

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

SV,		: No. 11-21,178
	Plaintiff	:
		:
vs.		:
		:
EE,		: CUSTODY
	Defendant	:

OPINION AND ORDER

AND NOW, this 16th day of **February, 2012**, after a hearing held in part on October 21, 2011, and finished on February 7, 2012, at which time SV was present with his counsel Christina Dinges, Esquire and EE (Mother) was present with her counsel, William A. Miele, Esquire. This hearing was held in regard to a paternity hearing ordered on September 28, 2011 by the Honorable Dudley N. Anderson as a result of a custody conference held before the Court concerning a Complaint for Custody filed by SV on September 27, 2011¹.

Background

Mother married DK (Husband) on August 6, 2011. Mother has one biological child; a son named WEK born August 25, 2011. Mother and Husband reside together and are raising WEK and DK's 17 year old son Cole. The petitioner is SV (hereinafter V). V believes that he is the biological father of Mother's son. On September 7, 2011 V filed a Custody Complaint, at the custody conference the issue of paternity was brought

¹ It is noted that custody conferences are normally held before a Family Court Hearing Officer. In this case, both Family Court Hearing Officers recused themselves.

into question due to the fact that Mother was having sexual relations with both Husband and V at the time of conception.

Facts

Mother had an ongoing sexual relationship with both V and Husband². Mother testified that she would generally spend the week with Husband in Lycoming County Pennsylvania and the weekends with V in Maryland. On either December 26, 2010 or December 27, 2010 Mother took a home pregnancy test which came back as positive. Mother's doctor later confirmed that she was pregnant. Mother informed V that he was the father of the baby.

Mother first told Husband that she was not certain who the father of the unborn baby was and then at some point later she told Husband that V was the father of the child. Both V and Husband received cards from the unborn child referring to each of them as "Dad." Mother also text messaged V when she found out the sex of the baby.

Both Mother and Husband told his family that he was not the father of the child. Husband's mother testified that Mother told her that there was no possibility that the child was Husband's and that Mother has never told her that Husband is the biological father of the child. Husband's sister testified that Mother told her sometime in the beginning of 2011 that Husband was not the father of the child and then Husband told her that he was not the father of the child. Husband's sister further testified that it is known throughout the family that V is the father. Husband testified that during a conversation at the airport he told V that they were both being played by Mother. Husband testified that

² At the time Mother and Husband were not married.

he feels he is the father because he is raising and caring for the child. Based on the testimony presented, it is clear to this Court that both Husband and Wife were well aware prior to their marriage that Mother's unborn child was most likely the child of V.

Analysis

In Pennsylvania the law on paternity is well defined. If a child is conceived during the marriage or born into the marriage there is a presumption that Mother's husband is the father. *Brinkley v. King*, 701 A.2d 176, 177 (1997). This presumption can only be rebutted by clear and convincing evidence of sterility or that the husband had no access to the wife at the time of conception. *Id.* "[T]he *presumption is irrebuttable* when a third party seeks to assert his own paternity as against the husband in an intact marriage." *Martin v. Martin*, 710 A.2d 61, 63 (Pa. Super 1998) (quoting *Brinkley* @ 179). The policy behind the presumption is to preserve the marriage and family unit. *Martin* at 65 (Pa. Super 1998) (*see also Brinkley*). The Superior Court has held that the presumption of paternity is only to be applied when the presumption will advance the policy; if there is not an intact family to protect the presumption is not applicable. *Brinkley* at 181(*see also Martin*).

In *B.S and R.S. v. T.M.* the Superior Court further clarified the laws of paternity and when the presumption is applicable. 2001 PA Super 245; 782 A.2d 1031 (Pa. Super. 2001). In this case wife had an affair and became pregnant. *B.S. and R.S.* at 1032. Husband and wife separated after the pregnancy and subsequently wife filed for a divorce. *Id.* at 1032-1033. Husband was not present at the hospital for the birth of the child however T.M. was. In the beginning, T.M. was very much involved in the child's

life and even put the child on his insurance. *Id.* at 1033. Wife ended her affair, withdrew her divorce complaint and then moved back in with her husband. *Id.* at 1034. T.M. filed a petition to determine paternity, at the time of the filing B.S. and R.S. were an intact family, the trial court chose not to apply the irrebuttable presumption of paternity based on an intact family. *B.S. and R.S.*, 782 A.2d 1031. The appellate court looked at the facts of the case and upheld the trial court's decision not to apply the irrebuttable presumption of paternity holding that the policy of preservation of marriage behind the presumption would not be advanced in this case. *Id.* at 1036. The court stated "[g]iven our supreme court's pronouncement that the purpose of the presumption is to protect the institution of marriage, we must consider whether the application of the presumption of paternity would protect R.S. and B.S.'s marriage from the effects of disputed paternity." *Id.*

In the present case the Court must consider whether the application of the presumption of paternity would advance the policy behind the presumption by protecting Mother's marriage. *Id.* While the facts in this case are not identical to the facts in *B.S. and R.S. v. T.M.* there are similarities. Wife was in a relationship with two men at the time of conception. She informed V that he was the father and informed Husband that she was uncertain as to who had fathered the child. Wife also told her now step-son that Husband was not the father of the child. At the hearing Wife's mother-in-law testified that her son had told her that child was not his. Further Wife's sister-in-law testified that it was family knowledge that her brother was not the biological father of Wife's son. Currently, Wife, Husband, baby, and step-son are an intact family.

The issue becomes whether a third party challenging paternity is going to impact the intact family. The Court recognizes the significance of this decision and does not make the decision lightly. Furthermore, this is a case by case analysis because the determination is so fact specific. In looking at all of the evidence presented it is apparent that there is an intact family, Husband does love the child and has taken on the role of father and provider for the family. Husband is not disillusioned; he knows that he is most likely not the biological father of the child. In fact his family testified that it is common knowledge to the family that Husband is not the father. Husband testified that he decided to be a dad to this baby. The Court finds that just as in *B.S and R.S. v. T.M.* “this marriage will either succeed or perhaps fail with or without the application of the presumption.” 782 A.2d 1031, 1037. In this case applying the presumption would not advance the policy of preservation of marriage. By applying the presumption in this case Mother would be given the sole power to select who she wished the father of the child to be. The Court chooses not to apply the presumption.

It is hereby ORDERED and DIRECTED that SV, EE, and WEK shall under go genetic testing at the Lycoming County Domestic Relations Office. V shall immediately contact Lycoming County Domestic Relations to schedule a time for testing; he must be prepared to pay for the cost of the test, ninety-six dollars (\$96), in full prior to testing. Mother shall appear with child at the date and time requested by Lycoming County Domestic Relations Office. The genetic testing results are to be forwarded to the Court for the Court to distribute. For the convenience of Domestic Relations, the Court has V

residing at (address redacted) and Mother residing at (address redacted) if these address are incorrect the Court must immediately be notified of the correct address.

By The Court,

Joy Reynolds McCoy, Judge