



Paternity

6/14/2005

In **Paternity of H.J.B. Ex Rel. Sutton v. Boes**, 829 N.E.2d 157 (Ind. Ct. App. 2005), the Court affirmed the trial court's dismissal of a petition to disestablish paternity and request for DNA testing which had been filed by child's maternal grandmother as his guardian and-next friend. When the child was conceived, the mother was not married, but the child was born after the mother married the child's presumptive father. The mother and presumptive father were murdered on November 3, 2003, and the maternal grandmother became guardian over the person and estate of the child on June 1, 2004. The paternal grandparents and other paternal relatives exercised visitation with the child. On June 11, 2004, the child, by next friend and guardian, filed a Verified Petition to Disestablish Paternity and Request for DNA Testing. The guardian filed a supporting affidavit stating that the mother was pregnant at least four months prior to her dating the presumptive father and that the identity of the child's father was unknown to the mother. The presumptive father's estate filed a Motion to Dismiss, which the trial court granted in a one sentence Order. The child appealed.

The paternity laws of this state may not be used in such a way that a child is legally declared to have no father. *Id.* at 160. The Court noted that the statutes governing paternity actions, found in Article 14 of Title 31 of the Indiana Code assume establishing as opposed to disestablishing paternity, and gave examples of specific statutes. The Court also referred to Estate of Lamey, 689 N.E.2d 1265, 1268 (Ind. Ct. App. 1997) trans. denied, in which the court held that, in the probate framework, I.C. 20-1-2-7(b) "provides a limited opportunity for an illegitimate child...to establish paternity in a decedent, not an avenue for third parties to disestablish paternity following a presumptive father's death." *Id.* at 159. The Court also cited Russell v. Russell, 682 N.E.2d 513, 518 (Ind. 1997), in which the Supreme Court held that in a dissolution proceeding in which the mother and father of a child are attempting to stipulate or otherwise agree that a child is not a child of the marriage, "it is well within the discretion of the trial court to withhold approval [of such a stipulation] until paternity has been established in another man." The Court stated that it thought it would likewise be appropriate for the trial court to withhold the disestablishment of a deceased father's paternity until paternity had been established in another man in order to avoid the creation of a "filius nullius" (son of nobody), with the countless detrimental financial and emotional effects it would carry, which is exactly the result the paternity statutes were created to avoid. *Id.* at 160. The Court opined that, in this case, such a finding would undoubtedly produce a negative emotional effect on the two-year-old child and cause him to suffer a financial impact in that he would not be

entitled to governmental or other benefits he receives as the son of the presumptive father. Id.

The Court noted that this holding does not affect the right to establish paternity in a situation where a father already exists, thus indirectly disestablishing paternity of that father. See K.S. v. R.S., 669 N.E.2d 399, 400-01 (Ind. 1996) (holding that under Indiana law a man who claims to be the biological father of a child born during the marriage of the child's mother to another man may bring a paternity action while the mother's marriage is still intact); In re Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992) (stating that "a putative father may establish paternity without regard to the mother's marital status.") Id. at 159 n.2.