



COMMONWEALTH of VIRGINIA

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TO: Craig M. Burshem, Regional Special Counsel

FROM: Gary P. Webb, Special Counsel, Fredericksburg *GPW*

SUBJECT: Presumption of Paternity: Married Couples

As we have recently discussed, there seems to be some confusion about the legal status of children born in wedlock where allegations of adultery have been made. I wish to outline my position on the issue and set forth both case law and trial examples to illuminate the issue. I do not intend to address the issues of res judicata or fraud, as they seem to be more settled in Virginia case law.

I. Saving Private Hillenberg (or at least his wife's reputation)

The leading Virginia case on the presumption of paternity is *Scott v. Hillenberg*, 85 Va. 245, 7 S.E. 377 (1888). *Scott* arose when Adam Hillenberg and other heirs of Austin and Elizabeth Hillenberg brought action to, inter alia, have Adam's alleged sister, Margaret Hillenberg Scott, declared illegitimate and thus not an heir to the lands of Austin Hillenberg. Margaret was born, during the marriage of Austin and Elizabeth, on May 15, 1865, fixing the probable date of her conception in August of 1864, when Austin was serving as a private in the Confederate Army. The Supreme Court reviewed in detail the testimony of many of Austin's compatriots, which conflicted greatly as to Austin's presence with his unit in Tennessee and North Carolina during 1864, with some soldiers recalling his presence there and others asserting he left the army in 1864 and did not return. The Supreme Court concluded that "it is proved by a cloud of witnesses that [Austin] was a very bad soldier; a frequent and inveterate deserter . . . and that he was at his home in the summer and fall of 1864." *Id.* at ___, 7 S.E. at 379-80. The Court's factual review is interesting, but the legal holdings carry great weight to this day. Where the alleged parents are married to each other there is a presumption of legitimacy. "The presumption of legitimacy is not rebutted by proof of circumstances which only create doubt and suspicion. To repel the presumption of legitimacy in any case, the evidence must be clear and positive." *Id.* at ___, 7 S.E. at 378. (citation omitted)

Further, "non-access of the husband to the wife must be proved beyond all reasonable doubt." *Id.* (citation omitted). The fact that Austin Hillenberg *may* have been away at war during the time of Margaret's conception did not create such a reasonable doubt or clear and positive evidence of non-paternity.

II. When You're Married (*but not to each other*)

One hundred and two years after Mr. and Mrs. Hillenberg's reputations were saved, the Virginia Court of Appeals addressed the issue from a different angle. In a URESA case heard in Prince William County, John Wyatt claimed that the presumption of paternity prevented him from being the legal father of Ashley Cease, because Ashley was born during the marriage of Betsy and Steven Cease. Ms. Cease testified that she had intercourse with a number of men between July and September of 1984. Ashley was born on April 19, 1985. Medical testimony established her probable date of conception as July 26, 1984. Ms. Cease alleged that she had intercourse with Wyatt on July 22 and July 26, 1984. Wyatt admitted the July 22 intercourse, but denied the July 26 act. HLA tests, ordered by the Prince William JDRC, showed a 99.37% probability that Wyatt was Ashley's father. The Court of Appeals, in upholding the paternity order, looked back to and cited *Scott* as well as *Cassady v. Martin*, 220 Va. 1093, 266 S.E.2d 104 (1980) (a wrongful death case in which the Supreme Court held that the jury should have been instructed as to the presumption of legitimacy) in finding that the presumption was rebutted by " 'strong, distinct, satisfactory and conclusive' evidence" of paternity. *Wyatt v. Virginia Department of Social Services*, 11 Va. App. 225, 229, 397 S.E.2d 412, 415 (1990) (citations omitted). The Court of Appeals found that the presumption was overcome by three factors: (1) the HLA tests; (2) Ms. Cease's testimony that she had sexual intercourse with Wyatt on the date of Ashley's conception, and (3) Wyatt's testimony that he had sexual intercourse with Ms. Cease at the approximate time of Ashley's conception.

The *Wyatt* Court thus expanded on the previous year's case of *NPA v. WPA*, 8 Va. App. 246, 380 S.E.2d 178 (1989) which found that the presumption was overcome by the HLA test results and the wife's admission of sexual intercourse with another man during the probable period of conception. The tests were ordered on the husband's motion on cross-bill for divorce. *Wyatt* is silent as to who requested the test, but it must have been Wyatt, as the Department of Social Services surely would have accepted his acknowledgement of paternity if one were offered.

III. *Scott* Survives

Scott remains good Virginia law. It has not been overruled or altered in its 112 year history. The three-prong test of *Wyatt* shows a way of rebutting the presumption. *Scott* was cited by the Court of Appeals as recently as 1998, in *City of Hopewell v. Tirpak*, 28 Va. App. 100, 502 S.E.2d 166, *vacated on other grounds as Bass v. City of Richmond*, 258 Va. 103, 515 S.E.2d 557 (1999). The Court of Appeals cited *Scott* for the effect of presumptions (the issue was workers' compensation) and not for its paternity holding, but the old case continues to have life, at least in the appellate courtrooms of the Commonwealth.

IV. Practical Applications (*advising our client in a Jerry Springer world*)

Two scenarios arise with enough frequency to apply *Scott* and its progeny. The first is when DCSE or a court is faced with Wife, Husband, and Boyfriend, all of whom agree that (a) there was no intercourse between Husband and Wife at the time of conception (this satisfies *Scott*) and (b) there was intercourse between Wife and Boyfriend at the time of conception. The court may then order DNA testing to proceed under the third prong of the *Wyatt* test. If Boyfriend is the biological father under the DNA test, the Court may proceed to make him the legal father under *Wyatt*.

The second scenario is where there is no agreement. That is a pure *Scott* situation in which non-access of the husband to the wife must be shown beyond a reasonable doubt. It is likely that incarceration is the only situation in which that burden could be met. The moving parties in *Scott* were unable to prove non-access even when the husband was enrolled in a military unit, and the travel of individuals, military and civilian, is much faster now than it was in 1864. A soldier stationed in Europe, Asia or the Middle East could be home to his wife within hours, a sharp contrast to Private Hillenberg's lengthier journeys from North Carolina and Tennessee to Virginia. Without agreement, there is but one legal father, the husband. We must advise our client to proceed against the husband and let him raise the defense of non-paternity, if he can. We are on sound procedural ground by insisting on this course of action. We are the petitioner, it is the respondent's burden to defend our action.

V. Public Policy Concerns

Like all child support issues, the issue of the presumption of paternity deals with the hot buttons of sex, money and power. To these constants we must add to position of the Commonwealth of Virginia on the institution of marriage, concern for children (some of whom may be old enough to understand the implications of DNA testing) and the effect of our position on defensive positions we may need to take.

One would be naïve not to know that we live in a world where infidelity, divorce and illegitimacy are common. I am not convinced that the Commonwealth should take the vows of marriage as lightly as do some of its citizens. Marriage is not merely a social or religious convention, it is a privilege and an institution granted by the General Assembly in Title 20 of the Code of Virginia. The General Assembly could have remained silent on the issue, then marriage would be indeed a convention or a sacrament, the breach of which would not be actionable in the courts of the Commonwealth. The General Assembly has recognized the will of the people of Virginia that married persons have legal associations with each other which are denied unmarried persons or persons outside the marriage. Our law of descent and distribution is a prime example of the standing marriage has in the legal scheme of Virginia. Clearly it is the intent of the General Assembly, until otherwise expressed, that marriage be granted a special and honored status in Virginia law. We violate that public policy when we dismiss the institution as if it were just a long one-night stand.

Children must be considered as well. If a court orders DNA testing on a child born of a marriage, that child, unless he or she is very small, will realize that the mother is being accused of infidelity. Worse perhaps, the child will realize that the man he or she may have referred to as "Dad" or known as a father is now denying paternity. Unfortunately, I have seen this happen when RPs have attempted to raise the issue of paternity in the face of show cause or other enforcement proceedings. I cannot believe the Commonwealth endorses the infliction of emotional pain on the fourteen year old girl I saw run in tears from the Middlesex Court House when her father asked for DNA tests (his motion, during a show cause rule, was denied) or that an agency set up for the benefit of children would be pleased to learn that an eight year old now taunts her seven year old sister, because court-ordered DNA testing showed that they have different fathers. The younger girl's is unknown. These are public policy issues, and not as susceptible to the hard, cold analysis as are the more familiar legal issues dealt with above. I believe we must consider the human concerns in this matter.

As noted, we frequently receive requests for DNA testing from legal fathers. Usually this is a last-ditch effort to avoid jail; a hope that testing will be the *deus ex machina* to end the tragedy. If we allow the barriers of marriage to be broken when we are the petitioners, I suspect courts will not allow us to raise those barriers quite so high when we are seeking to enforce obligations. If we accede to the nibbling away at the edges of the legal institution, we can expect the whole thing to eventually be swallowed and DNA testing ordered in every case. Our client will lose many more cases, the public policy of the Commonwealth will be thwarted, and children will suffer needless hurt and embarrassment.

VI. Conclusion

I urge that we advise our client to proceed against the legal father except in the limited instance where all parties agree as to paternity. Even then, we should make the husband a party to the action, request a GAL for the child, and make certain that DNA tests are ordered to satisfy the *Wyatt* standard.

6:40/gpw