Sisseton, South Dakota
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SISSETON-WAHPETON-SIOUX
TRIBAL COURT
11/6/15
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Clerk of Courts

IN THE SISSETON-WAHPETON OYATE

OF THE LAKE TRAVERSE RESERVATION

SUPREME COURT

KOREY FINLEY Appellant, *v.* OLIVIA LOPEZ Appellee.	NO. APP-15-003-102 **OPINION AND ORDER**

Per curium (Chief Justice Thor A. Hoyte, Associate Justice Russell Zephier, Associate Justice Pat Donovan)

In the matter of the appeal of Korey Finley versus Olivia Lopez, the Sisseton-Wahpeton Supreme Court held a hearing on October 26, 2015. Appellant appeared without counsel, and telephonically. Ms. Finley's telephonic appearance was not objected to. Ms. Lopez appeared through her counsel, Greg Paulson.

The parties submitted no briefs. The Court has considered oral arguments and finds the following:

1) The results of the DNA test indicating the twins, Athan and Rheiwon Begaye, have different fathers is so unlikely, another DNA test by a neutral third-party testing company should be performed to ensure accuracy.

DISCUSSION

I. Factual Findings

The child in question, Athan Begaye ("Athan"), was born on February 21, 2014 to Ms. Finley, along with his twin sister, Rheiwon Begaye ("Rheiwon"). On September 2, 2014, Ms. Finley placed Athan with Ms. Lopez with an agreement that

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Ms. Lopez would later adopt the child. However, on January 5, 2015, Ms. Finley withdrew her consent to have Ms. Lopez adopt Athan, though the child remained in Ms. Lopez's custody pending further hearings. Genetic testing was then performed to determine if Brian Begaye was Athan's father. The genetic testing determined that Mr. Begaye was not the father of Athan, but was the father of Rheiwon. However, Mr. Begaye signed a voluntary acknowledgment of paternity for Athan on May 26, 2015. Ms. Finley's petition for custody of Athan was denied by the lower court on June 2, 2015.

Ms. Finley has had eight children in total. Four of her children, including Athan's twin sister, currently reside with Mr. Begaye's brother, Keith Slim-Tolagai, in Arizona. Ms. Finley has expressed her desire to have Mr. Slim-Tolagai take custody of Athan and he has agreed to do so. Mr. Slim-Tolagai went so far as to file a petition for emergency custody on March 18, 2015 upon learning that Mr. Begaye was the likely father of the twins, as Ms. Finley initially told him another man was the father. Purportedly, Ms. Finley determined the other man was not the twins' father through a DNA test and informed Mr. Slim-Tolagai that Mr. Begaye was likely the father.

II. DNA Testing

The company used to administer the genetic testing was DNA Diagnostic Center (DDC). Sisseton-Wahpeton Oyate Child Support Enforcement of South Dakota had DDC test Athan's DNA sample against Mr. Begaye. The result of the test indicated that the possibility of paternity was zero percent. As for Rheiwon, Stevens County Human Services of Minnesota had DDC test her DNA sample against Mr. Begaye as well. The result of this second DNA test indicated a probability of paternity of 99.98 percent. While the genetic tests performed by DDC may be accurate, the likelihood of twins having different fathers is very rare.[1]

This case deals with a matter of first impression for this Court that only a handful of courts throughout the country have considered. Heteropaternal superfecundation ("superfecundation") is a scientifically, and statistically rare event. Of the approximately 3.9 million individual children born each year, there is a 3.37 percent chance of the birth will be

[1] RE Wenk, T Houtz, M Brooks, FA Chiafari, *How Frequent is Heteropaternal Superfecundation?* 41 Acta Genet Med Gemellol 1, 43–7 (Rome 1992).

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to twins.[2] The frequency of superfecundation among twins is 2.4 percent.[3] In sum, there is approximately a 0.08 percent chance the children here have different fathers.[4] Generally, a DNA test would be sufficient to settle the question of paternity in this suit. When DNA tests are administered properly, their accuracy produces results nearing 100 percent. However, when the probability of a 0.08 percent event is the result of reliance on a negative result, the test administered should be viewed skeptically.

III. Dual Tribal Enrollment

An issue not before this court, but that should be addressed in the court below, is Athan's dual enrollment in Sisseton-Wahpeton Oyate and Navajo Nation. On June 12, 2015, after Mr. Begaye signed a voluntary acknowledgment of paternity, Athan enrolled in the Navajo Nation because Mr. Begaye is Navajo. However, on September 4, 2015, Athan enrolled as Sisseton-Wahpeton Oyate. Generally, tribes have the discretion to determine tribal enrollment. *See Santa Clara Peublo v. Martinez*, 436 U.S. 49 (1978). However, under Article II, Section 2 of the Sisseton-Wahpeton Oyate Constitution, "A member…shall not be dually enrolled in another tribe." This results in Athan's status as an Indian being put at risk.

DECISION

The case is REMANDED to the lower court with instructions that a neutral third-party testing company not otherwise affiliated with the Sisseton-Wahpeton Oyate, Navajo Nation, or DNA Diagnostics Center shall complete a new DNA test on both child and father. The test shall be completed at the expense of Brian Begaye. The father's test may be completed in Arizona, where Brian Begaye is located. Testing of the child, Athan Finley, shall be done to

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[2] Joyce A. Martin et al., *Births: Final Data for 2013*, U.S. DEPT. HEALTH HUM. SERV. (Jan. 15, 2015) (citing "[a] total of 3,932,181 births were registered in the United States."

[3] RE Wenk, T Houtz, M Brooks, FA Chiafari, *How Frequent is Heteropaternal Superfecundation?* 41 ACTA GENET MED GEMELLOL 1, 43–7 (Rome 1992).

[4] To determine the probability of superfecundation we use the following equation:

A and event B equals the probability of event A times the probability of event B given event A.

P(A and B) = P(A)•P(B|A).

The frequency of twin births, according to the CDC data, is approximately 3.37%. This is P(A).

The frequency of superfecundation is approximately 2.4% of twins. This is P(B|A).

Therefore P(A: 0.0337)•P(B|A:0.024)=0.0008088 or 0.08%. Another way to view this is that the probability of superfecundation not occurring in the U.S. is 99.92% or not occurring in twins 97.6% of the time.

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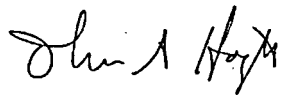
ensure that the chain of custody shall be independent of the Sisseton-Wahpeton Child Support Enforcement Office. The results shall be transmitted to the lower court in a manner acceptable to the lower court to ensure security of the results.

Made, this 3rd day of November, 2015, by



Thor A. Hoyte
Chief Justice
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