

# Whose Rights Are We Terminating Anyway? (and Why)

Legal, Putative, and Biological Fathers



You are not alone.



## Start with the end in mind

- ◆ Label your fathers in your initial pleadings
- ◆ Establish & adjudicate paternity as often as you can
- ◆ Check with Child Support as soon as possible
- ◆ Use your preliminary/pre-trial hearings to clean up paternity issues as soon as possible (7B-800.1 & 7B-1108.1 7B-1105)
- ◆ It's all about freeing the child for Adoption

## §7B-1105 Preliminary hearing; unknown parent

- ◆ Hearing required within ten days when identity of father is unknown (see In re A.N.S., 2015 N.C. App. LEXIS 16)
- ◆ Court may inquire as to identity of parents or require a diligent search; summons
- ◆ Court may order publication upon unknown parent
- ◆ Court shall terminate parental rights of unknown parent if no answer filed

## Adjudicating Paternity

- ◆ Is paternity “at issue?”
  - ◆ G.S. 7B-506(h)(1) and G.S. 7B-901
- ◆ Credible evidence
  - ◆ Testimony of mother or father/credible evidence of non-access or impotence
  - ◆ Genetic testing if available
  - ◆ Affidavits
- ◆ Proper order contents
  - ◆ Findings
  - ◆ Conclusions
  - ◆ Decree

## Legal, Putative, Unknown

- ◆ A legal father is one who:
  - ◆ Is on the birth certificate, §130A-101 / (signed an AOP?)
  - ◆ Was married to mother at time of birth or subsequently
- ◆ A putative father is one who:
  - ◆ Is not married to the mother
  - ◆ Has not established paternity
  - ◆ Has been named by the mother as a possible father

## Rebuttable Presumptions

- ◆ “The most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.”  
- Kenneth S. Broun et al., 2 McCormick on Evidence §343, at 500-01 (6<sup>th</sup> ed.2006)
- ◆ Examples: marital, genetic testing, name on AOP?

## Genetic Testing

- ◆ G.S. §8-50.1 Competency of blood tests
  - ◆ Greater than 95% = presumption of dad
  - ◆ 85 – 95% = no presumption at all
  - ◆ Less than 85% = presumption of not dad
- ◆ Enter the tests results into evidence
- ◆ Make findings, including whether or not the parent objected to or challenged the evidence.

## Not all putative fathers are created equal

- ◆ The absent putative dad who knows about his child
- ◆ The absent putative dad who doesn't know about his child
- ◆ The putative dad who is raising or helping raise his child (aka the "purported" father) – one who has "grasped"
- ◆ The putative dad who visits, is a part of the child's life, but has not taken an active parenting role – one who may or may not have "grasped"

## What parental rights?

- ◆ Rights of putative fathers – are there any? It depends.
- ◆ Notable cases that discuss the rights of putative fathers:
  - ◆ *Lehr v. Robertson*, 463 U.S. 248 (1983)
  - ◆ *In re Adoption of S.D.W.*, 367 N.C. 386 (2014)
  - ◆ *In re Adoption of B.J.R.* 2014 WL 7463230 (*Robinson v. Perkins*, 2014 N.C. App. LEXIS 1336)

## Lehr v. Robertson

- ◆ Were the natural father's rights under the due process and equal protection clauses violated when he did not receive notice and an opportunity to be heard before his child was adopted, when the father failed to put his name on the putative father registry, and did not have any significant custodial, personal, or financial relationship with the child? No.
- ◆ When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "[acts] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. (citations omitted).
- ◆ The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. (citations omitted).

## In re Adoption of S.D.W.

- ◆ Child born out of wedlock to woman who actively conceals pregnancy and birth of child from the child's father.
- ◆ Issue presented concerns legal ability of father who is unaware that he has fathered a child to challenge mother's decision to put that child up for adoption.
- ◆ Obtaining notice of mother's pregnancy was not beyond father's control and "a putative father who engages in a sexual relationship with a woman multiple times without the benefit of contraception is on notice that a child may result from the sexual relationship and must make diligent inquiry to discover the existence of his child in order or establish a Constitutional Parental Right regarding the minor child. (citations omitted).
- ◆ Does he require notice under N.C.G.S. §48-2-401? Is his consent required under §48-3-601?

## In re Adoption of B.J.R. (Robinson v. Perkins)

- ◆ Child born January 7, 2013. Father files actions for custody and genetic testing January 13, 2013.
- ◆ Robinsons file adoption petition on February 13, 2013. Father files objection to adoption on February 21, 2013, contending that his consent is required.
- ◆ Court orders genetic testing on June 7, 2013. Test comes back in July proving Plaintiff to be the father.
- ◆ Court enters order on August 26, 2013 finding that father's consent to the adoption is not required because he failed to make reasonable and consistent payments for support pursuant to §48-3-601(2)(b)(4)(ii)
- ◆ Court of appeals upholds the lower court's ruling, and also finds that father had failed to develop a parent-child relationship with his child and remained largely "passive."
- ◆ Also noteworthy that the Court indicated that waiting until after the results of genetic testing to provide support was not an excuse.

## Adoption: Notice of Pendency of Proceedings

- ◆ N.C.G.S. §48-2-401(c)(3):

A man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father of the minor, and any biological or possible biological fathers who are unknown or whose whereabouts are unknown, but notice need not be served upon a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the minor, a man whose parental rights have been legally terminated or who has been judicially determined not to be the minor's parent, a man whose consent to the adoption is not required under G.S. 48-3-603(a)(9) due to his conviction of a specified crime, or, provided the petition is filed within three months of the birth of the minor, a man whose consent to the adoption has been determined not to be required under G.S. 48-2-206.

## Who doesn't get notice?

- ◆ Any man whose parental rights have been terminated
- ◆ Any man who has signed a Denial of Paternity affidavit (form DSS 5118)
- ◆ Any man who has been judicially determined not to be the father or another man has been judicially determined father
- ◆ Any man whose consent to the adoption is not required under G.S. 48-3-603(a)(9) or G.S. 48-2-206

## Adoption: Consent Required

- ◆ §48-3-601(2) b. Any man who may or may not be the biological father of the minor but who:
  - ◆ "Is or was married to the mother ... if the minor was born during the marriage or within 180 days after the marriage is terminated..."
  - ◆ Attempted marriage
  - ◆ Legitimated the minor before the petition was filed
  - ◆ Before the petition was filed received the minor into his home
  - ◆ Is the adoptive father of the minor
  - ◆ Acknowledged paternity before the petition was filed AND
    - ◆ Is obligated to support the minor by written agreement or order
    - ◆ Has provided reasonable and consistent payments for support **and** has visited or communicated or attempted to communicate with child and/or mother (see In re Adoption of B.J.R.)
    - ◆ Attempted marriage

## Consent not required under §48-3-603:

- ◆ A man whose parental rights have been terminated
- ◆ A man described in 48-3-601(2) who has been judicially determined not to be the father or if another man has been judicially determined to be the father
- ◆ Any man who has executed relinquishments
- ◆ Any man who has executed a notarized statement denying paternity or disclaiming any interest in the minor
- ◆ Deceased parent or personal representative of the deceased
- ◆ An individual listed in 48-3-601 who has not executed a consent or relinquishment who has failed to respond to a notice of adoption proceeding within 30 days after service
- ◆ Conviction of crime that led to conception

## Notice & Consent under Ch. 48

***Remember: Any man who may or may not be the biological father.***

Even when a legal father is entitled to notice and/or his consent may be required, that is not the end of the road – if another man has been named a possible biological father, you must deal with him.

## Appeals

- ◆ G.S. §48-2-607
  - ◆ Final orders of adoption are basically ironclad except for when they aren't:
    - ◆ Consent obtained by fraud/duress
    - ◆ Consent of a parent/guardian was necessary and not obtained, within six months that the omission was discovered or reasonably should have been discovered
    - ◆ Only applies to non-parties

## TPR Grounds

- ◆ Any ground is fair game for a putative father; legal fathers as well except for the failure to establish paternity ground
- ◆ Unlikely that you can prove any ground requiring a show of willfulness for an unknown father
- ◆ Unknown fathers
  - ◆ Neglect (ground 1)
  - ◆ Failure to establish paternity (ground 5)

## Publication

- ◆ Be as specific as possible as to the circumstances
  - ◆ See G.S. 7B-1105(d) "...and the contents of the notice which the court concludes is most likely to identify the juvenile to such unknown parent."
  - ◆ Example: "named by a woman known to you as Jane Smith aka Crayzy Jane, conceived in a white pickup truck on or about the 3<sup>rd</sup> of January 2012 in the Hardy's parking lot, Jacksonville North Carolina."

## Putative Father Registry

- ◆ States with registries (30): Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, \*Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Wyoming.
  - ◆ States with no registry (20): Alaska, California, Colorado, Connecticut, Hawaii, Mississippi, Kentucky, Maine, Maryland, Nevada, New Jersey, **North Carolina**, North Dakota, South Dakota, Rhode Island, South Carolina, Vermont, Washington, West Virginia, Wisconsin.
  - ◆ If North Carolina had a putative father registry, would it mean that we could stop having to do TPR's on putative fathers? Possibly.
- \* Illinois has registered the domain [www.putativefather.org](http://www.putativefather.org)

## N.C. Central Registry

- ◆ Was the Central Registry created as a way for fathers to defeat TPR ground number 5? What other purpose does it serve?
- ◆ Is it relevant to Adoption as it is never mentioned in Chapter 48?
- ◆ Is the Central Registry analogous to a Putative Father Registry?