

# CLASP

CENTER FOR LAW AND SOCIAL POLICY

## Truth and Consequences: Part III Who Pays When Paternity Is Disestablished?

By Paula Roberts

April 2003

The first two monographs in this series have discussed the conditions under which a mother, a father, or a third party might disestablish a child's paternity. The first monograph dealt with paternity disestablishment for *non-marital* children, and the second monograph dealt with the same issue in regards to *marital* children. This third monograph will address the fiscal consequences to the child, the parents, and the state if paternity is disestablished.

As discussed in detail below, courts and state legislatures are dealing with the effect of disestablishment on past, present, and future child support obligations. Some are also addressing the circumstances under which a father who has disestablished his paternity may seek to recoup support he has provided to the child. A few states are also providing criminal penalties for those who intentionally establish the paternity of the wrong man.

### Current and Future Child Support

Formal paternity *establishment* is usually accompanied by the creation of a child support obligation.<sup>1</sup> In the case of a *non-marital* child, the order may have been issued at the end of a contested paternity case. In that situation, there will be an order establishing both paternity and child support. Alternatively, paternity may have been established through the voluntary acknowledgment process. In that case, the order will establish the support obligation (but not paternity) since paternity has already been established by acknowledgment.<sup>2</sup> Depending on the facts and state law, these orders may have been issued by a court or an administrative agency. In the case of a *marital* child, the support order is usually a court order included in the divorce decree between the parents. The order may have declared the child to be a "child of the marriage" (thus finding paternity)

---

<sup>1</sup> The order is also likely to address custody and visitation issues. The effect of paternity disestablishment on these aspects of the order is not addressed in this monograph. However, it should be noted that these issues will likely be considered in the paternity disestablishment process as well.

<sup>2</sup> A paternity acknowledgment ripens into the equivalent of a judgment of paternity after 60 days, so a judgment already exists. 42 USCA §666(a)(5)(D)(ii)(West Supp. 2002). For a detailed description of this process see Paula Roberts, TRUTH AND CONSEQUENCES: PART I. Available at [www.clasp.org](http://www.clasp.org).

or it may have been silent on this issue. Since a support obligation is premised on the parent-child relationship, however, the order is usually considered a paternity finding even if explicit language to that effect is not contained in the order itself.

In short, the establishment of paternity and a support obligation can occur in a variety of contexts. Moreover, paternity and support issues are deeply intertwined. For this reason, an attempt to disestablish paternity is generally accompanied by an effort to end current and future support obligations. Thus, once the court has decided that disestablishment is appropriate under state law, it will likely address the disestablished father's obligation to pay current and future support. The court may be guided by state law on this subject, or it may use its procedural and equitable powers. In either case, relief from these support obligations is likely to be granted.

### *The Statutory Approach*

At least seven states have enacted statutes that provide courts with specific authority to abate future support obligations when paternity is disestablished (see Appendix A). The states have taken a wide variety of approaches. In Arkansas, Iowa, and Montana, relief from future support obligations is authorized. The support obligation ends on the date of entry of the disestablishment order. In Arkansas and Iowa, such relief is mandatory; in Montana, it is discretionary.<sup>3</sup> In Virginia, the court may grant relief from current and future obligations. The support obligation may be terminated as of the date the disestablishment petition was served on the non-filing party.<sup>4</sup> Georgia requires its courts to address prospective support obligations, but does not specify the parameters of the court's discretion.<sup>5</sup> The Illinois statute allows the court to vacate future support obligations but only if disestablishment is based on genetic test results.<sup>6</sup> Minnesota's law applies in situations where paternity was established through the voluntary acknowledgement process and is disestablished on the basis of genetic test results. In that case, the court must terminate the future support obligation as of the date of the order and may terminate the current support obligation from the date the motion to disestablish paternity was served on the responding party forward.

### *The Judicial Approach*

As noted in the first two monographs in this series, courts in states that have not adopted specific paternity disestablishment statutes typically rely on the state equivalent of Federal Rule of Civil Procedure 60(b) and/or their inherent powers of equity to provide relief to the party wishing to disestablish paternity. They use these same concepts to terminate any current and future support obligations.<sup>7</sup> For example, in *State Department*

---

<sup>3</sup> ARK. CODE ANN. §9-10-115(f)(1)(2002); IOWA Code §600B.41A (4)(2002); MONT. CODE ANN. §40-6-105(4)(b)(2002).

<sup>4</sup> VA. CODE ANN. §20-49.10(2002).

<sup>5</sup> GA. CODE ANN. §19-7-54(d)(2002).

<sup>6</sup> 750 ILL. COMP. STAT. §45/7(b-5)(2002).

<sup>7</sup> See, e.g., *State, Child Support Enforcement Div. v. Maxwell*, 6 P.3d 733 (Alaska 2000); *Department of Revenue v. W.Z.*, 592 N.E.2d 1297.

*of Revenue, Child Support Enforcement Div. v. Wetherelt*,<sup>8</sup> the Alaska Supreme Court agreed with a lower court that once paternity was disestablished future support obligations should end. Moreover, the ex-husband was able to obtain relief from the date of filing his motion for disestablishment.<sup>9</sup>

## Arrears Forgiveness

Forgiveness of accrued arrears presents a more difficult legal issue for state courts and legislatures. This is because the elimination of arrears can be seen as a violation of the “Bradley Amendment,” which has been a part of federal law for more than 16 years.<sup>10</sup> In essence, the Bradley Amendment requires states to enact laws under which every installment of support is a judgment due and owing on the date it is to be paid and *not* subject to retroactive modification. Failure to enact such laws makes a state ineligible for federal funding for its child support enforcement and welfare programs.<sup>11</sup> Since the fiscal stakes are so high, every state has adopted a ban on retroactive modification. For example, the Arkansas statute says a court may not “set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the modification petition.”<sup>12</sup> Obviously, arrears forgiveness is inconsistent with such a statute.

In addition, there are public policy reasons to avoid wiping out arrears. One is to encourage respect for the judgments issued by courts and administrative agencies. Once a paternity determination and support order are in effect, they are judgments and should be followed. If litigants believe they have been wronged, their remedy is through the appeal process. They should not be allowed to simply ignore the terms of the judgment with impunity. Otherwise, respect for courts, administrative agencies, and their legal process will be undermined.<sup>13</sup> Another reason to be careful about wiping out arrears is to encourage people to act as quickly as possible. If a person believes he/she can disestablish paternity at any time and obtain retroactive relief from the support obligation,

---

<sup>8</sup> 931 P. 2d 383 (Alaska 1997).

<sup>9</sup> At the time this case was filed, the lower court ordered that all payments be put in escrow until a determination was reached. By doing this, the court assured that funds would be available to reimburse the ex-husband from the date he filed his motion to disestablish paternity forward.

<sup>10</sup> 42 USCA §666(a)(9)(West Supp. 2002). This law was enacted in 1986 and is referred to as the “Bradley Amendment” after its chief sponsor, former Senator Bill Bradley of New Jersey.

<sup>11</sup> Id. 42 USCA §654 sets out the child support state plan requirements. These are essentials a state must meet in order to be eligible for federal child support program funding. This statute includes id. § 654(20) that requires states to adopt all of the laws and procedures mandated by 42 USC §666, including the Bradley Amendment. In addition, 42 USCA §607 requires states to have an approved child support plan in order to draw down funds for their Temporary Assistance for Needy Families (TANF) programs. Without state laws reflecting the Bradley Amendment requirements, the state’s child support plan cannot be approved, and thus its TANF funds are also in jeopardy.

<sup>12</sup> ARK. CODE ANN. §9-12-314(c)(2002).

<sup>13</sup> See discussion in *Cuyahoga Support Enforcement Agency v. Guthrie*, 705 N.E.2d 318 (Ohio 1999)(finality requires that there be an end to litigation, producing certainty in the law and public confidence in the system’s ability to resolve disputes).

there is less reason for that person to act quickly.<sup>14</sup> This leaves the child in limbo—unable to collect support from the obligated parent and unable to pursue the biological father. This is not a desirable result. On the other hand, there is a sense that it is unfair to require support payments from a person who has been declared not to be a child’s father. This logic extends to past-due payments as well as current and future support.

As can be seen below, the tension among all of these concerns is playing out in state legislatures and court rooms.

### *The Statutory Approach*

Three states have enacted legislation giving courts the authority to forgive arrears that accrued before paternity disestablishment (see Appendix B for details). Alaska has given its administrative agency the authority to do so when it disestablishes paternity.<sup>15</sup> Georgia requires its courts to address the arrears issue,<sup>16</sup> and Iowa requires its courts to deem any unpaid support obligation to be satisfied.<sup>17</sup> The Georgia approach avoids direct conflict with the Bradley Amendment, while the Alaska and Iowa approaches do raise potential problems.

### *The Judicial Approach*

Courts have been quite careful in their approach to arrears forgiveness. Perhaps because of their heightened awareness of the desirability that citizens respect judgments—even when they disagree with them—courts have been reluctant to abate arrears. They have also been mindful that Rule 60(b) limits the type of relief to be granted to prospective relief only.

For example, in *Ferguson v. Department of Revenue*,<sup>18</sup> a six-year-old paternity order was vacated pursuant to Alaska’s equivalent of Rule 60(b). The disestablished father sought relief from his present obligations as well as forgiveness of accrued arrears. The lower court granted only prospective relief and the disestablished father appealed. The Alaska Supreme Court affirmed and required that arrears that accrued before the disestablishment of paternity be paid. The Court held that Rule 60(b) allows a court to grant relief from a judgment when it is no longer equitable that the judgment has *prospective* application. By its very terms, the rule does not contemplate retroactive relief. Therefore, to use the rule to forgive accrued arrears would be anomalous.<sup>19</sup> The

---

<sup>14</sup> See discussions in *Westendorf v. Westendorf*, 611 N.W. 2d 512(Iowa 2000); *Ferguson v. State, Child Support Enforcement Div.* 931 P. 2d 383 (Alaska 1997); *Walter v. Gunter*, 788 A.2d 609 (Md. 2002)(Wilner dissenting).

<sup>15</sup> ALASKA STAT. §25.27.166(d)(2002).

<sup>16</sup> GA. CODE ANN. §19-7-54(d)(2002).

<sup>17</sup> IOWA CODE §600B.41A(4)(2002).

<sup>18</sup> 977 P. 2d 95 (Alaska 1999).

<sup>19</sup> The Court also noted that its decision is consistent with the United States Supreme Court’s interpretation of the analogous federal rule. See *Pennsylvania v. Wheeling & Belmont Bridge Co* 59 I.U. (18 How.) 421 (1855); *United States v. Swift & Co.*, 286 US 106 (1932). The Court further noted that this ruling obviates the need to address the potential of conflict with the Bradley Amendment.

court also noted that forgiving arrears would reward those who ignored their legal obligations and disfavor obligors who had complied with the court's order by paying their support. The former would never have to pay the ordered amount while the latter would have already paid and so would have nothing to forgive. Moreover, a policy of arrears forgiveness would ease the pressure to resolve any questions of paternity as soon as possible. A father would have little incentive to act if he thought that he could avoid his obligation through arrears forgiveness at any time. For all these reasons, the court held that arrears forgiveness was bad public policy.<sup>20</sup>

In this same vein, courts have also been reluctant to extend statutes allowing prospective relief by applying them to grant retroactive relief. For example, in *Little v. Flemming*,<sup>21</sup> a man was ruled to be out of time to disestablish his paternity. (The law then in place required disestablishment within five years of the adjudication and 12 years had elapsed.) He then moved for a modification of his support obligation to "0" and to set the arrears aside. The lower court denied him relief, but the Arkansas Supreme Court gave him prospective relief. The Court applied the Arkansas statute discussed above authorizing prospective relief from support obligations when paternity has been disestablished. Although the man could not disestablish his legal paternity, the court held that he could claim relief from future support since this was within the spirit of the legislature's intent. However, while willing to stretch the law, the Court was not willing to extend it to relieve the man of his obligation to pay accrued arrears.

However, in Maryland the courts have taken a different view. In *Walter v. Gunther*,<sup>22</sup> the state's Supreme Court was presented with a case in which a man had consented to a judgment of paternity in 1993. He was ordered to pay \$43 a week in support. In 2000, he filed a motion to modify his support obligation and requested genetic tests. At that point, he was more than \$12,000 in arrears. Genetic tests were conducted, and he was excluded as the child's father. The lower court vacated the paternity judgment and terminated his current support obligation. However, it held him liable for arrears owed for the period before he filed the motion for genetic tests. The Maryland Supreme Court—in a 4-3 decision—held that a man could not be legally obligated to pay arrears that accrued under a now-vacated paternity judgment. There was no discretion in this matter: paternity and support orders are inherently interdependent and vacatur of the paternity determination requires vacatur of the support order as well. Thus, the support order was invalid from its inception and unenforceable.<sup>23</sup>

---

<sup>20</sup> 977 P.2d at 98.

<sup>21</sup> 970 S.W.2d 529 (Ark. 1998).

<sup>22</sup> 788 A.2d 609 (Md. 2002). The Alaska Supreme Court reached a similar conclusion in *Maxwell, supra*, finding that since the original order was issued without regard to the father's due process rights it was void and thus the father was responsible for neither current support nor arrears.

<sup>23</sup> To avoid the Bradley Amendment as well as a series of state court cases on vested rights under a judgment, the court took pains to note that it was not retroactively modifying the support order but rather nullifying the order itself.

## Recoupment of Support Paid

A disestablished father has probably paid at least some support before the disestablishment. He has lived on diminished resources and this negatively affects him and other children he may have fathered. He may wish to recoup these payments:

- From the custodial parent to whom the support was paid. While perhaps fair to the disestablished father, one has to consider the potential harm to the child. The child already loses current and future support (and possibly arrears). If the custodial parent is required to repay the support that was collected, that money will come from the already diminished resources of the child's household. This could leave insufficient resources to house, feed, cloth, and educate the child—with potentially devastating consequences. It could also lead the child's family to need public assistance, increasing the local, state, and federal costs for these programs.
- From the biological father. If this man was unaware of the child's existence, he could face an enormous lump-sum debt that would not have accrued had he known of the child and been called upon to pay support in installments over time. The biological father might also be supporting other children and recouping payments might well severely reduce the resources available to those children.
- From the state. If the child is receiving cash welfare benefits, the custodial parent has assigned the child support payments paid on the child's behalf to the state.<sup>24</sup> The state has collected these payments and retained some or all of them to reimburse itself and the federal government for assistance provided to the family. Should the state be liable to repay these retained collections or is the potential harm to the public fisc too great?

Courts and state legislatures are now grappling with these questions.

### *The Statutory Approach*

Four states have enacted legislation that bars a disestablished father from claiming reimbursement for or recoupment of support paid (see Appendix C). The Alabama statute applies in all disestablishment cases and bars claims against the court that rendered the initial paternity order, the state, any state agent or employee of the state, or the mother.<sup>25</sup> Delaware has a similar statute that bars a claim for reimbursement for child support

---

<sup>24</sup> Federal law requires those receiving assistance under the TANF program to assign their support rights to the state. 42 USCA §608(a)(3)(West Supp. 2002). The state is to collect the support, pay a share to the federal government, and either keep or give the remainder to the family. Id. §657(a)(1). Even if the family no longer receives cash assistance, the state may have retained support paid on its behalf in the past and may still be collecting arrears that remain assigned to the state after the family leaves assistance. Id. §657(a)(2)(B).

<sup>25</sup> ALA. CODE ANN. §26-17A-2 (2002).

(including medical support) paid before the date on which notice of the disestablishment action was served on the party or public agency to which the payments were made.<sup>26</sup> The Utah statute applies only in cases where a voluntary acknowledgement of paternity is later rescinded. It bars the recovery of support provided before entry of the order of rescission.<sup>27</sup> The Tennessee statute protects the state, its officers, employees, and agents, the counties, county officials, clerks of court, and the child support agency from claims for repayment of support paid. The custodial parent, however, is not protected by this statute.<sup>28</sup>

By contrast, Connecticut authorizes the state to reimburse the disestablished father for support paid if 1) paternity was established by voluntary acknowledgment; 2) the child has received cash assistance from the state; and 3) the state collected the support during the period in which the child received state support.

### *The Judicial Approach*

#### Reimbursement Claims

Disestablished fathers have had little success in obtaining orders of *reimbursement* from the courts. This is particularly true when the suit involves a claim for reimbursement from the state for funds retained pursuant to a public assistance assignment (see Appendix E for details).

As with arrears forgiveness, courts have been cognizant of the importance of the respect for judgments. For example, in *State, Child Support Enforcement Division v. Wetherfelt*,<sup>29</sup> the Alaska Supreme Court overruled a lower court that had ordered nearly \$40,000 in reimbursement for support paid prior to disestablishment. The Supreme Court reasoned that, until disestablishment, the order was a valid order and thus the state's collection of support pursuant to the order was a proper exercise of its power. The state was entitled to collect and retain this support in exchange for the public assistance it provided to the child's family. Since the child had benefited from the public assistance paid, the state was not "unjustly enriched" by retaining the support.<sup>30</sup>

Courts have also used the Bradley Amendment as grounds for rejecting a claim for reimbursement. For example, in *Indiana v. Murphy*,<sup>31</sup> paternity was disestablished and current and future support were abated. Before disestablishment, the obligor had paid nearly \$10,000 in support. These funds had been retained by the government as reimbursement for public assistance provided to the child's family. The disestablished

---

<sup>26</sup> DEL.CODE ANN. TIT. §812(d)(2002).

<sup>27</sup> UTAH CODE ANN. §78-45E-4 (2002).

<sup>28</sup> TENN. CODE ANN. §36-5-101(n)(2)(Supp.2002).

<sup>29</sup> 931 P. 2d 383 (Alaska 1997).

<sup>30</sup> See, also, *Department of Revenue v. W.Z.*, 592 N.E. 2d 1297 (Mass. 1992)(order was not appealed and was therefore valid until vacated. Disestablished father collaterally estopped from seeking reimbursement for support paid while order was valid).

<sup>31</sup> 608 N.E. 2d 1000 (Ind. App. 1993).

father sued the state for reimbursement, and the lower court granted relief. The state appealed, and the appellate court reversed. It found that reimbursing the obligor would be tantamount to a retroactive modification of the order, barred by the state's version of the Bradley Amendment.<sup>32</sup>

In addition, courts have used the doctrine of sovereign immunity to bar reimbursement suits against the state. For example, in *White v. Armstrong*,<sup>33</sup> a disestablished father sought reimbursement from the state for the support he had paid regularly and on time for a number of years. The juvenile court denied his motion, and he appealed. The Court of Appeals held that the juvenile court was correct since it did not have jurisdiction to award money damages against the state. Even if it did, sovereign immunity would preclude such an award since the state had not consented to being subject to such claims. Indeed, a state statute (discussed above) specifically precluded such claims.<sup>34</sup>

However, in states such as Maryland, which vacate the original judgment and support order, resisting reimbursement suits may be more difficult. Having held that the paternity judgment was invalid from the outset, these states cannot invoke either res judicata or Bradley Amendment principles. If the order was never valid, then collections pursuant to the order are also invalid and restitution is appropriate. Unless sovereign immunity prevents suits against the state, the state may well have to reimburse the obligor for payments made.<sup>35</sup>

### Tort Actions

Tort actions brought against the mother (not the state) have had some success. Courts in Minnesota and Oklahoma have allowed such cases to proceed (see Appendix E for details). Courts have distinguished these suits from reimbursement claims by noting that they do not involve attacks on paternity judgments themselves. Rather, they involve fraud, duress, and unjust enrichment arising from the paternity judgment. Indeed, in order to prove the tort claim, there must have been a paternity judgment. Thus, issues of res judicata, the finality of judgments, and the Bradley Amendment are not implicated.<sup>36</sup> However, at least one court—while allowing fraud and emotional distress actions to be maintained—has rejected the use of quantum meruit (unjust enrichment). The Oklahoma Supreme Court has ruled that an unjust enrichment claim is really a claim for restitution and there can be no restitution of benefits obtained under a valid, unreversed judgment.<sup>37</sup>

---

<sup>32</sup> Id. at 1001.

<sup>33</sup> 2001 WL 134601

<sup>34</sup> Id.

<sup>35</sup> In *Walter, supra*, at n. 2, the Maryland Supreme Court noted that the recoupment issue was not presently before the court. In dissent, Judge Wilner noted that a suit for reimbursement was inevitable and, under the majority's rationale, should be won by the disestablished father.

<sup>36</sup> See, e.g. *Day v. Heller*, 653 N.W. 2d 475 (Neb. 2002).

<sup>37</sup> *Miller v. Miller*, 956 P.2d 887 (Okla. 1998).

Moreover, the Nebraska Supreme Court has recently ruled that tort suits in this area are contrary to public policy.<sup>38</sup>

---

<sup>38</sup> *Day v. Heller*, 653 N.W.2d 475 (Neb. 2002).

## Criminal Fraud Statutes

When paternity is established through the voluntary acknowledgment process, the parties sometimes swear under penalty of perjury that their statements are correct. In this case, knowingly false swearing might be punishable under state law. Similarly, intentional false swearing in a paternity suit or the pleadings in a divorce case might be a crime under state law. However, perjury suits are relatively rare, at least in part because the false swearing must be intentional, and this is difficult to establish in most cases. For instance, a woman might testify mistakenly about the identity of the father of her child but not necessarily know she's wrong.<sup>39</sup>

Some states have enacted specific statutes about fraud in paternity establishment, however (see Appendix D for details.). Indiana limits the scope of its statute to cases where paternity was established through the voluntary acknowledgment process. This statute is problematic in that it specifically limits its scope to women who make false statements.<sup>40</sup> Louisiana, Mississippi, and Rhode Island have statutes that would apply to both voluntary acknowledgments and administrative or judicial proceedings.<sup>41</sup>

## Analysis and Conclusion

Courts concerned about a child's best interest might well decline to disestablish paternity under a variety of theories discussed in the first two monographs in this series. However, once the decision to disestablish paternity is made, there is little disagreement in either courts or state legislatures that the current and future support obligations of the disestablished father should be terminated. While this may create fiscal harm to the child, the general sense is that fairness to the disestablished father outweighs this harm.

There is less consensus about forgiveness of arrears accrued under a child support order. The majority of courts are uncomfortable with the notion of forgiving arrears, finding that this undermines respect for judgments, encourages dilatory conduct, and violates the Bradley Amendment. However, some courts and state legislatures are moving in a different direction. Again, out of a sense of fairness to the disestablished father, they are allowing (or even requiring) arrears forgiveness. Whether this position will hold up in light of the Bradley Amendment remains to be seen. In addition, there are troubling separation-of-powers issues when state legislatures act in this area. If a court

---

<sup>39</sup> For example, there are a number of reported cases in which a husband's paternity has been disestablished and genetic tests later proved that the husband was the child's biological father. All the parties thought they were acting truthfully at the time, but it turns out that they were wrong. See, e.g., *Cornelius v. Cornelius*, 15 P. 3D 528 (Okla. App. 2000).

<sup>40</sup> IND. CODE ANN. § 16-37-2-21 (2002). A man who falsely claims that he is the father in a paternity acknowledgment is not covered by this statute. Thus, a man who knowingly establishes his paternity of a child that is not his would not be punishable under the same circumstances as a mother. Thus, the statute might be attacked on equal protection grounds.

<sup>41</sup> LA. REV. STATS. ANN §§125.1 & 125.2 (2002); MISS. CODE ANN. § 93-9-37 (2002); R.I. GEN. LAWS §15-8-22 (2002). While not as specific as the Indiana statute, the terms of the Mississippi and Rhode Island statutes might also be read to apply only to women. However, courts could interpret these statutes more broadly and apply them to men as well.

has issued a judgment and/or a judgment is vested by virtue of the Bradley Amendment, it is not clear that a legislature can simply divest the child's right to the arrearages.<sup>42</sup>

States need to pay more attention to the issue of reimbursement of support already paid. There are certainly equity issues on the side of the disestablished father. At the same time, the ramifications for the state treasury and the child are severe. Moreover, the facts in the cases vary widely. While there are some cases of deliberate fraud by the mother, the vast majority of cases involve unintentional mistakes; default judgments because the man did not appear and request genetic testing when he should have; and situations in which a man acknowledged paternity or held the child out as his own when he knew this not to be the case.<sup>43</sup> Allowing reimbursement in these situations either punishes innocent parties or rewards men for inappropriate behavior. Neither of these results is good public policy.

Nonetheless, if the state has collected and retained support pursuant to a public assistance assignment, it may want to reimburse the father as Connecticut does.<sup>44</sup> On the other hand, this is inconsistent with the idea that the underlying order was valid until changed that seems to be where most court and legislatures have come down in the context of arrears. For the same reasons as well as for the sake of consistency, states may wish to enact legislation that bars reimbursement for support paid. To protect children, these statutes should bar claims against the custodial parent/mother as well as claims against the state.

This does not leave the disestablished father without a remedy in appropriate cases. Where it is clear that the mother has knowingly and deliberately misled the disestablished father, he should be able to bring an action for fraud or intentional infliction of emotional distress. As noted above, it appears that courts are open to these suits when the circumstances warrant. The state might also punish particularly grievous conduct through general or specific perjury statutes, such as those discussed above.

This approach allows states to balance the interests of disestablished fathers and their children. While a child suffers financial harm from disestablishment of current and future support obligations (unless and until the biological father can be required to support his child), fairness to the disestablished suggests that this is the most appropriate public policy. On the other hand, wiping out arrears or ordering reimbursement of support already paid creates such economic harm to the child that it is likely inadvisable.

---

<sup>42</sup> See discussion in *C.T.G. v. M.A.B.*, 723 So. 2d 644 (Ala. 1997) where the court refused to apply Alabama's disestablishment statute retroactively. The same arguments raised there might well apply here.

<sup>43</sup> See case summaries in Appendix E of this article as well as the case summaries at the end of the first two monographs in this series.

<sup>44</sup> It should be noted that it is not clear whether the federal government would participate in the cost of this reimbursement. Recall that federal law requires the state to split collections for public assistance families into a "state share" and a "federal share" based on the state's Medicaid match rate. Thus, 50 to 80 percent of the support may have been sent to the federal government to reimburse it for its share of the public assistance payments. In fairness, if the state reimburses the disestablished father, the federal government should assist by giving back its share of the collections. However, there is no federal guidance on this issue at the present.

So long as courts are open to tort claims when the facts warrant, the better balance is to bar relief from retroactive arrears and bar reimbursement of support paid and allow the disestablished father to proceed along this avenue.

## APPENDIX A

### State Statutes on the Payment of Future Child Support When Paternity Has Been Disestablished

STATE	DESCRIPTION
<p><b>ARKANSAS</b></p> <p>ARK. CODE ANN. § 9-10-115 (f)(1) (2002)</p>	<p>When paternity is disestablished, the court must relieve the obligor of all future support obligations from the date of disestablishment forward.</p>
<p><b>GEORGIA</b></p> <p>GA.CODE ANN. §19-7-54(d) (2002)</p>	<p>When paternity is disestablished, the court must address the issue of prospective support payments.</p>
<p><b>ILLINOIS</b></p> <p>750 ILL.COMP.STAT. §§45/7 (b-5 (2002)</p>	<p>If paternity is disestablished based on genetic test results, the order requiring future payment of support may be vacated.</p>
<p><b>IOWA</b></p> <p>IOWA CODE §600B.41A (4) (2002)</p>	<p>When paternity is disestablished, the father must be relieved of all future support obligations from the date of filing of the disestablishment order forward.</p>
<p><b>MINNESOTA</b></p> <p>MINN. STAT. § 257.75 (2002)</p>	<p>If paternity was established through the voluntary acknowledgment process and is later disestablished by a court based on genetic test results, the court must terminate all future support obligations. The court may also terminate the obligation to pay past-due support from the date of service of the notice of the motion to disestablish paternity on the responding party.</p>
<p><b>MONTANA</b></p> <p>MONT. CODE ANN. §40-6-105 (4)(b) (2002)</p>	<p>If paternity is disestablished, the court may relieve the obligor of responsibility for all support installments that accrue from the date of the disestablishment order.</p>
<p><b>VIRGINIA</b></p> <p>VA. CODE ANN. §20-49.10 (2002)</p>	<p>When paternity is disestablished, a court may set aside the child support obligation as well. However, the court may not retroactively modify the support order. It can grant relief only from obligations that accrued from the date the disestablishment petition was served on the non-filing party.</p>

## APPENDIX B

### State Statutes on Liability for Support Paid Prior to Disestablishment

STATE	DESCRIPTION
<b>ALASKA</b>  ALASKA STAT. §25.27.166(d) (2002)	When presumptive paternity is disestablished by the child support agency, the petitioner's child support obligation is modified retroactively to extinguish arrears. Also extinguished is his liability for public assistance provided to the child (if any).
<b>GEORGIA</b>  GA.CODE ANN. §19-7-54(d) (2002)	When paternity is disestablished, the court must address the issue of past due support.
<b>IOWA</b>  IOWA CODE §600B.41A (4) (2002)	When paternity is disestablished, the father must be relieved of all future support obligations from the date of filing of the disestablishment order forward. In addition, the court must find that any unpaid support obligation from the prior period is deemed satisfied.

## APPENDIX C

### State Statutes on Liability for Support Paid Prior to Disestablishment

STATE	DESCRIPTION
<p><b><i>ALABAMA</i></b></p> <p>ALA. CODE §26-17A-2 (2002)</p>	<p>When paternity is disestablished, there can be no claim for damages against the court rendering the initial order of paternity. In addition, there can be no claim for reimbursement or recoupment of money damages against the mother, the state, or any state employee or agent.</p>
<p><b><i>CONNECTICUT</i></b></p> <p>CONN. GEN. STAT. § 46B-172 (2002)</p>	<p>If paternity was established through voluntary acknowledgment, paternity is subsequently disestablished, and the child has been supported by the state (e.g., received TANF or was in foster care), the state must refund to the disestablished father any support that was collected for the child during the period he/she was supported by the state.</p>
<p><b><i>DELAWARE</i></b></p> <p>DEL.CODE ANN. TIT. § 812(d) (2002)</p>	<p>If paternity is disestablished by court order, the disestablished father has no right to reimbursement for any child support or medical expenses paid before the date on which notice of the action seeking disestablishment was served on the party or public agency to which the payments were made.</p>
<p><b><i>TENNESSEE</i></b></p> <p>TENN. CODE ANN. §36-5-101(n)(2)(Supp. 2002)</p>	<p>If a voluntary acknowledgment is rescinded or if any other order of legitimation, paternity, or support is rescinded, the state of Tennessee, its officers, employees, agents or contractors, counties, county officials, clerks of court, or the IVD agency are not liable to compensate any person for repayment of support paid.</p>
<p><b><i>UTAH</i></b></p> <p>UTAH CODE ANN. § 78-45e-4 (2002)</p>	<p>If paternity was established through voluntary acknowledgment and the acknowledgment is later rescinded, the obligor cannot recover any support he provided for the child before entry of the order of rescission.</p>

## APPENDIX D

### State Paternity Fraud Statutes

STATE	DESCRIPTION
<p><b>INDIANA</b></p> <p>IND. CODE § 16-37-2-21 (2002)</p>	<p>A woman who knowingly or intentionally falsely names a man as the child's biological father in a voluntary paternity acknowledgment commits a Class A misdemeanor.</p>
<p><b>LOUISIANA</b></p> <p>LA. REV. STAT. ANN. §§125.1 &amp;125.2 (2002)</p>	<p>False swearing (either orally or in writing) in a judicial proceeding to establish paternity filed by or on behalf of the state is a crime and may be punished by a fine of not more than \$500, or imprisonment for not more than six months, or both. The false swearing must be intentional and the person must know that the statement is false.</p> <p>Written or oral false swearing concerning biological paternity in or in support of a birth certificate is also a crime. It is punishable by not more than five years in prison, a fine of not more than \$10,000, or both.</p>
<p><b>MISSISSIPPI</b></p> <p>MISS. CODE ANN. § 93-9-37 (2002)</p>	<p>Making a false complaint as to the identity of the father, or aiding and abetting in the making of a false claim, is punishable as perjury.</p>
<p><b>RHODE ISLAND</b></p> <p>R.I. GEN. LAWS §15-8-22 (2002)</p>	<p>Making a false complaint as to the identity of the father, or aiding and abetting in the making of a false claim, is punishable as perjury.</p>

## APPENDIX E

### Case Summaries

#### Arrears Forgiveness for Marital Children

##### ALASKA

**State, C.S.E.D. v. Maxwell, 6 P.3d 733 (Alaska 2000)**—During the marriage, two children were born to the wife. Neither was the biological child of the husband, and he knew this. However, by state law, his name appeared on their birth certificates. The biological father of the second child eventually acknowledged his paternity and paid support. The couple later divorced. Their divorce decree did not mention the second child. The wife began receiving public assistance, and the child support agency eventually pursued the ex-husband for support of the second child since his name was on the child's birth certificate. The ex-husband countered, based on the biological father's establishment of his paternity. The lower court allowed this and relieved him of his support obligation from the date the biological father filed his paternity action. The child support agency appealed. The Alaska Supreme Court affirmed finding that he was entitled to such relief under Rule 60(b). To hold otherwise would deprive the husband of due process.

**State, CSED v. Wetherfelt, 931 P. 2d 383 (Alaska 1997)**—In 1974, a daughter was born to a married couple. The husband had had an irreversible vasectomy and thus believed he was not the child's biological father. Nonetheless, he was the presumed father (since the child was born during the marriage), so he was named as the child's father on her birth certificate. In 1977, the couple separated and the mother began receiving public assistance. She assigned her support rights to the state as a condition of receiving this help. In 1983, the couple sought a divorce. The divorce pleadings stated that there were no children born of the marriage, and the divorce decree stated the same thing. In 1989, the state child support program served an administrative notice on the ex-husband demanding current support and arrears. He replied that he was not the child's biological father and that the divorce decree had established that in 1983. The agency replied that the presumption of paternity of a child born during the marriage was in effect and that he would have to file a suit to disestablish his paternity in order to be relieved of his support obligation.

In January 1993, the ex-husband did file suit. All agreed that before entry of the divorce decree, the ex-husband had a duty to support the daughter. At issue was his obligation after that time. The lower court ordered him to continue to pay but required that the money be put in escrow pending the outcome of the litigation. Genetic tests established that the ex-husband was not the child's biological father. The lower court relieved him of future support obligations and ordered that the money in escrow be given to him. This part of the judgment was upheld on appeal.

## IOWA

**Westendorf v. Westendorf, 611 N.W. 2d 512 (Iowa 2000)**—A couple married and had three children. Five years after the birth of the last child, they divorced. The husband was ordered to pay support for the three children. The order set a specific amount to be paid for three children, then two children, then one child (presumably to avoid the need to amend the order as each child reached the age of majority.) Five years later and owing substantial arrears, the ex-husband moved to disestablish his paternity of the youngest child. He named the person believed to be the boy's biological father, and testing proved him correct. Iowa statute allows both disestablishment and abatement of support from the date of disestablishment. Iowa law also provides that accrued arrears be deemed satisfied. The lower court applied these precepts. However, the ex-husband disputed how the amount of arrears to be abated was calculated. The lower court set the abatement based on the difference between the ordered amount for three children and the ordered amount for two children. The ex-husband argued that the entire order should have been recalculated from the date of entry forward. The Iowa Supreme Court affirmed the lower court, holding the original order was res judicata on the amount owed for two children. It noted that to hold otherwise would be to retroactively modify the original order and the court was without legal authority to do this.

### Arrears Forgiveness for Non-Marital Children

## ALASKA

**Ferguson v. Dept. of Revenue, 977 P.2d 95 (1999)**—A male child was born in February 1986. In 1991, after a paternity proceeding was filed by the child support agency, Ray Ferguson signed an Acknowledgment of Paternity of this child and a paternity judgment was then entered. The judgment established current support and arrears back to the date of the child's birth. Six years later, privately conducted genetic tests excluded Ferguson as the biological father. Ferguson then sought relief from the Superior Court under Alaska Rule 60(B)(5). The child support agency did not oppose prospective relief, but opposed relieving Ferguson of his obligation to pay accrued arrears. The court vacated the paternity judgment and ordered the child support agency to cease collecting current support. However, the court refused to extinguish arrears that had accrued under the judgment. The Alaska Supreme Court affirmed and required payment of the arrears that accrued before the disestablishment of paternity.

Note that defendant argued that to allow the state to collect and retain the arrears would amount to unjust enrichment. The Alaska Supreme Court rejected this argument based on the reasoning applied in **Wetherfelt, supra**.

## ARKANSAS

**Littles v. Fleming, 970 S.W.2d 259 (Ark. 1998)**—The mother filed a paternity suit in 1982 alleging Littles was the father of her daughter. The court ordered genetic tests and required Littles to pay for the tests. He did not pay, so the tests were not done. The court

then entered a judgment of paternity and ordered Littles to pay \$50 per month in child support. Littles did not appeal. In 1994, Littles moved for paternity tests, alleging he had been unable to pay for them in 1982. The court ordered the tests and they established that he was not the biological father. The court then set aside the paternity judgment. The Arkansas Supreme Court overruled because, under the law at that time, the lower court had no statutory authority to order the tests. (The five-year period that allowed challenges to paternity based on genetic tests had passed.)

Littles then moved for a modification of his support order to “0” under Ark. Code §9-10-115(d). This statute mandates prospective relief from future support obligations for those found by DNA tests not to be biological parents when paternity is disestablished. The Supreme Court found he was entitled to such relief. It reasoned that, while Littles was still the legal father of the child (under the Court’s first decision), he was entitled under the statute to a modification of the order. Since the statute covered only future support, however, he was not entitled to relief from arrears.

#### *MARYLAND*

**Walter v. Gunter, 788 A.2d 609 (2002)**—In 1993, Walter consented to a judgment of paternity. He was ordered to pay \$43 a week in support but rarely made payments. The record reflects that he knew that there was doubt about his paternity, but he did nothing. In 2000, he filed a motion to modify his support obligation and requested genetic tests. At that point, he was more than \$12,000 in arrears. Genetic tests were conducted, and he was excluded as the child’s father. The court vacated the paternity judgment and terminated his current support obligation. However, it denied his motion for recoupment of support paid and held him liable for arrears owed for the period before he filed the motion for genetic tests. The case went to the Maryland Supreme Court on expedited review solely on the arrearage issue.

The Supreme Court held, in a 4-3 decision, that a man could not be legally obligated to pay arrears that resulted from a now-vacated paternity judgment. There is no discretion in this matter: paternity and support orders are inherently dependent and vacatur of the paternity determination makes the support order invalid.

#### *OHIO*

**Cuyahoga Support Enforcement Agency v. Guthrie, 705 N.E.2d 318 (Ohio 1999)**—A male child was born in 1990. The child’s family received public assistance, so the mother was required to cooperate in establishing his paternity. She named Denver Guthrie as the child’s father. In 1994, an action was brought, and, in 1995, a default paternity judgment was entered, and support was established. Eight months later, Guthrie requested a hearing and genetic tests. The hearing was held and tests ordered. They showed that he was not the child’s biological father. Therefore, in February 1997, the trial court vacated the paternity judgment and relieved Guthrie of the obligation to pay future support and arrears. The ruling was affirmed by the Court of Appeals of Cuyahoga County holding that this action was authorized under Rule 60(b)(4). This created a conflict in the lower

courts because another case held that the motion to disestablish paternity must be filed under Rule 60(b)(2).

The Ohio Supreme Court certified this case and held that Guthrie was not entitled to relief under any part of either Rule 60(b). However, the trial court did have the power to grant relief from the initial finding of paternity under its jurisdiction to modify or revoke judgments relating to the well-being of children under Ohio Revised Code 3111.16. Relief under this section, however, is prospective only. Guthrie cannot avoid arrears that accrued before paternity disestablishment due to “his own inexcusable conduct.”

## Claims for Reimbursement of Support Paid

### *ALASKA*

**State, CSED v. Wetherfelt, 931 P. 2d 383 (Alaska 1997)**—(See above for facts in this case.) In addition to relief from future support obligations, the ex-husband in this case sought return of the nearly \$40,000 in child support he had paid from the date of the divorce to the date of filing for disestablishment. He alleged that allowing the state (which had retained over \$20,000 under the public assistance assignment) and the mother (who had received about \$19,000 herself) to retain this money amounted to unjust enrichment. The lower court agreed, but the Alaska Supreme Court reversed this part of the decision.

The Court reasoned that the 1983 divorce decree did not disestablish the ex-husband’s paternity. Disestablishment did not occur until the 1994 decision. Since the child support program had no statutory authority to disestablish paternity, it had done what it could when the ex-husband raised the paternity issue: it told him he needed to file a legal action. Thus, the 1989 order under which the ex-husband paid current support and arrears was valid and enforceable. The state was entitled to collect the money in exchange for the public assistance provided to the child.

Note that the decision does not deal with the mother’s obligation to repay support she received since she did not apparently appeal the lower court decision.

### *INDIANA*

**Indiana v. Murphy, 608 N.E. 2d 1000 (Ind. App. 1993)**—A child was born in 1984. The parents divorced in 1985, and the ex-husband was ordered to pay support. The mother began receiving public assistance, and the state enforced her child support order through income withholding and tax intercepts. He was, however, in arrears. In 1986, the mother re-married, and subsequent genetic tests indicated that her new husband was the biological father of the child. In early 1989, the mother and her ex-husband sought an order of abatement of the support obligation until paternity was resolved. A few months later, the new husband adopted the child. The ex-husband filed a suit against the state seeking reimbursement of support collected on the child’s behalf. The lower court ruled

for the ex-husband and ordered the state to reimburse him nearly \$10,000. The state appealed.

The Appellate Court found that the ex-husband was responsible for all the support ordered before the date of the order abating support (early 1989). To hold otherwise would be to countenance a retroactive modification of support in violation of Indiana law. Since he was in arrears on his obligation, the money collected by the state after that date could be applied to pay off his arrears.

### *MASSACHUSETTS*

**Department of Revenue v. W.Z., 592 N.E. 2d 1297 (Mass. 1992)**—A child was born in 1980. In 1981, paternity was established in a criminal proceeding, and a support order entered. In 1988, a civil action was brought, and the man was again determined to be the child's father and ordered to pay current support and arrears. Since the child lived in a family that received public assistance, the support was assigned to the state, which collected and retained it as reimbursement for public assistance. In 1990, a court suspended the support order and required the parties to undergo genetic testing. The man was excluded as the child's father, and the court permanently suspended his support obligation. The man then sought remittance of all support he had paid. This was about \$11,600 under both the criminal and civil orders. A judge allowed this motion, and the Department sought direct appeal to the state Massachusetts Supreme Court.

That Court ruled that the man could not obtain relief through motion. The only route for him to press his case was by appeal of the criminal and civil orders, and he had not done this. In addition, while finding that the man's claim was not barred by *equitable estoppel*, the court ruled that he was barred from proceeding by *collateral estoppel* (issue preclusion). The issue of paternity was decided in the prior proceedings, so he was precluded from raising the issue again. He therefore could not obtain reimbursement for the support he had paid.

### *NEW MEXICO*

**Tedford v. Gregory, 959 P. 2d 540 (N.Mex. App. 1998)**—A daughter was born during the marriage. The parents subsequently divorced. The child was declared a child of the marriage, and the husband supported her both during her minority and through college. When the child was 20- years-old, she brought a paternity action against another man (Gregory), and genetic tests established that he was her biological father. The trial court established Gregory's paternity and ordered retroactive support back to the date of the daughter's birth. The trial court also ordered Gregory to reimburse the ex-husband for some of the support he had provided to the girl. On appeal, the court upheld the paternity and support determinations against Gregory. However, the court found that the ex-husband was collaterally estopped from pursuing reimbursement.

## TENNESSEE

**White v. Armstrong, No. M1999-00713-COA-R3-CV (Feb. 16, 2001)**—White and Armstrong cohabited for several years. During this time, two sons were born. In late 1992, White told Armstrong that he was not the father of the youngest child, and the couple separated. Armstrong then filed a petition to legitimize the oldest child and waived paternity tests. In 1994, a paternity order was entered, and back support and future support were ordered. For the next three years, Armstrong paid regularly and had contact with his son. The family received public assistance, so the state child support agency collected the support. Armstrong then began to question whether he was the child’s biological father. He sought paternity tests, but a court refused to order them. He then had them done on his own, and they showed that he was not the biological father. Armstrong then petitioned to be relieved of his support obligation. The juvenile court denied his motion, but the appellate court remanded the case and required that he be given prospective relief. The juvenile court did so. Armstrong then filed a motion for overpaid support. He sought reimbursement from the state for all of the support paid since 1994. The juvenile court denied his motion, and he appealed.

The Court of Appeals found that juvenile courts do not have jurisdiction to award money judgments against the state. Moreover, even if they had jurisdiction, sovereign immunity would preclude such a judgment since the state has not consented to being subject to claims such as the one presented here. In fact, Tenn. Code Ann §36-5-101(n)(2)(Supp. 2000) specifically says that the state may not be sued “to compensate any person for repayment of child support paid...as a result of... the rescission of any orders of legitimation, paternity or support.” However, in note 9, the court observes that sovereign immunity is not a defense in civil rights claims under 42 USC §1983. Armstrong might be able to raise such a claim, but not in juvenile court because that court lacks §1983 jurisdiction.

## Civil Tort Claims

## MINNESOTA

**G.A.W. v. D.M.W., 596 N.W. 2d 284 (Minn. App. 1999)**—Two children were born during a marriage. When the marriage dissolved, the wife informed the husband that he was not the biological father of the children. The divorce decree reflected this and relieved him of any support obligation toward the ex-wife or the children. He then brought a tort action alleging fraud and emotional distress. The Court of Appeals found that these claims were not barred by res judicata or collateral estoppel or by public policy considerations.

## NEBRASKA

**Day v. Heller, 653 N.W. 2d 475 (Neb. 2002)**—A child was born to married couple in 1987. In 1991, the couple divorced. The divorce decree indicates that a son was born during the marriage and orders the ex-husband to support that child. Eight years later, the ex-husband and the son underwent genetic testing. A month later, the ex-wife's new husband adopted the child, with the first husband's consent. The ex-husband then sued the mother for fraud, unjust enrichment, and emotional distress. The trial court granted summary judgment to the mother, and the ex-husband appealed. The Nebraska Court of Appeals reversed.

The court held that the ex-husband was not challenging the legal finding of paternity in the divorce decree, and therefore there was no res judicata problem. This was a tort action and here were genuine issues of fact between the parties as to the nature, extent, and effect of the ex-wife's conduct. Therefore, the case was sent back for trial.

The Nebraska Supreme Court disagreed. It likened the emotional damage to a child from such litigation to the well-documented emotional damage wrought on children in highly contested custody cases. Given the potential for such damage, the court declined to allow a parent to use a tort or assumpsit claim based on a mother's misrepresentation of biological fatherhood. It said: "We are not unsympathetic to a plaintiff who has been led to believe that a child is his when in fact the child is not. But, forced to choose between adopting a tort that carries all the detrimental effects of a custody battle or asking a plaintiff to go uncompensated for his emotional pain, we choose the latter." 653 N.W.2d at 482.

## OKLAHOMA

**Miller v. Miller, 956 P.2d 887 (Ok. 1998)**—A teenage couple were dating, and she became pregnant. Both the girl and her parents represented to the boy that he was the father of the expected child, so he married her. The daughter was born, and the couple remained together for five years. Then they divorced. The mother's divorce pleadings said that the child was a child of the marriage, and the divorce decree said the same. For ten years, the ex-husband paid support regularly and maintained a close relationship with the child. When the daughter was fifteen, she went to live with the ex-husband. At that point, the daughter told him that her mother and grandparents had revealed to her that he was not her biological father. He confirmed this with genetic tests.

The ex-husband then sued the mother and her parents in tort for damages. He sued the parents for fraud and intentional infliction of emotional distress. He sued his ex-wife for fraud, intentional infliction of emotional distress, and unjust enrichment (quantum meruit). In his fraud and unjust enrichment claims, he sought an amount equal to the child support he had paid as well as punitive damages. The trial court dismissed his suit for failure to state a claim on which relief could be granted. It held that because he could not disestablish his paternity under Oklahoma law, the ex-husband could not sue for fraud or quantum meruit. It also found the defendants conduct was not sufficiently outrageous

to support a claim for intentional infliction of emotional distress. The Court of Civil Appeals affirmed, but the Oklahoma Supreme Court disagreed.

It held that an action in tort is not the same as a divorce action or an action to disestablish paternity. While the divorce decree was res judicata on the paternity issue, and he was beyond the two-year period in which he could disestablish paternity under Oklahoma law, his suit did not seek to change the paternity determination. Therefore, the ex-husband could proceed on his separate fraud and intentional infliction of emotional distress claims. However, the unjust enrichment claim was really a claim for restitution. The general rule is that there can be no restitution of benefits obtained under a valid, unreversed judgment. Since the judgment ordering support was valid, and it was too late to seek reversal, the ex-husband could not pursue the unjust enrichment claim, as this would be the same thing as an attack on the judgment itself.