

GUEST COLUMN

In paternity, best interest of the child trumps biology

DNA testing has become the legally acceptable way of determining paternity due to its high degree of scientific accuracy. Therefore, if one is unsure about paternity of a child, that question could be resolved with a simple DNA test. However, that is not where the inquiry ends.

By Carol G. Cooper, Esq.

This issue comes up primarily in cases regarding child support. One could reasonably assume: (a) that no court would order a man who is not the biological or adoptive father of a child to pay child support for that child; and (b) that if the man contested his paternity, a DNA test would be ordered. Yet that is not the case.

There are two competing sets of laws in the Maryland Code that address the issue of paternity.

Under Md. Code Ann. Fam. Law § 5-1027(c)(1), "There is a rebuttable presumption that" a child conceived during a marriage is the legitimate child of that marriage. This is found in the "Paternity Act," §§ 5-1001-5-1048 of the Family Law Article, the purpose of which is to benefit children born out of wedlock. See § 5-1002 (b).

To rebut the presumption of paternity, Md. Code Ann. Fam. Law §5-1029 (b) provides that "On the motion of ... a party to the proceeding, ... the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child." The Court of Appeals in *Langston v. Riffe*, 359 Md. 396, 429, 754 A.2d 389, 407 (2000) interpreted that to mean that a trial judge has no discretion to deny a blood or genetic test request.

Under Md. Code Ann. Estates and Trusts §1-206, "[A] child born or conceived during a marriage is presumed to be the legitimate child of both spouses."

In addition, under Md. Code Ann. Estates and Trusts § 1-208 (b),

[A] child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father: (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; (2) Has acknowledged himself, in writing, to be the father; (3) Has openly and notoriously recognized the child to be his child; or (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

When relying on Estates and Trusts §1-206, the Court of Appeals held that "a blood or genetic test may be ordered only upon a showing of good cause presumably of sufficient persuasive force to overcome the statutory presumption." *Evans v. Wilson*, 382 d. 614, 629, 856 A.2d 679, 688 (1992). See also *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992) and Maryland Rule 2-423.

As a result of the conflict between these two sets of laws, the appellate courts have favored using the Estates and Trusts Article where the case cries out for discretion. In particular, when the child was born during the marriage, the Estates and Trusts Article is preferable, as the Paternity Act was created specifically to protect children born out of wedlock.

In the recent case of *Kamp v. Department of Human Resources*, 410 Md. 645, 980 A.2d 448 (2009), the Court of Appeals made it perfectly clear that where a presumptive father seeks to obtain a DNA test to confirm or disprove his paternity, the paramount concern of the court in deciding

whether to order the paternity test is in the best interest of the child.

In exercising their discretion, the court might consider the following factors in determining whether DNA testing is in the best interest of the child:

- the stability of the child's current home environment,
- whether the child has knowledge that the putative father may not be the biological father,
- whether the biological father could pay child support,
- whether there is an ongoing family unit,
- the child's physical, mental and emotional needs,
- the child's past relationship with the putative father,
- the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history,
- the putative father's commitment to the responsibilities of parenthood and interest in establishing his status as the child's natural father, and
- protecting the integrity of the familial relationships already formed.

See *Kamp v. Department of Human Resources*, 410 Md. 645, 980 A.2d 448 (2009), *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992), and *Evans v. Wilson*, 382 Md. 614, 856 A.2d 679 (2004).

The bottom line is oftentimes when a man plays daddy, a man pays like a daddy.

Carol Ghingher Cooper, an associate at Adelberg, Rudow, Dorf & Hendler, LLC focuses her practice on family law and can be reached at 410-986-0852 or visit www.AdelbergRudow.com.