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# Paternity Proceedings in Family Court

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## OUTSIDE COUNSEL

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### Paternity Proceedings In Family Court

**B**EYOND familial and societal concerns, there are economic and legal realities supporting the legitimizing of New York's out-of-wedlock children. Legitimate children receive inheritances,<sup>1</sup> child support,<sup>2</sup> and benefits like social security. Fathers of in-wedlock children have custody and visitation rights.<sup>3</sup> This article discusses current paternity law and new legislation (C. 398, L. 1997) the Governor signed on Aug. 13, 1997.

Paternity is established by an Acknowledgment of Paternity (AP) or an order of filiation (OF). An AP



settles paternity without petitioning Family Court for an OF.<sup>4</sup> Parents may sign an AP immediately before or after an in-hospital birth.<sup>5</sup> The Department of Social Services (DSS) may also ask at any time a putative (alleged) father to sign an AP.<sup>6</sup>

An AP is valid if the parents understand its consequences and their signatures are notarized.<sup>7</sup> It is void if the mother is married at conception to someone other than the alleged father.<sup>8</sup>

An AP may be rescinded by a petition to vacate filed within a year or, effective Nov. 11, at a court date involving a child or, if earlier, 60 days of signing unless fraud, duress or mistake of fact exist.<sup>9</sup>

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As of Nov. 11, if an AP is challenged, the court shall order blood testing.<sup>10</sup> The new law also deletes the notarization requirement but provides that APs be signed by the parents and two witnesses unrelated to the

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parents.<sup>11</sup>

Effective also on Nov. 11, DSS, which locates absent parents of out-of-wedlock children, may order blood genetic marker testing, such as DNA testing, to ascertain paternity.<sup>12</sup> The DSS directive may be challenged in court.<sup>13</sup>

After testing, the alleged father may sign an AP. If he contests, DSS may file a paternity petition. If the alleged father does not appear at a conference with DSS or refuses to undergo testing, DSS shall also request that the court issue a temporary child-support order.<sup>14</sup>

Securing an OF begins with filing a verified paternity petition in Family Court in the county where the child or either parent resides or is found.<sup>15</sup> Family Court has exclusive jurisdiction, concurrent with Surrogate's Court in adoption cases, over paternity matters.<sup>16</sup> Petitioner serves respondent with the summons and petition.<sup>17</sup> Respondent may then show cause why a declaration of paternity should not be entered.<sup>18</sup>

A petition may be brought after conception and before the child turns 21<sup>19</sup> by the child, mother, father, guardian, charity or DSS.<sup>20</sup> Paternity may be sought after the child is 21 only if the father has acknowledged paternity in writing or has provided support.<sup>21</sup> Neither laches nor due process affects "the 21-year statute of limitations in paternity proceedings."<sup>22</sup>

The parties appear before a Hearing Examiner, who advises them of their rights to an attorney — state-paid for indigents — and to be tested.<sup>23</sup>

The Hearing Examiner enters an OF if the father admits paternity.<sup>24</sup> If he denies, the court schedules testing for the child, mother and alleged father. The moving party pays for the tests initially,<sup>25</sup> but if that party cannot afford them, the court may direct DSS to pay.<sup>26</sup> The court may also apportion the cost on ability to pay or direct the losing party to pay.<sup>27</sup>

A licensed laboratory conducts the tests.<sup>28</sup> Certified results are admissible without authentication.<sup>29</sup> Objections must be in writing within 30 days of receiving the results or, if earlier, 20 days before the hearing.<sup>30</sup> A party who does not object timely may still dispute the result's weight.<sup>31</sup>

If the father admits paternity after testing, the Hearing Examiner enters an OF, if he contests, a judge will hold a trial.<sup>32</sup> A judge may require that respondent post bond or be incarcerated.<sup>33</sup> If he does not appear, a judge may hold an inquest or issue a warrant.<sup>34</sup> There is no jury trial,<sup>35</sup> and the public may be excluded from trial.<sup>36</sup>

Paternity must be proven clearly and convincingly.<sup>37</sup> Petitioner must prove that intercourse occurred during the critical period of conception

(CPC), about 265 days before birth in a full-term pregnancy.<sup>38</sup> If the pregnancy was not full term, medical records or testimony may explain an abnormal gestation period, which undermines test results.<sup>39</sup> Records are not needed if the mother testifies that she had intercourse with only one partner.<sup>40</sup>

### Testing

A judge may draw a strong adverse inference against an alleged father who fails to appear, remains silent or refuses testing.<sup>41</sup>

Effective Jan. 1, 1998, the court may suspend the recreational, driver's, business and professional licenses of an alleged father who fails to appear.<sup>42</sup>

If a party declines to be tested, the court may infer a 99.99 percent probability of paternity<sup>43</sup> and issue a temporary child-support order.<sup>44</sup> The court may also accept an excuse and re-order tests.<sup>45</sup> Tests are not testimony.<sup>46</sup>

A rebuttable presumption of paternity arises if the tests show a probability of paternity 95 percent or greater.<sup>47</sup> Tests are not dispositive but are given great weight.<sup>48</sup> If testimony about a mother's last menstrual cycle contradicts CPC evidence, a high probability of paternity from the tests will be determinative.<sup>49</sup> A high probability of paternity outweighs an alleged father's "bald denials" of having intercourse with the mother.<sup>50</sup>

A high probability of paternity will defeat testimony about non-exclusive access during the CPC.<sup>51</sup> Tests even support medical testimony that a man is only one twin's father.<sup>52</sup>

A mother may testify, without corroboration, to the father's exclusive access during the CPC.<sup>53</sup> However, an alleged father may not claim without corroboration that the mother had intercourse with other men during the CPC.<sup>54</sup>

Paternity is proven if an alleged father admits to intercourse during the CPC, tests show a high probability of paternity and other evidence suggests fatherhood.<sup>55</sup> Unrebutted testimony of intercourse with the alleged father, with tests indicating a high probability of paternity, also proves paternity at trial.<sup>56</sup> So does uncontradicted testimony about intercourse during the CPC.<sup>57</sup> A judge satisfied with the evidence must enter an OF.<sup>58</sup>

An alleged father's name on a birth certificate is persuasive evidence of paternity. A father's name may not be on a birth certificate without both parents' written consent.<sup>59</sup> Effective Nov.

11, 1997, a father may be named on a birth certificate only if he signs an AP or there is an OF.<sup>60</sup>

Paternity can be established if a parent is absent, deceased or mentally incompetent.<sup>61</sup> Another family member can provide blood. Paternity is also proven if the absent alleged father brought the petition, acknowledged paternity in court, submitted to tests or represented himself as the father.<sup>62</sup> If the mother had intercourse with closely related men during the CPC, tests can identify the biological father. The alleged fathers may be joined as necessary parties.<sup>63</sup>

A paternity petition will be dismissed if the court finds that a party is not the child's father.<sup>64</sup> A paternity petition dismissed against one party does not bar another from petitioning.<sup>65</sup> Dismissal with prejudice prevents legitimizing children born out of wedlock.

For persons married at conception, the law presumes that the mother's husband is the father.<sup>66</sup> The presumption of legitimacy (POL) is "one of the strongest and most persuasive known to law."<sup>67</sup> It covers conception by artificial insemination<sup>68</sup> or before divorce despite a divorce judgment's silence about children.<sup>69</sup> The POL does not violate due process or equal protection.<sup>70</sup> Only a judge may hear a POL case.<sup>71</sup>

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***We all benefit from fair laws and simple procedures that hold fathers accountable. Current law, strengthened by the new legislation, does exactly that.***

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Rebutting the POL requires clear and convincing proof that the husband is not the father.<sup>72</sup> Testimony that the spouses did not have intercourse during the CPC is probative.<sup>73</sup> Tests excluding the husband overcome the POL.<sup>74</sup> The POL is rebutted if the parents had intercourse during the CPC, the mother testifies that the alleged (non-husband) father is the biological father and tests show a high probability of paternity.<sup>75</sup>



## Motions to Vacate

A party may move to vacate an OF. The child will be delegitimized if the motion succeeds,<sup>76</sup> so the court should appoint a guardian ad litem for the child.<sup>77</sup>

The motion must be filed within a year after serving the OF.<sup>78</sup> It must allege excusable default and meritorious defense; new evidence; fraud; lack of jurisdiction; or vacatur of an underlying order.<sup>79</sup>

CPLR 5015(a) applies to motions to vacate an OF entered after a father admits paternity.<sup>80</sup> The motion must allege fraud or new evidence. If it does, the court decides whether estoppel defeats the motion. A movant cannot prevail by requesting tests.<sup>81</sup> Tests are not new evidence, they were available during the original proceeding.<sup>82</sup> Further, mothers are foreclosed from contending parental incompatibility or that the father is not the biological father.<sup>83</sup>

A party may be estopped from claiming or denying paternity. Estoppel applies when a party does not promptly assert paternity if enforcement would be inequitable.<sup>84</sup>

Estoppel succeeds when a father maintains a parental relationship with the child.<sup>85</sup> It applies if the child believes that the man is the father,<sup>86</sup> and it can be invoked after divorce if the child is named in a divorce judgment.<sup>87</sup> Estoppel fails if a father supports the child after admitting paternity in court.<sup>88</sup> A father may not vacate an OF 10 years after entry.<sup>89</sup>

Estoppel favors the child even if the acting father is not the biological father.<sup>90</sup> A biological father who waited over a year after the birth to claim paternity was estopped despite tests showing a 99 percent probability of paternity.<sup>91</sup> There the mother's husband acted like the father and supported the child.

A man claiming paternity will be estopped if another man proves that he was told he was the father, that he relied on this representation and that he will be harmed if found not to be the father.<sup>92</sup> Estoppel will fail if the challenging father proves that his paternity is in the child's best interests.<sup>93</sup>

A mother is estopped from vacating paternity once a father pursues a relationship with the child and supports the child.<sup>94</sup> Unless she proves that delegitimizing furthers the child's best interests, a mother may not contend that a man is not the father after she holds him out as such.<sup>95</sup>

## Conclusion

Being legitimate is important. The law presumes "that every person is born legitimate."<sup>96</sup> Children are legitimate whether a marriage is valid<sup>97</sup>

and remain so regardless how a marriage ends.<sup>98</sup> Counsel fees may be awarded to an indigent prevailing party if an OF is entered.<sup>99</sup> Findings in paternity cases are entitled to "great weight" on appeal.<sup>100</sup> Appeals to the Appellate Division are not even of right when a paternity petition also seeks child support, as they often do.

We all benefit from fair laws and simple procedures that hold fathers accountable. Current law, strengthened by the new legislation, does exactly that.

- .....●●●.....
- (1) Estates, Powers & Trusts Law ("EPTL") §4-1.2.
  - (2) Family Court Act ("FCA") §513; Domestic Relations Law ("DRL") §33(5).
  - (3) FCA §549(a).
  - (4) FCA §516-a; Social Services Law ("SSL") §111-k; Public Health Law ("PHL") §4135-b.
  - (5) PHL §4135-b.
  - (6) SSL §111-k.
  - (7) Id.
  - (8) FCA §417.
  - (9) FCA §516-a; PHL §4135-b.
  - (10) FCA §516-a.
  - (11) SSL §111-k.
  - (12) FCA §565; SSL §111-k.
  - (13) FCA §565.
  - (14) SSL §111-k(2)(d).
  - (15) FCA §521.
  - (16) FCA §511.
  - (17) FCA §525.
  - (18) FCA §8523, 524.
  - (19) FCA §517.
  - (20) FCA §522.
  - (21) FCA §517.
  - (22) *Matter of CSS o/b/o Lorraine NN v. Dann* OO, 544 NYS2d 79, 81 (3d Dept. 1989).
  - (23) FCA §439(b).
  - (24) Id.
  - (25) FCA §8418(c), 532(c).
  - (26) Id.
  - (27) Id.
  - (28) FCA §8418(a), 532(a); *Matter of Lavis v. Clair*, 640 NYS2d 609, 610 (2d Dept. 1996).
  - (29) FCA §8418(b), 532(b); Civil Practice Law & Rules ("CPLR") 4518(d).
  - (30) CPLR 4518(e); *Andre v. Warren*, 624 NYS2d 430, 430 (1st Dept. 1995).
  - (31) *Matter of CSS o/b/o Bonnie A v. Paul B.*, 507 NYS2d 560 (3d Dept. 1986).
  - (32) FCA §439(a) & (b).
  - (33) FCA §528.
  - (34) FCA §8439(b), 526(b).
  - (35) FCA §531.
  - (36) Id.; 22 NYCRR 205.4(b) (eff. 9/2/97).
  - (37) *Matter of CSS o/b/o Patricia A. v. Philip De G.*, 59 NY2d 137, 141-42 (1983).
  - (38) *Matter of Sharon H. v. Terry P.*, 648 NYS2d 599, 599 (1st Dept. 1996); *Matter of CSS o/b/o Jean MM v. Kenneth MM*, 551 NYS2d 671, 672 (3d Dept. 1990).
  - (39) *Matter of CSS o/b/o Lisa W v. Perry X*, 528 NYS2d 934, 935-36 (3d Dept. 1988).
  - (40) *Matter of Taiwana Y v. Benjamin Z*, 611 NYS2d 701, 702 (3d Dept. 1994).
  - (41) CPLR 3126; *Matter of Jane PP. v. Paul QQ.*, 65 NY2d 994, 996 (1985); *Philip De G.*, 59 NY2d at 141; *Fitzgerald v. Tamola*, 605 NYS2d 67, 69 (1st Dept. 1993).
  - (42) FCA §548; DRL §244; General Obligations Law ("GOL") §3-503(4); Alcoholic Beverage Control Law ("ABC") §119(4); Education Law ("EL") §6509-c; Judiciary Law ("JL") §90(2-a).
  - (43) *Matter of Molly M. v. Edwin F.*, 461 NYS2d 709, 711 (Bronx Co. Fam. Ct. 1983).
  - (44) FCA §542; SSL §111-k(2)(d) (eff. 11/11/97).

- (45) *Matter of Meredith P.B. v. Maxwell F.I.*, 597 NYS2d 162, 163 (2d Dept. 1993).
- (46) *Schmerber v. California*, 384 US 757, 763-65 (1966).
- (47) FCA §8418(a), 532(a); CPLR 4518(d).
- (48) *Matter of Nancy M.G. v. James M.*, 539 NYS2d 458, 459 (2d Dept. 1989); *Tamara B. v. Pete F.*, 536 NYS2d 767, 769 (1st Dept. 1989).
- (49) *Nancy M.G.*, 539 NYS2d at 460.
- (50) *Matter of DSS o/b/o Debra L. v. William J.*, 594 NYS2d 810, 811 (2d Dept. 1993).
- (51) *Jane PP.*, 65 NY2d at 996.
- (52) *Matter of CSS o/b/o Celia D. v. Hector S.*, 628 NYS2d 270, 272 (2d Dept. 1995).
- (53) *Matter of Dorn HH v. Lawrence II*, 31 NY2d 154, 159 (1972).
- (54) FCA §531.
- (55) *Matter of Kyra D.G. v. Jeffrey W.*, 611 NYS2d 225, 225-26 (2d Dept. 1994).
- (56) *Matter of CSS o/b/o Marcelline O. v. Lawrence P.*, 617 NYS2d 528, 529 (2d Dept. 1994).
- (57) *Fitzgerald*, 605 NYS2d at 68.
- (58) FCA §542(a).
- (59) PHL §4135.
- (60) Id.
- (61) FCA §8518, 519.
- (62) FCA §519.
- (63) CPLR 1001(a).
- (64) FCA §541.
- (65) *Matter of CSS o/b/o Pamela TT v. Jeffrey SS*, 544 NYS2d 46, 46 (3d Dept. 1989).
- (66) FCA §417; *Ghaznavi v. Gordon*, 558 NYS2d 46, 47 (1st Dept. 1990).
- (67) *Matter of Findlay*, 253 NY 1, 7 (1930).
- (68) DRL §73(1).
- (69) DRL §175.
- (70) *Michael H. v. Gerald D.*, 491 US 110, 129-31 (1989).
- (71) FCA §439(b).
- (72) *Ghaznavi*, 558 NYS2d at 47.
- (73) FCA §436; *Matter of Constance G. v. Herbert Lewis L.*, 506 NYS2d 111, 112 (2d Dept. 1986).
- (74) *Ghaznavi*, 558 NYS2d at 47; *New York o/b/o H. v. P.*, 457 NYS2d 488, 491-92 (1st Dept. 1982).
- (75) *Constance G.*, 506 NYS2d at 113.
- (76) *Matter of Ettore I. v. Angela D.*, 513 NYS2d 733, 738 (2d Dept. 1987).
- (77) *Matter of Leon L. v. Carole H.*, 621 NYS2d 93, 94 (2d Dept. 1994).
- (78) CPLR 5015(a)(1).
- (79) CPLR 5015(a); *Barasch v. Micuci*, 49 NY2d 594 (1980); *Kahn v. Stamp*, 382 NYS2d 199, 200 (4th Dept. 1976).
- (80) *Matter of Louise P. v. Thomas R.*, NYLJ, 2/4/97, at 30, col. 4 (Nassau Co. Fam. Ct. 1997).
- (81) *Matter of Constance S. v. Steven A.*, 515 NYS2d 77, 77 (2d Dept. 1987).
- (82) *Matter of Sandy M. v. Timothy J.*, 524 NYS2d 639, 641 (Broome Co. Fam. Ct. 1988).
- (83) *Matter of Sonji T. v. Allen C.*, 647 NYS2d 499, 500 (1st Dept. 1996); *Matter of June B. v. Edward L.*, 419 NYS2d 514, 515-16 (1st Dept. 1979).
- (84) *Ettore I.*, 513 NYS2d at 737-38.
- (85) *Richard W. v. Roberta Y.*, 658 NYS2d 506, 508 (3d Dept. 1997); *Biserka B. v. Zdenko R.*, 520 NYS2d 17, 18 (2d Dept. 1987).
- (86) *Vito L. v. Filomena L.*, 568 NYS2d 449, 451 (2d Dept. 1991).
- (87) *Biserka B.*, 520 NYS2d at 18.
- (88) *Constance S.*, 515 NYS2d at 77.
- (89) *Barbara A.M. v. Gerard J.M.*, 577 NYS2d 110, 111-12 (2d Dept. 1991).
- (90) FCA §418(a); *Vito L.*, 568 NYS2d 451-52; *Ettore I.*, 513 NYS2d at 739.
- (91) *Richard W.*, 658 NYS2d at 507.
- (92) *Michel DeL. v. Martha P.*, 570 NYS2d 279, 280 (1st Dept. 1991).
- (93) Id.
- (94) *Leon L.*, 621 NYS2d at 94.
- (95) *Matter of Sharon GG. v. Duane HH.*, 467 NYS2d 941, 943 (3d Dept. 1983), *aff'd*, 63 NY2d 859 (1984).
- (96) *Matter of Fay's Estate*, 44 NY2d 137, 141 (1978).
- (97) FCA §417.
- (98) DRL §824, 33(1), 33(2).
- (99) FCA §536.
- (100) *Matter of Evelyn T. v. Willis Charles T.*, 547 NYS2d 403, 404 (2d Dept. 1989).
- (101) *Matter of Jane PP. v. Paul QQ.*, 64 NY2d 15, 17 (1984).