

## **CHECKLIST FOR GS § 49-14 AND GS § 110-132**

- Has a motion been filed? GS § 49-14(h)
  - Was the motion properly served? GS 1A-1, Rule 5
  - Has the motion been noticed for hearing? GS 1A-1, Rule 6(d)
  - Was the notice for hearing given no less than 5 days in advance? GS 1A-1, Rule 6(d)
  - If the motion has not been properly filed or served, move to dismiss.
  
- Is the motion that was filed in the underlying paternity case?
  - If not, move to dismiss.
  
- Is the underlying paternity order a North Carolina order?
  - If not, move to dismiss. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978); Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576 (2000)(North Carolina did not have subject matter jurisdiction to require genetic testing for purposes of establishing paternity when Alaska had already determined that the man was the father of the minor child).
  
- Does the motion plead or allege fraud, duress, mutual mistake, or excusable neglect as the reason for the paternity order to have been issued?
  - Each of these allegations must be pled with particularity; that is, the motion must provide specific allegations as to time and place that the alleged fraud, duress, mistake, or neglect occurred. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).
  - If the motion does not specifically plead these allegations, move to dismiss. GS 1A-1, Rule 9(b). Leake v. Sunbelt Ltd. Of Raleigh, 93 N.C. App. 199, 377 S.E.2d 285, cert. denied, 324 N.C. 578, 381 S.E.2d 774 (1989).
    - The elements of a fraud claim which should be alleged are:
      - a false representation or concealment of a material fact;
      - reasonably calculated to deceive;
      - made with the intent to deceive;
      - which does in fact deceive; and which
      - results in damage to the injured party. Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981).
  
- Does the movant have standing? (Is the movant a party to the existing lawsuit?)
  - If the movant does not have standing, move to dismiss.
  
- If the motion is sufficient on its face (allegations of fraud, duress, etc.) and proper filing and service, the agency should prepare for a hearing in which the movant will ask for an order for genetic testing.
  - Review complete file (including court file)
  - Confer with child support agent
  - Meet with custodial parent (without establishing an attorney/client relationship)

- Consider motion to dismiss if allegations are not alleged with particularity
- Consider motion to dismiss if:
  - movant previously had genetic testing;
  - previously admitted paternity knowing he was not the biological father of the child (judicial estoppel - Price v. Price, 169 N.C. App. 187, 609 S.E.2d 450 (2005);
    - If father had knew or reasonably should have known that he was not the biological father of the child.
      - In re Doe, 231 N.C. 1, 56 S.E.2d 8 (1949);
      - Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979)(husband, knowing he was signing a false affidavit in order to obtain a new birth certificate for child, was estopped from collaterally attacking his admission of paternity in a subsequent hearing for support);
      - Leach v. Alford, 63 N.C. App. 118, 304 N.C. 265 (1983)(Rule 60(b)(6) motion was allowed to set aside a voluntary support agreement when defendant did not have sickle cell trait or gene even though more than three years following the signing of the VSA).
- If the movant's motion depends, in any fashion, upon already completed genetic testing, move to strike pursuant to GS § 1A-1, Rule 12(f).
  - The chain of custody must still be proven.
  - Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992); Catawba County v. Khatod, 125 N.C. App. 131, 479 S.E.2d 270 (1997); Columbus County v. Davis, 163 N.C. App. 64, 592 S.E.2d 225 (2004)(if paternity testing not court ordered, GS § 8-50.1(b1) does not apply and the movant needs to show a chain of custody); Rockingham County DSS ex rel. Shaffer v. Shaffer, 126 N.C. App. 197, 484 S.E.2d 415 (1997)(if chain of custody not verified, admission of the genetic testing result was error in that it did not comply with the statute).
- Burden of proof is on the movant.
  - If court grants movant's motion for genetic testing, ask for findings of fact and conclusions of law. GS § 1A-1, Rule 52.
  - In anticipation of appellate rights, request a stay. GS § 1A-1, Rule 62.
  - If the agency believes the court is incorrect in its ruling file a petition for writ of certiorari and a writ of supersedeas. N.C. App. R. 21 and 23.
- Genetic tests results (assuming a proper documented verified chain of custody):
  - 97% and higher = rebuttable presumption that alleged parent is the biological father. GS § 8-50.1(b1)(4)
  - 85%-97% = this evidence is admissible by the court and is weighed with all of the other competent evidence. GS § 8-50.1(b1)(3)

- Less than 85% = rebuttable presumption that the alleged parent is not the biological father. GS § 8-50.1(b1)(1)
- If court determines:
  - as a result of genetic testing, the alleged father is not the biological father, and
  - the prior order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect
  - then, the court in its discretion, may set aside the order of paternity. GS § 49-14(2)



## **CHECKLIST FOR GS § 50-13.13**

- Has a complaint been filed starting a new civil action? G.S. § 50-13.13(b).
  - If not, go to the provisions for motions practice below starting on page 3.
- Are the summons and complaint proper in form and substance?
  - If not, move to dismiss.
- Was summons and complaint served in accordance with G.S. § 1A-1, Rule 4?
  - If not, move to dismiss.
- Was the summons and complaint timely served?
  - If not, move to dismiss.
- Did the plaintiff keep the summons alive by appropriate endorsements and/or alias and pluries summonses?
  - If not, move to dismiss.
  
- Is the plaintiff in the new civil action the father of a child who is required to pay child support? G.S. § 50-13.13(a).
  - Is he required to pay child support pursuant to:
    - Chapter 49 (legitimation)?
    - Chapter 50 (custody and support)?
    - Chapter 52C (interstate child support)?
    - Chapter 110 (Title IV-D)?
    - G.S. 52-10.1 (separation agreement)?
  - If not, move to dismiss.
  
- Is the underlying paternity order a North Carolina order? G.S. § 50-13.13(a).
  - If not, move to dismiss. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978); Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576 (2000)(North Carolina did not have subject matter jurisdiction to require genetic testing for purposes of establishing paternity when Alaska had already determined that the man was the father of the minor child).
  
  - When did the plaintiff first know or reasonably should have known that he was not the biological father of the child? G.S. § 50-13.13(b). Must know the facts of the case very well to address this in a hearing.
  - If more than one year from date of filing of his complaint, move to dismiss. See Hatem v. Bryan, 117 N.C. App. 722, 453 S.E.2d 199 (1995)(mixed question of law and fact as to when the action accrues for purposes of applying a statute of limitations).
  
- Is the complaint verified? G.S. § 50-13.13(b)
  - If not, move to dismiss.
  
- Does the complaint allege with particularity how the plaintiff has come to believe that he is not the child(ren)'s biological father? G.S. § 50-13.13(b)(1).

- If not, move to dismiss.
- Does the complaint allege either that the plaintiff has not acknowledged paternity of the minor child(ren) or he acknowledged the child(ren) without knowing that he was not the biological father. G.S. § 50-13.13(b)(2).
  - If not, move to dismiss.
- Has the plaintiff adopted the minor child(ren)? G.S. § 48-1-106.
  - If so, move to dismiss. G.S. § 50-13.13(b)(3).
- Has the plaintiff legitimated the minor child(ren)? G.S. § 49-10; Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), disc. rev. denied, 331 N.C. 117, 414 S.E.2d 756 (1992).
  - If so, move to dismiss. G.S. § 50-13.13.(b)(3).
- Has the plaintiff legitimated the minor child(ren) by subsequent marriage? G.S. § 49-12; Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902).
  - If so, move to dismiss. G.S. § 50-13.13(b)(3).
- Has the plaintiff legitimated the minor child(ren) when the mother was married to another man? G.S. § 49-12.1; Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003).
  - If so, move to dismiss. G.S. § 50-13.13(b)(3).
- Is the plaintiff the legal father of the child(ren) through heterologous artificial insemination? G.S. § 49A-1.
  - If so, move to dismiss. G.S. § 50-13.13(b)(3).
- Is the plaintiff a member of the armed forces?
  - He has 180 days [not just 30 days after deployment, G.S. § 50-13.13(i)] after the termination of his service to apply for relief from any liability or obligation that was incurred during his service by default judgment. 50 U.S.C. Appx. §§ 521, 597a; Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).
- The court may, but need not, appoint a guardian ad litem on behalf of the minor child(ren). G.S. § 50-13.13(c).
- The trial court upon motion of a party shall order genetic testing of the child(ren)'s mother, the children, and the plaintiff if it finds good cause for such testing. This is “[n]otwithstanding G.S. 8-50.1(b1).”
  - In arguing that no good cause exists will probably be limited to fighting the allegations in plaintiff’s motion. Arguably these allegations will include the same claims discussed in G.S. § 49-14(h) and G.S. § 110-132. Ensure that any fraud or mistake allegations are pled with particularity. Leake v. Sunbelt Ltd. Of Raleigh, 93 N.C. App. 199, 377 S.E.2d 285, cert. denied, 324 N.C. 578, 381 S.E.2d 774 (1989).
- The provisions of G.S. § 8-50.1(b1) govern the admissibility and weight of the genetic testing results.
- Failure to comply with the genetic testing order subjects the individual to civil or criminal contempt or sanctions pursuant to G.S. 1A-1, Rule 37.

- The plaintiff's child support obligation is to be suspended while the complaint is pending unless the support is being paid to the child(ren)'s mother. [Ask the court that the plaintiff be ordered to continue to pay, but that the sums be placed on hold.]
  
- The court may grant relief from the child support order if it finds:
  - The results of a genetic test establish that the plaintiff is not the child(ren)'s biological father, see also Nash County DSS ex rel. Williams v. Beamon, 126 N.C. App. 536, 485 S.E.2d 851, disc. rev. denied, 347 N.C. 268, 493 S.E.2d 655 (1997);
  - The plaintiff either:
    - did not acknowledge paternity of the child(ren); or
    - acknowledged paternity of the child(ren) without knowing that he was not the child(ren)'s biological father.
      - "Acknowledging paternity" means
      - publicly acknowledged the child(ren) as his child(ren) and supported him/them while married to the child(ren)'s mother; or
      - acknowledged paternity in a sworn written statement, including an affidavit of parentage executed under G.S. § 110-132(a) or G.S. § 130A-101(f); or
      - executed a consent order, a voluntary support agreement, or any other legal agreement to pay child support as the child(ren)'s father; or
      - admitted paternity in open court or in any pleading.
  
- If plaintiff has not satisfied the requirements of this section the court shall:
  - deny the complaint to disestablish paternity;
  - if the court finds the plaintiff did not act in good faith, the court shall also award attorneys' fees to the prevailing party;
  - all existing orders shall remain in full force and effect until, and unless, properly modified by a court of competent jurisdiction.
  
- If plaintiff has satisfied the requirements of this section the court shall:
  - enter an order **with findings of fact and conclusions of law** terminating the plaintiff's ongoing child support obligation;
  - order that **any child support due prior to the filing of the complaint remains due and owing**;
  - order that the plaintiff does not have any right to reimbursement for moneys paid prior to the filing of the complaint;
  - order the clerk of superior court to notify the State Registrar to modify the child(ren)'s birth certificate(s). G.S. § 130A-118(b)(2).

- The court may tax as costs to the mother the expenses of genetic testing if the complaint is successful.
  
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  - Was the motion properly served? GS 1A-1, Rule 5
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  - Was the notice for hearing given no less than 5 days in advance? GS 1A-1, Rule 6(d)
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- If court determines:
  - as a result of genetic testing, the alleged father is not the biological father, and
  - the prior order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect
  - then, the court in its discretion, may set aside the order of paternity. GS § 49-14(2)

## **NOTES FOR CHECKLIST FOR GS § 49-14 AND GS § 110-132**

- Has a motion been **filed**? GS § 49-14(h)
  - Was the motion properly **served**? GS 1A-1, Rule 5 - It is the NCP's motion. The NCP will be filing it and serving it on the agency and, if the CP/agency's client is a party, the NCP must serve that person as well.

**RULE 5 SERVICE and Certificates of Service** - filed with the court & a copy served on each party or on the parties' attorneys of record. This can be by personal service or by mailing to the last known address of the party or by leaving with the attorney of record/attorney's partner/employee or faxing to the attorney by 5:00pm on business day w/fax confirmation receipt. If fax after 5:00pm, then receipt was the next business day. Certificate of service must accompany all pleadings served on any party or nonparty. It must be signed in accordance with and is subject to Rule 11 of the Rules of Civil Procedure. Rule 11 states that "every pleading, motion and other paper of a party represented by an attorney must be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address....If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Is the custodial parent or the agency's client (grandparent/aunt, etc.) a party in his/her own right? The IV-D attorney must look at all the orders in the case to make that determination. If the Child Support Agency intervened in the case and the parties are the original parties, then the custodial party is a party in the matter. Sometimes, third parties, such as grandparents were interveners in the underlying action, so they could be parties as well. All parties must be served with all pleadings, motions, notices and orders. Also, if any parties had attorneys of record who have not obtained orders allowing them to withdraw; they must be sent said pleadings until the agency is notified to do otherwise.

- Has the motion been **noticed** for hearing? GS 1A-1, Rule 6(d)

**Rule 6(d)** - for motions, notice of the hearing shall be served not later than 5 days before the hearing. Rule 6(e) - references that if the notice was sent by mail, add 3 days.

- Was the notice for hearing given no less than 5 days in advance? GS 1A-1, Rule 6(d)
- If the motion has not been properly filed or served, move to dismiss.
- Is the motion that was filed in the underlying paternity case?
- If not, move to dismiss.
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genetic testing for purposes of establishing paternity when Alaska had already determined that the man was the father of the minor child).

**AS TO Williams v. Holland, SEE FULL FAITH AND CREDIT**, must give another State's order full faith and credit.

**AS TO Reid v. Dixon, SEE NCGS 52C-3-314** - Nonparentage cannot be used as a defense under UIFSA if another state has already determined paternity because of principle of res judicata. (But see NCGS 52C-6-607(a)(2) - a defense is fraud and (a)(5) - a defense that "there is a defense under the law of this State to the remedy sought." However, we must argue that the NCP full faith and credit requires that NC must uphold the other State's order and the NCP has to fight the fraud in the original state.)

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