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Matrimonial Matters

A child's wishes and paternity

A Bronx County Family Court dealt with a conundrum last year. In *Emily R. v Emilio R.* (53 Misc. 3d 325; 35 NYS 3d 904), the petitioner was legally the 15-year-old daughter of a man who was not her biological parent, although he had executed a paternity acknowledgment. The legal father had not been involved in her life nor seen her at all since she was 7 years old. Unlike many children in Family Court, Emily had a man who wanted to be recognized as her father and take "parental responsibility." However, that man had been blocked from doing so because of "the uncertainties of the statutory scheme for vacating an acknowledgment of paternity." Litigation dragged on over seven years as the result of the "vagaries of Family Court Act §516-a."

Emily's mother never married. In 1997, she began a relationship with Juan C., who was married at the time. That relationship continued for approximately eight years. Between 2000 and 2001, Emily's mother was also involved in a relationship with Emilio R. In April 2001, Emily was born, and her mother and Emilio R. executed a paternity acknowledgment the day after her birth, and Emily received Emilio R.'s last name. Shortly after Emily's first birthday, her mother and Emilio R. broke up. Emilio R. had had only limited significant contact with Emily, and that before she turned a year old. Emily's mother had filed a petition for child support against Emilio R. and was awarded the support.

During this time Juan C. had significant contact with Emily and had developed a father-daughter relationship with her. Emily and her mother moved to Florida in



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2005 when Emily was 4, and Juan C. stayed in contact with Emily via telephone and voluntarily sent support funds for Emily. Emily and her mother returned to New York City, and Juan C. again regularly saw Emily.

Emilio R. had a private paternity test done which supposedly provided that he was not Emily's father. Then in 2009, Emily's mother petitioned the Family Court to terminate Emilio R.'s child support order and vacate his paternity acknowledgment. These cases were dismissed, with no reasons given. Later that year, Emilio R. filed a petition to vacate the acknowledgment, but he failed to serve the mother and he himself failed to appear in court, and the petition was dismissed.

Emily and her mother then moved back to Florida. Juan C. had phone contact with Emily and sent presents. Emily and her mother moved again to New York and her mother filed for an upward modification of Emilio R.'s child support; he then filed a petition to vacate the paternity acknowledgment; both cases were put on the docket before a Support Magistrate. The Magistrate appointed an AFC, who filed a petition to have Juan C. declared Emily's father, but this was rejected in light of Emilio R.'s paternity acknowledgment.

Emily and her mother moved back to Florida, her mother withdrew the petition, but the magistrate directed the parties to

have a court-ordered paternity test. Emilio R. never showed up for the test. Emily's AFC submitted a memorandum of law addressing the issues. The AFC served Emilio R., who defaulted, and on Juan C., who admitted to service of the papers. The Magistrate made no ruling, but transferred the case to a Family Court judge.

Before the judge, Juan C. said he wanted to be named the father, but not until Emilio R.'s paternity acknowledgment was dealt with. The judge then addressed the matter of who could challenge a paternity acknowledgement. Noting that the law was amended in 2007 to allow certain parties to petition to vacate the acknowledgment under particular circumstances, the judge stated that developing case law was also permitting non-signatories to challenge the acknowledgment. Family Court judges had issued orders of filiation for one man without vacating the paternity acknowledgment of another, but this judge found that "not entirely satisfactory."

The AFC maintained that since under the law the child has standing to submit a paternity petition, the child should also have standing to challenge a paternity acknowledgment. The court agreed with the AFC, noting that Juan C. wanted to be named the father and without such an order, he had no obligation to pay child support or right to visitation. Further, the court pointed out that without Juan C. being adjudicated Emily's father, if he died she "would have no right to inheritance or Social Security benefits or similar programs."

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While the situation in this is uncommon, it is certainly not unknown, and family lawyers should get a copy of this case to squirrel away for future reference.

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