

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0043-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-PR-21

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF ROBERT E. STOLZMAN,
DECEASED:**

AMY S. PLUMMER, PERSONAL REPRESENTATIVE,

APPELLANT,

V.

TINA M. ROBERTS,

RESPONDENT.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

Before Dykman, Roggensack and Deiningner, JJ.

¶1 PER CURIAM. Amy Plummer appeals from an order designating Tina Roberts as a nonmarital child and heir of Robert Stolzman. Amy argues that the evidence Tina presented on the paternity question was insufficient, as a matter

of law, to overcome the presumption that Tina was a marital child of Barbara Roberts and Rodney Riffle. We agree and therefore reverse the order of the circuit court.

¶2 Barbara and Rodney were married on February 9, 1970. Tina was born seven and a half months later, on September 17, 1970. Tina was treated as a marital child when Barbara and Rodney divorced, and Rodney was ordered to pay child support for her.

¶3 However, prior to her marriage, Barbara had informed Rodney that she believed she was carrying Robert Stolzman's child. There was testimony that at various times over the ensuing years, Robert told his siblings and others that Tina was his child. Robert also sent Tina several cards in which he called her his daughter.

¶4 Robert died intestate on February 23, 2001. His ex-wife, Amy Plummer, was appointed personal representative. Tina objected to Amy's appointment because Amy had listed only her own two children by Robert as interested parties on the application for informal administration which she had filed with the court. Tina claimed that she was a nonmarital child of Robert and petitioned for an order affirming her status as an heir.

¶5 WISCONSIN STAT. § 852.05(1)(c) (1999-2000)¹ provides that a nonmarital child is entitled to the same consideration in intestate succession as a marital child when the father has acknowledged his relationship with the child in a

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

signed writing. A claimant seeking to inherit under § 852.05(1)(c) must first establish his or her status as a nonmarital child, and then show that the acknowledgement condition has been met. *Schneider v. Schneider*, 150 Wis. 2d 286, 289, 441 N.W.2d 335 (Ct. App. 1989).

¶6 When, as here, the claimant's mother was married to a man other than the alleged father at the time of the claimant's birth, the claimant must overcome the presumptions of legitimacy and paternity codified in WIS. STAT. §§ 891.39(1)(a) and 891.41 by clear and satisfactory evidence in order to establish his or her status as a nonmarital child. *Schneider*, 150 Wis. 2d at 291. We independently review whether the claimant has introduced sufficient evidence to satisfy the burden of proof. *Id.* at 292.

¶7 The presumption that a child born during a marriage is the marital child of the spouses is one of the strongest presumptions known to law. *Id.* at 291. In order to rebut it, the claimant must show that it was physically or biologically impossible for the husband to have fathered the child. *Id.* at 293. The burden may be satisfied by biological tests or evidence that the husband was absent or otherwise incapable of having sexual intercourse with the mother during the conceptive period. *Id.* Under WIS. STAT. § 891.395, conception is presumed to have occurred between 240 and 300 days prior to the child's birth.

¶8 Given Tina's birth date of September 17, 1970, the presumptive conception period was from November 21, 1969 to January 20, 1970. Barbara testified that she had known Rodney since childhood and began dating him about a month before she married him. Given the wedding date of February 9, 1970, it follows that Barbara was dating Rodney during approximately the last ten days of the conceptive period. There was no evidence presented that would establish that

Rodney was incapable of having sexual intercourse with Barbara during that time, and no biological tests were introduced which would exclude him as the father.

¶9 Tina's evidence boiled down to testimony and some written cards tending to show that both Barbara and Robert believed, and informed others, that Robert was Tina's father. While such evidence might have been sufficient to show that Robert was Tina's father if Barbara had been unwed at the time of Tina's birth, we conclude that the evidence was insufficient, as a matter of law, to overcome the presumption that Rodney was Tina's father because it failed to show that it was physically or biologically impossible for Rodney to have fathered Tina.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

