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Court Discusses Paternity: When Best Interest of the Child Trumps Biology

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BY DONNA M. MARCUS

With the advent and increased prevalence of genetic testing, one would think that establishing paternity today would be easier than ever. If biology alone was the sole factor in determining parentage, you would likely be correct. As the Superior Court recently decided in *S.N.M. v. M.F.,* No. 868 EDA 2017, 2017 Pa. Super. Unpub. LEXIS 3671 (a nonprecedential decision), biology alone does not determine parentage.

S.N.M. v. M.F. involved a child conceived out of wedlock. In 2003, when the child was two months old, the father, M.F., signed an acknowledgement of paternity, and he and the mother, S.N.M., entered into a shared custody agreement. The father continued to hold himself out as the child's father for the next 13 years. In 2016, the father filed a motion for genetic testing. Over the mother's objection, the trial court granted the father's request and ordered genetic testing. The results of the testing excluded M.F. as the child's biological father and, without a hearing on the results the trial court entered an order declaring that M.F. was not the child's legal father. The plaintiff appealed that order.

There were two issues before the Superior Court in *S.N.M. v M.F.* First, whether the trial court abused its discretion when it granted genetic testing after paternity had already been established and the father failed to meet his burden of proof. The second was whether the trial court violated the mother's due process rights when it entered an order establishing paternity without a stipulation by the parties as to the admissibility of the genetic testing results and without having a hearing on the results.

Establishing paternity in Pennsylvania has long been more complicated than simple biology and taking a genetic test. In Pennsylvania, there is no law ordering genetic testing to be automatically administered at the time a child is born. As such, the child is often much older by the time one of the parties requests genetic testing. At that point, and absent any finding of fraud, the court must determine whether granting genetic testing is in the best interests of the child.

In Pennsylvania, there still exists the presumption that a child born to a married couple is a product of the marriage, as in *John M. v. Paula T.,* 571 A.2d 1380 (Pa. 1990). The Supreme Court limited this presumption in *Brinkley v. King,* 701 A.2d 176 (Pa. 1997), when it held that the marital presumption of paternity should only be applied to preserve the marriage and keep a family intact. Therefore, Pennsylvania's courts seem inclined to grant genetic testing for a child born to a married couple only if there is no longer a family unit to preserve.

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When dealing with a child born out of wedlock, where no presumption of paternity exists, there are additional issues. The father of a child born out of wedlock can sign an acknowledgement of paternity. The Superior Court has held that by signing an acknowledgement of paternity, a party is acknowledging that he is the biological father and is giving up the right to later challenge and litigate paternity, as in *D.M. v. V.B.,* 87 A.3d 323, 328 (Pa. Super. 2014).

When paternity is no longer a relevant factor and has already been established in a prior proceeding, genetic testing should not be ordered, even for humanitarian purposes, as held in *Wachter v. Ascero,* 550 A.2d 1019, 1021 (Pa. Super. 1988). The governing statute, Pa.C.S.A. Section 5103, states that once an acknowledgment of paternity is signed and 60 days have passed, it can only be challenged by presenting clear and convincing evidence of fraud or mistake. Absent such a showing, the acknowledgement cannot be challenged and paternity cannot be rescinded, regardless of any genetic testing results.

Even absent a signed acknowledgement of paternity, a party may still be denied genetic testing if he has held the child out as his own. This concept is known as the doctrine of paternity by estoppel. In Pennsylvania, once a party has held himself out as the child's father and waited so long to challenge paternity that it would not now be in the child's best interest to do so, a party is estopped from denying paternity, as in *K.E.M. v. P.C.S.,* 38 A.3d 798, 810 (Pa. 2012). "Estoppel in paternity action is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage," as in *R.K.J. v. S.K.,* 77 A.3d 33, 39 (Pa. Super. 2013) (quoting *Brinkley v. King,* 701 A.2d 176, 180 n.5 (Pa. 1997)).

The doctrine of paternity by estoppel has been codified as 23 Pa. C.S. Section 5102(b), which states: for children born out of wedlock, paternity will be determined by the parents marrying each other, clear and convincing evidence that the father holds the child out as his own or clear and convincing evidence that the man is the father of the child (this may include a prior court determination of paternity). The doctrine of paternity by estoppel will not be applied when there is a showing that fraud was involved, as in *B.O. v. C.O.,* 590 A.2d 313, 315-316 (Pa. Super. 1991). It is well settled that fraud is proved when it is shown that the false representation was made knowingly, or in conscious ignorance of the truth, or recklessly without caring whether it be true or false, (quoting *Warren Balderston v. Integrity Trust,* 170 A. 282 (Pa. 1934)).

If genetic testing is granted, the procedure to follow after submitting to genetic testing is set forth in Pa.R.C.P. 1910.15(d). If the parties stipulate to the results prior to testing, the results will be mailed to the parties and an order will be entered. If there is no prior stipulation and the results show that the man tested (also referred to as the putative father) is the biological father, the court will issue a rule to show cause why an order should not be entered declaring him to be the father. The rule will advise him that his defense is limited to showing that the genetic test is unreliable, pursuant to 23 Pa.C.S. Section 4343. If a father does not respond within 20 days after service of the rule, an order finding paternity will be entered. If a father does respond within 20 days, the case will be listed for an expedited hearing with a judge. If there is no prior stipulation and the results of the testing show that there is less than a 99 percent probability of paternity, the case should be listed for expedited trial before a judge. If after a hearing on the results the judge finds that the putative father is not the father, a final order dismissing the action will be entered. If, however, after a hearing the judge finds that the putative father is the legal father, an interlocutory order finding paternity will be ordered (an interim support order may also be entered at this time).

The Superior Court in *S.N.M. v. M.F.* determined the trial court abused its discretion when it granted genetic testing. The ruling was based upon the father's signed acknowledgement of paternity. In its ruling, the court relied on the existing custody order and recognized it as a proceeding that already determined paternity. The lack of a support order in the case was irrelevant since the custody order had the same effect. Although the ruling was based upon the acknowledgement of paternity, the Superior Court agreed with the mother's paternity by estoppel and due process arguments. In reversing the trial court's ruling, the Superior Court concluded, "… although father is not child's biological father, he remains child's legal father together with all that designation implies."

Where does that leave us and our clients? Should all children be tested at birth, whether born of the marriage or out of wedlock? Should all putative fathers request genetic testing prior to signing an acknowledgement of paternity? As it stands today, some may find the existing paternity laws may not seem fair to the father who may find out years later the child he has raised may not be his biologically. And perhaps the laws are not fair to the father. But the father's rights are not the sole issue to be considered. The primary concern for the courts in Pennsylvania has been, and continues to be, the best interest of the child.

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