Paternity

7/27/2004

In **Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004), the Court affirmed the trial court's order finding the presumed father to be the child's biological father. Mother and presumed Father had two children before the divorce. At the final dissolution hearing on September 15, 2000, Mother testified that she was not pregnant. Following the hearing, the trial court issued the Decree of Dissolution dissolving the marriage of Mother and presumed Father. Eight and one-half months later, on June 1, 2001, Mother gave birth to the child. On May 14, 2002, Mother filed her Petition to Establish Paternity and Affidavit of Birth in which she named presumed Father as respondent. On July 14, 2003, presumed Father filed his Third Party Complaint to Establish Paternity in which he named his identical twin brother as the biological father of the child. He also requested that the trial court dismiss Mother's paternity petition. Presumed Father and his brother submitted to DNA testing. The results indicated paternity probabilities of 99.999% and 99.995% for the presumed Father and his brother, respectively. Following a hearing, the trial court found that presumed Father did not successfully rebut the statutory presumption that he was the biological father of the child, and issued its Order finding the presumed Father to be the biological father. The trial court's Order indicated that the court had knowledge of the presumed father's family history independent of evidence presented at the hearing. The Order stated, among other things, that, (1) fifteen years earlier, brother was involved in an accident which left him in a coma for three weeks and after the coma the brother's "higher reasoning abilities became marginally impaired so that he is somewhat less restrained in his statements and, occasionally in his behaviors than he was before;" (2) monetary issues provided ulterior motives to the testimony in that the presumed father "is a person of means and may even be considered wealthy" and the brother "lives at the edge of poverty …probably being maintained by other family members;" and (3) in claiming paternity, the brother requested, by his testimony at the hearing, that he be ordered to pay $25 per week in support." Presumed Father appealed.

In the same vein that the supreme court has held that a putative father cannot overcome the presumption that he is the biological father of a child by merely denying he had relations with his wife (See L.F.R. v. R.A.R., 378 N.E.2d 855, 857 (Ind. 1978)), a presumed father cannot overcome the presumption of paternity by merely presenting testimony of his identical twin brother that the child is probably his and he is willing to pay child support. Richard at 228. The Court disagreed with presumed Father's contention that the statutory presumption that he is the biological father, was successfully rebutted when the brother acknowledged paternity and offered to

pay $25 per week child support. Relevant portions of I.C. 31-14-7-1 provide that a man is a presumed father if (1) he was married to the biological mother and the child is born not later than three hundred days after the dissolution; or (2) genetic testing indicates a ninety-nine percent or greater probability that he is the child's biological father. The Court noted that Minton v. Weaver, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998), *trans. denied*, holds that the presumption may be rebutted by direct, clear, and convincing evidence that the husband: (1) is impotent; (2) was absent so as to have no access to the mother; (3) was absent during the entire time the child must have been conceived; (4) was present with the mother only in circumstances which clearly prove there was no sexual intercourse; (5) was sterile during the time the child must have been conceived; or (6) can show that the DNA test of another man indicates a 99% probability that the man is the child's father combined with uncontradicted evidence that the man had sexual intercourse with the mother at the time the child must have been conceived. The Court further noted that the record revealed no such evidence here. The Court opined that this was an unusual paternity case in that two men had DNA test results indicating a 99% probability of paternity because they were identical twins. Contrary to presumed Father's contentions, however, the Court found nothing in the brother's testimony that constituted the direct, clear, and convincing proof necessary to overcome the statutory presumption that presumed father was the biological father. Richard at 226-28.

The Court agreed with the trial court's conclusion in this matter; therefore it found that any error committed with respect to the trial court's spontaneous judicial notice of facts was harmless. Id. at 225. Presumed Father argued that the trial court violated Ind. Rule of Evid. 201 when it took judicial notice of facts that were not adduced at the hearing and then relied upon them in entering its judgment. The Court held presumed Father's argument was waved because he failed to support it with specific references to the record or to materials in the appendix as required by Ind.App. R. 46(A)(8)(a). Waiver notwithstanding, however, the Court found that any error the trial court committed in taking judicial notice of facts not in evidence was harmless error. The Court cited (1) In Re Paternity of Tompkins, 542 N.E.2d 1009, 1014 (Ind. Ct. App. 1989) for the holding that "A trial court may take judicial notice of records of a case over which it presides; however, the trial court may not take notice of records of another case even if it involves the same parties with nearly identical issues ;" and (2) Matter of A.C.B., 598 N.E.2d 570, 573 (Ind. Ct. App. 1993) for its holding that "[e]rror must result in prejudice in order to disturb the judgment." The Court stated that it was clear from the remainder of the trial court's Order that the trial court based its decision on the fact that presumed Father simply failed to present sufficient evidence to overcome the presumption of paternity arising from the marriage pursuant to I.C. 31-14-7-1. Id.