

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 27 1988

CLERK SUPREME COURT

STATE OF IOWA, ex rel. DEREK)
LANCE PURSELL, a Minor by)
SHERRY PURSELL, As Next of Kin,)

Plaintiff-Appellant,)

vs.)

DOUGLAS HOWARD WAY,)

Defendant-Appellee.)

Filed January 27, 1988

274

7-458
87-551

Appeal from the Iowa District Court for Pottawattamie County (57081),
James M. Richardson, Judge.

Petitioner appeals the ruling of the trial court that she failed to establish
by a preponderance of the evidence respondent is the natural father of her minor
son. **AFFIRMED.**

Thomas J. Miller, Attorney General of Iowa, and Mark Haverkamp, Assistant
Attorney General, for plaintiff-appellant.

Douglas Howard Way, Council Bluffs, pro se.

Considered by Oxberger, C.J., and Donielson, Hayden, Sackett, and Habhab,
JJ. Schlegel, J., takes no part.

HAYDEN, J.

Petitioner, Sherry Pursell, appeals the ruling of the trial court that she failed to establish by a preponderance of the evidence respondent, Douglas Way, is the natural father of her minor son, Derek Pursell. She asserts she presented evidence sufficient to prove paternity and the trial court erred in ruling otherwise. Pursell also contends the trial court erred by failing to order blood tests after Way brought to the court's attention he had earlier requested such tests. Pursell asserts she was prejudiced by this failure since the court allegedly penalized her for the lack of blood tests.

It is not clear from the record whether this action was brought under Iowa Code chapter 252A or chapter 675. The petition was filed at law, which suggests filing under chapter 675 was intended. Proceedings under chapter 675 are at law. Iowa Code § 675.18; State ex rel. Brown v. Middleton, 147 N.W.2d 40, 40 (Iowa 1966). By contrast, proceedings under chapter 252A are in equity. Iowa Code § 252A.6(1); State ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870, 872 (Iowa App. 1983). The distinction, of course, determines our scope of review.

We need not decide this issue, however, as we conclude the trial court was correct under either standard of review.

Derek Pursell was born January 6, 1985. It is undisputed conception occurred sometime between March 6, 1985, and May 6, 1985. At trial, Sherry Pursell testified she and Way engaged in sexual intercourse three times between April 3, 1985, and April 12, 1985. She further testified she did not have sexual intercourse with any other male during the March 6-May 6 time frame for conception. She stated she had known Way for 5-6 years.

Way denied having intercourse with Pursell during the time period relevant herein. He acknowledged they had attempted to have a child in 1981 or 1982, but failed due to an alleged blood type incompatibility. Way stated he and Pursell

had a relationship that was off and on for one and one-half to two years. He also informed the trial court he had requested blood tests, but was only capable of paying for his tests and not those for Pursell and Derek. The trial court was thereafter apprised by Pursell's counsel that the county fund for blood tests for indigents had been entirely spent and had not been replenished.

Under these circumstances, the trial court concluded Pursell had not met her burden of proof. We agree. In essence, she contends she had intercourse with Way; he denies the allegation. It is not disputed they were intimately involved at one time, but it is not clear when their relationship commenced and when it ended. Without this contextual evidence, we are as unable as was the trial court to accord the testimony of Pursell more weight than that of Way.

Nor are we persuaded by Pursell's assertion the trial court erred by failing to order blood tests. At no time did she request such tests. Although Way requested blood tests before trial, he did not reassert that request at trial, and obviously does not do so now. Pursell is attempting to assert an error allegedly preserved by Way. We decline to entertain the attempt. In the alternative, Pursell apparently contends the trial court abused its discretion by not ordering blood tests on its own motion, as allowed by Iowa Code section 675.41. We conclude there was no abuse of discretion. Although such an order might be advisable in close cases such as this, it is not required. It was reasonable for the trial court to allow Pursell to prove her own case.

AFFIRMED.

Donielson and Habhab, JJ., concur; Sackett, J., and Oxberger, C.J., dissent; Schlegel, J., takes no part.

I dissent.

The trial court's conclusions of law were as follows:

277

The burden of proof is upon the petitioner to establish paternity by a preponderance of the evidence. A favorable blood analysis would, naturally, go a long ways to meeting such a burden. However, none was offered in this case. Thus, the paternity evidence offered consisted solely of the testimony of the mother which was rebutted by the Respondent's denial.

The petitioner has totally failed to meet its burden by a preponderance of the evidence. As a result of said failure, Respondent is deemed not to be the natural father of Derek Pursell.

The trial court's order also stated that respondent, acting pro se, had requested a blood test before the trial. The court has the authority on its own motion to require the parties to submit to blood tests and the court shall require the tests upon the request of a party. See Iowa Code §675.41.

Courts usually find results of blood tests either to be conclusive or highly persuasive on the issue of paternity. See In re Marriage of Schneckloth, 320 N.W.2d 535, 538 (Iowa 1982); State ex rel. Hodges v. Fitzpatrick, 342 N.W.2d 870, 873 (Iowa App. 1983). I believe the trial court erred in failing to order blood tests after respondent requested them. Furthermore, in light of the court's conclusion "a favorable blood analysis would, naturally, go a long ways to meeting [petitioner's] burden," I would hold the court abused its discretion in failing to require tests on its own motion.

A correct determination of paternity is important to society to assure that fathers as well as mothers will contribute to the financial upbringing of their children. No less vital is society's obligation to protect men who are falsely accused of having fathered a child. It is also the policy of the law to protect the interests of minor children incapable of looking after their own affairs. 43 C.J.S. Infants §220, at 564 (1978). The courts have a duty to guard the interests of minor children, to see they have a full day in court, and to ensure their rights are not sacrificed. See Cavender v. Heirs of Smith, 5 Iowa 157,

194-95 (1857). The child in this case was not represented by independent counsel. The outcome of this case significantly affects his life.

While the testing process is increasingly able to provide reliable evidence of paternity that has not heretofore been available, see Iowa Code chapter 675, the test should be utilized for what it is: a form of evidence to be considered when properly admitted with other evidence to determine the issue of paternity.

I would reverse and remand to the trial court for a hearing to determine the qualified expert to interpret the results and the time and place of taking the tests.

Oxberger, C.J., joins this dissent.