

Disestablishment of Paternity

2016 Child Support Enforcement: Representing Respondents
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Legal avenues have always existed to set aside paternity orders under rare circumstances. Statutory changes, effective January 2012, were expected to make disestablishment of paternity less difficult to achieve. The reality may be totally different.

Let's assume you have been appointed to represent a defendant in a child support case who was served with an order to show cause for failure to comply with a child support order. He tells you that he is pretty sure he is not the father of the child. Where do you begin?

1. Ask your client lots of questions.

A list of sample questions is attached as a starting point. *Attachment 1*. Some of the later questions may be unnecessary if you receive affirmative answers to some of the earlier questions. You might want to tweak this list to add other questions of your own or to word them in a different way. But these will provide a basic outline for the information you need in order to determine whether it is feasible to move forward with a motion for disestablishment.

2. Research the court file.

Your client may not remember all of the details regarding dates or events. Even if he thinks he remembers what happened, you will need to check the court file to verify his claims. Research the court file to determine how paternity was established, when it was established, and what documentation is in the file to support the method of establishment. Make copies of the relevant documents.

➤ *Affidavit of Parentage*

The Affidavit of Parentage ([AOC-CV-604](#)) contains the father's acknowledgement and the mother's affirmation executed before a notary. Very often this is executed at the hospital. This document is 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[.]" N.C. Gen. Stat. § 110-132(a). *See also* N.C. Gen. Stat. § 130A-101(f). An affidavit of parentage may be rescinded "within the earlier of (1) 60 days of the date the document is executed, or (2) the date of entry of an order establishing paternity or an order for payment of child support." *Id.*

- This document must contain the social security number of both parents. N.C. Gen. Stat. § 110-132(a3).
- This document may be executed by minor parents. *Id.*
- The parents must receive oral and written notice of the legal consequences and responsibilities arising from the signing of this document and any alternatives to its execution. *Id.*

When paternity has been voluntarily established by affidavit of parentage, only a child support action will be initiated by the child support enforcement agency. A Summons will be issued by a judge or the Clerk of Superior Court requiring the father to show cause as to why the court should not enter an order for the support of the child by periodic payments. N.C. Gen. Stat. § 110-132(b).

➤ *Order of Paternity*

When paternity has not been voluntarily established and there is no presumption of paternity, child support enforcement will file a civil action to determine parentage of a child born out-of-wedlock. Pursuant to N.C. Gen. Stat. § 49-16, a civil action to establish paternity may be initiated by:

- The mother, putative father, child, or the personal representative of the mother or child; or
- The director of social services in the county where either the mother, putative father, or child resides or is found, when the mother or child is likely to become a recipient of public assistance.

N.C. Gen. Stat. § 49-16.

The civil complaint may include a claim for paternity only or a claim for both paternity and child support. The civil complaint must be accompanied by a civil summons that is served on the defendant pursuant to Rule 4 of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4. Often a notice of hearing is served simultaneously. A civil complaint cannot be served upon an un-emancipated minor defendant, unless a guardian ad litem has been appointed. N.C. Gen. Stat. § 1A-1, Rule 17(b)(2).

After service of the civil complaint upon the defendant, the order for paternity may have been entered by *default* if he did not appear. *See* N.C. Gen. Stat. § 1A-1, Rule 55.

If the defendant appeared in court, he either *admitted* or *denied* paternity.

- If he *admitted* paternity, an order for paternity was entered and, if a claim for child support was also made, the court proceeded to address the child support issue.
- If he *denied* paternity, paternity testing was ordered. An order for paternity would only have been entered after the results of paternity testing were returned and there was an opportunity for the defendant to be heard.

Paternity testing is required in any contested civil case if the child is more than three years old. N.C. Gen. Stat. § 49-14(d). If no objections are filed to the testing procedures or results, the results are admissible without proof of authenticity or accuracy. N.C. Gen. Stat. § 8-50.1(b1).

➤ *Presumed Legal Father*

If the father is a presumptive legal father, the child support action alone will be pursued by the child support enforcement agency through a civil action. It should be apparent from the civil complaint for child support why an action for paternity was not pursued when the father is a presumptive legal father. The complaint should indicate that the child was conceived

and/or born during the marriage, that the child was adopted by the father, or that the child was legitimated by the father. After service of the civil complaint upon the father, the order for support may have been entered after his appearance in court or by default if he did not appear.

3. Review the paternity disestablishment (set aside) statutes.

Our legislature added three statutes specific to disestablishment of paternity effective January 1, 2012: 1) Motion to set aside a determination of paternity in an affidavit of parentage (N.C. Gen. Stat. § 110-13(a2)); 2) Motion to set aside a determination of paternity in a civil order (N.C. Gen. Stat. § 49-14(h)); and 3) Motion or claim for relief from a child support order (N.C. Gen. Stat. 50-13.13). Review each one carefully to determine which is the most applicable to your client's situation.

➤ *Motion to set aside a determination of paternity in an affidavit of parentage*

Section 110-132(a2) of the North Carolina General Statutes reads as follows:

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.

N.C. Gen. Stat. § 110-132(a2).

There is an AOC form motion and notice of hearing to set aside an affidavit of parentage that coincides with the requirements of this statute, or you may prepare your own motion. [AOC-CV-670](#). Here is a list of the statutory requirements broken down:

- A proper motion to set aside an affidavit of parentage must make allegations to support fraud, duress, mutual mistake, or excusable neglect;
- The court shall order the mother, child and putative father to submit to genetic paternity testing upon filing of a proper motion;
- The movant has the burden of proof (no standard of proof is specified);
- If the genetic paternity testing shows the putative father is not the father and the affidavit of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect the court may set aside the affidavit of parentage (i.e., at the court's discretion);
- This statute is not applicable to a presumed legal father.

➤ *Motion to set aside an order of paternity in a civil order*

Section 49-14(h) of the North Carolina General Statutes reads as follows:

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.

N.C. Gen. Stat. § 49-14(h).

There is an AOC form motion and notice of hearing to set aside an order of paternity that coincides with the requirements of this statute, or you may prepare your own motion. [AOC-CV-670](#). This motion is the same motion as the one that is used to set aside an affidavit of parentage. Note that the wording of both statutes is identical.

➤ *Motion or claim for relief from a child support order*

Section 50-13.13 of the North Carolina General Statutes reads as follows:

(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.

N.C. Gen. Stat. § 50-13.13. Whew!

There is an AOC form motion and notice of hearing for relief from child support obligation due to disestablishment of paternity pursuant to N.C. Gen. Stat. § 50-13.13, or you may prepare your own motion. [AOC-CV-671](#).

The requirements for a motion or action pursuant to section 50-13.13 are:

- It must be filed within one year of the date the party knew or reasonably should have known that he was not the father of the child;

- It must be verified by the moving party;
- It must state the basis, with particularity, on which he believes he is not the child's father;
- It must state that he has not acknowledged paternity of the child, or he acknowledged paternity without knowing that he was not the child's biological father;
- It must state that he has not adopted the child, has not legitimated the child pursuant to specific enumerated statutes, and is not the child's legal father through artificial insemination;
- It must state he did not act to prevent the biological father from asserting his paternal rights.

The court may appoint a guardian ad litem to represent the interest of the child. The moving party pays the costs of the genetic testing, if it is ordered. The child support obligation is suspended while the motion or claim is pending, if support is paid on behalf of the child to the State. N.C. Gen. Stat. § 50-13.13 (c)-(e).

4. Carefully prepare the appropriate motion or claim.

Although the AOC form motions provide a good outline, they may not provide enough space to meet the requirements of the statutes. Feel free to either file your own motion or to include attachments.

- *Preparing a motion to set aside paternity pursuant to N.C. Gen. Stat. 110-132(a2) or N.C. Gen. Stat. 49-14(h)*

There is no case law that has addressed these statutes to provide us with guidance regarding the way in which a motion should be filed or in what manner a hearing should be conducted. It appears that the request for a paternity test is only dependent upon the filing of a "proper motion." If so, that means that a well-written motion is critical.

In order to prepare an effective motion to set aside paternity for your client, you must first know whether there was an order of paternity or an

affidavit of paternity, the date on which that occurred, and a copy of that document to attach to the motion.

Second, you must know the reason upon which your motion should be based: fraud, duress, mutual mistake, or excusable neglect. Some of these reasons are also bases for granting motions under Rule 60(b) of the Rules of Civil Procedure. Appellate cases defining these reasons in that context are helpful for providing an understanding of the proof required. The following definitions merely brush the surface, and will help you begin your own research:

- Fraud – To assert fraud, the defendant “must present evidence tending to show (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) which was relied upon and which resulted in damages to the injured party.” *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663 (1995). The reliance must be reasonable. *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72 (2002), *disc. review denied*, 356 N.C. 694 (2003).
- Duress – “Duress is the result of coercion.” *Link v. Link*, 278 N.C. 181, 191 (1971). “Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.” *Id.*
- Mutual mistake: The mistake must be “common to both parties and because of it each has done what neither intended.” *Stevenson v. Stevenson*, 100 N.C. App. 750, 752 (1990).
- Excusable neglect: “While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.” *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 425 (1986).

In general, to assert one of these reasons as a basis for setting aside the affidavit or order, it will be necessary to make specific allegations to satisfy the required elements.

Third, you must include the name and birthdate of the child. And fourth, you must indicate whether or not your client is under an order to pay child support.

➤ *Preparing a motion or claim for relief from a child support order pursuant to N.C. Gen. Stat. § 50-13.13*

A well-written motion or claim for relief from a child support order is just as important as preparing a motion to set aside paternity. The statute states that the court shall order 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.” N.C. Gen. Stat. § 50-13.13(d) (emphasis added). There is some guidance regarding this statute from an unpublished case, *Guilford County v. Sutton*, COA13-310, 753 S.E.2d 397 (N.C. Ct. App. November 5, 2013) (**unpublished**). In *Sutton*, the Court of Appeals affirmed the trial court’s determination that the defendant did not show good cause to believe that he was not the father of the child in order to permit the trial court to order paternity testing. *Id.*, slip op. at 6.

Two of the most important requirements in the statute are:

- The motion or claim for relief must be *verified* by the moving party (not the attorney). N.C. Gen. Stat. § 50-13.13(b).
- The motion or claim for relief from a child support order must state “[t]he basis, with *particularity*, on which the moving party believes that he is not the child’s father.” N.C. Gen. Stat. § 50-13.13(b)(1) (emphasis added). “Particularity” means that the pleading should include sufficient detail to show the court that there is good cause to believe your client is not the father of the child. When preparing your motion, you must consider and address the information you glean

from your client. Do not neglect to address any “bad facts” that will be brought forward by the child support enforcement agency.

5. Prepare for the hearing

➤ *Obtaining an order for a paternity test: the first hurdle*

Because there is little case law guidance for a paternity disestablishment proceeding, the way in which the hearing is conducted varies across the State of North Carolina. The statutes all indicate that the first step is for the court merely to consider whether or not the allegations are sufficient for the court to order paternity testing. This is not a hearing on the merits to *prove* whether or not your client is the father. This is akin to a probable cause hearing. Be prepared for whatever the judges in your jurisdiction may require. If your judge will expect you to provide evidence, you need to prepare your client to testify, subpoena any additional necessary witnesses, and obtain necessary documents.

Remind your client that, if the court orders paternity testing, he may have to advance the cost. N.C. Gen. Stat. § 50-13.13 requires the court to order the moving party to pay the costs of testing. The other statutes are silent as to who is required to pay, although each makes reference to N.C. Gen. Stat. § 8-50.1 which also requires the moving party to pay for the testing. Despite the wording of these statutes, many jurisdictions order the child support enforcement agency to advance the costs for paternity testing (even for disestablishment proceedings) and allow defendants to reimburse if found to be the father. Your ability to convince the court to order the agency to advance the costs may depend upon the egregiousness of your factual allegations.

➤ *After the paternity test: the second hurdle*

If the court orders a paternity test, it is likely that your worries are over. Either your client will be found to be the father and the child support order continues, or he is found not to be the father and the child support enforcement agency will assist in terminating the child support order. In the unlikely event that there is still resistance, you will need to prepare for a

hearing on the merits of the issue based on all of the evidence that supports your motion plus the paternity test results. Refer to N.C. Gen. Stat. § 8-50.1 for guidance in the admission of the paternity testing results.

6. What if my client wants to appeal an adverse decision?

If you are court-appointed to represent your client, you must inform your client that he is not entitled to court-appointed representation for the appeal of a paternity disestablishment proceeding. It is best to explain that to your client from the beginning. If he wishes to appeal, you should explain to the client his right to appeal and that he may represent himself or hire an attorney to represent him on the appeal.

Please do not hesitate to contact us if you want to consult with us about your disestablishment proceeding. We will do our best to assist you!

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