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OF WEST VIRGINIA

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Maynard, Justice, dissenting:

This case raises several significant questions on which the majority and I strongly disagree. First, should any man, rich or poor, be legally and financially responsible for a child that absolutely is not his and that he did not father?

Second, do children have a right to know the identity of their biological fathers?

Finally, should courts hold mothers accountable when they deliberately make patently false statements? I would like to examine how the majority opinion answers each of these questions, and how I would answer them differently.

The majority opinion is based on *res judicata*. In other words, the majority says that because William E.W. did not challenge paternity during his divorce proceedings or appeal the issue of paternity during the statutory four-month time period, he is *forever* foreclosed from litigating the paternity issue even in light of new facts. The result is that William E.W. must financially support Crystal, who is undisputedly not his child, until she reaches adulthood. According to the majority, this result is compelled by Syllabus Point 1 of *Nancy Darlene M.*

v. James Lee M., Jr., 184 W.Va. 447, 400 S.E.2d 882 (1990), which states, in part, “An adjudication of paternity, which is expressed in a divorce order, is *res judicata* as to the husband and wife in any subsequent proceeding.”

In *Nancy Darlene M.*, the putative father, James Lee, observed his wife, Nancy Darlene, having sex with another man before she discovered that she was pregnant with L.D.M. Nancy Darlene M. subsequently told James Lee that he was not the father of the unborn child. Nevertheless, during divorce proceedings, James Lee opined that he *was* the father of the child. As a result, the divorce decree stated as much. James Lee did not challenge paternity until a hearing was held on his failure to pay child support. At that point, James Lee was required to undergo blood tests. This Court held that the original divorce decree was *res judicata*, and the trial court should not have ordered or considered blood tests to determine paternity.

The facts of *Nancy Darlene M.* are very different from the facts of the instant case. When Betty L.W. instituted a divorce action against William E.W., she alleged that the three children, including Crystal, were born of the parties’ marriage. Unlike James Lee, William E.W. had no reason to question the paternity of the children. Accordingly, he admitted paternity of the three children, and this was indicated in the December 6, 1996 divorce order. It was not until March 2001, when the appellant discovered through DNA testing that he was not Crystal’s biological father, that he challenged his support of Crystal. Despite the significant differences between *Nancy Darlene M.* and the instant case, the

majority rigidly insists on taking the overbroad rule articulated in *Nancy Darlene M.* and awkwardly imposing it on the present set of facts.

Although I generally concur with the application of *res judicata* principles to promote finality in judgments, in cases like the instant one, the application of *res judicata* should be modified when it conflicts with the state interest in preventing paternity fraud. According to Black's Law Dictionary, 660 (6th ed. 1990), fraud is "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." This case is a perfect example of paternity fraud. Betty L.W. represented to William E.W. and to the court that William E.W. was the biological father of Crystal. This representation was made despite the fact that Betty L.W. knew there was either a possibility that William E.W. was not Crystal's father or that he absolutely was not her father. Betty L.W. made this representation so that she could collect child support from William E.W. on behalf of Crystal. Therefore, Betty L.W. intentionally perverted the truth concerning Crystal's paternity for the purpose of inducing William E.W. to pay child support. As I said previously in my dissent in *William L. v. Cindy E.L.*, 201 W.Va. 198, 204, 495 S.E.2d 836, 842 (1997), "fraudulent conduct exists in every case where a wife gives birth to a child cognizant of the fact that paternity is uncertain, yet remains silent while her husband innocently assumes the care of the child."

This brings us back to the three questions asked above. First, the majority believes that a man should be responsible for a child that he absolutely did not father, regardless of the circumstances. I, on the other hand, believe that, instead of applying an overbroad and ironclad rule, the Court should take into consideration the circumstances of each case. For example, I understand and cannot really take issue with this Court's decision in *Nancy Darlene M.* based on the law of estoppel. If a man willingly holds himself out to be the biological father of a child despite knowledge to the contrary, he may be estopped from subsequently disavowing paternity. In the instant case, however, William E.W. innocently admitted paternity based on the fraudulent misrepresentations of Betty L.W. Therefore, I do not believe that he should be legally and financially responsible for Crystal.

Second, when there is a final divorce order indicating paternity of a child which is later determined to be false, the majority believes that the child does not have the right to know the identity of his or her biological father. Instead, the extent of the child's knowledge is bound by a legal document and the doctrine of *res judicata*. Again, in contrast, I believe that in certain circumstances, such as where fraud exists, the child has the right to know her biological father's identity. For example, it may be of the utmost importance for a child to know his or her biological father's medical history. And, if that biological father should die, that child has a right to inherit from his estate and to collect monthly social security checks until emancipated. We will just ignore the child's rights in that area says the majority.

Third, the majority does not believe that mothers should be held accountable when they deliberately make patently false and fraudulent statements. Rather, the majority opinion has the effect of permitting mothers who commit paternity fraud to continue to receive the ill-gotten fruits of their fraudulent conduct. I, in contrast, believe that fraud should be punished, and its victims should be relieved of their obligations that were induced by fraud.

Apparently, the idea of paternity fraud does not trouble the majority. Nevertheless, it should. Consider this. In 1999 alone, almost one-third of 280,000 paternity cases evaluated by the American Association of Blood Banks excluded the individual tested as the biological father of the child. In a period of only one year, that is almost 100,000 men who were falsely accused of being the father of a child which they simply did not father. And that is only one year!

Some states are currently acting on the issue of paternity fraud. For example, Georgia enacted legislation in May 2002 which allows a man to stop paying court-ordered child support if DNA tests prove he did not father the child in question. That bill passed both houses of the Georgia legislature by huge margins. David Gary, writing for the Associated Press, says that according to the National Conference of State Legislatures, more than a dozen states now allow disestablishment of paternity in some circumstances based on genetic testing.

Some states have time limits, but the Georgia law and a similar law passed in Ohio in 2000 do not.

Notably, in Vermont, Representative Leo Valliere introduced a bill that would not only stop the child support, it would also create a new crime called “paternity fraud.” The bill provides that those who knowingly make false accusations of paternity could be jailed. If that result is too harsh for some, and it is too harsh for me, certainly we can find a middle ground between jailing those who intentionally misrepresent paternity and rewarding them for their deception.

The majority, however, obviously subordinates the punishment of paternity fraud and the relief of its victims to what it considers to be the best interests of the child. The majority and I do not agree on what constitutes the best interests of the child in this case. If the best interests of the child consist only in receiving a check in the mail every month, the majority may be correct. I, on the other hand, believe the best interests of a child include the opportunity to know and have a meaningful relationship with his or her biological father and the biological father’s extended family. I urge the reader to consider his or her own family relationships with grandparents, aunts, uncles, cousins, etc. How would you like not having, not knowing, and not loving all those folks in your family? That is exactly what we are taking away from children when we do not give them their real families. In addition, the best interests of a child consist of knowing his or her biological families’ medical history. Finally, a child’s

best interests are in not being exposed to the bitterness and anger of a man who supports a child as a result of fraud and is then legally compelled to continue such support even when the truth is revealed. In the instant case, I believe it is in Crystal's best interests to know who her real father is and to be given the opportunity to develop a relationship with her biological father and his relatives. As I said in *William L. v. Cindy E.L.*, 201 W.Va. at 204, 495 S.E.2d at 842:

This Court . . . simply by the entry of a court order, cannot compel the giving of love and affection any more than it can change the weather. The Court's poor powers in this area are limited to ensuring continued financial support. Such financial support is, of course, beneficial to the child, but falls far short of what constitutes the child's best interests.

In conclusion, the majority opinion has the effect of permitting a woman in West Virginia to conceive a child as the result of an adulterous relationship, misrepresent the child's paternity by lying to her estranged husband in order to receive child support payments, and, as a result of this deliberate fraud, induce the victim to pay a substantial sum of money every month for a period of many years. Further, the victim is powerless to relieve himself of this obligation even if he can prove the fraud in a court of law. This is not simply injustice, it is justice turned bottom side up. Accordingly, I dissent.

