PATERNITY ESTABLISHMENT AND DEFENSES

I. Establishment of Paternity

A. G.S. §110-132(a): Acknowledgment of paternity

In lieu of filing an action to have paternity established, the mother and putative father can sign an affidavit of parentage that the putative father is the natural father of the minor child. This document constitutes "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 the mother or the father to rescind their signature within 60 days of signing.

B. G.S. §49-14: Civil action to establish paternity

1. When the father of a child born out of wedlock does not voluntarily acknowledge paternity under G.S. §110-132, a civil action to establish paternity can be initiated under G.S. §49-14 to have paternity established.

2. The action may be brought "at any time prior to the child's eighteenth birthday."

3. Proof of paternity is by clear, cogent and convincing evidence.

4. If the child is more than three years of age, a blood test must be done or else evidence must be presented that the putative father declined the opportunity for testing.

5. If the blood-test results show a probability of paternity less than 85%, then the defendant is presumed not to be the father. This evidence may be rebutted by clear, cogent, and convincing evidence. If the results are 97% or greater, a rebuttable presumption of paternity arises. See G.S. §8-50.1(b1) for details on presumptions and blood-testing. See also Nash County Dept. of Social Services ex rel., Williams v. Beamon, 126 N.C. App. 536, 485 S.E.2d 851, disc. rev. denied, 347 N.C. 268, 493 S.E.2d 655 (1997).

6. No action may be started nor judgment entered unless it is initiated within one year following the death of the putative father. G.S. §49-14(c).

C. G.S. §§49-10 and 49-12: Legitimation

1. Paternity is established when the putative father of a child born out of wedlock legitimates the child pursuant to the provisions of G.S. §49-10. G.S. §49-11.

a. The putative father files a verified written petition in a special proceeding in Superior Court in the county where either the putative father or the child resides.

b. The mother (if living) and the child, are necessary parties.

c. The petition must contain the full names of the father, mother and child.

Note: see In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). Where the mother is married to another man, the putative father must also join the mother's spouse as a necessary party and a guardian ad litem must be appointed to represent the child if the child is a minor. G.S. §49-12.1.

2. Paternity is established when the reputed father and mother intermarry. G.S. §49-12. Stated differently, if he and the mother "regard," "deem," "consider" or "hold in thought" (either before or after marriage) that they are the child's parents, then the child is legitimate. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950); Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

D. Compliance with G.S. §130A-101(f): Birth registration

1. When a child is born to an unmarried woman, the father's name cannot be entered onto the birth certificate without "written consent of the father and mother under oath." State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991). If the father, however, states under oath that he is the father and has his name placed on the birth certificate, he will be estopped from denying paternity because of his sworn admission. Chambers.

2. The defendant will be estopped from denying paternity even if the affidavit signed was false. Id.

3. If a child is born to a married woman, the name of the husband is entered as the child's father on the birth certificate, unless a court of competent jurisdiction has ruled otherwise. G.S. §130A-101(e).

E. G.S. §49-2: Nonsupport of illegitimate child

1. In a criminal action to seek support of an illegitimate child, paternity must first be established. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968) (Discussing the elements of the offense).

2. Once established it does not need to be relitigated in subsequent prosecutions. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

3. A general verdict of guilty of willful nonsupport is sufficient as a finding of paternity. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

4. A general verdict of not guilty does not, however, determine that the defendant is not the biological father of the minor child. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952).

6. When a sister state has previously adjudicated paternity the biological father may not contest paternity in North Carolina. Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576 (2000). See also G.S. §52C-3-314; G.S. §110-132.1.

II. Denials and Defenses in Paternity Actions

A. G.S. §8-50.1: Blood tests

1. The best defense that a putative father has in a paternity action is an exclusion as the result of a blood test. A mere statement that "I am not the father" is insufficient.
But see Beamon. G.S. §8-50.1 grants the parties to a paternity action the right to request and receive a blood test. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970) ("There can be no doubt that a defendant's right to a blood test to determine parentage is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so.") But see Johnson v. Johnson, 343 N.C. 114, 468 S.E.2d 59 (1996) (G.S. §8-50.1 does

not confer standing on an alleged natural father to compel a presumed father to submit to blood testing to determine the paternity of a child born during the marriage of the presumed father to the natural mother). See also Ambrose v. Ambrose, 140 N.C. App. 545, 536 S.E.2d 855 (2000)(putative father of child born during marriage entitled to genetic testing because the issue of paternity not previously adjudicated or determined).

2. Indigent defendants are entitled to a free blood test.

3. The test cannot "prove" paternity. If defendant is included, it is up to the trier of fact to determine the weight given blood tests. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986); Beamon.

4. The test is conclusive in excluding the putative father.

5. Where evidence showed that defendant was sterile at the time of conception of the child, the inclusionary probability had to be reduced to 0%. Cole v. Cole, 74 N.C. App. 247, 328 S.E.2d 446, affirmed, 314 N.C. 660, 335 S.E.2d 897 (1985).

B. Rebutting the presumption of legitimacy

1. If a child is born to a married woman the husband's name must be placed upon the birth certificate. G.S. §130A-101(e). Exception: If paternity "has been otherwise determined by a court of competent jurisdiction . . . the name of the father as determined by the court shall be entered." G.S. §130A-101(e).

2. The husband, who is not the natural father is generally called the "legal father" because of G.S. §130A-101(e).

3. A husband can rebut the presumption of legitimacy in several ways:

a. Where he has access to the wife --

(1) Blood test exclusion. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972). The court held that a blood test excluding a presumed father from the class of persons capable of being the natural is sufficient to rebut the presumed legitimacy of a child conceived during wedlock.

(2) No capacity to procreate. The defendant was sterile at the time of conception. Cole v. Cole, 74 N.C. App. 247, 328 S.E.2d 446, affirmed, 314 N.C. 660, 335 S.E.2d 897 (1985).

(3) Possible racial or other distinctive physical differences. Leach v. Alford, 63 N.C. App. 118, 309 S.E.2d 265 (1983) (the trial court set aside a paternity order when it later determined that the minor child had a genetic disease for which both parents had to be carriers and the man was proven not to have the gene); Wright.

(4) Testimony by either husband or wife that they did not engage in sexual relations during the conception time period. G.S. §8-57.2. (Warning: Get a blood test; if the defendant had access, it will be presumed that he exercised his access. Wake County ex rel. Bailey v. Matthews, 36 N.C. App. 316, 244 S.E.2d 191 (1978)). Exception: Wife and paramour lived in "open and notorious adultery." This term means that the parties engaging in adultery resided together publicly as if a marital relationship existed between them, and this as well as the fact that they are not husband and wife are both known in the community of their residence. Id at 194.

b. Where non-access exists

(1) Bloodtest exclusion.

(2) No capacity to procreate.

(3) Racial or other distinctive physical differences.

(4) "Across the seven seas doctrine." At the time conception took place, the defendant (usually a service member) was in another state, including overseas, on a ship, or in a location which would have prevented him from engaging in sexual

relations with his spouse. G.S. §8-57.2 would permit his testimony on this issue.

C. Rescission. Either the man or the woman may petition the district court to order their respective signatures be rescinded from the affidavit of parentage which they may have signed in accordance with G.S. §110-132(a). The parties have no longer than 60 days from the date of signing to petition the court. In the event that no rescission petition is filed, the only recourse available to the putative father to overcome the admission of paternity is to file a Rule 60 motion alleging either fraud, duress, mistake, or excusable neglect.

III. Collateral estoppel and res judicata in paternity cases

A. The principles of res judicata and collateral estoppel preclude the relitigation of a claim or issue after a final determination on the merits by a court of competent jurisdiction. It applies to parties and persons in privity with parties. See Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996).

B. Application in paternity cases

1. When the mother and father execute the documents necessary to have paternity established under G.S. §110-132(a). Person County ex rel. Lassiter v. Holloway, 74 N.C. App. 734, 329 S.E.2d 713 (1985); Beaufort County v. Hopkins, 62 N.C. App. 321, 302 S.E.2d 662 (1983).

2. Additionally, "when a judgment is rendered by a court having jurisdiction to do so finding paternity to exist, the relitigation of that issue by the parties to the original judgment is precluded." Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821(1978).

3. Once paternity has been established, res judicata precludes a trial court from ordering a blood test. Sampson County Child Support Enforcement Agency ex rel. McNeill v. Stevens, 101 N.C. 719, 400 S.E.2d 776 (1991).

4. If granted, blood test orders will be vacated on appeal because the trial judge lacked authority to enter the order because that issue had been previously determined. McNeill.

5. If defendant is found not to be the father in an action brought the mother, can he be assured that the matter is over? No--

because there are two other "persons" that can bring an action.

(a) Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976). The North Carolina Supreme Court held that defendant's prior criminal conviction under G.S. §49-2 does not preclude him from denying paternity in a subsequent civil action brought by the mother to establish paternity and obtain support under G.S. §§49-14 and 49-15 because the mother and child were not in privity with the State. In the state prosecution, she was a mere witness and did not control the prior criminal prosecution.

(b) Settle v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983). There is no privity between the State and the mother of an illegitimate child and the county IV-D agency for purposes of res judicata and collateral estoppel in connection with two actions against the same putative father seeking to establish paternity.

C. Actions to establish paternity can be brought by the mother, the father, the child or the personal representative of the mother or the child, and the Director of Social Services or such person "as by law performs the duties of such official." G.S. §49-16.

IV. Other likely defenses

A. Statute of limitations (e.g., the child is 18 or older at the time the action is brought.) G.S. §49-14(a). In the interstate context paternity establishment may be requested pursuant to the Uniform Interstate Family Support Act. North Carolina procedural and substantive law will apply in those cases where paternity is being established in North Carolina. G.S. §52C-7-701.

B. The court lacks subject matter jurisdiction to determine paternity (e.g., plaintiff failed to attach certified copy of birth certificate.) Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

C. The court lacks personal jurisdiction over the defendant.

D. Parental rights have been terminated, either by termination of parental rights action or entry of final order of adoption.

E. Objection to chain of custody for blood test results.

1. Blood test results may be inadmissible under G.S. §8-50.1 when they are not ordered by the trial court. Catawba County ex

rel. Kenworthy v. Khatod, 125 N.C. App. 131, 479 S.E.2d 270 (1997).

2. Where G.S. §8-50.1 provides that verified documentary evidence of the chain of custody is competent evidence for admission into evidence, certification of the documents is not sufficient to comply with the statute. Rockingham County Department of Social Services ex rel. Shaffer v. Shaffer, 126 N.C. App. 197, 484 S.E.2d 415 (1997).

3. A proper chain of custody will admit any blood test results into evidence. Lambroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).