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On Tuesday 24/4/2001

Paternity and Child Support

Summary:

Some time ago Morgan Wise, a resident of the town of Big Spring, Texas, was mortified to discover that he is not the biological father of three of the four children of his former marriage. He was also mortified when a court found that he must continue to pay child support for the three children and then proceeded to strip him of his visitation rights to the children.

The program looks closely at this case and how DNA testing is influencing the rights and responsibilities of fatherhood as interpreted by the courts both in the United States and Australia.

Details or Transcript:

Damien Carrick: Today on The Law Report how do Family Law Courts, both here and in the USA, define fatherhood in a world where DNA testing has taken the doubt out of paternity

Morgan Wise is a train driver who lives in the town of Big Spring, Texas, population 24,000. It's at the bottom of the Texas Pan Handle, about 500 kilometres west of Dallas. For many years he was married to Wanda, and together they raised four children.

In 1996 the couple divorced. Morgan, as you'll hear, is paying child support for the four children. But as his attorney, Robert Miller, explains, a coincidence of timing, new technology and a genetic disease have changed Morgan's ideas about family.

Robert Miller: Morgan's a hard-working individual, works for the Union Pacific Railroad; he's a train engineer. He's the biological father of one and deemed legal father of four children; he's divorced, and he recently remarried, and he's paying child support and honoured his legal obligations.

Damien Carrick: Morgan Wise for many years, believed himself to be the father of four children in his marriage; why did his understanding change?

Robert Miller: He was divorced in '96. At the time of the divorce, the youngest child has cystic fibrosis. In '99 part of his side of the family was concerned where did the genetic gene come from? Both parents have to have the recessive cystic fibrosis gene before a child is born with it. And so they did a gene screening, a CS screening, and he was not a cystic fibrosis carrier. And so the doctor told him, he said, 'Morgan, I don't think this child's yours and the only way we know is do a DNA.' So he did the DNA of the boy and it's kind of like you could do three for the price of one, so he did all three boys, never expecting all three of them to come back not being his children.

Damien Carrick: What financial arrangements were in place at the time he divorced his wife, or at the time that the tests showed that he wasn't their biological father?

Robert Miller: When he first started divorce, he had custody of the kids and then custody was given to the wife because he was working on the railroad, and the judge was basically saying 'The parents can't raise them, the grandparents', so the wife asked for custody of the children back, and instead of fighting, he did that.

Now his financial arrangements, he was paying \$1100 a month child support, and still is, at the time we found out about the DNA.

Damien Carrick: And presumably when he found out that he wasn't the biological father of three of the four children of the marriage, he tried to change the financial arrangements. What did he try and change?

Robert Miller: Well the first thing we did was file a motion to terminate paying child support on the three boys. That was denied. And then we filed a Bill of Review, which was a new lawsuit to ask the court to set aside the divorce decree that found him the father of three boys, when in fact he isn't. In Texas, any child born of the marriage, the father is the presumed biological father, and there's no way he could ever be a biological father now.

Damien Carrick: Were the DNA tests, the genetic tests, were they admissible in court?

Robert Miller: If the divorce hasn't gone through, DNA testing is admissible, and there can be a finding if the child is not born of the marriage and you can't order child support. Once the divorce decree is entered, unless we can change the law, Texas takes the attitude that you're barred. That's it. And therefore you can't set aside and the DNA testing is not admissible. Now in this case, that wasn't the issue about DNA, the issue was can you even open up the divorce decree when you have proof and facts that's going to state that you're not the presumed father, and the Texas law basically says you can't do it and that's why we're on appeal, using the Equal Rights Amendment and the due process of law amendments of the US Constitution and the State Constitution. We're calling it a constitutional issue now.

Damien Carrick: The appeal was heard in February and a decision is expected in the next few months. I asked Robert Miller whether his client has any visitation rights to the four children that

he's financially supporting.

Robert Miller: No. What happened was the kids were aware of this. My client says the mother told them. He was called by the councillors to come to the school and explain to the children what's going on, so he went to the school, explained to the boys that he is not their biological father but he's still their daddy. And the mother got upset about that and filed a motion with the court saying 'He should have supervised visitation'. The judge was hearing the item, and the judge didn't like the fact that Morgan is talking to his children about this, so he just said, 'You're not going to see any of them.' And just summarily cut off all visitation. I personally believe part of it is that the judge did not want the journalists, the newspaper and the people to know about this. He doesn't like the idea that we're talking, in my opinion, I don't know if it's true, but in my opinion I think he doesn't like us talking to you-all.

Damien Carrick: Was part of the judge's reasoning perhaps that he felt that discussing this with the children may well upset them and leave them confused and rejected?

Robert Miller: Oh yes, I think he felt that. He thinks it's detrimental, not to their best interests. And you know, I agree, but what do you do? What's the alternative? Do you lie to your children, or do you say 'We're going to tell them when they get older?' I mean there is not an easy answer to that issue. The innocent people in this whole process is Morgan and his children; the guilty person in this whole process is the mother. I mean it would have been better if the mother had come out with this in the very beginning, than to just, you know. You can cover up a lie, and eventually the truth comes out, we all know that.

Damien Carrick: What do you say to the argument that if a man has loved and cared for children, loved them as his own children, then if he subsequently discovers that he isn't the biological father, that doesn't change his feelings, and perhaps not even his

responsibilities towards those children.

Robert Miller: That's true, and that's been argued. His feelings haven't changed but the responsibility towards them; what is his responsibility, is it his responsibility to give money to the ex-wife who hasn't worked in two years, and is not working? What about the responsibility of the biological father who we're after, we even sued the biological father and we can't get paternity tested on him, the alleged biological father. Does he not also have a duty to pay support? And if there were three different fathers, she would even get that much more money under Texas, because it's a percentage of your nett income. So it's not like the money won't be there, I think it's more of a question who has the legal obligation, and I'll go one step further: if you don't pay child support you can go to jail. Should a man be locked up in jail for non-payment of support of children who are not his, a criminal-type process, where we've used DNA to get people out of jail who are wrongfully convicted now.

Damien Carrick: So tell me about the legal action you've taken against the person who you believe is the biological father of the three children.

Robert Miller: We filed a torte action, meaning we sought to go after both of them for conspiracy and fraud, concealment, reimbursement of all child support that's been paid, and the determination that he's the father. The judge severed that course of action from the Bill of Review for reopening the case, and is now abated, meaning it's just on hold. You cannot sue another person to be the father of a child while there's already a legal father, in other words we've got to get out from underneath the divorce decree or we don't have a course of action as it stands now.

Damien Carrick: You mentioned earlier that the victims in this sad situation are both your client and the children; yes, of course that's true, but we shouldn't really be punishing the children in any way,

shape or form for what the mother did, even if that had ramifications for your client.

Robert Miller: Well what do you mean about punishing the children, I mean you're equating punishing the children meaning by telling them the truth, I assume.

Damien Carrick: Telling them the truth and attempting to no longer pay maintenance.

Robert Miller: Well I don't see how the children are punished. They're not going to be on the street without any income because the minute Morgan's out of it, we've got someone else to pay the money so the income's going to be there. It's not like - someone's (not) going to pay child support. Psychological is the other item; I don't know what you do about that, I mean what do you do about the relationship between the children and their mother. Who caused it? I think that's damage control that the mother needs to be able to explain to her kids rather than putting the blame on the father. I think the mother has the duty to say 'This is what happened' and whatever, and I don't see why Morgan's the guy that's in the black hat and the bad guy for just seeking the truth. We've got to talk in terms of moral issues versus legal issues. Morally it's not good, but do we set a legal precedent where a court's in a position of condoning and protecting a person who committed perjury in court. We specifically asked her if she ever had marital affairs when we got the divorce. Do we protect a person if they can lie long enough and keep it concealed to the point that the court now protects them. Is that a legal precedent to establish? So you've got two competing issues, the moral issue and the legal issue, and I just don't see how you can take a court of law and condone perjury.

Damien Carrick: Now I understand that this legal principle isn't unique to Texas, in fact it applies in most American States, I think there are only three or four States which allow DNA evidence to

alter child support obligations subsequent to a divorce. But I believe the National Conference of Commissioners on uniform State laws has proposed legislation that would give men two years to challenge paternity; do you think that's a good idea?

Robert Miller: No. There should be no Statute of Limitations. Because what if you're happily married you think, and then five years later you find out you're getting divorced, you do DNA testing and bingo! you find out it's not your child. Why don't we do DNA testing at the time of the birth of the child? I mean we do all sorts of other tests when a kid's born. But I know people are not going to go with that, they'd say, 'Oh gosh, that's an invasion of privacy', but that would be the way to resolve it, you'd know it right then.

Now in Texas there are some DNA labs that have billboards up on the sign that are basically catering to mothers saying Who is the father? and they tell them how to get samples of DNA, send it in, and they will then tell the mothers whether or not their husband is the father of that child, and it's a very discreet way of doing it. I think now I tell fathers getting divorced, 'Do DNA testing; if you don't it's malpractice'. And no-one's talking about the child. Does not the child have a right to know its genetic history when it grows up? Does the child not have a right to inherit from its natural parent? A child born of the marriage basically has less rights, an illegitimate child, than an adopted child.

Damien Carrick: Big Spring is a small country town unused to national media attention. And according to lawyer and academic, Professor Jack Sampson, of the University of Texas, that point's important to a full understanding of the Morgan Wise case. While Mr Wise doesn't think he should pay to support three children who are not biologically his, he says that he still wants to have a relationship with them.

But Jack Sampson says it's not that straightforward.

Jack Sampson: Big Spring is not a big place. He's in the paper, he's in the Dallas papers, he's on national television. Big Spring, Texas is a white spot in the road, and the idea that well the children don't know when it's in the national papers, is pretty ludicrous. So he's taken these three boys and held them up to scorn and ridicule in their school and in their community and with their friends, and everybody can say 'Oh, there's the kids that are the product of adultery and adultery and bastards now the three of them,' and so forth and so on. And he can say, 'Well I wanted to maintain a relationship, I didn't want to pay child support but I wanted to maintain a loving relationship', and if you believe that, more power to you, but I'm dubious, let's say dubious. Males want to have it either way, they want to really say, 'If I want to keep the kids, they're mine, your wife ought not to be able to kick me out of their lives because you're the guilty party, you've defrauded me and I accept the consequences of that fraud, but I want to maintain a relationship.' The next male in the same fact situation says 'They're not my kids I learned about it later, I don't want to have anything to do with them. Goodbye to you and goodbye to child support.'

Damien Carrick: But isn't that too black and white? Aren't there shades of grey?

Jack Sampson: No it's not, it isn't really too black and white, it's basically the choice that you've got, is that you are the father and you have custody rights, you have visitation rights, you pay your child support or you're not the father and you don't have those things.

Damien Carrick: I understood that the court took away the visiting rights of Morgan Wise because he spoke to his children about the biological facts. And surely there are shades of grey where you could talk about those things without necessarily closing up the child-father relationship?

Jack Sampson: I think there are shades of grey, and if the talk hadn't been on national television in a little small town, perhaps it might have been a different situation. But the publicity, I mean you know, yes, the man's very angry, he's been cuckolded, this has been going on as long as man has lived in small groups. So if it had been a conversation under certain circumstances, undoubtedly it would have been very hard on the children, but the way it was actually played out, it was extraordinarily hard on the children. Think of what from the child's perspective, what has happened that their lives, through the anger that the husband has against his adulterous wife, and the adulterous wife if undoubtedly the bad guy, the real bad guy in this whole scenario but if we're going to nominate bad guys, when you take a look at the child's perspective, the mother isn't the only bad guy. That's my belief that yes, for the way it was handled caused the maximum psychological trauma to the children.

Michael Gilding: I wonder whether the DNA testing is a bit like the modern-day chastity belt, it's another way for men to control women's sexuality and guarantee biological paternity in a way that they might once have done through the chastity belt. And so the support for DNA testing might be seen as kind of a modern-day equivalent to support for the chastity belt in medieval times. It's never been possible to absolutely guarantee biological paternity. Biological fatherhood has always been a social relationship. We know who the biological mother is, but we've never as a species been able to guarantee biological paternity. Now historically, if you look at societies throughout the ages, the way in which kinship systems and societies have dealt with is by controlling women's sexuality, from chastity belts to being pelted to death with rocks for adultery. Now I think what's happened over the last 50 years is that men's capacity to control women's sexuality has diminished enormously, just dramatically. I mean largely because of changes in the workforce. Women now have the capacity to earn an independent income. And I think the other thing to remember is that in the past, mostly men left women. Now since the 1970s it's

mostly women who leave men, and in about two-thirds of cases in countries like the States and Australia, women are leaving men, women are more dissatisfied with marriage than men, and often the men are really, really angry. And they want revenge. And I think one way to wreak revenge is through DNA testing and questioning children's' paternity, and this is one more bargaining chip in a way, to prolong the relationship too, you know, 'If she won't love me, at least she'll hate me', I think there's that element as well.

Damien Carrick: Sociologist, Michael Gilding from the Swinburn University of Technology. The legal response to this issue differs from place to place. Melbourne Family Law specialist, Michael Taussig of Taussig, Cherrie and Associates says in Australia new evidence on paternity can alter child support obligations at any point in time.

Michael Taussig: Well there's been a recent decision, in fact as recent as April 1999, in which the Family Court of Australia held that DNA testing could take place even in the circumstance where the putative father had been held some 12 or 13 years previously not to be the father. And it was done on the basis that it was an important issue, paternity was an important issue, child support was an important issue, and for those social purposes and for the benefit of the child, that issue could be re-litigated.

Damien Carrick: And what was the upshot?

Michael Taussig: The upshot was that the judge held that DNA testing should take place, particularly because DNA testing was not available 12 or 13 years ago and it was blood tests, which were certainly not as up-to-date as DNA testing is. Blood tests could establish paternity to the tune of roughly 80%, whereas DNA testing is so close to 100% that it doesn't matter.

Damien Carrick: So the attitude of the courts in Australia is if there is new evidence, we're prepared to take that into account; if in fact the father is not the biological father of the child, we're prepared to overturn any court orders.

Michael Taussig: Yes, that's the purport of that decision, and it was not a surprising decision.

Damien Carrick: In the USA the law is different, primarily because of a philosophical difference as to what are the best interests of the child; the argument is put that the door needs to be closed. If somebody is established as the father, if somebody is paying child maintenance, there's no point in reopening that door even if in fact they are not the biological father. What's your view?

Michael Taussig: Look, I can understand both arguments, and I think both arguments are quite valid. I guess at the end of the day it's a pretty subjective approach and subjectively the Australian approach appeals to me more, because I don't think that you should compound a wrong, I think that if a wrong is established, you ought to be able to overturn it.

Damien Carrick: One of the arguments put to me by a legal academic in Texas was, 'Well you shouldn't, if somebody is actually supporting a child and perhaps even loving a child, then you shouldn't remove that force from the child's life before you can actually put in another one, and therefore that's an argument for keeping that door closed.'

Michael Taussig: Yes, I hear that. I find that fairly convoluted reasoning. There is nothing to stop a person that has been in the position of a father maintaining that position and in fact paying some money if that's what he wants to do. And ultimately if he's been excluded from the child's life and wants to be included in a child's life, he has the opportunity to go to court and to attempt to do that.

Damien Carrick: The principle underlying our Family Court system is the best interests of the child, so presumably that's consistent in our court system with getting to the bottom, getting to the truth of the matter when it comes to paternity at whatever stage.

Michael Taussig: Yes, that's right. And I guess that our social mores, or mine anyway, suggest that's in the best interests of the child, but that's not to say that somebody else won't have a different view, as they obviously do have in Texas. And I don't know how to resolve the impasse, it just I guess depends where you live at the time and what the community's expectations are at that time.

Damien Carrick: Another important difference between the USA and Australia is media coverage of Family Law cases. In this country the publication of any information which might identify anyone involved in a Family Law dispute is strictly forbidden.

Well why have the USA and Australia come to such different conclusions about how to deal with the issue of paternity?

Sociologist Michael Gilding has studied and written at length about the history and changing nature of family and kinship. He says the Morgan Wise paternity case, when you boil it down, is about money, it's about financially supporting a child. He says it's a social welfare issue which has been occupying policymakers and lawyers for a long, long time.

Michael Gilding: 100 years (ago) in Australia the big welfare issue was the problem of wife desertion, because men kept on shooting through and going to the goldfields, and the inner cities were crowded with women who were looking after their children. Now that hasn't changed, like really we still confront that issue of how do you get biological fathers to look after their children? In

Australia for example, about 40% of marriages end in divorce. In 92% of the cases, it's the mothers who look after the children; in about two-thirds of all the cases where divorce occurs, biological fathers rarely see their children or don't see their children at all. So it's a problem for governments to try to get biological fathers to take responsibility for their children, because if the biological fathers don't look after them, who will?

Now America on the whole, has had a meaner welfare system than Australia, and I think probably the difference between the United States and Australia don't so much have to do with different attitudes towards biological fatherhood, what they have to do with is the role of the welfare state, and the attempts by governments to actually make fathers take responsibility for children.

Damien Carrick: The agency responsible for calculating and administering child support in Australia is the Child Support Agency. Sheila Bird is the agency's Assistant General Manager. She points out that non-biological parents do sometimes have child support obligations. But she says the agency does change child support obligations when new DNA evidence becomes available.

Sheila Bird: What the father could do is say to the Child Support Agency, 'Look, I don't believe I'm the father', and what we would say to him is, 'Well you must apply to the court and the court will make a decision in relation to that.' And until the court makes that decision, then the Child Support Agency will need to operate on the presumption that you are the father. What he would then do is go to the court, the court for example could order the DNA testing, and as a result of that they might make a declaration that he's not the father of the children. At that point in time, the child support assessment itself would end, but what the mother could do at that point in time is apply to the court for the person who was previously thought to be the father, to continue to pay child support on the basis that he is the step-parent of the children. And then in

making that decision, the court has to look at a whole host of circumstances, things like the length and circumstances of the marriage between the parents, the relationship between the step-parent and the child, and what arrangements have been made for the care of the children. So the court can look at all of those factors and decide whether or not that person is to pay child support into the future.

Damien Carrick: In instances where somebody subsequently discovered that they weren't the biological father and have gone to the court to change their obligations in terms of child maintenance or child support, does the Child Support Agency ever provide a refund for the amounts which have previously been paid?

Sheila Bird: There have been circumstances in the past where this has happened. However it's not our policy to do that because it's appropriate and in accordance with the legislation for the parents to ask the court to make that particular decision. There is one other thing that we can do: when a parent applies to court for the court to make a decision that they're not the father of the children, that person can tell the Child Support Agency that they've made that application and they can ask us not to pay out money to the other parent until the court has made that decision, and once the court makes a decision we would either refund that money if the person was found not to be the father, or we would pay the money out to the other parents who's looking after the children if the court said that they are the father and liable to pay child support.

Damien Carrick: But of course a DNA paternity bombshell can impact on more than just child support

Michael Taussig: I can actually recall a case in which I was involved where the property settlement was achieved in principle, although not documented. For some reason or other between the

time the settlement was achieved and it was documented, the husband, who happened to be my client, had a second thought and wanted to be sure that the child was his. DNA testing took place, it was established that he was not the father in fact, and the property settlement collapsed and the wife ended up getting significantly less than she would otherwise have got. And I would imagine that that sort of scenario would be replicated from time to time.

Guests on this program:

Robert Miller
Texan lawyer

Professor Jack Sampson
Lecturer, University of Texas

Sheila Bird
Assistant general manager, Child Support Agency

Michael Taussig
Family law specialist

Michael Gilding
Sociologist, Swinburne University of Technology

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