

Paternity: Defining Fatherhood In The Nineties

By Barbara Ann Bartlett And Sherrie Thompson McAllister

I. INTRODUCTION

Over the past 20 years Oklahoma has seen many changes in its laws on paternity. The substantive changes represent the evolving acceptance of children born out of wedlock and the recognition by putative fathers of the importance of the parental relationship. The procedural changes have allowed the increasing number of single mothers, many of whom represent the largest poverty class in America, to obtain child support.

The first laws passed in this state on paternity made the action a criminal proceeding. The child was called a bastard,¹ and the proof revolved around whether the man had "access" to the woman and whether the child looked like the father.² A child born out of wedlock and not "legitimized" by the father was not allowed to inherit from any lineal or collateral kindred of the mother,³ nor from the father even if the man was judicially determined to be father in a paternity proceeding.⁴

Today the paternity proceedings are no longer exclusively criminal. The child, by law, cannot be labeled a bastard nor called illegitimate.⁵ As of July 1, 1974, all children born in Oklahoma are legitimate.⁶ Proof of parentage is primarily by blood test. Children may inherit through their mother's relatives whether born in or outside of a marital relationship. A judicial determination of paternity, among other ways of legitimization, now allows the child to inherit through the father.⁷ Finally, fathers are initiating actions to establish rights to a relationship with their biological children.

II. IS A PATERNITY ACTION NEEDED?

An action for paternity is not always needed. A process of "legitimization" may have already

determined the father of the child for many legal purposes. In this way, the father is deemed to have adopted the child.⁸

A father can make a child born out of wedlock legitimate by publicly acknowledging it as his own child, and receiving it into his home.⁹ The relationship must be biological, and not as stepfather.¹⁰ The conduct on the part of the father should show that the child's status is the same as any legitimate children he may have.¹¹ If the father is married, his wife must consent to the child being received into the father's family.¹² This legitimization results in giving the father rights of custody,¹³ and giving the child the right to inherit.¹⁴ The right to inherit seems to attach even if the father's rights are terminated.¹⁵ Once legitimized, the father can inherit from the child as well.¹⁶

Legitimization is not the only method by which a child born out of wedlock is made eligible to inherit through the paternal side of the family.¹⁷ An acknowledgment of paternity in writing in front of a competent witness is sufficient.¹⁸ Also, if the father, after marrying the mother, acknowledges the child as his own then the child may inherit.¹⁹ The father's role in the relationship must be more than that of a step-parent.²⁰

A man who simply wants to claim to be the father of a child may file notice of his intent with the paternity registry.²¹ The Department of Human Services is presently in charge of the registry and allows one to simply file forms claiming to be the father of a child. The notice can be later disclaimed or revoked.²² An unrevoked notice may be used by any party in any proceeding in which the paternity facts may be relevant.²³

There are many reasons formal proceedings of paternity may be desirable. While a father's

BARBARA ANN BARTLETT

is associated with the Tulsa law firm of Harris, Turner, Daniel, McMahan & Peters, P.C. Ms. Bartlett obtained a B.S. Degree *cum laude* in environmental studies from Utah State University in 1979. After attending the University of Oklahoma Law Center, she received a J.D. Degree, with distinction, in 1985. Ms. Bartlett has served on the Executive Board of the Family Law Section of the Oklahoma Bar Association. In such capacity, she chaired the Committee on membership, served on the Committee for CLE and was Co-editor of the *Oklahoma Family Law Journal*. She presently serves as Chair of the Family Law Section of the Tulsa County Bar Association, and is a member of the Academy of Family Mediators.



legitimization of a child may create a moral obligation to pay support, it does not create an enforceable right.²⁴ It also does not address the rights of custody and visitation.

Judicial determination of paternity is required to establish the rights of paternal grandparents to visitation.²⁵ The paternal grandparental rights must be established prior to the adoption of the child born out of wedlock.²⁶

Another problem might arise when the father lives outside of the State of Oklahoma. If the acts of legitimization occur outside the jurisdiction, paternity may not be established under Oklahoma law.²⁷ A judicial proceeding would be necessary to establish the rights of the parties.

Lastly, if the father refuses to acknowledge the child as his own, the inheritance can only be secured by a judicial determination. Of course, that is no guarantee that the father will not disinherit the child through his will.

III. WHO?

If a judicial determination of paternity is needed, a paternity action should be filed. Persons who may bring paternity actions are the mother, the father, guardian or custodian of the child, Department of Human Services, public or private agencies chargeable with support of the child, the child²⁸ or the district attorney.²⁹

All persons who have had sexual intercourse

with the woman during the possible time of conception may be joined as defendants in an action to determine paternity.³⁰

As important as it is to know who can bring an action, it is important to know who cannot. All children born in wedlock are presumed to be legitimate.³¹ The presumption of legitimacy can be disputed only by the husband or wife, or the decedent of one or both of them.³² This would appear to preclude the natural father from bringing an action to establish paternity of a child born with another's marriage. The United States Supreme Court has held that this presumption does not violate the natural father's procedural or substantive due process rights nor the child's equal protection rights.³³ The Court's decision was a very precarious plurality and specifically did not address the father's equal protection issue.³⁴

No precedence exists in Oklahoma for the natural father demanding rights to a child born in someone else's marriage. Some courts, however, have found the presumption to be unconstitutional in denying equal protection to children.³⁵ This presumption may also be inconsistent with the Federal Child Support Enforcement Amendments of 1984 which require all states to establish paternity of any child under eighteen years of age.³⁶

The presumption that the husband is the father becomes irrefutable by anyone after two years if the child is raised as a member of their



SHERRIE THOMPSON McALLISTER

is associated with the Tulsa law firm of Harris, Turner, Daniel, McMahan & Peters, P.C. and is engaged primarily in the practice of family law and litigation. She attended the University of North Carolina receiving a B.S. in Design and the University of Tulsa where she earned a Juris Doctor Degree. She is a member of the American Bar Association, the Association of Trial Lawyers of America, American Inns of Court, the Oklahoma Bar Association and Tulsa County Bar Association.

family without disputing the child's legitimacy.³⁷ This is true even when the husband knows the child is not his.³⁸

According to Oklahoma's Uniform Act on Blood Tests to Determine Paternity, the presumption of legitimacy of a child born during wedlock is overcome by evidence based on the blood tests.³⁹ What impact this has on who can dispute the paternity presumption and whether the presumption is conclusive is unknown. No Oklahoma court has addressed the problem.

In the statutes on descent and distribution, paternity may be established even though a marriage may be nullified for some reason. The marriage does not have to be a valid one in order for the parties' children to be deemed born in wedlock.⁴⁰ The acts of marriage, albeit void, must be more than a meretricious relationship.⁴¹ The status does apply, for example, to polygamist marriages.⁴² The strength of the assumption of paternity is not addressed by statute even though it appears to be less than the presumption given a child born in a valid marital relationship.⁴³ A natural father's rights in such a situation are unknown, but at least his heirs have the right to contest the status.⁴⁴

IV. WHEN?

A paternity action can be brought at any time before the eighteenth birthday of a child born out of wedlock.⁴⁵ The mother is entitled to recover all or a portion of the costs of the birth

and the reasonable expenses of providing for the child. Liability for support provided before the determination of paternity may, however, be imposed for only five years preceding the filing of the action.⁴⁶

The district attorney can bring a paternity action prior to the birth of the child.⁴⁷ All others, it appears, must wait until after the birth of the child.

An action to establish paternity is available for any child for whom a paternity action was brought and dismissed because of the application of a statute of limitations of less than 18 years.⁴⁸ The Oklahoma Supreme Court has held that the imposition of a statute of limitations of three years is unconstitutional.⁴⁹ The court noted federal precedent for striking as unconstitutional a one-year and a two-year statute of limitations in paternity proceedings. The shorter limitation barring paternity suits was held to violate equal protection of the laws.⁵⁰

V. WHERE?

An action to determine paternity shall be, at the option of the plaintiff, in either the county where the father, mother, or child resides.⁵¹ While the statute for venue expressly allows an action even though both the child and the mother live outside of Oklahoma, the statute fails to address the subject matter jurisdiction problem. The Uniform Child Custody Jurisdiction Act⁵² and the Parental Kidnapping Preven-

tion Act⁵³ would forbid a court from taking jurisdiction for custody and visitation matters if the specific jurisdictional requirements are not met.⁵⁴

The legislature has decided that a court in this state will have personal jurisdiction over anyone who is the subject of a paternity action, whether or not that person is a resident of this state.⁵⁵ This statute, however, may not meet the minimum contacts test required to determine the constitutionality of any court's exercise of jurisdiction.⁵⁶

VI. HOW?

To begin a paternity action a petition verified by an affidavit of the plaintiff is filed and summons served as allowed in all other civil actions. The rules prescribed by the code of civil procedure are applied and failure to answer the petition is grounds for default.⁵⁷ This would imply that one would have to wait at least 20 days after service before default could be taken.⁵⁸

Another section of the paternity code requires the court to order the defendant to appear and show cause why he should not be determined to be the father.⁵⁹ If the defendant fails to appear at the hearing, the court shall enter an order determining paternity.⁶⁰ A prudent practitioner would take a default only after the defendant failed to timely answer the petition, and also failed to appear at the scheduled hearing. Once default is taken, the court may proceed to determine issues of paternity, support, custody and visitation in the same manner as actions for divorce.⁶¹

If the defendant does appear at the hearing and does not admit paternity, then the court shall enter an order directing blood tests to determine paternity.⁶² The Uniform Act on Blood Tests to Determine Paternity is found at 10 O.S. Section 501 to 508. Section 501 authorizes paternity blood testing in civil actions where paternity 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 order the mother, child and putative father to submit to blood tests.

This section provides sanctions where a party refuses to submit to such tests. These sanctions include resolving the question of paternity against the party. The court may also enforce the order requiring blood to be drawn if the rights of others and the interests of justice so require. The sole exception, "unless such individual is found to have good cause for refusing to cooperate," may allow a party to avoid both the blood testing and the sanctions.

The selection of experts to be qualified before court as examiners of genetic markers is addressed in Section 502.⁶³ The expert shall be called by the court or by a party to testify as to the findings and shall be subject to cross-examination. A party may request other experts and/or tests, then offer those results in evidence. It will be left to the discretion of the court as to the number and qualifications of the experts. Compensation for the experts and the ability to tax costs in the action is addressed in Section 503.

Evidence which shows a statistical probability of paternity is admissible and shall be weighed in addition to other evidence. Blood testing, medical, scientific, and/or genetic evidence is admissible. Further, if that evidence shows that the defendant is not the parent of the child then that evidence is conclusive proof of non-paternity and the court shall dismiss the action. If the statistical probability of paternity is established at 95% or more a presumption of paternity is created. The presumption is rebuttable by clear and convincing evidence admitted on behalf of the defendant.⁶⁴

All children born in wedlock are presumed to be legitimate.⁶⁵ The presumption that all children born in wedlock are legitimate⁶⁶ is overcome if the court finds that the husband is not the father as disclosed by evidence based upon the blood tests.⁶⁷ Children born within 10 months after the dissolution of the marriage, or children born before wedlock but made legitimate by the subsequent marriage of their parents⁶⁸ would arguably not be included in the presumption of legitimacy statute based on blood testing.⁶⁹ In civil actions for paternity the statute requires the court to dismiss the action if the evidence shows that the defendant is not the parent of the child.⁷⁰

The Uniform Act of Blood Tests to Determine Paternity is made applicable to criminal actions under 10 O.S. Section 506. The defendant or the state can apply for an order requiring blood testing and the experts appointed by the court shall be paid by the county. The court may direct a verdict of acquittal if the court finds that the evidence shows that the defendant is not the parent of the child.⁷¹

If the issue of paternity is tried, it will be by a judge of the district court.⁷² The right to a jury, which was once allowed in paternity cases, has been legislatively terminated.⁷³ The burden of proof and procedure for the trial, according to 10 O.S. Section 76.1, shall be the same as an action for divorce.⁷⁴ The problem is that there has been no burden of proof established in divorce proceedings on proof of paternity unless one of the legislative paternity presumptions is at issue.⁷⁵ Prior to the enactment of 10 O.S. Section 76.1, paternity was established only by a fair preponderance of the evidence.⁷⁶ The Oklahoma Supreme Court recently has held, however, that paternity for purposes of the descent and distribution statutes must be proven by clear and convincing evidence.⁷⁷

If all issues are to be decided as they are in a divorce proceeding, does that mean that a father stands in equal rights with the mother in obtaining custody? A mother of an unmarried, minor child born out of wedlock is entitled to custody, except as otherwise provided by law.⁷⁸ Case law has made a wide exception. A father who has legitimized the child by way of accepting the child into his own home is deemed to have "adopted" the child.⁷⁹ The father's custody rights then become equal to the mother's allowing for the father to refuse to give the child back to the mother unless a court orders otherwise.⁸⁰

The laws passed after 1986 uniformly have included references to custody and/or visitation when determining child support in paternity actions. In all cases of paternity, the court shall make inquiry to determine if the non-custodial parent has been denied reasonable visitation.⁸¹ If reasonable visitation has been denied then the court shall include provisions for visitation in any child support order,⁸² or in a wage assignment order.⁸³ If the action is brought by

the Department of Human Services, the issues of custody and visitation must be specifically and affirmatively pled by the father.⁸⁴

Once paternity has been established, child support can be ordered pursuant to the Child Support Guidelines.⁸⁵ Support can be ordered retroactively for five years preceding the filing of the action as well as for current support.⁸⁶ The father also may be ordered to pay all or a portion of the costs of the birth.⁸⁷ A father can relieve all his responsibility for the liability of child support by a settlement approved by the court.⁸⁸ This lump sum settlement will be disbursed for the child's needs according to a plan, and periodic accountings may be required by the court.⁸⁹

Lastly, costs and attorney fees are payable to the prevailing party in a paternity action. This includes an action for attorney fees against the Department of Human Services,⁹⁰ or if the action is dismissed.⁹¹

VII. CONCLUSION

It is apparent that the legislatively created and all-inclusive classification of children in Oklahoma as "legitimate" and the associated presumptions often conflict with actions to determine paternity. Sophisticated testing is available to determine paternity with a remarkable degree of certainty. Therefore, courts may be forced to weigh the rights of families created by presumption against those who want to establish a relationship founded upon a genetic determination of paternity. Until the courts and legislature clarify Oklahoma law with respect to these issues the practitioner would be well advised to research these cases carefully in order to properly serve the client's interests.

1. A 1973 amendment to the pertinent statutes changed bastard to an "illegitimate" child; 10 O.S. §§ 1.1 and 6.5 passed in 1974 changed all references of bastard or illegitimate child to a child born "out of wedlock."

2. *Lawhead v. State*, 99 Okl. 197, 226 P. 376 (Okla. 1924) (child is offered into evidence to show the resemblance of pointy ears as proof of parentage).

3. *Aldridge v. Anderson*, 229 P. 262 (Okla. 1924).

4. *Matter of Benson's Estate*, 558 P.2d 384 (Okla. 1976) ("legitimization" was necessary before inheritance would occur; legitimization included not only establishing paternity, but the father openly and notoriously accepting the child into his home as though the child was his own.)

5. 10 O.S. §§ 1.1 (in Oklahoma Statutes) and 6.5 (by anyone).

6. 10 O.S. § 1.2.

7. 84 O.S. § 215.

8. 10 O.S. § 55.

9. 10 O.S. §55; *In re LaSarge's Estate*, 526 P.2d 930 (Ok. 1974), (the acceptance into the home need only be of short duration).

10. *Byers v. Byers* 618 P.2d 930 (Ok. 1930); *Matter of Johnson's Estate*. 560 P.2d 962 (Ok. 1977).

11. *Brown v. Brown*, 355 P.2d 1034 (Ok. 1960).

12. 10 O.S. § 55.

13. *Miles v. Young*, 818 P.2d 1258 (Ok. App. 1991).

14. 84 O.S. § 215.

15. See *Matter of Swarer*, 566 P.2d 126 (Ok. 1977).

16. *In re: Chew's Estate*, 200 Okl. 317, 193 P.2d 572 (Ok. 1948); Note the existence of 84 O.S. § 216 that provides only for mother and her issue to inherit from the child if father has not acknowledged.

17. Note that laws defining paternity for inheritance purposes supposedly are interchangeable with paternity statutes under Title 10. See, *Green v. Green*, 309 P.2d 276 (Ok. 1957); but cf, *Matter of King*, 837 P.2d 463 (Ok. 1990).

18. 84 O.S. § 215.

19. 84 O.S. § 215.

20. *Matter of Johnson's Estate*, 560 P.2d 962 (Ok. 1977).

21. 10 O.S. § 55.1.

22. 10 O.S. § 55.1.

23. 10 O.S. § 55.1

24. Arguably, the district attorney would have the right to bring a charge of omission to provide for a child, 21 O.S. § 852.

25. 10 O.S. § 5 (A) (2).

26. 10 O.S. § 5(A). There is no right of establishing visitation if the child is placed for adoption before obtaining six months of age. Also for grandparents to maintain visitation after the termination of the father's rights, the grandparents must show that they previously had a relationship with the child and that the visitation is in the best interest of the child.

27. *Pfeifer v. Wright*, 41 F.2d 464, cert. denied, 282 U.S. 896, 51 S.Ct. 181, 75 L.Ed. 789 (10th Cir. 1930) The jurisdiction where the acts occur must recognize a status change from illegitimate to legitimate. Once legitimization occurs in one jurisdiction the child will be recognized as legitimate in other jurisdictions. See also *Colpitt v. Cheatham*, 267 P.2d 1003 (Ok. 1954) (where father did acts of legitimization in a jurisdiction not recognizing such acts, then subsequently moved to Oklahoma after child reached majority, held child was legitimized).

28. 10 O.S. § 89.

29. 10 O.S. § 70.

30. 10 O.S. § 89.1.

31. 10 O.S. §§ 1 and 2.

32. 10 O.S. § 3; *Byers v. Byers*, 618 P.2d 930 (Ok. 1980); *Matter of Estate of Raulston*, 805 P.2d 113 (Ok. App. 1990) (descendants does not include parents or siblings of the father)

33. *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed. 291 (1989) (California law presumed the husband to be the father of a child born during the marriage. The law gave no rights to the natural father who had exercised his visitation with his daughter for eight years prior to the mother's termination of the relationship.)

34. *Id.* at 109 S.Ct. 2338.

35. *Arizona v. Saffe*, 801 P.2d 598 (Mont. 1990).

36. *Id.* citing 42 U.S.C. § 666(5) (A) (i).

37. 10 O.S. § 3.

38. *Banta v. Banta*, 782 P.2d 946 (Ok. 1989).

39. 10 O.S. § 505.

40. 84 O.S. § 215; Note the statute says "for all purposes". This would seem to mean that the statute could be read broader than allowing inheritance for the child, and would include the determination of paternity and related issues, see *Green v. Green*, 309 P.2d 276 (Ok. 1957); but cf *Matter of King*, 837 P.2d 463 (Ok. 1990).

41. *Allen v. Smith*, 61 P.2d 564 (Ok. 1936).

42. *Green v. Green*, 309 P.2d 276 (Ok. 1957).

43. *In re: Willis' Estate*, 265 P. 1064 (Ok. 1927), cert. denied, 277 U.S. 599, 48 S.Ct. 561, 72 L.Ed. 1008 (it still must appear that the child is of that relationship).

44. *Id.*

45. 10 O.S. § 83 (A).

46. 10 O.S. § 83 (B).

47. 10 O.S. § 71.

48. 10 O.S. § 83 (A).

49. *Callison v. Callison*, 687 P.2d 106 (Ok. 1984).

50. *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982); *Callison*, 687 P.2d at p. 109, 110.

51. 10 O.S. § 89 (B).

52. 43 O.S. § 501, et seq.

53. 28 U.S.C. § 1738A.

54. These jurisdictional prerequisites cannot be waived by the parties; see *Joliff v. Joliff*, 829 P.2d 34 (Ok. 1992).

55. 10 O.S. § 89 (C). But compare 43 O.S. § 324 where an obligor can defend an action for support by arguing he is not the father. The court will make a determination of paternity if proof so indicates, or allow a court of competent jurisdiction to do so.

56. See *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Taylor v. Taylor*, 709 P.2d 707 (Ok. App. 1985).

57. 10 O.S. § 89 (D) and (E); See also 10 O.S. § 501 (failure to cooperate in blood test allows default).

58. 12 O.S. § 2012.

59. 10 O.S. § 77.1; Note that the statute presumes that the father is the defendant, where now there is a possibility that the father may be the plaintiff bringing the action.

60. 10 O.S. § 77.1.

61. 10 O.S. § 89.

62. 10 O.S. § 77.1. Blood tests can be conducted by many different laboratories. It is suggested that the laboratory be contacted to ascertain costs of testing and testimony, what kind of test will be run, time to get results and minimum age requirement for the child before testing.

63. For a digest of current case law of the admissibility of certain paternity tests see The Reporter of Human Reproduction and the Law, Legal-Medical Studies Inc., Box 8219, Boston, MA 02114.

64. 10 O.S. § 504.

65. 10 O.S. § 1.

66. 10 O.S. § 1.

67. 10 O.S. § 505.

68. 10 O.S. § 2; 84 O.S. § 215 (if the father treats the child as his own); *Wilson v. Going*, 87 Okl. 265, 210 P. 1014 (Okl. 1922) (legitimization occurs even if marriage is after child reaches majority); *In re: Tinker's Estate*, 91 Okl. 21, 215 P. 779 (Okl. 1923).

69. 10 O.S. § 505.

70. 10 O.S. § 504, 506.

71. 10 O.S. § 504(B).

72. 10 O.S. § 76.1.

73. The repeal of 10 O.S. § 76 on November 1, 1989 terminated the defendant's statutory right to request a jury trial.

74. 10 O.S. § 76.1.

75. As discussed supra, 10 O.S. § 3 creates an irrefutable presumption. Other presumptions created by 10 O.S. § 2 for marriage at some other time than birth can be overcome by clear and conclusive evidence. See *Austin v. Austin*, 418 P.2d 347 (Okl. 1966).

76. *Leach v. State ex rel. Cooper*, 398 P.2d 848 (Okl. 1965).

77. *Matter of Estate of King*, 837 P.2d 463 (Okl. 1990).

78. 10 O.S. § 6.

79. 10 O.S. § 55.

80. *Miles v. Young*, 818 P.2d 1258 (Okl. App. 1991).

81. 10 O.S. § 90.5.

82. 10 O.S. § 90.5.

83. 12 O.S. § 1171.3 (B)(2); where obligor has requested a hearing on the delinquency notice the court shall make inquiry to determine if non-custodial parent has been denied reasonable visitation.

84. 10 O.S. § 89.

85. 10 O.S. § 83 providing for use of the Child Support Guidelines found at 43 O.S. § 118.

86. 10 O.S. § 83.

87. 10 O.S. § 83.

88. 10 O.S. § 85.

89. 10 O.S. § 85.

90. *State, ex rel. Department of Human Services on behalf of Meadows v. Gates*, 808 P.2d 995 (Okl. App. 1991).

91. *Id.*

EXPERT MEDICAL TESTIMONY

Our group covers ninety-three specialty areas. All physician specialists are board-certified medical school faculty members or are of medical school faculty caliber.

Specialist's curriculum vitae and complete fee schedule based on an hourly rate provided upon initial inquiry. Specialist will contact attorney with oral opinion approximately three weeks after receipt of records. If requested the specialist will then prepare and sign a written report and be available for testimony.

Experience in over 4,800 medical and hospital malpractice, personal injury and product liability cases for plaintiff and defendant. Local attorney references.

Dr. Steven E. Lerner & Associates

Honolulu	(808) 947-8400
San Francisco	(415) 861-8787
San Rafael	(415) 453-6900
Houston	(713) 799-1010
Chicago	(312) 631-3900
Washington, D.C.	(202) 628-8697

