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Distinguishing Legitimacy from Paternity

Has Legitimacy Become a Label Without Substance Under Florida Law?

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Recent Florida decisions indicate that paternity is now considered a distinct concept from legitimacy.[1] Careful attention to the definitions of the words "legitimacy" and "paternity" is necessary because they are used loosely in the reported decisions. Some courts refer to a "presumption of paternity,"[2] or a "presumption [of]... lineal descendan[cy]"[3] as well as a "presumption of legitimacy."[4] Before the recent opinion of *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997), a child born during a marriage was presumed to be legitimate and the Florida Supreme Court had declared this was "one of the strongest rebuttable presumptions known to the law."[5] However, after *Daniel*, the presumption has become a label given to any child born during a lawful marriage, regardless of his or her paternity. Now "paternity" means the status of being the natural or biological father of a child and "legitimacy" means the status of a child born or conceived during a lawful marriage—whether or not the child received half of his or her genes from the husband.[6] The term "legal father," on the other hand, is the man the law identifies as the father—whether or not he is the biological father.[7]

In *Daniel*, the Supreme Court of Florida held that a child's legitimacy is a separate and distinct issue from his or her paternity. Even recently, courts have used the terms "legitimate" and "paternity" interchangeably[8] and have assumed that a child who does not have the husband's genes is illegitimate. In *Daniel*, the Supreme Court held a child is legitimate if born during a valid marriage, even if the husband is not the child's biological father. The *Daniel* court held that paternity is purely a question of "natural lineage" and "paternity is not contested here" because "the parties have stipulated that Michael Daniel is not Ciara's natural father, and Mr. Daniel is not asserting any rights he might have had as Ciara's 'legal father.'"[9] Furthermore, because Mr. Daniel was not the child's biological father, the court applied the "well settled rule" that "a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted."[10]

> This article discusses the legitimacy of children and reviews recent Florida decisions which have created a distinction between the terms "paternity" and "legitimacy."

It appears a child's legitimacy, like the emperor's new clothes, is invisible, a form without substance that cannot prevent the exposure of the underlying truth; that is, the paternity of the child. It also appears that legitimacy carries with it no material benefit in that the court held Ciara was not entitled to support from the former husband, even if she is his legitimate child.

Just how invisible and empty the status of legitimacy has become is illustrated by recent cases citing *Daniel*. In *Gantt v. Gantt*, 23 Fla. L. Weekly D2031 (Fla. 4th DCA 1998), during the pendency of a dissolution action, the husband asked for blood tests on the six children born during the marriage. The husband sought to avoid paying child support for the children who were not his biological children. The trial court followed the procedure set forth in *Department of Health and Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993), and appointed a guardian ad litem to determine the best interests of the children before ordering a genetic test. After the guardian had rendered a report, the trial court held a hearing and denied the husband's request. The appellate court reversed and ordered blood tests on all six children, ruling that *Privette* did not apply because *Daniel* limits the application of *Privette* to cases in which a "legal father" seeks to maintain his parental rights.[11] The appellate court also held that all of the children are legitimate children, because they were born during a lawful marriage, but they are not entitled to support from the husband if their paternity is not established by a genetic test. *Privette's* broad language directing trial courts to protect the "best interests of the child" against an "impugning" of their legitimacy by a genetic test which would prove paternity was brushed

aside because the "legal father" was not trying to preserve his parental rights. After *Daniel*, if the legal father asks for a genetic test, *Privette* does not prevent the request when the legal father is challenging his status as father.

In *DeRico v. DeRico,* 23 Fla. L. Weekly D1732 (Fla. 5th DCA 1998), the presumption of legitimacy and *Privette's* requirement that trial courts must protect a child's presumed legitimacy by appointing a guardian again did not prevent a determination of biological paternity. In *DeRico,* after the couple was divorced, genetic testing was conducted on the three children born during the marriage—apparently outside of legal proceedings. The results revealed that two of the three children born during the marriage were not the former husband's biological children. The former husband then filed a post-judgment petition asking to be relieved of his support obligation for those two children. The trial court, citing *Privette,* denied the former husband's petition, finding it was in children's best interest to "remain legitimate," thus assuming where there is no paternity there is no legitimacy. The appellate court reversed, however, noting the trial court did not have the benefit of *Daniel*. Following *Daniel* the appellate court separated legitimacy and paternity into two distinct issues noting:

> [T]here is no issue as to paternity, DeRico is not claiming any rights as "legal father" of the two children, and, as in *Daniel,* the children's status as legitimate is not subject to dispute. Accordingly, *Privette* does not govern this case; *Daniel* does. There is no need for the appointment of a guardian ad litem as DeRico has no legal duty to provide support for children he neither biologically fathered, adopted, nor contracted to care for.

The dissent in *DeRico* challenged the majority's disregard of the doctrine of res judicata. A determination of paternity cannot be changed without a finding of fraud once a final judgment of paternity or dissolution has been entered.[12] The dissent pointed out the trial court determined the wife had not committed fraud because the trial court found the wife believed the children were the husband's until "she learned the DNA results."

What does "out of wedlock" mean? Is a child born during a marriage who is not fathered by the husband born "in wedlock"?

Is *Privette* Still Valid?

Privette's directives to protect a child's legitimacy are not entirely defunct. In another recent decision, *Privette* was invoked to prevent the determination of paternity through genetic testing. In *Contino v. Estate of Contino,* 23 Fla. L. Weekly D1870 (Fla. 3d DCA 1998), the children of a deceased father questioned whether the youngest son, now age 32, had the father's genes. They claimed that if he did not, he was not an heir and, therefore, not entitled to an intestate share. During their parents' divorce almost 20 years before the father died, the mother told their father that the youngest son, Daniel, was not the father's biological child. The parents also signed a separation agreement which provided "the Wife waives support moneys from the Husband for the care and maintenance of the minor child Daniel for the reason that the Husband is not the natural father of said minor child, Daniel." However, the evidence never established that the deceased ever said he did not believe Daniel was his son, and Daniel testified he believed the deceased was his father. The trial court determined that Daniel was an heir and denied the other children's motion for a blood test. The appellate court affirmed, citing *Privette,* and declared that in "the instant case, Daniel's best interests cannot be served by being declared illegitimate regardless of his age." Again, this court, like so many other courts and like the Contino siblings, assumed that illegitimacy follows from a finding of no paternity and that a child who is not engendered by the deceased father is not an heir or a lineal descendant.

The *Contino* court further stated that F.S. §742.12(1) (1997), which allows a court on its own motion to order a genetic test "in any proceeding to establish paternity," is limited by §742.10 to cases in which a child is "born out of wedlock," and the court said Daniel was born during a marriage so the "'presumption of paternity' (*sic*) . . . has not been overcome and scientific testing is not available by statute to determine paternity." This, of course, begs the question: What does "out of wedlock" mean? Is a child born during a marriage who is not fathered by the husband born "in wedlock"? A cuckold, perhaps, might believe such a child is born "out of wedlock." *Daniel* says such a child is legitimate but that his or her paternity is another question. Nevertheless, the majority in *Contino* indicates that legitimacy follows from paternity; there is a "presumption of paternity," and this presumption cannot be challenged by evidence to the contrary, that is, a genetic test, without complying with the requirements of *Privette,* even though the legal father, Mr. Contino, is deceased, the child is 32 years old, and, further, that §742.10 does not permit a court to order a genetic test for a child born during a marriage.

The dissent in *Contino* cited *Daniel* and indicated the "presumption that Daniel is a lineal descendant (*sic*) is a rebuttable one." The dissent also pointed out that because the presumption is rebuttable, the case should be decided by the most reliable evidence available, that is, genetic testing. The dissent also argued the protections required by *Privette* to preserve a child's best interests did not apply to a 32-year-old child of a deceased legal father.

Apparently the dissenting judge in *Contino,* like many other judges, as-