

WHO'S YOUR DADDY?
PATERNITY FRAUD AND THE LAW IN
GEORGIA

BY:

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INTRODUCTION

This paper addresses a situation that affects many in our state and nationally: post-appeal challenges to incorrect paternity judgments. According to the American Association of Blood Banks, 22.7 to 28.2% of males tested for paternity by American blood labs show that the tested party is not in fact the child's father.¹ There is an epidemic of men wrongly liable for paternity judgments in the United States.

A number of values are involved in challenging paternity judgments, and states have differed significantly in their treatment of the subject. The legislatures and courts have struggled to weigh many considerations including basic fairness, the best interest of the child, res judicata, the encouragement or discouragement of skepticism of paternity, and the preservation of family.

In a typical scenario, a child is born to a wed mother. A paternity judgment is granted, often a part of a final decree of divorce. Either through mistake, through fraud, out of a love of the child, or simply based on a reasonable presumption, the father stipulates to his fatherhood. He does not demand a genetic test. Some years, and many dollars later, he hears or begins to suspect that he is not the father of the child. Alternatively, the mother may be interested in excluding the non-biological father, perhaps in favor of the actual father, from a relationship with the child.²

This scenario illustrates the difficulties courts and legislatures face in applying their values to paternity cases. If the court is to apply a strong presumption of res judicata to divorce judgments, they force men with any doubts whatsoever to get paternity tests, straining an already

¹American Association of Blood Banks, *Annual Report Summary for 1999*, page 5.

² Include Illinois cases, that apply a best interest standard.

confrontational situation.³ Further, such a strong presumption may reward deceptive behavior on the part of the mother. 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. **But is this wrong? Might it be inevitable? Shouldn't the child have a right to know who thier father is?**

ATTACKING PATERNITY JUDGMENTS NATIONALLY

All states have a civil procedure for setting aside paternity judgments. Of the states (such as Georgia, until recently) without specific statutes, there is typically a statute addressing motions to set aside similar to Federal Rule of Civil Procedure 60 (b):⁴

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 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. This rule does not limit the power of a court to entertain an independent action to

³Some commentators have suggested that paternity tests should be mandatory in certain situations, or at least require a specific waiver.

⁴Georgia's O.C.G.A. Section 9-11-60 is very similar, though the time limits vary from the federal rule.

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 set aside a judgment for fraud upon the court.

The application of such statutes, and the substantive law of challenging paternity differs widely between the states.⁵ All family law concerning children ultimately devolves upon a best interest of the child rationale, though the test in these cases usually revolve around the issue of res judicata. Some courts hold that a 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). On the other hand, other courts have been more willing to deny 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 (year).

Only nine states have specific paternity judgment set aside statutes. Of the states with such statutes, about half enable the Court to set aside the judgment by a relatively liberal interpretation of the law, typically by extending the time limit for direct challenge to judgment.

Of the states with specific set aside statutes, there are differing approaches to pre-motion

⁵An 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). Also, David M. Cotter, *Direct Attacks Upon Final Paternity Judgments Under Provisions Other Than Those Analogous to Fed. R. Civ. P. 60(b)*, ?? Divorce Litigation ?? (2002).

arrears. In Iowa, past-due arrears remain due. Alabama, Arkansas, Illinois, Louisiana, and Maryland are either silent on the issue or allow for the discretion of the court. Only Alaska's statute explicitly extinguishes past-due sums. Ohio's statute grants 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.⁶

The Model Paternity Statute would allow any party to the original paternity judgment, or the child to bring a motion to set aside the motion. 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.⁷

THE STATUTE AND THE LAW OF CHALLENGING PATERNITY IN GEORGIA TODAY

The text of the statute as it passed the Georgia Senate is as follows:

AS PASSED SENATE

A BILL TO BE ENTITLED
AN ACT

To amend Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, so as to provide for a motion to set aside a determination of paternity based on newly discovered evidence regarding paternity of a child; to provide requirements for filing such a motion; to provide that relief on such motion shall be granted if genetic testing conclusively shows that the alleged father is not the biological father of the child and certain other conditions are met; to provide that such relief shall not be denied because of the

⁶Lecture 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.

⁷Ibid. (that means the one above, right?)

prior occurrence of certain acts unless the alleged father acted with knowledge that he was not the biological father; to provide for additional testing; to provide for costs; to provide for relief; to provide for matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, is amended by adding after Code Section 19-7-53, relating to confidentiality of hearings, a new Code section to read as follows:

"19-7-54.

(a) In any action in which a male is required to pay child support as the father of a child, a motion to set aside a determination of paternity may be made at any time upon the grounds set forth in this Code section. Any such motion shall be filed in the superior court and shall include:

(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.

(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 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.

(c) 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.

(d) In the event relief is granted pursuant to subsection (b) of this Code section, relief shall be limited to the issues of prospective child support payments, past due child support payments,

termination of parental rights, custody, and visitation rights.

(e) The duty to pay child support and other legal obligations for the child shall not be suspended while the motion is pending except for good cause shown; however, the court may order the child support be held in the registry of the court until final determination of paternity has been made.

(f)(1) In any action brought pursuant to this Code section, if the genetic test results submitted in accordance with paragraph (2) of subsection (a) of this Code section are provided solely by the male ordered to pay child support, the court on its own motion may, and on the motion of any party shall, order the child's mother, the child, and the male ordered to pay child support to submit to genetic tests. The court shall provide that such genetic testing be done no more than 30 days after the court issues its order.

(2) If the mother of the child or the male ordered to pay child support willfully fails to submit to genetic testing, or if either such party is the custodian of the child and willfully fails to submit the child for testing, the court shall issue an order determining the relief on the motion against the party so failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, such failure shall not be considered willful.

(3) The party requesting genetic testing shall pay any fees charged for the tests. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, such agency shall pay the cost of genetic testing if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(g) If relief on a motion filed in accordance with this Code section is not granted, the court shall assess the costs of the action and attorney's fees against the movant."

SECTION 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed.

The current statute, as yet unsigned, does the following:

1. Removes any time barrier to a movant who has newly discovered evidence that challenges paternity: 19-7-54 (a): "In any action in which a male is required to pay child support as the father of a child, a motion to set aside a determination of paternity *may be made at any time* upon the grounds set forth in this Code section. . . ." (emphasis supplied).

2. Creates a mechanism for *mandatory relief*: “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: . . .” (emphasis supplied). Mandatory relief is available when there is reliable testing establishing with certainty that the support paying male is not the father, where there is newly discovered evidence (the subsection (a) affidavit showings), he has not adopted the child⁸, the child is not the product of artificial insemination while the paying father and the mother were in wedlock, blocked the biological father from “asserting his parental rights” and he has not, in essence, acted to ratify paternity while aware that he is not the biological dad.
3. For those cases where relief is mandatory, the statute allows relief from past due child support and may lead to a termination of parental rights as well as custody decisions, prospective child support, and visitation. O.C.G.A. Section 19-7-54(d).
4. Creates a second tier of cases where the petitioner *may* have his or her motion granted. Section 19-7-54(c). These are those cases in which the Section 19-7-54 (a) affidavit showing of new information and a zero percent probability that the paying male is the biological father can be made but mandatory relief is not available under subsection (b).
5. Where relief is permissible, but not mandatory, it cannot include relief from past due child support or allow termination of parental rights. It can, however, set aside paternity, order paternity, create or eliminate a duty to support, order custody and visitation. However, it cannot grant relief from past due child support (except perhaps that held in the registry of the court pursuant to subsection (e)).

⁸Which would be an odd thing for the father to do if he believed that he was in fact the biological father.

6. Clarifies the mechanism for confirmatory testing in subsection (f).
7. There appears to be no avenue for relief under this statute where there is no newly discovered evidence since entry of judgment.
8. There appears to be no relief under this statute where genetic testing does not establish non-paternity to an absolute certainty. Fortunately, zero percent probability is apparently the usual result where the subject is not the father.⁹
9. Subsection (g) creates a loser pays system against the movant when the motion is not granted.

The statute raises some questions as well:

1. Is there a third tier of cases for petitioners who cannot make the subsection (a) showing of newly discovered evidence and absolute certainty that the male is not the biological father, or does this statute foreclose all other attacks on paternity judgments?
2. (B)(4): “The male ordered to pay child support did not act to prevent the biological father of the child from asserting his parental rights with respect to the child;” This subparagraph appears to intend to prevent the putative father from intentionally spoiling the actual biological father’s relationship with the child. But it arguably includes situations where the putative father passively or unknowingly acted in way that prevented the biological dad from asserting his rights. Indeed, if, as the statute requires, the male

⁹Genetica 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 probability of fatherhood, as required by the statute. It should be noted that where the purported dad 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%.

challenging paternity does so only on the basis of *newly discovered evidence*, it is hard to see how, except through happenstance, he would intentionally act to thwart the biological dad's assertion of his rights.

3. Once the putative father has "knowledge that he is not the biological father of the child" the statute arguably compels the putative father begin to deny his paternity. If he stipulates to paternity (O.C.G.A. 19-7-54 (b)(5)(B): "acknowledged his paternity in a sworn statement.", agrees to be named as father on the birth certificate (19-7-54 (b)(5)(C), or makes a written agreement to pay child support (19-7-54 (b)(5)(D) he loses the mandatory grant of his motion to defeat paternity.

The statute does not mandate (but allows) setting aside paternity if the putative father, having "knowledge that he is not the biological father" "proclaim[s] himself to be the child's biological father. First, what is such "knowledge"? Subjective certainty (I look at that child and I know he is not mine)? Subjective suspicion (I look at that child and I wonder if he is mine)? Objective grounds for certainty (anyone looking at that child could tell that he was not mine)? Objective grounds for suspicion (anyone looking at that child would question whether he was mine)? Second, what is a "proclamation"? It would appear to be a "holding one's self out as" test, much as in common law marriage.

4. Subsection (f) sets out the mechanism for confirming the blood results if they are submitted "solely by the male ordered to pay child support". What is the mechanism for getting a blood test in the event the male ordered to child support and/or the child are not available or willing to be tested? It would appear to be provided for by Section 19-7-54(f)(2), which specifically allows for enforcing testing if a party fails to do so,

apparently on a request prior to the filing of the suit. **(Randy-check my logic here, I am confused by this section).**

5. What if the paying male's DNA is not available (e.g. he is gone)? Is it not sufficient to show that the petitioning male has a 99.999% probability of being the father?
6. Finally, a big question: what is newly discovered evidence? Under pre-statute cases, extraordinary motions for new trial based on newly discovered evidence required that the petitioner prove that the newly discovered evidence had come to his knowledge since the trial, that lack of due diligence was not the reason for the late evidentiary discovery, and that the evidence was decisively material. See Patterson v. Whitehead, 224 Ga. App. 636, 481 S.E. 2d 621 (1997). But the statute appears to be intended to modify the requirements needed to overturn paternity judgments from the strict standards that apply to extraordinary motions for new trial, allowing for an entirely different set of criteria to apply to the decision. As this statute seems to completely eclipse the law of extraordinary motion for new trial in the paternity arena, it would appear to be improper to apply precedent from that area.

HOW HAS THE LAW CHANGED IN GEORGIA

Prior to the enactment of O.C.G.A. Section 19-7-54, the law of challenging paternity judgments was largely case law based. To show how the law in this area has changed, it is instructive to compare the cases and their outcomes to the outcomes expected under the new law.

In Macuch et al. V. Pettey et al., 170 Ga. App. 467 (1984), an ex-wife, who had signed a

divorce decree that legitimated the children, petitioned to have parental rights of the ex-husband terminated. Indeed, the ex-wife brought the case under her own name and under that of her child as next friend. The court ruled that the wife had consented to her ex-husband's paternity, and hence, absent fraud or mistake, was prevented by res judicata from challenging the result. Further, the court found that the mother's actions could not be circumvented by the mother as next friend of her child. The court ruled that the child was a privy to the divorce case, had been named as a beneficiary of the case and had in fact been a beneficiary of the case. Therefore, the trial court's grant of the non-biological but legitimate father's motion to dismiss was affirmed.

Under the new statute, the ex-wife's quest would have ended at the affidavit stage, assuming that the court treated the child was treated as a privy as they did in the actual case. The ex-wife cannot claim to have discovered new evidence as she appeared to know the identity of the actual father all along. However, her revelation to her ex-husband that he is not the biological dad would likely allow him to bring the motion successfully, or at least to get past the affidavit stage.

In Ghrist v. Fricks et al. Fricks v. Ghrist, 219 Ga. App. 415 (1995), probably the most cited paternity attack case in Georgia, the ex-wife of the adjudicated father moved the court to set a paternity judgment aside. Later, her new husband (the actual father of the child) separately moved to set the paternity judgment aside.

The 1990 final judgment and decree of divorce included custody and child support arrangements; the ex-wife concealed her sexual relationship with the biological father until after the divorce and in fact gave positive reassurance to the ex-husband that the child was his. Eight months after their 1991 marriage, the biological parents did a blood test yielding a 99% probability that the adulterous male was the biological father.

The trial court dismissed the mother's petition on estoppel grounds: she had alleged and stipulated to her ex-husband's paternity, she misled the ex-husband about his paternity status, and she clearly had absolutely no reason to believe that only her ex-husband could have been the father. The court held that collateral estoppel applied to her new husband as well. They reasoned that he was a privy to her acts in that he knew about Mrs. Fricks' deception of her first husband and the court. Indeed, he passively encouraged another man to take care of a child he believed was his. His petition was dismissed.

The court noted that Mr. Grist enjoyed an excellent relationship with the child and considered him his son. It is interesting to wonder whether the case would be decided differently had it been Mr. Grist who had petitioned to delegitimize the child.

The court stated that "The public policy of this state favoring the institution of marriage and the legitimacy of children born during a marriage is the strongest public policy recognized by law." The court strongly opposed "rendering the child illegitimate." The court went on to state that "paternity and legitimation are not the same thing. Biology is not destiny, and a man has no absolute right to the grant of his petition to legitimate a child simply because he is the biological father. Instead we have held time and time again that the court *must* consider the best interest and welfare of the child before granting a legitimation petition, and that it is not bound by the desires and contentions of the biological parents."

Under the new statute, the petitioners would need to show that they were in possession of newly discovered evidence. This showing would presumably be impossible, as they would appear to have known the truth about the identity of the biological father from the outset. But what if the ex-husband, a year after defeating their motion, filed one of his own? First, he should be able to get past the affidavit requirement of newly discovered evidence. But problems begin

to assert themselves as he applies for the mandatory relief of O.C.G.A. Section 19-7-54, subsection (b). He has clearly acted to prevent the biological dad from asserting his parental rights by defeating his legal efforts to be legitimated. Therefore, the court is not forced to grant his motion. However, under subsection (c) it may do so. I suspect that, given the good bond the child had formed with the ex-husband earlier, and Georgia's strong policy against delegitimation, the court would be inclined to deny the motion. Costs to ex-husband.

In Grice v. Detwiler et al., 227 Ga. App. 280 (1997) the petitioner in the original action was an ex-husband who had not been legitimated in his divorce decree. He asserted that he was defrauded by his wife and her mother, who had, he testified, stated that the child was not his. However, he hired a lawyer who never had him undergo a blood test, and relied on the lawyer's (apparently unsupported and definitely erroneous) representation that the child was not his. A custody battle took place between the mother (Detwiler) and her second husband (Ogle) who ultimately was legitimated in their divorce decree. At the time of the case, Mr. Ogle had acted as the child's father for more than a decade. Some years later, the mother and the grandmother of the child finally told the first ex-husband (Grice) that the child was his. The Court of Appeals found that because a dispositive blood test was available at the time of his marriage, and because he failed to use it despite his suspicion that the child was his, the ex-husband failed to apply due diligence at the time of the divorce decree, and thus was bound by it.¹⁰

How would this case have played out under the new statute? Under the new statute, due diligence is not at issue. In this scenario, the affidavit requirement can be met. Mr. Grice would have been able to show the non-paternity of Mrs. Detwiler's current husband, as well as his new

¹⁰Interestingly, Justices Beasley and McMurray dissented. They noted that the trial court found fraud, based in large part on the fact that the child's mother's mother testified that she conspired with her daughter to deceive Ogle, the biological father.

evidence (the mother and grandmother's admissions). Where the case goes from that point depends largely on Mr. Ogle (the second husband and paying male). If Mr. Ogle acts to block Mr. Grice from asserting his parental rights, Mr. Ogle automatically defeats the law's provision for a mandatory granting of his motion. Further, the mandatory granting provision can apparently be defeated if Mr. Ogle proclaims that he is the biological father while knowing that in fact he is not (O.C.G.A. Section 19-7-54(b)(5)(G)). If Mr. Ogle does these things, the motion still may be granted. I suspect that most courts would preserve the long standing relationship between Mr. Ogle and his son (and deny the relationship between Mr. Detwiler and his son). Again, if Detwiler loses, he pays the attorney's fees.

CONCLUSION

The new paternity challenge statute has greatly clarified the standards and procedures applicable to this important area of the law. However, many questions remain. Hopefully, case law will develop and answers will arise.