

# **You Bastard!**

Kit Kat

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Before I start, I would like to thank Chris DuRose for being here tonight. Chris was a member a number of years ago and has since moved to Michigan where he has recently retired. Chris actually was a guest of Warren Tyler on the night of my first essay about a dozen years ago.

That night my essay was entitled “When did I choose” which discussed homosexuality and the coming out of my youngest son and the conclusion that there was not a choice.

Both Chris and I are very proud of our two gay sons. That evening I noted at that time it was thought about 5% of the population was LGBT+. For my next essay, I wanted to discuss something that was experienced by a greater percentage of the population, so that essay 5 years ago was entitled “Out of this World,” which dealt with out of body experiences. Such experiences were estimated at 15% or more of the population and on that evening a self-identifying show of hands noted a 20% experience among the Kats. So in keeping with the spirit of trying to discuss topics of a more general experience to our members, my essay tonight is, “You Bastard.” While probably most of you have been called a bastard, or at least the lawyers in the room, my essay tonight will highlight the concept of paternity, adoption, parenthood, and inheritance.

My interest in exploring the topic was generated in part by my long-time relationship with Dave Thomas

who, as an adopted child, grew to become a champion of foster children finding forever homes in a loving family through the Dave Thomas Foundation for Adoption. Also, the experiences of friends of my gay son who have attempted to have families, either through surrogacy, adoption or donation, has been illuminating. And of course a shout out to probably the most famous Bastard in America: “How does a bastard, orphan, son of a whore and a Scotsman, dropped in the middle of a forgotten Spot in the Caribbean by providence, impoverished, in squalor, grow up to be a hero and a scholar,” Alexander Hamilton. And lastly, I make the standard Kit Kat disclaimer as there usually is someone in Kit Kat who is a subject matter expert on any topic discussed, I am not a family law practitioner, a judge, or a priest who has greater knowledge. I ask for your indulgence.

As a general rule the historic experience was the mother was known and the father through marriage primarily religious or through acknowledgement determined the formal relationship of child and parent. The parents had the duty of support and the child obedience along with the right to inherit. That concept of support is extended today as not only financial support, but education, physical custody, visitation and health care. As a general rule only legitimate child which were those of a recognized marriage and the biological children of the union could inherit. Gender and birth order could also influence that right but again legitimacy was required.

While biological children were favored, some ancient cultures recognized adoption. As early as 1750BC the Code of a Babylonian king mentions adoption. The bible references some early Jewish tribes having some form of adoption. In ancient Athens, adoptions were permitted during life time and even at death in wills. Roman culture, while very legalistic in its formal application of legitimacy, found adoption quite common particularly in the adoption of adults to perpetuate the names of families without male heirs and to honor the family god and ancestors.

With the fall of the Roman empire formal adoption fell in practice in medieval Europe. The feudal customary law required a lineal descendant to be of the blood and legitimately born. This was the general rule for most of the centuries in Europe until the 1800's. By then, through either changing social norms or the influence of earlier Rome, various countries and kingdoms of Europe gradually accepted some forms of adoption – both of children and adults.

England was substantially different from Continental Europe in its view on adoption and inheritance. In 1253 an English Statute stated, "He is a bastard that is born before marriage of his parents even when the parents couldn't marry because one parent was already married or there was incest." By 1576, England's Poor Law was the basis of Bastardy Law. The law served to punish the bastard child's mother and putative father so that the parish wouldn't have to pay support for a child making it the father's responsibility. With rare exception a bastard couldn't inherit land. It wasn't until 1926 that adoption was permitted and certain births legitimized. In 2002, The English Adoption and Children's Act permitted the adoption of children but not adults.

In the United States, as in England, a legal marriage with biological children was the norm for inheritance. With some exception, it wasn't until 1851 that Massachusetts enacted the first general adoption law which required a parent must be able to support, nurture and educate a child for adoption. By 1931 all states had some form of adoption laws although most only dealt with child adoption. It was not until the middle of the 1900s that most states allowed adult adoptions by statute or judicial interpretation.

As to adult and child adoption there are major differences in views. Generally, an adult adoption is

viewed as relatively simple and easy. Most states don't require an extensive inquiry into the "best interest of the child" since there is no legal obligation to support, educate or provide shelter with an adult. Some states do not require any preexisting parent child relationship. Two thirds of the states permit any adult to adopt any other adult. About one third of the states require as much as a 15-year difference in age or that there be a parent-child or older relationship to younger in an adoption.

Other motivations are present in adult adoptions. To some there may have been an existing parent child relationship but a biological parent wouldn't consent when the child was a minor. Upon reaching adulthood the now adult child could be adopted without that consent. Prior to the same sex marriage case in Obergefell v Hodges, gay couples used adoption as a marriage substitute as did heterosexual couples who chose not to or couldn't marry due to religious prohibitions. The ruling in that case diminished the utilization of adoption. As to adoption being used as a marriage substitute, different states have ruled differently. Some have permitted adoption in cases of an adult sexual relationship while others have ruled against such of an adoption as against public policy and not consistent with a parent child relationship. In some adult adoptions there can be non-sexual and non-parent child relationship reasons such as social security benefits, rent control, life insurance, or inheritances for longtime friends and care givers.

While the preceding adult adoption considerations may sound to you to be creative lawyering, I would note that such creativity has been present for several thousand years. In the Roman Empire, emperors such as Julius Caesar would adopt a relative or a suitable candidate to insure or legitimize their heir to become the emperor upon their death. In one case Julius Caesar presided over the adoption of a 34-year old patrician who wished to be a tribune, a requirement of which was being a plebeian.

Accordingly, the 34-year old was adopted by a 20-year old plebeian allowing Caesar to select the 34-year

old son as the new tribune. Creative lawyering at its best.

Another concept that runs through adult and child adoption to differing extents is “fresh start.”

Traditionally an adoption envisions a child severing all ties to the biological family thus starting all over.

But in cases where a child may be adopted by a family member such as a grandparent, the fresh start

theory may not fully apply. Perhaps an allowance of inheritance rights from the biological parents as

well as the adoptive parent. This also could be the case when step parents adopt a step child. The

Uniform Probate Code provides some guidance in these matters, but again it depends upon the

particular state with jurisdiction. The fresh start in the context of an adult adoption raises questions of

the necessity of such a convention. Different states again have various views. Some states have the

fresh start for adults, some do not, and some have outcomes in between. It requires a specific review of

the state law to be applied.

While I have referenced the differences in the various state laws, the 1973 Uniform Parentage Act was

created to establish the aspirational thinking about Adoption, Inheritance, Custody, Visitation and

Health Care. The Act has been adopted in whole or in part by many but not all states. In 2002 the Act

was updated to include medically assisted births, paternity registry and surrogacy. In 2017 after the

2015 Same Sex marriage case was decided by the Supreme Court, gender neutral language was adopted

and children’s rights for medical information from donor assisted conception was addressed. Also

addressed was the preclusion of a parent-child relationship between child and parent if the child was

born of a sexual assault, the status of de-facto parents when non biologically related to the child, and

the listing of same sex parents on the birth certificate – not limiting a birth certificate to one man and

one woman .

Again The Uniform Parentage Act as amended has been adopted by many states in whole or in part. A thorough examination of the facts and the jurisdiction laws and cases is critical to understanding in a given situation.

Besides the evolving legal landscape in the states, another significant issue in how we view paternity and the concept of family is the rising rates of children born outside of marriage or wed lock. We no longer use the word bastards or seldom the word illegitimate, both in our common language or in the legal sense. The rise of unwed births is global with the exception of China and a handful of countries.

In the United States 50 years ago, only 5% of all children were born to an unwed mother. By 2014 approximately 40% of all children were born to unwed mothers. 24% of white births, 53% of Hispanic births and 71% of black children were in this category. In Ohio the rate was about 43%. In Europe in 2014 the number of unwed births were about 42% with many countries including Catholic countries over 50 %. Iceland led the count at 70%. Our neighbors to the North in Canada had a 30% overall rate while Quebec was 63%. To our south, Latin America countries averaged 55% to 70% of unwed births. It is not my intention to discuss the reasons for this dramatic trend only to say that views of sexuality, fertility, personal reproductive rights, secularization, and in our country the Supreme Court decisions abolishing the common law disabilities of non-marital births being in violation of the equal protection clause of the 14th Amendment have evolved.

A third issue has also strained the legal system and the determination of parental rights with its collateral effect on adoption and inheritance. The opioid crisis has gripped our nation. In 2018 alone 94,386 children entered the foster care system due to parental drug use. That number represented about 36% of all foster children. The scope of the problem requires a review of our legal system to

attempt to mitigate the suffering of untold families. A review of abandonment, abuse, statute of limitations in adoptions to name a few.

So with this quick general review of paternity, how do we determine paternity in most states today.

- 1) If a man is married to a woman at the birth of a child or married to her within 300 days of the child's birth, he is the father. An exception being if she is the gestational surrogate for another person and the husband consents – the child is not his.
- 2) If the parents attempted to get married but there was an impediment or a child was born within 300 days after the termination of a marriage, he is the father.
- 3) Legal adoptions either child or adult
- 4) Court Process such as an administrative hearing for Child Support, or cases of abuse, abandonment or divorce.
- 5) Acknowledgement – formal or possibly informal.

While all these methods of paternity seem very straight forward, the process can be lengthy in time, emotionally and financially draining, contentious and litigious. There are many factors to consider.

A sub set of the legal determination in a paternity or inheritance dispute are the “competing presumptions” in a case. By way of example, if a woman is cohabitating with an unmarried man while she is still married, her husband is presumed to be the child's father. Of course, if the biological father acknowledges paternity, this sets the stage for a contest of presumptions. Also, with the presumptions there could be different levels of proof – preponderance of the evidence or clear and convincing proof. That being said biology doesn't always win. In some jurisdictions in a competing presumption case, the

standard for the court could be a decision in the best interest of a child. The Biological father may not prevail.

As I mentioned earlier, different states and courts have different thoughts and interpretations. In the case of an adult adoption and the fresh start concept a Virginia case is a good example. A woman dies without a will leaving a small fortune and no immediate family except the children of her older dead sister. Those children are her only blood/biological relatives. But at the age of 53, the older now dead sister had been adopted in an adult adoption. According to Virginia and the fresh start view, the children inherited nothing through their mother from the rich dead sister, since they were no longer related. But again, paternity and inheritance are not as straight forward as it would appear.

In rulings in the area of adoption particularly the standard *in the best interest of the child* may be tempered by the cultural, religious or moral view points of the beholder. In Tennessee a recently passed bill allows the child placement agencies to deny services to anyone who violates the agencies written religious and moral convictions. Proponents say it ensures religious liberty and protects faith-based groups. Opponents suggest that the law denies placement of children to LGBT+, interfaith marriages, single parents and parents who may be previously divorced. So again, a complicating factor in who is to have a family.

The last subset of adoption to discuss is Egg and Sperm Donors and the legal rights and responsibilities. There is no uniform set of standards although the Parentage Act gives some guidance. Generally, if conception is from an anonymous donor, the presumption is the donor has given up all rights. But states differ. In New York courts will not enforce a contract between a sperm donor and a recipient in relation to parental rights. In California any person providing sperm used for artificial reproduction is



considered a donor and not a parent. If the donor intends to be a parent a written agreement must be signed before conception. In the case of donors, it is always best to have a written agreement to clearly demonstrate the intent of the parties. Absent an agreement, the standard of the best interest in the child would generally be the case absent state law. Even with an agreement, as in New York, parental rights may not be permitted to be negotiated away. Also, in most states, the sperm donation and insemination should be made in a medical facility to ensure a witness to the process.

In Ohio if you donate an egg or sperm you have the right to request custody, visitation and the responsibility to provide support. If you desire to sever your rights Ohio requires that the donor submit to a series of tests and give medical history and the insemination be performed by a physician or someone under their control. In a non-spousal artificial insemination of a married woman, the consent of the spouse is required. If the requirements are not met there is NO severance of rights. Accordingly, if litigation ensues even though a case for fitness of a parent or the best interest of the child is made, the executed donor agreement should carry the day.

I have chosen not to discuss foreign adoptions or the changing requirements of immigration and the concept of legal family for citizenship. That could be an essay on its own.

A final factor has also caused a change in the dynamics of paternity. That being technology that is broadly available at affordable prices. The advent of web sites and services such as 23 & Me or Ancestry.com permit a person, for as little as \$50, to find the genealogical records of millions of people and also to those members on the site who opt in to see if and how they are biologically related to others on the site. New biological fathers, mothers, sisters and brothers have all been a consequence of the use of these popular sights. I personally in the last past months found by accident a first cousin who

I had no knowledge of their existence. I had known their mother, my aunt, for 70 plus years. Our relationship is biological. Whether we are legal relatives is another matter.

I have probably given you enough detail to satisfy your continuing legal education requirement for a while or you are thinking that you are answering a bad bar exam question, but I have seen and heard first hand some of the situations that arise from this evolving concept of paternity and family in law, societal norms and technology.

[Go off Script for privacy.]

Work associate – child not looking for money or a kidney

Who is my father

Gay son's friends

Surrogacy and donation dilemma – who has jurisdiction

Place of donation, insemination/conception, birth, or residence.

Park bench across the school yard – legal standing as grandparents.

Jeff with opioid daughter. Foster care state, state of residence, state of father and state of grandparent. Time and money and child may be in foster care or temporary custody. While grandparents wait to adopt.

Craigs family – Marriage, children, two families. 3 gay parents teacher conference at a parochial school.

[On script.]

There are so many stories, but I wanted to share just a few. I am sure that many, if not most, of you have your own stories of adoption, surrogacy, paternity, donation of eggs and sperm, either first hand or with friends and colleagues.

So, I would suggest you have a will and it really does what you want. For the curious, you can spit on a stick and see to whom you may be related or if you have any other biological relatives and change your will.

Understanding what a family is and how it may or may not be viewed legally by others.

I hope I have left you with some new insight into paternity and family in the 21st century and how difficult that dream of family can be to obtain and the institutional barriers to its achievement.

Thank you