

Valley Bank and Trust Company is overruled. The defendant is granted 20 days from this date to file a responsive pleading or suffer non pros.

ROSENBERRY v. SWAN, C.P. Franklin County Branch, Civil Action

Non-Support - Paternity - Proof by Preponderance of Evidence

1. The question of paternity is determined in a civil action where the burden of proof is by a preponderance of the evidence.
2. The fact that a mother admits to one incident of sexual intercourse around the time of conception by someone other than the alleged father is a matter to be weighed in the balance by the trier of fact along with all other evidence.
3. Where it is impossible to determine whether a child is born of the sexual relations with the alleged father or of a single sexual act with another man, the plaintiff has not met her burden of proof.

District Attorney's Office, Counsel for Plaintiff

William C. Cramer, Esq., Attorney for Defendant

OPINION AND VERDICT

EPPINGER, P.J., October 25, 1979:

This is an action to compel Donald E. Swan (Donald) to pay support for a child born to Barbara A. Rosenberry (Barbara).¹ Jason Alan Rosenberry, the child, was born December 27, 1978. Donald and Barbara dated from December 1, 1977; they began having sexual relations at that time and continued doing so once or twice a week. Their respective spouses found out about it and she was "kicked out" of her home. They continued seeing each other and in April, 1978, Donald left his wife and moved in with Barbara. After this they had sexual relations three to four times a week, using no birth control measures. Barbara discovered that she was pregnant in April, 1978. Donald left her and went back with his wife in June, 1978.

¹ After the trial, counsel requested the opportunity to prepare briefs and argue the case. Supplemental briefs were later filed.

While Barbara did not come right out and say to Donald that he was the father, she took it for granted that he knew he was. But this is not the entire story. On March 8, 1978, Barbara had sexual relations with her husband. Both of them had been drinking and she claims that her husband used a contraceptive, a statement which we do not accept as being true in light of her experiences with Donald when no birth control methods were used. A trier of fact is free to believe all, part or none of the testimony of any witness. *Commonwealth v. Harper*, Pa. , 403 A.2d 536 (1979).² During the trial, the child that was born to Barbara was brought into the court room. There was nothing about the child's appearance that would suggest that he was Donald's son.

Construing the Act of 1978, P.L. 202, No. 53, 42 P.C.S.A. Sect. 6704 to give effect to subsection (f),³ it appears that paternity is to be decided by the court without a jury (unless either party demands a jury trial) and that the burden of proof is "by a preponderance of the evidence". The issue is a civil matter.

While defendant concedes this to be the burden of the plaintiff in establishing that he is the father, he argues that because of the presumption of legitimacy of the child, in order to establish that he is illegitimate the proof must be of such overwhelming weight as to be irrefutable. *Commonwealth v. Cicerchia*, 177 Pa. Super 170, 110 A.2d 776 (1955). How much of a factor the presumption of legitimacy, which at the time of *Cicerchia* meant that the child was born in wedlock, might be now is questionable considering the Act of 1971 P. L. 175 No. 17, Sect. 1, as amended, 48 P.S. Sect. 167, which declares that all children shall be legitimate regardless of the marital status of

² If indeed it was true that contraceptives were used when Barbara had sexual relations with her husband, that is a matter on which she could have been corroborated by her husband, and he was not called to testify. Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him. See *Commonwealth v. Gibson*, 245 Pa. Super 103, 369 A.2d 314 (1976) and cases cited therein.

³ Former section 5 of the Act of July 13, 1953 (P.L. 431, No. 95), from which section 6704 was derived, was amended April 28, 1978, No. 46, effective in 60 days, by adding subsections (e) and (f). These subsections are to be given effect in construing section 6704, in accordance with the Official Note to 42 Pa.C.S.A. Sect. 6704.

LEGAL NOTICES, cont.

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 or after February 5, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Sunrise Company with its principal place of business at 240 West Main Street, Fayetteville, Pennsylvania 17222. The names and addresses of all persons owning or interested in said business are Ralph P. Matter, 240 West Main Street, Fayetteville, Pennsylvania 17222.

David S. Dickey, Attorney
11 North Carlisle Street
Greencastle, PA 17225

(1-25)

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 February 15, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Tri-State Broadcasting with its principal place of business at Route 4, Airport Road, Waynesboro, Pennsylvania 17268. The names and addresses of all persons owning or interested in said business are Michael S. Amcigh, 12101 Country Club Road, Waynesboro, Pennsylvania 17268.

J. Edward Beck, Jr., Attorney
237 East Main Street
Waynesboro, PA 17268

(1-25)

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 January 1, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Spectrum Company with its principal place of business at 165 East Washington Street, Chambersburg, Pennsylvania 17201. The names and addresses of all persons owning or interested in said business are Nicholas J. Kalathas, of 165 East Washington Street, Chambersburg, Pennsylvania 17201 and Nikolaos A. Balaoutas, of 165 East Washington Street, Chambersburg, Pennsylvania 17201.

Glen and Glen, Attorneys
306 Chambersburg Trust Bldg.
Chambersburg, PA 17201

(1-25)

LEGAL NOTICES, cont.

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 February 10, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Castle Crafts with its principal place of business at 704 East Baltimore Street, Greencastle, Pennsylvania 17225. The names and addresses of all persons owning or interested in said business are Vickie K. Hickman - Route 3, Box 400, Greencastle, PA 17225.

J. Edward Beck, Jr., Attorney
237 East Main Street
Waynesboro, PA 17268

(1-25)

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 January 31, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Dave's Truck Repair with its principal place of business at R. D. 6, Chambersburg, Pa. 17201. The names and addresses of all persons owning or interested in said business are David W. Burkholder, R. D. 9, Box 427, Chambersburg, Pa. 17201.

(1-25)

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA, ORPHANS' COURT DIVISION

The following list of Trustees, Guardians of Minors, Guardians of Incompetents and Custodians Accounts will be presented to the Orphans' Court Division of the Court of Common Pleas, Franklin County, Pennsylvania for Confirmation on February 7, 1980.

ATHERTON First and final account of the Chambersburg Trust Company, Guardian of the estate of Viola R. Atherton, an Incompetent.

GLENN E. SHADLE
Clerk of Orphans' Court of
Franklin County, Pennsylvania

(1-25, 2-1)

their parents. But we do not have to decide the case on this issue.

It is true that for a time Donald seemed to act as though the child was his. This was because he assumed that he had been the only man with Barbara. When he discovered that she had been with her husband, he no longer felt that he could be sure it was he who was the father of the child.

For many years there was a rule that if a mother admitted to other sexual intercourse around the time of the conception of the child, that was, in effect, a bar to recovering support from any of the possible parents. *Commonwealth v. Harbaugh*, 201 Pa. Super 360, 191 A.2d 844 (1963); *Commonwealth v. Rankin*, 226 Pa. Super 37, 311 A.2d 660 (1973). But now, where the question of paternity is to be determined in a civil proceeding where the burden of proof is by a preponderance of the evidence, such an admission is only a matter to be weighed in the balance by the trier of fact along with all of the other evidence. *Commonwealth ex rel. Lonesome v. Johnson*, 231 Pa. Super 335, 331 A.2d 702 (1974).

It seems to be the crux of the plaintiff's argument that the numerous times she had relations with Donald compared with the single act with her husband proves her case by a preponderance of the evidence. She asks us to reach some conclusions that this relationship is unlikely to have caused the pregnancy because it occurred eight days after her menstrual period began and three weeks prior to the date nine months before the child in question was born. These are factors, but they certainly do not establish that the child was not born of this union.⁴

We find that it is impossible to determine whether the child was born of the sexual relations with Donald or of the single event with Barbara's husband, and thus she has not met the burden.

We will enter a verdict for the defendant.

ORDER OF COURT

October 25, 1979, the verdict is for the defendant.

⁴ In *Commonwealth v. Watts*, 179 Pa. Super 398, 116 A.2d 844 (1955) the court held that it was not error for the trial judge to have charged a jury that a gestation period may vary from 220 to 330 days, even though there was no medical testimony in the case to support such conclusion.