

PATERNITY RESPONSES

Given the DNA test results of Mr. Brown and Junior, I would treat this matter as a legal/biological and bring a paternity lawsuit against both Mr. Brown and Mr. Smith, naming them as co-defendants. I would ensure that the allegations of the complaint stated all of the facts as presented here.

It is necessary to allege all of the facts presented here in order to allege, in the alternative, that Mr. Smith is the biological father of Junior through legitimation by subsequent marriage and that Mr. Brown is the biological father of Junior as demonstrated by the DNA tests. The issue of legitimation by subsequent marriage may (no case law on this exact point) preclude raising the issue of Mr. Brown's paternity. The unresolved answer for legitimation by subsequent marriage is does it establish paternity as a matter of law or does it simply put the husband in the same position as if the child were born during the marriage.

N.C.G.S. §49-14(e) expressly provides that "[e]ither party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it." Therefore, either party upon request can attempt to have the paternity action heard on an expedited basis. A temporary child support should be available to you while you await the trial. N.C.G.S. §49-14(f) requires the trial court to enter a temporary child support order when a "determination of paternity" is pending. To receive a temporary child support order the moving party must show paternity by clear, cogent and convincing evidence. DNA results of greater than 97% meet that statutory requirement. We have also been successful in getting temporary child support if the child was born during the marriage.

Assuming that the issue of paternity has not been adjudicated you should be successful in your motion for an order to do genetic testing. The real concern in this scenario is whether Mr. Smith is already Junior's father as a matter of law precluding Mr. Smith from contesting paternity of Junior. See N.C.G.S. §8-50.1(b1)(the trial court shall enter an order upon motion of either party if paternity is at issue). On the other hand, Amanda's paternity has not been adjudicated and, therefore, the court should issue an order for testing Smith, Jane, and Amanda.

Assuming that the issue of legitimation by subsequent marriage has been resolved, we now know that Smith cannot be the biological father of Junior. We also know that Brown cannot be the biological father of Amanda. Accordingly, I would have Brown agree to a consent order, rather than a voluntary support agreement, stating that he is the biological father of Junior, that he is not the biological father of Amanda, and that he will pay child support on behalf of Junior. Likewise, I would ask the trial court to dismiss the paternity claim regarding Junior as to Smith. This should narrow your issues in court to whether Smith is the biological father of Amanda.

The primary piece of evidence available to the child support program is the results of the genetic tests. N.C.G.S. §8-50.1(b1) specifically authorizes the introduction of this information through a qualified expert without demonstrating foundation testimony or other authentication.

However, if the opposing attorney objects to the introduction of this evidence not less than 10 days prior to the hearing you may have problems. The statute does not provide that the test results would not come in, but you may have to authenticate the test results as well as establish a foundation. Unfortunately, the statute is not as clear as it could be as to what happens if the opposing counsel does timely object. Out of an abundance of caution you should be prepared with your witnesses to demonstrate a complete chain of custody. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992). In addition, you should ensure that the genetic tests were court-ordered and that the test results themselves are certified and its documentary chain of custody is verified. If the test results do not meet this criteria they may not be allowed into evidence upon a proper objection. See Catawba County ex rel. Kenworthy v. Khatod, 125 N.C. App. 131, 479 S.E.2d 270 (1996) and Rockingham County DSS ex rel. Shaffer v. Shaffer, 126 N.C. App. 197, 484 S.E.2d 415 (1997).

A viewing of the children directly or through photographs is allowed under current caselaw. The issue here is how will it impact your fact-finder. Will the fact-finder be concerned that you place the child in this environment? Is the child so strikingly similar in appearance to the alleged father that he or she is your best evidence? You should win this issue if you want to show the child.

The high probability of parentage should aid you tremendously in the trial of your case. Once you have been successful in putting into evidence the genetic tests results that putative father is now, as a matter of statutory law, presumed to be the biological father of the child. This presumption may still be rebutted by the putative father but he must do so by clear, cogent and convincing evidence. Accordingly, we have been successful in getting a special jury instruction which expressly shifted the burden to the putative father.