that the petitioners have met their burden of proof in showing that Hall is the father of Sheila's child.

While I agree that blood test results showing a high degree of probability that a respondent is the putative father are extremely persuasive, State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 210-12 (Iowa 1982), such tests showing a statistical probability are not in and of themselves conclusive, as the majority appears to suggest, but rather are to be weighed along with other evidence of the alleged father's paternity. Iowa Code § 675.41 (1985). I would therefore not afford Hall's blood test results the great weight given them by the majority.

I find that Sheila's testimony is permeated with confusion and uncertainty. Talona was born on July 26, 1983. Therefore, the critical period for the time of conception would be from approximately September 26, 1982, to November 26, 1982, taking into account the medically accepted sixty-day period of conception, with the likely date of conception being approximately October 26, 1982. Sheila testified that during this time period she had sexual intercourse with only two men, Bill Coatney and respondent Hall. Sheila testified, however, that almost immediately after having intercourse with Bill Coatney, she experienced her menstrual period, and therefore Coatney could not have been the father. Sheila additionally testified that she met respondent on October 25, 1982, and dated him for the first time one week later, at which time she indicated she had intercourse with the respondent for the first time. Sheila also testified that she had intercourse with respondent once more before she was informed about the middle of November that she was pregnant.

On redirect examination, however, Sheila appeared hesitant and confused regarding her involvement with other men during this time period. When asked by her attorney whether she had sexual intercourse with various men, Sheila

testified as follows:

Q. With Alan Rudolph? A. What day? Maybe a long time ago.

Q. September of 1982? A. Long —

Q. Long before that? A. Long time.

Q. With Doug Mitchell? Was that the name you gave? A. Probably a while ago, a long while ago.

Q. Was that before September of 1982? A. It could have been.

Q. Was it after? A. I'm not sure.

Q. Did you ever think that Doug Mitchell might be the father of Talona? A. No, definitely not.

Q. Why not? A. I don't know. Just, there's no way.

Sheila's own husband, Charles Watson, testified that he had discussions with Sheila concerning her sexual past and, when questioned about whether he had any knowledge of any sexual encounters with other men in September or October of 1982, he said that he had been told by Sheila that she had indeed had sex with men other than respondent during this time period, but could only remember respondent's name.

Bill Coatney testified that he had sexual intercourse with Sheila in September or October of 1982, but could not remember the exact date, though Coatney did testify that he thought it was September 14. Coatney's wife, Kim, testified that when she confronted Sheila concerning Kim's suspicions regarding Sheila's affair with her husband, Sheila denied any involvement. Kim also testified that she had seen a car owned by a Doug Mitchell parked in Sheila's driveway overnight approximately the beginning of November 1982. Kim testified that one day in the late morning or early afternoon she saw a young man naked upon Sheila's couch as she walked up to the front door of Sheila's residence. Sheila denied any involvement with the young man, stating that he was only 14 years old and was merely staying with her while his mother was in the hospital. Finally, Kim testified that shortly after Sheila began work at Warin Oil, Sheila expressed fear that she was pregnant and, though Kim could not remember the exact dates,

she thought this incident occurred approximately two weeks after Sheila had first met respondent.

While evidence of Sheila's numerous sexual exploits was not admissible to stitch upon her "the scarlet letter," it was, however, admissible to show that Sheila had sexual intercourse with men other than Hall. Though Sheila adamantly denied having sexual intercourse with anyone other than Bill Coatney and Hall, her own testimony underscored her uncertainty as to with whom she had engaged in sexual intercourse. Stating that a particular individual could not be the father simply because he could not be is simply not a showing by a preponderance of the evidence that other men could not have been the father. I am therefore not compelled, as is the majority, to unequivocally accept Sheila's version of the facts. In addition, Sheila's uncertain testimony regarding her sexual activity was almost identical to that rejected by this court in State ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870, 874 (Iowa Ct. App. 1983) (testimony by witnesses claiming they were "not absolutely positive," "believed that they did," or "reasonably sure" that they had intercourse with petitioner was held not persuasive). The results of the blood test and the fact that Sheila and Hall had intercourse do not standing alone satisfy the burden of proof by a preponderance of the evidence. I additionally note that while the issue of the possibility of the paternity of Bill Coatney was placed into evidence, no blood test was ever taken to determine whether Coatney could have been the father. I would therefore affirm the judgment of the trial court.

Hayden, J., joins this dissent.