CLASP

CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: December 30, 2004

RE: Paternity Disestablishment in 2004: The Year in Review

In 2003, CLASP published a series of articles on paternity disestablishment called *Truth and Consequences, Parts I, II, and III*. The original series can be found at www.clasp.org in the Publications section of the Child Support and Fathers page. It can also be found in volume 57 of *Family Law Quarterly,* pages 35-103 (Spring 2003). The first two articles analyzed recent statutory and case law on this important issue while the third looked at the fiscal implications of disestablishment.

The original articles were supplemented in February and April of 2004 by memos (available on the CLASP website) describing case law developments in late 2003 and early 2004. Since then more cases have been reported and at least one state has enacted new legislation. This memo analyzes the statutory and case law developments in late 2003 and 2004. It contains two appendices. The *first* appendix describes in detail the reported cases in 2004. The cases are divided by topic and listed alphabetically by state. The *second* appendix contains two charts listing the major state cases in the last seven years. One chart deals with disestablishment for marital children and the other for non-marital children.

OVERVIEW OF 2004

Disestablishment and Non-Marital Children

Voluntary Acknowledgments

The paternity of a non-marital child may be established through voluntary acknowledgment. Using this method, the parties sign a standardized form and receive basic information about the rights and responsibilities that flow from the acknowledgment. They should also be told about the availability of genetic testing and

given an opportunity to obtain such testing before they sign. Thereafter, they have 60 days in which to rescind the acknowledgment and thereby disestablish the child's paternity. At the expiration of the 60-day period, the acknowledgment is the equivalent of a judicial order and can be challenged only on the basis of fraud, duress, or material mistake of fact. In most states, if a parent challenges an acknowledgment, he or she must do so within a specific period of time. Before proceeding, the court will also consider equitable principles (res judicata, collateral estoppel, or judicial estoppel) as well as the best interests of the child.[1]

In *People ex rel the Department of Public Aid v. Smith,* 797 N.E.2d 172 (Ill. 2004), the Illinois Supreme Court used these principles to deny a man's petition to disestablish paternity. Although Illinois law allows a man who has been *adjudicated* to be a father to bring a subsequent action to disestablish paternity based on genetic test results, the court found that the law did not apply to voluntary acknowledgments. Once 60 days have passed, a voluntary acknowledgment creates a conclusive presumption of paternity. It can be attacked only on the basis of fraud, duress, or material mistake of fact. The father could show none of these things. Therefore, his petition was unsuccessful. In contrast, and on a similar set of facts, an appellate court in Oklahoma reached the opposite conclusion, *Department of Human Services v. Chisum,* 85 P.3d 860 (Ok. App. 2004). That court found that since genetic testing contradicted the acknowledgment, there had been a "material mistake of fact." The appellate court also held that the neither equity nor the best interest of the child applied in paternity cases involving a man who was not the genetic father.

The California legislature also took on the issue of paternity disestablishment in 2004. Prior law allowed rescission during the 60-day post-acknowledgment period and under Rule 60(b) for fraud, duress, or material mistake of fact. These laws remain in place. However, AB 252 established a third way to challenge paternity established through the voluntary acknowledgment process. Now, either parent can challenge a voluntary acknowledgment if he or she does so within two years of the child's birth and alleges that the acknowledged father is not the biological father. If genetic tests confirm this allegation, the court may disestablish paternity if it finds that doing so is not contrary to the best interests of the child. The legislation also limits involvement of the IV-D agency in this area to cases in which there is a conflict between two voluntary acknowledgments or a voluntary acknowledgment and a judgment. See, California Family Code Section 7575 (2005).

Litigation

Paternity can also be established through litigation. In a IV-D case, the agency may facilitate testing before trial. In a non-IV-D case, the judge will usually order testing. Thus, typically the judgment will be consistent with genetic test results. However, sometimes the parties waive their right to testing and agree to an order of paternity. Alternatively, the defendant doesn't appear for the hearing and the court enters a default judgment. Thereafter, the party who declined testing or defaulted might bring an action to

[1] For a more detailed description of state practice in this area, see *Truth and Consequences, Part 1.*

disestablish paternity based on subsequently obtained genetic tests. Some states allow this by statute and some have case law setting the parameters for action. As with acknowledgments, there are usually time limits within which an action can be brought, equitable principles may be applied, and the best interests of the child are considered.

MAM v. State of Wyoming, Dept. of Family Services, 99 P.3d 982 (Wyo. 2004) is a case in which the parents voluntarily waived a hearing and genetic testing. The court then entered an order adjudicating parentage. When the child was about two years old, the mother revealed that there was another possible father and genetic tests established that he—rather than the adjudicated father—was the child's biological parent. The Wyoming Supreme Court found that the adjudicated father could move to vacate the judgment, and the motion should have been granted. In its ruling, the court noted that the record did not establish that the man had been informed of his right to genetic testing, and thus, he did not make a knowing waiver of his rights. In addition, the fact that the biological father was available to be sued so that paternity could be established weighed heavily in the court's decision.

In contrast, on a very similar set of basic facts, the New Jersey Supreme Court found that the father could not disestablish his paternity. *FB v. ALG,* 821 A. 2d 1157 (N.J. 2003). What distinguishes these two cases is that in the former, the adjudicated father had no contact with the child, while in the latter, the adjudicated father had a long-standing, close relationship with the child. In addition, the biological father was available for suit, while in the second, there was no biological father in the picture.

The California legislation discussed above also addresses disestablishment of the paternity of a non-marital child whose paternity has been previously adjudicated. Under the new law, the mother, adjudicated father, the child, or the legal representative of one of them may move to set aside a judgment based on genetic test results. The action must be brought within two years of the date the adjudicated father 1) knew or should have known of the judgment; or 2) knew or should have known of the existence of the paternity establishment suit, whichever is first. The legislation also allows any father whose paternity was adjudicated in a default proceeding held prior to the effective date of the new law (January 1, 2005) to move to disestablish his paternity based on genetic testing if he does so within two years. The court may deny the motion if it finds that it is not in the best interests of the child. California Family Code Section 7645 (2005).

Fiscal Consequences

When acknowledged or adjudicated paternity is disestablished, courts have had to wrestle with what to do about child support. There is near universal agreement that current and future support end once paternity is disestablished. However, the question of arrears remains. Should the disestablished father have to pay any outstanding arrears? Several courts have determined that, once a valid paternity order has been issued, if it is accompanied by a support order, the support order must be obeyed until paternity is

disestablished. Thus accrued arrears must be satisfied.[2] This trend continued in 2004. See, *State ex.rel. L.L.B. v. Hill,* 682 N.W. 2d 709 (Neb. 2004).

In addition, some fathers have brought tort actions to recover the support they paid to either the mother or the state (in public assistance cases). Disestablished fathers continue to be unsuccessful in this regard. *Bouchard v. Frost*, 840 A. 2d 109 (Maine 2004); *McBride v. Boughton, No. A103456 (Cal. App., 1st Dist. Oct. 21, 2004)*. See also, *Magwood v. Tate,* 835 So.2d 1241 (Fla. App. 2003). But, see *Haller v. Haller,* 839 A.2d 18 (N.H. 2003) (man could not sue the state, but *dicta* suggests he might be able to sue the mother or the biological father).

The California legislature also addressed these issues. By statute, if the court sets aside or vacates a paternity judgment, it must also vacate any order for child support and arrearages based on the previous judgment. The law also states that the previously established father has no right of reimbursement for any support paid prior to the granting of the motion.

Disestablishment and Marital Children

Litigation

If a child is born during a marriage, the husband is presumed to be the father of that child. Unless there has been substantial contact between the biological father and the child, courts have been reluctant to allow the biological father to disestablish the husband's paternity in order to establish his own. This continued to be the case in 2004. See, *In re Jesusa V.,* 85 P.3d 2 (Cal. 2004); *Stubbs v. Calendra,* 841 A.2d 361 (Md. Spec. App. 2004). In deciding these cases, the courts put heavy emphasis on the best interests of the child as well as the husband's wish to remain the child's legal father.

If the marriage ends, paternity might also be brought up in a divorce proceeding. When a wife raises the issue at divorce in order to push the husband out of the child's life, courts are generally reluctant to allow the challenge if the husband does not wish paternity to be disestablished. This is true even when the biological father is available and wishes to establish his paternity. This view was followed by two state Supreme Courts in late 2003 and 2004. See, *Baker v. Baker,* 582 S.E. 2d 102 (Ga. 2003); *Randy A. J. v. Norma I.J.,* 677 N.W.2d 630 (Wis. 2004). Both courts emphasized the importance of the best interests of the child as, in both cases, the husband was so involved with the child that he had sought custody in the divorce action. However, in late 2003, another state's highest court did allow a wife to raise paternity in a divorce proceeding since the action was commenced before the two-year statute of limitations on disestablishment actions had expired. *Barber v. Barber,* 77 P.3d 576 (Okla. 2003).

If the divorce decree confirms the marital presumption and finds a child to be "a child of the marriage" or uses similar language, the court will likely order child support. At some later point, the ex-husband, the ex-wife, or a third party might raise the question

[2] See, *Truth or Consequences, Part III* for more detail.

of genetic parentage. Usually, principles of *res judicata* or collateral estoppel are used to bar such actions, and this continued to be the case in late 2003 and 2004. See, *In re Marriage of Pedregon,* 107 Cal. App. 4th 1284 (Cal. App. 2003). Moreover, legislative attempts to interfere with courts use of these doctrines and thus allow post-judgment relief based on genetic tests came into question. Two courts found that legislative attempts to bar the use of *res judicata* violated the Separation of Powers doctrine and were thus unconstitutional. *Van Dusen v. Van Dusen,* 784 N.E.2d 750 (Ohio App. 2003); *Poskarbiewicz v. Poskarabiewicz,* 787 N.E.2d 688 (Ohio App. 2003).

Fiscal Consequences

Like their acknowledged or adjudicated counterparts, husbands whose paternity has been disestablished have sought reimbursement of support paid through the use of a tort claim. They have also continued to be unsuccessful in this endeavor. *Brooks v. Brooks,* 680 N.W.2d 379 (Iowa App. 2004) (unpublished opinion); *Gallo v. Gallo,* 861 So.2d 168 (La. 2003).

APPENDIX 1
CASE LAW DEVELOPMENTS IN 2004

Disestablishment and Non-Marital Children

Illinois

People ex. rel. the Department of Public Aid v. Smith, 797 N.E.2d 172 (Ill. 2004). A couple executed a voluntary paternity acknowledgment two days after the child's birth. The acknowledgment form clearly said that they had the right to genetic testing and that they waived that right. About six months later, the child support agency obtained a support order requiring both cash and medical support. Four years later, the man filed an action to declare the non-existence of a parent/child relationship pursuant to 750 Ill. Comp. Stat 45/7(b-5). This statute gives *adjudicated* fathers the right to bring a termination proceeding based on DNA test results. The man attached such results, indicating that he was not the child's biological father, to the pleadings.

The circuit court granted the state's motion to dismiss, finding that the terms of the voluntary acknowledgment statute made acknowledgments binding after 60 days unless fraud, duress, or material mistake of fact was raised. 750 Ill. Comp. Stat 45/5(b) and 45/6(d). Since the man had not acted within this time or raised these issues, he was not entitled to relief. The appellate court reversed, finding that the acknowledgment was the legal equivalent of an adjudication and therefore the statute allowing post-adjudication challenges based on DNA testing applied. The Illinois Supreme Court reversed the appellate court. Applying traditional rules of statutory construction, to harmonize the two statutes, and consulting the legislative history of both enactments, the Court found that the statute allowing a disestablishment action based on genetic test results was meant to apply to fathers whose paternity had been adjudicated, not to those who had signed voluntary acknowledgments. Fathers who have established their paternity through a voluntary acknowledgment have created a conclusive presumption that they are the biological parent, and the only way to undo this is to act within 60 days or make out a case of fraud, duress, or material mistake of fact.

Oklahoma

Department of Human Services v. Chisum, 85 P.3d 860 (Ok. App. 2004). On the day the child was born, Chisum executed a voluntary acknowledgment of paternity. Seven months later, he agreed to the entry of an administrative child support order, which recited that he had acknowledged paternity. This order was then entered in the district court. Several months later, he began to suspect that he was not the child's biological father and had private DNA tests done. The tests showed he was not the biological father and he then moved to vacate the child support order and the paternity acknowledgment. The trial court ordered genetic tests, which again showed Chisum was not the biological father. It then granted his motion, finding that the acknowledgment was based on a material mistake of fact.

DHS appealed, arguing that 1) principles of *res judicata* precluded the challenge; 2) the state paternity statute in effect when Chisum signed the acknowledgment did not allow a challenge after 60 days, and that period had expired before the motion was filed; 3) even if the amended statute (giving the parties two years to challenge on the basis of fraud, duress, or material mistake of fact) applied, there was no "material mistake of fact" since Chisum had not availed himself of paternity tests; and 4) the best interest of the child should have been considered.

The appellate court disagreed. It held that the amended statute became effective three days after Chisum signed the acknowledgment and gave him the right to challenge his paternity during the two-year period. The statute overrode *res judicata.* The court also said that Chisum could raise the "mistake of fact issue" as he was under no legal obligation to seek genetic tests before signing. Finally, citing *Barber v. Barber, 77 P.3d 576* (Okla. 2003), the court said it was not able to apply equitable principles (including the "best interests" standard) in paternity cases involving a man who is not the biological father.

Wyoming

MAM v. State of Wyoming, Department of Family Services, 99 P.3d 982 (Wyo. 2004). MAM and the mother established paternity through a Stipulated Order Waiving Informal Hearing and Order Waiving Genetic Tests. MAM had no contact with the child, but paid support regularly. The mother suspected that MAM was not the biological father, and, when the child was about two years old, voluntary genetic testing was done. The test revealed that MAM was not the child's biological father and identified another man who was. The mother then sought help from the IV-D agency to correct the error. She was told that there was nothing she could do. MAM then filed a petition to disestablish paternity. The district court refused to disestablish as it was inconsistent with Wyoming paternity statutes, and an appeal was filed with the Wyoming Supreme Court.

That Court reversed finding that the lower court had abused its discretion in denying the motion. The Supreme Court chose to treat the petition to disestablish as a motion for relief from a judgment. Relying on the rules governing relief from judgments, the Court noted that Wyoming's Rule 60(b)(6) allows a court to overturn a judgment for any reason justifying relief so long as the motion is made in a reasonable time. The doctrines of *res judicata,* collateral estoppel, and judicial estoppel do not bar such motions. The Court then went on to note that "…given the ready availability of the child's biological father, it is difficult to imagine *any* justification for denying the appellant's motion. The child's best interests are certainly better served by tying his future to his father rather than a stranger. Furthermore, there is an unsaid implication in public policy that child support payments and public assistance recoupment should be from the parent of the child." (Emphasis in original.)

However, the Court went on to note "…we emphasize that this case should not be construed to represent the Court's willingness to willy-nilly grant relief from paternity

judgments whenever genetic testing proves an error has occurred. Rather, the particular combination of facts in this case, especially the absence of evidence that [MAM] knowingly waived his rights to genetic testing and the lack of any prejudice to the child in granting relief from the judgment, have dictated the result."

Disestablishment and Marital Children

California

In re Jesusa V., 85 P.3d 2 (Cal. 2004). A husband and wife had been married for 18 years and had five children. They separated and the wife began living with Heriberto C. with whom she had a daughter. Heriberto held the child out as his, but made no effort to formally establish his paternity. The wife and baby daughter returned to the husband almost every weekend to visit the older children and the husband also held the new child out as his own. Heriberto was abusive. At one point he beat and raped the mother who was hospitalized. The county then brought a dependency action on behalf of the two-year-old child. In response, the husband filed for a declaration that he was the child's presumed father. Nine days later Heriberto also filed a request to be named as the child's presumed father. After some delay, a hearing was held but Heriberto was not present because, by then, he had been convicted of the rape and was in state prison. He was, however, represented by counsel and submitted briefs on the legal issues.

The juvenile court declared the husband to be the presumed father. On appeal, Heriberto challenged this ruling and also challenged the court's making the adjudication in his absence. A deeply divided California Supreme Court agreed with the juvenile court. Four of the justices, relying in part on *In re Nicholas H*, 28 Cal. 4th 56 (Cal. 2002), extended that holding to find that biological paternity by a competing presumed father does not necessarily defeat a non-biological father's presumption of paternity. Rather, in cases where there are two competing presumptions of paternity (here the marital presumption and the presumption based on the biological father's holding the child out as his own), the courts are required to weigh the competing presumptions and follow the one based on the weightier policy and logic. It was not an abuse of discretion for the lower court to find that policy and logic favored the husband since this was consistent with the wife's wishes, provided the child with a stable home, and embedded the child in the household of her five half-siblings.

The three dissenters were concerned about the broader implications of the decision for incarcerated fathers. However, the majority noted that its decision was confined to that "small subset of biological fathers who have neither married the mother of their child nor otherwise taken any steps to formalize their legal relationship with the child prior to the child's formation of a presumptive parent-child relationship with a competing man who is interested in asserting his legal rights as a father."

Maryland

Stubbs v. Calendra, 841 A.2d 361 (Md. Ct. Spec App. 2004*)*. A child was conceived and born during the Calendra's marriage. The marriage is ongoing and the child has lived with the Calendras and their two other children all of her life. Two years after her birth, a former neighbor sued Mrs. Calendra to establish his paternity and claim visitation rights.

Mr. Calendra intervened in the suit in opposition to the motion to establish paternity. A hearing master applied the "best interests of the child" standard and declined to order genetic testing. The court agreed, and denied the neighbor's motion to establish paternity, finding that he had not overcome the marital presumption that Mr. Calendra was the child's father.

On appeal, the court had to consider whether the paternity statute and the state Supreme Court's ruling in *Langston v. Riffe,* 754 A2d 389 (2000) required the ordering of genetic tests without regard to the best interests of the child. After reviewing federal and state law, the court concluded that the paternity statutes applied only to non-marital children. The paternity of marital children was to be determined under the state's Estates and Trusts Article. As interpreted by the state Supreme Court in *Turner v. Whisted,* 607 A. 2d 935 (1992), that statute required a "best interests of the child" hearing before genetic testing is ordered. Thus, it was not error for the court below to have held such a hearing. Moreover, the appellate court determined that the lower court had not abused its discretion in determining that it was not in the child's best interest to have the testing done. The decision contains a lengthy discourse on the psychological evidence presented and discusses why it would be harmful to the child to disrupt her existing family relationships.

Wisconsin

Randy A.J. v. Norma I.J., 677 N.W.2d 630 (Wis. 2004). A daughter was born during the marriage of a Wisconsin couple. The husband's name was placed on the child's birth certificate and he has supported her for her entire life. Unbeknownst to him, his wife was having an affair in Illinois at the time the child was conceived. When the child was about 15 months old, the wife was convicted of embezzlement and sentenced to jail. At that point she told the husband that he might not be the child's biological father. Shortly thereafter, her boyfriend filed a paternity action in Illinois. This action was later dismissed for lack of jurisdiction. The husband then filed for divorce seeking sole legal custody of the child. A temporary custody hearing was held. The boyfriend was notified of the hearing but did not appear. The court awarded temporary sole custody to the husband. The wife then counterclaimed alleging he was not the child's father (and therefore not entitled to custody) and the boyfriend intervened in the divorce action asserting his parental rights. For reasons that are not clear, the husband did allow genetic testing and it showed a high probability that the boyfriend was the biological father.

The trial court found that the wife was equitably estopped from asserting her husband's non-paternity. The boyfriend was not equitable estopped, but he had failed to

overcome the marital presumption of paternity. The court held that it was in the child's best interest to have the husband adjudicate to be her father and did so. On appeal, the court upheld the decision but used the equitable parent doctrine to do so, 655 NW 2d 195 (Wis. App. 2002).

The Wisconsin Supreme Court affirmed the ruling but disagreed with the appellate court's reasoning. It held that the equitable parent doctrine should not be used in Wisconsin. Instead, equitable estoppel principles should be used. In this case, applying those principles prohibits both the wife and her boyfriend from challenging the husband's paternity. The husband's paternity was affirmed.

The boyfriend had also raised a constitutional claim to establish his paternity. The court held that biology was not sufficient to raise the issue to a constitutional level. There has to be a relationship between the child and the alleged father before constitutional dimensions come into play. Here, the boyfriend had allowed the husband to put his name on the birth certificate and let the husband fully support the child. The boyfriend made no effort to assert paternity until the child was 15 months old, and he had failed to appear at the temporary custody hearing where the issue could have been resolved much earlier. In addition, even after the genetic tests were conducted, he made no attempt to support the child. Thus, his conduct did not create a relationship worthy of constitutional protection. The court declined to take a "purely biological approach to parenthood."

Constitutionality of Disestablishment Statutes

Van Dusen v. Van Dusen, 784 N.E.2d 750 (Ohio App. 2003). A daughter was born in 1985, four months after her parents married. In 1995, the parents divorced. The divorce decree named the girl as a child of the marriage and provided for her support. Subsequently, the father had genetic tests performed and they indicated that he was not her biological father. He then sued under Ohio's disestablishment statute (Ohio R.C. 3119.95) for a declaration that he was not her parent. The trial court found the statute to be unconstitutional and declined to issue a disestablishment order.

The Court of Appeals for the 10th Appellate District agreed. The court found that while the legislature could change the law prospectively, the separation of powers doctrine prevented it from overturning existing legal judgments. The divorce decree is *res judicata* on the issue of the girl's paternity. Since it is an existing judgment, it can only be attacked through Rule 60(b) and the case law surrounding that rule. The legislature cannot overturn the judgment. The Court went on to note that "[s]uch a disregard for the traditional powers of the other branches of government is especially egregious in the context of parenting and parentage matters. The legislature has, in effect, ordered the courts to enter new judgments taking away the only father a child has ever known if a DNA test indicates that the father and child are not genetically linked. Such a legislative mandate overlooks how complex the parent-child relationship is."

Poskarbiewicz v. Poskarbiewicz, 787 N.E.2d 688 (Ohio App. 2003). A daughter was born to a married couple who divorced in 1978. The father unsuccessfully challenged the

daughter's paternity, and he was ordered to pay support. In 1994, he again challenged her paternity but the court held that the divorce decree was *res judicata*. In 2000, armed with genetic tests showing he was not the girl's biological father, he tried again under Rule 60 (b)(4). The trial court granted relief, but the appeals court sent the case back for further consideration under Ohio's new paternity disestablishment statute (specifically Ohio R.C. 3119.961 and 3119.962). On remand, the trial court disestablished paternity, eliminated child support arrears, and ordered the return of an IRS tax intercept.

The Court of Appeals reversed, finding Ohio R.C. 3119.961, 3119.962, and 3119.967 to be unconstitutional and in direct violation of the separation of powers doctrine. In its view, the statute permits a party to bypass Rule 60(b) and the long established policy of *res judicata* and the legislature cannot do this. The court also notes that disestablishment is not always in the best interests of the child and that courts—not legislatures—are best-suited to make the best interests determination.

Fiscal Consequences of Disestablishment

California

McBride v. Boughton, Cal. App. No. A103456, (Cal. App. First Dist. October 21, 2004). After a brief affair, mother gave birth to a child in 1996. She told a man that he was the father and, based on that representation, he supported her and formed a relationship with the child. When the child was two years old, the mother sought to relocate and take the child with her. The man then filed a paternity action, as well as filing for custody of the child. Genetic tests established that he was not the biological father, and he abandoned the custody action. He then sued the mother and her new husband (who apparently was the biological father) to recover the support he had provided, using an unjust enrichment theory.

The trial court ruled in favor of the mother on public policy grounds and the California Court of Appeals affirmed. The court said there were two fundamental public policy reasons for not allowing the man to pursue the mother. *First*, it would require courts to look into the nature of the parent-child relationship in order to determine the amount of restitution due. Any financial loss could be offset by the emotional benefits gained from the man's relationship with the child. This is an area courts should avoid under the principles laid out in *Nagy v. Nagy,* 258 Cal. Rptr. 787 (Cal. App. 1989) and *Richard P. v. Superior Court,* 249 Cal. Rptr. 246 (Cal. App. 1988). *Second,* men should be encouraged not to lightly enter into agreements to support children who are not necessarily theirs. Allowing restitution would make men less careful about such agreements, and in the end, this hurts children. Finally, the court noted that the potential emotional and psychic costs to the child outweigh any financial injury a man might suffer from mistakenly supporting another man's child for a temporary period.

Maine

Bouchard v. Frost, 840 A.2d 109 (Maine 2004). A child was born to an unmarried mother in 1989. The mother began receiving public assistance and named Bouchard as the father. The IV-D agency brought Bouchard in for an interview and he acknowledged paternity. He did not request genetic tests although the form he signed told him of this right. Based on the acknowledgment, a support order was entered. He did not appeal the order and paid $22,695 over the next 11 years. In 2001, he filed a complaint to determine parental rights and responsibilities. Genetic tests were conducted and they showed he was not the biological father. The district court rescinded the paternity acknowledgment, declared him not to be the father, and held he was not liable for future support. This part of the order was not challenged. The district court also held that Bouchard was estopped from denying paternity during the period the acknowledgment was in effect. Bouchard appealed.

The Supreme Court of Maine held that Bouchard could not recover what he had paid from the state because of sovereign immunity. It also found that he could not recover against the mother under the doctrine of restitution. Child support law is statutory in nature and nothing in the statute authorizes a court to award restitution to a man who, without objection, pays child support for a child who later is determined not to be his. Moreover, such an award would effectively be a retroactive modification prohibited by federal and state law. Finally, the order—although voidable prospectively—was not void and therefore rights that accrued under it were properly enforced. In dicta, the court also notes that the purpose of child support is to provide for a child's welfare. It would manifestly undermine the purpose of this statute to order a mother receiving public assistance to repay child support.

Nebraska

State ex. rel. L.L.B. v. Hill, 682 N.W.2d 709 (Neb 2004). In 1996, the state sued to establish paternity and support. The alleged father (Hill) was properly served but failed to appear, and a default order was entered. He then moved to set aside the decree, but abandoned that action. It appears that, at the time, he was in prison. He was released from prison in 1998. While he was in prison, and after his release, his wages were garnished to pay the ordered support. In 2001, his driver's license was suspended for failure to meet the full obligation and a short time later, a contempt action was begun. Hill responded with a motion for genetic testing. The testing was ordered and showed that Hill was not the biological father of the child in question. Hill then moved—and the state did not oppose—to disestablish paternity and terminate future support. Hill also moved to vacate the arrears owed under the original order. The state opposed this motion. The court granted all of Hill's motions, and the state appealed the arrearage issue.

The Nebraska Supreme Court reversed the lower court and reinstated the arrearages. It found that the basis of Hill's motion was equity. However, to invoke equity a party must show that the situation was not due to his or her own fault, neglect, or carelessness. In this case, Hill's failure to respond to the original suit, his abandonment of

his earlier motion to set aside the judgment, and his inaction in raising the issue in response to the wage garnishment meant that he was negligent. "It was Hill's inexcusable lack of diligence which led to the accumulation of the arrearages, and, as a result, equity will not aid him in vacating those arrearages." In support of this holding the court cited *CSEA v. Hill,* 705 N.E.2d 318 (Ohio 1999).

Damage Actions

Iowa

Brooks v. Brooks, **680 N.W.2d 379 (Iowa App. 2004).** A married couple had three children. One was born three years before the marriage and a set of twins were born eight years after the marriage. The husband signed an affidavit of paternity of the older child, and there was a subsequent paternity proceeding as well. The couple divorced in 2001. At that time, the wife had genetic testing done for all the children. The test results showed that another man was the biological father of all three children. She did not tell the husband the results. He later learned of the tests and filed a petition for paternity disestablishment (as allowed by Iowa law). He also filed suit against the wife and her lover for fraud and intentional infliction of emotional distress. The district court granted a motion for summary judgment, finding that it was contrary to public policy to allow tort claims that threaten an existing parent-child relationship.

The Iowa Court of Appeals affirmed the decision in an unpublished opinion. Citing the rationale of *Day v. Heller,* 653 N.W.2d 475 (Neb. 2002), the court concluded that Iowa law does not recognize tort actions by husbands against wives for intentional infliction of emotional distress or fraud based on misrepresentation of paternity. The court went on to say that whether such torts should be recognized is up to the state's Supreme Court or the legislature.

APPENDIX 2
CASE LAW ON PATERNITY DISESTABLISHMENT ISSUES FOR MARITAL CHILDREN: 1997 - 2004

State	Major Cases
Alabama	*Jenkins ex rel. J.B. v. M.A.B.*, 723 So.2d 649 (1998) *Conway v. Dept. of Human Resources*, 720 So.2d 889 (1998)
Alaska	*T.P.D. v. A.C.D.*, 981 P.2d 116 (1999) *B.E.B v. R.L.B.,* 979 P.2d 514 (1999) *Rubright v. Arnold*, 973 P.2d 580 (1999) *Dixon v. Pouncy,* 979 P.2d 520 (1999)
Arkansas	*Office of Child Support Enforcement v. Williams*, 995 S.W.2d 338 (1999) *Graves v. Stevison*, 98 S.W.3d 848, (Ark. App. 2003)
Arizona	*Worcester v. Reidy*, 960 P.2d 624 (1998)
California	*Dawn D. Superior Court of Riverside County*, 952 P.2d 1139 (1998) *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Cal. App. 2000) *In re Marriage of Pedregon*, 107 Cal. App. 4th 1284 (Cal. App. 2003) *In re Jesusa V.,* 85 P.3d 2 (2004)
Colorado	*N.A.H. v. S.L.S.,* 9 P.3d 354 (2000)
Connecticut	*Serrano v. Serrano*, 566 A.2d 413 (Conn. Super. 2000) *W. v. W.,* 779 A.2d 716 (2001)
Florida	*Anderson v. Anderson*, 845 So.2d 870 (2003)

Georgia	*Baker v. Baker*, 582 S.E.2d 102 (2003)
Hawaii	*Doe v. Doe*, 52 P.3d 255 (2002)
Illinois	*In re Parentage of Griesmeyer*, 707 N.E.2d 72 (Ill. App. 1998)
Indiana	*Cochran v. Cochran*, 717 N.E.2d 892 (Ind. App. 1999) *Driskill v. Driskill*, 739 N.E.2d 161 (Ind. App. 2000)
Iowa	*Treimer v. Lett*, 587 N.W.2d 622 (1999) Callendar v. Skiles, 623 N.W.2d 852 (2001)
Kansas	*Ferguson v. Winston*, 996 P.2d 841 (Kan. App. 2000) *In re Marriage of Phillips*, 58 P.3d 680 (2002)
Kentucky	*Moore v. Cabinet for Human Resources*, 954 S.W.2d 317 (1997)
Louisiana	*State v. Walker*, 700 So.2d 496 (1997) *T.D. v. M.M.M.*, 730 So.2d 873 (1999) *Leger v. Leger*, 829 So.2d 1101 (La. App. 2002) *Gallo v. Gallo*, 861 S.2d 168 (2003)
Maine	*Stitham v. Henderson*, 768 A.2d 598 (Me. 2000)
Maryland	*Stubbs v. Calendra*, 841 A.2d 361 (Md. App. 2004)

Minnesota	*G.A.W. v D.M.W.*, 596 N.W.2d 284 (Minn. App. 1999) *Witso v. Overby*, 627 N.W.2d 63 (2001)
Mississippi	*R.E. v. C.E.W.*, 752 So.2d 1019 (1999) *W.H.W. v. J.J.,* 735 So.2d 990 (1999)
Missouri	*W.B. v. M.G.R.,* 955 S.W.2d 935 (1997) *Div. of Child Support Enforcement v. T.J.*, 981 S.W.2d 149 (1998)
Nebraska	*Day v. Heller*, 639 N.W.2d 158 (Neb. App. 2002)
Nevada	*Love v. Love*, 959 P.2d 523 (1998)
New Mexico	*Tedford v. Gregory*, 959 P.2d 540 (N.M. App. 1998)
Ohio	*Van Dusen v. Van Dusen*, 784 N.E.2d 750 (Ohio App. 2003) *Poskarbiewicz v. Poskarbiewicz*, 787 N.E.2d 688 (Ohio App. 2003)
Oklahoma	*Miller v. Miller*, 956 P.2d 887 (1998) *Cornelius v. Cornelius*, 15 P.3d 528 (Okla. App. 2000) *Barber v. Barber*, 77 P.3d 576 (2003)
Oregon	*In re Marriage of Moore*, 328 Ore. 513 (1999) *In the Matter of Sleeper*, 929 P.2d 1028, (Ore Ct. App. 1996)aff'd on other grounds 982 P.2d 1126 (Ore.1999)
Pennsylvania	*Brinkley v. King*, 701 A.2d 176 (Pa. Super. 1997) *Strauser v. Starr*, 726 A.2d 1052 (1998) *Fish v. Behrs*, 741 A.2d 721 (1999) *Sekol v. Delsantro*, 763 A.2d 405 (Pa. Super. 2000) *Weidman v. Weidman*, 808 A.2d 576 (Pa. Super. 2002) *JC formerly known as JA v. JS*, 826 A.2d 1 (Pa. Super. 2003)

Rhode Island	*Pacquette v. Trottier*, 723 A.2d 794 (R.I. 1998)
South Carolina	*Douglass v. Boyce*, 542 S.E.2d 715 (2001)
South Dakota	*Culhane v. Michels*, 615 N.W.2d 580 (2000)
Vermont	*Godin v. Godin*, 725 A.2d 904 (1998) *Jones v. Murphy*, 772 A.2d 502 (2001)
West Virginia	*William L. v. Cindy E.L.,* 495 S.E.2d 836 (1997)
Wisconsin	*Randy A.J. v Norma I.J.,* 677 N.W.2d 630 (2004)
Wyoming	*R.W.R. v E.K.B. and J.D.B.,* 35 P.2d 1224 (2001)

CASE LAW ON PATERNITY DISESTABLISHMENT FOR NON-MARITAL CHILDREN: 1997 - 2004

State	Major Cases
Alaska	*Ferguson v. Dept. of Revenue*, 977 P.2d 95 (1999) *State, Dept. of Revenue, CSED v. Button*, 7 P.3d 74 (2000)
Arizona	*Stephenson v. Nastro*, 967 P.2d 616 (1998)
Arkansas	*Littles v. Fleming*, 970 S.W.2d 259 (1998)
California	*In re Nicholas H.*, 46 P.3d 932 (2002) *McBride v. Boughton,* Cal. App. No. A 103456 (Cal. App. October 21, 2004)
Florida	*Fla. Dept. of Revenue ex rel. R.A.E. v. M.L.S.,* 756 So.2d 125 (Fla. App. 2000) *Fla. Dept. of Revenue ex rel. Sparks v. Edden*, 761 So.2d 436 (Fla. App. 2000) *Magwood v. Tate*, 835 So.2d 1241 (Fla. App. 2003)
Georgia	*Davis v. LeBrec*, 549 S.E.2d 76 (2001)
Illinois	*Donath v. Buckley*, 744 N.E.2d 385 (Ill. App. 2001) *People ex. Rel. Dept. of Public Aid v. Smith* , 797 N.E.2d 172 (2004)
Indiana	*Nickels v. York*, 725 N.E.2d 997 (Ind. App. 2000)
Louisiana	*Rousseve v. Jones*, 704 So.2d 229 (1997) *Faucheux v. Faucheux*, 772 So. 237 (La. App. 2000)

Maine	*Dept. of Human Services. V. Blaisdell*, 816 A.2d 55 (2002) *Bouchard v. Frost*, 840 A.2d 109 (2004)
Maryland	*Langston v. Riffe*, 754 A.2d 389 (2000) *Walter v. Gunter*, 788 A.2d 609 (2002)
Massachusetts	*In re Paternity of Cheryl*, 746 N.E.2d 488 (2001)
Michigan	*Van v. Zahorik*, 597 N.W.2d 15 (1999)
Minnesota	*Turner v. Suggs*, 653 N.W.2d 458 (Minn. App. 2002)
New Hampshire	*In the Matter of Haller*, 839 A.2d 18 (2003)
New Jersey	*F.B. v. A.L.G.*, 821 A.2d 1157 (2003)
New York	*Cleophus P. v. Latrice M.R.*, 299 A.2d 936 (App. Div. 2003) *Sarah S. v. James T.*, 299 A.2d 785 (App. Div. 2003)
North Carolina	*Price v. Howard*, 484 S.E.2d 528 (1997)
Ohio	*Cuyahoga Support Enforcement Agency v. Guthrie*, 705 N.E.2d 318 (1999)
Oklahoma	*Dept. of Human Services v. Chisum*, 85 P.3d 860 (Ok. App. 2004)
Pennsylvania	*McConnell v. Berkheimer*, 781 A.2d 206 (Pa. Super. 2001) *In re Adoption of MTJ*, 814 A.2d 225 (Pa. Super. 2003) *Warfield v. Warfield*, 815 A.2d 1073 (Pa. Super. 2003)

Texas	*Texas Dept. Protective &Regulatory Services v. Sherry*, 46 S.W.3d 857 (2001)
West Virginia	*State ex rel. West Va. Department of Health and Human Resources, Child Support Div. V. Michael George K.* , 531 S.E.2d 669 (2000)
Wyoming	*D.M.M. v. D.F.H*, 954 P. 2d 976 (1998) *MAM v. State of Wyoming, Dept. of Family Services,* 99 P.3d 982 (2004)