**“LEGITIMIZATION” PODCAST**

**HELLO EVERYONE, AND WELCOME TO A NEW EPISODE OF THE GOOD JUDGE-MENT PODCAST. I’M WADE PADGETT**

*AND I’M TAIN KELL. TODAY, WE’RE GOING TO BE TALKING ABOUT A TOPIC THAT COMES UP QUITE OFTEN IN MY JURISDICTION, WHAT ABOUT YOU, WADE?*

**OH, YEAH, DEFINITELY.**

*TODAY WE’RE TALKING ABOUT THE SUBJECT OF ACTIONS TO LEGITIMATE CHILDREN BORN OUT OF WEDLOCK.*

* 1. [WADE] It is important to understand that there is always a tension between establishing rights of parents and deciding what is in the best interest of the child involved.
  2. [TAIN] One of the most fundamental rights afforded under the both the United States and Georgia constitutions is the right to be a parent. Some say that right is even more protected than other, more familiar rights afforded by the constitution.
  3. [TAIN] **IT IS IMPORTANT TO REMEMBER THAT COURTS ARE CHARGED TO ALWAYS LOOK TO THE “BEST INTERESTS OF THE CHILD”. YOU WILL HEAR THIS STANDARD REPEATEDLY TODAY. In fact, if you’re a judge and you’re really bad at remembering stuff, just remember that phrase…**
  4. [WADE] But there are times when the constitutionally protected right to be a parent and a decision on what is in the best interest of the child conflict. Those are tension points for judges.
  5. [WADE] Which is a perfect segue to the area of law we plan to discuss today, legitimation.

1. **LEGITIMATION**
   1. [TAIN] The first and most important rule involving legitimation. Everyone have their writing utensils ready? Ok, here is the secret to success in the field of legitimation:
      1. DO NOT EVER, UNDER ANY CIRCUMSTANCES, REFER TO THIS LEGAL PROCESS AS “LEGITIMIZATION!”
      2. Please ignore the heading of O.C.G.A. § 19-7-22 because that was just a moment of legislative weakness. Call this procedure a “legitimation”, leave the “z” out. Absolutely NO Z
   2. Seriously, as a lawyer, you will make your living with your words.
   3. Wade, what do you tell parties who appear in court for a legitimation as an explanation for the process- I’m asking for a friend…?
2. [WADE] I look at the parties and tell them some version of the following:
   1. You are here for a legitimation action. I realize you may have some understanding of what we are going to be doing here but please allow me a moment to give you my explanation. In a legitimation action, the parties have brought a child into the world outside of marriage. Georgia is the only state I am aware of that uses this process. It might be easier if I explain it this way – back in the day, children who were born to a couple who were not married at the time of the birth were referred to as “illegitimate children.” While we do not really use that phrase any longer, the law realized long ago that a process needed to be in place that would allow the “illegitimate child” to become “legitimate.”
   2. Our statutes allow a father- and only a father can do this- to file an action where he seeks to have the child be declared his legitimate child. Effectively, if the request is granted, the father moves from the status of “biological father” to “legal father.”
   3. For many years, the old statute required that the father to bring a legitimation action against the mother and, if granted, for the court to enter the order granting the legitimation and then everyone would leave the courthouse. If the parties wanted to discuss issues such as custody, visitation, and child support, a second, separate action would have to be filed to address those issues.
   4. FINALLY, someone in the legislature realized that everybody we need to decide these issues is present for the legitimation action. Therefore, the judge must first decide whether to grant the legitimation. If granted, the court can move forward to discuss the issues of custody, visitation and support within the same action. That is what we are doing today – the first step in that process.

**[*END SCRIPTED PORTION OF THIS OUTLINE*]**

1. So let’s break down some of the features of a legitimation action:
   1. **Child born outside of marriage.**
      1. Georgia law provides that any child born is the legal child of the mother. If the parents were married at the time of the birth (not the time of conception – that would have ruined the purpose for shotgun weddings if it was not at the time of birth), a legal presumption arises that the child is “of the marriage.” That means that we presume that the husband is the father and the child is automatically “legitimate” as a matter of law.
         1. **§19-7-20(a)** “All children born in wedlock or within the usual period of gestation thereafter are legitimate.”
         2. **§19-7-20(c)** “The marriage of the mother and reputed father of a child born out of wedlock and the recognition by the father of the child as his shall render the child legitimate; in such case the child shall immediately take the surname of his father.”
      2. So if the child was born and the parents were married at the time of birth (or subsequently marry after the birth), there is no need to file a legitimation action because the child is *presumptively* legitimate. We will discuss in a moment what happens then the facts (or the biology) shows that the husband is not actually the father.
      3. So the short answer is that every child born when the mother is married is presumed to be the legitimate child of the father. And legitimation actions are only addressed to children born outside of wedlock.
   2. **NEXT BIG ISSUE: Only a father can file a legitimation action.**
      1. The law says that every child born is the legal child of the mother. If the child is not legitimated, the mother has all parental power over the child.
         1. **§19-7-25** “Only the mother of a child born out of wedlock is entitled to custody of the child, unless the father legitimates the child as provided in Code Section 19-7-22. Otherwise, the mother may exercise all parental power over the child.”
      2. Therefore, the entire legitimation process must be initiated by the father.
         1. As an aside, there is a process for the mother “to establish paternity and to set child support.” Notice it says nothing about legitimation, only to establish a legal duty to financially support the child by first establishing paternity as creating that duty.
         2. **§19-7-43** allows child, mother, custodian, Dept. of Human Services, and even the father to file an action to determine paternity and establish support obligations. BUT this code section mentions nothing of “legitimation.”
      3. We will discuss in a moment the “modern family” issue when the other spouse cannot biologically be the “father.”
   3. JURISDICTIONAL ISSUES
2. **Jurisdiction/Venue and procedure:**
3. Under §19-7-22(b) the action must be filed in the county of the residence of the mother (or other person who has legal custody or guardianship of the child), assuming that person is a resident of Georgia;
4. If the mother is not a resident of Georgia or cannot, after due diligence, be found within the state, the petition must be filed in the county of the residence of the petitioner;**vii**
5. If filed in a pending adoption action, the legitimation petition must be filed in the county where the adoption is pending;**viii**
6. If there is a legal father who is not the biological father, the legal father must be made a party to the action, served according to the Civil Practice Act and be afforded an opportunity to be heard;**ix**
7. A “legal father” in this context would include a male who has not otherwise surrendered his legal rights to the child and who: a) has legally adopted the child; b) was married to the biological mother at the time the child was born or within the usual period of gestation, unless paternity was disproved by a final order; c) married the legal mother after the child was born and recognized the child as his own, unless paternity was disproved by a final order; or d) has legitimated the child.**x**
8. The legal father also has a right to intervene in a legitimation action.**xi**
9. Where mother files an action for establishment of child support (§19-7-43), the father may file a counterclaim for legitimation.**xii**
10. The UCCJEA applies to all custody determinations and while the court may have jurisdiction to enter a legitimation order, it does not automatically follow that the court has jurisdiction to make a child custody determination if the requested legitimation is granted.**xiii**
11. The juvenile court has concurrent jurisdiction to hear a legitimation action where transferred to it by proper order of superior court**xiv** and where there is a pending dependency action in juvenile court.**xv**
12. **Requirements of petition:**
13. Only a biological father may file a petition for legitimation and, therefore, a stepparent cannot bring a legitimation action;**xvi**
14. The petition must set forth the name, age and gender of the child, the name of the mother;**xvii**
15. The law allows the petitioner to request that the child’s surname be changed and if the petitioner seeks to have the name of the child changed, the new name of the child must be a part of the petition;**xviii**
16. Older cases noted that the superior court did not have the right to terminate the parental rights of a legal father which is effectively what a legitimation petition accomplishes where there is a legal father who is not the biological father.  However, that issue was resolved with the enactment of §19-7-1(b.1) which gave superior courts the authority to terminate parental rights of a legal father in connection with a petition for legitimation.**xx**
    1. **Deciding whether to grant the legitimation (“opportunity interest”).**
       1. So under what circumstances could the judge deny the legitimation petition?
       2. The law has long held that ““unwed fathers possess an opportunity interest [to develop a relationship with their children that is] protected by due process of law.” And “This opportunity interest begins at conception and endures probably throughout the minority of the child. But it is not indestructible.” *Mathenia v. Brumbelow*, 308 Ga. 714, 843 S.E. 2d 582, 588 (5/18/2020).

[*SHOUTOUT TO THE AUTHOR: JUSTICE MELTON*]

* + 1. Unwed fathers have an interest that is protected by due process. BUT, if not pursued, it can be lost or abandoned.
       1. When deciding whether to grant a legitimation petition, the law says it *should* be granted *unless* the father has lost his opportunity interest to the child.
       2. “Factors which may support a finding of abandonment include, without limitation,
          1. a biological father's inaction during pregnancy and at birth,
          2. a delay in filing a legitimation petition, and
          3. a lack of contact with the child.” *Mathenia*, supra.
       3. Judges look to issues such as whether the father was involved with the birth, supported the mother (emotionally or financially) during the pregnancy and birth process, the father’s relationship with the child (or lack thereof) after birth.
       4. While the lapse of time between the birth and the filing of the legitimation petition is an important factor, we frequently see cases where the father has a relationship with the child, maybe even visitation under an informal agreement, but files the petition to legitimate years after the birth once he “gets sideways” with the mother. That is an important point to consider but is not conclusive.
       5. It is possible that the mother never told the father that the child was born or otherwise attempted to frustrate the father’s relationship with the child (frequently the case). Those facts are important when deciding whether the father has lost his opportunity interest
       6. “In considering a legitimation petition, the court must initially determine whether the father **has abandoned his opportunity interest to develop a relationship with the child**.”**xxviii**
       7. “[T]he appropriate inquiry is not whether ‘the father could have done more,’ but rather whether the father ‘has done so little as to constitute abandonment.’”**xxix**
       8. The fact that the father did not file a legitimation petition earlier because the results of genetic testing had not been obtained is no defense to an unreasonable delay.  Genetic testing is not a prerequisite to filing a legitimation petition and, therefore, cannot be an excuse for not filing the petition earlier in the child’s life;**xxx**
       9. The fact that the biological father had been incarcerated is no excuse for failing to file a legitimation petition earlier in the child’s life;**xxxi**
       10. The lack of contact during the child’s lifetime is an important consideration when deciding whether the petitioner has abandoned his opportunity interest;**xxxii**
       11. Payment of child support (either voluntarily or involuntarily) is a factor the court should consider when addressing an opportunity interest argument;**xxxiii**
       12. **Best interest determination:**

1. The court must **then determine whether the petitioner is a fit parent and that legitimation is in the best interest of the child**.  The court can find that the petitioner has abandoned his opportunity interest and, yet, can still grant the legitimation petition if the court finds that petitioner is a fit parent**xxxvi** and that the legitimation is in the child’s best interest;**xxxvii**
2. “In determining whether legitimation is in the best interest of the child, ‘the court must examine the benefits that might flow to the child if she were legitimated and…consider the legal consequences of the grant of the petition.”**xxxviii**
3. Where there is a legal father of the child who is not the biological father, the best interest standard is implicated in an even more heightened manner.**xxxix**
4. It is the petitioner’s burden to prove that he has not lost his opportunity interest as addressed in detail above.
   1. **Change of surname of child.**
      1. There is one other area where there are HUGE disagreements in legitimation actions – the name change of the child
      2. The statute (**§19-7-22(d)(1)**) allows for the judge hearing the legitimation petition to decide whether the child’s name should be changed, assuming the legitimation petition is granted.
         1. There is very little guidance on this point (within the statute) as to what factors courts should consider in deciding whether to change the child’s name
         2. I usually consider the age of the child (if the child has an “identity” associated with that name), the history of a relationship between the child and the biological father, whether there are other children in the household who have the same surname, etc. But these are my personal guidelines and are not based upon legal principles.
   2. **Custody, visitation and support – Limited to legitimation actions**
      1. ***Only*** after the court decides that the legitimation petition IS GRANTED
      2. Court address issues such as child custody, visitation and support.
      3. The same custody/visitation/support rules that apply in all other types of domestic relations cases apply here
5. **Child Support (§19-6-15):**
6. There is a right to a jury trial on the issue of child support in a legitimation proceeding;**lvi**
7. In a legitimation action, you may be asked to make an initial award of child support and you could also be asked to consider a modification of a prior child support determination;**lvii**
8. Need financial affidavit to make determinations;**lviii**
9. The Child Support Guidelines (“Guidelines”) must be used when setting or modifying child support;**lix**
10. Child support payments cannot be waived or forgiven by the parents;
11. **UNIQUE ISSUES ASSOCIATED WITH LEGITIMATION ACTIONS**
    1. The **statutory presumption**
    2. What happens if the husband is not the father? Can that presumption of legitimacy for a child born “of the marriage” be rebutted?
       1. First take a moment and consider the “reason for the rule.”
          1. This statute simply promotes marriage and promotes children being born into marriages. Putting aside the value judgment associated with that philosophy for a moment, understand that it is actually quite common for people who are married to have sexual relations with people other than their spouse.
          2. You have people who are married, separate but do not get a divorce and move on to have children with other people. And you also have spouses who are involved in extra-marital affairs so….
          3. Tain’s example: Divorce in 2020; child born in 2017; husband incarcerated for the past 7 years; I’m not good at math, but…
       2. **§19-7-20(c)** “The legitimacy of a child born as described in subsection (a) of this Code section may be disputed. Where possibility of access exists, the strong presumption is in favor of legitimacy and the proof must be clear to establish the contrary.”
    3. **“MODERN FAMILY” issues**
    4. Legitimation actions can only be filed by “the father.”
       1. We are all surprised that this statute has not been challenged on a constitutional basis by a same sex couple where one of the partners adopted a child during their relationship.
          1. §19-7-22(a)(1) defines a “biological father” as “the male who impregnated the biological mother resulting in the birth of a child”
          2. §19-7-22(a)(2) - “Legal father” means a male who has not surrendered or had terminated his rights to a child….
          3. Discuss same sex marriages and how the “presumption of legitimacy” seems both socially outdated and factually (biologically) impossible
          4. [discuss Tain’s case with sex change “father”]
    5. Georgia’s experiment with **“administrative legitimations.”**
       1. What a nightmare.
       2. For several years, someone thought it would be a great idea for Georgia to have “administrative legitimations.” [In fairness, some states STILL have them and this is no worse than the “common law marriage” problem we tolerated for years]
          1. Instead of legitimation actions heard in a courtroom as addressed above, the parents would sign (and countersign) a form at the hospital [or not; or think maybe they did].
          2. If signed correctly, the child left the hospital as a “legitimate child.”
       3. Couple of problems:
          1. The statute itself (**former §19-7-21.1**) provided a list of six circumstances under which the administrative legitimation “would not be recognized.”
          2. But they were all fact-based determinations! So the “administrative legitimation” would remain on file – but there was no mechanism to determine how the administrative determination would be declared to be “not recognized.”
          3. More often than you would like to believe, the man who is present at the hospital for the birth is not the father; biological, legal, or otherwise.
          4. If he signed the form (in the hospital, without understanding of legal rights, while mom is dealing with pain, emotion, etc. from childbirth), then he was the legitimated father, even if mom was married to someone else at the time and without establishment of paternity even being addressed.
          5. Understand that outside of the administrative legitimation issue, fathers are listed on the child’s birth certificate in the normal course. I cannot tell you how often we had disputes in court as to whether the father had signed the birth certificate or signed the administrative legitimation certificate. It was more pain than it was worth and was finally abolished in 2016.
          6. Administrative legitimation was created in 2008 and abolished in 2016.
          7. THOSE CASES CAN STILL ARISE- PEOPLE THINK THEIR CHILD IS LEGITIMATED UNDER THAT PROCESS…

WELL, FOLKS, THAT IS A BRIEF OVERVIEW OF THE ISSUES OF A LEGITIMATION ACTION.

BUT WHAT IS THE MOST IMPORTANT THING WE LEARNED?

NO “Z” IN LEGITIMATION.

I’M WADE PADGETT.

AND I’M TAIN KELL.