

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1195 CS Paternity
SPONSOR(S): Richardson and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>5 Y, 0 N, w/CS</u>	<u>Lammers</u>	<u>Billmeier</u>
2) <u>Future of Florida's Families Committee</u>	<u></u>	<u></u>	<u></u>
3) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

This bill provides that a petitioner may, at any time, file a petition to challenge the determination of paternity of a man who is under an order to pay child support, upon filing an affidavit stating that newly discovered evidence that has come to the petitioner's knowledge since the entry of judgment. The petition must also include the results of reliable scientific tests, conducted within the past 90 days, indicating that the male ordered to pay child support cannot be the father of the child for whom support is required, and an affidavit that the male is current on all child support payments concerning the child whose paternity is questioned.

The court shall grant relief on a petition filed in accordance with the above requirements when the genetic testing was properly conducted, the male is current on all child support payments for the child, the male has not adopted the child and the child was not conceived by artificial insemination while the male was married to the child's mother, the male has not prevented the child's biological father from asserting paternal rights to the child, and the male has not otherwise acted as the child's father with knowledge that he is not the child's biological father.

If relief is granted under this section, it shall be limited to prospective child support payments, past due child support payments, termination of parental rights, custody, and visitation rights. The bill does not provide a cause of action for child support that has already been paid.

The duty to pay child support and other legal obligations shall not be suspended while the petition is pending unless good cause is shown.

If the genetic tests submitted are provided solely by the male, the court may choose, and another party may demand, that the mother, the child, and the alleged father submit to additional genetic testing. If any party willfully refuses to submit themselves or the child to genetic testing, if the child is in that party's custody, the court shall enter an order granting relief against the party failing to submit to genetic testing. The party requesting genetic testing shall pay for the costs of such tests, although if a state agency requests the testing for child support purposes, the agency may seek reimbursement of its costs against the person held responsible for court costs.

If relief on a petition filed in accordance with this section is not granted, the court shall assess costs and attorney's fees against the petitioner.

The fiscal impact of this bill is unknown.

The bill provides an effective date of July 1, 2005.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1195a.CJ.doc
DATE: 3/29/2005

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families—This bill will allow a man required to pay child support as the father of a child to petition to set aside the determination of paternity upon meeting certain conditions.

B. EFFECT OF PROPOSED CHANGES:

Establishment of Paternity

A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife.¹ Paternity for children born out of wedlock is established pursuant to s. 742.10, F.S. A determination of paternity must be established by clear and convincing evidence.² In any proceeding to establish paternity, the court may on its own motion require the child, the mother, and the alleged father to submit to scientific tests generally relied upon for establishing paternity.³ A woman who is pregnant or who has a child, any man who has reason to believe he is the father of a child, or any child may bring a proceeding to determine the paternity of the child when the paternity has not otherwise been established.⁴

If there is no adjudicatory proceeding to determine paternity, a notarized voluntary acknowledgement of paternity, signed under penalty of perjury in the presence of two witnesses, shall create a rebuttable presumption of paternity, subject to the right of rescission within 60 days of the date of signing the acknowledgement.⁵ After the expiration of the 60-day period, the signed voluntary acknowledgement of paternity shall constitute an establishment of paternity and is only subject to challenge in court on the basis of fraud, duress, or material mistake of fact.⁶ However, the challenger to the determination of paternity shall still be responsible for his legal responsibilities, including child support, during the pendency of the challenge, except upon a finding of good cause by the court.⁷

"If the paternity of the child is determined by a court of competent jurisdiction as provided under s. 382.015, the name of the father . . . shall be entered on the certificate in accordance with the finding and order of the court."⁸ When a court enters a determination of paternity, the department shall prepare a new birth certificate with the same file number as the original birth certificate, with the names of the parents entered as of the date of the registrant's birth.⁹

Currently, there is no statute allowing a man who has been determined to be the father of a child to be declared not the father of the child and to be discharged from making child support payments. In order for a man determined to be the father of a child to be relieved of his child support obligation, he must bring an action pursuant to Florida Rules of Civil Procedure 12.540¹⁰ and 1.540. Rule 1.540(b), entitled

¹ Section 382.013(2)(a), F.S.; *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) (citations omitted).

² Section 742.031, F.S.; *T.J. v. Dep't of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).

³ Section 742.12(1), F.S.

⁴ Section 742.011, F.S.

⁵ Section 742.10(1), F.S.

⁶ Section 742.10(4), F.S.

⁷ *Id.*

⁸ Section 382.013(2)(d), F.S.

⁹ Section 382.015(2), F.S.

¹⁰ Rule 12.540 provides that rule 1.540 "shall govern general provisions concerning relief from judgment, decrees, or orders, except that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases."

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.," states in pertinent part that a party may file a motion for relief:

from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

Intrinsic fraud is fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.¹¹ The Florida Supreme Court has expressly found that false testimony given in a proceeding is intrinsic fraud.¹² Extrinsic fraud is fraud that "prevents a party from having an opportunity to present his case in court."¹³ Fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."¹⁴ The equitable remedy of an independent action attacking a final judgment outside of the one-year limitation is available where extrinsic fraud or fraud on the court is established.¹⁵

Once paternity has been adjudicated, unless there is a showing of fraud upon the court, the paternity order is res judicata on the issue of paternity, and relitigation of the paternity issues is unauthorized in connection with any subsequently-filed motion for contempt for failure to pay court-ordered child support.¹⁶ A final judgment of dissolution of marriage that establishes a child support obligation for a former husband is a final determination of paternity, and any subsequent paternity challenge must be brought pursuant to rule 1.540.¹⁷

In a non-marital paternity dispute, the Second District Court of Appeal has determined that a man who was informed by the mother that he was the father of her child, and who was named as the biological father in a final judgment of paternity, could not have the judgment of paternity vacated six years later absent a showing that the mother had committed a fraud on the court at the time of the original paternity action.¹⁸ Any subsequent blood testing of the alleged father, mother, and child would not change the alleged father's monetary obligations to the child in the absence of proof of fraud on the court.¹⁹ The fact that, six years later, the mother submitted an affidavit expressing her belief that the man paying child support was not the biological father, did not constitute evidence of fraud on the court.²⁰

¹¹ *DeClaire v. Yohanon*, 453 So. 2d 375, 377 (Fla. 1984).

¹² *Id.*

¹³ *Id.* at 379.

¹⁴ *Arzuman v. Saud*, 843 So. 2d 950, 952 (Fla. 4th DCA 2003) (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989)).

¹⁵ *DeClaire*, 453 So. 2d at 378.

¹⁶ *Dep't of Revenue v. Clark*, 866 So. 2d 129, 129 (Fla. 4th DCA 2004).

¹⁷ *D.F. v. Dep't of Revenue*, 823 So. 2d 97, 100 (Fla. 2002).

¹⁸ *State, Dep't of Revenue v. Pough*, 723 So. 2d 303, 306 (Fla. 2d DCA 1998).

¹⁹ *Id.*

²⁰ *Id.*

Other States

California has adopted legislation allowing determinations of paternity based on scientific testing for the first two years of a child's life, and after that time, there is a conclusive statutory presumption that a child born in a marriage a marital child.²¹ The Supreme Court has held that this conclusive presumption was constitutional, noting that this was a difficult social issue appropriately addressed by the legislature.²²

Maine has restricted the concept of legitimacy so that it has different meanings for the law of paternity and the law of inheritance, which allows for a presumption of paternity.²³ On the other hand, Ohio courts have declared that state's law permitting disestablishment of paternity "at any time" on the grounds that it violated the separation of powers by allowing the legislature to overturn existing legal judgments that were *res judicata*.²⁴

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This bill creates an unnumbered section providing that, in any action where a male is required to pay child support as the father of a child, a petition to set aside a determination of paternity may be filed at any time, based on the grounds set forth in this section. A petition to set aside a determination of paternity must be filed in the circuit court and shall include:

- An affidavit executed by the petitioner stating that newly discovered evidence has come to the petitioner's knowledge since the entry of judgment
- The results of scientific testing, generally accepted within the scientific community for showing a probability of paternity, administered within 90 days of the filing of such a petition, indicating that the male ordered to pay child support cannot be the father of the child for whom he is required to pay support
- An affidavit executed by the petitioner stating that he is current on all child support payments for the child whose paternity is in question

The court shall grant relief on a petition that complies with the above requirements if the court finds that all of the following grounds have been met:

- The genetic test was properly conducted
- The male is current on all child support payments for the child
- The male ordered to pay child support has not adopted the child
- The child was not conceived by artificial insemination while the child's mother and the male who is ordered to pay child support were married
- The male ordered to pay child support did not prevent the biological father of the child from asserting parental rights over the child; and
- The male ordered to pay child support with knowledge that he is not the biological father of the child has not:
 - Married the child's mother and voluntarily assumed a parental obligation and duty to pay support
 - Acknowledged paternity of the child in a sworn statement
 - Been named by his consent as the child's biological father on the child's birth certificate
 - Been required to support the child because of a voluntary written promise
 - Disregarded a written notice from any state agency or court instructing him to submit to genetic testing
 - Signed a voluntary acknowledgement of paternity pursuant to s. 742.10(4), F.S., or
 - Declared himself to be the child's biological father

²¹ *Lefler v. Lefler*, 722 So. 2d 941, 944 (Fla. 4th DCA 1998).

²² *Id.* (citation omitted).

²³ Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 254 (1999).

²⁴ Department of Revenue Bill Analysis.

If the petitioner fails to make the showing required by this section, the court must deny the petition. If the trial court grants relief pursuant to this section, the relief shall be limited to the issues of prospective child support payments, past due child support payments, and termination of parental rights, custody, and visitation rights. This section does not create a cause of action for the recovery of previously paid child support.

While the petition is pending, the duty to pay child support and other legal obligations for the child shall not be suspended except for good cause shown. The court may order child support payments to be held in the court registry until the final determination of paternity has been made.

If the genetic testing results submitted pursuant to this section are provided solely by the male ordered to pay child support, the court may, on its own motion, and shall, on the motion of any part, order the child's mother, the child, and the male to submit to genetic tests. Such genetic testing must occur within 30 days of an order by the trial court. If the child's mother or the male ordered to pay child support willfully refuses to submit to genetic testing, or if either party, as custodian of the child, willfully fails to submit the child for testing, the court shall issue an order granting relief on the petition against the party failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, the failure shall not be considered willful.

The party requesting genetic testing shall pay any fees charged for the tests. If the child's custodian receives services from an administrative agency providing enforcement of child support orders, the agency shall pay the costs of genetic testing if it requests the test, and the agency may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

If relief is not granted on a petition filed in accordance with this section, the court must assess costs and attorney's fees against the petitioner.

This section shall take effect July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Creates an unnumbered section establishing grounds by which a man required to pay child support as the father of a child may petition to set aside a determination of paternity.

Section 2. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may have a fiscal impact on the Department of Revenue, since the department will not be able to seek reimbursement for services provided to the mother from the male formerly determined to be the father.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may relieve a financial burden men ordered to pay child support for children who are not their biological children, although the exact impact is unknown.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenues in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Separation of Powers

This bill might raise a separation of powers issue, because it allows for a petition to set aside a determination of paternity to be brought “at any time,” although the procedural rules established by the supreme court restrict challenges to final orders and judgments to one year from entry of the judgment or order, except in cases of fraud upon the court. This bill could raise a constitutional concern if it were considered a procedural rather than a substantive law, although it can be argued that this bill constitutes substantive law.²⁵

With respect to the separation of powers issue, several supreme court justices and appellate court judges have urged the Legislature to address paternity issues, although the courts’ concern seems to focus on the paternity of children whose mothers are married to men who are not the biological fathers of their children.²⁶

In *Anderson*, the Florida Supreme Court noted that “this is another case requiring the Court to define the law regarding a child support obligation of a husband who is not the biological father of the child.”²⁷ The supreme court upheld the trial court’s determination that the father had not proven “by a preponderance of the evidence that he had been defrauded into believing that the minor child was his.”²⁸ Justice Pariente dissented, stating that:

Cathy Anderson’s unequivocal, affirmative response to Michael Anderson that the child was his constituted a misrepresentation under Florida Rule of Civil

²⁵ Altenbernd, *Quasi-Marital Children*, 26 FLA. ST. U. L. REV. at 260-61 (noting that in a due process challenge, the Supreme Court has upheld a statute’s conclusive presumption of fatherhood as a substantive rule of law supported by social policy concerns) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

²⁶ See *Anderson*, 845 So. 2d at 872-874 (Pariente, J., dissenting); *D.F.*, 823 So. 2d at 101-03 (Pariente, J., concurring); *Fla. Dep’t of Revenue v. M.L.S.*, 756 So. 2d 125, 127-33 (Altenbernd, J., dissenting); *Lefler*, 722 So. 2d at 942-44 (Klein, J., specially concurring).

²⁷ 845 So. 2d at 870.

²⁸ *Id.* at 871.

Procedure 1.540(b)(3) In light of this affirmative misrepresentation, it was error to refuse to set aside the final judgment of dissolution in this case based on his timely filed postjudgment motion.

. . . a father should be able to rely on the unequivocal, affirmative representations of his wife that he is the father of her child, and should not be obligated to request DNA testing during the divorce action to disprove this presumed fact.²⁹

In *D.F.*, where the supreme court held that a final judgment of dissolution of marriage establishing a child support obligation for a former husband is a final determination of paternity, subject to challenge only through rule 1.540, Justice Pariente concurred, stating:

I write separately to urge the Legislature to address the difficult issues raised in cases such as this one. Cases involving the rights and responsibilities of biological and non-biological parents are no doubt fraught with difficult social issues that translate into complicated legal issues. The legal problems that arise are not limited to the area of child support, but also may arise in the area of probate, wrongful death, adoption, and actions to terminate parental rights.³⁰

Due Process

The bill may infringe upon the child's due process rights by failing to provide the child with representation in a process which will significantly affect the child's legal rights and may leave him or her without a father and without financial support. A child has a constitutional due process right to retain his or her legitimacy if doing so is in the child's best interest.³¹ The child has a strong interest in maintaining legitimacy and stability,³² and the legal recognition of a biological father other than the legal father will affect the heretofore legal father's rights to the care, custody, and control of the child.³³ Because the law does not recognize "dual fatherhood,"³⁴ the entry of a judgment of paternity and, presumably, the entry of an order rescinding a determination of paternity, affects the legal rights of both the father and the child.³⁵

B. RULE-MAKING AUTHORITY:

This bill does not grant rule-making authority to any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered this bill on March 23, 2005, and adopted an amendment changing the word "motion" to "petition" and "movant" to "petitioner," specifying that a male seeking relief from a determination of paternity is only required to be current on child support payments with respect to the child in question, and providing that a male who does not have access to the child for purposes of obtaining genetic testing may petition the court to order such testing. The amendment also clarifies that any action taken by the male in reliance on his previous status as legal father shall not be disturbed. The bill as amended was reported favorably as a committee substitute.

²⁹ *Id.* at 872-73.

³⁰ *D.F.*, 823 So. 2d at 101.

³¹ *Dep't of Health & Rehab. Servs. v. Privette*, 716 So. 2d 305, 307 (Fla. 1993).

³² *R.H.B. v. J.B.W.*, 826 So. 2d 346, 350 n.5 (Fla. 2d DCA 2002) (citation omitted).

³³ *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1060 (Fla. 2d DCA 2004).

³⁴ *G.F.C. v. S.G.*, 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997).

³⁵ *See Cummings*, 871 So. 2d at 1060.