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Chapter 10
Paternity

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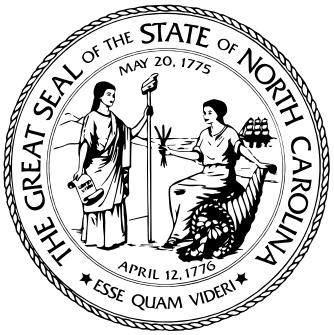

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Chapter 10: **Paternity**

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Chapter 10: **Paternity**

I. Paternity

A. Paternity and the Law

1. There is no single, universally applicable legal definition of the term "father." Instead, whether a man is recognized as the legal father of a child and what legal rights and obligations he has by virtue of his being recognized as a child's father are determined by a number of different laws that apply in a number of different contexts (for example, intestate succession, child support, adoption, termination of parental rights, etc.).
2. The *natural* (biological) father of a child is often (but not always) the child's *legal* father.
   a. A man who is presumed, by law, to be the natural father of a child is sometimes referred to as the child's *presumed* (or legal) father and generally is considered the child's legal father unless there is a legal determination that he is not the child's natural (biological) father. [Legal presumptions regarding paternity are discussed in Section I.B, below.]
   b. A man who is alleged, purported, or reputed to be the natural (biological) father of a child born out of wedlock and whose paternity of the child has not been legally determined is generally referred to as the *putative* (or reputed) father of the child. [*See* Black's Law Dictionary 725 (10th ed. 2014) (defining a *putative father* as the alleged biological father of a child born out of wedlock); *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).]
   c. A child who is born out of wedlock (that is, born to an unmarried woman or born to a married woman but conceived by a man other than her husband) is generally considered to be *illegitimate*. [*See* Black's Law Dictionary 290 (10th ed. 2014) (defining as *illegitimate* a child who was not conceived or born in lawful wedlock, nor later legitimated); *In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985) ("minor child was 'born out of wedlock,' although his mother was married to another man, not his natural father").] S.L. 2013-198 removed references in the General Statutes to "illegitimate" when used in connection with an individual and inserted in most places "born out of wedlock".
3. A man may be the legal father of a child *by operation of law* regardless of whether he is or is not the child's natural (biological) father.
   a. A man who adopts a child becomes the child's legal father by operation of law. [*See* G.S. 48-1-106(b).]
   b. A husband who consents in writing to the heterologous artificial insemination of his wife is the legal father of the child born as a result of that technique. [G.S. 49A-1.]

In heterologous artificial insemination, sperm are donated by a man other than the mother's husband.

c. A child's reputed father who marries the child's mother at any time after the child's birth becomes the child's legal father by operation of law. [*See* G.S. 49-12.] See Section I.D.4, below.

d. A valid legal determination that a man is the natural (biological) and legal father of a child may be legally binding with respect to his paternity even if he is not, in fact, the child's biological father. [The collateral estoppel and res judicata effects of civil and criminal judgments involving paternity are discussed in Sections II.K and II.L, below, and in Section V.E, below. *See State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002) (trial court correctly denied a motion to void an acknowledgment and order of paternity, and a related support agreement and order, pursuant to G.S. 1A-1, Rule 60(b)(1) and (3) brought outside the statutory time limit of one year, even though DNA test showed defendant was not the father); *Guilford Cty. ex rel. Wright v. Mason,* 169 N.C. App. 842 (2005) (**unpublished**) (defendant's Rule 60(b) motion for relief from a child support order, based on subsequent DNA analysis establishing that he was not the child's biological father, was properly denied as untimely); *State ex rel. Blakeney v. Reid*, 159 N.C. App. 467, 583 S.E.2d 428 (2003) (**unpublished**) (trial court correctly denied a motion to set aside a voluntary support agreement and order of paternity pursuant to Rule 60(b)(2) and (3) (addressing newly discovered evidence and fraud) as untimely, even though DNA test showed defendant was not the father).] **NOTE:** S.L. 2011-328, §§ 1 and 2, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h) and 110-132(a1) and (a2), which provide procedures to set aside orders of paternity or affidavits of parentage under certain circumstances. See Sections II.Q and IV.B.5, below.

e. A grandfather, stepfather, or man who has physical or legal custody of a minor child, has been appointed as a child's guardian, or stands in loco parentis with respect to a minor child but who is not otherwise the child's natural, adoptive, or legal father does *not* become the child's legal father by operation of law, even if the law gives him certain legal rights or imposes certain legal obligations on him with respect to the child. [*See Heatzig v. MacLean*, 191 N.C. App. 451, 458, 664 S.E.2d 347, 353 (in determining custody sought by a nonparent, court stated that "[t]he sole means of creating the legal relationship of parent and child is . . . [adoption]"), *appeal dismissed, review denied,* 362 N.C. 681, 670 S.E.2d 564 (2008); *Mason v. Dwinnell,* 190 N.C. App. 209, 660 S.E.2d 58 (2008) (only a legal (biological or adoptive) parent has a constitutionally protected right to custody and control of his children, which may be lost if a court finds that the parent has acted inconsistently with his protected status).]

f. North Carolina law currently does *not* recognize the doctrine of "paternity by estoppel." Except as otherwise expressly provided, a person who is not the biological parent of a child cannot become the child's legal parent under North Carolina law based solely on (1) an express or implied acknowledgment or assertion that he is the child's parent; (2) his actions of paternity; or (3) his actions assuming the familial or social role as the child's parent. [*See Heatzig v. MacLean*, 191 N.C. App. 451, 458, 664 S.E.2d 347, 353 (stating that a "district court in North Carolina is without authority

to confer parental status upon a person who is not the biological parent of a child" and noting that "[t]he sole means of creating the legal relationship of parent and child is . . . [adoption]"), *appeal dismissed, review denied,* 362 N.C. 681, 670 S.E.2d 564 (2008). *But see Chambers v. Chambers,* 43 N.C. App. 361, 258 S.E.2d 822 (1979) (citing *Myers v. Myers*, 39 N.C. App. 201, 249 S.E.2d 853 (1978), *review denied,* 296 N.C. 736, 254 S.E.2d 178 (1979)) (defendant who made a false affidavit of paternity in obtaining a new birth certificate for a child under G.S. 49-13 was estopped from collaterally attacking his admission of paternity in a later proceeding for support); *Myers* (defendant father who filed an affidavit of paternity in obtaining a new birth certificate for a child under G.S. 49-13 was estopped from collaterally attacking an earlier legitimation of the child and from denying paternity in a civil action for support).]

B. Legal Presumptions Regarding Paternity

1. Presumption of paternity when child is born in wedlock.

   a. The husband of a woman who gives birth to a child during the course of her marriage to her husband is presumed, by law, to be the child's natural father and is considered the child's legal father until it is legally determined that he is not the child's father. [*Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972). *See also Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968) (when a child is born in wedlock, the law presumes the child to be legitimate, and this presumption can only be rebutted by facts and circumstances that show the presumed father (husband) could not be the natural father).]

      i. This presumption applies if the child was:

         (a) Conceived and born during the parties' marriage, including during any separation; [*In re Mills,* 152 N.C. App. 1, 567 S.E.2d 166 (2002) (in termination of parental rights proceeding, mother's husband was considered legal father of children conceived after parties separated and after testing excluded him as biological father of child born not long after separation), *cert. denied,* 356 N.C. 672, 577 S.E.2d 627 (2003).]

         (b) Conceived prior to the parties' marriage but born during the marriage; [*State v. Tedder,* 258 N.C. 64, 65, 127 S.E.2d 786, 787 (1962) (per curiam) (presumption applies if child born "within a month or a day after marriage").]

         (c) Conceived during the parties' marriage but born after termination of the marriage, either by divorce or death, with the presumption lasting for a "competent time" after the end of the marriage. [3 Lee's North Carolina Family Law §§ 16.11a, 16.1 (5th ed. 2002).]

      ii. The presumption does not apply if the child was born prior to the parties' marriage. [3 Lee's North Carolina Family Law § 16.11a n.218 (5th Ed. 2002).] If the mother and reputed father marry after the child's birth, the child is legitimated pursuant to G.S. 49-12. [3 Lee's North Carolina Family Law § 16.11a n.218 (5th ed. 2002). *See Batcheldor v. Boyd,* 119 N.C. App. 204, 458 S.E.2d 1 (after defendant child successfully rebutted the presumption that mother's husband was his father, defendant was a "child born out of wedlock" and was legitimized by the

subsequent marriage of his mother to his reputed father), *review denied,* 341 N.C. 418, 461 S.E.2d 753 (1995).]

iii. The presumption of paternity does not apply when the parties stipulate that mother's husband is not the biological father of the child. [*Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (upholding dismissal of mother's motion for child support from mother's husband at time child was born based on stipulation that he was not the father even though he was listed as the father on the birth certificate and knew at time of child's birth that he was not the father; to be liable for support, mother's husband would have had to voluntary assume obligation of support in writing as required by G.S. 50-13.4(b)).]

iv. A child born of a bigamous or voidable marriage is legitimate notwithstanding the subsequent annulment of the marriage. [G.S. 50-11.1.]

v. Absent an applicable statutory provision, courts generally presume that conception occurred ten lunar months (280 days) before the child's birth, but this presumption may be rebutted by other evidence, including expert testimony regarding length of pregnancy. [*See Lenoir Cty. ex rel. Dudley v. Dawson*, 60 N.C. App. 122, 298 S.E.2d 418 (1982) (evidence was sufficient without expert testimony for submission to the jury in a paternity action when it showed that child was born 289 days after parties' last sexual relations).]

b. The presumption that a mother's husband is the father of a child conceived or born during the parties' marriage may be rebutted by clear and convincing evidence proving that he is not the child's biological father. [G.S. 49-12.1(b) (presumption of legitimacy can be overcome by clear and convincing evidence by putative father in a legitimation proceeding); *In re Papathanassiou,* 195 N.C. App. 278, 281, 671 S.E.2d 572, 574 (quoting statement in *In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985), that the presumption that a child born during a marriage is the product of the marriage is "one of the strongest known to the law" but noting that "the presumption of legitimacy can be overcome by clear and convincing evidence" pursuant to G.S. 49-12.1(b)), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009); *Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (applying clear and convincing standard in G.S. 49-12.1(b) to find marital presumption rebutted by stipulation that mother's husband did not father child born during their marriage).] **NOTE:** S.L. 1991-667, § 2 added G.S. 49-12.1 addressing legitimation when mother is married, which changed the standard to clear and convincing evidence from the standard set out in *Locklear*, which was proof beyond a reasonable doubt. Evidence to rebut the presumption may include:

i. Evidence of husband's impotence; [*In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (citing *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968)); *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972) (citing husband's impotency as an example of evidence that would show husband could not be the father); *Cole v. Cole*, 74 N.C. App. 247, 328 S.E.2d 446 (when scientific evidence demonstrated that husband was sterile when child was conceived, husband found not to have fathered child despite a blood test finding a probability of paternity of 95.98 percent), *aff'd per curiam*, 314 N.C. 660, 335 S.E.2d 897 (1985).]

ii. Blood or genetic test results proving that mother's husband could not be the child's biological father; [*Wright v. Wright,* 281 N.C. 159, 188 S.E.2d 317 (1972) (court allowed mother's husband to amend answer to delete admission of paternity and permitted the use of blood tests under G.S. 8-50.1 to rebut the presumption of legitimacy in mother's civil action for alimony, custody, and child support); *Ambrose v. Ambrose,* 140 N.C. App. 545, 536 S.E.2d 855 (2000) (citing *Wright*).] Blood and genetic testing to determine paternity are discussed in Section II.I, below.

iii. Evidence of husband's lack of sexual access to his wife (or "nonaccess") during the time of conception; [*Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972) (citing nonaccess as an example of evidence that would show husband could not be the father); *Jeffries v. Moore,* 148 N.C. App. 364, 559 S.E.2d 217 (2002) (citing *Wright*) (trial court considered lack of access during separation but could not determine whether the mother and husband were continuously separated surrounding the time of conception).]

(a) That the mother was notoriously living in adultery at the time the child was conceived has been considered "a potent circumstance" tending to show nonaccess. [*Ray v. Ray*, 219 N.C. 217, 13 S.E.2d 224 (1941); *Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981) (citing *Ray*).]

(b) The husband's access or nonaccess is a fact to be established by proper proof. [*Ray v. Ray*, 219 N.C. 217, 13 S.E.2d 224 (1941); *Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981) (citing *Ray*).]

(c) The husband, or other person or entity seeking to establish paternity, is not required to prove "that the husband *could not* have had access [to his wife at the time the child was conceived], but that he *did not* have access." [*Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 30, 279 S.E.2d 901, 904 (1981) (emphasis in original).]

(d) Evidence that husband and wife were not living together and did not have sexual relations during the time the child was conceived was sufficient to rebut the presumption of legitimacy. [*Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 30, 279 S.E.2d 901, 904 (1981) (stating that where the spouses are living apart, the presumption of legitimacy will be rebutted unless there is "a fair and reasonable basis in light of experience and reason" to find that the husband and mother were engaging in sexual relations).]

(e) Either spouse is competent to testify as to any relevant matter regarding paternity, including nonaccess. [G.S. 8-57.2; *Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981) (holding that a husband and wife may testify concerning nonaccess to each other; testimony of a spouse about nonaccess is clearly the best evidence of that fact).]

(f) Testimony regarding the mother's *reputation* for promiscuity, however, is generally not admissible. [*See State ex rel. Williams v. Coppedge*, 332 N.C. 654, 422 S.E.2d 691 (emphasis added) (evidence of mother's reputation should not have been admitted, as it had questionable probative value because it did not tend to prove or disprove the issue of paternity, and was

highly prejudicial), *rev'g per curiam for reasons stated in dissenting opinion in* 105 N.C. App. 470, 414 S.E.2d 81 (1992) (Walker, J., dissenting).]

iv. Evidence of racial differences.

(a) Trial court erred when it dismissed complaint of alleged parent for custody of child born during marriage of mother and mother's husband after finding, among other things, that the minor child appeared to be of mixed ancestry, including African-American ancestry, as did the alleged parent, and that child resembled the alleged parent and not the mother's husband. [*Jeffries v. Moore,* 148 N.C. App. 364, 559 S.E.2d 217 (2002) (presumption of legitimacy rebutted by this evidence and other findings).]

c. Limitation when mother is contesting the paternity of her husband.

i. In a child custody action involving a child's mother, her husband (or former husband), and a child born during their marriage, in which the mother challenges the paternity of her former husband, the mother cannot attempt to rebut the presumption that her former husband is the child's father *unless* "another man has formally acknowledged paternity . . . or has been adjudicated to be the father of the child." [*Jones v. Patience,* 121 N.C. App. 434, 439, 466 S.E.2d 720, 723 (to permit the marital presumption to be rebutted in the context of a custody dispute between the mother and her husband concerning a child born during the marriage would, absent a determination that another man is the father of the child, illegitimate the child in violation of the public policy of this state), *appeal dismissed, review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996). Limitation of *Jones* holding was recognized in *Ambrose v. Ambrose,* 140 N.C. App. 545, 548, 536 S.E.2d 855, 857 (2000) (noting that *Jones* is applicable only "in the narrow context of a custody dispute when the mother challenges the paternity of her former spouse").]

d. No limitation when mother's husband is contesting his paternity, as long as the issue has not been litigated or formally acknowledged.

i. The husband (or former husband) of a mother who gave birth to a child during the course of their marriage was not barred from attempting to rebut the legal presumption that he was the child's father. [*Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (defendant former husband was entitled to genetic test to determine paternity of child born during the parties' marriage when paternity had not been litigated and he had never formally acknowledged paternity in the manner prescribed by G.S. 110-132).]

2. Presumption of paternity from blood and genetic testing.

a. In a civil action involving paternity, a man is presumed to be a child's natural father if blood or genetic testing conducted pursuant to G.S. 8-50.1(b1) indicates at least a 97 percent statistical probability of parentage. [G.S. 8-50.1(b1)(4).] See Section II.I, below.

i. The presumption in G.S. 8-50.1(b1)(4) may be rebutted only by clear, cogent, and convincing evidence that the man is not the child's biological father. [G.S. 8-50.1(b1)(4). *See Nash Cty. Dep't of Soc. Servs. ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851 (court held that a putative father's testimony

that he did not know the mother, that he did not have sexual relations with her, or recall ever meeting her was sufficient to rebut the presumption of paternity created by the 99.96 percent probability of paternity test result), *review denied,* 493 S.E.2d 655 (N.C. 1997).]

b. If blood or genetic testing indicates a probability of parentage below 85 percent, the putative father is presumed not to be the child's natural father. This presumption may be rebutted only by clear, cogent, and convincing evidence that he is the child's natural father. [G.S. 8-50.1(b1)(1).]

i. The court of appeals has held that a respondent in a termination of parental rights proceeding must be given an opportunity to rebut the presumption created by G.S. 8-50.1(b1)(1), even if the respondent failed to comply with the statutory requirements to contest the test procedure or results. [*In re L.D.B.*, 168 N.C. App. 206, 617 S.E.2d 288 (2005) (citing *Nash Cty. Dep't of Soc. Servs. ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851, *review denied,* 493 S.E.2d 655 (N.C. 1997), as an example of a case in which testimony overcame test results) (trial court erred when it refused respondent, who was identified in the TPR petition as the father, an opportunity to rebut the statutory presumption of nonpaternity arising from test results that showed a zero percent probability that respondent was the father; the results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption).]

c. There is no statutory presumption, and thus no standard for evidence in rebuttal, if blood or genetic testing indicates a probability of parentage between 85 and 97 percent. [G.S. 8-50.1(b1)(3).]

3. In North Carolina, there is no presumption that a father who is named on a birth certificate has had his paternity *judicially* established. [Sara DePasquale, Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases 42 n.7 (UNC School of Government, 2016) (hereinafter Fathers and Paternity) (emphasis in original) (citing G.S. 130A-101(e), (f); 49-12; 49-13; 130A-118(b)(2), (3); Title 10A of the North Carolina Administration Code, Chapter 41H, § .0910, and the cases immediately following this parenthetical). *But see In re J.K.C.,* 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a termination of parental rights (TPR) proceeding brought on the ground set forth in the version of G.S. 7B-1111(a)(5) then in effect (that unwed father failed to acknowledge or establish paternity before the TPR action was initiated), there is a rebuttable presumption that respondent father took the required legal steps necessary to establish paternity if he is named on the child's amended birth certificate). *See also Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (mother could not rely on holding in *J.K.C.* to support her argument that husband's name on child's birth certificate judicially established his paternity of the child).]

4. There is no presumption of paternity from execution after Dec. 13, 2005, of an affidavit acknowledging paternity under G.S. 130A-101(f).

a. G.S. 130A-101(f) provides a procedure for the name of the putative father to be entered on the birth certificate of a child born to a woman who was unmarried at all times from the date of conception through the date of birth.

b. An unrescinded affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) before Dec. 13, 2005, creates a presumption that the declaring father is the natural father of the child of the unmarried mother. [S.L. 2005-389, § 4 deleted the following italicized language from G.S. 130A-101(f): "Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth certificate *and shall be presumed to be the natural father of the child*."]

c. An unrescinded affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) on or after Dec. 13, 2005, does not give rise to a presumption of paternity.

d. However, it appears that an affidavit acknowledging paternity executed under G.S. 130A-101(f) has the legal effect of a judgment establishing paternity for the purpose of establishing the father's obligation to pay child support. [*See* G.S. 110-132(a) ("written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation").]

e. If paternity is properly placed at issue, a certified copy of an affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) is admissible in any action to establish paternity of the child. [G.S. 130A-101(f).]

f. The execution and filing with the State Registrar of Vital Statistics of an affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) does not affect the father's or the child's rights of inheritance or intestate succession unless the affidavit is also filed with the clerk of superior court pursuant to G.S. 29-19(b)(2). [G.S. 130A-101(f).] The requirement in G.S. 29-19(b)(2) that the instrument acknowledging paternity be filed with the clerk has been found not to violate the Equal Protection Clause of the U.S. Constitution. [*In re Estate of Williams*, 246 N.C. App. 76, 83, 783 S.E.2d 253, 258 (quoting *Outlaw v. Planters Nat. Bank & Tr. Co.*, 41 N.C. App. 571, 574–75, 255 S.E.2d 189, 191 (1979)) (the classification based on illegitimacy created in G.S. 29-19(b)(2) is substantially related to the state's interest in the "just and orderly disposition of property at death," which the court in *Outlaw* found permissible), *review denied, appeal dismissed,* 787 S.E.2d 30 (N.C. 2016).]

5. There is no presumption of paternity from execution of an affidavit of parentage (formerly an acknowledgment of paternity) under G.S. 110-132.

a. From July 1, 1975, until Sept. 30, 1997, an acknowledgment of paternity executed pursuant to G.S. 110A-5(a) (predecessor to G.S. 110-132(a)) or G.S. 110-132(a) and approved by a district court judge had the same force and effect as a judgment of that court. [S.L. 1975-827, § 1, effective July 1, 1975.]

b. From Oct. 1, 1997, through Sept. 30, 1999, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) constituted an admission of paternity, subject to a right to rescind, but no longer had the same force and effect as a judgment of the court, as language to that effect was deleted. [G.S. 110-132(a), *amended by* S.L. 1997-433, § 4.7, effective Oct. 1, 1997.]

c. In 1999, G.S. 110-132 was amended to provide that an executed acknowledgment of paternity has the same legal effect as a judgment of paternity for the purpose of

establishing a child support obligation, subject to a right to rescind as set out therein. [G.S. 110-132(a), *amended by* S.L. 1999-293, § 1, effective Oct. 1, 1999.]

d. In 2001, S.L. 2001-237, § 2, effective June 23, 2001, amended G.S. 110-132(a) to change the name of the documents executed by the putative father and mother to "affidavits of parentage".

C. Name Appearing on Birth Certificate

1. Applicable North Carolina law.
   a. If the mother was married at the time of either conception or birth, or between conception and birth, the husband's name shall be entered on the birth certificate as father of the child, except as otherwise provided in G.S. 130A-101(e). [G.S. 130A-101(e).]
   b. To acknowledge the validity of same-sex marriage, G.S. 12-3 was amended to define the terms "husband", "wife", and similar terms, when used throughout the North Carolina General Statutes, to mean "any two individuals who then are lawfully married to each other." [G.S. 12-3(16), *added by* S.L. 2017-102, § 35, effective July 12, 2017.] For more on the implications of this amendment, see Cheryl Howell, *New Legislation Acknowledges Same-Sex Marriage*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 8, 2017), https://civil.sog.unc.edu/new-legislation-acknowledges-same-sex-marriage.
2. Birth mother is married at time of birth.
   a. When a woman gives birth to a child in North Carolina and is married at the time of either conception or birth, or between conception and birth:
      i. To a person of the opposite sex, the name of the mother's husband must be entered on the child's birth certificate as the child's father, except as noted in Section I.C.3, immediately below. [G.S. 130A-101(e).]
      ii. To a person of the same sex, the name of the mother's female spouse must be entered on the birth certificate as the other parent of the child. [*See* G.S. 12-3(16); *Pavan v. Smith,* 137 S. Ct. 2075, 2077 (U.S. 2017) (per curiam) (overturning on constitutional grounds Arkansas statute which generally required that the name of birth mother's male spouse be placed on the child's state-issued birth certificate "regardless of his biological relationship to the child" but did not extend that requirement to similarly situated same-sex couples).]
3. The name of the putative father is entered on the birth certificate as father of the child:
   a. If paternity has been otherwise determined by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered, or
   b. The child's mother, mother's husband, and putative father complete an affidavit acknowledging paternity that contains all the following:
      i. Sworn statements by the mother, the putative father, and the mother's husband as set out in G.S. 130A-101(e)(2), as well as Social Security numbers for each;

ii. Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and

iii. DNA test results that confirm the paternity of the putative father. [G.S. 130A-101(e), *amended by* S.L. 2009-285, § 1, effective July 10, 2009, and applicable to birth certificates of children born on or after that date.] The statute does not specify the effect of signing the affidavit or the effect the affidavit acknowledging paternity has on parental rights and responsibilities.

4. In North Carolina, there is no presumption that a father who is named on a birth certificate has had his paternity *judicially* established. [Fathers and Paternity, 42 n.7 (citing G.S. 130A-101(e), (f); 49-12; 49-13; 130A-118(b)(2), (3); Title 10A of the North Carolina Administration Code, Chapter 41H, § .0910; and the cases immediately following this parenthetical). *But see In re J.K.C.,* 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a termination of parental rights (TPR) proceeding brought on the ground set forth in the version of G.S. 7B-1111(a)(5) then in effect (that unwed father failed to acknowledge or establish paternity before TPR action initiated), there is a rebuttable presumption that respondent father took the required legal steps necessary to establish paternity if he is named on the child's amended birth certificate). *See also Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (mother could not rely on holding in *J.K.C.* to support her argument that husband's name on child's birth certificate judicially established his paternity of the child).]

5. Prior to amendment in 2009, G.S. 130A-101(e) provided: "If the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband shall be entered on the certificate as the father of the child, *unless paternity has been otherwise determined by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered.*" [G.S. 130A-101(e), before modification by S.L. 2009-285, § 1, effective July 10, 2009, which deleted the italicized language and added language allowing the name of the putative father to be entered on the birth certificate if certain conditions exist, as set out in Section I.C.2, above.]

6. The child's surname, however, may or may not be the same as that of the mother's husband. [G.S. 130A-101(e) (providing for surname of choice upon agreement of the parents); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981) (finding former statute void insofar as it precluded parents from recording the surnames of their choice on the birth certificates of their children).] S.L. 2009-285, § 1, effective July 10, 2009, did not change the surname provision.

7. Amendment of birth certificate is governed by G.S. 130A-118. That statute allows the State Registrar of Vital Statistics to issue a new birth certificate upon notification "from the clerk of a court of competent jurisdiction of a judgment, order or decree disclosing different or additional information relating to the parentage of a person." [G.S. 130A-118(b)(2). See 130A-118(b)(1), (3), and (4) for other grounds for issuance of a new birth certificate).]

D. Establishing Paternity of a Child Born Out of Wedlock

The paternity of a child born out of wedlock can be established in the following ways:

1. A civil action to establish paternity pursuant to G.S. 49-14 *et seq*., discussed in Section II, below;
2. A criminal nonsupport action pursuant to G.S. 49-2 in which paternity is established as a prerequisite to conviction, discussed in Section V, below;
3. A special proceeding to legitimate a child pursuant to G.S. 49-10 (when mother is not married) or 49-12.1 (when mother is married to a man other than the child's biological father), discussed in Section VI.A, below; and
4. By the subsequent marriage of the mother and the reputed father pursuant to G.S. 49-12.
    a. The word "reputed" rather than "putative" was used in G.S. 49-12 "to dispense with absolute proof of paternity, so that, if the child is 'regarded,' 'deemed,' 'considered,' or 'held in thought,' by the parents themselves, as their child, either before or after marriage," the child is legitimated pursuant to G.S. 49-12 upon their subsequent marriage. [*Carter v. Carter,* 232 N.C. 614, 617, 61 S.E.2d 711, 713 (1950) (quoting *Bowman v. Howard,* 182 N.C. 662, 666, 110 S.E. 98, 100 (1921)). *See also Chambers v. Chambers,* 43 N.C. App. 361, 258 S.E.2d 822 (1979) (if a man reasonably believes that he is the biological father of the mother's child, upon marriage to the child's mother, the child is legitimized pursuant to G.S. 49-12); *Bowman* (rejecting contention that "reputed father" means "actual father").]
    b. Where the parties stipulated that man the mother married after the child's birth was not the child's father, G.S. 49-12 was not available to legitimate the mother's child upon their marriage; in that case, the mother's husband was not the "reputed" father even if the couple represented to the community or to the child himself that the mother's husband was the biological father. [*Chambers v. Chambers,* 43 N.C. App. 361, 258 S.E.2d 822 (1979).]
    c. The parents have to actually marry for G.S. 49-12 to apply. [*Dep't of Transp. v. Fuller,* 76 N.C. App. 138, 332 S.E.2d 87 (1985) (in dicta, court noted that where parties lived together and represented themselves to be husband and wife to the general public, G.S. 49-12 was not applicable).]

E. Acknowledging Paternity of a Child Born Out of Wedlock for Support Purposes

The paternity of a child born out of wedlock can be acknowledged for support purposes in the following ways:

1. By voluntary affidavit of parentage pursuant to G.S. 110-132, subject to the right to rescind or to be set aside, which has the legal effect of a judgment of paternity for the purpose of establishing the father's obligation to pay child support, discussed in Section IV.B, below;
2. By affidavit (completed at the hospital) pursuant to G.S. 130A-101(f), subject to the right to rescind, which has the legal effect of a judgment of paternity for the purpose of establishing the father's obligation to pay child support, discussed in Section IV.C, below. [*See* G.S. 110-132(a) ("written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation").]

II. Civil Action to Establish Paternity of a Child Born Out of Wedlock [G.S. 49-14 *et seq.*]

A. Generally

1. The legislative purpose underlying G.S. 49-14 paternity actions is to establish the identity of the father of a child born out of wedlock so that an order of support can be entered and enforced and the child will not become a public charge. [*Smith v. Price,* 74 N.C. App. 413, 328 S.E.2d 811 (1985) (citing *Lenoir Cty. ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980)), *aff'd in part, rev'd in part on other grounds,* 315 N.C. 523, 340 S.E.2d 408 (1986); *Cogdell.*]
2. G.S. 49-14 recognizes a civil action to establish the paternity of a child born out of wedlock.
    a. The term "out of wedlock" generally refers to a child born to an unmarried woman or a child born to a married woman but fathered by a man other than her husband. [*In re Legitimation of Locklear,* 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985) ("minor child was 'born out of wedlock,' although his mother was married to another man, not his natural father"); *Smith v. Bumgarner*, 115 N.C. App. 149, 151, 443 S.E.2d 744, 745 (1994) (citing *Locklear* and *Wright v. Gann*, 27 N.C. App. 45, 217 S.E.2d 761, *cert. denied,* 288 N.C. 513, 219 S.E.2d 348 (1975)) ("[a] child born to a married woman but begotten by one other than her husband is a child 'born out of wedlock' "); *Wright* (G.S. 49-14 is applicable to all children born out of wedlock).]
    b. A civil action may not be brought pursuant to G.S. 49-14 to establish the paternity of a child who has been previously legitimated. [*See Lewis v. Stitt*, 86 N.C. App. 103, 356 S.E.2d 398 (1987) (noting in dicta that if a child had been legitimated pursuant to G.S. 49-12 by her mother's subsequent marriage, mother could not later maintain an action to establish paternity under G.S. 49-14 against another man).]

B. Subject Matter Jurisdiction

1. The district court has subject matter jurisdiction over civil actions that are brought pursuant to G.S. 49-14 *et seq*. to establish the paternity of a child born out of wedlock. [*See Smith v. Barbour,* 154 N.C. App. 402, 407 n.3, 571 S.E.2d 872, 877 n.3 (2002) (footnote 3 states that, in connection with a transfer by the clerk of a legitimation proceeding under G.S. 49-10 when paternity is disputed, "[w]ith respect to the issue of paternity, the appropriate court is the district court"), *cert. denied*, 599 S.E.2d 408 (N.C. 2004).] **NOTE:** The clerk of superior court has original jurisdiction over special proceedings to legitimate a child pursuant to G.S. 49-10 and 49-12.1. See Section VI.A.3.b, below.
2. Under the Uniform Interstate Family Support Act (UIFSA), a district court in North Carolina:
    a. May serve as an initiating tribunal to forward proceedings to a tribunal of another state and as a responding tribunal for proceedings initiated in another state or foreign country. [G.S. 52C-2-203, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. Authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage brought pursuant to UIFSA or a law or procedure substantially similar to UIFSA, [G.S. 52C-4-402, *added by* S.L. 2015-117, § 1, effective June 24, 2015.] regardless of whether the proceeding also seeks support for the child. [See Section III.B, below, for discussion of interstate UIFSA paternity proceedings.]

3. A district court lacks jurisdiction to adjudicate the paternity of a child born out of wedlock:

   a. If the plaintiff fails to attach a copy of the child's birth certificate to the complaint as required by G.S. 49-14(a). [*Reynolds v. Motley*, 96 N.C. App. 299, 385 S.E.2d 548 (1989).] **NOTE:** The requirement that the copy of the birth certificate be certified was repealed by S.L. 2005-389, § 3, applicable to actions filed on or after Dec. 13, 2005.

   b. If a proceeding to legitimate the child is filed or pending in superior court. [*Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002) (plaintiff's filing of a legitimation action in superior court under G.S. 49-10 divested the district court of subject matter jurisdiction to adjudicate the issue of paternity under G.S. 49-14; district court nevertheless had authority to enter a temporary custody order), *cert. denied*, 599 S.E.2d 408 (N.C. 2004).]

4. Jurisdiction when child and/or parties are reservation Indians.

   a. Absent a congressional act governing jurisdiction, if the exercise of state court jurisdiction would unduly infringe on a tribe's self-governance, the district court does not have subject matter jurisdiction. [*See Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (exercise of state court jurisdiction to determine paternity of a child would unduly infringe on tribal self-governance where mother, child, and putative father were all members of the Eastern Band of Cherokee Indians living on reservation; exclusive tribal court jurisdiction over determination of paternity especially important to tribal self-governance), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]

   b. If the matter at issue does not unduly infringe upon the tribe's right of self-governance, the tribal court and district court have concurrent jurisdiction, except in cases where the tribal court has first exercised jurisdiction and retains jurisdiction.

      i. The district court had concurrent jurisdiction with the tribal court for action to recover Aid to Families with Dependent Children (AFDC) payments. [*Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (tribe's interest in self-governance not significantly affected; no prior action for the same claim was filed in tribal court), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93, 98 L.E.2d 54 (1987).]

      ii. When a claim for child support had been filed in tribal court and that court had retained jurisdiction, the district court did not have jurisdiction of an action to recover AFDC payments. [*Jackson Cty. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (claim for AFDC payments was based on defendant father's duty to support his children, jurisdiction over which had been retained by the tribal court); *State ex rel. West v. West*, 341 N.C. 188, 459 S.E.2d 791 (1995) (per curiam) (action to establish current and future child support payable by non-Indian mother for child in custody of Indian father was properly

dismissed; tribal court exercised jurisdiction first and continued to exercise jurisdiction).]

5. Because jurisdiction in child custody cases is determined by G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act, and that Act does not apply to paternity determinations, a court may have subject matter jurisdiction to determine a child's paternity but not have subject matter jurisdiction to determine the child's custody. [See *Child Custody*, Bench Book, Vol. 1, Chapter 4, for discussion of subject matter jurisdiction in custody matters.]

C. Personal Jurisdiction

1. Generally.
   a. An action to establish paternity is in personam. [*Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).] A court must have personal jurisdiction over a putative father before it can determine his paternity.
   b. When a nonresident defendant challenges the court's exercise of jurisdiction, the burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (action seeking, among other things, alimony, postseparation support, and equitable distribution).]
   c. Unless the defense has been waived, an order entered without personal jurisdiction over a defendant putative father is void and may be collaterally attacked or set aside at any time pursuant to G.S. 1A-1, Rule 60(b)(4). [*See Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976) (North Carolina not required to give full faith and credit to determination of a Hawaii court that defendant was father of plaintiff's child because Hawaii court never obtained personal jurisdiction over North Carolina defendant), *aff'd*, 292 N.C. 192, 232 S.E.2d 687 (1977).]
   d. A court can exercise jurisdiction over any defendant who waives objection to personal jurisdiction. A general appearance in a proceeding waives objection to jurisdiction. [See Section II.C.3.a.iii, below.]
2. Two-part inquiry to determine personal jurisdiction over a nonresident.
   a. When a nonresident defendant challenges the court's exercise of personal jurisdiction, the court must undertake a two-part inquiry:
      i. The court must first determine whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction, i.e., "long-arm jurisdiction." [*Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 707 S.E.2d 385 (2011), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012).]
      ii. If the court concludes that there is a statutory basis for jurisdiction, it next must consider whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment, i.e., "minimum contacts" analysis. [*See Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]
   b. Because North Carolina's long-arm statute extends personal jurisdiction to the limits permitted by due process, in some appellate opinions the two-part inquiry has been

merged into one question: whether the exercise of jurisdiction comports with due process. [*See Lang v. Lang,* 157 N.C. App. 703, 579 S.E.2d 919 (2003); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).] Note, however, that in *Speedway Motorsports International Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 487, 707 S.E.2d 385, 394 (2011), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012) (citing *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009)), the court of appeals rejected the practice of collapsing the long-arm statute analysis into the minimum contacts analysis in favor of "two separate steps of analysis."

c. Factors to consider when determining whether a defendant has sufficient minimum contacts with North Carolina:

   i. Quantity of contacts with the state;

   ii. The nature and quality of those contacts;

   iii. The source and connection of the cause of action to the contacts;

   iv. The interest of the forum state in litigating the matter;

   v. The convenience of the parties; and

   vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner,* 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v.Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart,* 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

d. Service on defendant within the state. [G.S. 52C-2-201(a)(1); 1-75.4(1)a.]

   i. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Hedden v. Isbell*, 792 S.E.2d 571 (N.C. Ct. App. 2016) (service within the state satisfies both requirements for establishing personal jurisdiction over a defendant), *appeal dismissed, cert. denied,* 369 N.C. 487, 795 S.E.2d 366 (2017)); *Jenkins v. Jenkins,* 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

3. Statutory basis for personal jurisdiction.

   a. A North Carolina tribunal has the statutory authority ("long-arm jurisdiction") to assert personal jurisdiction over a resident or nonresident defendant in a civil action to determine parentage of a child if:

      i. The defendant is personally served with a summons and complaint within this state; [G.S. 52C-2-201(a)(1); 1-75.4(1)a. See Section II.C.2.d, above, on service within state negating need for minimum contacts inquiry.]

      ii. The defendant is domiciled in the state at the time he is served with process; [G.S. 1-75.4(1)b.]

      iii. The defendant submits to jurisdiction by consent in a record, by entering a general appearance in the action, or by filing a responsive document that has the

effect of waiving his right to contest personal jurisdiction; [G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 1-75.7(1) (general appearance).]

(a) "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

iv. The defendant is engaged in substantial activity within this state at the time he is served with process; [G.S. 1-75.4(1)d.]

v. The defendant resided in this state with the child; [G.S. 52C-2-201(a)(3).]

vi. The defendant resided in this state and provided prenatal expenses or support for the child; [G.S. 52C-2-201(a)(4).]

vii. The child resides in this state as the result of the defendant's acts or directives; [G.S. 52C-2-201(a)(5).]

viii. The child may have been conceived as a result of sexual intercourse by the defendant within this state; [G.S. 52C-2-201(a)(6); 49-17.] or

(a) G.S. 49-17 satisfies the first prong of the two-part inquiry by creating special jurisdiction under very limited circumstances as set out therein, i.e., an act of sexual intercourse within North Carolina. [*Cochran v. Wallace,* 95 N.C. App. 167, 381 S.E.2d 853 (1989).] For its application to the second prong of the inquiry, i.e., minimum contacts, see Section II.C.4.c, below.

ix. "There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction. [G.S. 52C-2-201(a)(8).]

b. The "marital relationship" basis for exercising personal jurisdiction over a nonresident [G.S. 1-75.4(12).] does not apply to civil actions to establish the paternity of a child born out of wedlock pursuant to G.S. 49-14. [G.S. 1-75.4(12) states that the marital relationship basis for exercising jurisdiction is applicable to "any action under [G.S.] Chapter 50."]

c. G.S. 52C-2-201 was amended in 2015 to delete as a basis for jurisdiction over a nonresident defendant that the defendant asserted paternity in an affidavit filed with the clerk. [S.L. 2015-117, § 1, effective June 24, 2015, deleting former G.S. 52C-2-201(7).]

4. Compliance with due process requirements.

a. Due process requires that defendant have minimum contacts with the state. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]

b. Defendant's fathering of the infant in North Carolina and his signing of an acknowledgment of paternity and a voluntary support agreement were sufficient to meet the standards of due process. [*Moore v. Wilson*, 62 N.C. App. 746, 748, 303 S.E.2d 564, 565 (1983) (actions indicated "that defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum").]

c. G.S. 49-17(a) states "The act of sexual intercourse within this State constitutes sufficient minimum contact with this forum for purposes of subjecting the person or

persons participating therein to the jurisdiction of the courts of this State for actions brought under this Article for paternity and support of any child who may have been conceived as a result of such act." However, this statute does not abrogate the requirement that a trial court determine that the exercise of jurisdiction over a defendant in a specific case does not violate due process. [*Cochran v. Wallace,* 95 N.C. App. 167, 171, 381 S.E.2d 853, 856 (1989) (acknowledging that "minimum contacts" language in statute is "misleading and confusing").]

d. For factors that have proven useful in an analysis of "minimum contacts" with a jurisdiction, see Section II.C.2.c, above.

e. For cases discussing minimum contacts in the context of child support, see *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.

f. For cases discussing minimum contacts in the context of alimony, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

5. Notice.

a. In addition to the requirement that the court have personal jurisdiction over the defendant, a court may not enter a valid order determining a defendant putative father's paternity of a child born out of wedlock unless the putative father is properly served with process pursuant to G.S. 1A-1, Rule 4 or makes a general appearance in the action. [*See Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977) (judgment of paternity is one in personam); G.S. 1-75.3(b) (Rule 4 service required).] For a more extensive discussion of notice, see *Procedure for Initial Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 2.

6. Appeal.

a. The denial of a defendant's motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable, or the defendant may preserve his exception for determination upon any subsequent appeal in the cause. [G.S. 1-277(b); *Lang v. Lang,* 157 N.C. App. 703, 704 n.1, 579 S.E.2d 919, 920 n.1 (2003); *Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001).]

b. In reviewing an order determining whether personal jurisdiction is statutorily and constitutionally permissible, "[t]he trial court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there may be evidence to the contrary." [*Butler v. Butler,* 152 N.C. App. 74, 76, 566 S.E.2d 707, 708 (2002) (quoting *Shamley v. Shamley*, 117 N.C. App. 175, 180, 455 S.E.2d 435, 438 (1994)).]

D. Venue

1. Since G.S. 49-14 does not address venue, G.S. 1-82 applies and provides that the proper venue for a civil action to establish paternity is in the county in which any plaintiff or any defendant resides at the commencement of the action, subject to right of the court to transfer venue in accordance with G.S. 1-83. [G.S. 1-82 also addresses when none of the plaintiffs or defendants reside in the state.]

2. Transfer of venue. G.S. 1-83 provides in part that a court may change the place of trial when:

a. The county in which the action is brought is not the proper one [G.S. 1-83(1) (venue is improper).] or

i. The provision in G.S. 1-83(1) that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "*must* change" when a proper motion has been filed. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100, 105 (N.C. Ct. App. 2016) (quoting *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014)) (custody action); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978) (divorce action).]

ii. When an action is instituted in the wrong county, the court should, upon apt motion, remove the action, not dismiss it. [*Coats v. Sampson Cty. Mem'l Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).]

b. The convenience of witnesses and the ends of justice would be promoted by the change. [G.S. 1-83(2) (venue is proper but may be changed for reasons in the statute).]

i. Change of venue under G.S. 1-83(2) is discretionary with the court. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016).]

ii. G.S. 1-83(2) does not authorize a change of venue for the "convenience of the court." [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100, 108 (N.C. Ct. App. 2016).]

3. Time for filing request for transfer of venue.

a. Objection to venue based on **improper venue** must be raised before the time of answering expires [G.S. 1-83.] or before pleading if a further pleading is permitted. [G.S. 1A-1, Rule 12(b)(3); *Stokes v. Stokes,* 821 S.E.2d 161 (N.C. 2018), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018) (objection to improper venue pursuant to G.S. 1-83(1) must be raised either in a pre-answer motion pursuant to G.S. 1A-1, Rule 12 or set forth affirmatively in the answer).]

b. Motions for change of venue based on **convenience of witnesses** pursuant to G.S. 1-83(2) may be filed at any time before trial if the party can make the required showing. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]

i. For earlier cases *contra*, see *Thompson v. Horrell,* 272 N.C. 503, 158 S.E.2d 633 (1968); *Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (motion for change of venue for convenience of the witnesses must be filed after the answer is filed); *Smith v. Barbour,* 154 N.C. App. 402, 571 S.E.2d 872 (2002) (citing *McCullough v. Branch Banking & Tr. Co., Inc.,* 136 N.C. App. 340, 524 S.E.2d 569 (2000)) (motion pursuant to G.S. 1-83(2) must be filed **after** an answer has been filed; in custody and paternity action, trial court did not abuse its discretion by denying mother's motion to change venue based on G.S. 1-83(2), which was filed before she answered), *cert. denied,* 599 S.E.2d 408 (N.C. 2004).

c. A court may not change venue *sua sponte* under G.S. 1-83, whether under 1-83(1) or 1-83(2), when no defendant had answered or objected to venue. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (trial court's authority to change venue under G.S. 1-83(1) **or** (2) is triggered by a defendant's objection to

venue).] For more on this case, see Cheryl Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.

4. Waiver of objection to venue.
   a. Venue requirements are *not* jurisdictional and may be waived by express or implied consent. [G.S. 1A-1, Rule 12(h)(1) (a defense of improper venue is waived under certain circumstances set out therein); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978) (in divorce action, trial court was justified in finding an implied waiver of defendant's right to a change of venue by her failure to pursue her motion for removal).]
   b. An objection to venue is waived if not timely filed. [*Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (in custody action, objection to venue based on improper county was waived when included in an untimely answer); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (when custody and support modification action was filed in improper county, venue issue was waived because not raised either in a pre-answer motion or in the answer; oral motion made at trial after pleadings were complete was not timely).]
   c. If a civil action to establish paternity is brought in a county that is not a proper venue and a party fails to object, or if an objection is not timely, the court may enter a valid judgment determining paternity if it has subject matter and personal jurisdiction.
   d. Whether a defendant has waived objection to venue is reviewed on appeal de novo. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016).]
5. Appeal of an order granting or denying a motion for change of venue pursuant to G.S. 1-83.
   a. An order granting or denying a motion to change venue based on improper venue pursuant to G.S. 1-83(1) affects a substantial right and is immediately appealable. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]
   b. An order granting or denying a discretionary transfer of venue based on convenience of witnesses pursuant to G.S. 1-83(2) does not affect a substantial right and is not subject to immediate appeal. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]

E. Parties

1. A civil action brought pursuant to G.S. 49-14 to determine the paternity of a child born out of wedlock may be brought by:
   a. The child's [putative] father; [G.S 49-16.]
   b. The child's mother or the mother's personal representative; [G.S 49-16.]
   c. The child (through the child's guardian or guardian ad litem) or the child's personal representative; [G.S. 49-16.]

d. The director of social services or such person as by law performs the duties of such official, when the child, or the mother in case of medical expenses, is likely to become a public charge; [G.S. 49-16.] or

e. A county department or child support services agency, which may pursue a paternity action commenced by the child's mother, or the child's custodian or guardian. [G.S. 110-130.] Federal law also allows the IV-D agency to bring an action on behalf of the putative father under certain circumstances. [42 U.S.C. § 654(4); 45 C.F.R. § 302.33; 45 C.F.R. § 303.8 (modification of child support orders); G.S. 110-130.1(a).]

i. In an action brought by a IV-D agency pursuant to Article 9 of G.S. Chapter 110 to establish, enforce, or modify child support or to establish paternity, collateral disputes between a custodial parent and a noncustodial parent, involving visitation, custody, and similar issues, shall be considered only in separate proceedings. [G.S. 110-130.1(c).] Collateral issues regarding visitation and custody cannot be filed in IV-D cases.

ii. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).]

2. If a civil action to establish paternity is brought by the child or if the child is named as a party in the action, the child must sue or be sued through the child's guardian or guardian ad litem. [G.S. 1A-1, Rule 17(b); 1A-1, Rule 4(j)(2)(a). See Section II.E.5, below (child not a necessary party).]

3. A civil action to establish paternity of a child born out of wedlock may be brought by or against a minor parent through the minor parent's guardian or guardian ad litem. [G.S. 1A-1, Rule 17(b); 1A-1, Rule 4(j)(2)(a).]

4. Only those individuals listed in G.S. 49-16 may be a party to a paternity proceeding under G.S. 49-14. [*Stockton v. Estate of Thompson,* 165 N.C. App. 899, 600 S.E.2d 13 (2004) (guardian ad litem for legitimated children of decedent not allowed to intervene in paternity proceeding brought to determine paternity of child born out of wedlock after decedent's death).] **NOTE:** *Stockton* did not involve a child support enforcement (IV-D) agency, nor was G.S. 110-130, which authorizes a IV-D agency to bring an action for paternity, considered. The court's conclusion in *Stockton*, that only those persons listed in G.S. 49-16, and not others, could intervene in a paternity proceeding under G.S. 49-14, should not affect the statutory authorization to IV-D agencies set out in G.S. 110-130.

5. The child is not a necessary party in a civil action to establish paternity. [*Smith v. Bumgarner*, 115 N.C. App. 149, 443 S.E.2d 744 (1994).] As noted above in Section II.E.1.c, a child may initiate a paternity action but is not a necessary party when the action is initiated by a different party. [Fathers and Paternity, 51 n.79.]

6. If a civil action to establish paternity is commenced after the putative father's death, the putative father's personal representative or the administrator of the putative father's estate is a necessary party defendant.

a. If a proceeding for administration of the putative father's estate has not been brought, the plaintiff in the civil action must have a personal representative or administrator appointed to allow the civil action for paternity to proceed.

b. The clerk may appoint a public administrator pursuant to G.S. 28A-12-4.

7. If the child whose paternity is at issue was conceived or born while mother was married:

   a. When a judgment regarding the husband's paternity has not been entered, the mother's husband should be joined as a party. [*See In re Legitimation of Locklear,* 314 N.C. 412, 334 S.E.2d 46 (1985) (mother's husband was a potentially adverse party in the legitimation special proceeding and should be considered a respondent on whom summons must be served).] G.S. 49-12.1, applicable to proceedings for legitimation when mother is married to another man and added to G.S. Chapter 49 after *Locklear* was decided, provides that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. [G.S. 49-12.1(a).]

   b. When a judgment determining that the husband is not the father has been entered, the mother's husband is not a necessary party. [*Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992) (Florida court had entered judgment finding that mother's husband was not the father of the child; civil paternity action against putative father did not affect interest of mother's husband in any way); *In re Papathanassiou,* 195 N.C. App. 278, 671 S.E.2d 572 (unless it has been determined that husband is not the child's father, he is a necessary party to the legitimation action), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).]

F. Statute of Limitations

1. If the putative father is living, a civil action to establish paternity of a child born out of wedlock must be commenced before the child's 18th birthday. [G.S. 49-14(a).] A child over 18 may be legitimated in a special proceeding before the clerk pursuant to G.S. 49-10 or 49-12.1. See Section VI.A, below. For more on the difference between paternity and legitimation, see Sara DePasquale, *Legitimation versus Paternity: What's the Difference?* UNC Sch. of Gov't: On the Civil Side Blog (Mar. 23, 2016), https://civil.sog.unc.edu/legitimation-versus-paternity-whats-the-difference.

2. If the putative father has died, a civil action to establish paternity of a child born out of wedlock must be commenced before the child's 18th birthday and:

   a. Before the death of the putative father,

   b. Within one year of the putative father's death if a proceeding for administration of the putative father's estate has not been commenced within one year of the putative father's death, or

   c. Within the period specified in G.S. 28A-19-3(a) for presentation of claims against the putative father's estate if a proceeding for administration of the putative father's estate has been commenced within one year of the putative father's death. [G.S. 49-14(c).]

3. If a civil action to establish paternity is brought more than three years after the child's birth or is brought after the putative father's death, paternity may not be established in a contested case without evidence from a blood or genetic marker test. [G.S. 49-14(d).]

4. A three-year statute of limitations imposed by prior law was held unconstitutional. [*Lenoir Cty. ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) (equal protection

violation since there was no similar limitation for a support action on behalf of a legitimate child).]

G. Pleading and Procedure

1. Except as otherwise provided, the N.C. Rules of Civil Procedure govern civil actions to establish the paternity of a child born out of wedlock. [G.S. 1A-1, Rule 1.] A copy of the child's birth certificate must be attached to the complaint. [G.S. 49-14(a).]
   a. Failure to provide the required copy deprives the court of subject matter jurisdiction to determine the child's paternity. [*Reynolds v. Motley*, 96 N.C. App. 299, 385 S.E.2d 548 (1989) (when statutory prerequisite was not complied with, trial court was without subject matter jurisdiction to adjudicate defendant's paternity).]
   b. The requirement that the copy of the birth certificate be certified was repealed by S.L. 2005-389, § 3, applicable to actions filed on or after Dec. 13, 2005.
2. The Social Security numbers, if known, of the child's parents must be placed in the record of the proceeding. [G.S. 49-14(a).]
3. Either party to a civil paternity action may request that the case be tried at the first session of court after the case is docketed. [G.S. 49-14(e).] The presiding judge, however, may first try any pending case in which the rights of the parties or the public demand it. [G.S. 49-14(e).]

H. Right to Counsel

1. An indigent putative father defendant has no per se constitutional right to appointed counsel in a civil action to establish his paternity of a child born out of wedlock. [*Wake Cty. ex rel. Carrington v. Townes*, 306 N.C. 333, 337, 293 S.E.2d 95, 98 (1982) ("the necessary menace to personal liberty is clearly absent at that legal stage" as there is no immediate threat of imprisonment in the initial civil paternity action itself), *cert. denied,* 459 U.S. 1113, 103 S. Ct. 745 (1983).]
2. Even though there is no absolute due process right to counsel in a civil paternity suit against an indigent, the trial court may appoint counsel if it determines that due process and fundamental fairness require appointment. The trial court should determine the merits of a due process claim by an indigent party for appointed counsel on a case-by-case basis. [*Wake Cty. ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982) (when record was devoid of any indication that proper individual consideration was given to the minimum requirements of fundamental fairness and judge made no findings and conclusions addressing the assertions in defendant's motion for appointment of counsel, including his unemployment and lack of education and training, case was remanded), *cert. denied,* 459 U.S. 1113, 103 S. Ct. 745 (1983).]
   a. When an indigent defendant requests appointment of counsel in a civil paternity suit, the trial judge is to "determine, in the first instance, what true fairness requires, in light of all of the circumstances." [*Wake Cty. ex rel. Carrington v. Townes*, 306 N.C. 333, 340, 293 S.E.2d 95, 100 (1982), *cert. denied,* 459 U.S. 1113, 103 S. Ct. 745 (1983).]
   b. The trial court should then evaluate "the vital interests at stake on both sides" and determine "the degree of actual complexity involved in the given case and the corresponding nature of defendant's peculiar problems, if any, in presenting his own

defense without appointed legal assistance." [The North Carolina Supreme Court notes that most paternity cases are not legally complex, stating "whether the defendant is the father of the child . . . is not an especially complex matter." *Wake Cty. ex rel. Carrington v. Townes*, 306 N.C. 333, 340, 341, 293 S.E.2d 95, 100 (1982), *cert. denied,* 459 U.S. 1113, 103 S. Ct. 745 (1983).]

c. Finally, the judge must "weigh the foregoing factors against the overall and strong presumption that the defendant is not entitled to the appointment of counsel in a proceeding which does not present an immediate threat to personal liberty." [*Wake Cty. ex rel. Carrington v. Townes*, 306 N.C. 333, 341, 293 S.E.2d 95, 100 (1982) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S. Ct. 2153 (1981), and *Matthews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893 (1976)), *cert. denied,* 459 U.S. 1113, 103 S. Ct. 745 (1983).]

I. Genetic Testing to Determine Paternity

1. Generally.

a. Genetic paternity testing may (1) prove that the man is not the child's biological father or (2) establish the man's paternity based on a statistical probability that he is the child's biological father. [*See* G.S. 8-50.1(b1).] (Prior to 1979, genetic test results were admissible only to exclude paternity, not to establish a putative father's paternity.)

i. North Carolina's court of appeals and supreme court have upheld the admissibility of genetic paternity test results obtained using a mathematical formula known as Bayes theorem and a 0.5 or 50 percent prior, nongenetic probability of paternity. [*Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000) (rejecting defendant's argument that a prior probability of zero, instead of 0.5, should have been used when there was expert testimony that defendant's paternity was a factual possibility); *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987) (setting out the formula for determination of the paternity index and explaining application of Bayes theorem in the context of a human leukocyte antigen (HLA) tissue typing test); *Cole v. Cole*, 74 N.C. App. 247, 328 S.E.2d 446 (discussing how probability of paternity is calculated), *aff'd per curiam*, 314 N.C. 660, 335 S.E.2d 897 (1985).]

ii. "'[P]rior probability,' in a paternity testing context, is a numerical representation of the nature and value of the non-genetic evidence." [*Brown v. Smith,* 137 N.C. App. 160, 163, 526 S.E.2d 686, 689 (2000) (setting out the explanation of prior probability from an expert affidavit).]

iii. The prior probability value, typically expressed as a number between zero and 1, is used in the conversion of the combined paternity index into the probability of paternity. The number zero indicates that paternity is factually impossible, while 1 indicates that paternity is factually certain. A neutral assessment of the non-genetic evidence would result in a prior probability of 0.5. [*Brown v. Smith,* 137 N.C. App. 160, 526 S.E.2d 686 (2000) (setting out the explanation of prior probability from an expert affidavit; where expert testified that paternity by defendant was a factual possibility, it would have been error to assign zero as the prior probability of paternity).]

2. When the court can or must order testing pursuant to G.S. 8-50.1.
    a. In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert. [G.S. 8-50.1(b1).]
        i. In a termination of parental rights (TPR) proceeding, when respondent contested paternity and requested testing and record did not show that paternity had ever been determined judicially or otherwise, G.S. 8-50.1(b1) required the court to order paternity testing. [*In re J.S.L.,* 218 N.C. App. 610, 723 S.E.2d 542 (2012) (trial court's subsequent termination of respondent's parental rights did not render the denial of respondent's motion for testing nonprejudicial or make the appeal moot; TPR order has collateral consequences in that under G.S. 7B-111(a)(9), termination of respondent's rights could be the basis for termination of his rights to other children).]
        ii. A question of parentage does not arise when paternity has already been decided in a prior proceeding. [*Heavner v. Heavner,* 73 N.C. App. 331, 326 S.E.2d 78 (father pled guilty in criminal nonsupport action and alleged in divorce complaint that child was born of the marriage; guilty plea was evidentiary admission of paternity; allegation in complaint also barred father from raising issue of paternity), *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985); *Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978) (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on prior adjudication of paternity in Nevada divorce and support proceeding; Nevada court had in personam jurisdiction over defendant).]
        iii. A question of parentage does not arise in a rape prosecution, as parentage is not an element of the offense. [*State v. Jackson,* 320 N.C. 452, 358 S.E.2d 679 (1987) (since G.S. 8-50.1 was not applicable, N.C. R. Evid. 701 through 706, relating to the testimony of experts, applied to testimony of geneticist concerning results of blood typing tests).]
    b. When the issue of paternity has not been litigated or judicially determined.
        i. Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage and was entitled to genetic test to determine paternity when paternity had not been litigated and he had never formally acknowledged paternity in the manner prescribed by G.S. 110-132. [*Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (trial court had earlier entered "a formal order" that denied defendant's request for a paternity test and incorporated an agreement between the parties in which defendant agreed to pay child support; court of appeals reversed and remanded with instructions to the trial court to order a paternity test). *Cf. Jones v. Patience,* 121 N.C. App. 434, 439, 466 S.E.2d 720, 723 (holding that in a child custody action involving a child's mother, her husband (or former husband), and a child born during their marriage, in which the mother challenges the paternity of her former husband, the mother cannot attempt to rebut the presumption that her former husband is the child's father *unless* "another man has formally acknowledged paternity . . . or has been adjudicated to be the father of the child"), *appeal dismissed,*

review denied, 343 N.C. 307, 471 S.E.2d 72 (1996). Limitation of *Jones* holding was recognized in *Ambrose,* 140 N.C. App. 545, 548, 536 S.E.2d 855, 857 (2000) (noting that *Jones* is applicable only "in the narrow context of a custody dispute when the mother challenges the paternity of her former spouse").]

c. When the putative father has never formally acknowledged paternity by executing an affidavit of parentage in the manner prescribed by G.S. 110-132 or in another sworn written statement.

i. Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage when the issue had not been litigated and he had never formally acknowledged paternity by executing an affidavit of parentage in the manner prescribed by G.S. 110-132; defendant had a right to a genetic test under these facts. [*Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (defendant agreed to pay child support in a separation agreement entered into a year after separation and again following the court's denial of his request for a paternity test, which was reduced to a memorandum of order and judgment and incorporated into the order denying the paternity test; court of appeals reversed and remanded with instructions to the trial court to order a paternity test).]

d. **NOTE:** S.L. 2011-328, §§ 1 and 2, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h) and 110-132(a1) and (a2), which provide procedures to set aside orders of paternity or affidavits of parentage and to order genetic testing under G.S. 8-50.1(b1), under certain circumstances. See Sections II.Q and IV.B.5, below.

3. When court cannot order testing pursuant to G.S. 8-50.1.

a. When paternity has already been litigated or otherwise judicially determined.

i. A finding in a 2002 custody order between unmarried parties that plaintiff was the biological father of the child was a judicial determination of paternity and was binding in a 2007 proceeding filed by mother for proof of paternity; trial court properly dismissed mother's motion for paternity testing. [*Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674 (mother had not appealed the custody order, had not sought relief from the order under G.S. 1A-1, Rule 60(b), and contested paternity only after losing custody), *rev'g per curiam for reasons stated in dissenting opinion in* 194 N.C. App. 787, 671 S.E.2d 347 (2009) (Jackson, J., concurring in part and dissenting in part).]

ii. Trial court erred in ordering the parties to submit to DNA or gene testing when defendant was judicially determined in a previous action to be the father of the minor child based on test results showing a 99.99 percent probability of paternity; prior determination was res judicata. [*State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993).]

iii. Putative father's legitimation of a child by a consent order entered pursuant to G.S. 49-12.1(c) (legitimation of child when mother is married to another at time of birth) judicially determined his paternity and barred him from contesting paternity and obtaining paternity testing in a support proceeding for the child; res judicata applicable. [*State ex rel. Meza v. Meza,* 179 N.C. App. 227, 633 S.E.2d 892 (2006) (**unpublished**).]

iv. Divorce order incorporating a separation agreement in which plaintiff and defendant admitted that three children were born of their marriage and which included provisions relating to custody and support judicially established the rights and obligations of the parties and determined all issues of paternity; denial of former husband's request for paternity testing was affirmed. [*Rice v. Rice*, 147 N.C. App. 505, 555 S.E.2d 924 (2001).]

v. New York paternity determination was entitled to full faith and credit in North Carolina; North Carolina district court had no authority to invite relitigation of the paternity issue by ordering blood testing when mother sought to register New York child support order for enforcement. [*New York ex rel. Andrews v. Paugh*, 135 N.C. App. 434, 521 S.E.2d 475 (1999). See also G.S. 110-132.1, providing for full faith and credit to a paternity determination by another state.]

vi. A default judgment declaring the putative father the natural and legal father of a child and ordering child support conclusively established his paternity so that res judicata barred the granting of a later motion for blood testing. [*Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 450 S.E.2d 554 (1994) (father's motions for relief from default judgment denied).] For a case in which a default judgment against defendant former husband for child support was set aside but holding that defendant was entitled to genetic testing because his paternity had not been litigated and because defendant had never formally acknowledged paternity in the manner prescribed by G.S. 110-132, see *Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000). For a discussion of provisions in the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq*., addressing entry of a default judgment against a servicemember who has not made an appearance, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

vii. Order of paternity, entered after mother and defendant filed affirmations of paternity pursuant to G.S.110-132 and defendant executed a voluntary support agreement pursuant to G.S. 110-133, judicially established that defendant fathered the child involved in later contempt proceeding; defendant could not, twelve years later, move for a blood test. [*Sampson Cty. ex rel. McNeill v. Stevens*, 101 N.C. App. 719, 400 S.E.2d 776 (1991) (citing *Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985)). *See also Holloway* (when court entered orders of paternity and support pursuant to mother's affirmation of paternity, father's acknowledgment of paternity, and voluntary support agreement, father could not later attack the paternity judgment by filing a motion for a blood grouping test in a proceeding related solely to support; G.S. 110-132(b) prohibits reconsideration of paternity).]

b. When the father has admitted paternity in a sworn statement.

i. Where father admitted in a verified complaint for absolute divorce and in an incorporated separation agreement that three children were born of the marriage, denial of father's subsequent motion for paternity testing was affirmed. [*Rice v. Rice*, 147 N.C. App. 505, 555 S.E.2d 924 (2001).]

ii. Father was barred from raising the issue of paternity by his own allegation in his divorce complaint that child was born of his marriage to defendant; trial court

erred in ordering blood grouping test. [*Heavner v. Heavner,* 73 N.C. App. 331, 326 S.E.2d 78 (additionally, father's guilty plea in criminal nonsupport action was evidentiary admission of paternity), *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985). *But see Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996) (parentage of child was not an issue actually litigated in and necessary to the prior action for divorce between child's mother and her husband, the presumed father, so putative father could not assert collateral estoppel to bar a subsequent action to establish his paternity of the child; identification in divorce judgment of mother's husband as father was based upon unrebutted presumption of paternity arising from child's birth during their marriage and could not be relied upon by a third party).]

c. When there is a pending G.S. 1A-1, Rule 60(b) motion to set aside an order of paternity.

   i. A party must obtain relief from an acknowledgment of paternity and a voluntary support agreement pursuant to a trial court's ruling on a G.S. 1A-1, Rule 60(b) motion before the trial court can grant a motion for paternity testing. [*State ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002); *State ex rel. McKinney v. Lotharp,* 161 N.C. App. 541, 589 S.E.2d 751 (2003) (**unpublished**) (citing *Bright*) (error for trial court to grant defendant's motion for genetic testing when defendant had not filed a Rule 60(b) motion for relief from the paternity order).]

   ii. Judgment of paternity must be set aside before complainant is entitled to an order for blood testing under G.S. 8-50.1(b1). [3 Lee's North Carolina Family Law § 16.18a (5th ed. 2002).]

   iii. For more on setting aside a paternity judgment pursuant to Rule 60(b), see Section II.P, below.

   iv. **NOTE:** S.L. 2011-328, §§ 1 and 2, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h) and 110-132(a1) and (a2), which provide procedures to set aside orders of paternity or affidavits of parentage and to order genetic testing under G.S. 8-50.1(b1), under certain circumstances. See Sections II.Q and IV.B.5, below.

d. When a putative father seeks to compel testing of mother's husband and husband does not deny paternity of the child born during his marriage to the mother of the child.

   i. The North Carolina Supreme Court has construed a former version of G.S. 8-50.1 as not conferring standing upon an alleged parent (the putative father) to compel a presumed father (mother's husband) to submit to a blood test to determine the parentage of a child born during the marriage of the husband and the mother. [*Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996), *rev'g per curiam for reasons stated in dissenting opinion in* 120 N.C. App. 1, 461 S.E.2d 369 (1995) (Walker, J., dissenting). *See Jeffries v. Moore,* 148 N.C. App. 364, 370, 559 S.E.2d 217, 220 (2002) (calling the holding in *Johnson* "very narrow" and noting that "*Johnson* merely placed a restriction upon an alleged parent's ability to compel blood testing of a presumed father as a means to challenge

the presumption of legitimacy pursuant to [G.S. 8-50.1]—as the statute read when the action originated").]

ii. **NOTE:** G.S. 8-50.1(b1), requiring testing of mother, child, and alleged father defendant (but not of mother's husband if he is not a defendant in a civil action), may be inconsistent with 42 U.S.C. § 666(a)(5)(B)(i), which requires states (unless otherwise barred by state law) to adopt laws or procedures requiring the genetic testing, upon the request of a party, of the child and *all* other parties in a contested paternity case (including a mother's husband when the husband is the child's presumed father), provided that the requesting party makes a sworn statement alleging or denying paternity and setting forth facts establishing a reasonable possibility that he is or is not the child's father.

4. Costs of testing.

   a. The court shall require the person who requests blood or genetic testing to pay the costs of the blood or genetic testing. [G.S. 8-50.1(b1).]

   b. Due process, however, requires that the state pay the cost of genetic paternity testing when an indigent putative father requests genetic testing in a civil action to establish paternity. [*See Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202 (1981) (application of a Connecticut General Statute to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment; paternity proceeding was initiated by the state).]

   c. Federal funding is available to pay the cost of genetic testing in a civil paternity action brought by a child support enforcement (IV-D) agency on behalf of a child, the child's mother, or the putative father. [45 C.F.R. § 304.20(b)(2)(i)(B) (provision for federal funding).] Invoices for genetic testing are admissible as evidence without foundation testimony of a third party and are prima facie evidence of the cost of testing. [G.S. 49-14(g).]

   d. The court may, in its discretion, tax the expense of genetic testing as costs in the action. [G.S. 8-50.1(b1).]

5. Admitting results of tests ordered by a court pursuant to G.S. 8-50.1.

   a. When a court orders testing pursuant to G.S. 8-50.1(b1), the results of the tests may be admitted into evidence under a less formal procedure. [*Columbus Cty. ex rel. Brooks v. Davis,* 163 N.C. App. 64, 592 S.E.2d 225 (2004).]

   b. The less formal procedure is set out in G.S. 8-50.1(b1), which provides that verified documentary evidence is sufficient to establish the chain of custody of the blood specimens that were tested.

   c. If no party files with the court and serves on the other party or parties at least ten days before hearing or trial a written objection to admission of the blood or genetic test results contesting the procedures or results of the test and stating the basis for the objection, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. [G.S. 8-50.1(b1).]

d. Test results are admissible upon documentary proof of chain of custody only if the testing was ordered by the court upon motion of a party and the other requirements of G.S. 8-50.1(b1) are met.

i. When mother's husband asked for paternity testing, paid for it upon being contacted by a child support enforcement agency, and was not a party to the action against the putative father commenced after husband's testing was completed, husband's test report did not qualify for admission under the relaxed evidentiary requirements of G.S. 8-50.1(b1); trial court properly refused to allow it into evidence. [*Catawba Cty. ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997).]

ii. When chain of custody reports were not verified as required by G.S. 8-50.1(b1), the reports were not admissible under the statute. [*Rockingham Cty. Dep't of Soc. Servs. ex rel. Shaffer v. Shaffer*, 126 N.C. App. 197, 484 S.E.2d 415 (1997) (court appeared to assume that the tests were conducted pursuant to G.S. 8-50.1(b1), even though opinion does not indicate that tests were court-ordered pursuant to a motion by a party).]

6. Effect of the results of tests conducted pursuant to G.S. 8-50.1.

a. When genetic paternity testing has been ordered pursuant to G.S. 8-50.1(b1) and the test results are admitted as evidence, the test results create a presumption (rebuttable by clear, cogent, and convincing evidence) that the putative father is:

i. The child's father if all of the genetic test results indicate that the putative father is not excluded as the child's father and that the probability of his parentage of the child is at least 97 percent. [G.S. 8-50.1(b1)(4).]

(a) For a case finding that the presumption was rebutted, see *Nash County Department of Social Services ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851 (where court held that a putative father's testimony that he did not know the mother, did not have sexual relations with her, and did not recall ever meeting her was sufficient to rebut the presumption of paternity created by the 99.96 percent probability of paternity test result), *review denied*, 493 S.E.2d 655 (N.C. 1997).]

ii. Not the child's father if all of the genetic test results indicate that the probability of his parentage of the child is less than 85 percent. [G.S. 8-50.1(b1)(1).]

b. If the test results are not introduced and admitted into evidence, the court may not consider those results, even if the results show a high likelihood that respondent is not the child's father. [*In re L.D.B.*, 168 N.C. App. 206, 617 S.E.2d 288 (2005) (in a termination of parental rights proceeding, the trial court erred when it found that respondent was not the father based solely on the result of a court-ordered paternity test, when copies of the result were provided to the judge before the hearing and placed in the court file but not introduced into evidence; results showed a 0 percent probability that respondent was the father).]

c. The results of genetic tests ordered pursuant to G.S. 8-50.1(b1) may be admitted as evidence on the issue of paternity but do not create any presumption with respect to paternity if:

i. The results of two or more genetic tests are inconsistent or experts disagree in their findings or conclusions based on genetic testing or

ii. The test results do not exclude the putative father and the probability of his parentage is between 85 and 97 percent. [G.S. 8-50.1(b1)(2), (3).]

7. Admitting results of tests not ordered by the court.

a. If the test results do not meet the requirements for admission under G.S. 8-50.1(b1), the rule of *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992), applies and the party seeking to admit the results must present independent evidence of the chain of custody. [*Columbus Cty. ex rel. Brooks v. Davis*, 163 N.C. App. 64, 592 S.E.2d 225 (2004) (citing *Catawba Cty. ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997)); *Khatod*; *Lombroia*.]

b. The independent evidence must accurately identify the substance analyzed by proving a chain of custody that establishes "that the substance came from the source claimed and that its condition was unchanged." [*Lombroia v. Peek*, 107 N.C. App. 745, 749, 421 S.E.2d 784, 786 (1992).]

c. The chain of custody requirement in *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992), can be met:

i. Through competent evidence regarding the proper administration of the test and the "chain of possession, transportation and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn" from the alleged parent. [*Lombroia v. Peek*, 107 N.C. App. 745, 749, 421 S.E.2d 784, 787 (1992) (trial court erred in admitting blood test in paternity action where only evidence as to proper chain of custody was expert witness who "had no personal knowledge" concerning the test and no "personal ability to trace a chain of custody" for the blood sample).]

ii. By sworn affidavits or witness testimony from the people involved in the various stages of specimen custody and collection and handling, that is, for each link in the chain of custody for each sample. [*Columbus Cty. ex rel. Brooks v. Davis,* 163 N.C. App. 64, 592 S.E.2d 225 (2004) (evidence was not sufficient to establish chain of custody for samples from putative father and child when unverified client authorization forms were the only evidence that samples were from those parties and there was no testimony from the person who collected those samples; evidence was not sufficient to establish chain of custody for sample from mother when there was no testimony or affidavit from the person who performed the DNA tests at the lab).]

8. Expert testimony with respect to test results.

a. In a civil proceeding, G.S. 8-50.1(b1) allows verified test results to be admitted as evidence without foundation testimony, unless the other party files an objection not less than ten days prior to trial.

b. In a criminal proceeding, G.S. 8-50.1(a) provides that test results must be offered by a duly qualified and licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. While *State v. Green*, 55 N.C. App. 255, 284 S.E.2d 688 (1981), held that the offering expert did not need to be the

person who personally performed the test, the result in that case has been overruled by the holding in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S. Ct. 2527 (2009).

i. For more on *Melendez-Diaz*, see Jessica Smith, *Understanding the New Confrontation Clause Analysis:* Crawford, Davis, *and* Melendez-Diaz, Admin. of Just. Bull. No. 2010/02 (UNC School of Government, Apr. 2010), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aojb1002.pdf, and Jessica Smith, *Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford* (UNC School of Government, July 2, 2009), www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/melendez_diaz.pdf.

ii. For the most recent analysis of the *Crawford v. Washington* decision, see Jessica Smith, N.C. Superior Court Judges' Benchbook, "*Crawford* & the Confrontation Clause" (UNC School of Government, July 2018), http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause.

c. An expert may not offer opinion testimony that the putative father is, in fact, the child's biological father. [*State v. Jackson,* 320 N.C. 452, 358 S.E.2d 679 (1987) (error to admit opinion of a genetics expert that defendant probably is the father of the victim's child because it did not aid the jury); *Brooks v. Hayes,* 113 N.C. App. 168, 438 S.E.2d 420 (1993) (jury is capable of deciding if a defendant is a child's father once the expert explains the scientific data and provides the resulting probability figures), *review denied,* 335 N.C. 766, 442 S.E.2d 508, 509 (1994); *Lombroia v. Peek*, 107 N.C. App. 745, 750, 421 S.E.2d 784, 787 (1992) (error for doctor to testify that, in his opinion, "it's extremely likely" that defendant fathered the child; a jury "is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity"); *State ex rel. Williams v. Coppedge*, 105 N.C. App. 470, 414 S.E.2d 81 (proffer of geneticist's opinion as to the probability of paternity would have gone beyond testimony as to scientific information and would have trampled upon the jury's domain), *rev'd per curiam on other grounds*, 332 N.C. 654, 422 S.E.2d 691 (1992).]

9. Use of G.S. 1A-1, Rule 35 to order testing of mother's husband or other party.

a. A district court may have authority to order genetic paternity testing of the mother's husband pursuant to G.S. 1A-1, Rule 35(a), which authorizes a court to order a party to be examined when the party's physical condition (including the blood group) is in controversy. [*Jeffries v. Moore,* 148 N.C. App. 364, 371 n.3, 559 S.E.2d 217, 221 n.3 (2002) (Greene, J., concurring) (stating in dicta that "there appears to be authority under Rule 35" for such testing as long as the mother's husband is a party to the action).]

b. "The statutory presumptions of paternity or non-paternity are limited to testing conducted pursuant to a court order entered under G.S. 8-50(b1). There are no presumptions for genetic marker tests results when the testing was conducted pursuant to a court order under Rule 35 of the North Carolina Rules of Civil Procedure, a child support services agency subpoena, or the parties' own initiative." [Fathers and Paternity, 87.]

10. Testing in a IV-D case.
    a. A child support enforcement (IV-D) agency may order testing by administrative subpoena.
        i. In a civil action to establish paternity brought by a IV-D agency on behalf of a child, the child's mother, or the putative father, the IV-D agency may, without obtaining a court order, issue a subpoena requiring the child, the child's mother, the child's putative father, and the mother's husband (if he is the child's presumed father) to appear and submit to blood or genetic testing to establish paternity. [G.S. 110-132.2(a).]
        ii. The subpoena must be served pursuant to G.S. 1A-1, Rule 4. [G.S. 110-132.2(a).]
        iii. A person who is subpoenaed may contest the subpoena within fifteen days of receipt of the subpoena by requesting a hearing before the district court in the county in which the IV-D agency is located. Notice of the hearing must be served on all parties pursuant to G.S. 1A-1, Rule 4. [G.S. 110-132.2(b).]
        iv. The court must hold a hearing and make a determination within thirty days of the request for hearing as to whether the petitioner must comply with the subpoena to undergo testing. [G.S. 110-132.2(b).] A person who willfully refuses to comply with the subpoena may be held in civil or criminal contempt. [G.S. 110-132.2(a).]
        v. A party may contest the results of a blood or genetic test conducted pursuant to G.S. 110-132.2. If a party contests the test results and pays the cost of additional testing, the IV-D agency must obtain additional testing. [G.S. 110-132.2(a).]
        vi. The results of testing conducted pursuant to G.S. 110-132.2 are admissible as evidence at trial of a civil action to establish paternity by stipulation of the parties or by evidence establishing a chain of custody of the genetic samples and authentication of the test results and lab records. [*See Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992) (setting out procedure for admission of test results other than those obtained pursuant to G.S. 8-50.1(b1).] The rules regarding the admissibility of genetic test results under G.S. 8-50.1(b1) (see Section II.I, above) do not apply with respect to genetic paternity tests conducted pursuant to an administrative subpoena issued under G.S. 110-132.2. [*See Catawba Cty. ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997) (for less formal admission procedure to apply, the samples must be obtained pursuant to a court order upon motion of a party).]
    b. When a determination of paternity is pending in a IV-D case, the court must enter a temporary child support order against the putative father upon motion and clear, cogent, and convincing evidence that the putative father is the child's father. The results of a genetic paternity test shall constitute clear, cogent, and convincing evidence of paternity if they indicate at least a 97 percent probability of parentage. [G.S. 49-14(f).]

J. Burden of Proof and Evidence

1. The plaintiff has the burden of proving paternity by clear, cogent, and convincing evidence. [G.S. 49-14(b).] Before Oct. 1, 1993, G.S. 49-14 required the plaintiff to prove

paternity beyond a reasonable doubt. [*See* S.L. 1993-333, § 3.] **NOTE:** In the applicable jury instruction, N.C.P.I.—Civil 815.75—Child Born Out of Wedlock—Issue of Paternity, the burden of proof is "clear, strong and convincing" evidence.

2. In a case under G.S. 49-14, where the trial court sits as both finder of fact and arbiter of law, it is within the court's discretion to consider some, none, or all of the evidence and to determine the appropriate weight to place on the testimony. [*Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000) (citing *Nash Cty. Dep't of Soc. Servs. ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851, *review denied,* 493 S.E.2d 655 (N.C. 1997)).]
3. Evidence of mother's reputation.
    a. Evidence that the child's mother engaged in sexual intercourse with one or more men other than the putative father during the period of probable conception may be admitted if the court determines that the evidence is relevant, that its probative value outweighs the risk of unfair prejudice, and that the evidence, if accepted as true, would have a bearing on the issue of paternity. [*See State ex rel. Williams v. Coppedge*, 332 N.C. 654, 422 S.E.2d 691(evidence of a specific and identifiable act at a certain time, if true, would bear on the issue of paternity, but evidence here was "no more than a broadside attack on the [mother's] character"), *rev'g per curiam for reasons stated in dissenting opinion in* 105 N.C. App. 470, 479, 414 S.E.2d 81, 86 (1992) (Walker, J., dissenting); N.C. R. Evid. 403.]
    b. Testimony regarding the mother's reputation for promiscuity, however, is generally not admissible. [*See State ex rel. Williams v. Coppedge*, 332 N.C. 654, 422 S.E.2d 691 (evidence of mother's reputation should not have been admitted, as it had questionable probative value because it did not tend to prove or disprove the issue of paternity, and was highly prejudicial), *rev'g per curiam for reasons stated in dissenting opinion in* 105 N.C. App. 470, 414 S.E.2d 81 (1992) (Walker, J., dissenting).]
4. Evidence to rebut presumption of legitimacy.
    a. See discussion at Section I.B.1.b, above, of types of evidence that may be used to rebut the presumption that mother's husband is the father of a child born during their marriage.
    b. In cases involving a putative father's paternity of a child conceived by or born to a married woman during the course of her marriage, the plaintiff must introduce evidence sufficient to rebut the presumption that the mother's husband is the child's father.
        i. The results of a genetic paternity test that excludes the paternity of mother's husband, if properly admitted as evidence, are sufficient to rebut this presumption. See Section II.I, above.
        ii. The husband of a child's mother is competent, but may not be compelled, to testify with respect to sexual relations with his wife during the period of probable conception. [G.S. 8-56 (spouses not compellable to disclose any confidential communication made to each other during marriage). *See Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972) (citing *Biggs v. Biggs,* 253 N.C. 10, 116 S.E.2d 178 (1960)) (act of sexual intercourse is a confidential communication under G.S. 8-56).] It is unclear whether a husband's uncontradicted testimony or

affidavit denying his paternity of a child born during his marriage to the child's mother is sufficient, standing alone, to rebut the legal presumption that he is the child's father.

c. The presumed father and mother of a child born or conceived during the mother's marriage are competent, regardless of any privilege that might otherwise apply, to give evidence as to any relevant matter regarding the child's paternity, including nonaccess by the mother's husband. [G.S. 8-57.2; *Wake Cty. ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981) (holding that a husband and wife may testify concerning nonaccess to each other; testimony of a spouse about nonaccess is clearly the best evidence of that fact); *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783 (recognizing G.S. 8-57.2, but evidence of nonaccess provided by third parties), *appeal dismissed, review denied,* 304 N.C. 587, 289 S.E.2d 564 (1981).]

d. Courts have held that a judgment finding that the mother's husband is *not* the father of a child born during their marriage is not admissible against a putative father in a subsequent civil action to establish his paternity of the child. [*See Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992) (putative father was not a party to the Florida action which found that mother's husband was not the natural father of the child; putative father could not be bound by the findings of that judgment); *Catawba Cty. ex rel. Kenworthy v. Khatod,* 125 N.C. App. 131, 479 S.E.2d 270 (1997) (results of test that excluded mother's husband as father did not qualify for admission under less formal procedure in G.S. 8-50.1(b1) in an action against the putative father; test was not conducted pursuant to G.S. 8-50.1(b1) and mother's husband was not an "alleged father-defendant" under G.S. 8-50.1(b1)).]

5. An affidavit of parentage executed by a child's mother and putative father pursuant to G.S. 110-132, an affidavit acknowledging paternity pursuant to 130A-101(f), or a birth certificate that lists the putative father as the father of a child born out of wedlock, is admissible as evidence of the putative father's paternity. [G.S. 110-132(a) (affidavit constitutes an admission of paternity); 130A-101(f) (certified copy is admissible in any action to establish paternity).] In North Carolina, there is no presumption that a father who is named on a birth certificate has had his paternity *judicially* established. [Fathers and Paternity, 42 n.7 (citing G.S. 130A-101(e), (f); 49-12; 49-13; 130A-118(b)(2), (3); Title 10A of the North Carolina Administration Code, Chapter 41H, § .0910; and the cases immediately following this parenthetical). *But see In re J.K.C.,* 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a termination of parental rights (TPR) proceeding brought on the ground set forth in the version of G.S. 7B-1111(a)(5) then in effect (that unwed father failed to acknowledge or establish paternity before the TPR action was initiated), there is a rebuttable presumption that respondent father took the required legal steps necessary to establish paternity if he is named on the child's amended birth certificate). *See also Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (mother could not rely on holding in *J.K.C.* to support her argument that husband's name on child's birth certificate judicially established his paternity of the child).]

6. A birth certificate that does not list the name of the father of a child born out of wedlock was found not relevant with respect to a putative father's paternity of the child in *State v. McInnis*, 102 N.C. App. 338, 401 S.E.2d 774 (trial court's exclusion of the birth certificate under N.C. R. Evid. 403 upheld as absence of a named father on the birth certificate

had little probative value and was misleading because under G.S. 130A-101(f), the name of the father of a child born out of wedlock may not be entered on the child's birth certificate without the father's sworn consent), *review denied,* 329 N.C. 274, 407 S.E.2d 848 (1991).

7. Genetic test results, if otherwise admissible, are competent evidence to exclude or establish paternity. See Section II.I, above.

K. Defense of Collateral Estoppel

1. Generally.
   a. While res judicata prohibits the relitigation of the same cause of action between the same parties, collateral estoppel bars the relitigation of specific issues actually determined in a prior action between the same parties or their privies. [*Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996); 3 Lee's North Carolina Family Law § 16.18b (5th ed. 2002).] For a discussion of the continued viability of the requirement of mutuality of parties when applying collateral estoppel, see Sections V.E.1.b.i.(c) and (d), below.
   b. The issues resolved in the prior action may be either factual issues or legal issues. [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006).]
   c. The doctrine of collateral estoppel applies to criminal, as well as civil proceedings. [*State v. Dial,* 122 N.C. App. 298, 470 S.E.2d 84, *review denied, cert. denied,* 343 N.C. 754, 473 S.E.2d 620 (1996).]
   d. For collateral estoppel to apply to bar relitigation in a subsequent nonidentical action involving the same parties or their privies:
      i. The issues to be concluded must be the same as those involved in the prior action;
      ii. In the prior action, the issues must have been raised and actually litigated;
      iii. The issues must have been material and relevant to the disposition of the prior action; and
      iv. The determination made of those issues in the prior action must have been necessary and essential to the resulting judgment. [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006) (collateral estoppel prevented a trial court from relitigating in a custody action the issue of domestic violence that had been litigated and resolved in an earlier G.S. Chapter 50B proceeding); *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986) (under the traditional definition of collateral estoppel, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies").] For a discussion of the continued viability of the requirement of mutuality of parties when applying collateral estoppel, see Sections V.E.1.b.i.(c) and (d), below.
      v. For a more in-depth treatment of collateral estoppel, see Fathers and Paternity, 59–71.

2. Effect in a subsequent civil action of a prior judgment of paternity or nonpaternity.
    a. A finding in a divorce decree that a child was born or conceived during the parties' marriage may be a binding judicial determination with respect to the husband's paternity for purposes of collateral estoppel if paternity of the child was actually litigated.
        i. Putative father could not assert collateral estoppel to bar paternity action against him when divorce judgment between mother of child and her husband identifying husband as the child's father was based purely on the presumption of legitimacy of a child born in wedlock and child's paternity was not an issue actually litigated and necessary to the divorce action. [*Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996) (no evidence tending to prove parentage was presented during the uncontested divorce proceeding between mother and her former husband, other than the presumption of legitimacy applicable to a child born during a marriage).]
        ii. For more on effect of a paternity finding in a divorce decree, see Section VI.E.1, below.
    b. Privity requirement.
        i. It is not clear whether the requirement that the parties in prior and pending actions be the same or in privity will be applied in cases considering the application of collateral estoppel. For a discussion of *In re K.A.,* 233 N.C. App. 119, 756 S.E.2d 837 (2014), which considers this issue, see Section V.E.1.b.i.(d), below. *See also* Fathers and Paternity, 64–65 (discussing the application of traditional collateral estoppel (requiring mutuality of parties) and nonmutual collateral estoppel (mutuality of parties is not always required)).
        ii. Appellate courts in North Carolina considering the application of traditional collateral estoppel generally have been reluctant to find privity between different plaintiffs in successive civil actions to establish a child's paternity. [*See Devane ex rel. Robinson v. Chancellor*, 120 N.C. App. 636, 463 S.E.2d 293 (1995) (action by children through a guardian ad litem and by their mother to establish paternity and support not collaterally estopped because children and their mother were not in privity with State of North Carolina or the child support enforcement agency, both of which had brought previous actions against defendant), *review denied,* 342 N.C. 654, 467 S.E.2d 710 (1996); *Settle ex rel. Sullivan v. Beasley,* 309 N.C. 616, 308 S.E.2d 288 (1983) (action brought by child through his guardian to establish paternity and obtain support not barred by collateral estoppel because the child was not in privity with the county child support enforcement agency that brought the prior action).] For a discussion of collateral estoppel as applied to the child in an abuse, neglect, and dependency proceeding, see Fathers and Paternity, 66–70.
        iii. For reluctance to find privity in the res judicata context, see Section II.L.2.c, below.
3. For defense of collateral estoppel in a criminal nonsupport proceeding, see Section V.E, below.

L. Defense of Res Judicata

1. Generally.
    a. Under res judicata as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. All matters, either of fact or law, that were or should have been adjudicated in the prior action are deemed concluded. [*Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986).]
    b. Absent prejudice to plaintiff, the affirmative defense of res judicata may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer. [*Rutherford Cty. ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990).]
    c. The doctrine of res judicata applies to criminal, as well as civil proceedings. [*State v. Dial,* 122 N.C. App. 298, 470 S.E.2d 84, *review denied, cert. denied,* 343 N.C. 754, 473 S.E.2d 620 (1996).]
2. Effect in a subsequent civil action of a prior judgment of paternity or nonpaternity.
    a. A finding in a divorce decree that a child was born or conceived during the parties' marriage may be a binding judicial determination between the parties with respect to the husband's paternity for res judicata purposes.
        i. Divorce order, incorporating a separation agreement in which the parties admitted that three children were born of their marriage and which included provisions related to child custody and support, judicially established the rights and obligations of the parties and determined all issues of paternity. [*Rice v. Rice*, 147 N.C. App. 505, 555 S.E.2d 924 (2001) (husband's later motion for paternity testing was properly denied; it would be illogical for the divorce judgment to operate as res judicata for husband's child support and visitation rights and not for issues of paternity).]
        ii. Where husband admitted in his answer to wife's complaint that one child was born of their marriage and alleged in his complaint for divorce that one child was born of the marriage, and where judgment of divorce found that one child was born of the parties' marriage and awarded husband visitation and ordered him to pay child support, husband was barred by res judicata from raising paternity issue five years later. [*Withrow v. Webb,* 53 N.C. App. 67, 280 S.E.2d 22 (1981) (citing *Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978)). *See also Holland* (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on prior adjudication of paternity in Nevada divorce and support proceeding; Nevada court had in personam jurisdiction over defendant).]
    b. Putative father not a party to action between mother and her husband.
        i. A judgment finding that the mother's husband is not the father of a child born during their marriage was not admissible in a subsequent legal proceeding against a putative father to establish his paternity of the child. [*Lombroia v. Peek,* 107 N.C. App. 745, 421 S.E.2d 784 (1992) (putative father was not a party to the Florida action which found that mother's husband was not the natural father of the child; putative father could not be bound by the findings of that judgment).]

c. Lack of privity.

i. As noted in Section II.K.2.b, above, appellate courts applying traditional collateral estoppel in North Carolina generally have been reluctant to find privity between different plaintiffs in successive civil actions to establish a child's paternity.

ii. This is also true in the context of res judicata. [*See State ex rel. Tucker v. Frinzi,* 344 N.C. 411, 474 S.E.2d 127 (1996) (action by the State to establish paternity and recover public assistance paid on behalf of a state-administered child support enforcement program not barred by res judicata because the State was not in privity with the county-administered child support enforcement program that brought the prior action).]

3. For defense of res judicata in a criminal nonsupport proceeding, see Section V.E, below.

M. Other Defenses

1. Statute of limitations.

a. A defendant may plead the statute of limitations as an affirmative defense. [*See* G.S. 49-14 (generally requiring that a civil action to establish paternity be brought within one year of the putative father's death and before the child's 18th birthday).]

b. See Section II.F, above.

2. Impotency or sterility.

a. A defendant putative father's impotency or sterility during the period of probable conception, if proved, is an absolute defense in a civil paternity action against him. [*Cole v. Cole*, 74 N.C. App. 247, 328 S.E.2d 446 (when scientific evidence demonstrated that husband was sterile when child was conceived, court found that husband did not father child despite a blood test finding a probability of paternity of 95.98 percent), *aff'd per curiam,* 314 N.C. 660, 335 S.E.2d 897 (1985).]

b. See Section I.B.1.b, above.

3. Genetic paternity tests that exclude paternity.

a. Genetic test results, if otherwise admissible, are competent evidence to exclude or establish paternity.

b. Results of genetic tests ordered pursuant to G.S. 8-50.1(b1) create certain presumptions and have the effect as set out in G.S. 8-50.1(b1)(1)–(4). See Section II.I.6, above.

4. Presumption of legitimacy of child born during mother's marriage.

a. A defendant putative father may raise as a defense an unrebutted presumption that the mother's husband is the child's father if the child was conceived or born while the mother was married.

b. See Section I.B.1, above.

5. Deception or fraud in the fathering of a child as a defense.

a. A claim that the child's mother tricked the putative father into fathering the child (for example, by intentionally deceiving him with respect to her use of birth control) was not considered valid in a civil paternity action against the putative father. [*Smith*

v. Price, 74 N.C. App. 413, 422, 328 S.E.2d 811, 817 (1985) (putative father asserted fraud as a counterclaim and sought damages in the amount of support he would be required to pay if he was found to be the father of mother's child; court of appeals directed a verdict against father on the counterclaim because he, in effect, sought to use mother's alleged false representation as a basis for avoiding his support obligation; court of appeals found father's argument was "simply not appropriate in a civil action to establish paternity, either as a defense or a counterclaim;" state supreme court stated that it did "not decide here whether there can ever be a proper situation for allowing a fraud claim in a paternity suit;" its order for a new trial on paternity issue rendered fraud issue moot), *aff'd in part, rev'd in part on other grounds,* 315 N.C. 523, 537, 340 S.E.2d 408, 416 (1986).]

b. For fraud as a ground for relief from a judgment of paternity when the person adjudicated the father is not actually the father, see Section II.Q, below. For fraud as a ground for rescinding an affidavit of parentage, see Section IV.B.5, below.

N. Right to Jury Trial

1. Although G.S. 49-14 is silent with respect to a party's right to a jury trial in a civil action to establish paternity of a child born out wedlock, it appears that a defendant putative father has a constitutional right to a jury trial in that proceeding.

   a. North Carolina courts have implicitly assumed that a defendant putative father has the right to a jury trial in a civil action to establish his paternity of a child born out of wedlock. [*See Searcy v. Justice,* 20 N.C. App. 559, 202 S.E.2d 314 (stating that in an action under G.S. 49-14, jury decides only the factual issue of paternity), *review denied,* 285 N.C. 235, 204 S.E.2d 25 (1974); *Brooks v. Hayes*, 113 N.C. App. 168, 438 S.E.2d 420 (1993) (noting sufficient evidence to send the case to the jury without considering right to jury trial), *review denied,* 335 N.C. 766, 442 S.E.2d 508, 509 (1994).]

   b. The North Carolina Constitution preserves the right to jury trial in civil actions that involve "controversies at law respecting property" in which a right to jury trial was recognized at common law or by statute at the time North Carolina's 1868 Constitution was adopted. [N.C. Const. art. I, § 25.]

   c. Although the common law did not recognize a civil action to establish the paternity of a child born out of wedlock and G.S. 49-14 was enacted almost one hundred years after the Constitution of 1868 was adopted, an 1814 statute, which remained in effect when the 1868 Constitution was adopted, established a civil action to determine the paternity of a child born out of wedlock and gave the putative father the right to request a jury trial on the issue of paternity. [N.C. Rev. Stat. ch. XII, § 4 (1837); N.C. Rev. Code ch. 5, § 32 (1883). *See State v. Robinson,* 245 N.C. 10, 95 S.E.2d 126 (1956) (discussing the law in North Carolina between 1741 and 1933.] The statute was repealed in 1933 when G.S. 49-2 was enacted. [Pub. L. of 1933, ch. 228.]

   d. Assuming that civil paternity actions under G.S. 49-14 are "controversies at law respecting property" and are the legal equivalent of, or successor to, civil paternity actions established by the 1814 statute, a defendant putative father's right to a jury trial on the issue of paternity is preserved by Article I, Section 25 of the North Carolina's Constitution.

2. For a jury instruction on the issue of paternity in a civil action, see N.C.P.I.—Civil 815.75—Child Born Out of Wedlock—Issue of Paternity.

3. It was improper to give an *Allen* charge to a jury in a civil action to establish paternity pursuant to G.S. 49-14 in *Lenoir Cty. ex rel. Dudley v. Dawson,* 60 N.C. App. 122, 298 S.E.2d 418 (1982) (new trial ordered). An *Allen* charge is a charge to a deadlocked jury to engage in further efforts to reach a verdict, with each juror listening with deference to the arguments of the majority. [*Allen v. United States,* 164 U.S. 492, 17 S. Ct. 154 (1896).] It has been criticized for potentially coercing a verdict. [*See Dawson.*]

O. Judgment

1. Generally.

   a. If the defendant in a civil action to establish paternity fails to appear, the judge is required to enter a default judgment establishing the putative father's paternity of the child. [G.S. 1A-1, Rule 55(b)(2).] For a discussion of provisions in the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq*., addressing entry of a default judgment against a servicemember who has not made an appearance, see *Child Custody,* Bench Book, Vol. 1, Chapter 4.

   b. When a judgment is entered establishing a decedent's paternity of a child born out of wedlock, the judgment must be entered nunc pro tunc to the day preceding the father's death. [G.S. 49-14(c).] This enables the child to claim Social Security survivor benefits as the decedent's child.

   c. After a judgment establishing the paternity of a child born out wedlock is entered pursuant to G.S. 49-14, the clerk of superior court must notify the State Registrar of Vital Statistics of the judgment. [G.S. 130A-119.] Upon receipt of this notice (or receipt of satisfactory proof of the judgment submitted by an applicant along with payment of the required fee), the registrar must make a new birth certificate listing the putative father as the child's father. [G.S. 130A-118(b)(2), (3); 130A-119.] The child's surname, however, may not be changed to that of the child's father based solely on a paternity judgment entered pursuant to G.S. 49-14 *et seq*. [*See* G.S. 130A-118(c).]

2. Effect of a judgment of paternity pursuant to G.S. 49-14.

   a. A judgment pursuant to G.S. 49-14 establishing the paternity of a child born out of wedlock does not have the effect of legitimating the child. [G.S. 49-14(a).]

      i. For purposes of intestate succession, a judgment establishing the paternity of a child born out of wedlock allows the child to inherit property by, through, and from the child's father and allows the child's father and his lineal and collateral kin to inherit property by, through, and from the child. [G.S. 29-19(b)(1), (c).] [See also G.S. 29-19(b)(3), *added by* S.L. 2013-198, § 9, effective June 26, 2013, and applicable to estates of persons dying on or after that date (for purposes of intestate succession, a child born out of wedlock shall be entitled to inherit property by, through, and from a person who died prior to or within one year after the birth of the child and who can be established to have been the father of the child by DNA testing).]

ii. Other rights are not available to a child whose paternity has been established by judgment entered pursuant to G.S. 49-14.

(a) A year's allowance for a dependent child is not available to a child born out of wedlock unless the deceased father recognized the paternity of the child by deed, will, or other paper-writing, or unless the deceased father died prior to or within one year after the birth of the child and is established to have been the father of the child by DNA testing. [G.S. 30-17, *amended by* S.L. 2013-198, § 13, effective June 26, 2013, and applicable to estates of persons dying on or after that date.]

(b) Workers' compensation benefits are available to an acknowledged child born out of wedlock dependent on the deceased. [G.S. 97-2(12), *amended by* S.L. 2013-198, § 25, effective June 26, 2013. *See Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, *appeal dismissed, review denied,* 304 N.C. 587, 289 S.E.2d 564 (1981).]

b. When a judgment establishing a putative father's paternity of a child born out of wedlock is entered pursuant to G.S. 49-14, the rights, duties, and obligations of the child's mother and father with respect to the child's custody and support are the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of the mother and father. [G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013.] Thus, a claim for custody, visitation, or support of a child born out of wedlock pursuant to G.S. 50-13.1 *et seq*. may be joined with a civil action to establish the child's paternity. **NOTE:** Because jurisdiction in child custody cases is determined by G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act, and that Act does not apply to paternity determinations, a court may have subject matter jurisdiction to determine a child's paternity but not have subject matter jurisdiction to determine the child's custody. See *Child Custody*, Bench Book, Vol. 1, Chapter 4, for discussion of subject matter jurisdiction in custody matters.

c. When a putative father's paternity of a child born out of wedlock is established pursuant to G.S. 49-14, the putative father becomes legally responsible for the payment of medical expenses incident to the mother's pregnancy and the child's birth. [G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013.] G.S. 49-15 limits recovery of prebirth expenses to medical expenses and does not provide a basis for an award of other types of expenses incurred prior to birth. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (rejecting mother's claims for nursery expenses and the cost of maternity clothes prior to birth).]

3. Effect of a judgment of paternity pursuant to G.S. 49-14 in a subsequent action.

a. A judgment establishing a putative father's paternity in a civil action may be asserted as res judicata or collateral estoppel against the putative father, a party, or persons in privity with a party in a subsequent civil action in which paternity is at issue and the standard of proof with respect to paternity is not greater than clear, cogent, and convincing evidence. [See Section II.K and II.L, above.]

b. A judgment establishing a putative father's paternity in a civil action is not res judicata or collateral estoppel on the issue of paternity in a subsequent criminal action against the putative father for nonsupport of his child. [See Section V.E, below.]

P. Relief from a Judgment of Paternity Pursuant to G.S. 1A-1, Rule 60(b)

1. Procedure.

   a. A motion pursuant to G.S. 1A-1, Rule 60(b) is an appropriate method to challenge an acknowledgment of paternity or an order of paternity. [*State ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002) (citing *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983)).] The court in *Bright* considered an acknowledgment of paternity and voluntary support executed in 1995. Before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court.

   b. When a party has filed a motion to set aside a paternity order pursuant to G.S. 1A-1, Rule 60(b) and to compel genetic testing pursuant to G.S. 8-50.1(b1), a court must first grant relief from the paternity judgment pursuant to Rule 60 before it may grant the party's request for genetic paternity testing. [*State ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002) (citing *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983)); *State ex rel. McKinney v. Lotharp,* 161 N.C. App. 541, 589 S.E.2d 751 (2003) (**unpublished**) (citing *Bright*) (error for trial court to grant defendant's motion for genetic testing when defendant had not filed a Rule 60(b) motion for relief from the paternity order).]

   c. *See Guilford County ex rel. Hill v. Holbrook,* 190 N.C. App. 188, 660 S.E.2d 175 (2008), *review denied,* 363 N.C. 652, 684 S.E.2d 889 (2009), for an example of appropriate procedure when a motion for blood tests is filed together with a G.S. 1A-1, Rule 60(b) request to set aside a paternity and support order. In that case, the trial judge originally granted defendant's motion for paternity testing and held open defendant's request to set aside the paternity and support order pending the results of the blood test. Plaintiff appealed, and the court of appeals granted certiorari and reversed the order for blood testing on the ground that paternity is not at issue as long as a paternity judgment stands. Thus, defendant was barred from contesting paternity by the doctrine of res judicata. On remand, the trial judge used other evidence tending to show that defendant was not the father of the child as grounds to set aside the paternity and support order. After granting the Rule 60(b) motion, the trial judge then ordered the paternity test.

2. Use of G.S. 1A-1, Rule 60(b)(1), (2), or (3) to seek relief from a judgment of paternity. Motions for relief pursuant to Rule 60(b)(1), (2), or (3) must be made not more than one year after the judgment, order or proceeding was entered or taken. [G.S. 1A-1, Rule 60(b).]

   a. While the trial court enjoys discretion in granting or denying relief under Rule 60(b), it may not avoid the one-year limitation period set out immediately above by treating a claim that falls squarely within Rule 60(b)(1)–(3) as governed instead by the catch-all provisions of Rule 60(b)(6). [*State ex rel. Davis v. Adams,* 153 N.C. App. 512, 571

S.E.2d 238 (2002) (facts supported motion under either Rule 60(b)(1) (mistake of fact) or 60(b)(3) (fraud) when, after executing acknowledgment and order of paternity, and related support agreement and order, defendant began to hear rumors that he was not the child's father; Rule 60(b) motion filed three and five years after entry of those orders was untimely); *Guilford Cty. ex rel. Wright v. Mason,* 169 N.C. App. 842 (2005) (**unpublished**) (when the basis for setting aside defendant's prior admission of paternity in a civil action was plaintiff mother's misrepresentation that he was the child's father and her claim that she had not had sex with anyone else during the relevant period, defendant's claim was either a mistake of fact under Rule 60(b)(1) or of fraud, misrepresentation, or misconduct by the opposing party under Rule 60(b)(3); error for trial court to grant defendant's motion based on Rule 60(b)(6)).]

3. Use of G.S. 1A-1, Rule 60(b)(6) to seek relief from a judgment of paternity. Motions for relief pursuant to Rule 60(b)(6) must be made within a reasonable time. [G.S. 1A-1, Rule 60(b).]
   a. No abuse of discretion when trial court denied defendant's motion under Rule 60(b)(6) to set aside a judgment of paternity and to allow DNA testing based solely on defendant's allegation that the child had begun to resemble someone other than defendant and no longer resembled defendant. [*Robeson Cty. Dep't of Soc. Servs. ex rel. Black v. McGeachy,* 171 N.C. App. 365, 615 S.E.2d 435 (2005) (**unpublished**).]
4. For a discussion of cases considering a motion for relief pursuant to G.S. 1A-1, Rule 60(b) from an affidavit of parentage, see Section IV.B.4, below.

Q. Setting Aside an Order of Paternity Pursuant to G.S. 49-14(h)

1. Notwithstanding the time limitations in G.S. 1A-1, Rule 60 or any other provision of law, G.S. 49-14(h) sets out a procedure to set aside an order of paternity and to order genetic testing under G.S. 8-50.1(b1), under certain circumstances. [G.S. 49-14(h), *added by* S.L. 2011-328, § 1, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.]
2. Upon motion alleging that the paternity order was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court must order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). [G.S. 49-14(h).]
3. The moving party has the burden of proof. [G.S. 49-14(h).]
4. A court may set aside an order of paternity if the court determines:
   a. From the results of the genetic testing that the putative father is not the biological father of the child and
   b. That the order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect. [G.S. 49-14(h).]
5. G.S. 49-14(h) does not affect the presumption of legitimacy accorded a child born to a mother and her husband during marriage. [G.S. 49-14(h). See Section I.B.1, above.]
6. The court may grant relief from a child support order pursuant to the procedure in G.S. 50-13.13 if paternity has been set aside pursuant to G.S. 49-14(h). [G.S. 50-13.13(f), *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or

claims for relief filed on or after that date.] Additional genetic testing is not required. [G.S. 50-13.13(d).] For more on this procedure, see *Procedure for Initial Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 2.

a. Defendant failed to establish the good cause required for court-ordered genetic testing in G.S. 50-13.13(d) based on findings in an earlier order that at the time the child was conceived, mother told defendant that she was sexually active with at least two other men and had used the Internet to seek sexual partners and that defendant was the child's father. Other findings supporting denial of testing, which defendant did not challenge, were that mother and defendant signed an affidavit of parentage on the day child was born and defendant had filed motions for custody of the child and participated in mediation. [*Guilford Cty. ex rel. Ijames v. Sutton*, 230 N.C. App. 409, 753 S.E.2d 397 (2013) (**unpublished**).]

R. Costs and Attorney Fees

1. G.S. 50-13.6, which authorizes attorney fees in a custody or support action, does not apply to an action under G.S. 49-14 to establish paternity. [*Guilford Cty. ex rel. Holt v. Puckett,* 191 N.C. App. 693, 664 S.E.2d 362 (2008) (citing *Smith v. Price,* 74 N.C. App. 413, 328 S.E.2d 811 (1985)). *See also Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882 (citing *Smith v. Price,* 315 N.C. 523, 340 S.E.2d 408 (1986)) (attorney fees incurred in prosecuting paternity actions may not be awarded under G.S. 50-13.6, as they may only be assessed as costs under G.S. 6-21(10)), *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]
2. The court has discretion to tax or apportion costs, including reasonable attorney fees, against either party or between the parties in civil actions to establish paternity of children born out of wedlock under Article 3 of G.S. Chapter 49. [G.S. 6-21(10); *Guilford Cty. ex rel. Holt v. Puckett,* 191 N.C. App. 693, 664 S.E.2d 362 (2008) (recognizing authority under G.S. 6-21(10) to award attorney fees but declining, on equitable grounds, in action brought on mother's behalf by county child support agency to order mother to pay defendant's fees after blood test excluded defendant as father).]
3. Taxing fees as part of costs is different than ordering payment of fees pursuant to a statute authorizing the court to do so. In the second instance, the award of attorney fees is an order of the court enforceable by contempt. When costs are taxed, a liability for payment is established which, if not paid, is satisfied by the enforcement methods used for any other civil judgment. [*See Smith v. Price,* 315 N.C. 523, 340 S.E.2d 408 (1986); 3 Lee's North Carolina Family Law § 16.19 (5th ed. 2002).]

S. Appeal

1. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013.]
2. Standard of review.
   a. Where the legislature has set forth the weight of evidence required in the trial court to establish paternity, as it has done in G.S. 49-14(b), the only function on appeal is to determine whether there is competent evidence in the record to support the facts found by the court and whether the facts found support the conclusions of law reached by the court. [*Brown v. Smith,* 137 N.C. App. 160, 526 S.E.2d 686 (2000)

(citing *Nash Cty. Dep't of Soc. Servs. ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851, *review denied,* 493 S.E.2d 655 (N.C. 1997)); *Beamon* (applying standard to review sufficiency of evidence to rebut a presumption of paternity arising from results of statutory blood or genetic testing).]

3. Effect of an appeal on the paternity proceeding in district court.
   a. The general rule is that the filing of a notice of appeal removes the case from the jurisdiction of the trial court. [*Wake Cty. ex rel. Horton v. Ryles*, 112 N.C. App. 754, 437 S.E.2d 404 (1993); G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015 (providing that appeal of a judgment stays all further proceedings in the trial court upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from).]
   b. There is an exception to the general rule when the appeal is from an interlocutory order that does not affect a substantial right. In that case, the appeal is a nullity and does not divest the trial court of jurisdiction. [*Wake Cty. ex rel. Horton v. Ryles*, 112 N.C. App. 754, 437 S.E.2d 404 (1993) (when court of appeals found that defendant's appeal of an order denying his motion to dismiss an action for child support was interlocutory, did not affect a substantial right, and was a nullity, trial court did not err by proceeding to enter an order for child support while appeal was pending).] But see Section II.S.4.b, below.
   c. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal pursuant to N.C. R. App. P. 21(a)(1) and, if it does so, the trial court will lose jurisdiction.
4. Appeal of an order requiring paternity testing.
   a. A court order requiring parties and their minor child to submit to blood grouping testing does not affect a substantial right and is, therefore, interlocutory and not immediately appealable. [*Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996), and *State ex rel. Hill v. Manning,* 110 N.C. App. 770, 431 S.E.2d 207 (1993) (both citing *Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E.2d 78 (1985)).]
   b. Even though interlocutory, an order requiring a party to submit to genetic paternity testing may be reviewed by writ of certiorari. [*Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995) (choosing to treat an interlocutory appeal of an order for paternity testing as a petition for writ of certiorari), *rev'd per curiam on other grounds*, 343 N.C. 114, 468 S.E.2d 59 (1996); *Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996), and *State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993) (both citing *Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985)) (in both *Davis* and *Manning*, the court of appeals exercised its discretion to address the merits of an order requiring testing, even though appeal was interlocutory, in order to expedite the decision in the public interest).]

III. Uniform Interstate Family Support Act (UIFSA) Proceedings to Establish Paternity [G.S. Chapter 52C.]

A. One-State Long-Arm Paternity Proceedings

1. UIFSA and federal regulations allow the initiation of an action in the state of the obligee when the obligor is in another state, without involving that second state in a formal two-state process. [N.C. Dep't of Health & Human Servs., North Carolina DHHS On-line Manuals, *Child Support Services*, Intergovernmental, General Information, Uniform Interstate Family Support Act (UIFSA), One-State and Limited Service Cases, https://www2.ncdhhs.gov/info/olm/manuals/dss/cse/man/CSEcR.pdf.]
2. In a one-state long-arm paternity proceeding, a North Carolina tribunal may use UIFSA's long-arm statute to obtain personal jurisdiction over a nonresident defendant in a civil paternity action to determine parentage of a child brought under G.S. 49-14. [*See* G.S. 52C-2-201(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, and Section II.C, above.]
3. A district court that uses UIFSA's long-arm provisions to exercise personal jurisdiction over a nonresident defendant in a civil paternity action brought under G.S. 49-14 may use the following UIFSA provisions:
   a. G.S. 52C-3-315 (to receive evidence from outside this state; pursuant to G.S. 52C-3-315(j), *added by* S.L. 2015-117, § 1, effective June 24, 2015, a voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child);
   b. G.S. 52C-3-316 (to communicate with a tribunal outside this state); and
   c. G.S. 52C-3-317 (to obtain discovery through a tribunal outside this state). [G.S. 52C-2-210, *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
4. Apart from the provisions set out immediately above and G.S. 52C-2-201 and 52C-2-202, Articles 3 through 6 of G.S. Chapter 52C do not apply to one-state long-arm paternity proceedings, and the district court must apply North Carolina's procedural and substantive law governing civil paternity actions. [G.S. 52C-2-210, *added by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-3-303, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

B. Interstate UIFSA Paternity Proceedings

1. A tribunal of this state authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage of a child brought under G.S. Chapter 52C or a law or procedure substantially similar to Chapter 52C. [G.S. 52C-4-402, *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
2. A petitioner may file a direct request seeking a determination of parentage of a child. [G.S. 52C-7-705(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
   a. A "direct request" means a petition filed by an individual in a tribunal of this state in a proceeding involving an obligee, obligor, or child residing outside the United States. [G.S. 52C-7-701(4), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

3. A petitioner filing a direct request is not entitled to assistance from the North Carolina Department of Health and Human Services, Division of Social Services or the county child support agency. [G.S. 52C-7-705(d), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
4. When a North Carolina district court is acting as a responding tribunal in a Uniform Interstate Family Support Act (UIFSA) proceeding to determine parentage of a child, it must apply the procedural and substantive law of North Carolina (as set forth in G.S. 49-14 and elsewhere) governing determination of paternity and North Carolina's general law with respect to choice of law. [*See* G.S. 52C-7-705(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015 (if a petitioner files a direct request seeking a determination of parentage of a child, the law of this state applies).]
5. A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under G.S. Chapter 52C. [G.S. 52C-3-314; *Reid v. Dixon,* 136 N.C. App. 438, 524 S.E.2d 576 (2000) (father could not assert the defense of nonparentage in UIFSA enforcement proceeding because his paternity had already been established by Alaska legal proceeding; trial court erred in allowing father to challenge his paternity of the child in North Carolina).] **NOTE:** G.S. 52C-3-314 was not amended by S.L. 2015-117, § 1, effective June 24, 2015.
6. The procedure in interstate UIFSA proceedings is discussed in more detail in *Procedure for Initial Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 2.

IV. Voluntary Paternity Acknowledgment [G.S. 110-132 and 130A-101.]

A. Federal Requirements

1. Title IV-D of the Social Security Act was amended in 1996 by Public Law 104-192 to include federal requirements related to voluntary acknowledgment of paternity. North Carolina's statutes regarding voluntary paternity acknowledgment [G.S. 110-132(a) and 130A-101(f).] predated this federal law and were amended in 1997 and 1999 to comply with the federal requirements.
2. Federal law requires states to adopt laws and procedures establishing a "simple civil process for voluntarily acknowledging paternity" through the use of an affidavit for the voluntary acknowledgment of paternity that meets the requirements specified in federal regulations. [*See* 42 U.S.C. § 666(a)(5)(C)(i), 45 C.F.R. § 303.5(g).]
    a. These procedures must include a "hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after the birth of a child." [42 U.S.C. § 666(a)(5)(C)(ii).]
    b. Federal law also prohibits the inclusion of the putative father's name on the birth record of a child born out of wedlock unless the child's father and mother have signed a voluntary acknowledgment of paternity or a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity. [42 U.S.C. §§ 666(a)(5)(D)(i), (ii).]

3. Federal law requires that voluntary paternity establishment services be provided by hospitals and by the state agency that is responsible for maintaining birth records. [42 U.S.C. §§ 666(a)(5)(C)(iii)(I), (II)(aa).] The Secretary of the U.S. Department of Health and Human Services is required to prescribe regulations specifying the types of other entities that may offer voluntary paternity acknowledgment services and the manner in which these services may be provided. [42 U.S.C. § 666(a)(5)(C)(iii)(II)(bb).]
4. Federal law requires that state laws and procedures regarding voluntary paternity acknowledgment provide that, before a mother and a putative father may sign an acknowledgment of paternity, the mother and the putative father must be given notice, orally or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights (including, if a parent is a minor, any rights afforded due to minority status) and responsibilities that arise from signing the acknowledgment. [42 U.S.C. § 666(a)(5)(C)(i).]
5. Federal law also requires that state laws and procedures regarding voluntary paternity acknowledgment provide that:
    a. A parent who has executed a voluntary paternity acknowledgment be allowed to rescind the acknowledgment within sixty days or before the date of an administrative or judicial proceeding involving the child and the party (including a proceeding to establish a support order), whichever is earlier; [42 U.S.C. § 666(a)(5)(D)(ii).]
    b. A signed voluntary acknowledgment of paternity may be challenged in court after sixty days only if the challenger proves fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; [42 U.S.C. § 666(a)(5)(D)(iii).] and
    c. The legal responsibilities (including child support obligations) of a parent arising from the acknowledgment may not be suspended pending a determination with respect to a challenge to the acknowledgment except for good cause shown. [42 U.S.C. § 666(a)(5)(D)(iii).]
6. Federal law prohibits state laws and procedures governing voluntary paternity acknowledgments that permit or require judicial or administrative proceedings to ratify an unchallenged acknowledgment of paternity. [42 U.S.C. § 666(a)(5)(E).]
7. Federal law requires that state laws and procedures governing voluntary paternity acknowledgments provide that an unrescinded acknowledgment of paternity be considered a "legal finding of paternity." [42 U.S.C. § 666(a)(5)(D)(ii).] Note that an unrescinded affidavit of parentage executed pursuant to G.S. 110-132(a) "shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation." [G.S. 110-132(a).]

B. Affidavits of Parentage Filed with the Clerk of Superior Court [G.S. 110-132; 110-134.]

1. Execution.
    a. Effective Oct. 1, 1999, acknowledgments of paternity executed by the mother and putative father of a child born out of wedlock constitute an admission of paternity and have the same legal effect (but only for the purpose of establishing the putative father's child support obligation) as a judgment establishing the putative father's paternity if:

i. They are filed with a clerk of superior court in lieu of or in conclusion of a legal proceeding to establish paternity [G.S. 110-134.] and

ii. Neither affidavit is rescinded by the executing parent within sixty days of the date the parent executed the affidavit (*not* the date the affidavits are filed with the court) or the date a paternity or child support order is entered, whichever is earlier. [G.S. 110-132(a); 110-134; S.L. 1999-293, § 1, effective Oct. 1, 1999.]

(a) From July 1, 1975, until Sept. 30, 1997, an acknowledgment of paternity executed pursuant to G.S. 110A-5(a) (predecessor to G.S. 110-132(a)) or G.S. 110-132(a) and approved by a district court judge had the same force and effect as a judgment of that court. [S.L. 1975-827, § 1, effective July 1, 1975.]

(b) S.L. 1997-433, § 4.7 amended G.S. 110-132(a) to provide that an acknowledgment of paternity constituted an admission of paternity, subject to a right to rescind, but no longer had the same force and effect as a judgment of the court, as language to that effect was deleted.

(c) S.L. 1999-293, § 1 amended G.S. 110-132(a) to provide that an acknowledgment of paternity shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to a right to rescind.

(d) S.L. 2001-237, § 2 amended G.S. 110-132(a) to change the name of the documents executed by the putative father and mother to "affidavits of parentage".

(e) S.L. 2011-328, § 2 amended G.S. 110-132 to add a procedure to set aside an affidavit of parentage.

(f) S.L. 2015-117, § 1, amended G.S. 52C-3-315 to add G.S. 52C-3-315(j), effective June 24, 2015, to provide that a voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish paternity of a child.

b. Parents may use Form AOC-CV-604, Affidavit of Parentage, to voluntarily acknowledge paternity pursuant to G.S. 110-132(a).

c. When an affidavit of parentage is executed in connection with a paternity proceeding in which a child support enforcement (IV-D) agency is involved, the IV-D agency must ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from their execution of the affidavit and of any alternatives to executing the affidavit. [G.S. 110-132(a3).]

d. An unrescinded affidavit of parentage executed by a minor parent is binding on the minor parent despite his or her minority. [G.S. 110-132(a3).]

e. Approval by a district court judge of an affidavit of parentage filed pursuant to G.S. 110-132(a) is not required.

i. From July 1, 1975, until Sept. 30, 1997, state law required district court judges to approve voluntary paternity acknowledgments executed pursuant to G.S. 110-132(a). [S.L. 1975-827, § 1, effective July 1, 1975.]

ii. As noted in Section IV.A.6, above, federal law now prohibits state laws or procedures that require or allow the approval of voluntary paternity affidavits by judges or other state officials.

f. A voluntary child support agreement (VSA) under G.S. 110-132(a) (now G.S. 110-132(a3)) has been found sufficient to establish paternity of a child born out of wedlock, entitling the child to inherit pursuant to G.S. 29-19(b)(2) when the father died intestate. [*In re Estate of Potts,* 186 N.C. App. 460, 651 S.E.2d 297 (2007) (VSA met the acknowledgment, execution, and filing requirements of G.S. 29-19(b)(2)).] Similarly, a parenting agreement approved by a district court judge has been found to satisfy the requirements of G.S. 29-19(b)(2), entitling father of a daughter born out of wedlock to inherit as her legal heir upon her death. [*In re Estate of Magnum,* 212 N.C. App. 211, 214, 713 S.E.2d 18, 20 (2011) (court stated that the "Parenting Agreement and Order Approving Parenting Agreement meet the requirements [in G.S. 29-19(b)(2) for] a written instrument in similar fashion to the voluntary support agreement in *Potts*").]

g. Strict compliance with the requirement in G.S. 29-19(b)(2) that the instrument acknowledging paternity be filed with the clerk is required. [*In re Estate of Williams*, 246 N.C. App. 76, 783 S.E.2d 253 (citing *In re Estate of Morris,* 123 N.C. App. 264, 472 S.E.2d 786 (1996)) (rejecting purported heir's argument that substantial compliance with the filing requirement would be sufficient), *review denied, appeal dismissed,* 787 S.E.2d 30 (N.C. 2016).]

2. Right of rescission in G.S. 110-132.

a. G.S. 110-132(a) contains a sixty-day right of rescission that applies only to affidavits of parentage, not to voluntary support agreements.

b. A parent's request to rescind execution of an affidavit of parentage must be filed with the clerk of superior court and served pursuant to G.S. 1A-1, Rule 4 on all parties, including, if applicable, a child support enforcement agency. [G.S. 110-132(a).]

i. A district court judge must enter an order allowing the parent's rescission of an affidavit of parentage if the judge finds that the parent made a timely request to rescind the affidavit and properly served the other parent and other parties entitled to notice of the request to rescind. [G.S. 110-132(a).]

ii. The parent's right to rescind an affidavit of parentage, if timely and properly made, does not require proof that the putative father is not the child's father or proof of fraud, duress, mistake, excusable neglect, or good cause for rescission.

iii. If the court orders rescission and the putative father is subsequently adjudicated not to be the child's father, the clerk of superior court must send a copy of the rescission order to the State Registrar of Vital Statistics, who must remove the putative father's name from the child's birth certificate (if his name appears on the birth certificate). [G.S. 110-132(a).]

c. After the sixty-day period for rescission has passed, an affidavit of parentage may be set aside as provided in G.S. 110-132(a1) or (a2). [G.S. 110-132(a1). See G.S. 50-13.13 for a procedure for relief from a child support order based on a finding of nonpaternity.] See Sections IV.B.5 and IV.B.6, below.

3. Defense of res judicata.
    a. An unrescinded affidavit of parentage filed pursuant to G.S. 110-132(a) is res judicata with respect to the issue of paternity in a subsequent child support proceeding involving the putative father. The issue of paternity may not be reconsidered by the court. [G.S. 110-132(b); *Leach v. Alford*, 63 N.C. App. 118, 124, 304 S.E.2d 265, 269 (1983) (holding that the provision in G.S. 110-132(b) that a "prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court" applies to child support proceedings).] Note that before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court. See Section IV.B, above.
    b. The language in G.S. 110-132(b) quoted immediately above does not bar a party from seeking relief pursuant to G.S. 1A-1, Rule 60(b)(6) from an acknowledgment (judgment) of paternity when support is not at issue. [*Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983).] See Section IV.B.4, immediately below.
4. Relief from an affidavit of parentage pursuant to G.S. 1A-1, Rule 60(b).
    a. Procedure.
        i. A motion pursuant to G.S. 1A-1, Rule 60(b) is an appropriate method to attack a determination of paternity based upon an affidavit of paternity (now parentage) after the expiration of the sixty-day rescission period set out in G.S. 110-132(a). [*Cty. of Durham Dep't of Soc. Servs. ex rel. Stevons v. Charles,* 182 N.C. App. 505, 642 S.E.2d 482 (2007) (citing *Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983), and *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002)); *Adams*; *Leach*.] Note that before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court.
        ii. G.S. 110-132 is not a basis for relief from a paternity order apart from G.S. 1A-1, Rule 60(b). [*Cty. of Durham Dep't of Soc. Servs. ex rel. Stevons v. Charles,* 182 N.C. App. 505, 642 S.E.2d 482 (2007) (trial court erred in concluding that G.S. 110-132 afforded defendant a basis for revoking his acknowledgment of paternity, separate and apart from the provisions of Rule 60(b).] **NOTE:** S.L. 2011-328, §§ 2 and 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 110-132(a2) and 50-13.13, which provide procedures to set aside affidavits of parentage under certain circumstances and to grant relief from certain child support orders based on a finding of nonpaternity. See Sections IV.B.5 and IV.B.6, below.
        iii. A party cannot collaterally attack a paternity affidavit in a proceeding for child support. [*Leach v. Alford,* 63 N.C. App. 118, 124, 304 S.E.2d 265, 269 (1983) (language in G.S. 110-132(b) that a "prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court" applies to child support proceedings, so that a judgment of paternity may not be reconsidered by the court in a proceeding related solely to the support of a child); *Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985) (defendant could not attack, in a contempt proceeding for failure to pay child support,

a judgment of paternity arising from defendant's execution of an acknowledgment of paternity under G.S. 110-132(a); enforcement proceeding was one relating solely to support).] Before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court. See Section IV.B, above. **NOTE:** S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 50-13.13, which provides a procedure to seek relief from an order of child support under certain circumstances based upon a determination that the obligor is not the child's father. See Section IV.B.6, below.

iv. A party can directly attack a paternity affidavit in a later proceeding where support is not at issue. [*Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983) (language in G.S. 110-132(b) quoted in Section IV.B.4.a.iii, immediately above, does not bar a party from seeking relief pursuant to G.S. 1A-1, Rule 60(b)(6) from an acknowledgment (judgment) of paternity when support is not at issue).]

v. When a party has filed a motion to set aside a paternity order pursuant to G.S. 1A-1, Rule 60(b) and to compel genetic testing pursuant to G.S. 8-50.1(b1), a court must first grant relief from the paternity judgment pursuant to Rule 60 before it may grant the party's request for genetic paternity testing. [*State ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002) (citing *Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983) (error for court to order blood tests before ruling on Rule 60 motion; acknowledgment of paternity was res judicata, and so had to be first set aside); *State ex rel. McKinney v. Lotharp,* 161 N.C. App. 541, 589 S.E.2d 751 (2003) (**unpublished**) (citing *Bright*) (error for trial court to grant defendant's motion for genetic testing when defendant had not filed a Rule 60(b) motion for relief from the paternity order).] See Section II.P.1, above. The court in *Bright* considered an acknowledgment of paternity and voluntary support executed in 1995. Before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court.

b. Use of G.S. 1A-1, Rule 60(b)(1), (2), or (3) to seek relief from an affidavit of parentage. Motions for relief pursuant to Rule 60(b)(1), (2), or (3) must be made not more than one year after the judgment, order, or proceeding was entered or taken. [G.S. 1A-1, Rule 60(b).]

i. The one-year time period for seeking relief under G.S. 1A-1, Rule 60(b)(1), (2), and (3) applies to challenges to an affidavit of paternity executed pursuant to G.S. 110-132(a). [*Cty. of Durham Dep't of Soc. Servs. ex rel. Stevons v. Charles,* 182 N.C. App. 505, 642 S.E.2d 482 (2007) (putative father does not have an unlimited right to seek rescission of an affidavit of paternity; rather, he is limited to the grounds for setting aside a judgment set forth in Rule 60).]

ii. The one-year time period for bringing a Rule 60(b) motion begins to run when the affidavit of parentage under G.S. 110-132 is entered with the court. The time does not begin to run upon the putative father's execution of the paternity affidavit. [*Guilford Cty. ex rel. Hill v. Holbrook,* 190 N.C. App. 188, 660 S.E.2d

175 (2008), *review denied,* 363 N.C. 652, 684 S.E.2d 889 (2009).] **NOTE:** The sixty-day time period for seeking rescission of an affidavit of parentage begins to run on the date the parent executed the affidavit. [G.S. 110-132(a).]

iii. The one-year time limitation applicable to subsections (1), (2), and (3) of G.S. 1A-1, Rule 60(b) is an explicit requirement that the court cannot ignore. [*State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002) (trial court correctly denied a motion to void an acknowledgment and order of paternity, and related support agreement and order, pursuant to Rule 60(b)(1) and (3) brought outside the statutory time limit of one year); *State ex rel. Blakeney v. Reid*, 159 N.C. App. 467, 583 S.E.2d 428 (2003) (**unpublished**) (trial court correctly denied a motion to set aside a voluntary support agreement and order of paternity pursuant to Rule 60(b)(2) (newly discovered evidence) and (3) (fraud) as untimely when it was filed more than six years after entry of the voluntary support agreement and paternity order).]

c. Use of G.S. 1A-1, Rule 60(b)(6) to set aside an affidavit of parentage. Motions for relief pursuant to Rule 60(b)(6) must be made within a reasonable time. [G.S. 1A-1, Rule 60(b).]

i. G.S. 1A-1, Rule 60(b)(6) may be used to set aside a voluntary paternity affidavit filed pursuant to G.S. 110-132(a). [*Leach v. Alford,* 63 N.C. App. 118, 124, 304 S.E.2d 265, 269 (1983) (language in G.S. 110-132(b) that a "prior judgment as to paternity shall be res judicata as to that issue" applies to child support proceedings and is not an absolute bar to relief from an acknowledgment of paternity).]

5. Setting aside an affidavit of parentage pursuant to G.S. 110-132(a2).

a. Notwithstanding the time limitations in G.S. 1A-1, Rule 60 or any other provision of law, G.S. 110-132(a2) sets out a procedure to set aside an affidavit of parentage executed pursuant to G.S. 110-132(a) under certain circumstances. [G.S. 110-132(a1), (a2), *added by* S.L. 2011-328, § 2, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.]

b. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court must order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). [G.S. 110-132(a2).]

c. The burden of proof is on the moving party. [G.S. 110-132(a2).]

d. A trial court may set aside an affidavit of parentage executed under G.S. 110-132(a) after the expiration of the statute's sixty-day rescission period if:

i. Genetic tests establish that the putative father is not the biological father of the child and

ii. The affidavit of parentage was entered as the result of fraud, duress, mutual mistake, or excusable neglect. [G.S. 110-132(a2).]

e. Setting aside the affidavit of parentage pursuant to G.S. 110-132(a2) does not affect the presumption of legitimacy where a child is born to a mother and putative father during the course of a marriage. [G.S. 110-132(a2).] The presumption of legitimacy arising from the birth of a child to a mother and her husband during the course of their marriage is applicable.

f. The court may grant relief from a child support order pursuant to the procedure in G.S. 50-13.13 if paternity has been set aside pursuant to G.S. 110-132. [G.S. 50-13.13(f), *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.] Additional genetic testing is not required. [G.S. 50-13.13(d).] For more on this procedure, see *Procedure for Initial Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 2.

6. Setting aside an affidavit of parentage pursuant to G.S. 50-13.13.
   a. Paternity established by an affidavit of parentage executed in accordance with G.S. 110-132(a) may be set aside pursuant to G.S. 50-13.13. [G.S. 110-132(a1).]
   b. G.S. 50-13.13 provides that, notwithstanding G.S. 1A-1, Rule 60 or any other provision of law, a father required to pay child support under an order entered pursuant to G.S. Chapters 49, 50, 52C, or 110 or under an agreement between the parties pursuant to G.S. 52-10.1 or otherwise, which is subject to modification by a North Carolina court, may seek relief from a child support order under certain circumstances. [G.S. 50-13.13(a), *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.]

C. Paternity Affidavits Filed with the State Registrar of Vital Statistics [G.S. 130A-101.]

1. If the mother of a child born out of wedlock was unmarried at all times from the date of the child's conception through the date of the child's birth, the child's mother and the putative father may execute an affidavit acknowledging the child's paternity after the child is born and before a birth certificate for the child is issued. [G.S. 130A-101(f).]
2. An affidavit of paternity executed under G.S. 130A-101(f) must include:
   a. A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that he is the child's natural father,
   b. A sworn statement by the mother declaring that she was unmarried at all times from the date of conception through the date of birth,
   c. A sworn statement by the father declaring that he believes that he is the natural father of the child,
   d. The parents' Social Security numbers,
   e. Information explaining in plain language the effect of signing the affidavit, and
   f. A statement of parental rights and responsibilities and an acknowledgment of receipt of this information. [G.S. 130A-101(f).]
3. The State Registrar of Vital Statistics, in consultation with the Child Support Enforcement Section of the state Division of Social Services, must develop and disseminate a form affidavit that complies with G.S. 130-101(f), together with an information sheet that contains all the information required to be disclosed by G.S. 130A-101(f)(3). [*See* Affidavit of Parentage for Child Born Out of Wedlock (Form DHHS-1660).]
4. This is generally known as a "hospital-based paternity establishment," with designated hospital staff providing parents with the DHHS form and an explanation of the administrative paternity establishment process.

5. Affidavits of paternity executed pursuant to G.S. 130A-101(f) must be filed with the State Registrar of Vital Statistics along with the child's birth certificate listing the putative father as the child's father. [G.S. 130A-101(f).]
6. Either parent may rescind his or her execution of an affidavit of paternity executed pursuant to G.S. 130A-101(f). The time period allowed for rescinding an affidavit of paternity and the procedures for rescinding an affidavit of paternity are the same as those that apply to affidavits of parentage executed by the putative father and mother pursuant to G.S. 110-132(a). [*See* G.S. 130A-101(f) (father has right to rescind under G.S. 110-132) and Section IV.B.2, above.]
7. If paternity is properly placed in issue, a certified copy of the affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) is admissible in any action to establish the child's paternity. [G.S. 130A-101(f).]
8. Effect of an affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f).
    a. An affidavit acknowledging paternity executed pursuant to G.S. 130A-101(f) does not affect inheritance rights unless it is filed with the clerk of superior court pursuant to G.S. 29-19(b)(2). [G.S. 130A-101(f); *In re Estate of Williams*, 246 N.C. App. 76, 82, 783 S.E.2d 253, 258 (affidavit of parentage executed by the purported father before a notary public but never filed with the clerk of court as required by G.S. 29-19(b)(2) left purported heir "in an illegitimate status per . . . 29-19(b)(2)"), *review denied, appeal dismissed,* 787 S.E.2d 30 (N.C. 2016); *In re Estate of Morris,* 123 N.C. App. 264, 472 S.E.2d 786 (1996) (father who acknowledged his paternity before notary public and executed Form DHHS-1660 could not inherit from a child born out of wedlock since he had not filed acknowledgment with clerk of court as required by statute).]
    b. Strict compliance with the requirement in G.S. 29-19(b)(2) that the instrument acknowledging paternity be filed with the clerk is required. [*In re Estate of Williams*, 246 N.C. App. 76, 783 S.E.2d 253 (citing *In re Estate of Morris,* 123 N.C. App. 264, 472 S.E.2d 786 (1996)) (rejecting purported heir's argument that substantial compliance with the filing requirement would be sufficient), *review denied, appeal dismissed,* 787 S.E.2d 30 (N.C. 2016).] For more on *Williams*, see Meredith Smith, *Intestate Succession Rights and Children Born Out of Wedlock*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 4, 2016), http://civil.sog.unc.edu/intestate-succession-rights-and-children-born-out-of-wedlock.
    c. An affidavit of paternity executed pursuant to G.S. 130A-101(f) is a "written affidavit of parentage" pursuant to G.S. 110-132(a), meaning that it will be treated as a judicial determination of paternity for the purpose of establishing a child support order if it is filed with the clerk of superior court. See Section IV.B, above.

V. Criminal Nonsupport Proceedings Involving Children Born Out of Wedlock [G.S. 49-2.]

A. Generally

1. A parent who willfully neglects or refuses to provide adequate support and maintain his or her child born out of wedlock shall be guilty of a Class 2 misdemeanor. [G.S. 49-2, *amended by* S.L. 2013-198, § 17, effective June 26, 2013.]
2. The focus of the crime punishable by G.S. 49-2 is the willful failure to pay support for a child born out of wedlock. Paternity establishment is not the purpose of this proceeding, as the statute does not make the mere begetting of a child a crime. [*Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981).]
3. Paternity is, however, a necessary element in the criminal prosecution of a putative father for failing to support a child born out of wedlock. [G.S. 49-7, *amended by* S.L. 2013-198, § 20, effective June 26, 2013 (court shall determine whether or not the defendant is a parent of the child on whose behalf proceeding was instituted); *State v. Hobson,* 70 N.C. App. 619, 320 S.E.2d 319 (citing *State v. Coffey*, 3 N.C. App. 133, 164 S.E.2d 39 (1968)), *writ denied,* 312 N.C. 497, 322 S.E.2d 562 (1984); *Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981); *Coffey*.]
4. The state must prove the defendant's paternity of the child beyond a reasonable doubt. [*State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956) (fact of paternity cannot be established by mere preponderance of the evidence but must be established beyond a reasonable doubt).]
5. A putative father charged with nonsupport of a child born out of wedlock does not have a right to request a jury trial in district court. [G.S. 7A-196(b) (no jury trial in criminal cases in district court).] The putative father may request a jury trial on the issue of paternity and failure to support in a de novo hearing following appeal to the superior court. [G.S. 7A-196(b).]
6. Other issues relating to criminal nonsupport proceedings under G.S. 49-2 are discussed in *Procedure for Initial Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 2.

B. Procedure

1. When action may be brought.
   a. A criminal nonsupport proceeding under G.S. 49-2 against a child's mother may be brought at any time before a child's 18th birthday. [G.S. 49-4.]
   b. A criminal nonsupport proceeding under G.S. 49-2 against a reputed father must be brought:
      i. On or before the child's 3rd birthday,
      ii. Any time before the child's 18th birthday if the child's paternity has been judicially determined before the child's 3rd birthday, or
      iii. Within three years of the last support payment made by the reputed father and before the child's 18th birthday if the father has acknowledged paternity by making support payments on behalf of the child before the child's 3rd birthday. [G.S. 49-4.]

2. Elements.
   a. For a defendant to be found guilty of violating G.S. 49-2, the state must prove that:
      i. The defendant is a parent of the child in question and
      ii. The defendant has willfully neglected or refused to provide adequate support for such child. [G.S. 49-7, *amended by* S.L. 2013-198, § 20, effective June 26, 2013; *Sampson Cty. ex rel. McPherson v. Stevens,* 91 N.C. App. 524, 372 S.E.2d 340 (1988) (quoting *State v. Hobson,* 70 N.C. App. 619, 320 S.E.2d 319 (1984)).]
   b. Additionally, a defendant must receive notice and demand for support. [*See State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964) (no conviction under G.S. 49-2 unless demand for child's support has been made of the parent and the parent willfully neglected and refused to provide support); *State v. Hobson,* 70 N.C. App. 619, 320 S.E.2d 319 (defendant's receipt of notice and demand for support was one of the issues to be submitted to the jury), *writ denied,* 312 N.C. 497, 322 S.E.2d 562 (1984).]
      i. Demand must be made after the birth of the child and before prosecution for nonsupport has commenced. [*State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964); *State v. Killian,* 61 N.C. App. 155, 300 S.E.2d 257 (1983) (demand made after warrant issued not sufficient to support prosecution).]
   c. For a jury instruction on this offense, see N.C.P.I.—Crim.—240.40—Willful Neglect or Refusal to Adequately Support and Maintain a Child Born Out of Wedlock.

C. Right to Counsel

1. A defendant charged with willful refusal to support a child born out wedlock in violation of G.S. 49-2 has a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waives that right, since a sentence of imprisonment may be imposed for such offense. [*State v. Lee,* 40 N.C. App. 165, 252 S.E.2d 225 (1979) (guilty plea of nonindigent defendant charged under G.S. 49-2 stricken because when defendant was called upon to plead, he was neither represented by counsel nor had waived his right to counsel); 3 Lee's North Carolina Family Law § 16.12a (5th ed. 2002).]
   a. The maximum sentence for criminal nonsupport under G.S. 49-2 is 30, 45, or 60 days (depending on the defendant's prior criminal record) and a fine of up to $1,000. [G.S. 15A-1340.23(b), (c).]
   b. An indigent person is entitled to services of court-appointed counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." [G.S. 7A-451(a)(1).]

D. Genetic Testing to Determine Paternity

1. If paternity is at issue in a criminal nonsupport proceeding, G.S. 8-50.1(a) and 49-7 require the court, upon motion of the State or the defendant putative father, to order the putative father, the child, and the child's mother to submit to genetic paternity testing. [*See State v. Fowler*, 277 N.C. 305, 309, 177 S.E.2d 385, 387 (1970) (noting that a defendant's right to a blood test is a substantial right and stating "that, upon defendant's motion, the court must order the test when it is possible to do so").]
   a. Paternity is *not* at issue in a criminal nonsupport proceeding if the defendant's paternity has been conclusively adjudicated in a prior criminal proceeding involving the

putative father's failure to support the child. [*State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964) (in a subsequent prosecution for willful refusal to support, the defendant is not entitled to have the question of paternity relitigated).]

2. Costs of testing.
   a. The party who requests the genetic testing generally is "initially . . . responsible for any of the expenses thereof." [G.S. 8-50.1(a)(2).]
   b. Due process requires that the state pay the cost of genetic paternity testing when an indigent putative father requests genetic testing in a criminal nonsupport proceeding. [*See Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202 (1981) (nature of paternity proceedings under Connecticut statute at issue was civil but had "quasi-criminal" overtones).] Because of this case, one commentator has noted that the language in G.S. 8-50.1(a)(2), set out in Section V.D.2.a, immediately above, "may not constitutionally be applied to require indigent defendants to bear such costs." [3 Lee's North Carolina Family Law § 16.14 (5th ed. 2002).]
   c. A nonindigent putative father who requests genetic paternity testing in a criminal nonsupport proceeding is responsible for paying the cost of the test.
   d. Upon entry of judgment, the court may tax the cost of genetic paternity testing and related expert witness fees as costs as set out in G.S. 8-50.1(a)(2).
3. Admitting results of tests ordered by a court pursuant to G.S. 8-50.1(a).
   a. The results of genetic paternity testing, including the statistical likelihood of the putative father's paternity, if available, must be admitted as evidence, if otherwise admissible, on the issue of paternity in a criminal nonsupport proceeding when offered by a duly qualified person. [G.S. 8-50.1(a) (setting out persons duly qualified) and 49-7. *See State v. Fowler*, 277 N.C. 305, 177 S.E.2d 385 (1970); *State v. McInnis*, 102 N.C. App. 338, 401 S.E.2d 774 (G.S. 8-50.1(a) does not prohibit the admission of inconsistent test results), *review denied,* 329 N.C. 274, 407 S.E.2d 848 (1991).]
   b. When the genetic test results admitted as evidence indicate that the defendant putative father could not be the child's natural father, the court must instruct the jury that if they believe that the witness presenting the test results testified truthfully as to those results and that the tests and comparisons were conducted properly, then they must decide that the alleged-parent defendant is not the natural parent, whereupon the court will enter a special verdict of not guilty. [G.S. 8-50.1(a)(1); *State v. McInnis*, 102 N.C. App. 338, 401 S.E.2d 774 (when test results are consistent and show the defendant not to be the father of the child, G.S. 8-50.1(a) requires the jury to return a special verdict of not guilty), *review denied,* 329 N.C. 274, 407 S.E.2d 848 (1991).]
   c. Genetic paternity tests indicating a high statistical probability that the defendant putative father is the child's natural father do *not* create any legal presumption of paternity in a criminal nonsupport proceeding. [Language in G.S. 8-50.1(b1) as to presumptions of nonpaternity and paternity not found in G.S. 8-50.1(a).]

E. Defense of Res Judicata or Collateral Estoppel

1. Effect in a subsequent action of acquittal, conviction, or guilty plea on issue of paternity in a prior criminal nonsupport proceeding.

a. Subsequent criminal action.

i. When the question of paternity is determined against the defendant in a prior criminal nonsupport action, res judicata prevents the relitigation of paternity in a subsequent prosecution for criminal nonsupport. [*Tidwell v. Booker*, 290 N.C. 98, 225 S.E2d 816 (1976) (citing *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964)).] The defendant may not relitigate paternity in a subsequent criminal nonsupport prosecution, even if the defendant is acquitted of the nonsupport charge in the first proceeding. [*See State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964) (new trial ordered on the question of defendant's willful nonsupport, but determination of defendant's paternity would stand and would not be at issue in the new trial).]

ii. As it is a final judgment, a special verdict finding that a putative father is not a child's father also should be res judicata on the issue of paternity in a subsequent criminal prosecution of the putative father for failing to support the child, although North Carolina has no appellate case on point.

b. Subsequent civil action.

i. Conviction in prior criminal nonsupport proceeding.

(a) Defendant's conviction for failure to support under G.S. 14-322 established paternity and collaterally estopped defendant from relitigating the paternity issue in a subsequent civil action by the state for indemnification and a continuing order of support because the parties in the criminal action were the same as or in privity with the parties to the civil action. [*State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984) (the State of North Carolina was administering the child support enforcement program for the county that brought the subsequent civil action).] **NOTE**: When *Lewis* was decided, the standard of proof for a civil paternity action was beyond a reasonable doubt, allowing application of collateral estoppel. Collateral estoppel may not be used when the two actions have different burdens of proof. [See discussion in Fathers and Paternity, 60–61.] See Sections V.E.1.b.i.(c) and (d), below, for a discussion of the continued viability of the privity requirement.

(b) Defendant's criminal conviction for nonsupport under G.S. 49-2 did not estop him from denying paternity in a subsequent civil action brought by the child's mother to establish paternity under G.S. 49-14 and for support of the child. Paternity could be relitigated in the subsequent civil action because the parties to the criminal and civil proceedings were not the same and the state and child's mother were not in privity. [*Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).] **NOTE**: When *Tidwell* was decided, the standard of proof for a civil paternity action was beyond a reasonable doubt, allowing application of collateral estoppel. Collateral estoppel may not be used when the two actions have different burdens of proof. [See discussion in Fathers and Paternity, 60–61.] See Sections V.E.1.b.i.(c) and (d), immediately below, for a discussion of the continued viability of the privity requirement.

(c) While mutuality of parties was traditionally required to invoke collateral estoppel, some cases have held that mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel, [*See Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986) (abandoning requirement in defensive context), and *Rymer v. Estate of Sorrells,* 127 N.C. App. 266, 488 S.E.2d 838 (1997) (abandoning requirement in offensive context).] so long as the party that is collaterally estopped had a full and fair opportunity to litigate the issue in an earlier action. [*Dalenko v. Collier,* 191 N.C. App. 713, 664 S.E.2d 425 (citing *McInnis*) (plaintiff was collaterally estopped from asserting claims in 2007 against an arbitrator who had ruled against her in 2005, which ruling was later confirmed by court order; arbitrator was not a party in 2005, but plaintiff had a full and fair opportunity to litigate the issue in 2005), *appeal dismissed,* 362 N.C. 680, 670 S.E.2d 563 (2008).]

(d) After the *Hall* and *Rymer* cases, cited immediately above, other cases have again required mutuality of parties as noted by the N.C. Court of Appeals when it stated that "[i[nexplicably . . . our Supreme Court [in *State v. Summers*, 351 N.C. 620, 528 S.E.2d 17 (2000)] has since defined the doctrine of collateral estoppel using the traditional definition, providing a lengthy analysis of the mutuality element." [*In re K.A.,* 233 N.C. App. 119, 126, 756 S.E.2d 837, 842 (2014).] According to the court in *K.A.*, the result is various definitions of collateral estoppel, with some decisions applying the privity element or mutuality of parties and others not doing so.

(e) A court may refuse to give estoppel effect to a conviction under G.S. 49-2 if, in a given case, questions of judicial economy or fairness to the defendant weigh against it. [3 Lee's North Carolina Family Law § 16.18c (5th ed. 2002) (further noting in the same section that even though North Carolina no longer requires mutuality of estoppel, courts in North Carolina are sometimes hesitant to allow the offensive use of collateral estoppel).]

ii. Guilty plea in criminal nonsupport action.

(a) A plea of guilty in a criminal nonsupport action collaterally estopped a putative father from relitigating paternity in a subsequent action by a child support enforcement agency pursuant to G.S. 110-128 to recover past public assistance. [*Wilkes Cty. ex rel. Nations v. Gentry,* 63 N.C. App. 432, 305 S.E.2d 207 (1983) (North Carolina Supreme Court agreeing with the result reached by the court of appeals but finding it unnecessary to determine whether the guilty plea should be given collateral estoppel effect), *modified and aff'd on other grounds*, 311 N.C. 580, 319 S.E.2d 224 (1984).]

(b) A plea of guilty in a criminal nonsupport action under G.S. 49-2 may be considered as an evidentiary admission by the defendant on the issue of paternity sufficient to establish paternity in a subsequent action by a child support enforcement agency pursuant to G.S. 110-128 to recover past public assistance. [*Wilkes Cty. ex rel. Nations v. Gentry*, 311 N.C. 580, 319 S.E.2d 224 (1984). *See also Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E.2d 78 (guilty plea by former husband to the criminal charge of

nonsupport under G.S. 14-322 was an evidentiary admission of paternity in subsequent custody and support proceeding brought by mother, precluding blood test), *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).]

iii. Acquittal or not guilty in prior criminal nonsupport action.

(a) A putative father may not claim collateral estoppel on the issue of paternity based on his acquittal in a prior criminal proceeding for nonsupport because the standard of proof in a civil paternity action is less than the standard of proof in a criminal nonsupport proceeding. [*See Hussey v. Cheek,* 31 N.C. App. 148, 228 S.E.2d 519 (1976) (plaintiff was not estopped from proceeding in a civil action for assault by defendant's acquittal of a criminal assault arising out of the same occurrence, since the burden of proof in the two trials is different; the court stated that when the burden of proof at the second trial is less than at the first, the failure to carry that burden at the first trial cannot raise an estoppel to carrying the lesser burden at the second trial); *see also Powers v. Tatum,* 196 N.C. App. 639, 676 S.E.2d 89 (if the district court found that the state had failed to prove beyond a reasonable doubt that the petitioner willfully refused to submit to a blood alcohol test, the state would not be precluded from attempting to prove the same by a preponderance of the evidence at a civil license revocation proceeding), *writ denied, review denied,* 363 N.C. 583, 681 S.E.2d 784 (2009).] Collateral estoppel may not be used when the two actions have different burdens of proof. [See discussion in Fathers and Paternity, 60–61.]

(b) Defendant acquitted on criminal charge under G.S. 49-2 may not use his acquittal as res judicata in a proceeding under G.S. 49-14 to establish paternity when the record did not disclose whether the judge entered an acquittal because he found defendant was not the father of the children or because the judge did not believe defendant had willfully failed to provide support. [*Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981) (general decree in the criminal action did not bar the county's claim in the civil action); *Sampson Cty. ex rel. McPherson v. Stevens,* 91 N.C. App. 524, 372 S.E.2d 340 (1988) (citing *Stephens*) (general verdict of not guilty in criminal action under G.S. 49-2 did not operate as res judicata on issue of paternity in subsequent action under G.S. 49-14 to establish paternity and support of a child born out of wedlock).]

(c) The acquittal of a putative father for failing to support a child born out of wedlock based on a finding that he was not the father of the child did not collaterally estop the county from bringing a subsequent civil action to establish defendant's paternity and reimbursement from the defendant for past public assistance when there was no privity between the state in the criminal action for nonsupport and Rutherford County, the plaintiff in the civil action. [*Rutherford Cty. ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990); *Devane ex rel. Robinson v. Chancellor*, 120 N.C. App. 636, 463 S.E.2d 293 (1995) (citing *Hedrick*) (action by children, through a guardian ad litem and by their mother, to establish paternity and support was allowed to proceed because children and their mother were not

in privity with State of North Carolina or the child support enforcement agency, both of which had brought previous actions against defendant; in criminal proceeding, defendant was found not guilty and found not to be the father, while the other proceeding, a civil action to establish paternity and support, was dismissed with prejudice), *review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). *See also State ex rel. Orr v. Wilson*, 160 N.C. App. 710 (2003) (**unpublished**) (Forsyth County Department of Social Services and the state were not in privity).] **NOTE:** The basis of the *Hedrick* and *Orr* decisions was the lack of privity between the state in the criminal proceeding and the plaintiffs in the civil action. See Sections V.E.1.b.i.(c) and (d), above, noting that mutuality of parties is no longer required in some cases when invoking either offensive or defensive collateral estoppel and calling into question cases requiring privity between the parties in the first and second actions. An additional basis for the decision, under current law but not the law in effect when *Hedrick* was decided, is the differing standards of proof required in criminal nonsupport proceedings (beyond a reasonable doubt) and civil paternity actions (clear, cogent, and convincing evidence). Collateral estoppel may not be used when the two actions have different burdens of proof. [See discussion in Fathers and Paternity, 60–61; *see also In re K.A.,* 233 N.C. App. 119, 756 S.E.2d 837 (2014) (different burdens used in hearings for custody (preponderance of the evidence) and neglect (clear and convincing evidence) prevented application of collateral estoppel; trial court erroneously applied collateral estoppel to prevent mother from relitigating in the neglect proceeding issues adjudicated in the custody proceeding regarding father's alleged abuse of the parties' children).]

F. Appeal

1. A defendant who is found to be the father of a child born out of wedlock but is acquitted of nonsupport has the right to appeal the paternity determination to the superior court for trial de novo to the same extent as if he had been found guilty of nonsupport. [G.S. 49-7, *amended by* S.L. 2013-198, § 20, effective June 26, 2013; *State v. Lambert*, 53 N.C. App. 799, 281 S.E.2d 754 (1981).]

VI. Other Legal Proceedings Involving Paternity

A. Special Proceedings to Legitimate a Child Born Out of Wedlock [G.S. 49-10 *et seq.*; 49-12.1.]

1. Relationship between paternity and legitimation proceedings.
   a. A putative father does not have to first file a paternity action under G.S. 49-14 before proceeding under G.S. 49-10 to have the child legitimated. [*In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).]
   b. As legitimation vests greater rights in the parent and the child than an order adjudicating the child's paternity, a legitimation proceeding should be given preference when separate actions for both legitimation and paternity are filed. [*Smith v. Barbour*,

154 N.C. App. 402, 571 S.E.2d 872 (2002) (because legitimation action took priority over a paternity action, district court was divested of subject matter jurisdiction to decide paternity), *cert. denied*, 599 S.E.2d 408 (N.C. 2004).]

c. A child may be legitimated under either G.S. 49-10 or 49-12.1 at any age. However, paternity must be established by civil action prior to the child's 18th birthday. [G.S. 49-14(a).]

d. For more on paternity and legitimation, see Sara DePasquale, *Legitimation versus Paternity: What's the Difference?* UNC Sch. of Gov't: On the Civil Side Blog (Mar. 23, 2016), https://civil.sog.unc.edu/legitimation-versus-paternity-whats-the-difference.

e. For more on legitimation, see Joan G. Brannon & Ann M. Anderson, North Carolina Clerk of Superior Court Procedures Manual Vol. 2, Pt. VII (Special Proceedings), ch. 140 (Proceedings by Putative Father to Legitimate Child) (UNC School of Government, 2012).

2. Scope of the legitimation proceeding.

a. The only issue to be decided in a legitimation proceeding pursuant to G.S. 49-10 or 49-12.1 is whether the putative father who filed a petition to legitimate is the biological father of the child. [*In re Papathanassiou,* 195 N.C. App. 278, 671 S.E.2d 572 (rejecting argument of mother's husband that court must employ a two-step process, first determining whether grounds exist for legitimation and then determining whether legitimation is in the best interest of the child; according to the court of appeals, best interest is not an appropriate consideration in a legitimation proceeding), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).]

3. Jurisdiction.

a. The district court does **not** have subject matter jurisdiction over special proceedings to legitimate a child born out of wedlock. [G.S. 7A-246 (providing that the superior court is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings, with certain exceptions not relevant here).]

b. The clerk of superior court has original jurisdiction over special proceedings to legitimate a child born out of wedlock. [*See* G.S. 1-301.2(d) (providing for the clerk to decide all issues if a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer).]

c. The parties may enter a consent order legitimating a child with approval of the clerk. [G.S. 49-12.1(c).]

4. Contested issues of fact regarding paternity in a special proceeding to legitimate a child born out of wedlock are decided by a superior court judge or jury. [G.S. 1-301.2(b) (requiring transfer if an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading filed in a special proceeding); *In re Legitimation of Locklear,* 314 N.C. 412, 334 S.E.2d 46 (1985) (recognizing right to jury trial of paternity premised on a presumption of legitimacy); *In re Papathanassiou*, 195 N.C. App. 278, 287, 671 S.E.2d 572, 577 (citing *Locklear* and stating that "[n]ormally, the factual issue of paternity, when premised on a presumption of legitimacy, should be presented to and resolved by a jury"), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).] But when there is no issue of fact as to paternity, summary judgment is appropriate. [*See Papathanassiou,* (affirming summary

judgment to plaintiff putative father in legitimation action when DNA tests indicated a 99.99 percent probability that he was the biological father of the child and mother's husband admitted that he was not the biological father), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009); *Smith v. Barbour,* 167 N.C. App. 371, 605 S.E.2d 267 (2004) (**unpublished**) (when DNA tests indicated a 99.999 percent probability that petitioner was the child's father and mother's husband denied that he was the father, there was no genuine issue of material fact and summary judgment was properly granted in legitimation action; mother's request for a jury trial properly denied), *review denied*, 359 N.C. 322, 611 S.E.2d 418 (2005). *But see Smith v. Barbour,* 154 N.C. App. 402, 407 n.3, 571 S.E.2d 872, 877 n.3 (2002) (indicating that when paternity is disputed in a legitimation action, the clerk is to transfer the proceeding to district court), *cert. denied,* 599 S.E.2d 408 (N.C. 2004). **NOTE:** This appears to contradict statutes and case law.]

5. Necessary parties.
    a. A special proceeding to legitimate a child born out of wedlock may be brought only by a man who claims that he is the child's father. [G.S. 49-10; 49-12.1; *Tucker v. City of Clinton*, 120 N.C. App. 776, 463 S.E.2d 806 (1995) (putative grandfather lacked standing to attempt legitimation of child under G.S. 49-10, even though child's putative father was deceased).]
    b. The child and the child's mother are necessary parties to legitimation proceedings brought pursuant to G.S. 49-10 and 49-12.1(a). The spouse of the mother of the child is a necessary party to a proceeding brought pursuant to G.S. 49-12.1.
    c. A guardian ad litem (GAL) must be appointed to represent a minor child in a legitimation proceeding. [G.S. 49-12.1(a); 1A-1, Rule 17. *See also In re Papathanassiou,* 195 N.C. App. 278, 671 S.E.2d 572 (noting that whether or not G.S. 49-12.1 requires it, appointment of a GAL for the minor child is mandated by G.S. 1A-1, Rule 17), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).]
    d. In the context of a legitimation proceeding, where the inquiry of the court is whether the petitioner is the biological father of the minor child, the GAL must defend on behalf of the child in a manner that assures that the child's interest in the determination of his or her biological father is protected. [*In re Papathanassiou,* 195 N.C. App. 278, 671 S.E.2d 572, *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).]
    e. If the child was conceived or born to a married woman and a court order has not determined that the mother's husband is not the child's father, the mother's husband must be joined as a necessary party. [G.S. 49-12.1(a); *In re Papathanassiou*, 195 N.C. App. 278, 671 S.E.2d 572 (citing *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992)) (mother's husband is a necessary party unless he has previously been determined not to be the child's father), *review denied,* 363 N.C. 374, 678 S.E.2d 667 (2009).]
6. Effect of legitimation.
    a. Generally.
        i. An order entered pursuant to G.S. 49-10 or 49-12.1 imposes on the putative father all of the rights and obligations of a parent with respect to a child to the same extent as if the child had been born to the father and mother in wedlock. [G.S. 49-11; 49-12.1(d).]

ii. The clerk of superior court is required to send a certified copy of an order of legitimation to the State Registrar of Vital Statistics, who must amend the child's birth certificate to list the putative father as the child's father. [G.S. 49-13.] G.S. 49-13 also requires the registrar to change the surname of the child so that it will be the same as the surname of the father. In *Jones v. McDowell*, 53 N.C. App. 434, 281 S.E.2d 192 (1981), this part of G.S. 49-13 was found unconstitutional, but the statute has not been amended.

b. Effect on inheritance rights.

i. Legitimation allows the child to inherit under the Intestate Succession Act from the child's father as well as the mother.

(a) A child legitimated under G.S. 49-10 or 49-12.1 is entitled to take, by succession, inheritance, or distribution, real and personal property by, through, and from his or her father and mother as if the child had been born in lawful wedlock. [G.S. 49-11; 49-12.1(d).]

(b) A child legitimated under G.S. 49-10 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through, and from his or her father and mother and their heirs the same as if born in lawful wedlock. [G.S. 29-18.] Although G.S. 29-18 does not specifically mention G.S. 49-12.1, 49-12.1 is a later-adopted statute and 29-18 would apply to allow a child legitimated under 49-12.1 to inherit.

ii. Legitimation allows property of the child to pass intestate upon death.

(a) If a child legitimated under G.S. 49-10 or 49-12.1 dies intestate, his or her real and personal estate descends and is distributed according to the Intestate Succession Act as if the child had been born in lawful wedlock. [G.S. 49-11; 49-12.1(d).]

(b) The property of a child legitimated under G.S. 49-10 or in accordance with the applicable law of any other jurisdiction descends and is distributed as if the child had been born in lawful wedlock. [G.S. 29-18.] Although G.S. 29-18 does not specifically mention G.S. 49-12.1, 49-12.1 is a later-adopted statute and 29-18 would apply to property of a child legitimated under 49-12.1.

B. Juvenile Proceedings Involving Abuse, Neglect, and Dependency

1. At various stages in abuse, neglect, or dependency actions, the court must inquire as to whether paternity is an issue and make findings of any efforts taken to establish paternity. [Sara DePasquale & Jan S. Simmons, Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina ch. 5 (From Report through Pre-Adjudication in Abuse, Neglect, Dependency Cases), § 5.4.B.7 (discussing paternity and putative fathers) (UNC School of Government 2017). A free pdf version of this resource is available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/full_text_books/Complete%20ANDTPR%20Manual.pdf.

2. At each hearing involving the continued nonsecure custody of a juvenile who is alleged to be abused, neglected, or dependent, a district court judge must (1) inquire as to the

identity and location of any missing parent and whether paternity is at issue and (2) make findings with respect to the efforts that have been undertaken to establish paternity and locate a missing parent. [G.S. 7B-506(h)(1).]

3. G.S. 7B-506(h)(1) also allows a district court judge at the hearing on continued nonsecure custody to order specific efforts aimed at establishing paternity and determining the identity and location of a missing parent in a juvenile proceeding involving abuse, neglect, or dependency. Efforts may include ordering genetic paternity testing pursuant to G.S. 8-50.1(b1), ordering a party to initiate a separate civil action to determine the child's paternity pursuant to G.S. 49-14, or ordering a putative father to initiate a legitimation proceeding before the clerk of court.
4. At the initial dispositional hearing, a district court judge must (1) inquire as to the identity and location of any missing parent and whether paternity is at issue and (2) make findings of the efforts undertaken to establish paternity and locate and serve the missing parent. [G.S. 7B-901(b).] The court's order may provide for specific efforts in establishing paternity and in determining the identity and location of any missing parent. [G.S. 7B-901(b).]

C. Termination of Parental Rights Proceedings

1. The parental rights of an unknown putative father may be terminated without first determining his paternity of a child if appropriate efforts have been made to identify the putative father, notice of the proceeding has been published in the manner most likely to provide notice to the unknown putative father, and the putative father fails to file an answer in the proceeding. [G.S. 7B-1105 (requiring a preliminary hearing to ascertain the name or identity of an unknown parent and setting out procedures if the court is unable to do so).] No summons is required for a parent whose name or identity is unknown and who is served by publication as provided in G.S. 7B-1105. [G.S. 7B-1105(g), *added by* S.L. 2018-68, § 5.1, effective Oct. 1, 2018.]
2. The parental rights of a known putative father may be terminated without first determining his paternity of a child if he has been properly served, he is subject to the court's personal jurisdiction, and there is a sufficient ground for terminating his parental rights pursuant to G.S. 7B-1111.
    a. Grounds exist for terminating the parental rights of a father of a child born out of wedlock if, prior to the filing of a motion or petition to terminate parental rights, the father has not done any of the following:
        i. Filed an affidavit of paternity in a central registry maintained by the North Carolina Department of Health and Human Services;
        ii. Legitimated the child pursuant to G.S. 49-10, 49-12.1, or filed a petition for this specific purpose;
        iii. Legitimated the child by marrying the child's mother;
        iv. Provided substantial financial support or consistent care with respect to the child and mother;
            (a) Support of less than $1,000 over a three-year period was not "substantial" support sufficient to prevent termination of respondent's paternal rights. [*In re Hunt*, 127 N.C. App. 370, 489 S.E.2d 428 (1997) (applying an earlier version of the statute that provided grounds for terminating parental

rights).] Note that the termination of parental rights statute does not require the trial court to find that the father has the ability to pay. [Fathers and Paternity, 142.]

v. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding. [G.S. 7B-1111(a)(5), *amended by* S.L. 2013-129, § 35, effective Oct. 1, 2013.] Note that the statutory language "prior to the filing of a motion or petition to terminate parental rights", applicable to each ground in G.S. 7B-1111(a)(5), requires the petitioner, in this case the department of social services, to prove the lack of paternity or legitimacy as of the petition's filing date, not a month before the filing date. [*In re Harris,* 87 N.C. App. 179, 360 S.E.2d 485 (1987) (applying an earlier version of the statute).]

3. An order terminating the putative father's parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent arising from the parental relationship (except the child's right to inherit from the parent does not terminate until a final order of adoption is issued) [G.S. 7B-1112.]

4. For more on terminating the rights of an unknown parent, see Sara DePasquale & Jan S. Simmons, Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina ch. 9 (Termination of Parental Rights), § 9.6 (Hearing for Unknown Parent) (UNC School of Government 2017). A free pdf version of this resource is available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/full_text_books/Complete%20ANDTPR%20Manual.pdf.

D. Adoption Proceedings

1. Notice to putative father of adoption proceeding.

   a. A petitioner seeking to adopt a minor child generally must serve notice of the filing of the adoption petition on:

      i. A man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father of the child (regardless of whether the child's paternity has been legally established) and

      ii. Any biological or possible biological fathers who are unknown or whose whereabouts are unknown. [G.S. 48-2-401(c)(3).]

   b. The notice requirement in G.S. 48-2-401(c)(3) does not apply if:

      i. A presumed or putative father has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the child or

      ii. The presumed or putative father's parental rights have been legally terminated or he has been judicially determined not to be the father of the child. [G.S. 48-2-401(c)(3).]

2. A presumed or putative father's consent to the adoption of a minor child generally is required in a direct placement adoption if the presumed or putative father:

   a. Is or was married to the child's mother if the child was born during the marriage or within 280 days after the marriage is terminated or the parties have separated pursuant to a written separation agreement or an order of separation entered under G.S. Chapters 50 or 50B or a similar order of separation entered by a court in another jurisdiction; [G.S. 48-3-601(2)b.1.]

b. Legitimated the child before the date the adoption petition was filed under the law of any state; [G.S. 48-3-601(2)b.3.]

c. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the child and

i. Was obligated by written agreement or court order to support the child; [G.S. 48-3-601(2)b.4.I.] or

ii. Provided, in accordance with his financial means, reasonable and consistent payments for the support of the mother during or after the term of pregnancy, for the child, or for both, and regularly visited or communicated, or attempted to communicate or visit, with the mother during or after the term of pregnancy, with the child, or with both; [G.S. 48-3-601(2)b.4.II.] or

(a) Father's consent to adoption was not required when he failed to provide sufficient evidence to establish reasonable and consistent support payments before the adoption petition was filed; even if father's deposits into a home lockbox constituted "payments" under the statute, father's general bank statements and testimony that (1) the deposits were not "an exact amount each time," (2) the deposits were "just whatever [he] could afford here and there," and (3) he kept no records of the deposits, did not constitute an "objectively verifiable record" of reasonable and consistent payments. [*In re Adoption of C.H.M.*, 812 S.E.2d 804, 811 (N.C. 2018), *rev'g* 788 S.E.2d 594 (N.C. Ct. App. 2016). *See also In re Adoption of Byrd,* 354 N.C. 188, 552 S.E.2d 142 (2001) (consent of putative father not required because he only made attempts to support, or made offers of support, which were not sufficient for purposes of G.S. 48-3-601(2)b.4).]

iii. Married, or attempted to marry, by a marriage solemnized in apparent compliance with the law, although it was or could be declared invalid, the child's mother after the child's birth but before the child's placement for adoption or the mother's relinquishment; [G.S. 48-3-601(2)b.4.III.]

d. Received the child into his home and openly held the child out as his biological child before the date the adoption petition was filed; [G.S. 48-3-601(2)b.5.]

e. Has adopted the minor child. [G.S. 48-3-601(2)b.6.]

3. The consent of a presumed or putative father with respect to the adoption of a minor child (other than an adoptive father) is not required if his consent is not required under G.S. 48-3-601, discussed immediately above, or if:

a. He has been judicially determined not to be the child's father or

b. Another man has been judicially determined to be the child's father. [G.S. 48-3-603(a)(2).]

4. If a presumed or putative father's right to withhold consent to the adoption of a child depends on whether he is the child's father, a district court judge may order genetic paternity testing pursuant to G.S. 8-50.1(b1) and enter appropriate findings of fact and conclusions of law with respect to paternity in the pending adoption action.

5. For more on adoption, see *Adoption,* Bench Book, Vol. 1, Chapter 8.

E. Divorce, Child Support, and Child Custody Proceedings

1. Divorce.
   a. A judgment of divorce shall not cause any child after birth or begotten of the wife during coverture to be treated as a child born out of wedlock. [G.S. 50-11(b), *amended by* S.L. 2013-198, § 24, effective June 26, 2013.]
   b. A third party could not rely on a finding in a divorce decree that a child was born or conceived during the parties' marriage as a binding judicial determination that mother's husband is the child's father when paternity was not an issue actually litigated and necessary to the uncontested divorce action. [*Guilford Cty. ex rel. Gardner v. Davis,* 123 N.C. App. 527, 473 S.E.2d 640 (1996) (putative father could not rely on the divorce judgment as an adjudication of mother's husband as the biological father of the minor child as that judgment merely relied upon the presumption of legitimacy and paternity was not litigated).]
   c. A finding in a divorce decree that a child was born or conceived during the parties' marriage may, under certain circumstances, be a binding judicial determination with respect to the husband's paternity. [*See Rice v. Rice*, 147 N.C. App. 505, 555 S.E.2d 924 (2001) (divorce order, incorporating a separation agreement in which the parties admitted that three children were born of their marriage and which included provisions related to child custody and support, judicially established the rights and obligations of the parties and determined all issues of paternity); *Withrow v. Webb,* 53 N.C. App. 67, 280 S.E.2d 22 (1981) (where husband admitted in answer to wife's complaint that one child was born of their marriage and alleged in his complaint for divorce that one child was born of the marriage, and judgment of divorce found that one child was born of the parties' marriage and awarded husband visitation and ordered him to pay child support, husband was barred by res judicata from raising paternity issue five years later).]
   d. For more on divorce, see *Divorce and Annulment,* Bench Book, Vol. 1, Chapter 5.
2. Child support.
   a. A claim for custody, visitation, or support of a child born out of wedlock pursuant to G.S. 50-13.1 *et seq*. may be joined with a civil action to establish the child's paternity. [*See* G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013 (once paternity of a child born out of wedlock is established, the rights, duties, and obligations of child's mother and father for child's support and custody may be determined and enforced in the same manner as if the child were the legitimate child of the father and mother).]
   b. A presumed father of a legitimate child may raise the issue of his paternity of the child in a civil child support proceeding brought under G.S. 50-13.4 *et seq*. if his paternity of the child has not been previously established. [*See Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (defendant former husband was not barred from contesting paternity of a child born during the parties' marriage when the issue had not been litigated and he had never formally acknowledged paternity in the manner prescribed by G.S. 110-132).]
   c. A prior determination of paternity is a bar to raising the issue of paternity in a subsequent action for child support or for modification of child support. [*Heavner*

v. Heavner, 73 N.C. App. 331, 326 S.E.2d 78 (parentage already decided when former husband pled guilty in criminal nonsupport action under G.S. 14-322 and admitted paternity in his complaint for divorce; husband not entitled to court-ordered testing in mother's later action for custody and additional support), *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985).]

d. If paternity is at issue in a civil action for child support, the court shall, on motion of a party, order genetic paternity testing pursuant to G.S. 8-50.1(b1). [G.S. 8-50.1(b1).]

e. A judgment of paternity may not be reconsidered by the court in a contempt proceeding for failure to pay support pursuant to a voluntary support agreement [*Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985).] or in any proceeding related solely to support of a child. [*Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983).] Note that before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court. See Section IV.B, above.

f. Nonpaternity is not a valid defense in a child support enforcement proceeding when paternity has previously been decided.

i. A prior determination of paternity is itself a bar. [G.S. 52C-3-314; *Reid v. Dixon,* 136 N.C. App. 438, 524 S.E.2d 576 (2000) (when paternity had previously been established by Alaska legal proceeding based on father's admission of paternity, father could not later plead nonparentage as a defense in a Uniform Interstate Family Support Act enforcement proceeding brought in North Carolina).]

ii. A prior adjudication is res judicata in a later proceeding. [*Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978) (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on prior adjudication of paternity in Nevada divorce and support proceeding; Nevada court had in personam jurisdiction over defendant).] For more on nonpaternity as a defense in a child support proceeding, see *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2, Section I.G.4.

g. **NOTE:** G.S. 50-13.13(f) provides a procedure for relief from a child support order based on a finding of nonpaternity under certain circumstances. [G.S. 50-13.13(f), *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.] See Section II.Q.6, above.

h. For more on child support, see *Child Support,* Bench Book, Vol. 1, Chapter 3.

3. Child custody.

a. A claim for custody, visitation, or support of a child born out of wedlock pursuant to G.S. 50-13.1 *et seq*. may be joined with a civil action to establish the child's paternity. [*See* G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013 (once paternity of a child born out of wedlock is established, the rights, duties, and obligations of child's mother and father for child's support and custody may be determined and enforced in the same manner as if the child were the legitimate child of the father and mother).] **NOTE**: Because jurisdiction in child custody cases is determined by G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act, and that Act does not apply to paternity determinations, a court may have subject matter

jurisdiction to determine a child's paternity but not have subject matter jurisdiction to determine the child's custody. See *Child Custody,* Bench Book, Vol. 1, Chapter 4 for discussion of subject matter jurisdiction in custody matters.

b. In a child custody action involving a child's mother, her husband (or former husband), and a child born during their marriage, in which the mother challenges the paternity of her former husband, the mother cannot attempt to rebut the presumption that her former husband is the child's father *unless* "another man has formally acknowledged paternity . . . or has been adjudicated to be the father of the child." [*Jones v. Patience*, 121 N.C. App. 434, 439, 466 S.E.2d 720, 723, *appeal dismissed, review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). Limitation of *Jones* holding was recognized in *Ambrose v. Ambrose,* 140 N.C. App. 545, 548, 536 S.E.2d 855, 857 (2000) (noting that *Jones* is applicable only "in the narrow context of a custody dispute when the mother challenges the paternity of her former spouse").] See Section I.B.1.c, above, discussing *Jones*.

c. Evidence submitted by an alleged biological father of his paternity was properly considered in determining the best interests of the children in a custody action between mother and mother's husband. [*Surles v. Surles,* 113 N.C. App. 32, 437 S.E.2d 661 (1993).]

d. A finding in a 2002 custody order between unmarried parties that plaintiff was the biological father of the child was a judicial determination of paternity and was binding in a 2007 proceeding filed by mother for proof of paternity; trial court properly dismissed mother's motion for paternity testing. [*Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674 (2009) (mother had not appealed the custody order, had not sought relief from the order under G.S. 1A-1, Rule 60(b), and contested paternity only after losing custody), *rev'g per curiam for reasons stated in dissenting opinion in* 194 N.C. App. 787, 671 S.E.2d 347 (2009) (Jackson, J, concurring in part and dissenting in part).]

e. For more on custody, see *Child Custody,* Bench Book, Vol. 1, Chapter 4.

F. Other Legal Proceedings

1. Paternity may be determined in a declaratory judgment action brought to determine an individual's right to inherit property as the child of a decedent. [*See Batcheldor v. Boyd*, 119 N.C. App. 204, 458 S.E.2d 1 (child legitimized by parents' subsequent marriage was sole heir to his father's estate), *review denied,* 341 N.C. 418, 461 S.E.2d 753 (1995).]

2. Paternity may be determined by the North Carolina Industrial Commission in an administrative proceeding involving an individual's right to workers' compensation as the child of an injured worker. [*See Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783 (Industrial Commission has authority to determine the paternity of a child born out of wedlock for the limited purpose of establishing who is entitled to compensation under the Workers' Compensation Act), *appeal dismissed, review denied,* 304 N.C. 587, 289 S.E.2d 564 (1981).]

3. A husband who consents in writing to the heterologous artificial insemination of his wife is the legal father of the child born as a result of that technique. [G.S. 49A-1.] In heterologous artificial insemination, sperm are donated by a man other than the mother's husband.

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