

# 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.)

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Prepared By: Children and Families Committee

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BILL: CS/CS/SB 1456

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

SUBJECT: Paternity

DATE: April 25, 2005

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</u>
3.	_____	_____	<u>HA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This committee substitute for the committee substitute for SB 1456 creates a process by which a sworn petition may be filed to set aside a determination of paternity at any time prior to the child's 18<sup>th</sup> birthday and gives the grounds for the petition. It requires notice to the mother or other legal guardian or custodian of any child affected by the petition. In granting the petition, the court must consider the best interests of the child and must find that the male ordered to pay child support is current on all child support payments.

If relief is granted on the petition, the relief is limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. The committee substitute for the committee substitute does not provide a cause of action for child support that has already been paid. The obligation to pay child support as well as other legal obligations continues during the pendency of the petition unless good cause is shown.

If the genetic tests submitted in support of the petition are provided solely by the male, the court may order on its own motion (and must order on motion of any party) that the mother, the child, and the alleged father submit to additional testing. If any party willfully refuses to submit themselves or a child to genetic testing and the child is in that party's custody, the court is required to enter an order determining the relief on the petition against the party failing to submit to the testing.

The party requesting genetic testing is required to pay for the costs of the tests, except that if a state agency requests the test for child support purposes, the agency may seek reimbursement of its costs against the person held responsible for court costs.

The committee substitute for the committee substitute requires the court to impose costs and attorney fees on persons whose petition to set aside a determination of paternity is denied.

This committee substitute for the committee substitute creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### **Paternity Establishment**

“[A] child born during a 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 under s. 742.10, F.S. 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, 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 acknowledgment.<sup>5</sup> After the expiration of the 60-day period, the signed voluntary acknowledgment 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>

“If the paternity of the child is determined by a court of competent jurisdiction as provided under s. 382.015, (F.S.), 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 of Health must 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 Family Law Rules of

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

<sup>2</sup> Section 742.031(1), F.S., and *T.J. v. Dep’t of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).

<sup>3</sup> Section 742.12(1), F.S.

<sup>4</sup> Section 742.011, F.S.

<sup>5</sup> Section 742.10(1), F.S.

<sup>6</sup> Section 742.10(4), F.S.

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

<sup>8</sup> Section 382.013(2)(d), F.S.

<sup>9</sup> Section 382.015(2), F.S.

Procedure 12.540<sup>10</sup> and Rules of Civil Procedure 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 one 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 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.<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>

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<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. Yohanan*, 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>

### **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."<sup>21</sup>

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."<sup>22</sup>

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>23</sup>

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<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> 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>22</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)

<sup>23</sup> Goodman, C. Paternity, Marriage and DNA. Legisbrief, National Conference of State Legislatures. Vol. 9, No. 38. October 2001.

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.<sup>24</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>25</sup>

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.”<sup>26</sup> 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.<sup>27</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

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<sup>24</sup> Jacobs, M., *ibid.*

<sup>25</sup> Roberts, P. Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children. Center for Law and Social Policy. 2003.

<sup>26</sup> U.S. Citizens Against Paternity Fraud, [www.paternityfraud.com](http://www.paternityfraud.com).

<sup>27</sup> Roberts, P., *ibid.*

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.<sup>28</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>29</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 is a marital child.<sup>30</sup> 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.<sup>31</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>32</sup> On the other hand, Ohio courts have declared that state’s law permitting disestablishment of paternity “at any time” unconstitutional on the grounds that it violated the separation of powers by allowing the Legislature to overturn existing legal judgments that were *res judicata*.<sup>33</sup>

In 2002, Georgia enacted legislation allowing the disestablishment of paternity.<sup>34</sup> According to this same source, Texas, Iowa, Maryland, Ohio (but see above regarding Ohio court decision), and Louisiana have enacted legislation allowing men to challenge paternity using DNA testing.

Wyoming’s statute<sup>35</sup> 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.

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<sup>28</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>29</sup> Roberts, P., *ibid*.

<sup>30</sup> California Code sections 7540 and 7541, referenced in *Lefler v. Lefler*, 722 So. 2d 941, 944 (Fla. 4th DCA 1998) (concurring option).

<sup>31</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), referenced in *Lefler*, *id*.

<sup>32</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>33</sup> Department of Revenue Bill Analysis.

<sup>34</sup> HB 369, according to <http://www.paternityfraud.com/> (April 12, 2005).

<sup>35</sup> 14-2-801, Wyoming State Statutes.

### **III. Effect of Proposed Changes:**

This committee substitute for the committee substitute creates a process by which a petition may be filed to set aside a determination of paternity at any time and gives the grounds for the petition. It requires that notice be given to the mother or other legal guardian of a child who is the subject of a petition to set aside a determination of paternity. The grounds for setting aside a determination of paternity include an affidavit executed by the petitioner that newly discovered evidence has come to the petitioner's knowledge, that a generally accepted scientific test has shown that the man identified as the father cannot be the father of the child, and an affidavit that the petitioner is current on all child support payments for the child for whom relief is sought. If scientific testing proves that the petitioner is not the biological father, then the court, with some exceptions, must grant the petition. If the petition is granted, the relief is limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights.

#### **Conditions for Relief**

The court must find that granting the petition is in the best interests of the child. The petitioner must be current on his child support obligations and establish through generally acceptable scientific evidence that he is not the biological father of the child in order to be entitled to relief.

#### **Exceptions to Relief**

In some cases, however, a paternity determination may not be set aside even if the male with the child support obligation is not the biological father. A court may not set aside a paternity determination of a person who:

- has adopted the child;
- was married to the mother of the child when the child was conceived, if conception was through artificial insemination; or
- prevented the biological father of the child from asserting his rights.

Further, a court may not set aside a paternity determination of a person who knew he was not the father of the child and:

- Married the mother of the child and voluntarily assumed an obligation to pay child support;
- Acknowledged paternity in a sworn statement;
- Consented to be named on the child's birth certificate;
- Was required to support the child because of a voluntary written promise;
- Disregarded a written notice from a state agency to submit to genetic testing;
- Signed an acknowledgment of paternity; or
- Proclaimed to be the biological father of the child.

#### **Effect of Paternity Disestablishment**

If a paternity determination is set aside, the relief granted by the court is limited to issues of prospective child support payments and termination of parental rights, custody, and visitation rights. Previous actions taken in reliance on the male's status as father remain valid. No cause of action to recover child support already paid is created by this committee substitute for the committee substitute.

**Attorney Fees and Costs**

If relief on a petition filed under the provisions of this committee substitute for the committee substitute is not granted, the court is required to assess attorney fees and costs against the petitioner.

This committee substitute for the committee substitute takes effect on July 1, 2005.

**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:**

In *D.F. v. Department of Revenue*, 823 So. 2d 97 (Fla. 2002), the Florida Supreme Court considered whether a father of record with a child support obligation could challenge a determination of paternity made during a divorce proceeding nine years earlier. The Court would not allow the paternity determination to be set aside because the father of record did not plead fraud and his petition was not filed within a year of the initial judgment. In a concurring opinion, Justice Pariente “urge[d] the Legislature to address the difficult issues raised in cases [involving attempts to set aside prior determinations of paternity].”

In *Department of Health and Rehabilitative Services v. Privette*, 617 So. 2d 305, 307 (Fla. 1993), the Florida Supreme Court stated that children have a constitutional right to maintain their status as legitimate if doing so is in their best interests. The facts in that case, however, involved an attempt by a state agency effectively to terminate the parental rights of a father of record and name another person as the father.

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

None.

**B. Private Sector Impact:**

Males who are not the biological father of a child are less likely to have a financial obligation to support a child. Some children may experience a reduction in financial support.

**C. Government Sector Impact:**

The Department of Revenue may have greater difficulty locating a person who is financially obligated to support a child. Additional families may be eligible for public assistance in lieu of child support.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

When the committee substitute for the committee substitute provides that the relief which may be provided if the petition is granted is “limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights,” the limits of the court’s discretion in granting relief within those issues is not defined. While the bill has been read to require that future child support payments must be ended and parental rights must be terminated after a petition is granted, that conclusion is not required by the language of the committee substitute for the committee substitute.

The committee substitute for the committee substitute contains no provision for amending the child’s birth certificate if the relief is granted and the petitioner is named as the father on the child’s birth certificate.

The Department of Revenue has identified additional legal issues relating to this committee substitute for the committee substitute:

- Section 760.40(2), F.S., forbids performing DNA testing or disclosing the results of such testing without the informed consent of the person being tested. There is an exception for other required testing but not for the testing described in this committee substitute for the committee substitute.
- The limitations of the effect of a judgment of non-paternity (to prospective child support payments, termination of parental rights, custody, and visitation rights) and the failure to address other parentage-related issues such as inheritance and citizenship may cause confusion.
- Paternity determinations made in other states would not be subject to the reach of this bill under the provisions of the Uniform Interstate Family Support Act, chapter 88, Florida Statutes.



## **VIII. Summary of Amendments:**

None.

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

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