New Jersey Law Journal

VOL. 212 - NO 12 MONDAY, JUNE 17, 2013 ESTABLISHED 1878

Family Law

Overcoming the Presumption of Paternity

Is genetic testing the new standard, or merely "best interest of the child" by another name?

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The New Jersey Parentage Act, N.J.S.A. 9:17-38 to 9:17-59, allows individuals to seek reimbursement for money they have paid on behalf of a child's parent for various educational, medical and other support expenses. Under the act, a man alleged or alleging himself to be the father has standing to bring an action. N.J.S.A. 9:17-45.

Because parents have a legal duty to support their children, and to ensure that children get the financial support to which they are entitled, the act provides a means, through compelled blood or genetic testing, by which a child's parents can be identified so that that child-support obligations can be fulfilled. N.J.S.A. §9:17-48(d).

The first case to address when such testing could be compelled was *M.F. v. N.H.,* 252 N.J. Super 420 (App. Div. 1991). That case presented the less common situation of a biological father seeking to establish parentage over and above objections by the mother and her husband. The trial court initially ordered the defendant and the child to submit to paternity testing. But the appellate court reversed, finding that, given the presumption that the defendant's husband was the child's father, absent some other presumption of paternity as enumerated in N.J.S.A. 9:17-43(a)(2) – (a)(6) favoring the plaintiff as the father, "something more must be demonstrated … before plaintiff may be permitted to intrude upon the existing relationships between mother, her husband, and their child."

The court concluded that any rebuttal of presumed paternity must be shown to serve the best interests of the child. Stating broadly that the Family Part should consider *all* factors that weigh upon the child's best interest, or lack thereof, the court listed eight specific factors to be considered.

In *M.F.*'s wake, "best interest" became the bellwether analysis to determine when testing could be compelled pursuant to the act. A question remained, however, as to how this framework would function in a different parentage arrangement.

In October 2012, the Supreme Court clarified this gray zone with *D.W. v. R.W.*, 212 N.J. 232 (2012). The case presented the issue of a "wronged" father looking to overcome the presumption of his paternity, and who could only do so through testing.

In *D.W.*, the plaintiff-wife had given birth to the parties' son, Mark, in April 1987. Around April 2006, the parties' marriage experienced difficulties. A divorce complaint was filed and the plaintiff moved out of the marital home. In conversation with the defendant, however, she alluded to her and the defendant's ex-brother-in-law having had an affair, eventually admitting to the two having had sex on multiple occasions in the late summer of 1986.

At the time of the plaintiff's confession, Mark was living with the defendant and the defendant was able to obtain a sample of Mark's DNA, which he had privately tested. The results confirmed that the defendant was not Mark's biological father. Around the same time, Mark learned from his uncle that he might be Mark's biological father.

Mark objected to the testing, reasoning that he was "going through a lot in [his] life right now." He further stated, "I feel like it's my decision.… I should be able to decide on my own time." However, he confirmed that he might want to know who his father is some day.

The trial court disagreed that the defendant had a right to know whether Mark was his biological son. It found the principle purpose of the act was the child and his/her support, not a defrauded father's reimbursement. Reviewing the *M.F.* factors, the trial court denied the defendant's application, finding that he

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had not presented clear and convincing evidence that testing was in Mark's best interest. Per the court, the defendant's legal right to pursue reimbursement ended the minute Mark objected. The Appellate Division confirmed.

Warning that *D.W.* was "not about the wisdom of a father proceeding with a parentage action … but about his legal right to do so under the statute," the Supreme Court queried how the defendant could prove that Mark was the biological son of another man when he, the defendant, was presumed to be the father. As the court noted, "[w]ithout access to the one piece of evidence necessary to prove his case — genetic testing — [the defendant] will be unable to satisfy the substantive demands of [the act]."

Turning to prior reliance on a best-interest analysis, the Supreme Court acknowledged that, while best interest governs "most determinations involving children," the standard, in the context of paternity testing, would result in such testing almost never being ordered. Testing, it opined, by its very nature inevitably causes at least some destabilization in the child's life.

The court noted that, where parties cannot reach an agreement as to parentage, the plain language of the act obligated courts to order testing absent a "good cause" exception. Testing is thus the default, once a reasonable possibility of paternity or nonpaternity has been established. The burden then falls to the opponent of testing to make a good cause showing that testing should not go forward.

Good cause is undefined by the act. As such, the court turned to the Uniform Parentage Act (Uniform Act) for guidance. Amended in 2000, the Uniform Act includes a procedure for determining when to overcome a presumption of paternity.

Significantly, in making this determination the Uniform Act requires consideration of the child's best interest *as well as* eight other factors. The court felt this form of analysis struck the proper balance between best interests of the child and the interests of the party seeking testing, finding it would more broadly accommodate "the endless variety of parentage scenarios that will arise."

The court then articulated that analysis of good cause under N.J.S.A. 9:17-48(d) must consider best interest, but also the following:

(1) the length of time between the proceeding to adjudicate parentage, and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;

(2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;

(3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;

(4) the nature of the relationship between the child and the presumed or acknowledged father;

(5) the nature of the relationship between the child and any alleged father;

(6) the age of the child;

(7) the degree of physical, mental and emotional harm that may result to the child if presumed or acknowledged paternity is successfully disproved;

(8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child;

(9) the extent, if any, to which uncertainty of parentage exists in the child's mind;

(10) the child's interest in knowing family and genetic background, including medical and emotional history; and

(11) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father, or the chance of other harm to the child.

Applying their new analysis, the court found weight in Mark's age (over 20 at the time), that he could not articulate a specific emotional or psychic harm if the action proceeded, that he was aware that his uncle could possibly be his biological father, and that allowing Mark to choose the time for testing would permit him to "run the clock" so as to time-bar the defendant's claim. As balanced against Mark's best interest, the court found there was insufficient good cause to deny testing.

Judge Wefing, temporarily assigned, authored the lone dissent. She agreed in principle with the factor-based approach, but argued that best interest should remain the fundamental guide. In her view, any proof that testing is not in the best interest of the child would serve as good cause not to order testing. She found that, "when a child resists pursuing the issue of paternity; the best interests of that child are broader … than a private interest in seeking financial reimbursement.…"

Judge Wefing noted that the inquiry in this matter requires "an exquisite balancing." The question remains whether the factors, which are purposely broad in scope, can achieve such a fine-tuned result, or if they even should. As the majority highlighted, testing is the default under the act. But, given the overlap between some of the factors set forth in *D.W.* and those in *M.F.*, and considering that the child's best interests *must* be considered and given due weight in any analysis, best interest is well-built into the very framework of the inquiry.

In the recent unpublished case *M.M. v. M.G.*, 2013 N.J. Super. LEXIS 538, a presumed father was provided genetic proof of his nonpaternity by the putative father. The presumed father was denied multiple requests to disestablish paternity, and the case has been remanded in light of *D.W.* We must now wait and see how the trial courts will begin to grapple with this new analysis and the balancing of interests that must necessarily be sussed out of each unique matter. ■