Sex, Lies & D.N.A. Tests

By: Adam Singer

Sex is not the only way to become a parent. And adoption is not the only way for an adult to acquire parental rights and responsibilities towards a child. From Moses to Superman and beyond, our history, culture and legal systems have long recognized that an adult who voluntarily takes on a parental role towards a non-blood-related child ultimately will be seen and treated as the child's own parent. But what about a man who raises and supports a child under a mistaken belief that he is the child's biological father? Until fairly recently, before the development of blood and D.N.A. tests which can determine biological paternity with scientific exactitude, this issue tended to be the subject of theological, philosophical and literary rumination, rather than legal adjudication. Even the science-fiction-obsessed creators of Superman did not foresee the rise of genetic testing and the challenges it would bring to bear on our conceptions of paternity.

For many years in Canada, the test for determining whether a person legally stands in the place of a parent towards a child unrelated by blood – the status of "Loco Parentis" – was governed by an old common law definition which was summarized by the Alberta Court of Appeal in ***Theriault v. Theriault*** (1994) 113 D.L.R. (4th) 57: "A person becomes a parent when he or she puts himself or herself in the situation of a lawful parent with reference to the office and duty of making provision for the child."

Nearly five years after ***Theriault***, the definition of "Loco Parentis" was scrutinized and modernized in the Supreme Court of Canada's decision in ***Chartier v. Chartier*** [1999] 1 S.C.R. 242, which remains the starting point in Canada for legal consideration of this issue. Justice Bastarache, writing for an unanimous panel of seven judges, cited ***Theriault*** for recognizing that "the proper approach to this issue" is to "focus on what is in the best interests of the children of the marriage, not on biological parenthood or legal status of children," but he also quoted with approval Justice de Weerdt's statement in ***Laraque v. Allooloo*** (1992) 44 R.F.L. (3d) 10 (N.W.T.S.C.) that "it takes a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis, to bring the *in loco parentis* status in law into being."

Accordingly, there remains an underlying and unresolved tension in ***Chartier*** between a child's best interests and an adult's intentionality about assuming the place of a parent. On the one hand, Justice Bastarache stated:

"Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult. …The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents toward them."

But he rejected the argument "that the test for whether or not a person stands in the place of a parent should be determined exclusively from the perspective of the child": "The opinion of the child regarding the relationship with the step-parent is important, but it constitutes only one of many factors to be considered."

Justice Bastarache ruled that courts must "determine the nature of the relationship by looking at a number of factors, among which is intention. …The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent." These factors must be "viewed objectively".

Even "if a relationship has broken down after a separation or divorce, the obligation of a person who stands in the place of a parent to support a child remains the same. Natural parents, even if they lose contact with their children, must continue to pay child support."

The era of ***Chartier*** has also seen the rise of D.N.A. testing to determine paternity and court cases involving men who, initially believing that they were the biological fathers of children they were helping to raise and support, learned through genetic testing that other men had fathered these children.

Reported decisions on mistaken paternity since ***Chartier*** have not resolved the tension between prioritizing the child's best interests and the adult's intentionality. Of 10 decisions which I reviewed, eight tended to align with the view that "it takes a properly informed and deliberate intention to assume parental obligations for support of a child", while two put priority on the formation of parental relationships between children and the men they knew as their fathers, emphasizing the children's reliance "on that relationship continuing and that these persons will continue to act as parents toward them."

The facts underlying these decisions have prompted judges to express strong, if sometimes irreconcilable, views of the law. In ***T.A. v. R.C.A.*** (1999) 48 R.F.L. (4th) 205 (B.C.S.C.), released four months after ***Chartier***, Justice Chamberlist quoted extensively from ***Chartier*** but, citing an older line of case authority, held that in order for a person to stand in the place of a parent, he must know that someone else is the actual parent. Therefore, a man who believes himself to be a biological parent and does not know that someone else is the natural father cannot stand in the place of a parent.

A similar rationale was enunciated in ***R.N.H. v. G.C.-B.***(2005) 248 D.L.R. (4th) 379 (Sask. Q.B.): "Clearly, a person cannot stand in the place of a parent to a child if he or she is in fact a parent to that child." Therefore, a "person who acts as a parent to a child under the [mistaken] belief that he is the biological parent of that child does not assume the parental responsibility". Justice Pritchard stated that the "essential time in determining" whether such a person stands *in loco parentis* "is the period subsequent to learning" that he is not the biological father.

In ***D.R.D. v. S.E.G.***(2001) 14 R.F.L. (5th) 279 (Ont. S.C.J.), after the parties separated and the wife remarried, she gave her first husband D.N.A. test results which showed that her new husband was the biological father of the child she gave birth to during her first marriage, and revealed that she had an affair with her new husband while married to her first. Justice Granger

held, among other things, that the wife had no legal duty to advise the first husband of the affair which resulted in the child's conception, neither when she had the affair nor when she and the first husband executed Minutes of Settlement.

In ***L.S. v. C.S.*** [2002] O.J. No. 1890 (Ont. C.J.), Justice Spence ruled that, before a putative father can be held liable to support a child, he must first be "given the opportunity to make a choice" as to whether to treat the child as his own. "By necessary implication, one must know, first, that he is not the biological father. Once he knows this, he then has a choice - either to form a conscious decision to treat the child as his own, or to refrain from doing so."

This view was rejected in ***B.B. v. C.P.B.*** (2005) 18 R.F.L. (6th) 10 (Ont. C.J.). Justice Maresca stated: "Although the father may have made a different decision had he been advised of the facts at the time of the child's birth, the fact is that he was a parent to the child for many years. …It is the sense of family and bonding between parent and child that is important, not whose DNA is lodged in the child's cells."

The "mother's omission of disclosing all relevant information about conception" was found to be "tantamount to deceit" in ***K.L.B. v. J.M.*** (2005) 14 R.F.L. (6^{th}) 1 (Ont. C.J.). This was critical, in the view of Justice P.W.R. Isaacs, because "where some degree of deceit is involved and the child is not the biological child of the proposed payor, then in order to determine whether that person should be found to stand *in loco parentis*, only those acts and conduct that occur after the disclosure of the truth should be considered."

Cornelio v. Cornelio (2009) 65 R.F.L. (6^{th}) 129 (Ont. S.C.J.) contradicted this view of the law. Justice van Rensburg stated that while the wife's "failure…to disclose to her husband the fact that she had an extramarital affair and that the twins might not be his biological children may well have been a moral wrong…it is a wrong that does not afford him a legal remedy to recover child support he has already paid, and that does not permit him to stop paying child support."

Wanda Wiegers of the University of Saskatchewan's College of Law argues, in "Fatherhood and Misattributed Genetic Paternity in Family Law", (2011) 36 Queen's L.J. 623, that there should be "an onus on the man to verify his genetic status at the earliest opportunity, typically at the outset of a child's life. If he failed to do this and allowed a parental relationship with the child to develop over a substantial period of time, he would be seen as having assumed the risk of misattributed genetic paternity." This would provide "an incentive to resolve any uncertainty before a substantial attachment has developed" and "would reduce the probability of subsequent litigation." Professor Wiegers does not advocate placing such an onus on the woman, or on both the woman and the man, and she does not adequately justify why only the man should bear "the risk of misattributed genetic paternity". In actuality, placing such an onus only on men would be a **disincentive** for verifying paternity, as most men would not want to be viewed by their partners as attacking and undermining whatever trust has been established in the relationship. A neutral approach would be to require paternity testing at hospitals before mothers and babies are

discharged. It is questionable, however, whether such a requirement would enjoy broad political or public support.

Until there is mandatory paternity testing or the Supreme Court clarifies the law on this issue, Canadian courts can continue to choose between prioritizing the child's best interests or the man's intentionality to assume the place of a parent when deciding cases of mistaken paternity. Nobody – except for Superman – can travel back in time to change what they knew and what they decided.