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Chapter 10. Paternity (2014)

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Paternity

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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 at page 5.]

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 641 (8th ed. 2004) (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 763 (8th ed. 2004) (defining as *illegitimate* a child born out of lawful wedlock and never having been legitimated); *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (minor child was "born out of wedlock," although his mother was married to a man who was not the child's natural father).]

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. [*See* 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 at page 13.

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 res judicata and collateral estoppel effect of civil and criminal judgments involving paternity are discussed in sections II.K and L at pages 38 and 40 and in section V.E at page 63; *see also 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 pursuant to Rule 60(b)(1) and (3) brought outside the statutory time limit of one year even though DNA test showed defendant not the father); *Guilford County 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, 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), newly discovered evidence and fraud, as untimely even though DNA test showed defendant not the father).] **NOTE**: 2011 N.C. Sess. Laws 328, § 1, effective January 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 at page 47 and IV.B.5 at page 57.

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, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008) (in determining custody sought by a nonparent, court stating"[t]he sole means of creating the legal relationship of parent and child is…[adoption]"); *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 right 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 an express or implied

acknowledgment or assertion that he is the child's parent or his actions of paternity or his actions assuming the familial or social role as the child's parent. [*See Heatzig v. MacLean*, 191 N.C.App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008) (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 the "sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions)."] [*But see Chambers v. Chambers*, 43 N.C.App. 361, 258 S.E.2d 822 (1979), *citing Myers* (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 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 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) (citations omitted) (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).]

(1) This presumption applies if the child was:

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

(b) Conceived prior to the parties' marriage but born during the marriage. [*State v. Tedder*, 258 N.C. 64, 127 S.E.2d 786 *(*1962) (citations omitted) (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).]

(2) 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, *review denied*, 341 N.C. 418, 461 S.E.2d 753 (1995) (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).]

(3) 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*, _ N.C. App. __, 746 S.E.2d 22 (2013) (**unpublished**) (upholding denial 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 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 the obligation of support in writing as required by G.S. § 50-13.4(b)).]

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

(5) Absent an applicable statutory provision, courts generally presume that conception occurred 10 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 County 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. [*See* G.S. § 49-12.1(b) (presumption of legitimacy overcome by clear and convincing evidence by putative father in a legitimation proceeding); *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) (quoting statement in *Locklear* 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," "[h]owever, the presumption of legitimacy can be overcome by clear and convincing evidence"); *Gunter v. Gunter*, _ N.C. App. __, 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: 1991 N.C. Sess. Laws 667, § 2, changed the standard from that in *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985), which was proof beyond a reasonable doubt. This may include:

(1) Evidence of the 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, *aff'd per curiam*, 314 N.C. 660, 335 S.E.2d 897 (1985) (when scientific evidence demonstrated that husband was sterile when child was conceived, husband did not father child despite a blood test finding a probability of paternity of 95.98%).]

(2) Blood or genetic test results proving that mother's husband could not be the child's biological father. [*See Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972) (court allowed presumed father to amend answer to delete admission of paternity and permitted the use of blood tests under G.S. § 8-50.1 to rebut the marital presumption in a civil action); *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 at page 24.

(3) Evidence of the husband's nonaccess during the time of conception. [*See 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 County ex rel. Manning v. Green*, 53 N.C.App. 26, 279 S.E.2d 901 (1981), *citing Ray*.]

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

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

(d) Evidence that the husband and his wife were not living together and did not have sexual relations during the time the child was conceived sufficient to rebut the presumption of legitimacy. [*Wake County ex rel. Manning v. Green*, 53 N.C.App. 26, 279 S.E.2d 901 (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. [*See* G.S. § 8-57.2; *see Wake County 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 (1992), *reversing per curiam,* 105 N.C.App. 470, 414 S.E.2d 81 (1992) (supreme court adopting dissent in court of appeals opinion) (evidence of mother's' reputation should not have been admitted as it had questionable probative value, did not tend to prove or disprove the issue of paternity and was highly prejudicial).]

(4) 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.

(1) 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 child's father. [*Jones v. Patience*, 121 N.C.App. 434, 466 S.E.2d 720, *appeal dismissed, review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (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, absent a determination that another man is the father of the child, would illegitimate the child in violation of the public policy of this State); *see Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (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.

(1) The husband (or former husband) of a mother who gave birth to a child during the course of their marriage is not barred from attempting to rebut the legal presumption that he is the child's father. [*Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (2000) (father of child born during the marriage 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).]

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 paternity. [G.S. § 8-50.1(b1)(4); *see* section II.I at page 24.

b) This presumption may be rebutted 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 County Dep't of Social Services ex rel. Williams v. Beamon*, 126 N.C.App. 536, 485 S.E.2d 851, *review denied*, 493 S.E.2d 655 (1997) (where court held that a putative father's testimony that he did not know the mother, that he did not have sexual relations with her, nor

recall meeting her, was sufficient to rebut the presumption of paternity created by the 99.96% probability of paternity test result).]

c) If blood or genetic testing indicates a probability of paternity 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)]

d) The court of appeals has held that a respondent in a TPR proceeding must be given an opportunity to rebut the presumptions created by G.S. § 8-50.1(b1), 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) (trial court erred when it refused respondent an opportunity to rebut the statutory presumption of nonpaternity arising from test results that showed a 0% probability that respondent was the father, *citing Beamon*, above, as an example of a case in which testimony overcame test results).]

3. There is a rebuttable presumption of paternity arising from a birth certificate that names an individual as the father of a child born to an unmarried mother. [*See In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012).]

4. There is no presumption of paternity from execution after December 13, 2005, of an acknowledgment of paternity under G.S. § 130-101(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 acknowledgement of paternity executed pursuant to G.S. § 130A-101(f) before December 13, 2005, creates a presumption that the declaring father is the natural father of the child of the unmarried mother.

c) The language creating a presumption of paternity was deleted by 2005 N.C. Sess. Laws 389, § 4, so that an unrescinded acknowledgement of paternity executed pursuant to G.S. § 130A-101(f) on or after December 13, 2005, does not give rise to a presumption of paternity. [*Cf. In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a proceeding to terminate respondent's rights, holding that being named on a birth certificate as the father of a child born to an unmarried mother created a rebuttable presumption of paternity, reasoning that respondent could not have been listed as the "father" of the children at issue unless his name was placed on their birth certificates pursuant to either G.S. § 130A-101(f) (affidavit of paternity) or G.S. § 130A-118(b) (amendment of a birth certificate based upon a judicial determination of parentage)).]

d) If paternity is properly placed in issue, a certified copy of an affidavit of 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)]

e) The execution and filing with the registrar of an affidavit of paternity executed pursuant to G.S. § 130A-101(f) does not affect the father's or 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)]

f) If a voluntary affidavit of paternity executed under G.S. § 130A-101(f) is not rescinded by either parent or set aside by the court pursuant to G.S. § 110-132, it has the legal effect of a judgment establishing paternity but only for the purpose of establishing the father's obligation to pay child support. [G.S. § 110-132(a)]

5. There is no presumption of paternity from execution of an affidavit of paternity under G.S. § 110-132.

a) The execution of a voluntary paternity affidavit pursuant to G.S. § 110-132 constitutes an *admission* of paternity and, if not rescinded, has the same legal effect as a judgment establishing paternity for the purpose of the father's obligation to pay child support. [G.S. § 110-132(a)]

b) It does not, strictly speaking, create a legal *presumption* that the man who executed the affidavit is the child's father.

c) If a voluntary affidavit of paternity executed under G.S. § 110-132 is not rescinded by either parent or set aside by the court pursuant to G.S. § 110-132, it has the legal effect of a judgment establishing paternity for the purpose of establishing the father's obligation to pay child support. [G.S. § 110-132(a)]

C. Name appearing on birth certificate.

1. 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, 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 2 below. [G.S. § 130A-101(e), *amended by* 2009 N.C. Sess. Laws 285, § 1, effective July 10, 2009, and applicable to birth certificates of children born on or after that date.]

2. The name of the putative father is entered as father 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 the child's mother, mother's husband and putative father complete an affidavit acknowledging paternity that contains all the following:

a) Sworn statements by the mother, the putative father and the mother's husband as set out in the statute, as well as social security numbers for each;

b) 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

c) DNA test results that confirm the paternity of the putative father. [G.S. § 130A-101(e), *amended by* 2009 N.C. Sess. Laws 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 acknowledgment has on parental rights and responsibilities.

3. There is a rebuttable presumption of paternity arising from a birth certificate that names an individual as the father of a child born to an unmarried mother. [*See In re J.K.C.,* 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a proceeding to terminate parental rights, a birth certificate, amended to add the respondent's name as father of children born to an unmarried mother, created a rebuttable presumption that respondent had in fact established paternity of the children either judicially or by affidavit as required by G.S. § 7B–1111(a)(5)(a); procedures in Chapter 130A require a person to take the legal steps necessary to establish paternity before he may be listed on the birth certificate as the father of a child born to an unmarried mother); *cf. Gunter v. Gunter,* _ N.C. App. __, 746 S.E.2d 22 (2013) **(unpublished)** (presumption in *J.K.C.* not applicable when parties were married when child born and G.S. § 130A-101(e) required husband to be listed on the birth certificate as father) (appearing to apply version of G.S. § 130A-101(e) in effect at time of child's birth in 1995 that required husband's name to be entered as father on the birth certificate when child born during marriage).]

4. Prior to the 2009 amendment, if the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband was entered on the birth certificate as the father of the child, unless paternity had been otherwise determined by a court of competent jurisdiction, in which case the name of the father as determined by the court was entered. [*See* G.S. § 130A-101(e), before modification by 2009 N.C. Sess. Laws 285, § 1, effective July 10, 2009.]

5. 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).] 2009 N.C. Sess. Laws 285, § 1, effective July 10, 2009, did not change the surname provision.

6. Amendment of birth certificate is governed by G.S. § 130A-118. That statute allows the State Registrar 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)]

D. 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 at page 59; and

3. A special proceeding to legitimate a child pursuant to G.S. § 49-10 (when mother not married) or pursuant to G.S. § 49-12.1 (when mother married to a man other than the child's biological father), discussed in section VI.A at page 67; and

4. By the subsequent marriage of the mother and reputed father pursuant to G.S. § 49-12.

a) The word "reputed" rather than "putative" in G.S. § 49-12 was used 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, 61 S.E.2d 711 (1950), *citing Bowman v. Howard*, below; *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 v. Howard*, 182 N.C. 662, 110 S.E. 98 (1921) (rejecting contention that "reputed father" means "actual father").]

b) Where the parties stipulated that the 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, noting that where parties lived together and represented themselves to be husband and wife to the general public, G.S. § 49-12 not applicable).]

E. Paternity of a child born out of wedlock can be acknowledged for support purposes in the following ways:

1. By voluntary acknowledgment of parentage pursuant to G.S. § 110-132, subject to 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 at page 52.

2. By affidavit (completed at the hospital) pursuant to G. S. § 130A-101(f), subject to 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 at page 58.

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 provide the basis or means of establishing the identity of the father of a child in order to allow the courts to impose an obligation of support. [*See Smith v. Price,* 74 N.C.App. 413, 328 S.E.2d 811 (1985), *aff'd in part, rev'd in part on other grounds,* 315 N.C. 523, 340 S.E.2d 408 (1986), *citing Cogdell*; *Lenoir County ex rel. Cogdell v. Johnson,* 46 N.C.App. 182, 264 S.E.2d 816 (1980).]

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, 334 S.E.2d 46 (1985) (minor child was "born out of wedlock" although his mother was married to a man who was not the child's natural father); *Smith v. Bumgarner*, 115 N.C.App. 149, 443 S.E.2d 744 (1994), *citing Locklear* and *Wright* (a child born to a married woman but begotten by one other than her husband is a child "born out of wedlock"); *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) (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 paternity of a child who has been previously legitimated. [*Lewis v. Stitt*, 86 N.C.App. 103, 356 S.E.2d 398 (1987) (noting 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 under G.S. § 49-14 for paternity).]

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. [G.S. §§ 7A-242, 7A-244; *see also Smith v. Barbour,* 154 N.C.App. 402, 410 n.3, 571 S.E.2d 872 (2002), *cert. denied,* 599 S.E.2d 408 (2004) (citation omitted) (with respect to the issue of paternity, the appropriate court is the district court).] 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 at page 67.

2. A district court in North Carolina may serve as an initiating tribunal or as a responding tribunal in a proceeding brought pursuant to UIFSA or a law that is substantially similar to UIFSA or URESA to establish the paternity of a child born out of wedlock [G.S. § 52C-7-701(a)], regardless of whether the proceeding also seeks support for the child. [*See* section III.B at page 50 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 2005 N.C. Sess. Laws 389, § 3, applicable to actions filed on or after December 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), *cert. denied*, 599 S.E.2d 408 (2004) (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).]

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 Co. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413, *reh'g denied*, 319 N.C. 412, 354 S.E.2d 713, *cert. denied*, 484 U.S. 826 (1987) (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 the determination of paternity especially important to tribal self-governance).]

a) 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.

(1) District court had concurrent jurisdiction with the tribal court for action to recover AFDC payments. [*Jackson Co. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413, *reh'g denied*, 319 N.C. 412, 354 S.E.2d 713, *cert. denied*, 484 U.S. 826, 108 S.Ct. 93, 98 L.E.2d 54 (1987) (tribe's interest in self-governance not significantly affected; no prior action for the same claim filed in tribal court).]

(2) 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 County ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (claim for AFDC payments based on defendant's duty to support his children, jurisdiction of which had been retained by the tribal court); *see also 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 nonIndian mother for child in custody of Indian father 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) (citations omitted) (alimony 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), *aff'd*, 292 N.C. 192, 232 S.E.2d 687 (1977) (North Carolina not required to give full faith and credit to the determination of a Hawaii court that defendant was the father of plaintiff's child since the Hawaii court never obtained personal jurisdiction over North Carolina defendant).]

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* II.C.3.a(3) 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:

(1) The court must first determine whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction, i.e., "long-arm jurisdiction."

(2) 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) (citation omitted); *Sherlock v. Sherlock*, 143 N.C.App. 300, 545 S.E.2d 757 (2001) (citations omitted).]

b) Because North Carolina's long-arm statute extends personal jurisdiction to the limits permitted by due process, in some appellate opinions, the two-step inquiry is 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) (citation omitted); *Sherlock v. Sherlock*, 143 N.C.App. 300, 545 S.E.2d 757 (2001) (citations omitted).]

c) Factors to consider to determine whether a defendant has sufficient minimum contacts with North Carolina.

(1) Quantity of contacts with the state;

(2) The nature and quality of those contacts;

(3) The source and connection of the cause of action to the contacts;

(4) The interest of North Carolina in litigating the matter;

(5) The convenience of the parties; and

(6) The interests of and fairness to the parties. [*Hamilton v. Johnson*, __ N.C.App. __, 747 S.E.2d 158 (2013) (citation omitted) (first 5 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).]

3. Statutory basis for personal jurisdiction.

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

(1) If the defendant is personally served with process within the state [G.S. § 52C-2-201(1); G.S. § 1-75.4(1)a];

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

(3) If the defendant submits to jurisdiction by consent, 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(2); G.S. § 1-75.7(1) (general appearance)];

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

(5) If the defendant resided in North Carolina with the child [G.S. § 52C-2-201(3)];

(6) If the defendant resided in North Carolina and provided prenatal expenses or support for the child [G.S. § 52C-2-201(4)];

(7) If the child resides in North Carolina as the result of the defendant's acts or directives [G.S. § 52C-2-201(5)];

(8) If the child may have been conceived as a result of sexual intercourse by the defendant within North Carolina [G.S. § 52C-2-201(6); G.S. § 49-17];

(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 4(d) on the next page.

(9) If the defendant asserted paternity in an affidavit filed with the clerk [G.S. § 52C-2-201(7)]; or

(10) 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(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. [Marital relationship basis for exercising jurisdiction applicable to "any action under Chapter 50".]

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) (citations omitted).]

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, 303 S.E.2d 564 (1983) (actions indicate 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) It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe v. Washington*, 326 U.S. 310 (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); *Jenkins v. Jenkins*, 89 N.C.App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant served with process while temporarily in North Carolina for a brief visit related to his employment).]

d) 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, 381 S.E.2d 853 (1989) (acknowledging "minimum contacts" language in statute is "misleading and confusing").]

e) For factors that have proven useful in an analysis of "minimum contacts" with a jurisdiction, *see* II.C.2(c) at page 17.

f) 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.

g) 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 (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, 566 S.E.2d 707 (2002), *citing Shamley v. Shamley,* 117 N.C.App. 175, 455 S.E.2d 435 (1994).]

D. Venue.

1. Since G.S. § 49-14 does not address venue, G.S. § 1-82 provides that the proper venue for a civil action to establish paternity is any of the following:

a) The county in which any plaintiff resides;

b) The county in which the defendant resides.

2. Transfer of venue.

a) If a civil action to establish paternity is brought in a county that is not a proper venue, the court may, upon timely request of a party, transfer venue to a county that is a proper venue. [G.S. § 1-83(1)]

(1) The provision in G.S. § 1-83 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. [*Miller v. Miller*, 38 N.C.App. 95, 247 S.E.2d 278 (1978) (citations omitted) (divorce action).]

(2) When an action is instituted in the wrong county, the court should, upon apt motion, remove the action, not dismiss it. [*Coats v. Sampson County Memorial Hospital*, 264 N.C. 332, 141 S.E.2d 490 (1965) (citations omitted).]

b) Even if a civil action to establish paternity is brought in a proper county, upon request of a party, the court may, in its discretion, grant a change of venue if the ends of justice and the convenience of witnesses would be promoted by a change of venue. [G.S. § 1-83(2)]

3. Time for filing request for transfer of venue.

a) Objection to venue based on filing in improper county must be raised "before the time of answering expires" [G.S. § 1-83] or before pleading is a further pleading is permitted. [G.S. § 1A-1, Rule 12(b)(3)]

b) Motions for change of venue based on convenience of witnesses pursuant to G.S. § 1-83(2) are addressed to the discretion of the judge and cannot be considered by the trial court until after pleadings are complete. [*Thompson v. Horrell,* 272 N.C. 503, 158 S.E.2d 633 (1968); *Smith v. Barbour*, 154 N.C.App. 402, 571 S.E.2d 872 (2002), *cert. denied*, 599 S.E.2d 408 (2004) (citation omitted) (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).]

4. Waiver of objection to improper venue.

a) Venue requirements are *not* jurisdictional and may be waived by express or implied consent. [*Miller v. Miller*, 38 N.C.App. 95, 247 S.E.2d 278 (1978) (citations omitted) (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 waived when included in an untimely answer); *Brooks v. Brooks*, 107 N.C.App. 44, 418 S.E.2d 534 (1992) (custody and support modification action filed in improper county, venue issue waived because not raised either in a pre-answer motion or in the answer; oral motion at trial after pleadings complete 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 objection is not timely, the court may enter a valid judgment determining paternity if it has subject matter and personal jurisdiction.

E. Parties.

1. A civil action to determine the paternity of a child born out of wedlock may be brought by:

a) The child's [putative] father;

b) The child's mother or the mother's personal representative;

c) The child (through the child's guardian or guardian ad litem) or the child's personal representative; or

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; or

e) A child support enforcement (IV-D) agency on behalf of the child, the child's mother or the child's personal representative. [G.S. § 49-16; 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); G.S. § 110-130.1(a)]

(1) In an action brought by IV-D pursuant to Article 9 of 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.

2. If a civil action to establish paternity is brought by the child or 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); G.S. § 1A-1, Rule 4(j)(2)(a); *see* section 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); G.S. § 1A-1, Rule 4(j)(2)(a)]

4. Only those 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 child support enforcement (IV-D) agency to bring an action for paternity, considered. The court's conclusion in *Stockton*, that only those 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 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).]

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 in wedlock:

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).]

b) When a judgment regarding the husband's paternity 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).]

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 at page 67.

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; or

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 County ex rel. Cogdell v. Johnson*, 46 N.C.App. 182, 264 S.E.2d 816 (1980) (equal protection violation since no similar limitation for a support action on behalf of a legitimate child).]

G. Pleading and procedure.

1. Except as otherwise provided, the Rules of Civil Procedure govern civil actions to establish the paternity of a child born out of wedlock. [*See* 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 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 2005 N.C. Sess. Laws 389, § 3, applicable to actions filed on or after December 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 if necessary to protect the rights of the parties or the public interest. [G.S. § 49-14(e)]

H. Right to counsel.

1. An indigent defendant putative father 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 County ex rel. Carrington v. Townes,* 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied,* 459 U.S. 1113 (1983) (necessary menace to personal liberty clearly absent as there is no immediate threat of imprisonment in the initial civil paternity action itself).]

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 the trial court 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 County ex rel. Carrington v. Townes,* 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied,* 459 U.S. 1113 (1983) (when record 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, including his unemployment and lack of education and training, case remanded).]

a) The trial judge is to determine, in the first instance, what true fairness requires, in light of all of the circumstances.

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.]

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 that does not present an immediate threat to personal liberty. [*Wake County ex rel. Carrington v. Townes,* 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied,* 459 U.S. 1113 (1983), *citing Lassiter v. Dep't of Social Services,* 452 U.S. 18 (1981) and *Matthews v. Eldridge,* 424 U.S. 319 (1976).]

I. Genetic testing to determine paternity.

1. Generally.

a) Genetic paternity testing may (a) prove that the man is not the child's biological father or (b) 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.)

(1) 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% prior, nongenetic probability of paternity. [*See Brown v. Smith*, 137 N.C.App. 160, 526 S.E.2d 686 (2000) (rejecting defendant's argument that a prior probability of 0, instead of .5, should have been used when there was expert testimony that defendant's paternity was a factual possibility); *see also 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 HLA tissue typing test); *Cole v. Cole*, 74 N.C.App. 247, 328 S.E.2d 446, *aff'd per curiam*, 314 N.C. 660, 335 S.E.2d 897 (1985) (discussing how probability of paternity is calculated).]

(2) "Prior probability," in a paternity testing context, is a numerical representation of the nature and value of the nongenetic evidence. [*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).]

(3) The prior probability value, typically expressed as a number between 0 and 1, is used in the conversion of the combined paternity index into the probability of paternity. The number 0 indicates that paternity is factually impossible, while 1 indicates that paternity is factually certain. A neutral assessment of the nongenetic 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 0 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)]

(1) In a 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).]

(2) 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, *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (citations omitted) (father pled guilty in criminal nonsupport action and admitted paternity in divorce complaint; guilty plea was evidentiary admission of paternity); *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).]

(3) 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, G.S. § 8C-1, Rules 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.

(1) Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage and was entitled to testing because paternity had not been litigated and because defendant 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).] [*Cf. Jones v. Patience*, 121 N.C.App. 434, 466 S.E.2d 720, *appeal dismissed, review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (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 child's

father).] Limitation of holding recognized in *Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (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.

(1) Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage because the issue had not been litigated and because defendant 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).]

d) **NOTE**: 2011 N.C. Sess. Laws 328, § 1, effective January 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 at page 47 and IV.B.5 at page 57.

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

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

(1) Alleged father's paternity was established judicially by 2002 custody order finding that the plaintiff and defendant "are the biological father (Plaintiff) and mother (Defendant) of the minor child." Trial court properly dismissed mother's 2007 motion for paternity testing. [*Helms v. Landry*, 363 N.C. 738, 686 S.E.2d 674 (2009), *adopting per curiam dissenting opinion in* 194 N.C.App. 787, 671 S.E.2d 347 (Jackson, J, concurring in part and dissenting in part) (unmarried parties) (mother had not appealed the custody order, nor had she sought relief from the order under Rule 60(b), and contested paternity only after losing custody).]

(2) Trial court erred in ordering the parties to submit to DNA or gene testing when defendant judicially determined in a previous action to be the father of the minor child based on test results showing a 99.99% probability of paternity; prior determination res

judicata. [*State ex rel. Hill v. Manning*, 110 N.C.App. 770, 431 S.E.2d 207 (1993).]

(3) 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 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**).]

(4) 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 determined all issues of paternity; denial of former husband's request for paternity testing affirmed. [*Rice v. Rice*, 147 N.C.App. 505, 555 S.E.2d 924 (2001).]

(5) New York paternity determination 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 paternity determination by another state).]

(6) A default judgment entered against the putative father 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) (citations omitted) (father's motions for relief from default judgment denied).] For a case setting aside a default judgment of paternity, *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 App. U.S.C.A. § 500 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.

(7) 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 County ex rel. McNeill v. Stevens*, 101 N.C.App. 719, 400 S.E.2d 776 (1991), *citing Holloway*; *see also Person County ex rel. Lester v. Holloway*, 74 N.C.App. 734, 329 S.E.2d 713 (1985) (when court entered orders of paternity and for support pursuant to mother's affirmation of

paternity and 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.

(1) Where father admitted in 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 affirmed. [*Rice v. Rice*, 147 N.C.App. 505, 555 S.E.2d 924 (2001).]

(2) 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, *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (citations omitted) (father's guilty plea in criminal nonsupport action was evidentiary admission of paternity); *but see Guilford County ex rel. Gardner v. Davis*, 123 N.C.App. 527, 473 S.E.2d 640 (1996) (parentage of child not an issue actually litigated 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 Rule 60(b) motion to set aside an order of paternity.

(1) A party must obtain relief from an acknowledgment of paternity and voluntary support agreement pursuant to a trial court's ruling on a 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).]

(2) 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).]

(3) For more on setting aside a paternity judgment pursuant to Rule 60(b), *see* II.P at page 46.

(4) **NOTE**: 2011 N.C. Sess. Laws 328, § 1, effective January 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 at page 47 and IV.B.5 at page 57.

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.

(1) 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 (husband) to submit to a blood test to determine the parentage of a child born during the marriage of the husband and mother. [*Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996) *reversing per curiam*, 120 N.C.App. 1, 461 S.E.2d 369 (1995) (supreme court adopting dissent in court of appeals opinion); *see Jeffries v. Moore*, 148 N.C.App. 364, 559 S.E.2d 217 (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 N.C.G.S. § 8-50.1 - as the statute read when the action originated").]

(2) Note: G.S. § 8-50.1(b1), requiring testing of mother, child and alleged father defendant [and not 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 to adopt laws or procedures requiring the genetic testing, upon the request of a party, of the child and *all* parties in a paternity or child support proceeding (including a mother's husband when the husband is the child's presumed father) and the requesting party makes a sworn statement setting forth facts establishing a reasonable possibility that a party 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 (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 civil paternity actions 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 the 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 County 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 10 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.

(1) When mother's husband asked for paternity testing and 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 father's testing completed, father'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 County ex rel. Kenworthy v. Khatod,* 125 N.C.App. 131, 479 S.E.2d 270 (1997).]

(2) When chain of custody reports were not verified as required by the statute, the reports were not admissible under G.S. § 8-50.1(b1). [*Rockingham County Dep't of Social Services 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:

(1) 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 paternity of the child is at least 97%. [G.S. § 8-50.1(b1)(4); *see Nash County Dep't of Social Services ex rel. Williams v. Beamon*, 126 N.C.App. 536, 485 S.E.2d 851, *review denied*, 493 S.E.2d 655 (1997) (where court held that a putative father's testimony that he did not know the mother, that he did not have sexual relations with her, nor recall meeting her, was sufficient to rebut the presumption of paternity created by the 99.96% probability of paternity test result).]

(2) Not the child's father if all of the genetic test results indicate that the probability of his paternity of the child is less than 85%. [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 the 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 TPR 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% 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:

(1) The results of two or more genetic tests are inconsistent or experts disagree in their findings or conclusions based on genetic testing; or

(2) The test results do not exclude the putative father and the probability of his paternity is between 85% and 97%. [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 County ex rel. Brooks v. Davis*, 163 N.C.App. 64, 592 S.E.2d 225 (2004), *citing Khatod*; *Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997); *Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992).]

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, 421 S.E.2d 784 (1992) (citations omitted).]

c) The chain of custody requirement in *Lombroia* can be met:

(1) 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, 421 S.E.2d 784 (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).]

(2) 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 County ex rel. Brooks v. Davis*, 163 N.C.App. 64, 592 S.E.2d 225 (2004) (citations omitted) (evidence not sufficient to establish chain of custody for samples from putative father and child when unverified client authorization forms were only evidence that samples were from those parties and there was no testimony from person who collected those samples; evidence not sufficient to establish chain of custody for sample from mother when no testimony or affidavit from 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 10 days prior to trial.

b) In criminal proceedings, G.S. § 8-50.1(a) provides that test results must be offered by a duly qualified, 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*, 129 S.Ct. 2527 (2009). For

more on this case, *see Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford*, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/melendez_diaz.pdf. For cases considering whether testimony of a substitute analyst violates a defendant's confrontation clause rights as set out in *Crawford*, *see* Criminal Case Compendium available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Criminal%20Case%20Compendium%20November%202008%20to%20Present%20-%20April%201%202014.pdf.

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), *review denied*, 335 N.C. 766, 442 S.E.2d 508, 509 (1994) (citations omitted) (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); *Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (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, *rev'd per curiam on other grounds*, 332 N.C. 654, 422 S.E.2d 691 (1992) (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).]

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 (2002) (Greene, J., concurring) (discussing 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) If testing is ordered pursuant to Rule 35 rather than pursuant to G.S. § 8-50.1(b1), it is not clear whether the presumptions regarding paternity provided by G.S. § 8-50.1(b1) will apply.

10. Testing in a IV-D case.

a) A IV-D agency may order testing by administrative subpoena.

(1) In a civil action to establish paternity brought by a child support enforcement (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)]

(2) The subpoena must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 110-132.2(a)]

(3) A person who is subpoenaed may contest the subpoena within 15 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)]

(4) The court must hold a hearing and make a determination within 30 days 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)]

(5) A party may contest the results of a 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)]

(6) The results of genetic 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 at page 24) do not apply with respect to genetic paternity tests conducted pursuant to an administrative subpoena issued under G.S. § 110-132.2. [*See Catawba County 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

are clear, cogent, and convincing evidence of paternity if they indicate at least a 97% probability of paternity. [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 October 1, 1993, G.S. § 49-14 required the plaintiff to prove paternity beyond a reasonable doubt. [*See* 1993 N.C. Sess. Laws 333, § 3.] NOTE: According to N.C.P.I. Civil 815.75 Child Born Out of Wedlock – Issue of Paternity in Civil Action, 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 County Dep't of Social Services ex rel. Williams v. Beamon*, 126 N.C.App. 536, 485 S.E.2d 851 (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, its probative value outweighs the risk of unfair prejudice and 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 (1992), *reversing per curiam,* 105 N.C.App. 470, 414 S.E.2d 81 (1992) (supreme court adopting dissent in court of appeals opinion) (evidence should be of a specific and identifiable act at a certain time and must be more than a "broadside attack" on the mother's character); G.S. § 8C-1, Rule 403.]

b) Testimony regarding the mother's reputation for promiscuity, however, is generally inadmissible. [*See State ex rel. Williams v. Coppedge*, 332 N.C. 654, 422 S.E.2d 691 (1992), *reversing per curiam,* 105 N.C.App. 470, 414 S.E.2d 81 (1992) (supreme court adopting dissent in court of appeals opinion) (evidence of mother's reputation should not have been admitted as it had questionable probative value, did not tend to prove or disprove the issue of paternity and was highly prejudicial).]

4. Evidence to rebut presumption of legitimacy.

a) *See* discussion at section I.B.1.b on page 6 of types of evidence that may be used to rebut the presumption that the 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.

(1) 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 at page 24.

(2) 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 disclosure 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 matter regarding the child's paternity, including nonaccess by the mother's husband. [G.S. § 8-57.2; *see Wake County 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, *appeal dismissed, review denied*, 304 N.C. 587, 289 S.E.2d 564 (1981) (recognizing G.S. 8-57.2 but evidence of nonaccess provided by third parties).]

d) Courts have held that a judgment finding that the mother's husband is *not* the father of a child born during their marriage was not admissible as evidence against the child's 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) (citation omitted) (putative father defendant was not a party to the Florida action which found that plaintiff's husband was not the natural father of the child; putative father could not be bound by the findings of that judgment); *see also Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997) (results of tests that excluded mother's husband as father not admissible 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 acknowledging paternity executed by a child's mother and putative father pursuant to G.S. § 110-132 or G.S. § 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. [*See* G.S. § 110-132(a)

(affidavit constitutes an admission of paternity); G.S. § 130A-101(f) (certified copy is admissible in any action to establish paternity).] NOTE: There is a rebuttable presumption of paternity arising from a birth certificate that names an individual as the father of a child born to an unmarried mother. [*See In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012) (in a proceeding to terminate parental rights, a birth certificate, amended to add the respondent's name as father of children born to an unmarried mother, created a rebuttable presumption that respondent had in fact established paternity of the children either judicially or by affidavit as required by G.S. § 7B–1111(a)(5)(a); procedures in Chapter 130A require a person to take the legal steps necessary to establish paternity before he may be listed on the birth certificate as the father of a child born to an unmarried mother).]

6. A birth certificate that does not list the name of the father of a child born out of wedlock is not relevant with respect to a putative father's paternity of the child. [*See State v. McInnis*, 102 N.C.App. 338, 401 S.E.2d 774, *review denied,* 329 N.C. 274, 407 S.E.2d 848 (1991) (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).]

7. Genetic test results, if otherwise admissible, are competent evidence to exclude or establish paternity. *See* section II.I at page 24.

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 County ex rel. Gardner v. Davis*, 123 N.C.App. 527, 473 S.E.2d 640 (1996); *see* 3 Lee's North Carolina Family Law § 16.18b (5th Ed. 2002).]

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) (citation omitted).]

d) For collateral estoppel to apply to bar relitigation in a subsequent nonidentical action involving the same parties or their privies:

(1) The issues to be concluded must be the same as those involved in the prior action;

(2) In the prior action, the issues must have been raised and actually litigated;

(3) The issues must have been material and relevant to the disposition of the prior action; and

(4) 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) (citation omitted) (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 50B proceeding).]

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.

(1) 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 paternity and child's paternity was not an issue actually litigated and necessary to the divorce action. [*Guilford County 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, other than the presumption relating to a child born during a marriage).]

(2) For more on effect of a paternity finding in a divorce decree, *see* section VI.E.1 at page 73.

b) Privity requirement.

(1) It can be argued that *any* plaintiff who brings a civil paternity action against a putative father does so on behalf of the child whose paternity is at issue and that the plaintiff is asserting the child's legal rights or legal rights that are derivative of the child's legal rights. If so, a plaintiff in a pending civil action to establish the child's paternity generally should be considered in privity with a nominally different plaintiff who brought a prior civil action to establish the child's paternity as long as the plaintiff's interest was adequately represented in the prior proceeding.

(2) Appellate courts in North Carolina, however, generally have been reluctant to find privity between different plaintiffs in successive civil actions to establish a child's paternity. [*See Devane v. Chancellor*, 120 N.C.App. 636, 463 S.E.2d 293 (1995), *review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996) (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); *Settle 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).]

(3) For reluctance to find privity in the res judicata context, *see* section II.L.2.c at page 41.

3. For defense of collateral estoppel in a criminal nonsupport proceeding, *see* section V.E. at page 63.

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 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) (citations omitted).]

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 County ex rel. Hedrick v. Whitener*, 100 N.C.App. 70, 394 S.E.2d 263 (1990) (citation omitted).]

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) (citation omitted).]

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.

(1) A 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 properly denied; would be illogical for the consent order and judgment to operate as res judicata for husband's child support and visitation rights, and not for issues of paternity).]

(2) Where husband admitted in answer to wife's complaint that one child born of marriage, husband alleged in his complaint for divorce that one child born of marriage, and judgment of divorce found one child born of 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 Holland*; *see also 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).]

b) Putative father not a party to action between mother and her husband.

(1) A judgment finding that the husband of a child's mother 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 the putative father's 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.

(1) As noted in the section II.K.2.b at page 39 in the collateral estoppel context, appellate courts in North Carolina generally have been reluctant to find privity between different plaintiffs in successive civil actions to establish a child's paternity.

(2) 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. at page 63.

M. Other defenses.

1. Statute of limitations.

a) A defendant may plead the statute of limitations (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) as an affirmative defense.

b) *See* section II.F at page 23.

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 the putative father. [*Cole v. Cole*, 74 N.C.App. 247, 328 S.E.2d 446, *aff'd per curiam*, 314 N.C. 660, 335 S.E.2d 897 (1985) (when scientific evidence demonstrated that husband was sterile when child was conceived, husband did not father child despite a blood test finding a probability of paternity of 95.98%).]

b) *See* section I.B.1.b at page 6.

3. Genetic paternity tests that exclude paternity.

a) Court-ordered genetic paternity test results that conclusively exclude the putative father's paternity, if valid and properly admitted as evidence, are an absolute defense in a civil paternity action against the putative father.

b) *See* section II.I.6 at page 32.

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 at page 5.

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. [*See Smith v. Price*, 74 N.C.App. 413, 328 S.E.2d 811 (1985), *aff'd in part, rev'd in part on other grounds*, 315 N.C. 523, 340 S.E.2d 408 (1986) (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 as a counterclaim"; 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).]

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 at page 47. For fraud as a ground for rescinding an affidavit of parentage, *see* section IV.B.5 at page 57.

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, *review denied*, 285 N.C. 235, 204 S.E.2d 25 (1974) (stating that in an action under G.S. § 49-14, jury decides only the factual issue of paternity); *Brooks v. Hayes*, 113 N.C.App. 168, 438 S.E.2d 420 (1993), *review denied*, 335 N.C. 766, 442 S.E.2d 508, 509 (1994) (noting sufficient evidence to send the case to the jury without considering right to jury trial).]

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. [Rev. Stat. (1837), Ch. XII, sec. 4; Code (1883), Ch. 5, sec. 32; *see State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956) (discussing the law in North Carolina between 1741 until 1933.] The statute was repealed in 1933 when G.S. § 49-2 was enacted. [Pub. L. (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 art. I, § 25 of 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 in Civil Actions.

3. It is improper to give an Allen charge to a jury in a civil action to establish paternity pursuant to G.S. § 49-14. [*Lenoir County ex rel. Dudley v. Dawson,* 60 N.C.App. 122, 298 S.E.2d 418 (1982).] 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. U.S.,* 164 U.S. 492 (1896).] It has been criticized for potentially coercing a verdict. [*See Lenoir County ex rel. Dudley v. Dawson,* 60 N.C.App. 122, 298 S.E.2d 418 (1982).]

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 App. U.S.C.A. § 500 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 vital statistics registrar 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); G.S. § 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. [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)]

(1) 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* 2013 N.C. Sess. Laws 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).]

(2) 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 putative 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* 2013 N.C. Sess. Laws 198, § 13, effective June 26, 2013.]

(b) Workers' compensation benefits are available to an acknowledged child born out of wedlock. [G.S. § 97-2(12), *amended by* 2013 N.C. Sess. Laws 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* 2013 N.C. Sess. Laws 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* 2013 N.C. Sess. Laws 198, § 23, effective June 26, 2013.] G.S. § 49-15 limits

recovery of pre-birth 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*, __ N.C.App. __, 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 L at pages 38 and 40.]

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 at page 63.]

P. Relief from a judgment of paternity pursuant to Rule 60(b).

1. Procedure.

a) A motion pursuant to N.C. R.CIV. P. 60(b) is an appropriate method to attack 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).]

b) When a party has filed a motion to set aside a paternity order pursuant to Rule 60(b) and to compel genetic testing pursuant to G.S. § 8-50.1(b1), a court must first grant relief from the judgment pursuant to G.S. § 1A-1, 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*; *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 Rule 60(b) request to set aside a paternity judgment. In that case, the trial judge originally granted defendant's motion for blood tests and held open defendant's request to set aside the paternity judgment pending the results of the blood test. Plaintiff appealed and court of appeals granted cert. and reversed the order for blood testing on the ground that paternity is not at issue as long as paternity judgment

stands. On remand, trial judge used other evidence tending to show defendant was not the father of the child as grounds to set aside the paternity judgment. After granting the Rule 60(b) motion, the trial judge then ordered the paternity test.

2. Use of Rule 60(b)(1), (2), or (3) to set aside a judgment of paternity.

a) While the trial court enjoys discretion in granting or denying relief under Rule 60(b), it may not avoid the applicable one-year limitation period 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 (b)(1), mistake of fact, or (b)(3), fraud, when after executing acknowledgment of parentage defendant began to hear rumors that he was not the child's father; Rule 60(b) motion filed three years later untimely); *Guilford County 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, his 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 Rule 60(b)(6) to set aside a judgment of paternity.

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 County Dep't of Social Services 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 Rule 60(b) from an affidavit of paternity, *see* section IV.B.4 at page 55.

Q. Setting aside an order of paternity pursuant to G.S. § 49-14(h).

1. Notwithstanding the time limitations in Rule 60, or any other provision of law, G.S. § 49-14(h) sets out a procedure to set aside an order of paternity under certain circumstances. [G.S. §49-14(h), *added by* 2011 N.C. Sess. Laws 328, § 1, effective January 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).

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. [*See* section I.B.1 at page 5.]

6. The court may grant relief from a child support order pursuant to the procedure provided 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* 2011 N.C. Sess. Laws 328, § 1, effective January 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 1.

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 child was conceived, mother told defendant she was sexually active with at least two other men and had used the Internet to seek sexual partners and that mother told defendant he was the 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 County ex rel. Ijames v. Sutton*, __ N.C.App. __, 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 County 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, *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989), *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).]

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, chapter 49. [G.S. § 6-21(10); *Guilford County 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's 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 putative father may appeal the district court's judgment establishing his paternity of a child born out wedlock to the court of appeals by filing a written notice of appeal within 30 days of the date the judgment was entered. [*See* G.S. § 1-277(a); G.S. § 1A-1, Rule 58; G.S. § 7A-27; N.C.R.App.P. 3]

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 Beamon*; *Nash County Dep't of Social Services ex rel. Williams v. Beamon*, 126 N.C.App. 536, 485 S.E.2d 851, *review denied,* 493 S.E.2d 655 (1997) (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 County ex rel. Horton v. Ryles*, 112 N.C.App. 754, 437 S.E.2d 404 (1993) (citations omitted); *see* G.S. § 1-294 (providing that appeal of a judgment stays all further proceedings in the trial court upon the matter embraced therein).]

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 County 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, not affecting a substantial right, and a nullity, trial court did not err by proceeding to enter an order for child support while appeal pending).] *But see* 4(b) immediately below. Court of appeals has

discretion to grant certiorari. If court of appeals grants cert., 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 County ex rel. Gardner v. Davis*, 123 N.C.App. 527, 473 S.E.2d 640 (1996); *State ex rel. Hill v. Manning*, 110 N.C.App. 770, 431 S.E.2d 207 (1993), both cases *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. [*See Johnson v. Johnson*, 120 N.C.App. 1, 461 S.E.2d 369 (1995), *rev'd per curiam on other grounds*, 343 N.C. 114, 468 S.E.2d 59 (1996) (choosing to treat an interlocutory appeal of an order for paternity testing as a petition for writ of certiorari); *see also Guilford County ex rel. Gardner v. Davis*, 123 N.C.App. 527, 473 S.E.2d 640 (1996), *citing Person County ex rel. Lester v. Holloway*, 74 N.C. App 734, 329 S.E.2d 713 (1985) (COA in its discretion addressing the merits of an interlocutory appeal on this issue in order to expedite the decision in the public interest).]

III. UIFSA Proceedings to Establish Paternity [G.S. Chapter 52C]

A. "One state" long-arm paternity proceedings.

1. A North Carolina district court may use UIFSA's long-arm provisions [G.S. § 52C-2-201] to obtain personal jurisdiction over a nonresident defendant in a civil paternity action brought under G.S. § 49-14. [*See* G.S. § 52C-2-202 and section II.C at page 16.]

2. 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 two additional UIFSA provisions related to evidence and discovery:

a) G.S. § 52C-3-315 to receive evidence from another state; and

b) G.S. § 52C-3-317 to obtain discovery through a tribunal of another state.

3. Apart from these two provisions and G.S. §§ 52C-2-201 and 52C-2-202, the remaining provisions of UIFSA do not apply to "one state" long-arm paternity proceedings pursuant to G.S. § 52C-2-202 and G.S. § 49-14 and the district court must apply North Carolina's procedural and substantive law governing civil paternity actions. [G.S. § 52C-2-202]

B. Interstate UIFSA paternity proceedings.

1. A district court in North Carolina may serve as an initiating tribunal or as a responding tribunal in a proceeding brought pursuant to UIFSA or a law that is substantially similar to UIFSA or URESA to establish that the petitioner is a

parent of a particular child or that a respondent is a parent of that child, regardless of whether the proceeding also seeks support for the child. [G.S. § 52C-7-701(a); Official Comment thereto]

2. 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 1.

3. When a North Carolina district court is acting as a responding tribunal in a UIFSA proceeding to establish the paternity 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. [G.S. § 52C-7-701(b)] *See* section II at page 14.

4. Defense of nonparentage prohibited when paternity has previously been established by a legal proceeding. [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).]

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

A. Federal requirements.

1. Title IV-D of the Social Security Act was amended in 1996 by Pub. L. No. 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 G.S. § 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. [42 U.S.C. § 666(a)(5)(C); *see* 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)]

3. Federal law requires that voluntary paternity acknowledgment 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)(aa)] DHHS regulations specify the

other entities that may offer voluntary paternity acknowledgment services and the manner in which these services may be provided.

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 60 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;

b) A signed voluntary acknowledgment of paternity may be challenged in court after 60 days only if the challenger proves fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; 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)]

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)]

B. Affidavits of parentage filed with the clerk of superior court. [G.S. §§ 110-132; 110-134]

1. Execution.

a) Effective October 1, 1999, written affidavits executed by the mother and putative father of a child born out of wedlock constitute a legal 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:

(1) 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

(2) Neither affidavit is rescinded by the executing parent within 60 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); G.S. § 110-134; 1999 N.C. Sess. Laws 293, § 1]

(a) From July 1, 1975, until September 30, 1997, a voluntary paternity affidavit executed pursuant to G.S. § 110-132(a) and approved by a district court judge had the same legal effect as a judgment establishing the putative father's paternity of the child pursuant to G.S. § 49-14.

(b) From October 1, 1997, through September 30, 1999, a voluntary paternity affidavit executed pursuant to G.S. § 110-132(a) constituted an admission of paternity but did not have the same legal effect as a judgment establishing the putative father's paternity. [1997 N.C. Sess. Laws 433, § 4.7]

b) Parents may use AFFIDAVIT OF PARENTAGE (AOC-CV-604) 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.

(1) From July 1, 1975 until September 30, 1997, state law required district court judges to approve voluntary paternity acknowledgments executed pursuant to G.S. § 110-132(a).

(2) As noted 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 under G.S. § 110-132(a) 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); father a legal heir of his daughter born out of wedlock upon her death. [*In re Estate of Magnum,* 212 N.C.App. 211, 713 S.E.2d 18 (2011) (noting that the Parenting Agreement and Order Approving Parenting Agreement meet the requirements in G.S. § 29-19(b)(2) as to a written instrument in similar fashion to the VSA in *Potts*).]

2. Rescission.

a) A parent's request to rescind his or her 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)]

(1) 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)]

(2) 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.

(3) If a parent rescinds his or her affidavit of parentage 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)]

b) After the 60 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* section IV.B.5 at page 57.

3. Defense of res judicata.

a) An unrescinded voluntary paternity affidavit 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, 304 S.E.2d 265 (1983) (holding that the provision in 110-132(b) that the "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).]

b) The language in G.S. § 110-132(b) quoted above does not bar a party from seeking relief pursuant to 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 immediately below.

4. Relief from an affidavit of parentage pursuant to G.S. § 1A-1, Rule 60(b).

a) Procedure.

(1) A motion pursuant to N.C.R.CIV. P. 60(b) is an appropriate method to attack a determination of paternity based upon an affidavit of paternity after the expiration of the 60 day rescission period. [*County of Durham Dep't of Social Services ex rel. Stevons v. Charles,* 182 N.C.App. 505, 642 S.E.2d 482 (2007), *citing Leach and Adams*; *State ex rel. Davis v. Adams,* 153 N.C.App. 512, 571 S.E.2d 238 (2002) (citations omitted); *Leach v. Alford,* 63 N.C.App. 118, 304 S.E.2d 265 (1983).]

(2) G.S. § 110-132 is not a basis for relief from a paternity order apart from Rule 60(b). [*County of Durham Dep't of Social Services 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**: 2011 N.C. Sess. Laws 328, §§ 2 and 3, effective January 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. *See* sections IV.B.5 and IV.B.6 at pages 57 and 58.

(3) A party cannot collaterally attack a paternity affidavit in a proceeding for child support. [*Leach v. Alford,* 63 N.C.App. 118, 304 S.E.2d 265 (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); *see also Person County ex rel. Lester v. Holloway,* 74 N.C. App 734, 329 S.E.2d 713 (1985) (court could not reconsider a judgment of paternity in a contempt proceeding for failure to pay support pursuant to a voluntary support agreement).] **NOTE**: 2011 N.C. Sess. Laws 328, § 3, effective January 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 at page 58.

(4) 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 above does not bar a party from seeking relief pursuant to Rule 60(b)(6) from an acknowledgment (judgment) of paternity when support is not at issue).]

(5) When a party has filed a motion to set aside a paternity order pursuant to 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 G.S. 1A-1, 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*; *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 at page 46.

b) Use of Rule 60(b)(1), (2), or (3) to set aside an affidavit of parentage.

(1) The one-year time period for seeking relief under Rule 60(b)(1), (2) and (3) applies to challenges to an affidavit of paternity executed pursuant to G.S. § 110-132(a). [*County of Durham Dep't of Social Services 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).]

(2) 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 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).] NOTE: The 60 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)]

(3) The one-year time limitation applicable to sections 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 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) and (3), newly discovered evidence and fraud, as untimely when it was filed more than six years after entry of the voluntary support agreement and paternity order).]

c) Use of Rule 60(b)(6) to set aside an affidavit of parentage.

(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, 304 S.E.2d 265 (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 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* 2011 N.C. Sess. Laws 328, § 2, effective January 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) 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 60 day rescission period if:

(1) Genetic tests establish that the putative father is not the biological father of the child; and

(2) 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* 2011 N.C. Sess. Laws 328, § 1, effective January 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)]

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 Rule 60, or any other provision of law, a father required to pay child support under an order entered pursuant to Chapter 49, 50, 52C, or 110 of the General Statutes, 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* 2011 N.C. Sess. Laws 328, § 3, effective January 1, 2012, and applicable to motions or claims for relief filed on or after that date.]

C. Paternity affidavits filed with the 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 father declaring that he believes that he is the natural father of the child;

c) The parents' social security numbers;

d) Information explaining in plain language the effect of signing the affidavit; and

e) A statement of parental rights and responsibilities, and an acknowledgment of receipt of this information. [G.S. § 130A-101(f)]

3. The state Department of Health and Human Services has adopted a form that may be used as an affidavit acknowledging paternity under G.S. § 130A-101(f). [*See* Affidavit Of Parentage For Child Born Out Of Wedlock (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 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 paternity filed with the clerk of superior court 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 at page 54.] NOTE: The procedure in G.S. § 110-132(a1) and (a2) to set aside an affidavit of parentage is not applicable to an affidavit of paternity executed under G.S. § 130A-101. [*See* 2011 N.C. Sess. Laws 328, § 2, effective January 1, 2012, and applicable to motions or claims for relief filed on or after that date.]

7. A certified copy of an affidavit of paternity is admissible in any action to establish the child's paternity. [G.S. § 130A-101(f)]

8. Effect of an affidavit of paternity executed pursuant to G.S. § 130A-101(f).

a) An affidavit of 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); *see 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 "Affidavit Of Parentage For Child Born Out Of Wedlock" could not inherit from a child born out wedlock since he had not filed acknowledgement with clerk of court as required by statute).]

b) 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 at page 52.

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

A. Generally.

1. 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).]

2. Paternity is, however, a necessary element in the criminal prosecution of a putative father for failing to support a child born out of wedlock. [*See* G.S. § 49-7, *amended by* 2013 N.C. Sess. Laws 198, § 20, effective June 26, 2013; *State v. Hobson*, 70 N.C.App. 619, 320 S.E.2d 319, *writ denied*, 312 N.C. 497, 322 S.E.2d

562 (1984), *citing Coffey*; *Stephens v. Worley*, 51 N.C.App. 553, 277 S.E.2d 81 (1981); *State v. Coffey*, 3 N.C.App. 133, 164 S.E.2d 39 (1968).]

3. 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) (citations omitted) (fact of paternity cannot be established by mere preponderance of the evidence but must be established beyond a reasonable doubt).]

4. 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)]

5. 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 putative father must be brought:

(1) On or before the child's 3rd birthday;

(2) Any time before the child's 18th birthday if the child's paternity has been judicially determined before the child's 3rd birthday; or

(3) Within three years of the last support payment made by the putative 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) To be found guilty of violating G.S. § 49-2, the state must prove:

(1) That the defendant is a parent of the child in question; and

(2) That the defendant has willfully neglected or refused to support such child. [G.S. § 49-7, *amended by* 2013 N.C. Sess. Laws 198, § 20, effective June 26, 2013; *Sampson County ex rel. McPherson v. Stevens*, 91 N.C.App. 524, 372 S.E.2d 340 (1988), *citing 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 the 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, *writ denied,* 312 N.C. 497, 322 S.E.2d 562 (1984) (defendant's receipt of notice and demand for support one of the issues to be submitted to the jury).]

(1) Demand must be made after the birth of the child and before prosecution 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 an Illegitimate Child.

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); 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 of 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 G.S. § 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, 177 S.E.2d 385 (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 the expenses thereof. [G.S. § 8-50.1(a)(2)]

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 criminal nonsupport proceeding. [*See Little v. Streater*, 452 U.S. 1 (1981) (nature of paternity proceedings under Conn. 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 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 witness. [G.S. §§ 8-50.1(a) and 49-7; *see State v. Fowler*, 277 N.C. 305, 177 S.E.2d 385 (1970) (citations omitted); *State v. McInnis*, 102 N.C.App. 338, 401 S.E.2d 774, *review denied*, 329 N.C. 274, 407 S.E.2d 848 (1991) (G.S. § 8-50.1(a) does not prohibit the admission of inconsistent test results).]

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 the test results and that the test was conducted properly, then they must render a special verdict of not guilty based on the defendant's nonpaternity of the child. [G.S. § 8-50.1(a)(1); *see also State v. McInnis*, 102 N.C.App. 338, 401 S.E.2d 774, *review denied*, 329 N.C. 274, 407 S.E.2d 848 (1991) (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).]

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 criminal nonsupport proceeding.

a) Subsequent criminal action.

(1) 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 Ellis*], even if the defendant is acquitted of the nonsupport charge in the first proceeding. [*State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964) (citations omitted) (new trial ordered on the question of the father's willful nonsupport but determination of defendant's paternity would stand and would not be at issue in the new trial).]

(2) 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.

(1) Conviction in prior criminal nonsupport proceeding.

(a) Defendant's conviction for nonsupport 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).] *See* paragraphs (c) through (e) below questioning the privity requirement.

(b) Defendant's conviction for nonsupport under G.S. § 49-2 did not estop him from denying paternity in a subsequent action brought by the child's mother 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.E2d 816 (1976).] *See* paragraphs (c) through (e) below questioning the privity requirement.

(c) While mutuality of parties was traditionally required to invoke collateral estoppel, 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, *appeal dismissed*, 362 N.C. 680, 670 S.E.2d 563 (2008), *citing McGinnis* (concerning confirmation of an arbitration award).]

(d) To the extent that *Lewis* and *Tidwell* require that the plaintiff in the civil action be in privity with the State in the prior criminal prosecution of the putative father, those cases may no longer be valid.

(e) However, a court may still 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).]

(2) 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 County ex rel. Nations v. Gentry*, 63 N.C.App. 432, 305 S.E.2d 207 (1983), *modified and aff'd on other grounds*, 311 N.C. 580, 319 S.E.2d 224 (1984) (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).]

(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 County 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, *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (guilty plea to the criminal charge of nonsupport under G.S. § 14-322 was an evidentiary admission of paternity in subsequent custody and support proceeding).]

(3) 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 stating 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, *writ denied, review denied*, 363 N.C. 583, 681 S.E.2d 784 (2009) (if district court found that the State had failed to prove beyond a reasonable doubt that petitioner willfully refused to submit to 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).]

(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 County 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 County ex rel. Hedrick v. Whitener*, 100 N.C.App. 70, 394 S.E.2d 263 (1990); *Devane v. Chancellor*, 120 N.C.App. 636, 463 S.E.2d 293 (1995), review denied, 342 N.C. 654, 467 S.E.2d 710 (1996) *citing Hedrick* (action by children through a guardian ad litem and by their mother to establish paternity and support 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 found not guilty and not the father, in other proceeding, civil action to establish paternity and support dismissed with prejudice); *see also State ex rel. Orr v. Wilson*, 160 N.C.App. 710 (2003) (**unpublished**) (Forsyth County DSS 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 section V.E.1.b.1 at page 63 noting that mutuality of parties is no longer required 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).]

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* 2013 N.C. Sess. Laws 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.; G.S. § 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), *cert. denied*, 599 S.E.2d 408 (2004) (citation omitted) (because legitimation action took priority over a paternity action, district court was divested of subject matter jurisdiction to decide paternity).]

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 legitimation, *see* North Carolina Clerk of Superior Court Procedures Manual, Vol. 2, *Proceedings by Putative Father to Legitimate Child*, Chapter 140.

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, *review denied*, 363 N.C. 374, 678 S.E.2d 667 (2009) (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).]

3. Jurisdiction.

a) The district court does **not** have subject matter jurisdiction over special proceedings to legitimate a child born out of wedlock. [*See* 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, 671 S.E.2d 572, *review denied*, 363 N.C. 374, 678 S.E.2d 667 (2009) (citing *Locklear* and stating that normally the factual issue of paternity, when premised on a presumption of legitimacy, should be presented to and resolved by a jury).] But when there is no issue of fact as to paternity, summary judgment is appropriate. [*See 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) (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); *Smith v. Barbour*, 167 N.C.App. 371, 605 S.E.2d 267 (2004) (**unpublished**), *review denied*, 359 N.C. 322, 611 S.E.2d 418 (2005) (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 properly granted in legitimation action; mother's request for a jury trial properly denied).] [*But see Smith v. Barbour*, 154 N.C.App. 402, 410 n.3, 571 S.E.2d 872 (2002), *cert. denied*, 599 S.E.2d 408 (2004) (indicating that when paternity is disputed in a legitimation action, the clerk is to transfer the proceeding to district court); 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; G.S. § 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 the legitimation proceeding. [G.S. § 49-10; G.S. § 49-12.1(a)]

c) A guardian ad litem must be appointed to represent a minor child in a legitimation proceeding. [G.S. § 49-12.1(a); G.S. § 1A-1, Rule 17; *see also 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) (noting that whether or not G.S. § 49-12.1 requires it, appointment of a guardian ad litem for the

minor child is mandated by Rule 17 of the North Carolina Rules of Civil Procedure).]

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 guardian ad litem 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); *see also 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), *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).]

6. Effect of legitimation.

a) Generally.

(1) An order entered pursuant to G.S. § 49-10 or G.S. § 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; G.S. § 49-12.1(d)]

(2) 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 state 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.

(1) 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 from his or her father and mother as if the child had been born in wedlock. [G.S. § 49-11; G.S. § 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 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 G.S. § 29-18 would apply to allow a child legitimated under G.S. § 49-12.1 to inherit.

(2) 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; G.S. § 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 G.S. § 29-18 would apply to property of a child legitimated under G.S. § 49-12.1.

B. Juvenile proceedings involving abuse, neglect, and dependency.

1. 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 inquire as to whether the child's paternity is at issue and the identity and location of any missing parent or putative father, and make findings with respect to the efforts that have been undertaken to establish paternity or locate a missing parent. [G.S. § 7B-506(h)(1)]

2. G.S. § 7B-506(h)(1) also allows a district court judge 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.

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]

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 putative father with respect to a child born out of wedlock if, prior to the filing of a motion or petition to terminate parental rights, the putative father has not:

(1) Established paternity judicially or by affidavit filed in a central registry maintained by the Department of Health and Human Services; or

(2) Legitimated the child pursuant to G.S. § 49-10 or filed a special proceeding to do so; or

(3) Legitimated the child by marrying the child's mother; or

(4) Provided substantial financial support or consistent care with respect to the juvenile and mother. [G.S. § 7B-1111(a)(5); *see In re Hunt*, 127 N.C.App. 370, 489 S.E.2d 428 (1997) ($1,000 over a three year period was not "substantial" support sufficient to avoid termination of respondent's paternal rights); *In re Harris*, 87 N.C.App. 179, 360 S.E.2d 485 (1987) (DSS must prove the lack of paternity or legitimacy as of the petition's filing date, not a month before the filing date).]

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 putative father does not terminate until a final order of adoption is issued) regardless of whether paternity has been previously determined. [G.S. § 7B-1112]

4. For more on terminating the rights of an unknown parent, *see* Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina (2011), Chapter 9 at section 9.6 (Hearing for Unknown Parent).

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:

(1) 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

(2) 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:

(1) 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

(2) 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 if the presumed or putative father:

a) Was married to the child's mother when the child was born or conceived. [G.S. § 48-3-601(2)b.1]

b) Legitimated the child before the date the adoption petition was filed. [G.S. § 48-3-601(2)b.3]

c) Acknowledged his paternity of the child before the date the adoption petition was filed and;

(1) Was obligated by written agreement or court order to support the child; or

(2) Provided support for the mother or child, and regularly visited or communicated, or attempted to communicate or visit, with the mother or child; or

(3) Married, or attempted to marry, the child's mother after the child's birth but before the child's relinquishment for adoption. [G.S. § 48-3-601(2)b.4; *see In re Byrd,* 354 N.C. 188, 552 S.E.2d 142 (2001) (consent of putative father not required because he only attempted to support or made offers of support, which were not sufficient for purposes of the statute).]

d) Received the child into his home and 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:

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 to be treated as a child born out of wedlock. [G.S. § 50-11(b), *amended by* 2013 N.C. Sess. Laws 198, § 24, effective June 26, 2013]

b) A finding in a divorce decree that a child was born or conceived during the parties' marriage is not a binding judicial determination that the husband is the child's father when paternity was not an issue actually litigated and necessary to the uncontested divorce action. [*Guilford County 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 not litigated).]

c) However, 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) (holding that divorce order, incorporating a separation agreement in which 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) (citations omitted) (where husband admitted in answer to wife's complaint that one child born of marriage, husband alleged in his complaint for divorce that one child born of marriage, and judgment of divorce found one child born of marriage and awarded husband visitation and ordered him to pay child support, husband 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* 2013 N.C. Sess. Laws 198, § 23, effective June 26, 2013 (once paternity established, rights, duties and obligations of mother and father for 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 not barred from contesting paternity because the issue had not been litigated and he had never formally acknowledged paternity under 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, *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (parentage already decided when former husband pled guilty in criminal nonsupport action and admitted paternity in divorce complaint; husband not entitled to court-ordered testing in mother's action for custody and additional support).]

d) If paternity is at issue in a civil action for child support, the court may order genetic paternity testing pursuant to § G.S. 8-50.1(b1) and enter a judgment on the issue of the presumed father's paternity. [*See* 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 County ex rel. Lester v. Holloway*, 74 N.C. App 734, 329 S.E.2d 713 (1985)], or any proceeding related solely to support of a child. [*Leach v. Alford,* 63 N.C.App. 118, 304 S.E.2d 265 (1983).]

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

(1) A prior determination of paternity is itself a bar. [*See* G.S. § 52C-3-314 and *Reid v. Dixon*, 136 N.C.App. 438, 524 S.E.2d 576 (2000) (when paternity previously established by Alaska legal proceeding based on father's admission of paternity, father could not later plead nonparentage as a defense in a UIFSA enforcement proceeding).]

(2) A prior adjudication is res judicata in a later proceeding. [*See 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 Nevada divorce decree that found child to be child of the marriage; 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*, Part 2 of this Chapter, section I.F.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* 2011 N.C. Sess. Laws 328, §

1, effective January 1, 2012, and applicable to motions or claims for relief filed on or after that date.] *See* section II.Q.6 at page 48.

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* 2013 N.C. Sess. Laws 198, § 23, effective June 26, 2013 (once paternity established, rights, duties and obligations of mother and father for 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 civil child custody proceeding involving a child's mother, the mother's husband (or former husband), and a child born during the marriage, in which the mother challenges the paternity of her former spouse, the mother cannot attempt to rebut the presumption that he is the child's father unless another man has formally acknowledged paternity or has been adjudicated to be the child's father. [*Jones v. Patience*, 121 N.C.App. 434, 466 S.E.2d 720, *appeal dismissed, review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *see Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (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 at page 9 discussing *Jones v. Patience*.

c) Evidence submitted by an alleged biological father of his paternity 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 denied mother's motion for paternity testing. [*Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674 (2009), *reversing 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, *review denied*, 341 N.C. 418, 461 S.E.2d 753 (1995) (child legitimized by parents' subsequent marriage was sole heir to his father's estate).]

2. Paternity may be determined by the 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, *appeal dismissed, review denied,* 304 N.C. 587, 289 S.E.2d 564 (1981) (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).]

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. [See G.S. § 49A-1] In heterologous artificial insemination, sperm are donated by a man other than the mother's husband.

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