

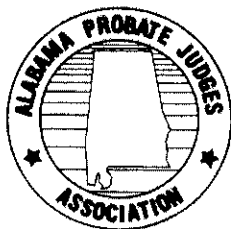
# Legitimation

**Honorable Nick Williams**

*Probate Judge, Washington County*

**Penny A. Davis, Esq.**

*Tuscaloosa*

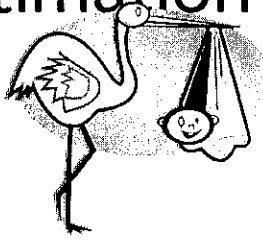


Probate Training Conference  
September 13-14, 2018  
University of Alabama School of Law  
Tuscaloosa, Alabama



Probate Judges Fall  
Conference  
2018

Paternity/Legitimation



## Statutes



## Legitimation

•26-11-1 through 26-11-3



## Legitimation by marriage of parents and recognition of child by father.

- **Section 26-11-1**
- The **marriage of the mother and reputed father** of a bastard child renders it legitimate **if the child is recognized by the father as his child.**



## Section 26-11-2

- (a) A father may seek to legitimate a child and make it capable of inheriting his estate by:
- ✓ filing a notice of declaration of legitimation in writing attested by two witnesses,
  - ✓ setting forth the name of the child proposed to be legitimated, its sex, supposed age and the name of mother, and
  - ✓ that he thereby recognizes it as his child and capable of inheriting his estate, real and personal, as if born in wedlock.

## DECLARATION

- **Section 26-11-2 (a) (cont.)**

- **The declaration:**

- ✓ acknowledged by the maker **before** the judge of probate of the county of the father's residence or the child's residence, **or its execution proved by the attesting witnesses**,

- ✓ shall be **filed in the office of the judge of probate** of the father's residence or the child's residence.

## GUARDIAN AD LITEM

- **Section 26-11-2 (b) (cont.)**

- The probate court **shall appoint** a **guardian ad litem** to represent the child:

1. **if the mother files a timely objection; or**
2. **if the court determines such appointment to be in the best interest** of the child.



## NOTICE

- (b) Notice shall be given to the child's mother and to the child as provided by the Alabama Rules of Civil Procedure.
- Notice may be waived as provided by the Alabama Rules of Civil Procedure.



## NOTICE

- (b)
- The child's mother shall, within **30 days** after receiving notice, **file her objection or consent** to the legitimation with the probate court.



## HEARING

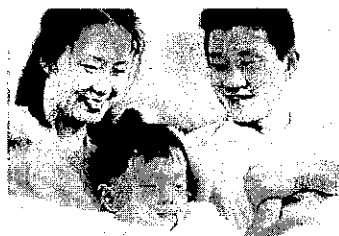
Following receipt of the mother's response or upon expiration of the time for her response,

- probate court shall conduct an **informal hearing**
- at which all interested parties may **present evidence** for determination of whether legitimation is in the **best interest** of the child.

## NAME CHANGE

- **Section 26-11-3**
- (a) The father may petition **at the time of filing the declaration of legitimation or at any time subsequent** to the determination of legitimation to change the name of such child,

(follow same procedure as in Section 2)



## Case Law



Underwood v. Underwood,  
460 So.2d 1306 (Ala. Civ. App. 1984)

- When a child is born of an illicit relationship, and parties **subsequently enter into a common-law marriage, this marriage serves to legitimate the child if father recognizes the child as his.**
- **Recognition** of child so as to legitimate it must be **unambiguous and clear.**
- **Essence of recognition** of child so as to legitimate it is **treatment of child as one's own.**



Evans v. Evans,  
434 So. 2d 254 (Ala. Civ. App. 1982)

**Synopsis**

In **divorce proceeding**, the Circuit Court

- ✓ granted divorce;
- ✓ awarded custody of child to wife;
- ✓ ordered husband to pay child support;
- ✓ alimony in gross and attorney fees; and
- ✓ divided parties' property.

Husband appealed.

**Evans**

- The **Court of Civil Appeals**, held that:
  - (1) wife's testimony tending to show former husband's **nonaccess** at time of child's conception and the **impossibility of such husband's parenthood was admissible**;
  - (2) **finding that presumption that former husband was father of child was overcome by clear and convincing evidence was not erroneous**;

## Evans

- The **Court of Civil Appeals**, held that:
- (3) **finding that parties had entered into common-law marriage subsequent to birth of child, so as to legitimize the child, was supported by substantial evidence;**
- (4) any error in admission of child's birth certificate, in which defendant husband was named as the father, was not prejudicial so as to require reversal;

## Evans

- **Evidence presented:**

**Though the testimony is heavily disputed,**

- ✓ Mrs. Evans began a relationship with Charles Leon Evans in the **spring or summer of 1976.**
- ✓ **She testified that she moved in permanently with him in May 1976.**
- ✓ This testimony was corroborated by another witness who also lived with Evans at that time.
- ✓ **Evans, however, testified that Mrs. Evans did not move in with him permanently until January 1977.**

## Evans

- **Evidence presented:**

- ✓ He admitted, however, in his deposition, that she spent several nights a week at his home in Prattville "visiting him" prior to that time, and that he had sexual intercourse with her as early as the summer of 1976.
- ✓ Mrs. Evans **changed her name** from Cox to Evans soon after the relationship began and the **parties filed joint income tax returns for 1977, 1978 and 1979.**

## Evans

**Evidence presented:**

- ✓ In **June 1977**, Mrs. Evans had a baby—a daughter who was named Maria Nicole Evans.
- ✓ **Evans took her to the hospital to have the baby, and he paid the bills in connection with the birth.**
- ✓ When Mrs. Evans was released with the baby from the hospital, she **went home to Evans' house.**
- ✓ **The child's birth certificate named Evans as the father.**

## Evans

### Evidence presented:

- ✓ At trial, Mrs. Evans testified that she had intercourse with no one but Evans during the critical period when the child was conceived.
- ✓ Evans, however, testified that she dated others while living in his house, and that he found her in bed with one of the young men who lived in the house at one time.

## Evans

- **In early 1978**, the Evanses and the child moved from Prattville to a house in Grand View Pines in Millbrook.
- **In July 1979, Mrs. Evans was divorced from Cox. She continued thereafter to live with Evans.**
- She left Evans' home with the child in February 1980. Mrs. Evans filed for divorce claiming that she and Evans were married on October 1, 1979, and that one child was born of the marriage, namely Maria, on June 19, 1977.
- Evans denied these allegations.

Murphy v. Murphy, 421 So.2d 1285  
(Ala.Civ.App.1982)

- **Synopsis**
- Appeal was taken from proceedings brought by an **administratrix to ascertain who were the lawful heirs and widow of the deceased.**
- The **Circuit Court**, determined that an **alleged illegitimate child was permitted to participate in the distribution of the estate.**

Murphy

- The **Court of Civil Appeals**, held :
- that where there **was neither a written, attested and filed declaration of legitimation;**
- **nor a judicial determination of paternity,**  
it was **error to permit the alleged illegitimate child to participate in the distribution of the assets of the estate.**

## Murphy

"We have concluded that there are **three situations in Alabama in which a child born out of wedlock may inherit from his intestate father, short of having been adopted by the father.**

**In the first**, the child is '**legitimated**' by the *marriage* of the parents and *recognition* of the child by the father as his own. Code 1975, § 26-11-1.

**Recognition must be unambiguous and clear** in its character. Howard v. Pike, 290 Ala. 213, 275 So.2d 645 (1973).

## Murphy

- "**In the second**, the child is '**legitimated**' by the father's *written declaration*, attested by two witnesses, which is filed in the office of the probate judge. Code 1975, § 26-11-2.
- "**The third situation** is a '**judicial determination of paternity.**' Code 1975, §§ 26-12-1 et seq

Cotton v. Terry,  
495 So.2d 1077 (Ala. 1986)

The Supreme Court held that:

Alabama version of **Uniform Probate Code** allowed **establishment of paternity of illegitimate child** after death of father through adjudication supported by clear and convincing evidence.

Other statutes

- Alabama Uniform Parentage Act
- **26-17-1 through 26-17-22**



- **CIRCUIT COURT**

## Acknowledgment of paternity.

- **Section 26-17-301**

- The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity.

## Effect of acknowledgment of paternity.

- **Section 26-17-305**

- (a) Except as otherwise provided in Sections 26-17-307 and 26-17-308, a valid acknowledgment of paternity filed with the Alabama Office of Vital Statistics shall be considered a legal finding of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.
- (b) An acknowledgment of paternity shall be a **legally sufficient basis for establishing an obligation for child support and for the expenses of the mother's pregnancy and confinement.**



## Proceeding for rescission.

- **Section 26-17-307**

- A signatory may rescind an acknowledgment of paternity only in a judicial proceeding before the earlier of:

- (1) sixty days after the effective date of the acknowledgment, as provided in Section 26-17-304; or
- (2) the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.

- 

## Challenge after expiration of period for rescission.

- **Section 26-17-308**

- (a) After the period for rescission under Section 26-17-307 has expired, a signatory of an acknowledgment of paternity may commence a proceeding to challenge the acknowledgment only:

- (1) on the basis of fraud, duress, or material mistake of fact; or
- (2) in the same manner as provided in Section 26-17A-1.

- (b) A party challenging an acknowledgment of paternity has the burden of proof.

## Hospital paternity acknowledgment program.

### Section 26-17-315

- (a) Hospitals ... shall provide to the mother and **alleged father**, if he is present in the hospital, during the period immediately preceding or following the birth of a child to an **unmarried woman** in the hospital, all of the following:
  - (1) written materials about paternity establishment;
  - (2) form affidavits of paternity;
  - (3) a written description of the rights and responsibilities of acknowledging paternity; and
  - (4) an opportunity, prior to discharge from the hospital, to speak with a trained person made available through the Department of Human Resources, either by telephone or in person, who can clarify information and answer questions about paternity establishment. .... If the mother and father complete the affidavit in the hospital, **the hospital shall send the affidavit of paternity to the Office of Vital Statistics within five days of the birth of the child.** ...

## Hospital paternity acknowledgment program.

### Section 26-17-315

- (c) Notwithstanding any law to the contrary,
- an affidavit of paternity completed in accordance with this section shall be accepted by the Office of Vital Statistics for purposes of listing the father's name on the child's birth certificate.

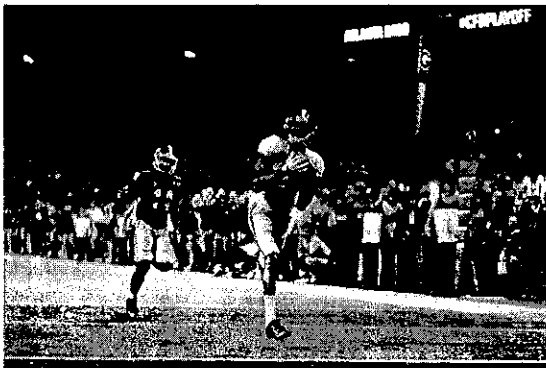
## Hospital paternity acknowledgment program.

### Section 26-17-315

(d) If a birth certificate has been filed in the Office of Vital Statistics, listing a father of the child;

- No new birth certificate can be established by the Office of Vital Statistics based on an affidavit of paternity received subsequently by that office
- unless a determination of paternity has been made by a court of competent jurisdiction or following adoption.

The End



IN THE PROBATE COURT OF \_\_\_\_\_ COUNTY, ALABAMA

STATE OF ALABAMA

COUNTY OF \_\_\_\_\_

CASE NO. \_\_\_\_\_

DECLARATION OF LEGITIMATION

I, \_\_\_\_\_, a \_\_\_\_\_ [race] male, born on \_\_\_\_\_ and a resident of \_\_\_\_\_ County, Alabama; my address being \_\_\_\_\_ do hereby declare that I am the father of the following named child, \_\_\_\_\_, a \_\_\_\_\_ child born on \_\_\_\_\_ in \_\_\_\_\_ County, Alabama whose mother is \_\_\_\_\_. Said child has been in the custody of \_\_\_\_\_ since \_\_\_\_\_.

I hereby file this Declaration of Legitimation for the purpose of recognizing said child as my own, capable of inheriting my estate, real and personal, as if born in wedlock. I further declare that I want said child, presently known as \_\_\_\_\_ to bear and be known as \_\_\_\_\_.

IN WITNESS WHEREOF, I, hereunto subscribed my name on this day the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

WITNESSES:

\_\_\_\_\_  
[NAME]

\_\_\_\_\_  
[NAME]

\_\_\_\_\_  
[ADDRESS]

\_\_\_\_\_  
[ADDRESS]

Attorney: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN THE PROBATE COURT OF \_\_\_\_\_ COUNTY, ALABAMA

STATE OF ALABAMA

COUNTY OF \_\_\_\_\_

AFFIDAVIT

I, \_\_\_\_\_, am a \_\_\_\_\_ female above the age of nineteen years and I presently reside at \_\_\_\_\_.

I am the mother of the following named child, \_\_\_\_\_, a minor, born on \_\_\_\_\_ in \_\_\_\_\_ County, Alabama. The father of my said child is \_\_\_\_\_.

I do hereby consent to the legitimation of the above named child and change of \_\_\_\_\_ name from \_\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_  
[Affiant's Signature]

STATE OF ALABAMA

COUNTY OF \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me \_\_\_\_\_, a Notary Public in and for said State, personally appeared \_\_\_\_\_, known to me to be the person who executed the within affidavit and acknowledged to me that \_\_\_\_\_ executed the same for the purposes therein stated.

\_\_\_\_\_  
NOTARY PUBLIC, \_\_\_\_\_ County, Alabama  
My Commission Expires:

CONSENT OF MOTHER

IN THE MATTER OF:

IN THE PROBATE COURT OF

\_\_\_\_\_

\_\_\_\_\_ County, Alabama

TO LEGITIMATE: \_\_\_\_\_

AND CHANGE NAME TO: \_\_\_\_\_

CASE NO: \_\_\_\_\_

Comes Now, \_\_\_\_\_ and shows unto the Court as follows:  
That she is a resident, citizen of \_\_\_\_\_ County, Alabama and of legal age and is the  
mother of \_\_\_\_\_ born at \_\_\_\_\_ County, Alabama on  
\_\_\_\_\_.

I hereby consent to the Legitimation of my child \_\_\_\_\_ by  
\_\_\_\_\_ and consent that said child's name be change to  
\_\_\_\_\_ and waive any other or further notice thereof.

This, the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_

\_\_\_\_\_

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Notary Public

