

CLASP

CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: People Interested in Paternity Disestablishment

FROM: Paula Roberts

DATE: March 18, 2004

RE: Paternity Disestablishment Case Update

Since the publication of the CLASP series on paternity disestablishment, *Truth and Consequences*, there have been a number of new reported cases. The original series can be found at www.clasp.org in the Publications section, Child Support and Low-Income Fathers subsection. It can also be found at 57 FAMILY LAW QUARTERLY 35-103 (Spring 2003). The newest cases are summarized below.

Disestablishment and Non-Marital Children

FB v. ALG, 821 A. 2d 1157 (N.J. 2003)—In early 1990, FB and ALG began dating. Six months later she gave birth to a full-term child. In 1994, the mother applied for public assistance and was required to establish paternity and pursue support. She identified ALG as the father and a legal action was commenced. He waived his right to genetic testing and voluntarily acknowledged paternity. A court order of paternity and support was then entered. In 1996, a second child was born. ALG acknowledged paternity and was listed as the father on the birth certificate. He had a close relationship with both children. In 1998, the relationship ended and ALG moved to vacate the paternity judgment finding him to be the father of the oldest child. He sought genetic testing. The trial court found, after eight years of acting as the child's father, ALG was estopped from disestablishing paternity. The Appellate Division reversed.

The New Jersey Supreme Court reinstated the trial court's decision. It found that the trial court had properly denied ALG's application to reopen the paternity and support judgment entered years earlier in a proceeding in which ALG had fully participated and in which he had affirmatively acknowledged responsibility for the child. Noting that ALG had waived his right to genetic testing in the original action and had asserted that he was the child's biological father, the Supreme Court found that he could not disavow that position when the only thing that had changed was his relationship with the child's

mother. The Court also noted that the state's public policy strongly favored the finality of judgments.

Disestablishment and Marital Children

Baker v. Baker, 582 S.E.2d 102 (Ga. 2003)—A child was born during the marriage but both the husband and the wife knew that the child was not the husband's biological child. The biological father (Staples) was in prison. It was undisputed that the husband provided financial and emotional support to the mother during the pregnancy, was listed (with the mother's consent) as the father on the child's birth certificate, and always supported the child financially and emotionally even after the couple separated. The husband filed for divorce and sought custody of the child. The wife answered that he was not the child's biological father and thus was not eligible to seek custody. The biological father intervened in the suit, seeking to establish his paternity. The trial court ordered DNA testing, which proved that husband was not the biological father of the child. Since Georgia law allows the rebuttal of the paternity of a marital child by "clear and convincing evidence," the trial court found the husband was not the biological father, granted a divorce, and refused to grant the ex-husband custody.

The Georgia Supreme Court reversed and remanded, holding that before disestablishing paternity, the court must conduct an analysis of the "best interests of the child." The Court noted that while Georgia law allows disestablishment by clear and convincing evidence, it is not contradictory to first require a "best interests analysis" before such evidence is presented. The Court also noted that the Georgia statute allows fathers to rebut paternity with DNA evidence, but only under certain specific circumstances. However, mothers are free to disestablish without such constraints. The Court urged the legislature to examine this issue. Three judges dissented. They felt that Georgia law clearly allowed a challenge without looking to the child's best interests, and the Court was bound to apply the law.

In re marriage of Pedregon, 107 Cal. App. 4th 1284 (Cal. App. 2003)—A wife had a child before marriage and both she and the husband acknowledged that the husband was not the boy's biological father. Nonetheless, the husband treated the child as if he were his father. The couple then had a son who was the husband's biological child. The couple separated and a support order for both sons was entered. A year later, the husband filed a motion to be relieved of his support obligation to the first son because he was not the biological father of that child. The IV-D agency argued that he was the child's father by estoppel. The trial court found he was not obligated to support the child and the IV-D agency appealed.

The Court of Appeals reversed. It cited the California Supreme Court's decision *In re Nicholas H.*, 28 Cal. 4th 56 (2003) for the proposition that just because a man admits he is not the biological father does not wipe out the presumption of paternity. Here, the man's conduct and the fact that it had occurred over a number of years prevented him from denying his paternity.

In re Jesusa v. S 106843 (Cal. March 1, 2004)—A husband and wife had been married for 18 years and had five children. They separated and the wife began living with Heriberto C. with whom she had a daughter. Heriberto held the child out as his, but made no effort to formally establish his paternity. The wife and baby daughter returned to the husband almost every weekend to visit the older children and the husband also held the new child out as his own. Heriberto was abusive. At one point he beat and raped the mother who was hospitalized. The county then brought a dependency action on behalf of the two-year old child. In response, the husband filed for a declaration that he was the child’s presumed father. Nine days later Heriberto also filed a request to be named as the child’s presumed father. After some delay, a hearing was held but Heriberto was not present because, by then, he had been convicted of the rape and was in state prison. He was, however, represented by counsel and submitted briefs on the legal issues.

The juvenile court declared the husband to be the presumed father. On appeal, Heriberto challenged this ruling and also challenged the court’s making the adjudication in his absence. A deeply divided California Supreme Court agreed with the juvenile court. Four of the justices, relying in part on *In re Nicholas H*, 28 Cal. 4th 56 (Cal. 2003), extended that holding to find that biological paternity by a competing presumed father does not necessarily defeat a non-biological father’s presumption of paternity. Rather, in cases where there are two competing, presumptions of paternity (here the marital presumption and the presumption based on the biological father’s holding the child out as his own), the courts are required to weigh the competing presumptions and follow the one based on the weightier policy and logic. It was not an abuse of discretion for the lower court to find that policy and logic favored the husband since this was consistent with the wife’s wishes, provided the child with a stable home, and embedded the child in the household of her five half-siblings.

The three dissenters were concerned about the broader implications of the decision for incarcerated fathers. However, the majority noted that its decision was confined to that “small subset of biological fathers who have neither married the mother of their child nor otherwise taken any steps to formalize their legal relationship with the child prior to the child’s formation of a presumptive parent-child relationship with a competing man who is interested in asserting his legal rights as a father.”

Fiscal Consequences of Disestablishment

Bouchard v. Frost, 840 A.2d (Maine 2004)—A child was born to an unmarried mother in 1989. The mother began receiving public assistance and named Bouchard as the father. The IV-D agency brought Bouchard in for an interview and he acknowledged paternity. He did not request genetic tests although the form he signed told him of this right. Based on the acknowledgment, a support order was entered. He did not appeal the order and paid \$22,695 over the next 11 years. In 2001, he filed a compliant to determine parental rights and responsibilities. Genetic tests were conducted and they showed he was not the biological father. The district court rescinded the paternity acknowledgment, declared him not to be the father, and held he was not liable for future support. This part of the order was not challenged. The district court also held that Bouchard was estopped from

denying paternity during the period the acknowledgment was in effect. Bouchard appealed.

The Supreme Court of Maine held that Bouchard could not recover what he had paid from the state because of sovereign immunity. It also found that he could not recover against the mother under the doctrine of restitution. Child support law is statutory in nature and nothing in the statute authorizes a court to award restitution to a man who, without objection, pays child support for a child who later is determined not to be his. Moreover, such an award would effectively be a retroactive modification prohibited by federal and state law. Finally, the order—although voidable prospectively—was not void and therefore rights that accrued under it were properly enforced. In dicta, the court also notes that the purpose of child support is to provide for a child’s welfare. It would manifestly undermine the purpose of this statute to order a mother receiving public assistance to repay child support.

In the matter of Haller, 839 A. 2d 18 (N.H. 2003)—A mother held her child out as Haller’s and he signed an affidavit of paternity. The mother applied for public assistance and the state IV-D agency obtained an order of paternity and support, which Haller paid. The court also ordered visitation and the mother failed to comply. Haller then filed for contempt and mother countered with a request for paternity testing. The testing was ordered and proved Haller was not the biological father. The court then issued an order finding him not to be the father relieving him of his financial obligations toward the child. Haller then filed a motion requesting a refund of the \$750 he had paid to the state.

The court denied his motion and Haller appealed. The Supreme Court affirmed the denial. It found that paternity was voluntarily and legally established by Haller through his acknowledgment. Paternity having been established, a support order was properly entered. The support obligation remained in effect until judicially modified. Until then, Haller owed the support, and the state was not unjustly enriched when it received the payments. The court noted that Haller’s recourse was an action against the biological father and possibly an action against the mother for misrepresentation.

Gallo v. Gallo (La. 2003)—A married couple had three children. At divorce, Mr. Gallo obtained custody of them. Several years later, the mother took custody of the youngest and obtained a consent judgment for support. Several months later, Mr. Gallo filed a petition to disavow paternity. Shortly thereafter, he, the mother, and a Mr. Nelson entered into a three-way Paternity Acknowledgment and Disavowal under which Gallo is not the father and Nelson is. The court then entered an order finding Gallo not to be the father and relieving him of his support obligation. The judgment was not appealed. Gallo then filed a rule to show cause why the mother should not be required to reimburse him for the \$22,125 in support he had paid as well as other costs. The trial court denied the motion, but the court of appeals reversed.

The Louisiana Supreme Court reversed. It noted that, under Louisiana law, a suit for disavowal of paternity must be filed within one year after the husband learned or should have learned of the birth of the child and this had not been done, and therefore

paternity could not be disavowed even by a three-way affidavit. The Court then noted that another Louisiana statute allows paternity to be raised in the context of a child support proceeding. This statute forgives the husband's inaction during his period of erroneous belief based on the mother's deception that the child is his or within 10 years, whichever occurs first. The record is devoid of any evidence of deception and more than 10 years has passed, so that statute does not apply here. In addition, that statute specifically says that disestablishment does not affect the validity of prior support orders. Nor can the court find any other legal basis on which Gallo has a claim for reimbursement of that which has already been paid. Child support payments, although paid to the mother, were for the benefit of the child. Gallo benefited from his relationship with the child in many ways, and she should not have to reimburse him.

Related Cases

In Re Adoption of SAJ, 838 A. 2d 616 (Pa. 2003)—A non-marital child was born in 1989. At the time of conception, the mother was involved with two (and possibly three) men. After the birth, SS sought partial custody. As a result, he obtained a visitation agreement which he honored for about one year. The mother then sought child support, and in that proceeding SS denied paternity in a notarized statement. Visitation was then terminated and the mother withdrew her support action. SS never sought genetic tests and let the paternity denial case languish. The court informed him the suit would be dismissed and he did nothing. Thereafter, the child lived with her mother and the mother's new husband for 11 years. They provided her the only support and family she ever knew. The husband filed to adopt the child and notice was given to the other potential biological father (not SS), who agreed to the adoption. The adoption was granted and SS then moved to set it aside, arguing that he was the child's biological father and that the adoption was void because he had not been given notice of the proceeding. The trial court granted his motion and the Superior Court reversed.

The Pennsylvania Supreme Court affirmed the Superior Court's decision. It held that SS was *judicially estopped* from asserting his parentage. He had asserted fatherhood in one proceeding (visitation and adoption) and denied it in another (child support). Thus, he took two factually opposite positions in litigation. He benefited by his assertion of non-paternity in the support proceeding, thereby avoiding his responsibility to support the child. He cannot now come back and assert his paternity in a third proceeding; to allow him to do so would offend justice and the dignity of the court.

The Court also found that SS was *equitably estopped* from now asserting his paternity. By his conduct, he left the mother and her husband entirely responsible for the child for over 11 years. He cannot now undo the situation he created by his words and by his failure to act. While it is true that the mother did not notify him of this proceeding, she acted under the reasonable belief that his assertion of non-paternity, coupled with his failure to be involved in the child's life in any way, was a renunciation of his paternity. Thus, she does not have "unclean hands" so that equitable remedies do not apply.

Damage Actions

Brooks v. Brooks, No. 4-059/03-1217 (Iowa App. Feb. 11, 2004)—A married couple had three children. One was born three years before the marriage and a set of twins were born eight years after the marriage. The husband signed an affidavit of paternity of the older child, and there was a subsequent paternity proceeding as well. The couple divorced in 2001. At that time, the wife had genetic testing conducted for all the children. The test results showed that another man was the biological father of all three children. She did not tell the husband the results. He later learned of the tests and filed a petition for paternity disestablishment (as allowed by Iowa law). He also filed suit against the wife and her lover for fraud and intentional infliction of emotional distress. The district court granted a motion for summary judgment finding that it was contrary to public policy to allow tort claims that threaten an existing parent-child relationship.

The Iowa Court of Appeals affirmed the decision. Citing the rationale of *Day v. Heller*, 653 NW 2d 475 (Neb. 2002), the court concluded that Iowa law does not recognize tort actions by husbands against wives for intentional infliction of emotional distress or fraud based on misrepresentation of paternity. The court went on to say that whether such torts should be recognized is up to the state's Supreme Court or the legislature.