

# 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 1456

SPONSOR: Judiciary Committee and Senator Lawson

SUBJECT: Determination of Paternity

DATE: April 8, 2005

REVISED: \_\_\_\_\_

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

## I. Summary:

This committee substitute creates a process by which a male obligated to pay child support as the father of a child may petition a court to set aside an incorrect determination of paternity. If scientific tests prove that the petitioner is not the biological father, then the court, with some exceptions, must enter an order relieving the person of future child support obligations and terminating his parental rights.

This 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>

<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.

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, 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 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 1 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.

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<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.

<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.”

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>

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>

### III. Effect of Proposed Changes:

This committee substitute creates a process by which a male obligated to pay child support as the father of a child may petition a court to set aside an incorrect determination of paternity. If scientific testing proves that the petitioner is not the biological father, then the court, with some

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<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).

<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.*

exceptions, must enter an order relieving the person of future child support obligations and terminating his parental rights.

### **Conditions for Relief**

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 petitioner's child support obligations will cease prospectively and his parental rights will be terminated. Actions taken in reliance on a prior determination of paternity will remain valid.

This 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.

**C. Government Sector Impact:**

The Department of Revenue may have greater difficulty locating a person who is financially obligated to support a child.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

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

None.

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