Constitutional Issues for Fathers Known and Unknown

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The Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Case Law

Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).*

Summary of Facts
An Illinois statute declared that children of unmarried fathers, upon the death of the child's mother, are to be declared dependents without any hearing as to the fathers' parental fitness or a determination of neglect. Illinois did require such hearing before the State could assume custody of a divorced couple's children, or an unmarried mother's children. An unmarried father, whose children were declared wards of the state and placed in guardianship upon the death of their mother, brought due process and equal protection challenges against the State of Illinois.

Summary of Holding
The United States Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, the unmarried father was entitled to a hearing on his parental fitness before his children could be placed with the State. The Court also held that such denial of a hearing to unwed fathers, where unwed mothers and divorced parents were granted such hearing, violated the Equal Protection Clause of the Fourteenth Amendment.

Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549 (1978).*

Summary of Facts
Under one Georgia statute, the consent of a father was not required before a child born out of wedlock could be placed for adoption. Under another Georgia statute, the consent of both parents was required before a child born in wedlock could be placed for adoption. A mother, whose child was born out of wedlock, married a second man who was not the father. The mother consented to her new husband's adoption of the child. At that point, the biological father attempted to block the adoption and secure visitation rights. The trial court granted the adoption on the basis that it was in the "best interests of the child," and the Georgia Supreme Court affirmed.

Summary of Holding
The United States Supreme Court held that the unwed father's substantive rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by application of the "best interests of the child" standard. The Court reiterated the constitutionally

protected relationship between a parent and child, but distinguished this case from others. The Court held that in a case in which the unwed father never sought actual or legal custody of his child, he is not entitled to veto authority over the adoption of his child.

Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979).*

Summary of Facts
An unwed couple lived together in New York for five years and had two children together. A New York law permitted a child's unwed natural mother to withhold her consent and block the child's adoption, but did not permit a child's unwed natural father to do the same. The natural parents each attempted to adopt the children, and the New York court granted the natural mother and stepfather's petition to adopt. The court stated that the natural father was foreclosed from adopting the children because the natural mother had withheld her consent.

Summary of Holding
The United States Supreme Court held that the New York law in question violated the Equal Protection Clause of the Fourteenth Amendment. The Court analyzed the case through its intermediate scrutiny standard for questions regarding gender-based discrimination, and held that the statutory distinction did not bear "a substantial relation to the proclaimed interest of the State in promoting the adoption of illegitimate children." Id. at 393, 99 S. Ct. at 1769.

Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983).*

Summary of Facts
A woman gave birth to a child out of wedlock, and married a man who was not the biological father eight months later. After just over a year of marriage, the mother and her husband filed an adoption petition. The State of New York maintained a "putative father registry," whereby a man could demonstrate his intent to claim paternity of a child born out of wedlock. By registering, a putative father became entitled to notice of any proceeding to adopt that child. The child's biological father did not enter his name on the register. Even though the judge presiding over the adoption petition knew that the biological father had filed a paternity petition for the same child, he entered the adoption order without giving notice to the biological father. The father filed a petition to vacate the adoption, claiming the judge's failure to provide notice violated his constitutional rights.

Summary of Holding
The United States Supreme Court held that where a putative father had never established a substantial relationship with his child, the State's failure to give him notice of adoption proceedings, even though the State knew he was claiming paternity, did not violate the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment. The Court noted that a father's opportunity to "accept[] some measure of responsibility for the child's future" based on his biological relationship with the child would permit him to "enjoy the blessings" of parenthood and have a positive effect on the child's development. Id. at 262, 103 S. Ct. at 2993-94. If a biological father fails to take these steps, "the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." Id.

Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989).*

Summary of Facts
A biological father who had established a paternal relationship with his child filed an action to establish paternity and visitation rights. In addition, the child claimed she had a right to maintain a filial relationship with the biological father and her mother's husband. A California statute in place created a presumption that a child born to a married woman living with her husband is the child of the marriage. The California court granted summary judgment for the husband, who was presumed to be the father under California law.

Summary of Holding
The United States Supreme Court held that the California statute creating the presumption that a child born into a marriage is the child of that marriage did not violate the biological father's procedural or substantive due process rights. Nor did it violate the child's asserted due process or equal protection rights to maintain a filial relationship with two different fathers.

North Carolina Case Law

In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993).*

Summary of Facts
A mother gave birth to a child, and wished to place the child up for adoption. The mother had met the father only briefly. She made repeated attempts to locate the father in order to secure his consent to place the child for adoption, but was unsuccessful. The court found sufficient grounds to terminate the father's parental rights in the best interests of the child. However, the court did not terminate the father's parental rights because he had insufficient minimum contacts with the State of North Carolina to satisfy due process rights.

Summary of Holding
The Court of Appeals reversed, holding that traditional notions of fair play and substantial justice were not offended by permitting termination of the father's parental rights. Where the father had not taken any steps to establish paternity, legitimate the child, or provide substantial financial support, due process did not require minimum contacts.

Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).*

Summary of Facts
A married woman gave birth to a son, knowing that her husband was not the father. The husband was present for the child's delivery and all three lived as a family unit until the husband and wife separated and divorced. Even after separation, he continued his relationship with the child. The husband believed he was the child's father for over two and one-half years, until the mother told him he was not. She then terminated his visitation rights. The husband sought visitation, and the trial court awarded him visitation rights. The mother appealed.

Summary of Holding
The Court of Appeals reaffirmed North Carolina's longstanding presumption "that children born during a marriage, as here, are presumed to be the product of the marriage." Id. at 439, 466 S.E.2d at 723. Without any showing that another man has formally acknowledged paternity or been formally adjudicated to be the child's father, this marital presumption applies. Because he is presumed to be the child's father, the former husband had standing to seek and attain visitation rights under the "best interests of the child" standard.

Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).*

Summary of Facts
A man and woman lived together for three years, during which time the woman gave birth to a child. From the time of the child's birth, the mother represented that the man was the child's father. After the couple's separation, the child continued to live with the man who she believed was her biological father. After a custody dispute arose, the woman denied that the man was the child's father. Blood tests confirmed that he was not the father. Although the court concluded it was in the child's best interests to be with the putative father, it concluded that Peterson required the child be with the mother. The Court of Appeals affirmed.

Summary of Holding
The North Carolina Supreme Court held that the case should be remanded for a determination of whether the mother's conduct was inconsistent with her constitutionally protected status of a natural parent. In so doing, the court did not focus on the putative father's relationship with the child, but rather on the natural mother's relationship. The trigger for the "best interests of the child" test was the natural mother's actions and relationship with the child. There was not a simple assumption that placement with a natural parent is always in the best interests of the child.

In re Baby Girl Dockery, 128 N.C. App. 631, 495 S.E.2d 417 (1998).*

Summary of Facts
A woman became pregnant after briefly dating a man. After they stopped dating, they did not communicate and the woman did not tell the man she was pregnant. Shortly after placing the child for adoption, the woman requested the man's consent, and he refused. The adopting parents filed an adoption proceeding arguing that the father's consent was not required because he had not legitimated the child. One week later and unaware of the pending adoption proceeding, the father filed to establish paternity.

Summary of Holding
The Court of Appeals held that the statute in place at the time, which did not require a father's consent to adoption if he had not legitimated the child, did not violate the father's rights under the Due Process or Equal Protection Clauses of the Fourteenth Amendment. On equal protection, the court reasoned that mothers and fathers were not similarly situated, because without more, fathers have only a biological link to a child, where mothers have both a biological link and provide care throughout pregnancy and birth. Only upon doing one of the acts to legitimate the child does a father become similarly situated with the mother. On substantive due process, the

court held similarly that because he had not taken the required steps, his mere biological link to the child entitled him only to rational basis review.

In re Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001).**

The NC Supreme Court affirmed a holding that a putative father's consent to his child's adoption was not required because he had not provided reasonable, tangible support before the petition was filed. The father had filed a petition for a prebirth determination of his right to consent to adoption, and he filed a response to the adoption petition stating that his consent was required. Two justices dissented in part, expressing concern that the holding conflicted with the court's earlier holdings in *Petersen* and *Price*. The dissenting justices noted that the constitutional argument was not raised at trial or on appeal, but stated, "There are no facts to indicate that respondent has acted inconsistently with his protected parental interests."

Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003).**

Held. Trial court did not err in using best interest to determine custody between mother and father of child born out of wedlock.

Discussion. Trial court awarded custody to father of child born out of wedlock after concluding that custody to father would be in the best interest of the child. Court of appeals reversed, holding that it was bound by the opinion of the supreme court in Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965). In that case, the supreme court held there is a common law presumption that custody of an illegitimate child should be awarded to the mother unless the mother is unfit or otherwise unable to care for the child. According to the court of appeals, the presumption applies until the father has legitimated the child or obtained a judicial determination of paternity pursuant to G.S. 49-14. In this case, the father had signed an acknowledgment of paternity pursuant to G.S. 110-132(a) and an order of paternity had been entered pursuant to the acknowledgment, but the court of appeals held that the acknowledgment and order pursuant to G.S. 110-132(a) were insufficient to defeat the presumption in favor of the mother. The supreme court reversed the court of appeals, holding that case law and statutory amendments since 1965 have abrogated the common law presumption in favor of mothers of illegitimate children. The court outlined changes in the "laws governing familial relationships" since the Jolly decision in 1965 and concluded that those changes established that the General Assembly intended to abrogate the historical presumption in favor of mothers when it enacted G.S. 50-13.2(a), which now provides that "[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will promote the interest and welfare of the child."

A Child's Hope, LLC v. John Doe, 178 N.C. App. 96, 630 S.E.2d 673 (2006).**

Facts: After his girlfriend told him she was pregnant, respondent returned home from college, sought employment, planned with his girlfriend for the child's birth, kept her other children while she attended medical appointments, attended one prenatal appointment with her, and purchased a vehicle suitable for transporting the baby and the girlfriend's other two children. When he expressed that he was not ready to get married, the relationship ended. Respondent

continued to try to get information about the girlfriend and child, even after the girlfriend led him and his mother to believe that she had miscarried. The girlfriend hid the pregnancy from her family. After the baby's birth she surrendered the child to a private adoption agency and lied about paternity, saying that her pregnancy resulted from a rape by someone she could not identify. Respondent contacted a newspaper that had reported an abandoned baby, the mother's physician, a hospital, and DSS trying to determine whether the girlfriend had given birth. He was given no information due to confidentiality concerns. Because DSS conducted an investigation based on respondent's statements, his identity was made known to the petitioning adoption agency and the termination petition that had been filed against an unknown father was amended to name him as a respondent. Service of the petition on him was the first indication respondent had that the child had in fact been born. The trial court made lengthy findings and concluded that petitioner had failed to prove a ground for termination of parental rights by clear, cogent, and convincing evidence.

Holding: Reversed and remanded, one judge dissenting. The majority disagreed with the trial court and held that uncontroverted evidence showed that respondent had not met the requirements of G.S. 7B-1111(a)(5) – that is, that before the filing of the termination petition respondent had not

1. established paternity judicially or by affidavit filed in a central registry maintained by DHHS; or
2. legitimated the child, filed a petition to legitimate, or legitimated the child by marrying the mother; or
3. provided substantial financial support with respect to the child and mother; or
4. provided consistent care with respect to the child and mother.

The court of appeals relied on the "bright line rules" regarding the rights of putative fathers established by the state supreme court in In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001) and In re Adoption of Anderson, 360 N.C. 271, 624 S.E.2d 626 (2006).

Dissent: The dissenting judge would have affirmed the trial court's order on the basis that respondent's conduct after learning of the pregnancy amounted to "consistent care," a term the appellate courts have not heretofore interpreted.

Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58 (2008).*

Summary of Facts
A same-sex couple raised a child together from birth, until a custody dispute resulted in the nonbiological parent filing a complaint for custody. Because the biological parent had executed a "parenting agreement" with the non-biological parent, and shared the parenting responsibility in many other ways, the district court determined the biological parent had acted in a manner inconsistent with her parental rights. Therefore, the court applied the "best interests of the child standard" and ordered joint custody.

Summary of Holding
The North Carolina Court of Appeals held that the biological mother's actions, which included bringing another person into the child's life in the role of a second parent, were inconsistent with

her constitutionally protected status as a parent. This meant the Peterson presumption, that a child should be with its natural parent or parents, did not apply. Instead, the "best interests of the child" standard applied.

In re B.G., 197 N.C. App. 570, 677 S.E.2d 549 (2009).**

Facts: The child, who was adjudicated neglected, remained with her mother initially, then was placed in the custody of DSS and placed physically with an aunt and uncle ("the relatives"). After a permanency planning hearing the court placed the child in the joint legal custody of the relatives and the father, with the father to have structured visitation. The court based its order on a best interest determination, stating that the child could be returned to the father, but citing the child's wishes, the strong bond that had developed between the child and the relatives, and the fact that remaining with the relatives allowed the child to see her mother and siblings. The order referred to the father as "a non offending parent who has not acted inconsistently with [his] constitutionally protected right to the care and custody and control of the child."

Held: Affirmed in part; reversed and remanded in part.
1. The trial court misstated the standard for applying the best interest standard in a custody contest between a parent and non-parent. In order to apply that standard there must be a showing that the parent is unfit or has acted inconsistently with his or her constitutionally protected rights as a parent.
2. The court of appeals rejected respondent's arguments
   a. that awarding joint custody was not a dispositional alternative available to the court, and
   b. that findings required for a permanency planning hearing and about the relatives' ability to provide for the child were insufficient.

In re A.C.V., 203 N.C. App. 473, 692 S.E.2d 158 (2010).**

Facts: In early stages of pregnancy, respondent father and child's mother continued to see each other; respondent went to some appointments with the mother; and the mother's father talked with respondent about the need for him to provide financial assistance. The child's mother decided to place the child for adoption and informed respondent of this. On April 15, the child was born. On April 16, the child's mother relinquished the child to the Agency for adoption; on April 17, the Agency filed a petition to terminate respondent's rights alleging that respondent failed to provide adequate support for the mother during the pregnancy. Respondent filed an answer asserting that he was not given an opportunity to care for the child although he had expressed his desire to do so, and that he was not aware that he could file legal documents to legitimate the child. The court adjudicated a ground for termination under G.S. 7B-1111(a)(5), found that termination was in the child's best interest, and terminated respondent's rights.

Held: Affirmed.
1. Nothing in the trial court's findings or the facts put forward by respondent showed that he or his parents provided any direct financial support or "consistent care" during the pregnancy, and respondent satisfied no other prong of G.S. 7B-1111(a)(5).

2. The court of appeals rejected respondent's argument
   a. that the mother's relinquishment alone was insufficient to confer standing on the Agency to petition for termination of his rights.
   b. that he could not comply with G.S. 7B-1111(a)(5) because he was a minor.
   c. that the trial court erred by terminating his rights without finding that he was unfit or had neglected the child.
3. The court of appeals noted the potential unfairness to a putative father in application of the ground at issue in this case, but held that the court was bound by the holdings in Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003) and A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673 (2006) and the harsh interpretation of the statute that they represent.

In re Adoption of K.A.R., 205 N.C. App. 611, 696 S.E.2d 757 (2010).*

Summary of Facts
An 18-year-old woman gave birth to a child, and attempted to place the child for adoption. When a relative of the mother filed a petition for adoption, the 20-year-old father refused to consent. The father had attended pre-natal classes, purchased children's supplies and clothing, and petitioned to legitimate the child. The district court determined his consent to the adoption was required.

Summary of Holding
The North Carolina Court of Appeals upheld the decision, concluding he did all that was required of him to maintain his inherent parental rights.

In re D.M., 211 N.C. App. 382, 712 S.E.2d 355 (2011). **

Facts: The juvenile was removed from her mother's home, based on a petition alleging neglect and dependency. She was adjudicated dependent and placed in DSS custody, and DSS placed her with the maternal grandmother. After a home study of respondent father's home was reported to be favorable, the court indicted that the father's alcohol use required further assessment. DSS placed the child with the father but retained custody and placement authority. Eight months later DSS moved the child back to the grandmother's home. At a subsequent permanency planning hearing the court awarded permanent custody to the grandmother and visitation for respondent father.

Held: Reversed and remanded.
1. Because the trial court found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his constitutionally protected parental rights, the trial court erred in awarding custody to the grandmother.
2. Because these errors might recur, the court of appeals also noted that
   a. none of the orders entered before the award of permanent custody included any findings or conclusions about reasonable efforts made by DSS to prevent removal from the father or to reunify the child with the father. Where the child had been removed from the custody of both parents separately, efforts with both parents were required and reasonable efforts findings were required in each order that continued custody with DSS.

b. several orders, including the permanent custody order, left the father's visitation in the discretion of a treatment team. The trial court is required to set the parameters – time, place, and conditions – of parental visitation and cannot delegate that obligation.

In the Matter of J.K.C. and J.D.K. 218 N.C. App. 22, 721 S.E.2d 264 (2012). **

One of grounds alleged as basis for terminating parental rights of respondent father was that he never established paternity in one of the ways listed in GS 7B-1111(a)(5). However, the trial court concluded that the GAL had not proved respondent failed establish paternity. Upon denial of the TPR by the trial court, the GAL appealed. The court of appeals affirmed the trial court. On the issue of paternity, the court of appeals held that because the name of respondent appeared on the child's birth certificate, there was a rebuttable presumption that the respondent had established paternity either judicially or by affidavit as required by GS 7B-1111(a)(5). According to the court of appeals, when a child is born to an unmarried mother, NC statutes allow a father's name to be placed on the birth certificate if paternity is judicially determined and a copy of the judgment is sent to Vital Statistics (GS 130-118), or when the alleged father and mother execute an affidavit pursuant to GS 130A-101(f) in the hospital at the time of the child's birth. As such, the court of appeals concluded that there should be a presumption that respondent had done one of these things when his name actually appears on the birth certificate.

In re S.D.W., ___ N.C. ___, 758 S.E.2d 374 (2014).**

Facts: Unwed mother and father had repeated unprotected intercourse during their May 2009 through February 2010 relationship and on three of four occasions after the relationship ended. Mother had a child previously from another relationship, and early in the relationship with father, she became pregnant despite his belief that she had an IUD.
The couple decided she would have an abortion. After the abortion mother informed father that she changed her method of birth control to what he believed was a shot but may have been a patch. Mother eventually cut off contact with father, and she had a baby boy on October 10, 2010. The day after the baby was born, mother signed an Affidavit of Parentage that incorrectly identified father's last name and left the father's address blank. She also signed a relinquishment, and on a birth form provided by the adoption agency, she again incorrectly identified father's last name. A petition for adoption was filed November 2, 2010. Mother saw father on November 26, 2010 and did not notify him that she had had a baby. They did not communicate again until April 2011 after father heard mother had a baby, and in a phone call with father, mother confirmed she had a his child and placed him for adoption. Afterwards, mother notified the adoption agency of father's correct name. Father took steps to assert his intention to obtain custody of the child, including filing a motion to intervene in the adoption proceeding. Adoption petitioners filed a motion for summary judgment.

Procedural History: The trial court granted summary judgment for petitioners and denied respondent's motion to intervene and motion to dismiss the adoption on the basis that his consent was not required for the adoption. Father appealed, and the NC Court of Appeals reversed on the grounds that the statute regarding who must consent [G.S. 48-3-601] may be unconstitutional as applied to the father as violating his due process rights.

Without findings of fact regarding the father's actions to grasp the opportunity to develop a relationship with his child upon learning of the child's existence, the COA remanded the case for an evidentiary hearing on that issue. The NC Supreme Court granted discretionary review.

Held: Reversed decision of Court of Appeals (thereby affirming the trial court decision) Relying on the reasoning of the U.S. Supreme Court in Lehr v. Robertson, the court held an unwed father must grasp the opportunity to develop a relationship with his child for constitutional due process protections to apply.
The court must determine if an unwed father grasps the opportunity to be on notice of the pregnancy and/or birth, and if that opportunity is beyond the father's control.
In a fact specific analysis for this case, notice of the birth was not beyond father's control

- He had knowledge mother was fertile
- He continued to have intercourse with mother without using a condom, placing the responsibility for birth control solely with mother
- He did not inquire of mother if she was pregnant

For the Adoption of: Robinson, ___ N.C. App. ___ (December 31, 2014). **

Held: Affirmed

- Timeline:
  - Jan. 7, 2013, child born
  - Jan. 13, 2013, unwed father files action for genetic testing, custody, and child support
  - Feb. 13, 2013, petition for adoption filed
  - Feb. 21, 2013 unwed father files objection to adoption proceeding asserting his consent is required
  - July 2013 genetic testing confirms he is the father
  - August 26, 2013 trial court denies father's motion to dismiss concluding his consent was not required
- G.S. 48-3-601 requires the consent of a man who prior to the filing of the adoption petition or hearing completes three acts: (1) acknowledge paternity, (2) communicate or attempt to communicate with the mother regularly, and (3) make reasonable and consistent support payments within his financial means for the mother, child, or both. Father failed to meet the 3rd prong, therefore, his consent was not required pursuant to both the statute and holding in In re Byrd.
- Statute is not unconstitutional as it applies to father when relying on the reasoning in Lehr and In re S.D.W. Plaintiff did not grasp the opportunities within his control to develop a relationship with the child after the child's birth. In the child's first 6 months, plaintiff's actions were limited to filing for custody, visiting once despite more times being offered to him, and purchasing diapers once but never delivering them. Awaiting genetic testing results prior to paying support or taking further steps to develop a relationship with the child is not a valid excuse for a delay in father's action.

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§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

(b1) 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. The court shall require the person requesting the blood or genetic marker tests to pay the costs of the tests. The court may, in its discretion, tax as part of costs the expenses for blood or genetic marker tests and comparisons. Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence. The person contesting the results of the blood or genetic marker tests has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure. If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:

(1) If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the test, is that the probability of the alleged parent's parentage is less than eighty-five percent (85%), the alleged parent is presumed not to be the parent and the evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence;

(2) If the experts disagree in their findings or conclusions, the question of paternity shall be submitted upon all the evidence;

(3) If the tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is between eighty-five percent (85%) and ninety-seven percent (97%), this evidence shall be admitted by the court and shall be weighed with other competent evidence;

(4) If the experts conclude that the genetic tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher, the alleged parent is presumed to be the parent and this evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence.(1949, c. 51; 1965, c. 618; 1975, c. 449, ss. 1, 2; 1979, c. 576, s. 1; 1993, c. 333, s. 2; 1993 (Reg. Sess., 1994), c. 733, s. 1.)

§ 49-14. Civil action to establish paternity; motion to set aside paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;

(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or

(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(f) When a determination of paternity is pending in a IV-D case, the court shall enter a temporary order for child support upon motion and showing of clear, cogent, and convincing evidence of paternity. For purposes of this subsection, the results of blood or genetic tests shall constitute clear, cogent, and convincing evidence of paternity if the tests show that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher. If paternity is not thereafter established, then the putative father shall be reimbursed the full amount of temporary support paid under the order.

(g) Invoices for services rendered for pregnancy, childbirth, and blood or genetic testing are admissible as evidence without requiring third party foundation testimony and shall constitute prima facie evidence of the amounts incurred for the services or for testing on behalf of the child.

(h) Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an order of paternity may be set aside by a trial court if each of the following applies:

(1) The paternity order was entered as the result of fraud, duress, mutual mistake, or excusable neglect.

(2) Genetic tests establish the putative father is not the biological father of the child.

The burden of proof in any motion to set aside an order of paternity shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall 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). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the order of paternity. Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2; 1997-154, s. 1; 1997-433, ss. 4.2, 4.10; 1998-17, s. 1; 2005-389, s. 3; 2011-328, s. 1.)

§ 50-13.13. Motion or claim for relief from child support order based on finding of nonpaternity.

(a) Notwithstanding G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an individual who, as the father of a child, is required to pay child support under an order that was entered by a North Carolina court 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, and that is subject to modification by a North Carolina court under applicable law may file a motion or claim seeking relief from a child support order as provided in this section.

(b) A motion or claim for relief under this section shall be filed as a motion or claim in the cause in the pending child support action, or as an independent civil action, and shall be filed within one year of the date the moving party knew or reasonably should have known that he was not the father of the child. The motion or claim shall be verified by the moving party and shall state all of the following:

(1) The basis, with particularity, on which the moving party believes that he is not the child's father.

(2) The moving party has not acknowledged paternity of the child or acknowledged paternity without knowing that he was not the child's biological father.

(3) The moving party has not adopted the child, has not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1, or is not the child's legal father pursuant to G.S. 49A-1.

(4) The moving party did not act to prevent the child's biological father from asserting his paternal rights regarding the child.

(c) The court may appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent the interest of the child in connection with a proceeding under this section.

(d) Notwithstanding G.S. 8-50.1(b1), the court shall, upon motion or claim of a party in a proceeding under this section, order the moving party, the child's mother, and the child to submit to genetic paternity testing if the court finds that there is good cause to believe that the moving party is not the child's father and that the moving party may be entitled to relief under this section. If genetic paternity testing is ordered, the provisions of G.S. 8-50.1(b1) shall govern the admissibility and weight of the genetic test results. The moving party shall pay the costs of genetic testing. If a party fails to comply with an order for genetic testing without good cause, the court may hold the party in civil or criminal contempt or impose appropriate sanctions under G.S. 1A-1, Rule 37, of the North Carolina Rules of Civil Procedure, or both. Nothing in this subsection shall be construed to require additional genetic paternity testing if paternity has been set aside pursuant to G.S. 49-14 or G.S. 110-132.

(e) The moving party's child support obligation shall be suspended while the motion or claim is pending before the court if the support is being paid on behalf of the child to the State, or any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case as defined in G.S. 110-129(7).

The moving party's child support obligation shall not be suspended while the motion or claim is pending before the court if the support is being paid to the mother of the child.

(f) The court may grant relief from a child support order under this section if paternity has been set aside pursuant to G.S. 49-14 or G.S. 110-132, or if the moving party proves by clear and convincing evidence, and the court, sitting without a jury, finds both of the following:

(1) The results of a valid genetic test establish that the moving party is not the child's biological father.

(2) The moving party either (i) has not acknowledged paternity of the child or (ii) acknowledged paternity without knowing that he was not the child's biological father. For purposes of this section, "acknowledging paternity" means that the moving party has done any of the following:

a. Publicly acknowledged the child as his own and supported the child while married to the child's mother.

b. Acknowledged paternity in a sworn written statement, including an affidavit of parentage executed under G.S. 110-132(a) or G.S. 130A-101(f).

c. Executed a consent order, a voluntary support agreement under G.S. 110-132 or G.S. 110-133, or any other legal agreement to pay child support as the child's father.

d. Admitted paternity in open court or in any pleading.

(g) If the court determines that the moving party has not satisfied the requirements of this section, the court shall deny the motion or claim, and all orders regarding the child's paternity, support, or custody shall remain enforceable and in effect until modified as otherwise provided by law. If the court finds that the moving party did not act in good faith in filing a motion or claim pursuant to this section, the court shall award reasonable attorneys' fees to the prevailing party. The court shall make findings of fact and conclusions of law to support its award of attorneys' fees under this subsection.

(h) If the court determines that the moving party has satisfied the requirements of this section, the court shall enter an order, including written findings of fact and conclusions of law, terminating the moving party's child support obligation regarding the child. The court may tax as costs to the mother of the child the expenses of genetic testing.

Any unpaid support due prior to the filing of the motion or claim is due and owing. If the court finds that the mother of the child used fraud, duress, or misrepresentation, resulting in the belief on the part of the moving party that he was the father of the child, the court may order the mother of the child to reimburse any child support amounts paid and received by the mother after the filing of the motion or claim. The moving party has no right to reimbursement of past child support paid on behalf of the child to the State, or any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case as defined in G.S. 110-129(7).

If the child was born in North Carolina and the moving party is named as the father on the child's birth certificate, the court shall order the clerk of superior court to notify the State Registrar of the court's order pursuant to G.S. 130A-118(b)(2). If relief is granted under this

subsection, a party may, to the extent otherwise provided by law, apply for modification of or relief from any judgment or order involving the moving party's paternity of the child.

(i) Any servicemember who is deployed on military orders, and is subject to the protections of the Servicemembers Civil Relief Act, shall have the period for filing a motion pursuant to subsection (b) of this section tolled during the servicemember's deployment. If the period remaining allowed for the filing of the motion following the servicemember's redeployment is less than 30 days, then the servicemember shall have 30 days for filing the motion. (2011-328, s. 3.)

§ 110-132. Affidavit of parentage and agreement to motion to set aside affidavit of parentage.

(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

(a1) Paternity established under subsection (a) of this section may be set aside in accordance with subsection (a2) of this section or in accordance with G.S. 50-13.13.

(a2) Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an affidavit of parentage may be set aside by a trial court after 60 days have elapsed if each of the following applies:

(1) The affidavit of parentage was entered as the result of fraud, duress, mutual mistake, or excusable neglect.

(2) Genetic tests establish that the putative father is not the biological father of the child.

The burden of proof in any motion to set aside an affidavit of parentage after 60 days allowed for rescission shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall 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). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the affidavit of parentage was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the affidavit of parentage.

Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage.

(a3) A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she attests.

(b) At any time after the filing with the district court of an affidavit of parentage, upon the application of any interested party, the court or any judge thereof shall cause a summons signed by him or by the clerk or assistant clerk of superior court, to be issued, requiring the putative father to appear in court at a time and place named therein, to show cause, if any he has, why the court should not enter an order for the support of the child by periodic payments, which order may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action under this subsection on the affidavit of parentage previously filed with said court. The court may order the responsible parents in a IV-D establishment case to perform a job search, if the responsible parent is not incapacitated. This includes IV-D cases in which the responsible parent is a noncustodial mother or a noncustodial father whose affidavit of parentage has been filed with the court or when paternity is not at issue for the child. The court may further order the responsible parent to participate in the work activities, as defined in 42 U.S.C. § 607, as the court deems appropriate. The amount of child support payments so ordered shall be determined as provided in G.S. 50-13.4(c). The prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 5, 6; 1981, c. 275, s. 8; 1989, c. 529, s. 8; 1997-433, s. 4.7; 1998-17, s. 1; 1999-293, s. 1; 2001-237, s. 2; 2011-328, s. 2.)

APPOINTMENT OF COUNSEL FOR NON-PARENT RESPONDENTS IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS

Introduction:

G.S. 7B-602 provides that, where a juvenile petition alleges abuse, neglect, or dependency, the respondent parents have a right to appointed counsel if they are indigent. The General Assembly has not extended that statutory right to other named respondents in abuse, neglect, or dependency cases—such as guardians, custodians, or caretakers—and the North Carolina appellate courts have not squarely addressed the question of whether such named respondents are ever constitutionally entitled to appointed counsel at State expense.

IDS believes it is a question of law for the presiding judge to decide whether a particular indigent non-parent respondent is constitutionally entitled to appointed counsel. If a court were to determine that an indigent non-parent respondent has a constitutionally protected interest that triggers the right to due process, the court most likely would apply the balancing test set forth by the United States Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), to determine whether due process requires appointed counsel or whether some other process is sufficient. The three prongs of the Matthews test generally are: 1) the nature of the private interest at stake; 2) the nature of the government's interest, including the cost to the State of providing a particular form of process; and 3) the likelihood of error if that form of process is not provided. See Lassiter v. Department of Social Services, 425 U.S. 18, 101 S. Ct. 2153 (1981) (applying the Matthews test to hold that trial courts should assess the constitutional right to appointed counsel in termination of parental rights proceedings on a case-by-case basis).

IDS Policy:

If a judge concludes that due process requires appointment of counsel for a particular indigent non-parent respondent in an abuse, neglect, or dependency proceeding, IDS will pay for the representation pursuant to G.S. 7A-498.3(a)(1) (providing that IDS shall be responsible for providing counsel and related services in cases in which an indigent person is subject to a deprivation of a constitutionally protected interest and is entitled by law to legal representation).

Questions:

If you have questions about this policy or its application in a specific case, please contact:

- ✓ IDS' Parent Representation Coordinator, Wendy Sotolongo, at (919) 354-7230 or Wendy.C.Sotolongo@nccourts.org; or
- ✓ IDS' Assistant Director, Danielle Carman, at (919) 354-7200 or Danielle.M.Carman@nccourts.org.

Policy adopted July 2, 2008.

Authority:
G.S. 7A-498.3; 7B-602.

APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CIVIL PATERNITY CASES

Introduction:

There is no statutory right to counsel for an indigent defendant in a civil paternity suit and the Supreme Court of North Carolina has held that there is no per se constitutional right to counsel in such a proceeding. See *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333, 335, 293 S.E.2d 95, 97 (1982). However, the Supreme Court also held that "due process affords . . . a qualified entitlement to appointed counsel as determined by the trial court on a case-by-case basis." *Id.* Thus, it is a question of law for the presiding judge to decide whether a particular indigent defendant is constitutionally entitled to appointed counsel in a civil paternity case.

In determining whether a particular indigent defendant has a constitutionally protected interest that triggers the right to due process, the court should apply the balancing test set forth by the United States Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). The three prongs of the *Matthews* test generally are: 1) the nature of the private interest at stake; 2) the nature of the government's interest, including the cost to the State of providing a particular form of process; and 3) the likelihood of error if that form of process is not provided. See also *Lassiter v. Department of Social Services,* 425 U.S. 18, 101 S. Ct. 2153 (1981).

The *Carrington* Court specifically noted its belief that "with appropriate guidance from the trial court . . . , an indigent defendant could generally present his own defense to the 'charge' of paternity well enough without the aid of appointed counsel, although the unique circumstances of a particular case could indicate otherwise." *Carrington*, 306 N.C. at 340, 293 S.E.2d at 100. When a motion for appointment of counsel is made, "the trial court should proceed with an evaluation of the vital interests at stake on both sides and a determination of 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 judge must then weigh the foregoing factors against the overall and strong presumption that the defendant is not entitled to the appointment of counsel in a proceeding which does not present an immediate threat to personal liberty." *Id.* at 340-41, 293 S.E.2d at 100.

IDS Policy:

If a judge concludes that due process requires appointment of counsel for a particular indigent defendant in a civil paternity case, IDS will pay for the representation pursuant to G.S. 7A-498.3(a)(1) (providing that IDS shall be responsible for providing counsel and related services in cases in which an indigent person is subject to a deprivation of a constitutionally protected interest and is entitled by law to legal representation). In such a case, the Court must enter an Order specifically finding a constitutional right to appointed counsel, and that Order must be attached to counsel's fee application.

Questions:

If you have questions about this policy or its application in a specific case, please contact:

- ✓ IDS' Parent Representation Coordinator, Wendy Sotolongo, at (919) 354-7230 or Wendy.C.Sotolongo@nccourts.org; or

- ✓ IDS' Assistant Director, Danielle Carman, at (919) 354-7200 or Danielle.M.Carman@nccourts.org.

Policy adopted November 19, 2014.

Authority:
G.S. 7A-498.3; *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982).