

# P E N N S Y L V A N I A LAW WEEKLY

## To Test or Not to Test

*Advances in science are making the courts walk a fine line with genetic testing*

When Aldous Huxley wrote *Brave New World*, could he possibly have foreseen DNA testing? For those family law practitioners who were practicing in the 20th Century, paternity was established by HLA testing which ruled out paternity; DNA testing rules in paternity.

Today, with DNA testing, a buckle swab of the mother, the child, and the putative father determines paternity with certainty. It is unusual for a father to file with the court requesting paternity testing because with paternity comes the obligation for child support and other legal obligations.

On Dec. 7, 2005, the Superior Court decided *Buccieri v. Campagna*, 2005 Pa. Super. 403, (2005), where the putative father (Campagna) had filed for genetic testing to determine paternity. In Pennsylvania, a child born to a married woman is presumed to be the child of that woman's husband. *Barnard v. Anderson*, 2001 Pa. Super. 23 763 A.2d 592 (2001).

However, in *Buccieri, supra*, the parties weren't married. The child was born Nov. 8, 1996 and on March 16, 2004, the father filed a complaint for partial custody to which the mother (Buccieri) filed preliminary objections.

On June 4, 2004, he filed a petition for paternity testing and the mother filed an answer asserting, *inter alia*, that the doctrine of equitable estoppel should preclude the father's claim. The father's name was not on the birth certificate and he had never acknowledged paternity.

At trial, the mother testified she believed the father was the biological father of the child. The mother had not filed for support and the father had not filed to acknowledge paternity. The mother was engaged to be married and her fiancé testified that he intended to marry the mother and to adopt her children.

Subsequently, the mother did marry and her husband filed a petition to terminate the parental rights of Campagna and to adopt the child at issue. The trial court dismissed Campagna's complaint for partial custody, without prejudice, and considered only his petition for paternity testing.

Pennsylvania Rule of Civil Procedure 1936 governing paternity actions provides as follows:

"(a) Scope. This rule shall govern the procedure by which a putative father may initiate a civil action to establish paternity and seek genetic testing. Such an action shall not be permitted if an order has already been entered as to the paternity, custody or support of the child, or if a support or custody action to which the putative father is a party is pending." Pa. R.C.P. 1930.6 (a)

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In the instant matter, there was no paternity action pending nor was there any order of custody nor support.

Pennsylvania Rule of Civil Procedure 1915.3(d) provides as follows:

"If the mother of the child is not married and the child has no legal or presumptive father, then a putative father initiating an action for custody, partial custody or visitation must file a claim of paternity pursuant to 23 Pa. C.S. §5103 and attach a copy to the Complaint in the Custody action.

"*Note:* If a putative father is uncertain of paternity, the correct procedure is to commence a civil action for paternity pursuant to the procedures set forth at Rule 1930.6." Pa.R.C.P. 1915.3 (d)

It would seem then that the father had a right to file a petition for genetic testing and that the trial court was correct in granting the petition. The Superior Court disagreed and reversed.

The Uniform Act on Blood Tests to Determine Paternity, 23 Pa. C.S.A. §5104 (c), provides as follows:

"(c) Authority for Tests. - 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. If any party refuses to submit to the test, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order against a party or enforce its order if the rights of others or the interest of justice so require." 23 Pa. C.S.A. §5104(c)

## **The Act further provides:**

"While the Act creates a statutory right to obtain blood testing to determine paternity, the right is *not absolute* and must be balanced against competing societal/family interests (emphasis added)."

In *C.T.D. v. N.E.E.*, 653 A.2d 28 (Pa. Super. 1995), C.T.D. had requested court ordered blood tests to determine paternity. While the court negated the applicability of the doctrine of paternity by estoppel, it found the two-year period between the birth of the child and the filing of C.T.D.'s petition could constitute abandonment. Further, the mother had married and had established a new familial unit.

The Superior Court reversed the lower court order and remanded for a finding of whether C.T.D.'s actions were equivalent to an abandonment of his paternal responsibilities. If the trial court thus found, C.T.D.'s request for blood testing would be denied.

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In *Buccieri, supra*, that court examined *Strayer v. Ryan*, 725 A.2d 785 (Pa. Super. 1999) wherein the *Strayer* court stated:

"DNA paternity testing, with its pinpoint accuracy, has posed more squarely than ever before a dilemma in paternity testing. Before the advent of DNA testing, the determination of paternity could not be as accurately established as it is today. Because the truth can be so reliably revealed, the policy question as to whether to expose the truth or whether to bypass the truth for some important family or societal reasons has taken on added meaning. While we recognize that the right to paternity testing is not absolute and there may be strong family or societal reasons to deny paternity testing, such testing should be favored and a parent should be able to assert his legally protected interest in his or her child. The establishment of a parent-child relationship is important to both parent and child. A father and his child have the right to establish a kinship relationship and a child has a right to expect both financial and emotional support from his or her father. Furthermore, a child's biological history may be essential to his or her future health, and the child's cultural history may be important to his or her personal well-being.'" *Buccieri, supra*, citing *Strayer v. Ryan* at 786.

The *Buccieri* court focused its attention on *In Re Adoption of S.A.J.*, 575 Pa. 624, 838 A.2d 616 (2003), wherein the Supreme Court applied the doctrine of equitable estoppel and precluded the putative father from establishing paternity 12 years after the child's birth. In that matter, the Supreme Court stated:

"Appellant has been absent from Child's life over the course of her twelve years. Mother and Husband have taken the entire responsibility for Child. Appellant is equitably estopped from undoing the situation that he created by his words and by his failure to act." *Id.* at 639.

The *Buccieri* Court found the trial court erred when it interpreted the law to give an absolute right to the father regarding the paternity testing, citing *Strayer, C.D.T.*, and *In Re Adoption of S.A.J., supra*.

The court additionally emphasized that the mother had formed a new family unit, the mother's husband having parented the child for three years. The Superior Court weighed the stable family unit which had evolved against the father's delay and inactivity for eight years, reversed, and barred the paternity testing.

In light of the *Strayer* language concerning DNA testing and because many children who are adopted want information about their birth parents with regard to their genetic histories, the judicial balancing act straddles a very fine line.

The most obvious examples of children wanting knowledge of their genetic origins are when adopted children require an organ donor or a blood marrow donor. Some adopted children have strongly asserted that they have a *right* to know their genetic histories.

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Contrast *Buccieri* with *Ferguson v. McKiernan*, 2004 Pa. Super. 289, 855 A.2d 121 (2004); appeal granted, in part, *Ferguson v. McKiernan*, 581 Pa. 629; 868 A.2d 378 (2005), where the Superior Court dealt with the issue of whether a private oral contract between a woman and a

sperm donor to not hold the sperm donor liable for paternity and/or child support would prevail over the policy of the Commonwealth to have the child supported.

The biological mother, Ferguson, was married but convinced McKiernan, with whom she had had an affair, that in exchange for his participation as an anonymous sperm donor, she would release him from any obligation to any child conceived. Ferguson underwent IVF (*in vitro* fertilization) and gave birth to twins.

In August 1994, the putative father was present at the mother's insistence when she delivered, saw the twins two years later for a few hours, and not thereafter. The mother falsely listed her husband as the father of the children on the birth certificate and subsequently divorced her husband.

In 1999, the mother filed for child support against McKiernan. The Superior Court affirmed the trial court finding that the oral agreement between the parties was void as against public policy, citing *Kessler v. Weniger*, 2000 Pa. Super. 2, 744 A.2d 794 (2000) and *Sams v. Sams*, 2002 Pa. Super. 300, 808 A.2d 206 (2002).

In *Buccieri, supra*, the mother had married and made a new life and the undisputed the father was denied paternity testing whereas in *Ferguson*, a sperm donor who contracted for anonymity, was ordered to be tested and to support the children.

The Supreme Court of Pennsylvania has limited the appeal of *Ferguson, supra*, to the following issues:

"a. Whether the public policy of the Commonwealth, which precludes the ability of the parties to bargain away the legal rights of children, should be extended to an agreement between a sperm donor and donee for the donation of sperm in a clinical setting when the agreement was made prior to the conception of the children?

"b. Whether the Superior Court unconstitutionally violated the Petitioner's equal protection rights by holding him liable for the paternity and support of the children produced by his sperm donation when sperm donors similarly situated are not liable.

"c. Whether the Superior Court erred in finding that the Respondent was not estopped from denying the enforceability of the Agreement entered into prior to the conception of the children?" *Ferguson v. McKiernan*, 581 Pa. 629 (2005)

When Aldous Huxley wrote *Brave New World*, the book was considered science fiction. In today's world of sperm donors, *in vitro* fertilization and DNA testing, truth is indeed stranger than fiction.

# P E N N S Y L V A N I A LAW WEEKLY

The Supreme Court of Pennsylvania is now faced with deciding whether a sperm donor has greater rights than the children produced by the sperm. *Brave New World* is no longer science fiction.

The discovery of DNA has opened vistas heretofore unknown. To test or not to test presents an awesome judicial challenge because there is no longer a margin of error. •

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