MEMORANDUM

TO: Committee on the Judiciary, Pennsylvania House of Representatives

FROM: David N. Wecht, Administrative Judge, Family Division, Court of Common Pleas, Fifth Judicial District of Pennsylvania (Allegheny County)

RE: Summary of March 11, 2010 Testimony concerning H.B. 1140

DATE: March 9, 2010

Thank you very much for affording me the opportunity and privilege of addressing the Committee on the Judiciary. The following are some comments on HB 1140, as well as some thoughts on paternity law. As I suggest below, this Bill, like most other proposals in paternity law, leads inevitably to more questions than answers. I confess that, with my remarks, I also may be adding more to the pool of questions than to the fund of answers. In offering the views below, I wish to emphasize that I speak only for myself, and not for other persons or entities:

- The Bill appears by its terms to apply only to the presumption of paternity. This presumption is rarely case-determinative, because paternity issues seldom arise in families that are intact. If the family is not intact, the presumption of paternity does not apply.

- Because the Bill would allow testing only when the parties are divorced, separated or agree to the test, it may arguably serve merely to codify the existing case law about the presumption of paternity. Indeed, as I mentioned in my Lautar v. Lautar opinion (which I have provided separately to the Committee), it can well be argued that, at 23 Pa. C.S. § 5104, we already have the statutory law we need; perhaps the statute is just being judicially nullified.

- The Bill does not address the paternity by estoppel doctrine. Would the Bill and the doctrine co-exist? If so, how? If a paternity test is allowed under this Bill and the putative father is excluded as the biological father, but he had continued to hold himself out as the father, would the estoppel doctrine still preclude him from disclaiming paternity? Would support and custody follow?

- Does the Bill's five-year limit have any effect on common law doctrines? Should other forms of paternity contest (*i.e.*, under a fraud theory) be precluded if filed more than five years after the child's birth?

- The Bill does not indicate how it will relate to acknowledgement of paternity or support. Under current law, if a father signs an acknowledgement of paternity or consents to a support order, he cannot later refute paternity (absent fraud). Would this Bill supersede that principle, or will an acknowledgement of paternity trump this Bill?

- This Bill would still leave custody issues unresolved. If a putative father files for testing when the child is four, and he is excluded as the biological father, but has a strong relationship with the child, what happens with custody? A corresponding amendment of the custody laws should be considered so as to allow these fathers to continue to exercise some type of custody when it is in the best interest of the child.

- Assuming the Bill's drafters intended to address not just the presumption of paternity, but the doctrine of paternity by estoppel (and this, by the way, is the ground upon which most of the cases are fought) as well, then one issue for legislative consideration is whether the Bill would tip the law unduly from a child-centered focus to a parent or adult-centered focus. This tension is one that I addressed in my Lautar opinion.

- With regard to this battle of paradigms, in the event that this Bill advances, query whether the Committee should consider a faster time cut-off than five years. For example, in commenting on a similar Bill at an earlier Session, the Domestic Relations Association of Pennsylvania had suggested that a three-year limit would be preferable to a five-year limit, so as to reduce disruptions to bonds formed between children and putative fathers. This is a point worth considering. It may also be a point about which the Committee might wish to solicit input from child psychologists.

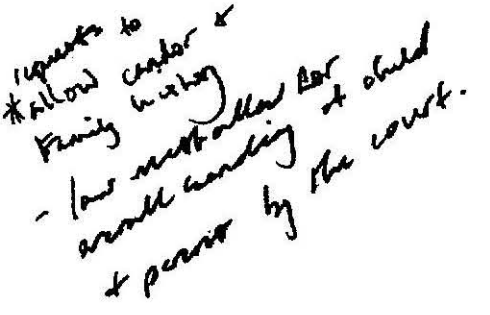
- The Bill's five-year provision would overcome the presumption of paternity (a redundancy, as stated above); if intended to overcome the estoppel doctrine as well, it would change the decisional law by eliminating the need for proof of fraud. Might this encourage "second thoughts" or pretextual behavior on the part of a putative father? Retaliation for an unrelated slight? What about disruption to the life of the child? Once again, we return to the conflict of paradigms.

- Procedures for establishment and disestablishment of paternity exist. For example, the Pennsylvania Department of Health provides an affidavit form that mothers may use to register children to fathers other than their husbands. In addition, in-home testing can be performed merely for the cost of a pharmacy-purchased kit. There can be little question that many Pennsylvanians would (and do) grow frustrated with decisional law that rejects science and that is so case-specific as to be unpredictable in precisely those circumstances that most require predictability: namely, the difficult cases.

- Perhaps, all things considered, it is best (or least bad) to allow the courts to consider the results of the tests, and to give those results such weight as they merit

based upon an overall and contextualized review of the facts and circumstances of the particular case. This would allow candor in recognizing scientific "truth", allow a child to know his or her biological ancestry, which could be important for medical, cultural, and/or other reasons, and eliminate the feeling that something is being hidden. It would allow the courts the flexibility to consider the lives and actions of the child and the relevant adults, and to deal with questions of paternity, support and custody on their own merits. As suggested above and in my Lautar opinion, some judicial expansion of *in loco parentis* rules might be required to accommodate this; or, instead, and perhaps more appropriately, this could be addressed by legislative revision of the custody statutes. In the context of such a revision, the General Assembly could fashion guidelines to cabin and channel the courts' decision-making so as to prevent unbridled discretion and so as to require courts to address factors that lawmakers deem important.

- An expansion of parental standing in custody might arguably call for a reexamination of the child support guidelines, as well as a larger inquiry into the definition of parenthood and filiation. For example, should our law conceive of the possibility that a child can have, in some sense, more than two "parents"? Should our law address "paternity" in a vacuum, or should we undertake a reassessment of the law in light of the advent of alternative reproductive technologies such as gestational surrogacy, egg donation, sperm donation, and the like? In the absence of statutes, Pennsylvanians are left to the expense and uncertainty of litigation. And, of course, as a representative and political branch charged with making laws, the Legislature is the most appropriate body to address these sticky issues. Otherwise, by default, the courts make policy on a piecemeal basis through adjudication of individual cases.



IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

STEPHANIE ARLENE LAUTAR,

Plaintiff,

v.

MICHAEL DAVID LAUTAR,

Defendant,

No. FD 03-3523-003

Superior Court Docket # 816 WDA 2008

OPINION OF THE COURT

DAVID N. WECHT, JUDGE
Court of Common Pleas

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

STEPHANIE ARLENE LAUTAR, Plaintiff, v. MICHAEL DAVID LAUTAR, Defendant.	No. FD 03-3523-003 Superior Court Docket # 816 WDA 2008

OPINION OF THE COURT

WECHT, J. June 23, 2008

This appeal, which concerns the law of paternity, arises from this Court's Order of April 8, 2008. That Order dismissed Defendant Michael David Lautar ["Father"]'s Exceptions to the Recommendations of Hearing Officer Pamela Abdalla, Esquire and granted Plaintiff Stephanie Arlene Lautar ["Mother"]'s Cross-Exceptions. In accordance with Pa. R.A.P. 1925, this Opinion sets forth the Court's reasons for the April 8 Order.

Background and Procedural History

Mother and Father married on September 24, 1994. (T. at 15, 16.) One child, Alexis [d.o.b. 5/2/98], was born during the marriage. (T. at 15.)

In 2000, Father learned that Mother had an affair during the marriage, and questioned whether he was the biological father of Alexis. (T. at 7.) In February 2003,

the parties engaged in private genetic testing. (T. at 7, 8.) While the result is known, it was not admitted during any court proceeding. On March 18, 2003, Mother and Father separated. (T. at 15, 16.)

On June 10, 2003, Father and Mother entered into a consent support order for Alexis. (T. at 17.) On September 10, 2003, a modified support order issued by consent. (T. at 17.) On June 3, 2005, a divorce decree issued. Father exercises partial custody of Alexis pursuant to a July 29, 2005 consent custody order. (T. at 24.)

On July 25, 2007, after learning that Mother had married Robert Wiedner ["Wiedner"], the man with whom she had engaged in the extramarital affair, Father presented a Petition for Termination of Support. Father asserted a belief that Wiedner was the biological father. On September 18, 2007, Father also filed a request for a support modification. That request was consolidated for hearing with Father's termination request. On October 4, 2007, Father filed a "Motion for Joinder of Party to Custody Action." Although the pleading references the parties' custody action, it sought in fact to join Wiedner as a party in the support action. (T. at 3.) The joinder motion was consolidated for hearing with the Petition for Termination of Support and the modification request. On October 19, 2007, the consolidated hearing on Father's petitions proceeded. On November 21, 2007, Hearing Officer Abdalla issued her recommendations.

The hearing officer recommended that the Petition for Termination of Support be denied, that the child support obligation be recalculated pursuant to the request for modification, and that the Motion for Joinder be granted. On December 11, 2007, Father filed Exceptions to the hearing officer's Recommendations. Mother filed Cross-

Exceptions. On March 28, 2008, this Court heard argument on the Exceptions and Cross-Exceptions. On April 8, 2008, this Court issued its Order dismissing the Exceptions and granting the Cross-Exceptions.

On May 7, 2008, Father filed his Notice of Appeal. On May 9, 2008, this Court issued an Order directing Father to file a concise statement of matters complained of in the appeal pursuant to Pa.R.A.P. 1925(b). Father timely complied, filing his 1925(b) statement on May 29, 2008.

Issues Raised on Appeal

In his 1925(b) Statement, Father claims the following errors:

1. The trial court erred when it incorrectly estopped the defendant from denying paternity, where the child lives in an intact family unit with her mother and her biological father, where the defendant is not the biological father of the child, and where mother's misrepresentations and fraudulent conduct induced defendant into supporting the child for over three years.

2. The trial court also erred in refusing to join the biological father as a party, thereby holding the biological father accountable for his duty to support the child, where the biological father lives in an intact family unit with his child, and where the biological father clearly demonstrated parental involvement well beyond merely being the biological father. This is in direct conflict with the Superior Court opinion of Jacob v. Schultz-Jacob, 923 A.2d 473 (Pa. Super. 2007), where the Court held a sperm donor financially obligated to support children in whose lives he is involved. The trial court is also in direct conflict with the Superior Court opinion of L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. 2002), where the court held that biological parents who have exercised the rights appurtenant to that status can be no less bound.

Discussion and Analysis

The Superior Court reviews paternity decisions in a support action under an abuse of discretion standard. Rodgers v. Woodin, 672 A.2d 814, 816 (Pa. Super. 1996). The trial court's ruling will stand absent a misapplication of law or a "manifestly unreasonable exercise of judgment." Id.

Pennsylvania trial courts have long been governed by what our Supreme Court labeled the "two great fictions of the law of paternity": the presumption of paternity and the doctrine of paternity by estoppel. Brinkley v. King, 701 A.2d 176, 180 (Pa. 1997). In recent years, some appellate judges have begun to chip (though not to hammer) away at these bedrock principles of paternity law. A review of Pennsylvania's current decisional law is appropriate before turning to the specific facts of the instant case.

The presumption of paternity holds that a child born or conceived during a marriage is presumed to be the child of that marriage unless there is clear and convincing evidence that the husband did not have access to the wife or that he was physically incapable of procreation. Brinkley, 701 A.2d at 179. The Brinkley court identified the preservation of marriage as the policy underlying this presumption of paternity. Id. at 181. Our Supreme Court instructed that the presumption should apply only in those cases where it would advance the policy of preserving marriage. Id. Hence, the applicability of the presumption of paternity often turns on the issue of whether the marriage is "intact." Vargo v. Schwartz, 940 A.2d 459, 466-67 (Pa. Super. 2007).

If the presumption of paternity does not apply or has been rebutted, the trial court must consider the doctrine of paternity by estoppel. Vargo, 940 A.2d at 464. Estoppel "is

a legal determination based on the conduct of the mother and/or the putative father with regard to the child, e.g., holding out the child to the community as a product of their marriage and/or supporting the child." Id. (*citing* Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999)). Our appellate courts have identified the public policy underlying the estoppel doctrine as the goal that children should rest secure in the knowledge of who their parents are and should not be traumatized by learning that someone they believe to be their father is not. Id. (*citing* Fish, 741 A.2d at 724).

However, evidence of fraud is relevant, and can preclude application of the estoppel doctrine. J.C. v. J.S., 826 A.2d 1, 4 (Pa. Super. 2003). Moreover, the trial court must inquire whether the man against whom estoppel is asserted continued to act as a father once the biological father was revealed. Id. at 4-5.

Judicial application of these rules of decision has often relied upon subtle and complicated distinctions of fact, with doctrinal tensions becoming more evident. The following appellate cases are illustrative.

In the Warfield case, Ms. Warfield, while married to Mr. Thompson, became involved with, moved in with, and had a son with Mr. Warfield. Warfield v. Warfield, 815 A.2d 1073, 1074 (Pa. Super. 2003). Later, Mr. and Ms. Warfield married and had a daughter. Id. Mr. and Ms. Warfield later separated, and, in conjunction with a support action, undertook genetic testing that revealed Mr. Warfield was the father of the daughter, but not the son. Id. Despite that information, Mr. Warfield signed an Acknowledgement of Paternity for both children. Id. Approximately a year later, Mr. Warfield sought to disclaim paternity of the son. Id. at 1074-75. After argument and briefing, the trial court rejected the argument that Mr. Thompson should be determined

to be the son's father. Id. at 1075.

The Superior Court affirmed. The Superior Court reasoned that Ms. Warfield was estranged from Mr. Thompson at the time of the son's birth, and that the marriage was not intact. Id. at 1076. The court concluded that an estoppel had arisen because Mr. Warfield lived with Ms. Warfield from the time of the son's birth until separation nearly eight years later. Id. at 1077. Additionally, the son bore Mr. Warfield's surname, and Mr. Warfield appeared as father on his birth certificate. Id. Finally, notwithstanding that Mr. Warfield had the results of the genetic testing, he still signed an Acknowledgement of Paternity and complied with a support order. Id.

A different result occurred in Gebler v. Gatti, 895 A.2d 1 (Pa. Super. 2006). In that case involving unmarried parents, Gatti (alleged father) and Gebler (mother) enjoyed a lengthy relationship, during which a child was born. Id. at 2. Gatti attended the birth, was named the father on the birth certificate, and entered into a stipulated support order when the relationship ended. Id. Later, Gatti obtained a private paternity test, which determined that he was not the biological father. Id. The trial court held Gatti estopped from denying paternity, reasoning that he had held himself out as the father for eighteen months and that there was no evidence of fraud or misrepresentation. Id. at 3. The Superior Court disagreed. That court concluded that there was fraud or misrepresentation because Gebler knew of the possibility that Gatti was not the father, but failed to provide him with that information. Id. at 4-5. Because there was no relationship between Gatti and the child, because Gatti stopped acting as a father once the truth was revealed, and because the child had an alternate source of support from the biological father, the doctrine of estoppel did not apply. Id. at 5.

In a case involving joinder, the Superior Court affirmed the trial court's conclusion that the biological father, Gresh, was not an indispensable party, because the ex-husband, Moyer, was the legal father by estoppel. Moyer v. Gresh, 904 A.2d 958, 962-63 (Pa. Super. 2006). Moyer and the mother were married when the son was born. Id. at 960. Moyer was actively involved in the son's life both before and after learning the truth about the child's paternity. Id. Gresh, however, was uninvolved with the son during the child's first nine years, having only sporadic contact. Id. Mother later married Gresh, and the son has lived primarily with them, subject to Moyer's partial custody. Id. at 960-61. Moyer filed a complaint for primary custody, and Gresh and Mother filed a motion to dismiss based on lack of standing. Id. at 961. Gresh and Mother argued that Moyer could not be *in loco parentis* because the biological father, Gresh, had assumed parental rights and responsibilities. Id. The trial court denied the motion, and also dismissed Gresh as a party. Id.

The Superior Court affirmed. The court noted that Moyer had not learned the truth about the son's paternity until the genetic testing was completed, and that Moyer supported the son both before and after learning the truth about paternity. Id. at 962. Because Gresh was uninvolved in the son's life for the first nine years, he essentially relinquished his parental rights and was estopped from contesting paternity. Id. Lacking a paternity claim, Gresh could not be an indispensable party. Id. at 963. The Superior Court further concluded that the result was in the son's best interests, as the son and Moyer have a close relationship and the son considers Moyer to be his father. Id.

In a recent case applying the presumption of paternity, the court refused to permit a third party to compel genetic testing, because the marriage remained intact.

E.W. v. T.S. & C.S., 916 A.2d 1197, 1203 (Pa. Super. 2007). The mother became involved with E.W. while still married. Id. at 1199. The mother told E.W. that he was the father of the child, but also told the husband that he was the father. Id. at 1199-1200. E.W. argued that the marriage was not intact, but the trial court did not find this argument credible. The Superior Court affirmed. Id. at 1202.

Applying the doctrine of collateral estoppel in Barr v. Bartolo, 927 A.2d 635 (Pa. Super. 2007), the Superior Court held that, absent fraud, the mother could not deny that the husband was the father when the husband previously was found to be the legal father. Id. at 643. The mother and the husband entered into a consent support order for the child after their separation. The husband paid in accordance with the order until the case was closed. Id. at 636. Later, the mother filed a second support complaint, the husband denied paternity, and the trial court ordered genetic testing which excluded the husband as the biological father. Id. at 637. The second support complaint against the husband was then dismissed. Id. The mother also brought a support complaint against Bartolo, as the biological father. Id. Bartolo objected, claiming that the husband was the legal father due to the earlier unappealed (and consented-to) support order. Id. at 639.

The Superior Court agreed. There was no evidence of fraud, as the mother informed the husband of her affair and the husband still allowed his name on the birth certificate and agreed to pay child support. Id. at 643. Further, the Superior Court found the doctrine of paternity by estoppel applicable as well. Id. at 645. The husband had maintained a relationship with the child, both before and after learning the truth about paternity. Id. at 644-45. In contrast, Bartolo had only met the child a handful of times and had no relationship with the child at all. Id. at 645.

In another recent case, the Superior Court found paternity by estoppel even though another man had been involved in the early years of the child's life. Conroy v. Rosenwald, 940 A.2d 409, 419-20 (Pa. Super. 2007). Conroy, the mother, was involved with both Rosenwald and another man, Guinan, at the time of conception. Id. at 411. Believing Rosenwald to be sterile, Conroy assumed Guinan was the biological father. Guinan acted as father for two years, and his name appeared on the birth certificate. Id. at 412. Guinan and Conroy split, and Conroy filed for support. Id. Guinan, however, denied paternity, asserting that he had undertaken genetic testing, although there is nothing in the court record to verify the statement. Id. at 412-13. Conroy then filed for support from Rosenwald. Id. at 413. Rosenwald was compelled to take a genetic test.[1] Id. Because Guinan no longer was involved with the child, the court did not have to consider disruption to the child's life or family relationships. Id. at 420. The child was not receiving any kind of assistance from a father figure and had not had a relationship with a father figure since the age of two. Id. The court also found that there was no fraud because Conroy had not "actively and intentionally misled" Guinan. Id. at 419. Instead, Guinan had acted as father for a period of time due to the mutual mistake of fact as to Rosenwald's sterility. Id. The Superior Court adopted the trial court's conclusion finding no fraud by either Rosenwald or Conroy. Id. Accordingly, the Superior Court affirmed the trial court's ruling requiring Rosenwald to pay child support. Id. at 420.

In the Vargo case, neither the presumption of paternity nor the estoppel doctrine

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[1] The results of the genetic testing are not specifically revealed in the Superior Court's opinion. However, the test must have shown Rosenwald to be the father, because he alleged that the results and his post-test conduct prejudiced the outcome in the trial court. Conroy, 940 A.2d at 415.

applied. Vargo v. Schwartz, 940 A.2d 450, 466 (Pa. Super. 2007). Recognizing that the determination of whether a marriage is intact is fact-specific and difficult, the Superior Court (in one of Justice McCaffery's last opinions before ascending to the Supreme Court) affirmed this court's finding that the Vargo marriage was no longer intact, given the spouses' repeated separations and their contemplation of divorce. Id. at 467 n.6.[2] Accordingly, the presumption of paternity did not apply. Id. The Superior Court also determined that the estoppel doctrine did not apply, principally because there was evidence of fraud. Id. at 469. Vargo believed he was the father until the mother informed him otherwise. Id. At that time, Vargo informed people that he was not the father, although he continued to provide health insurance for the children. Id. Because the mother testified that she planned to inform the children that Schwartz was the biological father, estoppel would not advance the public policy goal of ensuring that children are secure in the knowledge of their father's identity. Id. The Superior Court found no abuse of discretion in this trial court's decision to put more weight on Vargo's "public disavowal of his biological paternity than on his more private interaction with the two young girls." Id. at 470.

In a case where the presumed father had limited contact with the child, but regularly paid support, the Superior Court found evidence of fraud and a misapplication of the estoppel doctrine. Glover v. Severino, 946 A.2d 710, 711 (Pa. Super. 2008). The trial court had found no fraud because Glover, the mother, sincerely believed Severino was the biological father. Id. at 713. However, the Superior Court found fraud in Glover's refusal to acknowledge the possibility of another father even when confronted

[2] This Court's opinion in Vargo, affirmed on appeal, can be found at 81 Pa. D&C 4th 1 (C.P. (continued...)

with the results of two genetic tests, both of which excluded Severino as the father. Id. at 715. The Superior Court analogized the case to Gebler, affirming that a mother's silence on the issue of other possible fathers (which the Court viewed as "fraud by omission"), regardless of a strong belief about who the father is, can function as fraud for the purpose of overcoming the estoppel doctrine. Id. at 714. The Superior Court also concluded that the estoppel doctrine was incorrectly applied. The trial court had relied on Severino's regular payment of support for the first eleven years of the child's life, his sporadic visits to the child, his acknowledgment of paternity, and his gift purchases for the child as evidence that the estoppel doctrine should apply. Id. at 716.

The Superior Court focused instead on the lack of a parent-child bond, the fact that Severino had never lived with the child, and the fact that the child recognized Glover's ex-husband as his father. Id. at 717. Because there was no parent-child relationship to protect, the estoppel doctrine did not apply. Id. Judge Klein (the author of Gebler v. Gatti) dissented, disagreeing with the finding of fraud. Judge Klein noted that Severino had signed the acknowledgement of paternity despite knowing that Glover had other sexual partners at the time of conception. Id. at 718-19.

In the Wieland case, the mother was married to Wieland at the time of conception, but was separated from him and living with Dillon. Wieland v. Wieland, 2008 WL 1991527, at *1 (Pa. Super. 2008). Dillon was present at the birth, was named on the birth certificate, and shared a surname with the child. Dillon, the mother, and the child lived together for over four years after the child was born. Id. After the mother and Dillon separated, the mother filed for support from Wieland, her ex-husband. Id. Wieland filed

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preliminary objections, which were dismissed by the trial court and not appealed, and Dillon sought to intervene, which petition also was denied and formed the subject of the appeal. Id. In his appeal, Dillon asserted that the estoppel doctrine should prevent the mother from having Wieland named as the father. Id. at *6. Dillon argued that the policy of keeping children secure in the knowledge of their parents would not be advanced by naming Wieland as the father. Id. Because the child already knew the results of the genetic testing that showed Wieland was the biological father, the Superior Court concluded that the interests of the child were best served by requiring the biological father to support the child. Id. at *7. Significantly, the court also acknowledged the public policy reasons supporting genetic testing, including the right to establish a kinship relationship, and the fact that "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". Id. (*citing* Conroy v. Rosenwald, 940 A.2d 409, 416-17 (Pa Super. 2007)).

From the foregoing review of recent cases, it seems possible to discern trends, if not organizing principles, in Pennsylvania's current decisional law on paternity. The presumption of paternity is still valid, but rarely applies because the underlying marriage is seldom intact. However, when the marriage is intact, the presumption still will block a third party from asserting paternity or compelling testing. *See* E.W., 916 A.2d at 1202-03. The paternity by estoppel doctrine also remains viable. *See* Conroy, *supra*. However, the fraud exception has expanded to include cases in which the mother was silent as to the possibility of another father (*See* Gebler, 895 A.2d at 4-5), and to cases where the presumptive father knew mother had sexual relations with others at the time of conception. *See* Glover, 946 A.2d at 713, 715. When fraud applies, the court must

examine how the father against whom estoppel is claimed acts after learning the truth about paternity. *See* Vargo, 940 A.2d at 464.

In the instant case, as it surely must, this trial Court faithfully applied the law as set forth by our appellate courts. Mother and Father were divorced at the time Father presented his Petition. The marriage was no longer intact. The presumption of paternity does not apply. Fish, 741 A.2d at 722.

The next question is whether the estoppel doctrine prevents Father from denying paternity. The conduct of the parties is important to determining whether estoppel applies. Vargo, 940 A.2d at 464. Here, there is undisputed evidence that Father acted as a father to Alexis and held himself out as a father. It also is clear that Father continued to act as a father even after the genetic testing. Father entered into a consent support order. Father exercised, and continues to exercise, partial custody. (T. at 12, 25-26.)

However, Father claims that there was fraud, because Mother induced him to continue to act as Alexis' father. Father claims Mother told him that Wiedner would not accept his responsibility as the biological father.[3] (T. at 10-12.) Father further claims that he relied upon this statement by Mother, which induced him to continue to act as Alexis' father. Id. Mother disputed Father's claims. (T. at 62, 71, 78.) The hearing officer specifically found that Father's testimony on fraud was not credible and that Mother's testimony was. (Rec. at 4, 6.) Because the hearing officer had the opportunity to hear

[3] It should be noted that there is no evidence of record that Wiedner is the biological father. While private genetic testing was performed, the results were not admitted at the hearing, and are not of record before this Court. Father attempted to introduce testimony regarding the testing, but it was objected to and the objection was sustained. (T. at 8, 31-34.) Mother did testify that it was her belief that Wiedner was the biological father. (T. at 72.)

the testimony and observe the witnesses firsthand, the appellate case law affords her deference on issues of credibility. Moran v. Moran, 839 A.2d 1091, 1095 (Pa. Super. 2003). If Father is not credible on this issue, then there can be no finding of fraud, and the estoppel doctrine applies. As such, Father is estopped from denying paternity.

The remaining issue is the joinder of Wiedner to the litigation. The Moyer case is instructive. As noted hereinabove, Moyer concerned a biological father and mother who were married and constituted an intact family. Moyer, 904 A.2d at 961. The trial court dismissed the biological father from the case after finding that the ex-husband was the legal father under the estoppel doctrine. Id. at 962. The ex-husband supported the child throughout its life, both before and after learning that he was not the biological father. Id. Given those findings, the Superior Court determined that it was reasonable to conclude that the ex-husband was the legal father by reason of estoppel. Id. Without the paternity claim, the biological father's interests were "adequately represented" by the mother. Id. at 962-63.

The facts in this case are similar. Wiedner and Mother currently live together as an intact family. (T. at 75.) However, Father has maintained his involvement in Alexis' life. Father exercises custody rights and attends school and extracurricular activities. Alexis knows him as her father. (T. at 25-26, 27, 45, 61-62.) Father has not informed Alexis that he is not her biological father, although he has discussed with a counselor the issue of how to inform her. (T. at 29-30.) The estoppel doctrine applies. As such, Wiedner has no paternity claim, and is not an indispensable party who should be joined.

Father cites two cases in support of his argument. Father contends the Jacob case supports the proposition that, because Wiedner is involved in Alexis' life, Wiedner

should be obligated for support. The facts of the Jacob case are somewhat unique. Schultz-Jacob and her former same-sex partner, Jacob, who had cohabitated for some nine years and entered into a civil union in Vermont, contested custody of four children: two children conceived and carried by Jacob via a sperm donation from Schultz-Jacob's long-time friend, Frampton, and two children that Jacob had adopted. Jacob v. Schultz-Jacob, 923 A.2d 473, 476 (Pa. Super. 2007). Following separation, Schultz-Jacob filed a custody action naming both Jacob and Frampton, the sperm donor of the two biological children. Id. Jacob then filed a complaint for child support from Schultz-Jacob. Schultz-Jacob petitioned to join Frampton as third party. Id. The Superior Court noted that Schultz-Jacob was not seeking to avoid a support obligation, but was instead seeking to prevent Frampton from avoiding one. Id. at 480. Additionally, Frampton already was providing support to the children. Id. at 481. Frampton provided financial assistance, exercised partial custody, provided clothes and toys for the children, and encouraged the children to call him "Papa." Id. Based on these facts, the Superior Court decided that Frampton should be joined in the support proceeding. Id. at 482.

The instant case is distinguishable from Jacob. First, the Superior Court in Jacob found it important that Schultz-Jacob was not trying to avoid her support obligation by joining Frampton. Here, however, Father is trying to avoid his support obligation, as evidenced by his Petition to Terminate Support. Additionally, in Jacob, Frampton already was providing direct support to the children in the form of cash assistance to the mothers beyond the money he spent during the time the children were in his custody. Here, Wiedner is not providing direct support to Alexis. While Alexis now enjoys the benefits of Wiedner's household financial support because she and Mother live with

him, Wiedner has never paid support to Mother. (T. at 79.) Third, and most important, Jacob involved a unique factual situation where, while there were three potential sources of support, there was only one identifiable father. Paternity law was in no way implicated. Here, paternity law is squarely implicated. The Moyer case instructs clearly that, where there is paternity by estoppel, and where the biological father is married to the mother, the biological father is not an indispensable party.

Father also cites the L.S.K. case for a similar proposition. Father claims that, because Wiedner has acted as a biological parent, he is obligated to pay support. Like Jacob, L.S.K. involved the support obligation for children who were born during a relationship between the mother and her same-sex partner. L.S.K. v. H.A.N., 813 A.2d 872, 874 (Pa. Super. 2002). Applying equitable estoppel, the Superior Court determined that the former partner had held herself out as the parent of the children and was actively involved as their parent. Id. at 877-78. As such, the partner could not then deny that she was a parent for support purposes. Id. L.S.K. would appear to support this Court's conclusion that Father is obligated to support Alexis. Father has held himself out as Alexis' father and has been actively involved in her life. Hence, he should not be able to deny that he is a parent for support purposes.

Given the current state of the law, the paternity by estoppel doctrine compels this Court to determine that Father is the legal father of Alexis. He is, therefore, obligated to provide support. Additionally, since Father is the legal father, there can be no paternity claim against Wiedner, and Wiedner should not be joined to the litigation.

The current state of paternity law has been criticized. It does not always provide a fair and equitable result. As Judge (now Justice) McCaffrey stated for the Superior

Court in December 2007:

> [We] add our voice to earlier calls for modification of Pennsylvania law to permit DNA testing as an alternate avenue for rebutting the presumption of paternity. ... [I]n our view, Pennsylvania law is outdated on the issue of DNA evidence in paternity disputes, and should be modified to acknowledge the scientific reality that, in virtually all cases, it is now possible to establish to nearly absolute certainty whether a putative father is indeed the biological father of a child. Pennsylvania law at present requires courts to ignore this reality, unless the court first concludes that the presumption of paternity does not apply or has been rebutted via the traditional proofs.... Such a legal analysis [of whether a marriage is intact] not only invites inconsistency, but is also illogical and blind to modern social and scientific realities. In a case such as the one sub judice, it defies reason and logic to preclude the admission of DNA evidence to rebut the presumption of paternity. ... The trial judge, the Honorable David N. Wecht, has urged the appellate courts of this Commonwealth to revisit the doctrines of presumption of paternity and paternity by estoppel in light of the availability of accurate and precise DNA testing, and we strongly concur in his sentiments.

Vargo, 940 A.2d at 467 n. 6.

This Court humbly and respectfully joins the Vargo panel's criticism. Indeed, the instant case illustrates some of the unjust results that can arise from the current state of paternity law.[4] Here, Father will continue to pay support for Alexis, even though he is not the biological father. Wiedner, who may very well be the biological father, is able to

[4] It is important to recognize that, in some circumstances, the current law may force judges to impose real and potential injustices that can in turn extend into other areas of the law. Consider, for example, the following hypothetical scenario. Husband and Wife live together, and for a time raise the child to whom Wife gives birth during the marriage. Then, Wife leaves, Husband and Wife divorce, and Wife cohabitates and then marries Biological Father, whom child ultimately comes to consider, know, and live with as dad. Absent a Gebler v. Gatti/Vargo v. Schwartz species of fraud, Husband presumably will continue paying court-ordered support to Wife (and hence, indirectly, to her new husband) for child up to at least age eighteen, even though (in this hypothetical scenario) the child no longer enjoys any contact with Husband. Now, suppose that Husband dies intestate. Unless Husband has remarried (and assuming child is Husband's only "issue"), child inherits 100 percent. 20 Pa. C.S.A. § 2103. Indeed, if child is a minor, Wife and Biological Father will control child's inheritance, and hence, Husband's estate, until child reaches the age of majority.

avoid any direct support obligation because this Court is unable to order paternity testing, which is barred by the estoppel doctrine. The estoppel arose based on the hearing officer's credibility determination that no fraud was committed (*i.e.*, that Father was not induced to continue to hold himself out as the father by any deliberate misrepresentations by Mother).

Instead of engaging in a convoluted analysis turning upon various legal "fictions," this Court, had the law been different, could have ordered genetic testing and then handled child support accordingly.[5] There could be further injustice if the child refuses to continue a relationship with the legal father upon learning the truth about paternity. It is not inconceivable that a child in this situation may wish to sever a relationship with the legal father, particularly if the child feels betrayed by the revelation, wants to know the biological father, or wants to embrace the biological father's ancestry or culture. Then, the legal father would be in the unenviable position of paying support for a non-biological child with whom he has no contact.

When paternity could not be resolved definitively, the presumption of paternity and the estoppel doctrine served useful purposes. They prevented a marriage from being attacked by claims from a third party, and allowed a child to be secure in the

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[5] Custody arrangements should not be predicated solely upon paternity determinations. It may very well be that it is in a child's best interests to maintain a relationship with the father the child has known, even if that father is not the biological father. While standing may be an issue in these circumstances, the *in loco parentis* principle should permit adequate redress in appropriate cases. This Court acknowledges that some appellate broadening of *in loco parentis* standing may be necessary to accommodate testing realities. Current law provides that a third party cannot assume *in loco parentis* status when a natural parent opposes it. J.F. v. D.B., 897 A.2d 1261, 1274 (Pa. Super. 2006). It is possible that a biological father could claim he did not consent to a non-biological father assuming *in loco parentis* status. The *in loco parentis* doctrine is a common law principle with sufficient elasticity to ensure solid footing should the Supreme Court choose to review and expand the doctrine to accommodate fully the rights of the non-biological father.

knowledge about who his or her parents are. Today, however, they no longer serve these policy goals. As this Court previously has opined, these doctrines "increasingly seem quaint vestiges of a bygone era." Vargo v. Schwartz, 81 Pa. D&C 4th 1, 13, n. 7 (C.P. Allegheny 2007), *aff'd* at 940 A.2d 466 (Pa. Super. 2007). They derive from a paternalistic, antediluvian world. Time, and technology, have passed them by.

One question that looms – but is rarely remarked upon directly – in the recent cases is the issue of whose interests are being served. Our law commands fidelity to the best interests of the child. In fact if not in doctrine, however, our courts weigh the child's interests and the often disparate interests of the adults involved. These paradigms sometimes conflict. When and where they do, the jurisprudence becomes problematic. The introduction of the fraud exception to the estoppel doctrine may tip the balance toward the putative father in cases where fraud appears. If the courts were focused solely upon the child's interest, the fraud exception would not operate. Because a presumed father can avoid support if he can prove fraud, the child will not have the financial support of that parent, but can also lose an emotional relationship. Conversely, the fraud exception prevents an injustice from being perpetrated on a presumed father, particularly when he may only act as a father to the child because of the misrepresentations of the mother. In these circumstances, our courts now ask why a mother should benefit financially from this fraud and why a father should be made to bear a financial detriment because of it. Plainly, this approach considers the adults' interests, not the child's.[6] If the courts looked solely at the child's interest and the policy

[6] The manifest irony of this interest analysis is that the entire area of controversy arises in the courts and in people's lives because, at the time of conception, adults put their interests over those of the future child.

behind the doctrine – ensuring a child is secure in the knowledge of who the parents are – the fraud exception as we have come to know it would not exist.

The fraud exception has widened. It now may sometimes appear as the exception poised to swallow the rule. Certainly, the idea that a mother who actively perpetrates a fraud, deceiving one man into believing he is the father while knowing another is, seems clearly appropriate as an exception. The Superior Court has expanded the exception to include situations where the mother omitted to tell the purported father that another man could be the father. *See, e.g.*, Gatti, , 895 A.2d at 4-5; Vargo, 940 A.2d at 469. It now is not required that mother know that another man is the father, but rather that she know of the possibility that someone else is the father, coupled with failure to disclose that knowledge. In the Glover case, the exception expanded even farther. There, Severino knew that Glover was involved with other men at the time of conception. Arguably, the finding of fraud was premised more upon Glover's continued stubborn insistence that Severino is the father in the face of the genetic testing results, than upon a material omission or misrepresentation.

Fraud has become the game-changer in paternity law. The expansion of the fraud exception may reflect increasing judicial frustration with the old doctrines. A query begins to surface: Is the fraud exception serving as a silent proxy for an expanding (but as yet impermissible) desire to peer behind the curtain and see what the DNA tests tell us? The chains of the old doctrines are rattling, and the expanding fraud exception is part of the cacophony.

The recent rise of private genetic testing undermines the policy behind the paternity by estoppel doctrine and the presumption of paternity. In many, if not most, of

the recent cases, the parties involved undertook private genetic testing that was completed *before* the parties came into court for a trial on paternity.[7] In such a case, everyone knows the truth of paternity. Often, the child knows, or will be told, the truth. When the truth already is known, the presumption of paternity cannot prevent the marriage from attack. It already has been attacked. At that point, whether the marriage remains intact or not has nothing to do with the paternity of the child. Under the estoppel doctrine, if the parties all know the truth of paternity, the child is not protected from the trauma of learning that someone he or she thought was his or her father is not. The policy is not served. Further, even if parents do not intend to tell the child the truth, the court records are public and are now widely available on the Internet. A child can have access to the data and learn the truth, regardless of the parents' (or the court's) intent.

The courts have had to close their eyes to the truth. The private tests are often inadmissible because of the presumption or the estoppel doctrine. The truth is known to all participants. Yet the courts must engage in an analysis that forces them to ignore this truth. While judges are bound to follow the law, it can be difficult for litigants to be confident that the judge will ignore that large purple elephant in the room.

And there is yet another problem with the existing paternity jurisprudence. In some cases, it nullifies the statutory law. At 23 Pa.C.S.A. § 5104 ("Blood Tests To Determine Paternity"), our General Assembly has mandated (in pertinent part) as follows:

...

(c) **Authority for test.** — In any matter subject to this section in which

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[7] *See, e.g.*, Gatti, 895 A.2d at 2; Moyer, 904 A.2d at 960, n.3; Vargo, 940 A.2d at 461; Glover, 946 A.2d at 712-13; Wieland, 2008 WL 1991527 at *1.

> 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 tests, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order if the rights of others and the interests of justice so require.
>
> ...
>
> (f) **Effect of test results.** — If the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests are that the alleged father is not the father of the child, the question of paternity, parentage or identity of a child shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.
>
> (g) **Effect on presumption of legitimacy.** — The 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.

Notwithstanding this language, in the evolution of cases since Brinkley, our courts have come to view the presumption of paternity as well-nigh irrebutable. As Justice Newman, joined by now-Chief Justice Castille, noted in dissent in Strauser v. Stahr, 556 Pa. 83, 726 A.2d 1052 (1999):

> Next, we must address whether the presumption may be rebutted. [*citing* Brinkley]. The Majority posits that in this case, where the marriage is intact, "public policy" requires that the presumption be irrebutable. I disagree. It is generally not for this Court to make such assertions of "public policy" unless such policy is clear. *See, e.g.,* Muschany v. United States, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945) ("public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest"); Mamlin v. Genoe, 340 Pa. 320, 324, 17 A2d 407, 409 (1941) ("in our judicial system the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of the law.").

> Here, the Majority's conclusion that "public policy" requires an irrebutable presumption in favor of Mr. Stahr is erroneous because it is in direct conflict with the plain language of the Uniform Act on Blood Tests to Determine Paternity (the Act). 23 Pa.C.S.A. § 5104(c). Instead, the legislature has codified the "public policy" of this Commonwealth and clearly and expressly provided that a court may compel interested parties to submit to blood testing, and that such blood testing can rebut the presumption of paternity. 23 Pa.C.S.A. § 5104(c) and (g). Moreover, as I stated in Brinkley:
>
> > We would be both naïve and remiss to perpetuate the strength of this presumption and ignore the results of reliable scientific tests;
> >
> > ....
> > Pennsylvania is fast becoming one of only a minority of states that does not accept the results of blood tests that disprove the husband's paternity to rebut the presumption. Approximately two-thirds of the states currently have statutes permitting blood tests to be considered in the determination of paternity. HOMER H. CLARK, JR., 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 340 (2d ed.1987). We should join the majority of states and accept these reliable scientific tests to rebut the presumption that a child born to a married woman is her husband's child.
> > Brinkley v. King, 549 Pa. at 264, 701 A.2d at 188.

556 Pa. 95-96, 726 A.2d at 1057-58 (Newman, J., dissenting) (footnote omitted)

This Court respectfully suggests that the appellate courts revisit this area of law. It appears that some post-Brinkley decisions are at war both with the statutory mandate and with the interests of justice. Genetic testing should be ordered promptly in all paternity disputes. Child support could then be determined based on (or at least informed by) the finding of paternity. Custody should remain a separate and distinct matter from support: if a child has a relationship with a person who is excluded as a biological father, the relationship, if in the child's best interests, can remain intact. To be sure, there are some situations where a non-biological parent, such as a step-parent,

may provide support, or, as in Jacob, a third party may be obligated for support. But these are particular cases for which particular judicial solutions have been, and will be, crafted. While paternity based solely on genetic testing would not be a panacea, it would allow courts to act (and for litigants to see courts act) on the basis of fact and truth, rather than increasingly time-worn legal "fictions."

BY THE COURT:

_____ J.
David N. Wecht
Common Pleas Judge
Fifth Judicial District of Pennsylvania

The New York Times

November 22, 2009

Who Knew I Was Not the Father?

By RUTH PADAWER

I.

It was in July 2007 when Mike L. asked the Pennsylvania courts to declare that he was no longer the father of his daughter. For four years, Mike had known that the girl he had rocked to sleep and danced with across the living-room floor was not, as they say, "his." The revelation from a DNA test was devastating and prompted him to leave his wife — but he had not renounced their child. He continued to feel that in all the ways that mattered, she was still his daughter, and he faithfully paid her child support. It was only when he learned that his ex-wife was about to marry the man who she said actually was the girl's biological father that Mike flipped. Supporting another man's child suddenly became unbearable.

Two years after filing the suit that sought to end his paternal rights, Mike is still irate about the fix he's in. "I pay child support to a biologically intact family," Mike told me, his voice cracking with incredulity. "A father and mother, married, who live with their own child. And I pay support for that child. How ridiculous is that?"

Yet despite his indignation — and despite his court filings seeking to end his obligations as a father — Mike loves his daughter. Every other weekend, the 11-year-old girl, L., lives in Mike's house in a quiet suburban neighborhood in Western Pennsylvania. Her bedroom there is decorated to reflect her current passion: there's a soccer bedspread, soccer curtains and a soccer-ball night light. On her bed is an Everybody Loves Me pillow covered with transparent sleeves filled with photos of her and Mike, the man she calls "Daddy," canoeing, fishing and sledding together.

As the two of them prepared breakfast together one Saturday in June, just after L. finished fifth grade, Mike sang a little ditty about how she was his favorite daughter. A few minutes later, when he noticed L. sneaking a piece of raw biscuit dough, he poked her. She looked at him impishly until they both giggled.

"Just because our relationship started because of someone else's lie," he said later, "doesn't mean the bond that developed isn't real." Still, his love became entangled with humiliation and outrage, and each child-support payment stung so much that he felt compelled to take a stand on principle. In doing so, he also took the small but terrifying risk of losing his child.

Mike's conundrum is increasingly playing out in courts across the country, a result of political, social and technological shifts. Stricter federal rules have pressed states to chase down fathers and hold them responsible for children born outside of marriage, a category that includes 40 percent of all births. At the same time, DNA tests have become easier, cheaper and more reliable. Swiping a few cheek cells and paying a couple hundred dollars can answer the question that has plagued men since the dawn of time: Am I really the father?

One hundred and twenty-two years ago, the playwright August Strindberg meditated on this quandary. "The Father" is the story of a cavalry captain whose wife hints that he might not be the father of the daughter he adores. Consumed with doubt, he rages at his wife: "I have worked and slaved for you, your child, your mother, your servants . . . because I thought myself the father of your child. This is the commonest kind of theft, the most brutal slavery. I have had 17 years of penal servitude and have been innocent."

Without a biological tie, the captain cries, his paternal love is without foundation. But even as he laments that his daughter may not be his, the captain seeks consolation from his childhood nursemaid. With his mind unraveling, he rests his head in her lap and speaks of the comfort of "mother" — because that was the nursemaid's role, biology notwithstanding.

Strindberg never reveals whether the captain's fears were justified, and perhaps the answer doesn't matter. As long as the captain believed he had a biological link to his child, their relationship was meaningful. It is that link, or perhaps the fear of its absence, that drives men today to DNA tests.

Over the last decade, the number of paternity tests taken every year jumped 64 percent, to more than 400,000. That figure counts only a subset of tests — those that are admissible in court and thus require an unbiased tester and a documented chain of possession from test site to lab. Other tests are conducted by men who, like Mike, buy kits from the Internet or at the corner Rite Aid, swab the inside of their cheeks and that of their putative child's and mail the samples to a lab. Of course, the men who take the tests already question their paternity, and for about 30 percent of them, their hunch is right. Yet as troubled as many of them might be by that news, they are even more stunned to discover that many judges find it irrelevant. State statutes and case law vary widely, but most judges conclude that these men

must continue to raise their children — or at least pay support — no matter what their DNA says. The scientific advance that was supposed to offer clarity instead reveals just how murky society's notions of fatherhood actually are.

When Mike learned that Rob — the man who had impregnated Mike's wife — would now be the one to make his little girl breakfast and tuck her in at night, Mike wondered just what the word "father" really meant. Was he the father and Rob the stepfather or the other way around? Most galling to Mike was that he was expected to subsidize this man's cozy domestic arrangement. Mike's wages would be garnished because he was the legal father — even though, in this case, the biological father had more of the benefits of fatherhood and none of its obligations. (Neither L.'s mother, Stephanie, nor Rob agreed to be interviewed for this article. To protect the girl's privacy, the magazine is withholding the families' surnames and L.'s full first name.)

Even in paternity cases simpler than that of Mike and L., nonbiological fathers often feel like serial dupes: their wives or girlfriends cheated on them, the children they thought were theirs aren't and yet they are required to support children they did not create. Because nothing can be done about the cheating or the biological revelation, the men focus their indignation on the money. The urge to withhold every dime, lest it end up easing the mother's life, is hard to resist. Often the fight isn't really about child support; it's simply a way to channel rage about the woman's duplicity. Some observers suggest that insisting these men pay child support will damage rather than fortify the relationship between father and child that society seeks to preserve. As Alaska's Supreme Court concluded in a decade-old paternity case, making a nonbiological father pay "might itself destroy an otherwise healthy paternal bond by driving a destructive wedge of bitterness and resentment between the father and his child."

Mike did not tell L. that he was asking a court to release him as her legal father. But when she was 9, he did sit her down in his lap and tell her that, according to her mother, Rob was her biological father. He said there was a chance, though small, that the courts or her mom would forbid him to see her. But if they did, Mike told L., he would fight back.

"For nine years, I thought my dad was my dad," L. told me when I met her in June, as she tried to articulate the confusion she felt two years ago and has felt ever since. Her favorite movie is "The Parent Trap," a story of two girls who meet at summer camp and discover they are identical twins, then successfully plot to bring their parents back together. L.'s life hasn't worked out as neatly. She remembers the way her stomach hurt and her head felt dizzy when her dad said he wasn't her real dad, and she remembers crying.

"At first, it made me scared, because if my dad wasn't related to me, then I was living with someone who wasn't a part of my family, like a stranger," she said. "I want him always to be my real dad. Because if he's not my dad, then who is he?"

II.

THERE IS A STRONG cultural imperative that a man should never abandon his offspring: that a man who impregnates a woman should be responsible for their child, and that a man who acted as a child's father should continue to nurture her. But what is the cultural standard when those roles are filled by two different men? Judges, legislators and policy makers have floundered trying to reconcile the issues — a tangle of sex, money, science, betrayal, abandonment and the competing interests of the child, the biological parents, the nonbiological father and the state itself. No matter how they decide, the collateral damage is high because fairness for one party inadvertently violates fairness for another.

The challenge is to settle on principles that help answer the riddle of who is the father in each distinct and gut-wrenching situation. In most states, paternity decisions are governed by centuries-old English common law, the presumptions of which hold sway, whether or not they're codified: a child born in a marriage is presumed the product of that union unless the husband was impotent, sterile or beyond "the four seas" when his wife conceived. The aim was to avoid "bastardy" and to preserve family stability — or at least the appearance of it.

Judges around the country have interpreted the common law in so many different ways that what happens in contested-paternity cases depends almost as much on the state as on the details of the case. Some state-court judges have let nonbiological fathers off the hook financially, but they are in the minority. In most states, judges put the interest of the child above that of the genetic stranger who unwittingly became her father — and that means requiring him to pay child support. Some judges have even rebuked nonbiological fathers for trying to weasel out of their financial obligations. "The laws should discourage adults from treating children they have parented as expendable when their adult relationships fall apart," Florida's top court held in a 2007 paternity decision, quoting a law professor. "It is the adults who can and should absorb the pain of betrayal rather than inflict additional betrayal on the involved children."

In an age of DNA, when biological relationships can be identified with certainty, it can seem absurd to hew so closely to a centuries-old idea of paternity. And yet basing paternity decisions solely on genetics places the nonbiological father's welfare above the child's. Phil Reilly, a lawyer who is also a clinical geneticist, has been wrestling with the policy implications of DNA testing for years, and even he is stumped about how society should

manage the problem that men like Mike face. "We're at a point in our society where the DNA molecule is ascendant, and it's very much in the public's consciousness that this is a powerful way to identify relationships," Reilly says. "Yet at the same time, more people than ever are adopting children, showing that parents can very much love a child who is not their own. The difference here for many men is the combination of hurt and rage over the deceit, the fact that they're twice beaten. I can see both sides of this argument. As a nation, we're still in search of what the most ethical policy should be. Every solution is imperfect."

Once a man has been deemed a father, either because of marriage or because he has acknowledged paternity (by agreeing to be on the birth certificate, say, or paying child support), most state courts say he cannot then abandon that child — no matter what a DNA test subsequently reveals. In Pennsylvania and many other states, the only way a nonbiological father can rebut his legal status as father is if he can prove he was tricked into the role — a showing of fraud — and can demonstrate that upon learning the truth, he immediately stopped acting as the child's father. In 2003, a Pennsylvania appellate court bluntly applauded William Doran — who had been by all accounts a loving father to his 11-year-old son — for cutting off ties with the boy once DNA showed they were not related. The judges found that Doran had been tricked by his former wife into believing he was the father of their son, and he was allowed to abandon all paternal obligations.

Courts, of course, deal with paternity cases only when there is a legal dispute. Many men don't sue because it is expensive or because they suspect they will lose anyway. And then there are those who never even discover the biological truth. How many fall in that category is impossible to quantify. The most extensive and authoritative report, published in Current Anthropology in 2006, analyzed scores of genetic studies. The report concluded that 2 percent of men with "high paternity confidence" — married men who had every reason to believe they were their children's father — were, in fact, not biological parents. Several studies indicate that the rate appears to be far higher among unmarried fathers.

Some other number of men discover they are not biological fathers, but choose to soldier on rather than go to court, unwilling to upset their children or the relationships they have established. Tanner Pruitt, who owns a small manufacturing business in Texas, paid child support for seven years after divorcing his wife. His daughter never looked like him, but it wasn't until she was 12 that it began to bother him. He told the girl he wanted to check something in her mouth, quickly swabbed some cheek cells and sent the samples off to a lab. After the DNA test showed they weren't related, he contacted a lawyer, figuring the lab results would release him from child-support payments and justify reimbursement from the biological father. But the lawyer told Pruitt his only option was to take the matter to court and that doing so might mean giving up his right to see the girl at all. It might also alert her

to the truth. Pruitt didn't want to chance either possibility, so he stayed silent and kept paying.

"I spent thousands and thousands of dollars, and it hasn't cost that biological father a penny, and yeah, I'm angry, but it would have been more harm to her psychologically than it was worth," says Pruitt, who eventually fought for, and won, full custody. The girl, now 15 years old, recently learned from a relative that Pruitt is not her biological father. Afterward, Pruitt sat with her on a park bench, held her hand and told her the saga. "When it was all over with, she gave me a big hug and told me I'd always be her daddy," he told me. "Even though she's not my blood daughter, I was there the day she was born, and I've been there ever since, so she's my daughter, and as long as she's alive, she'll always call me Dad."

Mike's first inkling that something was amiss in his marriage was in 2000, when he was digging through a closet looking for the source of some mice. He didn't find any nests, but he did come upon a plastic grocery bag of love letters to his wife, Stephanie, from her co-worker Rob. Confronted, Stephanie confessed to a fleeting affair but assured Mike that L., then nearly 3, was his. A year later, according to Mike's undisputed court testimony, while changing the sheets, Mike found Rob's photograph tucked under Stephanie's side of the mattress. Despite Stephanie's assurances that L. was his child, Mike's doubts haunted him. The marriage deteriorated, and as L. approached her 5th birthday, Mike asked Stephanie to take a DNA test with him and their child. They told the girl that all three of them had to take a test for the doctor. Mike remembers telling her that rolling the swab inside her cheek wouldn't hurt one bit.

"The day the results came back was the most devastating day of my life," Mike said, beginning to cry as he described opening the envelope from the lab and reading there was no chance he was L.'s father. "This little girl," he whispered, his throat tight, "is not my child. I ran upstairs, locked myself in the bathroom and cried and dry-heaved for 45 minutes. I felt like my guts were being ripped out."

Mike and Stephanie separated immediately. Mike expected Rob to pay L.'s support and remembers asking Stephanie if Rob would "step up" to be L.'s father. He recalls Stephanie saying no, although Stephanie, in court documents, denies that such a conversation ever occurred. Mike would later claim that he agreed to support L. only because her rightful father would not.

After Mike moved out, the lawyers he consulted told him there was no use contesting paternity: if he denied he was the father, they said, he wouldn't get to see L. at all, and the state would probably take his money anyway. So when a clerk at the child-support office

handed Mike a form confirming he was the natural father, he signed. Since then, Mike — a human-resources analyst for an equipment manufacturer — says he has paid $7,500 a year in child support, child care, camp and medical insurance.

At first, whenever Mike saw Stephanie after the divorce, he felt a stabbing bitterness, but eventually, he grudgingly accepted the situation. In 2005, he began dating Lori, a woman he had met at his church and whom he would later marry. Lori deeply resented the chunk of Mike's salary that went to another man's child, while she was reduced to clipping coupons. But she accepted L. They made scrapbooks together, baked scones and pizza and picked berries at a local farm. Neither Mike nor Lori had any idea Rob was in L.'s life until 2006, when Stephanie called and said she was marrying him. It was then that Mike became consumed with resentment. "The courts insist on the best interest of the child," Mike fumes, "but it was in the child's best interest for Stephanie and Rob not to do this in the first place. So why is that burden all of a sudden put on me?"

A year after Mike learned about Rob and Stephanie's marriage, Lori read an article in the local newspaper about a paternity case involving Mark Hudson, a Pennsylvania doctor who discovered he wasn't related to his 11-year-old son. Like Mike, Hudson had questioned his wife about the child's origins and was assured he was the father. In Hudson's case, the state appellate court deemed this misrepresentation fraudulent and dismissed his $1,400-a-month child-support obligation. Lori showed Mike the article and urged him to file suit. For the first time, Mike felt he had a chance at being understood. There were, however, two crucial differences between the cases: Unlike Hudson, Mike had signed a paternity acknowledgment knowing it was a lie. And unlike Mike, when Hudson petitioned to end his legal fatherhood, he wholly disengaged from the child, underscoring for the court that he had stopped acting as the boy's parent.

This dictate to abruptly sever the bond with a vulnerable child — to simply cease reading bedtime stories or cheering at soccer games or wiping away tears — sounds coldhearted. But courts in Pennsylvania and many other states are suspicious of men who claim they were defrauded into serving as father but who, after discovering the truth, nonetheless continue to behave exactly as a father would. Looking through the narrow lens of legal reasoning, courts seem to conclude that these men are perpetuating the fraud and worsening the child's confusion and pain by prolonging a doomed relationship. In reality, however, the requirement to cut ties often destroys the relationship by forcing men to choose between their desire for retribution and their desire to remain the child's parent.

Hudson chose the former path, though he told me he had hoped his ex-wife would allow him time with the boy. "What do you do with that information?" Hudson says of the DNA

results. "Do you just stick it in your back pocket and forget about it?" But if he wanted to maintain that relationship, he was disappointed. The boy's mother said if Hudson wasn't going to be the father for financial reasons, he couldn't see the boy either. Court records show she also told the child his father no longer wanted him. Hudson and his former wife have another child, a daughter. When he goes to pick her up and tries to talk to the boy, now nearly 17, Hudson says that the boy turns and walks away.

Mike's enduring attachment to L. became the central question of a hearing before a family-court magistrate in October 2007. Mike acknowledged that he continued to act as L.'s father, even after the DNA results, but argued he did so only because he was conned into believing L.'s genetic father would not assume responsibility. Stephanie testified, however, that she never claimed such a thing. The real issue, her attorney, Todd Elliott, told the court, was that Mike didn't really want to stop being L.'s father.

"Every time he was given a chance to deny paternity, he never did," Elliott said, according to the transcript. "He signed consent order after consent order because he wanted to be the father. The testimony here today is that he only did it because of some philanthropic belief that he wanted to step up. That's not true. . . . He fought for every other weekend. He fought for having her overnight on a Wednesday. He fought for having her not be able to leave the jurisdiction. These aren't things that someone does because they are just philanthropic. He wants to be the dad; he just doesn't want to pay support." Elliott's accusation infuriated Mike, who believed it accurately described Rob, not him.

The hearing officer was persuaded by Elliott's argument: Mike hadn't been defrauded into admitting paternity after the DNA tests, and he had hardly abandoned L. after he learned the truth. Still, the officer ruled, Rob had also acted "essentially as a parent." During the hearing, Stephanie testified that Rob was the biological father, and that he and L. loved each other. He had taken her on vacations to Disney World, Las Vegas and the ocean, celebrated at her birthday parties, bought her gifts and attended her soccer games and school activities. As such, the hearing officer ordered, Rob should help pay her support, too.

Despite being named a defendant in Mike's lawsuit, neither Rob nor any legal representative for him ever showed up in court or contested the rulings. But Stephanie did. Her attorney argued in an appeal that parenthood shared by one mother and two fathers "would lead to a strange and unworkable situation." So, the lawyer reasoned, Rob should not be forced to help pay for L.'s care. David Wecht, the state-court judge charged with hearing the appeal, agreed with Stephanie's conclusions, albeit for different reasons. Pennsylvania law did not allow for the recognition of two fathers of the same child, he wrote in his opinion, and thus he could not order two men to pay paternal support. Wecht concluded that under the law,

Mike was L.'s legal father. Fraud is the only way to rebut the key paternity doctrine, and Wecht, like the hearing officer, concluded fraud did not induce Mike to continue as L.'s dad after the DNA results; love did.

In reaching his decision, Wecht looked to a 2006 custody dispute that seemed weirdly similar to Mike's. A married man named Kevin Moyer learned he was not the genetic father of his 9-year-old son. Still, when the marriage ended, Moyer retained partial custody and paid child support. Like Mike's ex-wife, Moyer's ex-wife, Vicky, subsequently married the son's biological father, a man named Gary Gresh, who had had little contact with the boy for his first nine years of life. The child lived primarily with Vicky and Gresh, but when he was a teenager, he asked to live full time with Moyer, whom he considered his father. Moyer sought primary custody of the boy. The Greshes fought back, suing to name Gresh as the legal father instead. The appellate court, however, ruled in favor of Moyer. Gresh, the judges said, had given up his right to be a legal father by being entirely absent during the child's first decade. Moyer, on the other hand, had provided emotional and financial support throughout the boy's life.

The ruling preoccupied Wecht as he considered the facts in Mike's case. If the court recognized Moyer's paternal role despite the lack of genetic tie — and despite the available biological father — how could Wecht disregard the role Mike had played in L.'s life, just because her biological father was now in her life?

Still, the state of the law frustrated the judge. In his opinion, Wecht wrestled with how to apply a law that requires deliberately ignoring genetic facts that are of the utmost importance to the people involved. The law's exasperating consequence, he wrote, is that the man who "may very well be the biological father is able to avoid any direct support obligation" and the nonbiological father is left with "unjust results."

Although Mike sensed that Wecht understood his predicament, he felt trapped by the ruling and he appealed, hoping another judge might find him a way out. When the appellate panel turned him down, Mike brought his plea to the state's top court. Then he waited.

III.

CARNELL SMITH, an engineer-turned-lobbyist in Georgia, is the leading advocate for men like Mike. In 2001, after Smith's own paternity struggle, he formed U.S. Citizens Against Paternity Fraud, to help the men he calls "duped dads." In his most notable success, Smith persuaded Georgia lawmakers to rescind nonbiological fathers' financial obligations, no matter the child's age or how close the relationship. Smith then became the first man to disestablish paternity under that law.

Smith's movement was spurred by federal welfare reform in the mid-1990s that pressured states to track down the fathers of children born out of wedlock and make them accountable. Congress demanded that states find fathers for at least 90 percent of those kids, arguing that connecting a child to her father would improve the child's emotional well-being. Identifying a man to tap for child support in welfare cases would also reduce government spending. The law required paternity-acknowledgment forms to be distributed at every birth by an unwed mother. It did not require states to offer genetic testing before those forms were signed, but most of the forms do note that genetic testing is available. Advocates on both sides of the issue, however, say nearly all men sign the form without undergoing testing. Sometimes they believe they are the father; sometimes they don't understand what they're signing; sometimes they hesitate to question a girlfriend's fidelity right after she's given birth; and sometimes they sign knowing full well the child isn't theirs. If the putative father isn't at the birth and the unwed mother is on welfare or seeking child support, she must identify the man she thinks is the father. He is then served with legal papers. If he doesn't respond, judges usually name him the father by default.

The policy changes have been a huge success: the number of out-of-wedlock births with established paternity has more than tripled in the last 15 years, reaching 1.8 million in 2008. But as that figure swelled, so did the number of men who started having doubts. What if, they asked, the child wasn't really theirs? New, easy-to-use technology provided them with the means to an answer. As Identigene, a paternity-testing company, says in its marketing material, "Putting your mind at ease has never been more convenient, affordable or accurate."

With the scientific proof in hand, men like Carnell Smith began fighting back. A few months after Smith split up with his girlfriend in 1988, she announced she was pregnant with his child. Believing her, he signed a paternity acknowledgment for their daughter, Chandria. He obtained joint custody, paid her support and spent virtually every weekend with his little girl. When Chandria was 11, her mother sued to increase support. Smith decided to be tested, and the results excluded him as the father. In a lawsuit, Smith demanded Chandria's mother pay back the $40,000 he had laid out in what he calls "involuntary servitude" and fraud. The court ruled against Smith, concluding that he had known that his former girlfriend had other partners at the end of their relationship and should have realized he might not be the father. By not exercising his "due diligence" and getting a DNA test early on, the court put the burden on Smith for not unearthing the truth sooner.

The law that Smith helped to pass in Georgia, like a similar one in Ohio, sets no time limit on using DNA to challenge paternity. The premise is that a man shouldn't be punished for entering a paternal relationship that he would have avoided had he known the truth. It is,

Smith says, a correction to a double standard that allows mothers and caseworkers to use DNA to prove paternity but prohibits men from using that same evidence to escape its obligations. But child-welfare experts counter that a child shouldn't be punished by losing the only father she has ever known — or the financial security he offers — just because he's upset that she doesn't share his genes. In 2002 the National Conference of Commissioners on Uniform State Laws — an influential body of lawyers and judges that proposes model laws — drafted a compromise. The proposal would allow the presumed father, the biological father or the mother to challenge the paternity until a child turns 2. The proposal had two goals: to balance the rights of children with those of their presumed fathers and to encourage parentage questions to be raised early in a child's life, before deep bonds are formed. Several states, including Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming, have adopted that model or a variation of it. But men's rights groups complain that most putative fathers don't discover the child isn't theirs until after the two-year window closes — at which point, they have little or no recourse.

The last time Smith saw his one-time daughter was nine years ago, when she was 11. His outrage at Chandria's mother and the system remains close to the surface. "We're penalized for trusting our wives or girlfriends!" Smith seethed to me. He has long since lost track of Chandria. It is as if she ceased to exist once their biological connection evaporated.

Chandria, however, has not forgotten Smith. Her memories of her 11 years with him are happy ones, which makes what happened afterward so hard for her to grasp. As Chandria, who is now 20, remembers it, Smith just disappeared from her life. "I was just a kid, so I didn't really understand what happened or why," she said. "He never did explain why he didn't want anything to do with me anymore." Chandria says he wouldn't answer when she called him at home, or he would promise to call back but never did. Smith says he doesn't recall Chandria calling him.

She stopped seeing friends and holed up in the bathroom, scratching and picking at her skin until it bled. The more it hurt, she told me, the calmer she felt. Her hair started to fall out, her grades slipped and she had trouble sleeping, details her mother and her mother's lawyer at the time corroborated. Chandria received counseling at her school and privately for years.

"It kind of wrecked my self-esteem," she says. "Even now, I worry about being a burden on people. I don't want to be in the way. I don't want to be anybody's problem. It's made me apprehensive about getting attached to people, because one day they're there and the next day maybe they won't be. You can't help but be careful."

Chandria now attends college in Georgia. She has seen Carnell Smith on the local news and on the Internet and cannot reconcile the man who seems to her so insensitive with the father she knew: attentive, seemingly proud of their relationship and eager to spend time with her. "He was what a father was supposed to be," she says, "but when things changed, he completely disconnected. That's just not fair. You've been in my life my entire life and for you to just cut that off for money, well, that's not fair to anybody."

Child-welfare advocates say that making biology the sole determinant of paternity in cases like Smith's puts the nonbiological father's interest above the child's. Besides, society has increasingly recognized that parenthood is not necessarily bound to genetics. Reproductive technology has made it possible for one person to supply an egg, another to fertilize it, a third to gestate it and a fourth and fifth to be deemed the parents. Stepparents, grandparents and same-sex co-parents are increasingly winning legally protected access to children whom they helped raise, even when no direct genetic link exists.

"Having been involved in cases like these, I think the answer to 'Is it my kid?' is irrationally important to the cuckolded husband," says Carol McCarthy, an officer of the Pennsylvania chapter of the American Academy of Matrimonial Lawyers. "My own biases are going into this because I'm adopted, so I'm real into 'your parents are the people who raise you.' I couldn't care less who my biological parents are. My parents are the ones who went through all the crap I gave them growing up."

IV.

WHY IS IT THAT we imbue genetic relationships with a potency that borders on magic? How many among us have trolled through genealogy records in search of unknown relatives or have welcomed strangers into our homes and hearts in instant intimacy simply because a genetic connection is suddenly revealed? Grandpa Harry's older brother's grandchild just found us on the Internet! A lovely man! Let's have him over for dinner! The emotional connection between newly discovered kin is trenchant because we believe the genetic link to be significant, allowing us to embrace a stranger who — if that tie were lacking — we would never otherwise blindly accept. But what happens when we believe a tie exists, as Mike did, and then discover it doesn't? If betrayal and money are taken out of the equation, would everything look different?

Denny Ogden has thought a lot about these questions. He was 54 when he got a phone call from a woman saying she was his daughter. As a college junior, Ogden had an intense summer romance; that September, the woman told him she was pregnant and planned to give up their baby for adoption. The day the baby was born, Ogden called his old flame from

a pay phone on campus and listened, distraught, as she described the beautiful baby girl she knew she needed to give away. He felt confused and guilt-ridden.

In the 34 years that followed, Ogden only rarely thought about that little girl. He married, had three kids and settled into a comfortable life in Connecticut, telling his secret to no one, not even his wife. The three times that his wife gave birth, he felt swoony and in love with their creations, and as he examined each baby's tiny toes and fingers, he wondered fleetingly how that other girl, by then a teenager, had turned out.

But then the phone rang, and a woman named D'Arcy Griggs said she was calling from Seattle to say she was his daughter. Her birth mother had died of cancer, but Griggs had met the mother's family, who in turn had led her to Ogden, and no, she wasn't after his money. Shaken, Ogden called his lawyer. He also ran a background check on Griggs and her husband, a prominent surgeon, to make sure Griggs's tale held together. It did. Ogden told the whole story to his shocked wife, and over the next several months, Ogden and Griggs exchanged hundreds of e-mail messages, phone calls and photos, quizzing each other on intimate medical histories and marveling at how similar their coloring was, their love of adventure (she's a skydiver; he's a private pilot) and their distaste for green peppers and Spanish class. He took to calling Griggs "honey" and slid her photo under his desk blotter at work, alongside those of his other children.

Two months after their first talk, Ogden flew to Seattle to meet her. He and Griggs spent four days, morning to night, catching up on 34 lost years, staring in the mirror side by side, comparing noses and ears and hair. "For the first time in my life, I felt like I totally fit, as if we shared the same personality," Griggs says.

Ogden was so reluctant to leave that he even stayed an extra day. As they prepared to part, one or the other of them (their memories are fuzzy on this detail) pointed out that they couldn't be sure they were related unless they had a DNA test, so they found a lab through the Yellow Pages and were tested. Both felt certain it would confirm what they already felt to be true.

When the news came back that Ogden wasn't the father, he was crushed. "It broke my heart," he said. "We talked to each other and cried, and I even called the testing lab to say, 'Are you really sure?' " As confused as Ogden had been about how to become a father to a 34-year-old stranger, he was even more confused about how to stop being a father to a 34-year-old daughter he had quickly come to love.

Griggs was devastated, too. Her biological mother was dead, and she had lost the man she thought was her father. She sobbed for days. Even seven years later, she cried as she recalled

it: "I had finally found a connection, a family I belonged to, and then I thought it was gone. But he didn't go away. I think of him as my 'almost dad.' I call him before I call anyone else in my family whenever I'm upset. When I was going through my divorce, we talked three, four, five times a day for weeks.

"If we had met on the ski slopes or at an airport, we might have hit it off as friends, but the fact that we believed we truly belonged to each other is why we loved each other right away like we did," she told me. Griggs is no longer interested in finding her true biological father. For her, Ogden is enough. On each Father's Day, she sends him a card and scrawls across the top, "I wish."

Many of Ogden's friends and family don't understand why he and Griggs remained close after discovering they were biological strangers. "They don't get the whole idea that believing you're genetically connected makes something happen between people," Ogden said. "All the emotions and feelings were there because we were convinced we were linked. I had committed myself to this child, and when I found out she wasn't my child, how could I just step away?"

V.

IN LATE JUNE, Pennsylvania's highest court announced it would not consider Mike's appeal. That left Wecht's decision intact: Mike was the legal father and the sole man responsible for L.'s support. "It all could have been avoided from the beginning if she'd just told the truth," Mike said of his former wife after the decision was handed down, "if she hadn't led us to believe we were father and daughter, if she had just told me after she got pregnant that it might not be my kid."

Three and a half years earlier, at a federally convened symposium on the increase in paternity questions, a roomful of child-welfare researchers, legal experts, academics and government administrators agreed that much pain could be avoided if paternity was accurately established in a baby's first days. Several suggested that DNA paternity tests should be routine at birth, or at least before every paternity acknowledgment is signed and every default order entered. In 2001 the Massachusetts Supreme Judicial Court urged the state to require that putative fathers submit to genetic testing before signing a paternity-acknowledgment form or child-support agreement, arguing that "to do otherwise places at risk the well-being of children."

In other words, the same care that hospitals take ensuring that the right mother is connected to the right newborn — footprints, matching ID bands, guarded nurseries, surveillance cameras — should be taken to verify that the right man is deemed father.

Mandatory DNA testing for everyone would be a radical, not to mention costly, shift in policy. Some advocates propose a somewhat more practical solution: that men who waive the DNA test at a child's birth should be informed quite clearly that refusing the test will prohibit them from challenging paternity later. Yes, the plan would reveal truths some men might not want to know. Yes, it would raise administrative costs, lower the number of paternity establishments and blow apart some families. But far fewer children would be entangled in traumatic disputes in which men they call Daddy suddenly reject them.

In the meantime, maybe the solution is to accept that lives can be messy and relationships much more complicated than the law would like. Several judges in Pennsylvania, including David Wecht, who heard Mike's case, have used their paternity rulings as a platform to urge the Legislature or top state court to grant them the discretion to consider DNA. It is evidence, they say, that should be neither exalted nor ignored, but rather weighed as one of many factors, along with the history of the relationship and the child's age, in determining who should raise a child and who should pay for his or her upkeep. In other words, maybe a nonbiological father could be granted custody rights even if the biological father is charged with paying support. A small but growing number of courts in other states have gone this route, but such arrangements are still rare. "There shouldn't be any reason why custody couldn't be treated differently than paternity and support, each looked at on its own merits," Wecht says. "But many states, including Pennsylvania, haven't begun to grapple with these issues yet. They are exceedingly complex, intellectually and legally, and perhaps most significantly, the issues are hotly disputed politically."

VI.

L. SAYS SHE wishes her parents, Mike and Stephanie, had taken a DNA test when she was a baby instead of waiting until she had a firm — but inaccurate — sense of who her biological father was. It's not that she wishes Mike hadn't turned out to be her dad; it's that, having had Mike as her dad for so long, she can't bear that he turned out not to be her father.

As Mike's case wended its way through the courts, Mike asked L. to take another DNA test, this one with witnesses. He knew the appellate court was unlikely even to consider DNA evidence, but if it did, he wanted to make sure the veracity of his test results would not be questioned. L. wavered. Why help him prove he wasn't her dad? "I didn't really want to be reminded of that," L. said.

Eventually, she yielded, and the test confirmed she was not Mike's biological daughter. She was disappointed. She had been secretly nursing a fantasy that provided her own "Parent Trap" ending. "I got a picture in my head," L. said, "that the test people would call and say

they had been wrong, that he really was my biological dad and that everything I had thought before never really happened."

Ruth Padawer is an adjunct professor at Columbia University's Graduate School of Journalism. Her last article for the magazine was about a dating site for "sugar daddies."

pennsylvania
DEPARTMENT OF HEALTH

Affidavit of Mother for Registration Other than as Child of Mother's Husband

When a child is born to a married woman and a man who is not the woman's husband, the father's name can be listed on the birth record if the mother signs this affidavit, in the presence of a witness, acknowledging the man listed below as the father and the husband is notified. The mother must also provide the complete name and last known address of her legal husband to notify him of this birth and her intention to name someone else as the father.

The legal husband must sign a similar statement in the presence of a witness, which will be sent to him by the Division of Vital Records. He may agree with his wife by circling "DO" which will allow the birth record to be completed as wished by the mother. However, if the husband circles "DO NOT" then by law, the husband will be listed as the father. If the husband does not reply within ten days, the birth record will be completed as the mother wishes. Until this process is completed, the father's name will be listed as "Information Not Recorded" on the birth record.

I, _____ **, the undersigned, do hereby acknowledge that**
(Name of Mother)

_____ **and I are the true and biological parents of**
(Biological Father's Name)

_____ **born in** _____ **on** _____
(Name of Infant) (Name of Hospital) (Date of Birth)

at _____ **AM. PM. I am submitting this affidavit to the Division of Vital Records**
(Time of Birth)

identifying _____ **as the father of the above infant.**
(Biological Father's Name)

_____ _____
(Date) (Signature of Mother)

Witness: _____
(Signature of Witness)

Husband's Information *(must include last known address)*

Name _____

Street, City, State and Zip _____

Mail completed form to Division of Vital Records, 101 S. Mercer St., P O Box 1528, New Castle PA 16103-1528

pennsylvania
DEPARTMENT OF HEALTH

AFFIDAVIT OF HUSBAND
FOR
REGISTRATION OTHER THAN AS CHILD OF MOTHER'S HUSBAND

When a child is born to a married woman and a man who is not the woman's husband, the biological father's name may be recorded on the Certificate of Live Birth if the mother signs an affidavit in the presence of a witness acknowledging him as the father. The mother must also provide the complete name and last known address of her legal husband so the Division of Vital Records can notify him that she is requesting to record an individual other than her legal husband as the father of her child.

The mother of this child is your legal wife; therefore, we are required to notify you that your wife intends to not list you as the father of this child. You, as her legal husband, may agree with your wife by circling "**do**" which would allow the father's information to be recorded as requested by the mother (as indicated below). However, by circling "**do not**" you will be recorded as the father on this child's birth record. If you do not respond within **ten days**, the father's information will be recorded as requested by the mother.

I, _____ . the undersigned, **do *(do not)** hereby
(Name of Husband)

authorize _____ . to submit to the Division of Vital Records
(Name of Hospital)

a birth certificate which identifies _____
(Name of Biological Father)

as the father of _____ who is the child of
(Name of Infant)

_____ , my lawful wife.
(Name of Mother)

_____ _____
(Date) (Signature of Husband)

Witness: _____
(Signature of Witness)

JMT:csw

H105.132 Rev. 2/06

Division of Vital Records
PO Box 1528
New Castle PA 16103

COMMONWEALTH OF PENNSYLVANIA
Department of Health

FILE #_____

CHANGE IN CIVIL STATUS

PLEASE COMPLETE THIS FORM ENTIRELY. IT WILL BECOME A PERMANENT RECORD USED FOR ISSUING AN AMENDED BIRTH CERTIFICATE

NAME OF CHILD (AT BIRTH) _____
FIRST MIDDLE LAST

DATE OF BIRTH_____ COUNTY OF BIRTH_____ SEX _____

MOTHER'S MAIDEN NAME_____
FIRST MIDDLE MAIDEN NAME

FATHER'S NAME_____
FIRST MIDDLE NAME

The child's name is requested to be:

NAME OF CHILD_____
FIRST MIDDLE LAST

THE PARENTS APPEARING BEFORE ME AFFIRM TO BE THE TRUE BIOLOGICAL PARENTS AND AUTHENTICATE THE ABOVE FACTS OF BIRTH.

SUBSCRIBED AND SWORN TO BEFORE ME MO DAY YEAR	Father's Signature:
→SIGNATURE OF PERSON ADMINISTERING OATH	Mother's Signature:
	Subject's Signature:
DO NOT NOTARIZE UNLESS SIGNED BY SUBJECT (OR PARENT(S) IF UNDER AGE 18) MUST BE SIGNED IN PRESENCE OF NOTARY	Present Address Daytime Phone #