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Short Title: Set Aside Paternity/Child Support.

(Public)

Sponsors:

Referred to:

March 7, 2011

1 A BILL TO BE ENTITLED
2 AN ACT ESTABLISHING A PROCESS TO SET ASIDE AN ORDER OF PATERNITY OR
3 AN AFFIDAVIT OF PARENTAGE UNDER LIMITED CIRCUMSTANCES, AND TO
4 ALLOW RELIEF FROM A CHILD SUPPORT ORDER WHEN THE OBLIGOR IS NOT
5 THE CHILD'S FATHER.

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** G.S. 49-14 reads as rewritten:

8 "**§ 49-14. Civil action to establish ~~paternity~~ paternity; motion to set aside paternity.**

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

14 ...

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

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

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

22 The burden of proof in any motion to set aside an order of paternity shall be on the moving
23 party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the
24 court shall order the child's mother, the child whose parentage is at issue, and the putative
25 father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). If the court determines,
26 as a result of genetic testing, the putative father is not the biological father of the child and the
27 order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect,
28 the court may set aside the order of paternity. Nothing in this subsection shall be construed to
29 affect the presumption of legitimacy where a child is born to a mother and the putative father
30 during the course of a marriage."

31 **SECTION 2.** G.S. 110-132 reads as rewritten:



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1 **"§ 110-132. Affidavit of parentage and agreement to support.****motion to set aside affidavit**
2 **of parentage.**

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

8 (1) 60 days of the date the document is executed, or

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

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

22 ~~After 60 days have elapsed, execution of the document may be challenged in court only~~
23 ~~upon the basis of fraud, duress, mistake, or excusable neglect. The burden of proof shall be on~~
24 ~~the challenging party, and the legal responsibilities, including child support obligations, of any~~
25 ~~signatory arising from the executed documents may not be suspended during the challenge~~
26 ~~except for good cause shown.~~

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

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

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

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

36 The burden of proof in any motion to set aside an affidavit of parentage after 60 days allowed
37 for rescission shall be on the moving party. Upon proper motion alleging fraud, duress, mutual
38 mistake, or excusable neglect, the court shall order the child's mother, the child whose
39 parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to
40 G.S. 8-50.1(b1). If the court determines, as a result of genetic testing, the putative father is not
41 the biological father of the child and the affidavit of parentage was entered as a result of fraud,
42 duress, mutual mistake, or excusable neglect, the court may set aside the affidavit of parentage.
43 Nothing in this subsection shall be construed to affect the presumption of legitimacy where a
44 child is born to a mother and the putative father during the course of a marriage.

45 (a3) A written agreement to support the child by periodic payments, which may include
46 provision for reimbursement for medical expenses incident to the pregnancy and the birth of the
47 child, accrued maintenance and reasonable expense of prosecution of the paternity action, when
48 acknowledged as provided herein, filed with, and approved by a judge of the district court at
49 any time, shall have the same force and effect as an order of support entered by that court, and
50 shall be enforceable and subject to modification in the same manner as is provided by law for
51 orders of the court in such cases. The written affidavit shall contain the social security number

1 of the person executing the affidavit. Voluntary agreements to support shall contain the social
2 security number of each of the parties to the agreement. The written affidavits and agreements
3 to support shall be sworn to before a certifying officer or notary public or the equivalent or
4 corresponding person of the state, territory, or foreign country where the affirmation,
5 acknowledgment, or agreement is made, and shall be binding on the person executing the same
6 whether the person is an adult or a minor. The child support enforcement agency shall ensure
7 that the mother and putative father are given oral and written notice of the legal consequences
8 and responsibilities arising from the signing of an affidavit of parentage and of any alternatives
9 to the execution of an affidavit of parentage. The mother shall not be excused from making the
10 affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter
11 be prosecuted for any criminal act involved in the conception of the child as to whose paternity
12 she attests.

13 (b) At any time after the filing with the district court of an affidavit of parentage, upon
14 the application of any interested party, the court or any judge thereof shall cause a summons
15 signed by him or by the clerk or assistant clerk of superior court, to be issued, requiring the
16 putative father to appear in court at a time and place named therein, to show cause, if any he
17 has, why the court should not enter an order for the support of the child by periodic payments,
18 which order may include provision for reimbursement for medical expenses incident to the
19 pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action
20 under this subsection on the affidavit of parentage previously filed with said court. The court
21 may order the responsible parents in a IV-D establishment case to perform a job search, if the
22 responsible parent is not incapacitated. This includes IV-D cases in which the responsible
23 parent is a noncustodial mother or a noncustodial father whose affidavit of parentage has been
24 filed with the court or when paternity is not at issue for the child. The court may further order
25 the responsible parent to participate in the work activities, as defined in 42 U.S.C. § 607, as the
26 court deems appropriate. The amount of child support payments so ordered shall be determined
27 as provided in G.S. 50-13.4(c). The prior judgment as to paternity shall be res judicata as to that
28 issue and shall not be reconsidered by the court."

29 **SECTION 3.** Article 1 of Chapter 50 of the General Statutes is amended by adding
30 the following new section to read:

31 **§ 50-13.13. Motion or claim for relief from child support order based on finding of**
32 **nonpaternity.**

33 (a) Notwithstanding G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure,
34 or any other provision of law, an individual who, as the father of a child, is required to pay
35 child support under an order that was entered by a North Carolina court pursuant to Chapter 49,
36 50, 52C, or 110 of the General Statutes, or under an agreement between the parties pursuant to
37 G.S. 52-10.1 or otherwise, and that is subject to modification by a North Carolina court under
38 applicable law may file a motion or claim seeking relief from a child support order as provided
39 in this section.

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

- 45 (1) The basis, with particularity, on which the moving party believes that he is
46 not the child's father.
47 (2) The moving party has not acknowledged paternity of the child or
48 acknowledged paternity without knowing that he was not the child's
49 biological father.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50 (h) If the court determines that the moving party has satisfied the requirements of this
51 section, the court shall enter an order, including written findings of fact and conclusions of law,

1 terminating the moving party's child support obligation regarding the child. The court may tax
2 as costs to the mother of the child the expenses of genetic testing.

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

11 If the child was born in North Carolina and the moving party is named as the father on the
12 child's birth certificate, the court shall order the clerk of superior court to notify the State
13 Registrar of the court's order pursuant to G.S. 130A-118(b)(2). If relief is granted under this
14 subsection, a party may, to the extent otherwise provided by law, apply for modification of or
15 relief from any judgment or order involving the moving party's paternity of the child.

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

22 **SECTION 4.** This act becomes effective January 1, 2012, and applies to motions
23 or claims for relief filed on or after that date. Notwithstanding the provision in Section 3 of this
24 act requiring motions or claims to be filed within one year of discovery that the moving party is
25 not the father, any person who would otherwise be eligible to file a motion or claim may file a
26 motion or claim pursuant to this act prior to January 1, 2013.