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Legitimation versus Paternity: What's the Difference?



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**This post was updated on 10/24/16 to add citations for district court jurisdiction of paternity actions*

Earlier this month, my colleague, Meredith Smith, posted about [Intestate Succession Rights and Children Born Out of Wedlock](#). Her post was prompted by [In re Estate of Williams](#), ___ N.C. App. ___ (March 1, 2016), which addressed the application of [G.S. 29-19\(b\)](#) when determining whether the decedent's child was an heir entitled to intestate succession. What caught my attention in the opinion were excerpts from both the orders of the clerk and the superior court that referred to the process of legitimating a child pursuant to G.S. 29-19(b)(1) and (3). However, G.S. 29-19(b) addresses paternity, not legitimation. Legitimation for purposes of intestate succession is addressed in [G.S. 29-18](#) (father and mother) and [G.S. 29-19\(a\)](#) (mother). So what is the difference?

Legitimation: The Child's Status

Legitimation is about the child's status as being "'lawfully begotten', [or] 'born in wedlock', [or] 'having or involving full filial rights and obligations by birth.'" *Carter v. Carter*, 232 N.C. 614, 616 (1950). A child is "declared" or "deemed" to be "legitimate." [G.S. 49-10](#); [49-12](#). The child is legally recognized as the child of his or her parents and is entitled to inherit from his or her mother and father intestate. [G.S. 49-11](#); [49-12](#); [29-18](#); [29-19\(a\)](#); *Greenlee v. Quinn*, 255 N.C. 601 (1961). Although legitimation is about the child's status, it also "impose[s] upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue." [G.S. 49-11](#); see [In re Papathanassiou](#), 195 N.C. App. 278 (2009).

Paternity: The Father's Status

Paternity addresses the father's status as the child's biological father; "[t]he legislative purpose of an action under G.S. § 49-14 is to provide the basis or means of establishing the identity of the biological father so that the child's right to support may be enforced and the child will not become a public charge." *Smith v. Bumgarner*, 115 N.C. App. 149, 151 (1994); see [G.S. 49-14](#); [49-15](#). Paternity "only serves to equalize between the child's father and mother 'the rights, duties,

and obligations ... with regard to support and custody of the child.” *Smith v. Barbour*, 154 N.C. App. 402 (2002). North Carolina law specifically states “the establishment of paternity shall not have the effect of legitimation.” G.S. 49-14.

N.C.G.S. Chapter 49 Procedures

Chapter 49 of the North Carolina General Statutes addresses “Children Born Out of Wedlock” and sets forth the process for:

- (i) criminal prosecution of a parent for the nonsupport of his or her child,
- (ii) a civil action to establish paternity, and
- (iii) declaring a child legitimate.

These are the procedures that are referred to by the estate proceeding statutes that address a child’s rights to inherit via intestate succession when the child is born out of wedlock. See G.S. 29-18; 29-19. Although there are other types of court proceedings that have the effect of legitimation (e.g., adoption, G.S. 48-1-106(d)) and may adjudicate paternity (e.g., divorce, child custody, child support, abuse, neglect, dependency, or declaratory actions), this post focuses exclusively on the procedures set forth in G.S. Chapter 49.

It is important to note that most of the legitimation and paternity procedures specified in G.S. Chapter 49 require that the child be **“born out of wedlock.”** See G.S. 49-2, -4, -10, -12, -14. “Out of wedlock” has two definitions:

1. the child’s mother is not married at the time of the child’s conception, birth, or period between conception and birth, or
2. “out of wedlock” refers to the relationship of the child’s parents with one another and includes a child conceived and/or born when his or her mother is married to someone other than his or her biological father.

In re Legitimation of Locklear, 314 N.C. 412 (1985); *Wright v. Gann*, 27 N.C. App. 45 (1975).

Based on the first definition alone, the issue of legitimation or paternity impacts a large number of children. In North Carolina, 41 percent of children born in 2014 were to unmarried women. Annie E. Casey Foundation, KIDS COUNT Data Center, [Births to Unmarried Women](#). Nationally, the average was also 41 percent. *Id.*

i. Criminal Action for Nonsupport: Paternity

Any parent who willfully neglects or refuses to provide adequate support for his or her minor child may be charged with a Class 2 misdemeanor. G.S. 49-2; 14-322. The mother, the State, or if the child is likely to become a public charge, the county department of social services where the mother resides or the child is found may bring the criminal action. G.S. 49-5; see 14-322. The action must be commenced before the child turns 3; or if paternity was judicially determined before the child turned 3, anytime before the child's 18th birthday; or if the father acknowledged paternity by paying support for the child before the child turned 3, within three years of the last payment so long as the case is commenced before the child turns 18. G.S. 49-4. A conviction requires that the prosecuting party prove three elements of the crime beyond a reasonable doubt: (1) the defendant is the child's parent, (2) the defendant failed to provide his or her child with adequate support, and (3) the failure was willful. State *ex rel.* New Bern Child Support Agency v. Lewis, 311 N.C. 727 (1984); see G.S. 49-7. A man cannot be convicted of this crime without an adjudication of his paternity because the "verdict necessitate[s] a finding, express or implied, that defendant [is] the father of the minor children." State *ex rel.* New Bern Child Support Agency v. Lewis at 731.

ii. A Civil Action to Establish Paternity

A civil paternity action for a child born out of wedlock is authorized by Article 3 of G.S. Chapter 49. A civil paternity action for a child born out of wedlock is heard in the district court. Smith v. Barbour, FN3, 154 N.C. App. 402 (2002); G.S. 7A-244; 49-14 and-15; 50A-102(4). The action may be initiated by the father, the mother, the child, or a personal representative of the mother or child. G.S. 49-16. A county department or child support services agency may also initiate a paternity action if the child or the mother, because of her medical expenses, is likely to become a public charge. *Id.*; G.S. 110-130. Although a child may initiate a paternity action, a child is not a necessary party when the action is initiated by a different party. *Smith v. Bumgarner*, 115 N.C. App. 149 (1994).

A paternity action must be initiated prior to the child's 18th birthday. G.S. 49-14(a). Unlike a legitimation proceeding, a paternity action may be commenced after the death of the putative father, so long as it is initiated within one year of the date of the death if an administration of the estate proceeding had not been commenced within that year, or if an estate proceeding was commenced within that year, within the time period set forth in G.S. 28A-19-3(a) for presentation of claims. G.S. 49-14(c); see *Tucker v. City of Clinton*, 120 N.C. App. 766 (1995).

Paternity must be proved by clear, cogent, and convincing evidence. G.S. 49-14(b). If a paternity action is initiated after the child turns 3 or within one year of the father's death and paternity is contested, there must be evidence of blood or genetic marker testing. G.S. 49-14(d).

iii. Legitimation of the Child

- By Marriage

In North Carolina, there is a common law presumption that a husband is the father of a child born to or conceived by his wife during their marriage. *Eubanks v. Eubanks*, 273 N.C. 189 (1968); see G.S. 50-11.1 Conception is presumed to have occurred ten lunar months, or 280 days, prior to the child's birth. *Byerly v. Tolbert*, 250 N.C. 27 (1959); see G.S. 48-3-601(2)b.1. The marital presumption of legitimacy may be rebutted by clear and convincing evidence. *In re Papathanassiou*, 195 N.C. App. 278 (2009); G.S. 49-12.1.

A child born out of wedlock may be legitimated if his or her mother and "reputed father" marry one another at any time after the child is born. G.S. 49-12. No court action is required. The child will be recognized as the legitimate child of his or her parents who married after the child's birth. *Batcheldor v. Boyd*, 119 N.C. App. 204 (1995).

- By Special Proceeding

A child may be legitimated through a special proceeding in the superior court. G.S. 49-10; 49-12.1. The clerk of superior court presides over the legitimation proceeding unless the action is transferred to superior court because there is an issue of fact, request for equitable relief, or equitable defense. G.S. 1-301.2(a),(b); see *In re Legitimation of Locklear*, 314 N.C. 412 (1985).

The putative father is the only person with standing to bring a legitimation proceeding, which is commenced when he files a verified petition seeking the child's legitimation. G.S. 49-10; 49-12.1 The father may bring the legitimation proceeding after the child reaches the age of majority. The putative father must name the mother (if living) and child as necessary parties. G.S. 49-10; 49-12.1. A putative father may bring a legitimation action when the mother was married at the time of the child's conception or birth. G.S. 49-12.1. In that case, the husband is also a necessary party. *Id.*

The only issue that is decided in a legitimation proceeding is whether the petitioner is the child's biological father. *In re Papathanassiou*, 195 N.C. App. 278 (2009). The court does not apply a best interests of the child analysis. *Id.* When a legitimation proceeding is brought pursuant to G.S. 14-12.1, which is when the child's mother was married to a different man when the child was born, the putative father must prove by clear and convincing evidence that he is the child's father. When the mother was not married during the time of the child's conception through birth,* the court may declare the child legitimate "[i]f it appears to the court that the petitioner is the father of the child." G.S. 49-10. Neither the statute nor case law addresses the required burden of proof. The civil standard of preponderance of the evidence or the higher standard used to rebut the marital presumption or establish paternity—clear, cogent, and convincing evidence—may apply. G.S. 49-12.1; 49-14.

There is a lot more to say about paternity and legitimation, especially when looking at other types of court actions and executed affidavits of parentage. I've done that in my book, Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases (which became available

May 19, 2016).

*Although G.S. 49-10 refers to “any child born out of wedlock,” G.S. 49-12.1, became effective October 1, 1991 and applies to “a child who was born to a mother who was married to another man” appearing to limit the definition of out-of-wedlock for a proceeding initiated under G.S. 49-10 to a mother who not not married at the time the child was born.

This entry was tagged with the following terms: estates, family law, intestate succession, legitimation, Paternity.

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