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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.<sup>1</sup> 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,"<sup>2</sup> or a "presumption [of] . . . lineal descendancy" as well as a "presumption of legitimacy."<sup>3</sup> Before the recent opinion of *Daniel v. Daniel*, 695 So. 2d 1263 (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."<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>6</sup> 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

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

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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.'"<sup>7</sup> 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."<sup>10</sup>

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.<sup>11</sup> 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