

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Children and Families Committee

BILL: CS/CS/SB 438

INTRODUCER: Children and Families Committee, Judiciary Committee, and Senator Lawson

SUBJECT: Determination of Paternity

DATE: March 8, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Sanford</u>	<u>Whiddon</u>	<u>CF</u>	<u>Fav/CS/CS</u>
3.	_____	_____	<u>HA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill authorizes a man to petition the circuit court with jurisdiction over a child support obligation to set aside a paternity determination of a child for whom he is not the biological father. It authorizes filing the petition with the court where the mother or legal guardian or custodian of the child resides when the child support obligation has been established administratively and not ratified by a court. It allows the petition to be filed in the circuit court in the county where the petitioner resides in the state when the mother or legal guardian no longer resides in the state. The bill also provides for the termination of child support obligations resulting from incorrect paternity determinations. The bill further provides for the revision of a child's birth certificate when a paternity determination is set aside.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

A person who is determined to be the father of a child can be ordered to pay child support for that child. Paternity of a child may be established through several methods. An adjudication of paternity can be set aside only if challenged within one year of the paternity determination.

Paternity Establishment

“[A] child born during a marriage is presumed to be the legitimate and legal child of the husband and wife.”¹ In a dissolution of marriage proceeding, a final judgment that establishes child support obligations for a former husband is a final determination of paternity.² On the other

¹ *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004), and *see s. 382.013(2)(a)*, F.S.

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

hand, paternity for children born out of wedlock is established under s. 742.10, F.S. Under that statute, paternity may be established by the following methods:

- Adjudicatory hearings by a court under statutes governing inheritance, or dependency under workers' compensation or similar compensation programs;
- Affidavits acknowledging paternity or a stipulation of paternity executed by both parties and filed with a clerk of court;
- Affidavits, notarized voluntary acknowledgements of paternity, or a voluntary acknowledgement of paternity that is witnessed by two individuals and signed under the penalty of perjury;
- Administrative adjudications of paternity by the Department of Revenue.

A voluntary acknowledgment of paternity which was not made as part of an adjudicatory hearing creates a rebuttable presumption of paternity. Additionally, the acknowledgement may be rescinded within 60 days after the acknowledgement was signed. After the 60-day period, a voluntary acknowledgement of paternity can be challenged in court only on the basis of fraud, duress, or material mistake of fact. Florida case law, however, has not discussed what constitutes fraud, duress, or mistake of fact necessary to void a voluntary acknowledgement of paternity.

Paternity Disestablishment

Currently, statutory law does not provide a mechanism to disestablish a determination of paternity of a child. Additionally, statutory law does not authorize the termination of child support obligations based on proof of non-parentage.

In limited circumstances, however, paternity may be disestablished under Florida Family Law Rules of Procedure 12.540³ and Rules of Civil Procedure 1.540. Under those rules, a judicial determination of paternity, generally, must be challenged within one year of the determination.⁴ Otherwise, the paternity order is *res judicata*⁵ on the issue of paternity, and re-litigation of the paternity issues is unauthorized in connection with any subsequently filed motion for contempt for failure to pay court-ordered child support.⁶ However, the First District Court of Appeal appears to allow a paternity determination to be challenged more than a year after a paternity determination in some cases. In *M.A.F. v. G.L.K.*, 573 So. 2d 862 (Fla. 1st DCA 1990), the court held that "when a wife knows that her husband is not the father of her children, and the husband does not know" a petition to set aside a paternity determination is not barred by the one year limitations on actions.

³ 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."

⁴ *D.F. v. Dep't of Revenue*, 823 So. 2d 97, 100 (Fla. 2002).

⁵ The term "*res judicata*" is defined as:

1. An issue that has been definitively settled by judicial decision.
2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been -- but was not -- raised in the first suit. • The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. BLACK'S LAW DICTIONARY (8th ed. 2004).

⁶ *Dep't of Revenue v. Clark*, 866 So. 2d 129, 129 (Fla. 4th DCA 2004).

Paternity Case Summaries***Initial Determination of Child Support Obligations for Child Born in Wedlock***

Albert v. Albert, 415 So. 2d 818 (Fla. 2d DCA 1982).

In *Albert v. Albert*, Mr. Albert married Mrs. Albert when she was pregnant with another man's child. When the child was born, Mr. Albert signed the application for the child's birth certificate. Mr. Albert's also orally agreed to take care of the child as if it were his own. The issue in the case was whether Mr. Albert had a duty to support the child. The Court held that: "a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted." Based on the facts of the case, the Court concluded that Mr. Albert had not contracted to support the child. The Court also stated that no evidence showed that the misrepresentation of parentage on the birth certificate application was relied upon by Mrs. Albert or her child to their detriment. Accordingly, Mr. Albert had no duty to pay child support for the child.

Paternity Disestablishment-Child Born in Wedlock

Parker v. Parker, 916 So. 2d. 926 (Fla. 2d DCA 2005).

In *Parker v. Parker*, Mrs. Parker gave birth to a child while she was married to Mr. Parker. Mr. Parker had no reason to suspect that he was not the biological father of the child. When the Parkers divorced three and one-half years later, Mr. Parker agreed to pay child support based on Mrs. Parker's representation that Mr. Parker was the father of the child. Mrs. Parker also represented to the court that Mr. Parker was the biological father of the child. About 16 months later, the former wife sought to enforce the child support order. A week later, the results of DNA testing showed that Mr. Parker was not the father of the child. The issue in the case was whether Mr. Parker could set aside the determination of paternity in the dissolution of marriage proceeding based on fraud on the court. The court held that Mr. Parker's fraud claim had to be raised within one year of the initial paternity determination. The court also stated that had Mr. Parker raised the paternity issue in the dissolution of marriage proceeding, he would have no child support obligation.

Anderson v. Anderson, 845 So. 2d 870 (Fla. 2003).

In *Anderson v. Anderson*, Mr. and Mrs. Anderson married when Mrs. Anderson was pregnant. A year and half after the child was born, Mrs. Anderson filed for dissolution of marriage. The dissolution of marriage decree ordered Mr. Anderson to pay child support. During the divorce proceeding Mr. Anderson learned that his wife lied when she denied having been married before. But, Mr. Anderson believed her when she stated that he was the father of her child. Five months later, however, Mr. Anderson filed a motion for relief from child support obligations. The motion was based on the results of a DNA test proving that he was not the father of the child. The Court noted that Mr. Anderson's motion was timely. Nevertheless, the Court held that the record evidence supported the denial of Mr. Anderson's motion. The information leading to Mr. Anderson's suspicions of paternity was known at the time of his divorce.

Paternity Disestablishment-Child Born Out of Wedlock

Dep't of Revenue v. Boswell, 915 So. 2d 717 (Fla. 5th DCA 2005).

In *Boswell*, Mr. Boswell stipulated to a final judgment of paternity and agreed to pay child support for a child. Eleven years later, Mr. Boswell filed a motion for termination of child support based on DNA evidence that he was not the father of the child. At the hearing on Mr.

Boswell's motion, the mother testified that she believed Mr. Boswell was the child's father during the previous paternity adjudication. The court held that Mr. Boswell's attempt to set aside the paternity determination had to be brought within a year of the initial paternity determination. The court also stated that Mr. Boswell could have contested paternity 11 years earlier.

Genetic Testing and Paternity Determination

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."⁷

Yet, as 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."⁸

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.⁹

Scientific advances are also changing the traditional definition of "family." 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.¹⁰

⁷ Jacobs, M. The Case Against Paternity Fraud Laws. at http://www.law.msu.edu/amicus/wi_2003-04/paternity.html

⁸ 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

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

¹⁰ Jacobs, M., *ibid.*

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.¹¹

The fact that it is now possible 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."¹² However, applying this reasoning can also enable mothers seeking to exclude men with long-standing, close relationships to their children from the children's lives and 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 biological facts.¹³

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 paternity, however, ignores the crucial difference between the criminal and family law contexts: the presence and best interests of a child.¹⁴

¹¹ Roberts, P. Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children. Center for Law and Social Policy. 2003.

¹² U.S. Citizens Against Paternity Fraud, www.paternityfraud.com.

¹³ Roberts, P., *ibid.*.

¹⁴ 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

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.”¹⁵

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 is a marital child.¹⁶ The United States Supreme Court has held that this conclusive presumption is constitutional, noting that this is a difficult social issue appropriately addressed by the Legislature.¹⁷

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.¹⁸ In 2002, Georgia enacted legislation allowing the disestablishment of paternity.¹⁹ According to this same source, Texas, Iowa, Maryland, Ohio and Louisiana have enacted legislation allowing men to challenge paternity using DNA testing.

Wyoming’s statute²⁰ provides an example of a statute which attempts to balance the interests of the child, the mother of the child, the man whose paternity is in question, and the State in making these difficult policy decisions. This statute enumerates the persons who have standing to bring the proceeding and describes policies which differ depending on whether or not the child has a presumed, acknowledged, or adjudicated father. It allows the court to deny a motion for genetic testing under certain circumstances (including the best interest of the child), but allows the action for determination of paternity at any time when the child has no presumed, acknowledged, or adjudicated male parent.

III. Effect of Proposed Changes:

This bill authorizes a male to petition a court to set aside a paternity determination of a child for whom he is not the biological father. The bill also provides for the termination of child support obligations resulting from incorrect paternity determinations.

The conditions under which paternity may be set aside by a male are as follows:

- The male was required to pay child support in a prior proceeding;
- The male petitioned to set aside paternity before the child at issue turned 18 years old;

¹⁵ Roberts, P., *ibid.*

¹⁶ California Code sections 7540 and 7541, referenced in *Lefler v. Lefler*, 722 So. 2d 941, 944 (Fla. 4th DCA 1998) (concurring opinion).

¹⁷ *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), referenced in *Lefler*, *id.*

¹⁸ 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).

¹⁹ HB 369, according to <http://www.paternityfraud.com/> (April 12, 2005).

²⁰ 14-2-801, Wyoming State Statutes.

- The male did not know of his non-paternity when his paternity was adjudicated, and newly discovered evidence relating to the paternity of the child exists;
- Scientific evidence proves that the male is not the father of the child;
- The male is current on child support obligations, or his delinquency arose from the inability to pay for just cause;
- The male did not adopt the child;
- The child at issue was not conceived by artificial insemination while the male and the mother of the child were married; and
- The male did not prevent the biological father from asserting his paternal rights to the child.

However, the bill creates exceptions to the circumstances under which a male may seek to set aside a paternity determination. A male who engages in the following conduct while knowing that he is not the father of a child is not eligible to disestablish paternity under the bill:

- Marries the child's mother and voluntarily assumed the parental obligation to pay child support;
- Acknowledges his paternity in a sworn statement;
- Consents to be named as the father on the child's birth certificate;
- Promises in writing to support the child;
- Disregards a request from a state agency to submit to scientific testing; or
- Signs a voluntary acknowledgement of paternity, unless the acknowledgement was set aside for fraud, duress, or mistake of material fact under s. 742.10(4), F.S.

Relief from an incorrect paternity determination is limited to prospective child support payments and termination of parental rights, custody, and visitation. The bill also provides for the correction of incorrect designations of paternity on a child's birth certificate.

The bill takes effect on July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

If its provisions are found to be procedural rather than substantive in nature, this bill may raise separation of powers concerns as infringing on the Supreme Court's authority under s. 2, Art. V, State Const., to promulgate rules for practice and procedure. Several Ohio appellate courts earlier found the Ohio paternity disestablishment statute unconstitutional for infringing on the Ohio Supreme Court's authority to promulgate procedural rules. On February 1, 2006, however, the Ohio Supreme Court ruled that the Ohio paternity disestablishment statutes create substantive rights rather than procedural rules.²¹ As such, the Ohio paternity disestablishment statutes were found to be constitutional.

The Florida Supreme Court has identified a constitutional right for children to maintain their status as legitimate if doing so is in their best interests.²² The facts in that case involved an attempt by a state agency to terminate the parental rights of a father of record and name another person as the father. In a later case, the Court limited the application of *Privette* to cases where paternity is contested²³ and clarified that a child born during a valid marriage remained legitimate, although the mother's husband was not the father and had no duty to pay child support after the dissolution of the marriage. In the words of the Court, "paternity and legitimacy are related, but nevertheless separate and distinct, concepts."²⁴

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill will permit the termination of child support payments if a paternity termination is set aside.

C. Government Sector Impact:

The termination of child support obligations authorized by the bill may increase the need for government services for the affected children.

VI. Technical Deficiencies:

None.

²¹ *State ex rel. Loyd v. Lovelady*, 2006 WL 145426 (Ohio 2006).

²² *Department of Health and Rehabilitative Services v. Privette*, 617 So.2d 305, 307 (Fla. 1993).

²³ *Daniels v. Daniels*, 695 So2d 1253 (Fla. 1997).

²⁴ *Id.* at 1254.

VII. Related Issues:

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 practical effect of granting a petition under this section, while at the same time maintaining the legitimacy of a child born during a lawful marriage, is unclear. For example, the bill does not address the status of “paternal” relatives of children in the dependency system after paternity is disestablished.

This Senate staff analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
