

DELEGITIMATING DUPED DADS: IS IT DOABLE?

THE CHANGING LAW OF ATTACKS UPON PATERNITY JUDGMENTS

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INTRODUCTION

Your new client has a problem that is far too common: he pays child support for a child that he doesn't think is his. His ex-wife had a baby ten years ago. They were divorced shortly thereafter, with custody going to mom, and your client paying child support. In hindsight, your client admits that he thought she was having an affair during the marriage, but that he did not want to push for a paternity test while negotiating the divorce settlement. As the years have gone on, it has become increasingly apparent to your client that the child is not his biological issue, but the child of the man his ex-wife later married. Your client's visitations with the child have dwindled to practically none; your client believes that the child lives with his actual father. Because your client agreed to a judgment that ruled that he was the father, your first instinct is to tell him that his opportunity to litigate the issue of paternity is long gone. Child support has been taken out of his paycheck for years, and he wants to stop paying and to get his money back. What are the prospects for an attack on this judgment?

This paper addresses an issue that affects many people in the United States: the viability of post-appeal challenges to paternity judgments. According to the American Association of Blood Banks, in 22.7% to 28.2% of paternity tests by American blood labs, the tested party is not in fact the child's father.¹ The genetic testing currently available is very accurate. Indeed,

¹American Association of Blood Banks, *Annual Report Summary for 1999*, page 5. For an idea of the depth and breadth of the passion this issue has generated, see Carnell Smith's (AKA 1man 4truth) website, www.paternityfraud.com.

the tests usually yield a zero percent (0%) probability when the tested party is not the father.²

There are an extraordinary number of men in this country who are subject to paternity judgments for children who are not their biological issue.

Unfortunately, the issue is not a simple one, and the “paying males” are not the only parties with an interest in these laws. Mothers, biological fathers, and especially children are also subject to their effects. Paternity policy involves many important values including basic fairness, the best interest of the child, *res judicata*, the encouragement or discouragement of skepticism of paternity, and the preservation of family.

A court that applies a strong presumption of *res judicata* to paternity judgments growing out of divorce settlements, for example, forces men with any doubts (or even those with no doubt or suspicion) to get paternity tests, straining an already confrontational situation.³ Further, applying a strong presumption of paternity may reward deceptive behavior on the part of the mother. Conversely, if the court does not apply a strong presumption, the child may lose a relationship with a man who has acted as a father in favor of one he has little or no relationship with (the biological father).

The presumption that the relationship earlier established in the courts has the best chance

²Genetica DNA Laboratories, Inc. utilizes a testing method that compares the size of genes which are strictly inherited from the father with those of the child. If they are not a match, there is indeed a zero percent (0%) probability of fatherhood, as required by the statute. It should be noted that where the purported father is indicated to indeed be the father, the average power of exclusion (the probability that he is the biological dad) is merely greater than 99.999999%.

³One solution would be to mandate paternity tests prior to any paternity judgment. This would take the onus of insisting on testing off of the putative father and would eliminate the problem of false paternity (assuming the testing procedure was sound).

of creating a good relationship between father and child is debatable. In many cases, especially where the paying male believes he is not in fact the biological father of the child, he has no interest in maintaining a relationship. He views the relationship as a financial strain, based on a legal error that is impossible to remedy. Giving a man the right to visitation with the child will not foster a loving relationship between the two, if he views the entire situation as an expensive error. In addition, the biological father may be interested in building a strong relationship with his child if his status as father is recognized by the court.

ATTACKING PATERNITY JUDGMENTS WHERE THERE IS NO SPECIFIC PATERNITY SET ASIDE STATUTE

All states have a civil procedure for setting aside paternity judgments. Of the states without specific statutes, there is typically a statute addressing motions to set aside similar to Federal Rule of Civil Procedure 60 (b):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, 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 under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) not more than one (1) year after the judgment, order or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation. . . .

Both the application of such statutes, and the substantive law of challenging paternity,

differ widely between the states.⁴ Although family law concerning children ultimately devolves upon a “best interest of the child” rationale, the law of paternity testing focuses on the issue of *res judicata*. Some courts hold that children are best served by the stability of a strong rule of *res judicata*: “if there is a class of judgments where the doctrine of *res judicata* should be scrupulously honored, it is a paternity judgment.” Robert J. v. Leslie M. 51 Cal. App. 4th 1642 (1997). Conversely, other courts have denied paternity where the factual basis for denial of paternity is compelling, despite a prior judgment: “a court’s adherence to a paternity agreement entered into by an 18 year-old putative father, without counsel, without a trial, without a blood test, when a subsequent blood test offered in proof positively excludes the male as the father, might very well undermine the public’s faith in our system of justice.” Jacqueline M.L. v. Korey D.S., 229 Wis. 2d 253 (1999).

A further option for attack exists in states that have no specific paternity judgment set aside statute, involving the “saving clause” of Rule 60(b) and its analogues:

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court.

This language preserves the litigant’s ability to bring a common-law action attacking the judgment. Naturally, the standards for such attacks are very high. For example, in Indiana, a strict requirement is that there be extrinsic fraud. Extrinsic fraud is that fraud which denies the

⁴An excellent series of articles on paternity challenges nationally can be found in Divorce Litigation: Nadine E. Roddy, *The Preclusive Effect of Paternity Findings in Divorce Decrees*, 10 Divorce Litigation 169 (1998). David M. Cotter, *Will You Still Need Me, Will You Still Feed Me, After 60(b)? Direct Attacks Upon Final Paternity Judgments*, 14 Divorce Litigation 1(2002).

parties or the court the opportunity to have their case heard.⁵ This is distinguished from intrinsic fraud, where there was perjury at trial or other deceptive behavior that could have been attacked at trial.⁶

Common law attacks on paternity judgments are typically used where the statute of limitations on statutory challenges has been exhausted. One example of a successful application of this theory is the case of *In Re Marriage of M.E.*, 622 N.E. 2d 578, (Ind. Ct. App. 1993). In that case, the paying male had been deceived into believing that the child was his by his wife at the time. As a result of this deception, their divorce decree named the husband as father. When the ex-wife confessed the situation, the real father, the paying male and the ex-wife did joint genetic testing, and filed a joint motion attacking the paternity finding in the divorce decree under the saving clause of Indiana's 60(b) analogue. The child's guardian ad litem opposed the motion, and the trial court found against the motion. On appeal, the trial court was reversed. The Court of Appeals of Indiana found that because extrinsic fraud deprived the paying male of the opportunity to contest paternity in the divorce, the motion should have been granted.

PATERNITY SET ASIDE STATUTES

Only nine (9) states have specific paternity judgment set aside statutes. Increasingly, the

⁵"If a party establishes that an unconscionable plan or scheme was used to improperly influence the court's decision, and that such acts prevented the losing party from fully and fairly presenting his case or defense, then 'fraud on the court' exists." *In re Paternity of Tompkins*, 518 N.E. 2d 500 at 507 (Ind. Ct. App. 1988)

⁶David M. Cotter, *Direct Attacks Upon Final Paternity Judgments Under Provisions Other Than Those Analogous to Fed. R. Civ. P. 60(b)*, 14(2) *Divorce Litigation* 34 (2002).

statutes require that courts reopen the paternity judgment when conclusive genetic testing is presented.⁷ In addition, the statutes often extend the time limits for bringing such challenges. It seems that legislatures have been swayed by a growing appreciation that genetic testing can reveal with absolute certainty that an original judgment was erroneous.

In several statutes, genetic evidence reopens the question of paternity. Alabama Code Section 26-17A-1(a), for instance, favors the use of genetic testing to determine paternity, even after the court has previously ruled on the issue: “Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father.” The statute mandates reopening the case on strong genetic evidence (though it does not seem to mandate a reversal of the judgment). Similarly, under 750 Ill. Comp. Stat. Ann. 45/7 (West 1999), genetic testing merely opens the door to the possibility of paternity judgment reversal: “. . . If, as a result of the deoxyribonucleic acid (DNA) tests, the plaintiff is determined not to be the father of the child, the adjudication of paternity and any orders regarding custody, visitation, and future payments may be vacated.” The ability to attack paternity judgments in Illinois is further attenuated by a statute of limitations barring such attacks “if brought later than 2 years after the petitioner obtains knowledge of relevant facts.” 750 Ill. Comp. Stat. Ann. 45/8(a)(3).

On the other hand, some statutes do not merely reopen the question of paternity, but mandate a reversal of the paternity judgment upon compelling genetic evidence. Under Arkansas Code Ann. Section 9-10-115, “If the court determines, based upon the results of scientific testing, that the adjudicated or putative father is not the biological father, the court

⁷*Ibid.*

shall set aside a previous finding or establishment of paternity and relieve the adjudicated or putative father of any future obligation of support as of the date of the filing of the motion for modification . . .”

Georgia’s new paternity fraud statute, signed into law on May 9, 2002, sets up a two tier system of mandatory and optional relief. To bring a motion under Georgia’s statute, O.C.G.A. Section 9-7-54(a) requires:

- (1) An affidavit executed by the movant that the newly discovered evidence has come to movant’s knowledge since the entry of judgment; and
- (2) The results from scientifically credible parentage-determination genetic testing, as authorized under Code Section 19-7-46 and administered within 90 days prior to the filing of such motion, that finds that there is a 0 percent probability that the male ordered to pay such child support is the father of the child for whom support is required.

If these requirements can be met⁸, and the hurdles of O.C.G.A. Section 19-7-54(b) can be overcome, mandatory relief is available. In essence, mandatory relief is available to the “paying male” if he has not adopted the child, the child is not the product of artificial insemination while the paying father and the mother were in wedlock, he has not blocked the biological father from “asserting his parental rights” and he has not acted to ratify paternity while aware that he is not the biological father:

- (b) The court shall grant relief on a motion filed in accordance with subsection (a) of this Code section upon a finding by the court of all of the following:
 - (1) The genetic test required in paragraph (2) of subsection (a) of this Code section was

⁸Raising two questions not clear in the text of the statute:

1. What is “new evidence”; does the genetic testing itself fulfill that requirement? Will there be a due diligence requirement embedded in that standard?
2. What if genetic testing is not available to the movant, if, for example, the mother does not make the child available for it?

properly conducted;

(2) The male ordered to pay child support has not adopted the child;

(3) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock;

(4) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child; and

(5) The male ordered to pay child support with knowledge that he is not the biological father of the child has not:

(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;

(B) Acknowledged his paternity of the child in a sworn statement;

(C) Been named as the child's biological father on the child's birth certificate with his consent;

(D) Been required to support the child because of a written voluntary promise;

(E) Received written notice from the Department of Human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded;

(F) Signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or

(G) Proclaimed himself to be the child's biological father.

O.C.G.A. Section 19-7-54(b).

However, if the above cannot be fulfilled, a movant with an affidavit of newly discovered evidence and preclusive genetic testing may still have his motion granted: "In the event movant fails to make the requisite showing provided in subsection (b) of this Code section, the court may grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law." O.C.G.A. Section 19-7-54(c). Georgia's statute illustrates the strong trend toward increasing the viability of paternity attacks and away from judicial discretion in such cases.

The new statutes may reduce or remove statutes of limitations on such challenges. Georgia's statute removes time barriers entirely; the Iowa statute can be brought to bear until the child reaches the age of majority. Statutes such as Maryland, Alabama and Virginia's are silent on the issue, implying that there is no statute of limitations on such actions. On the other hand,

Illinois, Alaska and Arkansas limit the motions to only two or three years.⁹

The states with paternity statutes also differ in their approach to pre-motion arrearages. In Iowa, past-due arrearages remain due. Alabama, Arkansas, Illinois, Louisiana, and Maryland are either silent on the issue or allow for the discretion of the court. The Georgia statute allows relief on past due child support only in mandatory relief cases. In cases where relief is not mandated, past due child support remains due. Alaska and Iowa's statutes explicitly extinguish past-due sums. Ohio's statute simply allows for continuing jurisdiction over the paternity cases to allow post-judgment genetic testing and a possible set aside or modification of the judgment.¹⁰

The Model Paternity Statute¹¹ would allow any party to the original paternity judgment or the child to bring a motion to set aside the judgment. Upon such motion, genetic testing would be ordered. If the putative father is excluded by the test, a guardian ad litem is appointed and a best interests of the child inquiry is held. The movant is responsible for the costs of the testing and the guardian ad litem.¹²

As with most fresh legislation, these statutes tend to raise as many questions as they answer. For instance, do they preclude 60(b) challenges to paternity judgments? Does *res judicata* operate to preclude parties who have lost attacks on a paternity judgment from using the

⁹*Ibid.*

¹⁰Lecture notes from a paper delivered by Stephen Eldred, Deputy District Attorney, Fresno County, entitled "Determined, Doubtful and Dubious Dads: Dilemmas in Paternity Establishment" and delivered on April 24, 2001, in Reno, Nevada.

¹¹Which can be found at the American Association of Matrimonial Lawyers site at: <http://www.aaml.org/Articles/2000-11/UPA%20FINAL%20TEXT%20WITH%20COMMENTS%20.htm>

¹²*Ibid.*

statute to attack the judgment again? The answers to these questions can only be revealed by litigation.

CONCLUSION

Courts and legislatures have dealt with the difficult policy problems involved in attacks on paternity judgments to mixed reviews. Much of the case law on the topic has historically favored preservation of the paternity judgment already in place; to some this tendency seems to ignore the compelling certainty of DNA evidence.

New paternity challenge statutes have greatly clarified the standards and procedures applicable to this important area of the law. However, many questions remain, and might only be answered through litigation. The advent of reliable genetic testing has had a profound impact on the law of paternity judgments. In states that have no statute, the law seems to be evolving toward easier challenges to paternity judgments. In the growing number of states where statutes exist, legislatures have often removed judicial discretion from the process, literally mandating reversal of the judgment under certain circumstances. Therefore, if your client is determined, and dubious, and has indeed been deceived, do not be deterred: delegitimation is doable.