

confidential relationship does not automatically flow from the existence of a marital relationship, but rather is a legal status dependent upon specific facts. *Butler v. Butler*, 464 Pa. 522, 528, 529; 347 A. 2d 477 (1975).

We consider the facts leading to the conclusion that a "confidential relationship" exists are material facts and must, therefore, be pleaded. Therefore, the defendant's motion for more specific pleading as to paragraph 11 will be granted.

ORDER OF COURT

NOW, this 6th day of May, 1980, the Plaintiff's Preliminary Objections in the nature of a Motion to Strike are dismissed, and the Plaintiff's Preliminary Objections Nos. 5 and 6 in the nature of a Motion for More Specific Pleading are granted.

Exceptions are granted both parties.

REED v. TRESLER, C.P. Franklin County Branch, F. R. 1980 - 154 - S

Paternity - Burden of Proof - Sexual Relationship With Others

1. The burden of proof in a paternity case is the preponderance of the evidence.
2. Sexual intercourse with another around the time the child was conceived is a matter to be weighed in the balance along with other evidence.
3. The fact that plaintiff had sexual relations with two men other than the alleged father during the 220 and 330 day gestation period does not exclude a finding that the alleged father is in fact the father.

District Attorney's Office

William C. Cramer, Esq., Attorney for Defendant

OPINION AND VERDICT

EPPINGER, P.J., June 12, 1980,

Tina M. Reed is the mother of a child she called Delilah Tresler because, she says, the father is James H. Tresler, Jr. While James acknowledges that he was living with Tina and had sexual relations with her, he says it cannot be established

that he is the father because others were having sexual relations with her during the 220 to 330 day gestation period mentioned in *Commonwealth v. Watts*, 179 Pa. Super. 398, 116 A.2d 844 (1955). We referred to *Watts* in a footnote in *Rosenberry v. Swan*, 3 Franklin Co. L.J. 190 (1979), where we noted the general proposition that sexual intercourse with another around the time the child was conceived is a matter to be weighed in the balance along with other evidence. *Commonwealth ex rel. Lonesome v. Johnson*, 231 Pa. Super. 335, 331 A.2d 702 (1974). In *Rosenberry v. Swan*, we held it was impossible to determine whether the child was born of a union with the defendant Swan or with the plaintiff's husband. There it was stated that the plaintiff had sexual relations with her husband before she knew the child was conceived. Her contention was that it was only once and that at the time he was using a contraceptive. We did not accept this contraceptive statement as being true.

The testimony in this case is quite different. Tina lived with James from December, 1978 through March, 1979 and the child was conceived early in March. That is when she suspected she was pregnant. Her last menstrual period began February 8th and her pregnancy was confirmed, in James' presence, at a clinic on April 17th. The child was born December 7, 1979. Talks between Tina and Jim about her pregnancy and his statement that he didn't want to have a child and that she should have an abortion caused her to move out the last part of March.

Tina acknowledged having sexual relations with two other, with one at the end of April, 1979 and with another in June or July of the same year. She said she told both of them that she was pregnant and that neither cared. One of these, Dennis Sheffler, testified that he had relations with her one time about April, 1979. Another person, not mentioned by Tina, Mike Boswell, said he had relations with her in the Spring of 1979, about the first, second, maybe third week of April.

The only evidence bearing on who was the father of the child was the recounting of a conversation, denied by Tina, which went about like this:

Kelly Monn: "You know this is not Jim's."

Tina: "I know, but what if it is?"

Kelly added that in the conversation Tina talked about getting James for nonsupport because she wanted him and that's the way she figured she'd get him. Tina responded that

LEGAL NOTICES, cont.

with its principal place of business at 603 Wayne Avenue, Chambersburg, PA 17201. The names and addresses of all persons owning or interested in said business are Marilyn D. Smith, 1838 Woodburn Drive, Hagerstown, MD 21740; Jerome Shuman, 1630 Juniper Street N.W., Washington, D.C. (8-1)

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on August 8, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Rich Highland Orchard with its principal place of business at 2410 Scotland Road, Chambersburg, Pennsylvania 17201. The name and address of the person owning or interested in said business is Richard I. Rotz, 2410 Scotland Road, Chambersburg, Pennsylvania 17201.

Paul F. Mower, Attorney
of MOWER and HOSKINSON
232 Lincoln Way East
Chambersburg, Pennsylvania 17201

(8-1)

NOTICE

Notice is hereby given that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania Department of State at Harrisburg, Pennsylvania, on June 16, 1980, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended is Upton Enterprises, Inc.

The purpose or purposes for which the corporation has been organized are: To manufacture and sell fabricated metal products and to have unlimited power to engage in and do any lawful act concerning any and all lawful business for which corporations may be incorporated under the Business Corporation Law of 1933, as amended.

Upton Enterprises, Inc.
Route 4, Buchanan Trail West
Greencastle, PA 17252

Gary Deane Wilt, Esquire
125 Lincoln Way West
McConnellsburg, PA 17233

(8-1)

LEGAL NOTICES, cont.

she said no such thing, that she sued Jim because he was the child's father.

The *Watts* rule is no longer an absolute bar to a finding that James is the father. The testimony in the case establishes that he is. As required in *Lonesome*, supra, we conclude that Tina has shown James' paternity by the preponderance of the evidence. Though she had sexual relations with others during the 220 to 330 day period, the incidents occurred after she became pregnant.

VERDICT

June 12, 1980, the verdict is for the plaintiff. The case shall be listed for a hearing to determine the amount that the defendant shall pay in support of the child.

HERR AND BAKER v. BOROUGH OF SHIPPENSBURG, C.P.
Franklin County Branch, A.D. 1978 - 526, A.D. 1979 - 27

Zoning Appeal - Curative Amendment - Exclusionary Ordinance

1. Where a request for rezoning is submitted to a borough planning commission and borough council and after several hearings, the applicant states that the request has implications as a curative amendment, the request shall be considered a rezoning request in that an applicant must strictly comply with the procedure in the Municipalities Planning Code (53 P.S. Sec.11004) to assert a curative amendment.
2. There is no right of appeal from a denial of a rezoning application.
3. A zoning ordinance is not exclusionary where a considerable portion of a borough is zoned residential even if there is an absence of vacant land for development.

*J. Wesley Oler, Jr., Esq., and Robert J. Yocum, Esq., Attorneys
for Mayor and Town Council of Shippensburg*

Richard L. Shoap, Esq., Attorney for Intervenors

Jan G. Sulcove, Esq., Attorney for Appellants

OPINION AND ORDER

EPPINGER, P.J., May 29, 1980:

On October 17, 1978, the Borough Council of Shippensburg (borough) turned down a rezoning request filed by the