

Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania

I. Overview

Questions surrounding the paternity of a child have a devastating emotional, as well as legal, impact on the child, the mother, the putative father, and the biological father.¹

Deoxyribonucleic Acid (DNA) testing, as well as other forms of blood testing, has made determining the identity of the biological father highly accurate, however, courts are reluctant to admit these blood tests into evidence due to the existence of the presumption of paternity.² As one author has noted, “[i]n the eyes of the law, a man can be determined the legal father of the child even though blood tests conclusively show that the man could not possibly fathered the child.”³

Pennsylvania law requires a two-part test to be satisfied before blood test results are admitted as evidence of paternity. The first step is to determine whether the presumption of paternity applies, and the second step is to determine whether paternity by estoppel can be invoked.⁴ The presumption of paternity stands for the principle that “a child conceived or born during the marriage is presumed to be the child of the marriage.”⁵ The Pennsylvania Supreme Court maintains that the presumption of paternity is “one of the strongest presumptions of the law of Pennsylvania,” however, if there is no longer an intact marriage to protect, this presumption becomes rebuttable.⁶

1. Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 59-60 (2003).

2. Brie S. Rogers, *The Presumption of Paternity in Child Support Cases: A Triumph of Law over Biology*, 70 U. CIN. L. REV. 1151 (2002).

3. Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963, 986 (Summer 1996).

4. *J.C. v. J.S.*, 826 A.2d 1, 3 (Pa.Super. 2003).

5. *Brinkley v. King*, 701 A.2d 176, 179 (Pa. 1997)(plurality opinion).

6. *Brinkley*, 701 A.2d at 179.

Paternity by estoppel is the legal theory that “because of a person’s conduct...that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father.”⁷

The most recent development in this area of Pennsylvania law is permitting the presumed father to “preclude the application of paternity by estoppel” when there is evidence of fraud or misrepresentation on behalf of the person attempting to invoke the doctrine even though for some time he has held the child out as his own.⁸

The presumption of paternity and paternity by estoppel have been highly criticized as being an antiquated system for establishing paternity. The majority opinion in *Brinkley v. King*⁹, written by Chief Justice Flaherty, upheld these two doctrines, but stated:

[t]he presumption of paternity and the doctrine of estoppel, therefore, embody the two great fictions of the law of paternity: the presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents; and the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has cared for the child is the parent.¹⁰

As one author noted, a “glaring difference exists between the doctrines of paternity and equitable estoppel. Equitable estoppel generally is used to punish the party who made the misrepresentation. However, in certain situations, paternity estoppel can actually penalize the victim of the misrepresentation.”¹¹

Using these legal theories before considering the results of genetic testing, on the surface, seems illogical because one would assume that the biological father would have a natural right to

7. *J.C.*, 826 A.2d at 3-4.

8. *Id.* at 4.

9. *Brinkley*, 701 A.2d at 180.

10. *Id.*

11. David M. Cotter, *Putting Family Ties First... Science Second*, 25 FAM. ADVOC. 22, 23 (Fall 2002).

support, visit and care for his issue. However, after considering the policy behind these rules, Pennsylvania seems to have found a workable rule. As will be discussed in this comment, Pennsylvania law preserves the functioning marital unit; precludes the presumed father from denying paternity when he has held the child out as his own and knew or had a reason to know the true paternity of the child; and allows the presumed father relief if the mother used fraud or misrepresentation with respect to the true paternity of the child.

II. The Presumption of Paternity

A. Origin of the Presumption of Paternity and the Supporting Public Policy

The presumption of paternity originated in the common law of England in the sixteenth century in order to “protect children from the hardship of being defined as ‘illegitimate,’” and “to preserve the traditional model of family.”¹² At that time in England, declaring a child to be illegitimate meant that the child was subjected to “serious legal and social discrimination” and was “the heir of no one and unable to create heirs.”¹³

In today’s society, the stigma associated with being an “illegitimate” child has become insignificant. In Pennsylvania, “the General Assembly has eliminated the legal distinction (and discrimination) between ‘illegitimate’ and ‘legitimate’ children.”¹⁴

Preservation of the family unit and an intact marriage continues to be of the utmost importance and worthy of protection.¹⁵ Chief Justice Flaherty, in *Brinkley*, stated:

12. Rogers, *supra* note 2, at 1152-53.

13. *Id.*

14. *Miscovich v. Miscovich*, 688 A.2d 726, 728 (Pa. Super. Ct. 1997). The Superior Court stated:

[t]he general assembly has declared all children to be legitimate:

All children shall be legitimate irrespective of the marital status of their parents, and in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents except as otherwise provided in Title 20 (relating to decedents, estates and fiduciaries).

Miscovich, 455 Pa.Super. at 441, 688 A.2d at 728, (citing 23 PA.CON.S. STAT. ANN. §5102(a)).

15. *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

[t]he public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents.¹⁶

The continued vitality of the policy behind the presumption was questioned in *Brinkley* because in modern society “separation, divorce, and children born during marriage to third party fathers is relatively common,” thus negating the sole purpose for maintaining the presumption of paternity.¹⁷ However, in those situations where the marital unit is intact and functioning, the Court has reasoned that it is necessary to continue to apply the presumption.¹⁸

The argument can be made that when challenges to the paternity of children born during wedlock arise, the marriage is in trouble and likely to end. Therefore maintaining a policy that protects the marital unit is an exercise in futility. However, if the married couple chooses to continue their marriage, and work through their problems, a third party should not be permitted to attack the institution. The preservation of the marital unit in that case is a worthy endeavor, and courts should do their best to protect it.

B. Application of the Presumption of Paternity.

Traditionally, the only fact necessary to apply the presumption of paternity was that a child was born when the couple was married.¹⁹ Once this occurred, the presumption could only

16. *Brinkley*, 701 A.2d at 180.

17. *Id.* at 181.

18. *Id.* Justice Zappala filed a concurring opinion, wherein he disagreed only with the majority’s definition of non-access. *Id.* at 181. (Zappala, J. concurring). It should be noted that Justice Nigro dissented with this rationale stating:

I am unable to join in this approach because I believe that both the presumption of paternity and paternity by estoppel should no longer be strictly applied, as they have been in the past.

In light of the changed, and increasingly fluid, nature of the family, and the increased rates of divorce and separation, these legal fictions have become less reflective of social reality.

Id. at 182. (Nigro, J. dissenting). Additionally, Justice Newman filed a dissenting and concurring opinion, to which Justice Castille joined, wherein it was stated that “the presumption that a child born during coverture is a child of the marriage has lost its place in modern society, especially considering the scientific testing available both to prove and to disprove paternity.” *Id.* at 185 (Newman, J. dissenting).

19. Faust, *supra* note 3, at 970.

be rebutted by clear and convincing evidence that the husband did not have access to his wife during the time of conception or that the husband was not able to reproduce (i.e. impotence or sterilization).²⁰ The presumption of paternity is irrebuttable “when a third party seeks to assert his own paternity as against the husband in an intact marriage.”²¹

In 1997, the Pennsylvania Superior Court, in *Miscovich v. Miscovich*,²² found that the husband did not present sufficient evidence to rebut the presumption of paternity and DNA evidence was not admissible to rebut that presumption.²³ The facts of this case are as follows: two years after husband and wife had divorced, husband began to question the paternity of his son.²⁴ After DNA testing determined that his son was not his biological son, he cut off all ties with the child, and the mother filed an action in support.²⁵ The Superior Court acknowledged that in some situations the presumption did not apply when there was not an intact marriage to preserve, however the Court focused on the fact that there was a child born during wedlock to trigger the presumption of paternity.²⁶ Since the presumption automatically applies, and there was no evidence presented to prove inability or inaccess, the Court concluded that the presumption had not been rebutted and the husband was legally the father of the child, irrespective of the fact that DNA testing proved otherwise.²⁷

However, courts have held that the presumption of paternity did not to apply in situations where the parties had separated and obtained a decree in divorce because the public policy

20. *Id.*

21. *Brinkley*, 701 A.2d at 179, (citing *John M. v. Paula T.*, 571 A.2d 1380, 1388-89 (Pa. 1990) *cert denied*, 498 U.S. 850 (1990)).

22. 688 A.2d at 727.

23. *Miscovich*, 688 A.2d at 727. It should be noted that this opinion was published after the Pennsylvania Legislature enacted its version of the Uniform Act on Blood Tests to Determine Paternity. 23 PA.CON.S. STAT. §5104 (1990).

24. *Miscovich*, 688 A.2d at 727..

25. *Id.*

26. *Id.*

27. *Id.*

behind the presumption (i.e. preservation of the marital unit) was no longer applicable.²⁸ In *Barnard v. Anderson*, the putative father and biological mother had three children before the putative father had a vasectomy.²⁹ Three years later, mother became pregnant and five months after the child's birth the parties separated.³⁰ Based on this factual situation, the Superior Court held that the presumption of paternity did not apply because "the very purpose for application of the presumption, preservation of the marriage, has been thwarted and is no longer relevant, for the parties were divorced before the hearing of this matter."³¹

III. Paternity by Estoppel

A. Origins and History of Paternity by Estoppel

Estoppel is "a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely upon that conduct to his or her detriment."³² In the realm of paternity law, estoppel is "applied to prevent a presumptive father (the husband), or the natural mother (the wife), from denying the husband's paternity if the couple has resided together as husband and wife and the husband held the child out as his own."³³ Consistent with the doctrine of estoppel, if the presumptive father is induced to believe that he is the biological father by fraud or misrepresentation on the part of the mother, the presumptive father is not estopped from denying paternity of the child as long as when the fraud is revealed, he ceases to have contact with the child.

28. *Barnard v. Anderson*, 767 A.2d 592, 595 (Pa. Super. Ct. 2001) (citing *Sekol v. Delsantro*, 763 A.2d 405 (Pa.Super. 2000)).

29. *Barnard*, 767 A.2d 592, 593.

30. *Id.*

31. *Id.* at 595. The Court further noted that another significant fact in this case was that mother and biological father had married and wished to raise the child "within that nuclear family." *Id.* Additionally, this case was remanded to the trial court because in holding that the presumption of paternity applied, the trial court did not make a sufficient finding to warrant an appellate decision on the application of paternity by estoppel. *Id.* at 595-96

32. Faust, *supra* note 3, at, 979 (internal quotations omitted).

33. *Id.*

B. Application of Paternity by Estoppel

The doctrine of paternity by estoppel is used most frequently to prevent a putative father from denying paternity, but it also has been used to prevent a person from claiming paternity.³⁴ In *J.C. v. J.S.*,³⁵ the Pennsylvania Superior Court used the doctrine of equitable estoppel to prevent the putative father from denying paternity.³⁶ In *J.C.*, mother and father were married, and approximately six months prior to the birth of their first child, father became aware that mother had had an extramarital affair.³⁷ Following a brief separation, the parties resumed their regular marital relationship in 1989 and maintained that relationship until 1996 when they obtained a final decree in divorce.³⁸ In 1997, father learned that the child was not his biological son, however, he continued to hold the child out as his own.³⁹ It was not until 2001, that father petitioned the trial court to order blood tests to establish paternity.⁴⁰

Upon these facts, the Superior Court determined that since father held child out as his own after learning the child was not his, he was required to support that child.⁴¹ The Court recognized that even though proof of fraud is sufficient to prevent application of paternity by estoppel, unless the putative father ceases contact with the child upon learning that he is not the biological father, he will be forced to support that child.⁴²

Where fraud is used to induce the putative father into holding the child out as his own, the Superior Court has held that he is not estopped from denying paternity.⁴³ In *Kohler v.*

34. Cotter, *supra* note 11, at 24.

35. 826 A.2d 1 (Pa. Super. Ct. 2003).

36. *J.C. v. J.S.*, 826 A.2d at 1.

37. *Id.* at 2, (citing *J.C. v. J.S.*, No. F.D. 95-010897, slip op. at 2 (Ct. Comm. Pl., Allegheny Cty. Oct. 7, 2002)).

38. *J.C.*, 826 A.2d at 2.

39. *Id.*

40. *Id.*

41. *Id.*

42. *J.C.*, 826 A.2d at 4-5.

43. *Kohler v. Bleem*, 654 A.2d 569 (Pa. Super. Ct.1995).

*Bleem*⁴⁴, the Pennsylvania Superior Court prohibited the biological father from using paternity by estoppel against the putative father who was attempting to deny paternity.⁴⁵ In *Kohler*, the mother of the child had an affair with the neighbor and became pregnant, but told her husband that it was an ‘unknown’ man that had fathered the child.⁴⁶ Based on this information, the father took responsibility for the child until he learned years later the actual identity of the biological father.⁴⁷ Upon learning the true identity of the child’s biological father, the husband left the marital residence and discontinued contact with the child.⁴⁸ When the mother filed for support against the biological father, the biological father attempted to estop the husband from denying paternity, but the Superior Court stated that since the putative father terminated contact with the children when he found out about the fraud perpetrated by mother, estoppel did not apply.⁴⁹

C. Public Policy Supporting Paternity by Estoppel

According to David Cotter, “[t]he guiding paternity-estoppel principle is the law’s preference for family relationships over biology.”⁵⁰ The Pennsylvania Supreme Court stated:

[e]stoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.⁵¹

Even though the determination of whether estoppel applies is very fact-specific, the policy behind the doctrine must be considered in any estoppel analysis.⁵²

44. *Kohler*, 654 A.2d at 576.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Kohler*, 654 A.2d at 576.

50. Cotter, *supra* note 11, at 23.

51. *Brinkley*, 701 A.2d at 180.

52. *J.C.*, 826 A.2d. at 6.

In *Ruth F. v. Robert B.*,⁵³ the Superior Court applied paternity by estoppel to prevent a mother from denying paternity of her former husband.⁵⁴ In *Ruth F.*, the father had knowledge that the child was not his child, but continued to hold the child out as his own.⁵⁵ As such, the court held that it would be contrary to the policy behind estoppel to force the child to begin a relationship with a man that he does not know and stop a relationship with a man that he always believed was his father.⁵⁶

IV. Mechanics of the Blood Test

In most cases where the presumption of paternity and paternity by estoppel arise, the parties are seeking to admit blood test results either confirming or denying one's paternity. The blood tests sought to be used are usually DNA tests, although there are other tests available.⁵⁷ DNA testing is premised on the theory of genetic fingerprinting—every human being has a unique genetic code.⁵⁸ Paternity can be nearly conclusively established through this type of testing based on the “extent to which an alleged father and the child in question actually share the same DNA.”⁵⁹ Thus, “if a child's blood contains a particular component that is not found in the mother's blood, that component must be found in the alleged father's blood, or that person is not the natural father.”⁶⁰

The procedure for DNA testing is as follows: first, all three parties (the child, the mother, and the putative father) submit samples of blood to the laboratory technician; next, the laboratory

53. 690 A.2d 1171 (Pa. Super. Ct. 1997).

54. *Ruth F.*, 690 A.2d at 1171.

55. *Id.* at 1175-76.

56. *Id.*

57. Faust, *supra* note 3, at 966-67.

58. *Id.*

59. *Id.* at 967.

60. *Id.* at 966.

technician “extracts the DNA from the tissue sample and divides the DNA into smaller segments;” finally, these smaller segments produce a “visual image...much like a fingerprint.”⁶¹

When the fingerprints of the putative father and mother are compared with the child, it is possible to determine whether the putative father is actually the biological father of the child. In most cases, this DNA paternity conclusion is not relevant to the legal issue of paternity due to the presumption of paternity and paternity by estoppel.

V. The Effect of the Uniform Act on Blood Tests to Determine Paternity

The Pennsylvania Legislature enacted the “Uniform Act on Blood Tests to Determine Paternity” (hereinafter “the Uniform Act” or “the Act”) to regulate the admissibility of blood tests to determine paternity.⁶² This legislation provides that courts may order blood tests in any matter in which paternity of a child is a “relevant fact.”⁶³ In the Uniform Act, the legislature specifically addressed the effect on the presumption of paternity:

[t]he presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.⁶⁴

When courts have interpreted the language of the Uniform Act, they have consistently stated that blood tests are not relevant unless the presumption of paternity has been rebutted.⁶⁵ In *McCue v. McCue*,⁶⁶ the Pennsylvania Superior Court stated that “[t]he necessity to follow the common law requirement of proving non-access or impotence has not been eliminated by

61. *Id.* at 967 (citing Pearsall, Anthony, *DNA Printing: The Unexamined Witness*, 77 CAL. L. REV. 665 (1989)).

62. 23 PA. CONS. STAT. ANN. §5104 (1990).

63. 23 PA. CONS. STAT. ANN. §5104(c). The text of this section provides:

In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly shall order the mother, child and alleged father to submit to blood tests.

Id.

64. 23 PA. CONS. STAT. ANN. §5104(g).

65. *McCue v. McCue*, 604 A.2d 738 (Pa. Super. Ct. 1992).

66. *McCue*, 604 A.2d at 738.

enactment of the blood test act.”⁶⁷ It was further recognized that “[t]he Act does not relax the presumption that a child born to a marriage is a ‘child of the marriage;’ it merely provides a mechanism through which an alleged father can accumulate evidence of paternity.”⁶⁸

In the area of paternity by estoppel the *McCue* court stated, “blood tests may well be *irrelevant*, for the law will not permit a person in these situations to challenge the status which he or she has previously accepted.”⁶⁹

Again, in 1997, the Superior Court, in *Miscovich*, discussed the relationship between the Act and the presumption of paternity.⁷⁰ The Court reasoned that the issue of paternity, and therefore blood tests, does not become relevant until sufficient evidence is presented to rebut the presumption.⁷¹ As a result, “[w]ith respect to a child born during wedlock, if the presumption of paternity has *not* been rebutted with clear and convincing evidence, as the trial court determined in this case, *blood tests may not be ordered.*”⁷² President Judge Emeritus Cirillo, writing for the majority, concluded that blood tests may be ordered “if the presumption of paternity has been rebutted by clear and convincing evidence” because at that point “paternity becomes a relevant fact.”⁷³

VI. Conclusion

Using the presumption of paternity and paternity by estoppel to make blood tests irrelevant for purposes of determining paternity has several beneficial effects. First, it permits a husband and wife to attempt to work through their difficulties in order to salvage a marriage that may be in trouble. Second, it requires adults who have created a bond with the child to maintain

67. *Id.* at 741 (citations omitted).

68. *Id.* at 742 (citing *John M.*, 571 A.2d at 1380).

69. *McCue*, 604 A.2d at 741.

70. *Miscovich*, 688 A.2d at 729-30.

71. *Id.*

72. *Id.* (emphasis in original).

73. *Id.*

that bond in order to prevent the child from suffering extreme emotional hardship. The policies that underlie these doctrines are significant and worthy of protection.

However, these legal fictions often punish the innocent spouse or party by forcing him to continue to support a child that is not his. Under the current state of paternity law, the only available remedy to the presumed father is to cease all contact with the child as soon as he learns of the possibility that the child may not be his. Even though this option creates extreme emotional difficulty for the innocent child and spouse, to allow a man to maintain a parental relationship with a child, but not support that child, could be equally damaging. Additionally, in situations where all three adult parties agree upon the identity of the biological father, and the biological father is ready, willing, and able to support the child, these legal fictions could prevent him from assuming that responsibility.

It appears that the legislature attempted to make blood test evidence relevant, and therefore admissible, in any situation where the paternity of a child is in dispute, but the Uniform Act only addressed the significance attached to the blood test once it had been admitted into evidence, it did not directly address the admissibility of these results. The courts that have addressed this issue have concluded that the language contained in the Uniform Act meant that blood test evidence is admissible to prove paternity only when the presumption of paternity and paternity by estoppel have been overcome. This conclusion that the presumption of paternity must be overcome by the traditional test before a court will look at the results of a DNA test is sound.

If there is to be any change in the way the presumption of paternity and paternity by estoppel are applied, the change should be made in the legislature, not the courts. The method outlined in case law seems to be a fair and workable standard, however, courts should be

permitted to admit evidence of blood tests on a case-by-case basis when the principles of equity would be offended by its omission.

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