

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: Judiciary Committee

BILL: CS/SB 438

INTRODUCER: Judiciary Committee and Senator Lawson

SUBJECT: Determination of Paternity

DATE: February 17, 2006

REVISED: _____

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

I. Summary:

This bill authorizes men to petition a court to set aside a paternity determination of children for whom they are not the biological father. 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 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:

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).

- 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 Diestablishment-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. On 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.

III. Effect of Proposed Changes:

This bill authorizes men to petition a court to set aside a paternity determination of children for whom they are 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;
- 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:

- Married the child's mother and voluntarily assumed the parental obligation to pay child support;
- Acknowledged his paternity in a sworn statement;
- Consented to be named as the father on the child's birth certificate;
- Promised in writing to support the child;
- Disregarded a request from a state agency to submit to scientific testing; or
- Signed 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:

This bill raises separation of powers concerns because it could be construed to infringe on the Supreme Court's authority under s. 2, Art. V, State Const., to promulgate rules for practice and procedure. Several Ohio appellate courts have found that the Ohio paternity disestablishment statute was 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.⁷ As such, the Ohio paternity disestablishment statutes were found to be constitutional.

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 effected children.

VI. Technical Deficiencies:

The last sentence of subsection (8) of section 1. states: "[i]f the child is a minor, the court shall consider whether it is in the child's best interests to grant the mother's request." What the mother may request is not specified. Other sentences in the subsection, however, could imply that the request is to change a child's surname.

⁷ *State ex rel. Loyd v. Lovelady*, 2006 WL 145426 (Ohio 2006).

VII. Related Issues:

The bill requires men who petition for paternity disestablishment to have newly discovered evidence. The Legislature may wish to consider whether “newly discovered evidence” refers to evidence acquired recently or more recently than the paternity determination. If “newly discovered evidence” refers to evidence acquired recently, men who have been prevented for years from seeking paternity disestablishment by case law may continue to be barred.

In *Cohen v. Nudelman*, a Georgia appellate court decided that newly discovered paternity evidence can be at least two years old.⁸ In that case, a man waited two years to set aside a paternity determination after obtaining the results of a DNA test. Other evidence described in the opinion suggests that the man may have been suspicious of his non-paternity years earlier.

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

⁸ *Cohen v. Nudelman*, 604 S.E.2d 580 (Ga. Ct. App. 2004).

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.
