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The Matrimonial Strategist®

'Who's Your Daddy?'

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Determining Paternity

I married at the age of 24, between my second and third year of law school. As a practicing Catholic, I went to the mandated pre-marriage counseling classes, where my fiancé and I were surrounded by younger brides and grooms. Now, over 30 years later, it is dramatic to notice the drop in the number of weddings. There is a distinct rise in the age of couples getting married. Often, we hear about young people who decide to have children out of wedlock and begin a family without the benefit of a spouse. Are these trends a quirk of my community and my experience? Absolutely not.

Recent Trends

The Institute for Marriage and Public Policy in Manassas, VA, has published a number of articles including "Trends in Cohabiting and Marriages" by Jan Latten, Oct. 12, 2008, http://www.marriagedebate.com/up/trends.php (last visited Feb. 5, 2009). The reported trends include fewer marriages overall; less chance of second marriage; and fewer marriages at a young age. With the rise in unmarried cohabitation, couples are entering into private contracts instead of taking marriage vows. This leads to what Ms. Latten refers to as "informal parenting." Research out of the University of Maryland shows that there is a decline in childbirth overall, but a dramatic rise in childbirth outside marriage. University of Maryland, http://www.bsos.umd.edu/socy/vanneman/socy441/trends/marriage.html (last visited Feb. 5, 2009).

The Appellate Courts

Every year I do a synopsis of the recent cases that have issued in the appellate courts in the state of Pennsylvania. Noticeably, several appellate cases address issues of paternity. It is logical to deduce that with the decline in marriages and the rise in the number of children being born out of wedlock in all economic sectors of the society, the higher income parents can afford to appeal their paternity decisions to the appellate courts. This has resulted in a number of interesting opinions, and perhaps the erosion of the well-established doctrine of paternity by estoppel.

Estoppel

In Pennsylvania, as in many states, estoppel is invoked in paternity cases to achieve fairness between the parents by holding both mother and father to their prior conduct regarding paternity of the child. The most obvious example is where the parties are married. A husband who holds himself out as the father of the child is estopped from denying his obligation to support that child if the marriage fails and the husband seeks to avoid the obligation to pay child support on the basis that the child is not his. With fewer couples getting married, the concept of preserving the family unit fades. If an unmarried mother has engaged in intimate relations with more than one man, the issue of estoppel will arise after the child is born, based on the relationship of the possible fathers to the child. If a father has acknowledged a child as his own, and treats a child as such, he will be estopped from denying paternity later when the issue of support arises.

Men who claim to be the father approach counsel to ask if they can assert custodial rights because they believe a child born to a married woman is truly theirs. Those putative fathers want DNA testing to confirm their biological relationship with the child so that they can obtain custodial time with the child. In the cases of an intact family, the public policy has been contrary to such intrusion by the biological father. With fewer marriages and relaxed moral codes in our society, is it more likely that the DNA testing will be allowed and those biological fathers might be given an opportunity to be involved in the child's life?

The predictability of the outcome of a paternity by estoppel claim is now affected by the loose definition of family. In non-traditional households, children are born of a mother who has no husband and either makes a bad guess at who the father might be, or names the wrong father in bad faith. Although there is a decline in the number of traditional marriages, there is a clear increase in the number of fathers seeking custodial rights, accepting the economic responsibility to pay support.

A review of several recent cases in Pennsylvania shows how the doctrine of paternity by estoppel is eroding. With the easy availability of DNA testing, will we be checking for the paternity of every child when he/she is born? Will the named father on the birth certificate be given less weight in the light of medical advances? A review of the cases shows the answers to these questions are not necessarily obvious.

N.C. v. M.H.

The Superior Court of Pennsylvania, the first court of appeals after a trial decision, discussed a former husband's petition to dismiss support for a child who was not his biological offspring in *N.C. v. M.H.*, 923 A.2d 499 (Pa.Super. 2007). The trial court, consistent with numerous precedents in the past, found that the father who had been caring for the child for ten years could not overcome the doctrine of estoppel. The father argued at the trial court level, then succeeded at the superior court level, in convincing the court that he had been subject to fraud by the mother. Father argued that the mother had omitted telling him that he might not be the father. Ultimately, the superior court reversed the trial court decision and remanded on the basis of misrepresentation by omission. In contrast, six weeks after the *N.C. v. M.H.*
decision, the doctrines of equitable estoppel and collateral estoppel were successfully invoked.

Barr v. Bartolo

In *Barr v. Bartolo*, 927 A.2d 635 (Pa.Super. 2007), the mother's husband had been named the father on the birth certificate. At some point, the husband was tested, and it was determined that he was biologically excluded from parenting the child in question. Since the husband had continued to hold himself out as the father, for example, by attending school meetings for the child, the trial court and the superior court would not allow the naming and testing of another putative father. The distinction here is that the husband had acquiesced to be treated as the father after he had reason to know that he had no biological relationship to the child. In many cases, these facts are disputed so the trial court has to assess credibility, and in rare cases, the appellate court will re-interpret the testimony.

Considering these first two cases side by side, it is clear that the doctrine of estoppel for the purposes of considering the best interests of the child was not strictly applied in *N.C. v. M.H.*. Surely if the husband had been treating the child as his for 10 years, one would think it would be upsetting to the child to have this man no longer acting as his or her father. The proof of fraud becomes extremely difficult in the intimacy of a marriage. On slightly different facts, could the court have stated that the father knew, or should have known, that he was not the father? Some cases have been decided on that basis.

Vargo v. Schwartz

On Dec. 31, 2007, the superior court issued its decision in *Vargo v. Schwartz*, 940 A.2d 459 (Pa.Super. 2007). In the *Vargo* case, when the child in question was born, the mother and husband were married. The husband successfully argued that although he held himself out as the girl's father for a short time, he presented evidence that when the mother told him he was not the child's father, he stopped paying support. As in *N.C. v. M.H.*, the court found that the mother had committed a fraud. The court went on to say that there were problems in the marriage, and, therefore, there was "no intact family unit." The husband was relieved of any support obligation, and the doctrine of equitable estoppel was not invoked successfully by mother.

Conroy v. Rosenwald

A few days earlier, Dec. 28, 2007, another superior court panel issued its decision in *Conroy v. Rosenwald*, 940 A.2d 409 (Pa.Super. 2007). In this instance, the court carved out a principle of "partial estoppel." In *Conroy*, there was no family unit. The mother had two partners, potential father #1 and potential father #2. The mother became pregnant and "everybody knew" that potential father #1 was sterile. Accordingly, when the baby was born, mother named potential father #2 the child's father. Father #2 treated the child as his own, initially accepting his financial responsibility and taking advantage of his custodial claim to the child. Father #2 later left the mother and had no contact with the child for some years. When support was sought, father #2 objected to the obligation on the basis that the child might not be his. At this point, one would think the doctrine of equitable estoppel would be invoked, and DNA testing would become irrelevant. Instead, the mother turned to potential father #1 for support. Father #1 invoked equitable estoppel unsuccessfully.

The trial court found, and the superior court agreed, that before the DNA tests, father #1 acknowledged that he "always thought" that the child was his. In fact, there was some discussion regarding distinctive characteristics in the child. Recognizing that genetic testing has become much more exact, the vague reference to the child looking like a possible father has long since been replaced by biological testing. The doctrine of equitable estoppel ignores physical dissimilarity for the sake of the child to promote the stability of the relationship between the child and the man who has held himself out to be the father.

In the *Conroy* decision, the court decided to apply partial estoppel up to the point that father #1 stated that he thought the child was his. In fact, DNA testing was conducted over the protest of father #1. Father #2 was excluded and miracle of miracles, the sterile father #1 was the biological father of the child. The superior court found that the goal of estoppel is to promote fairness. In this case, it was not fair to relieve father #1 of his responsibility. Therefore, estoppel did not apply. The court argued that the DNA testing under protest did not influence its decision. On the other hand, it is hard to ignore exacting science that confirms parentage on an absolute basis. Accordingly, father #2, who had cared for the child and left, was excused from support, and father #1 became obligated from the point of time he expressed his belief that the child was his. It is hard to envision how this is not confusing to the child in question.

Glover v. Severino

In March 2008, the superior court issued a decision, *Glover v. Severino*, 945 A.2d 710 (Pa.Super. 2008). This appears to be a classic case of paternity by estoppel. There was no family unit. The mother, Ms. Glover, had a brief relationship with Severino while they were students. Shortly thereafter she was pregnant; the child was born; Severino visited the hospital and signed the birth certificate, visiting the child from time to time thereafter. A support action was filed during the child's first year, and Severino completed the paperwork, including an acknowledgement of paternity. Severino's visits were infrequent after he left college, joining mother and child for birthday parties and occasional events. Severino eventually filed for custody, received partial custody and paid his court-ordered child support. Eleven years after the child was born, Severino had a private paternity test taken that excluded him as the father. When this case was initially addressed

by the trial court, the judge found that Severino was estopped from denying paternity. Based on the doctrine of equitable estoppel, most attorneys advising Severino would have drawn the same conclusion.

On appeal, the superior court agreed with Severino that the mother had acted fraudulently by failing to tell him he might not be the father. The standard of review in matters involving support requires the reviewing court not to disturb a determination by the trial court unless there has been an abuse of discretion. The superior court would have to find that there was insufficient evidence to sustain the decision. The superior court felt that the trial court ignored the evidence of fraud. In the instant case, the mother stated repeatedly that she believed Severino was the father. The superior court decided that the mother's persistent statements contravened common sense. The superior court felt that even though the mother consistently testified she believed Severino was father, the appellate court felt it was unavoidable to conclude that the mother's assertion was not true, and, therefore, fraud by omission must be applied. The superior court also found it was significant that Severino never resided with the mother, and that there were long periods of time when there is no contact between Severino and the child. It is easy to see that in a society where marriage is not involved, and commitment is not fashionable, a father with casual involvement will not be bound by the doctrine of equitable estoppel. One would never have advised a client this way several years ago, but now there is a crack in the door, and the fellow who does the right thing, signs the birth certificate and pays support may be relieved of that obligation later when a DNA test is conducted.

Distinction Between the Issues

The distinction between the issues of paternity in support and custody cases is highlighted in the May 9, 2008 superior court decision, *Wieland v. Wieland v. Dillon*, 948 A.2d 863 (Pa.Super. 2008). In this case, the mother was married to her husband at the time she became pregnant. She was occasionally living with her husband and was also involved in a relationship with Presley Dillon. When the baby was born, Dillon attended the birth, signed the birth certificate, and the child was named Presley, or "Little Pres," in honor of the named father. Dillon and the mother continued to live together, raising the child. By the time the case got to court, however, the mother was very critical of Dillon and his parenting skills. Unbeknownst to Dillon, the mother decided to sue her husband for support of the child. Again, unknown to Dillon, the husband asked for a genetic test, and the results indicated that the husband was the father of Little Pres. Dillon sought to intervene in the support case between the mother and husband. He asked to invoke the doctrine of paternity by estoppel. One would think there was no intact family, as had been discussed in *Vargo*. *See supra* p.4. The trial court would not ignore the results of the genetic testing, and the superior court refused to reverse. Dillon vehemently argued that the doctrine of equitable estoppel should have been invoked in order to avoid confusion in the child's life. Instead, the trial court and the superior court found that the doctrine could not be invoked by a putative father in order to prevent what the court determined was a "fair result." The court went on to say, however, that even though Dillon is not the father for the purpose of the support action between the mother and husband, he could pursue custody claims. The issue of the effect of these paternity cases on custody matters is discussed below. Surely, more work is being created for the courts and the lawyers who will represent the fathers and putative fathers in these cases.

RWE v. ABK and MK

On Oct. 24, 2008, the superior court issued its decision *RWE v. ABK and MK*, No. 0C05-02282, 2008 WL 4684 341 (Pa.Super. Oct. 24, 2008). The initial superior court decision was withdrawn for re-argument at the request of *MK*, the biological father. After re-argument, the superior court affirmed the trial court. When the mother became pregnant, she had been living with RWE, (Robert). Then she and Robert broke up, and she began a relationship with MK. After she and MK stopped seeing each other, the mother resumed her relationship with Robert and determined that she was pregnant. Due to the timing of her pregnancy, the mother believed that there was an even chance that Robert or MK could be the father. Robert was present at the birth, and he and the mother named Robert as the father on the birth certificate. Unfortunately for MK, he was deployed to Kuwait and was never told that the mother was pregnant or that a child had been born. Later, Robert and the mother broke up. Robert claimed the mother gave him some visitation with the child after separation. Once the custody litigation began, the question of paternity arose. After genetic testing excluded Robert, the mother advised MK that he was probably the biological father of the child in question. Motions were filed by Robert, MK and mother in the custody and support cases. Eventually the court re-ordered genetic testing and determined that MK was the biological father, confirming that Robert was excluded.

Robert argued that the acknowledgment of paternity by Robert and mother on the birth certificate should be binding. The trial court found that the acknowledgment of paternity had been due to fraud, found MK to be the father of the child and scheduled a hearing as to whether Robert had standing to pursue custody and visitation on the theory of in loco parentis.

The superior court wrestled with whether there were sufficient facts to uphold the trial court's determination of fraud at the execution of the birth certificate. Robert was seeking to determine custody based on "constructive paternity by statute" and on re-argument, the father pressed his claim that the acknowledgment of paternity should have been rescinded based on mistake of fact. On re-argument, the superior court focused on the argument of paternity by statute. The superior court found that Robert's interpretation of the statute was incorrect. Although the statute provides for challenging paternity within 60 days, it also allows that after the expiration of 60 days, paternity may be challenged on the basis of fraud, duress, or material mistake-in-fact. The superior court felt that the plain reading of the statute allowed the challenge after the 60 days had expired. The superior court, citing *Glover* and the loosening standards for proving fraud, extended the application of the fraud argument to fraud by omission.

In the instant case, the trial court and the superior court agreed that the decision by the mother and Robert to allow Robert to raise the child, without question as to paternity, was an intentional act on the part of the mother and Robert to defraud the natural father. This was an implicit agreement that MK would be kept in the dark about the mother's pregnancy and the possible paternity of the child. Accordingly, the superior court found that the trial court did not err in rescinding Robert's acknowledgment of paternity, nor would it apply paternity by estoppel, citing *Conroy v. Rosenwald* discussed above. *See supra* pp. 4-5. The appellate courts will not expand the doctrine to allow putative fathers to use the doctrine offensively in order to assert their paternity through their own prior conduct. Accordingly, the superior court found that Robert would not be treated as father of the child, and Robert would have no child support obligation retroactive to the date

of the trial court decision. That left open the issue on remand as to whether he could raise the partial custody case on the basis of in loco parentis.

Same-Sex Couples

This brings to mind the number of cases involving same sex couples, where the biological father is the sperm donor. In the April 30, 2007, decision of *Jacobs v. Schultz-Jacobs*, 923 A.2d 473 (Pa.Super. 2007), the sperm-donor-father provided the sperm for friends who were a lesbian couple. There was no dispute that the mothers of the child involved the father in the life of the child. Some partial custody was arranged. When one mother left the family unit, the other mother sought to join the father, the sperm donor, as an obligor in the support action. The trial court refused to do so, but on an appeal, the superior court reversed. The superior court found that the father's involvement was sufficient to make him a co-obligor, in addition to the biological mother and the other mother who was a parent "in loco parentis." Accordingly, the child would have three parents providing economic support, presumably in addition to emotional support.

Ferguson v. McKiernan

In contrast, on Dec. 27, 2007, the Pennsylvania Supreme Court, (the highest court of appeal in the state), issued its decision *Ferguson v. McKiernan*, 940A.2d 1236 (Pa. 2007). In this case, the mother decided to get pregnant and asked someone she knew, donor-father, to provide the sperm to impregnate her. A written contract was signed under which the sperm-donor would have no support obligation. On appeal to the highest court in Pennsylvania, it was determined that even though the donor-father was not anonymous, as one would be if sperm was obtained through an institution, the contract should be upheld. The supreme court decision reverses the decision of the intermediate court of appeal, the superior court, at 855 A.2d 121 (Pa.Super. 2004). As a consequence, the relationship of the sperm donor toward the child was protected by contract. As stated above, men and women do not want to enter into marriage contracts, but rather private contracts. Here, there is a private contract to bear a child. Surprisingly, the significant public policy in favor of supporting a child is overcome when the sperm contract relieves a known father of paying support.

LSK v. HAN

Compare this with a 2002 decision *LSK v. HAN*, 813 A.2d 872, (Pa.Super. 2002). In this case, a former domestic partner of a same-sex couple sought and won partial physical custody and shared legal custody of the children. The trial court and the superior court agreed that someone who has stood in loco parentis to the children, seeking partial physical custody, has a child support obligation. For years, we have addressed the issue as to whether a step parent is financially obligated to pay support of a child that is not biologically his or hers. Therefore, in the second marriage, when the couple breaks up, the natural parent of the child cannot ask the step-parent to contribute support. It has been six years since *LSK v. HAN* was determined, and we are seeing with increasing frequency that the definition of a parent, and who is obligated to support the child has become more confused. If Presley Dillon has the right to seek partial custody of "Little Pres," will Presley Dillon, who was denied the status of "father," be obligated to pay support because he is seeking partial custody?

Conclusion

It is not the goal of this article to criticize the increasingly loose definition of "father." Society must consider what it means to have these multiple father figures in a child's life. Is the commitment of one man to the child as father less sacrosanct now that the doctrine of equitable estoppel can be eroded by direct fraud, fraud by omission, and partial paternity by estoppel? Or are we moving toward a time when, among the initial inoculations and blood tests, babies are subjected to DNA testing. We hear talks of the wonders of knowing your DNA and your prospects for the future. Should every child have the comfort of knowing "Who's Your Daddy" within the first few weeks of life in order to avoid the heartache and expense of litigation in the years to come?

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