

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1195 CS                      Paternity  
**SPONSOR(S):** Richardson and others  
**TIED BILLS:** None.                      **IDEN./SIM. BILLS:** SB 1456

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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>Preston</u>	<u>Collins</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>

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### SUMMARY ANALYSIS

The 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 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 relating to 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, 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 is not granted, the court shall assess costs and attorney's fees against the petitioner.

The fiscal impact of this bill is unknown.

### FULL ANALYSIS

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

**STORAGE NAME:** h1195b.FFF.doc  
**DATE:** 4/5/2005

## 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.

#### Comments from the Future of Florida's Families Committee

**Provide limited government** – The bill has the potential to increase the workload of the courts and the Department of Revenue. If mothers and their children lose court ordered support as a result of a determination of paternity being set aside, they may have to rely on public assistance.

**Promote personal responsibility** – If mothers and their children lose court ordered support as a result of a determination of paternity being set aside, they may have to rely on public assistance. The individual filing the petition to set aside a determination of paternity is required to pay court costs and fees associated with the legal proceedings if relief is not granted. The party requesting genetic testing is required to pay for such testing.

**Empower families** – The bill has the potential of increasing the dependence of mothers and their children on public assistance. It also has the potential to adversely affect relationships between family members and decrease family stability. Provisions of the bill could also diminish the sense of security, care and nurturing felt by children.

### 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.<sup>1</sup> Paternity for children born out of wedlock is established pursuant to section 742.10, Florida Statutes. A determination of paternity must be established by clear and convincing evidence.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

If there is no adjudicatory proceeding to determine paternity, a notarized voluntary acknowledgement of paternity or a 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

<sup>1</sup> Section 382.013(2)(a), Florida Statutes; *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) (citations omitted).

<sup>2</sup> Section 742.031, Florida Statutes; *T.J. v. Dep't of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).

<sup>3</sup> Section 742.12(1), Florida Statutes.

<sup>4</sup> Section 742.011, Florida Statutes.

<sup>5</sup> Section 742.10(1), Florida Statutes.

<sup>6</sup> Section 742.10(4), Florida Statutes.

<sup>7</sup> *Id.*

"If the paternity of the child is determined by a court of competent jurisdiction as provided under section 382.015, Florida Statutes, the name of the father . . . shall be entered on the certificate in accordance with the finding and order of the court."<sup>8</sup> 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.<sup>9</sup>

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 12.540<sup>10</sup> and 1.540. Rule 1.540(b), entitled "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.<sup>11</sup> The Florida Supreme Court has expressly found that false testimony given in a proceeding is intrinsic fraud.<sup>12</sup> Extrinsic fraud is fraud that "prevents a party from having an opportunity to present his case in court."<sup>13</sup> 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."<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

<sup>8</sup> Section 382.013(2)(d), Florida Statutes.

<sup>9</sup> Section 382.015(2), Florida Statutes.

<sup>10</sup> 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."

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 379.

<sup>14</sup> *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)).

<sup>15</sup> *DeClaire*, 453 So. 2d at 378.

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

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

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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

## 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.<sup>21</sup> The Supreme Court has held that this conclusive presumption was constitutional, noting that this was a difficult social issue appropriately addressed by the legislature.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup>

## HB 1195

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 the bill. 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; and
- 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 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;

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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

<sup>22</sup> *Id.* (citation omitted).

<sup>23</sup> 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).

<sup>24</sup> Department of Revenue Bill Analysis.

- 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 section 742.10(4), Florida Statutes; or
- Declared himself to be the child's biological father.

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.

#### 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 on 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.<sup>25</sup>

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.<sup>26</sup>

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<sup>25</sup> 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)).

<sup>26</sup> 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).

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.”<sup>27</sup> 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.”<sup>28</sup> 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 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.<sup>29</sup>

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.<sup>30</sup>

## 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.<sup>31</sup> The child has a strong interest in maintaining legitimacy and stability,<sup>32</sup> 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.<sup>33</sup> Because the law does not recognize “dual fatherhood,”<sup>34</sup> 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.<sup>35</sup>

### B. RULE-MAKING AUTHORITY:

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

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## Comments from the Future of Florida’s Families Committee

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<sup>27</sup> 845 So. 2d at 870.

<sup>28</sup> *Id.* at 871.

<sup>29</sup> *Id.* at 872-73.

<sup>30</sup> *D.F.*, 823 So. 2d at 101.

<sup>31</sup> *Dep’t of Health & Rehab. Servs. v. Privette*, 716 So. 2d 305, 307 (Fla. 1993).

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

<sup>33</sup> *Dep’t of Revenue v. Cummings*, 871 So. 2d 1055, 1060 (Fla. 2d DCA 2004).

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

<sup>35</sup> *See Cummings*, 871 So. 2d at 1060.

- For hundreds of years, under American law, the father of a child was simply defined as the mother's husband. A legal doctrine that originated in English law called the "marital presumption" permitted courts to assume that the husband of the mother of a child was both the child's functional and biological father. The policy rationales for the presumption were that it protected children from the legal and social impact of illegitimacy and that it preserved the sanctity of the perceived cornerstone of a healthy society – a family consisting of a husband, wife and children. The presumption that the husband of a married woman is the father of any children born to that woman was a fundamental principle at common law and, in practice, it limited legal fathers to married men.<sup>36</sup>

Until the late 1960s, state law placed strict limitations on the ability of children to establish a paternity relationship in those situations in which no marriage existed between the child's mother and father. These statutes were reflective of the intent to punish immoral behavior by the parents and to protect the sacrosanct nature of procreation within marriage. The United States Supreme Court, beginning in 1968, decided a series of cases and found that many existing state statutes unconstitutionally discriminated against children born outside a marital relationship. The Court determined that the Equal Protection Clause mandated that states treat those children no differently than children of a marital relationship. As a result, many statutory provisions enacted to deter birth outside the marriage by denying the child of that non-marital relationship the same rights as those enjoyed by children of a marital relationship were struck down as unconstitutional.<sup>37</sup> The lack of logical justification for those statutes and the failure of them to pass constitutional muster was expressed by the *Supreme Court in Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 92 S. Ct. 1400, 1406-07 (1972):

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise.

What determines a parent has been the subject of much scholarship, and many researchers are now embracing nontraditional definitions of parentage and family. In recent years, academics, as well as judges and legislators, have begun to recognize the importance of functional parenthood. As a result, states have enacted laws allowing non-biological parents such as stepparents, grandparents, and foster parents to maintain greater access to the children they have helped to raise. Laws governing adoptions have acknowledged that parentage comprises a totality of factors, the least significant of which is genetics. Thus, biology is no longer being recognized as the sole criterion for determining parent-child relationships. As one judge noted, "A father-child relationship encompasses more (and greater) considerations than a determination of whose genes the child carries. Sociological and psychological components should be considered."<sup>38</sup>

Yet, as our societal definitions of "family" and "parent" grow, change, and move away from the traditional, nuclear family, an interesting disconnect has emerged. As Boston Globe columnist Ellen Goodman has observed, these scientific advances force us to ask, "What does make a father? Diapers or DNA?" She continues, "...family law seems to be going in two directions at once. We are giving more recognition to non-biological relationships...and more weight to DNA."<sup>39</sup>

<sup>36</sup> Murphy, J. "Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children" (November 8, 2004). ExpressO Preprint Series. Working Paper 425. at <http://law.bepress.com/expresso/eps/425>

<sup>37</sup> Nelson, R. Statutes of Limitation for Paternity Actions and Their Support Obligations at <http://www.childsupportguidelines.com/articles/art200107.html>

<sup>38</sup> Jacobs, M. The Case Against Paternity Fraud Laws. at [http://www.law.msu.edu/amicus/wi\\_2003-04/paternity.html](http://www.law.msu.edu/amicus/wi_2003-04/paternity.html)

<sup>39</sup> Ellen Goodman, "What Makes a Father?" Baltimore Sun, May 1, 2001, as cited in Jacobs, M. The Case Against Paternity Fraud Laws. [http://www.law.msu.edu/amicus/wi\\_2003-04/paternity.html](http://www.law.msu.edu/amicus/wi_2003-04/paternity.html)



Recent advances in the science of genetic testing have enabled conclusive establishment and disestablishment of paternity, giving rise to a number of public policy issues. Courts have been inconsistent in their treatment of the disestablishment of paternity. Many times the results of court cases have contradicted one another, and the legal standards applied depend on the individual circumstances. Such inconsistent decisions are putting pressure on state legislatures to address these issues. As the use of DNA tests to establish and disestablish paternity increase, these cases will continue to raise fundamental questions about our legal and societal ideas of fatherhood.<sup>40</sup>

Scientific advances are also changing how we define traditional families. While *res judicata* and estoppel principles have long existed to preserve the unitary, nuclear family, some states are moving away from these doctrines in favor of biological paternal certainty. As a result, if a man is not the biological father of a child, and was either uncertain or unaware of this biological fact, he may petition to disestablish paternity. These disestablishment petitions represent the beginning of a new family law phenomenon – the theory of paternity fraud.<sup>41</sup>

This has created a dilemma for states, courts, parents, and children. At what point should the truth about genetic parentage outweigh the consequences of leaving a child fatherless? Is a child better off knowing his/her genetic heritage or maintaining a relationship with his/her father and his family that provides both emotional and financial support? Should it matter who brings the action or should the rules be the same for men trying to disestablish paternity, women seeking to oust a father from the child's life, and third parties trying to assert their paternity of a child who already has a legal father? There is scant federal guidance on any of these issues. This has left the problem largely in the hands of state legislatures and courts. In some states, there are detailed procedures for challenging paternity acknowledgments; in other states, there is little or no statutory guidance in this area. Some states have statutory and case law to guide the process of paternity disestablishment when paternity has been adjudicated or presumed, while others offer little guidance.<sup>42</sup>

Simply because we have the means to determine biological parentage with greater certainty does not mean that it is necessarily in the best interests of children to do so. A grassroots movement has been organized to free these fathers from the responsibilities of parenthood. Comparing DNA evidence of non-paternity to DNA testing that exonerates a felon, the U.S. Citizens Against Paternity Fraud website includes this motto: "If the Genes don't fit, you must acquit."<sup>43</sup> From the postings on the site, it appears that to them, the "truth" is all that matters. However, once this principle is adopted, the "truth" can also enable mothers seeking to exclude men with long-standing, close relationships to their children from the children's lives. Likewise, the "truth" could be used by a man who has had no relationship to the child, but who decides to come forward and assert his paternity against a father and mother who have raised the child together. The consequences could be devastating for both children and men who wish to maintain relationships with their children regardless of the biological "truth."<sup>44</sup>

As authors Anderlik and Rothstein have recently observed, "...those within the father's rights movement...tend to view family law through the lens of criminal law...It is common to find the issue framed as one of justice or fairness, in the sense that evidence admissible to 'convict' should also be available to 'exonerate.'" But can (should) family law be equated with criminal law? A wrongly convicted man should be exonerated: he has been the victim of the system. A man who has no biological connection to his child may also feel wrongly adjudicated and tricked by the mother of the child and/or victimized by a federal and state system that forces the mother to name her baby's father in order to qualify for certain financial benefits. To simply disestablish

<sup>40</sup> Goodman, C. Paternity, Marriage and DNA. Legisbrief, National Conference of State Legislatures. Vol. 9, No. 38. October 2001.

<sup>41</sup> Jacobs, M. The Case Against Paternity Fraud Laws. [http://www.law.msu.edu/amicus/wi\\_2003-04/paternity.html](http://www.law.msu.edu/amicus/wi_2003-04/paternity.html)

<sup>42</sup> Roberts, P. Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children. Center for Law and Social Policy. 2003.

<sup>43</sup> U.S. Citizens Against Paternity Fraud, [www.paternityfraud.com](http://www.paternityfraud.com).

<sup>44</sup> Roberts, P. Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children. Center for Law and Social Policy. 2003.

paternity, however, ignores the crucial difference between the criminal and family law contexts: the presence and best interests of a child.<sup>45</sup>

In a series of monographs related to paternity disestablishment published in 2003, the author cautions that more thought needs to be given to a proper balance of the equities. "In the meantime, legislatures may want to carefully consider their options in this area. The wrong choice could have terrible consequences for both parents and children."<sup>46</sup>

- There is no provision in the bill for considering the best interests of the child. Nor is there any requirement that the court consider appointing a guardian ad litem for the child.
- The bill contains no requirement for providing notice to the mother of the child that a petition to set aside a determination of paternity has been filed.
- The bill allows the motion to set aside a determination of paternity "at any time." Currently, the statute of limitations in section 95.11(3)(b), Florida Statutes, sets the period at four years for an action relating to the determination of paternity, with the time running from the date the child reaches majority. The bill would remove any limitation for challenges to paternity, but would maintain the limitation for actions to establish paternity.
- The bill contains no provisions or process for amending the birth certificate if relief is granted.
- On line 42, "ordered to pay child support" should be added after the word "male" to conform paragraph (b) with paragraphs (c), (d), (e), and (f).
- The bill requires the petitioner to be current on all child support payments as a condition of filing a petition to set aside a determination of paternity. Line 71 of the bill references past due child support payments as one of the issues that can be considered if relief is granted.
- The bill requires three things to be included in a petition to set aside a determination of paternity, including the results of scientific tests which indicate the male paying support cannot be the father of the child. Lines 30-33 of the bill provide that if testing has not been performed then a petition may be filed to have the testing done. It would appear to be more logical to file the petition for testing, if necessary. If the results of the testing indicate the male cannot be the father, then the conditions are met for the petition to actually consider the set aside.

#### **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.

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<sup>45</sup> Anderlik, M. and Rothstein, M., DNA-Based Identity Testing and the Future of the Family: A Research Agenda, 28 Am. J.L.M. 215, 220 (2001), as cited in Jacobs, M. The Case Against Paternity Fraud Laws. [http://www.law.msu.edu/amicus/wi\\_2003-04/paternity.html](http://www.law.msu.edu/amicus/wi_2003-04/paternity.html)

<sup>46</sup> Roberts, P., Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children. Center for Law and Social Policy. 2003.