

# CHALLENGES TO PATERNITY ORDERS IN OREGON -- STANDING AND GROUNDS

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## *Summary*

*Ordinarily parties to a judicial or administrative procedure that results in the establishment of legal paternity may not challenge the finding after the time for appeal has expired. Oregon statutes create limited exceptions to this rule. While res judicata would not bar a third party's collateral attack on a paternity finding unless the party were in privity with one of the original parties, a court might bar an attack on policy grounds under some circumstances. In addition, a person who would otherwise have standing and grounds to challenge a paternity finding may be equitably estopped from doing so if he or she has made representations inconsistent with the challenge upon which another has relied.*

## I. Challenges to judicial findings of paternity by parties

Under usual res judicata principles, a party cannot attack a final order issued by a court or administrative agency that had jurisdiction to decide the matter once the time for direct appeal has expired. However, the Oregon statutes governing establishment of paternity allow parties to raise challenges that would otherwise be barred by res judicata under limited circumstances.

### A. Res judicata and challenges to paternity findings under ORCP 71

ORCP 71(B) provides that a court may, upon motion of a party, relieve that party from a judgment by reason of mistake, fraud, misrepresentation, or other misconduct of an adverse party if the motion is made within a year after the movant received notice of the judgment. Rule 71(C) gives the court the inherent power to modify a judgment within a reasonable time or to entertain an independent action to relieve a party from a judgment, or the power to set aside a judgment for fraud upon the court. Both aspects of Rule 71 have been invoked without success by petitioners who sought to set aside paternity judgments; the courts in these cases have emphasized the importance of res judicata and its cousin judicial estoppel in general and particularly in protecting the finality of findings of paternity.

#### 1. Claims of fraud under ORCP 71(B)

Oregon courts have been reluctant to set aside paternity judgments on the basis of claims of fraud. In *Watson v. State*, 71 Or. App. 734, 694 P.2d 560 (1985), the mother filed a filiation suit against Watson and gave a deposition asserting that he was the father and that she had not had sexual relations with anyone else during the time the child was conceived. Watson did not seek blood tests and stipulated that he was the father; a judgment was entered accordingly. Several years later he became suspicious that he was not the father and had blood tests done, which indicated that he was not the father. He moved to vacate the earlier paternity judgment on the basis that it was procured by fraud, mother's perjury during the deposition. The court of

appeals held that if the mother had committed perjury, this was intrinsic, rather than extrinsic, fraud, and so was not the kind of fraud that can be raised in a Rule 71 motion. 71 Or. App. at 737. The court emphasized that Watson had an opportunity to put on evidence, which he opted not to do when he stipulated. *Id.* Further, the court said that a court of equity could not relieve the plaintiff based on evidence of intrinsic fraud even though the judgment is manifestly wrong. *Id.* If this were the case, then the finality of many paternity judgments would be in doubt.

The court of appeals confirmed the holding in *Watson* in *McClain v. McClain*, 155 Ore. App. 258, 958 P.2d 909 (1998) (affirming a trial court order denying the motion of a former husband to set aside a dissolution judgment that included a finding of paternity, made on the basis that the mother had lied to him).

## 2. The court's inherent power under ORCP 71(C)

The court's authority to modify, set aside and relieve a party from the effect of judgments under Rule 71(C) is generally limited to making technical amendments, to correcting errors of the court or to situations in which extraordinary circumstances are present. *Dept. of Human Resources v. Shinall*, 148 Or. App. 560, 563-564, 941 P.2d 616 (1997); *Kneefel v. McLaughlin*, 187 Or. App. 1, 7, 67 P.3d 947 (2003). "Extraordinary circumstances' typically involve some type of fraud or overreaching by one of the parties." *Kneefel, id.*

In *Shinall*, the court of appeals held that the mother could not bring a filiation suit against Mr. B when Mr. A. had been adjudicated the child's father in an earlier administrative proceeding. The court characterized the filiation suit as an effort to circumvent the res judicata effect of the prior paternity finding and therefore held that the judgment in the filiation suit should be vacated. 148 Or. App. at 565. The court also held that the earlier judgment could not be set aside under the court's inherent authority to set aside a judgment under ORCP 71(C).

More recently, the court in *Kneefel v. McLaughlin*, 187 Or. App. 1, 67 P.3d 947 (2003), held that ORCP 71(C) does not authorize a court to set aside an order that permitted a mother's former boyfriend to visit her child, to which the mother had stipulated, when the mother claimed that the order violated her constitutional rights under *Troxel v. Granville*, 530 U.S. 57 (2000). First, the court said that a stipulated judgment is a contract approved by the court and can be set aside only on grounds adequate to rescind a contract. 187 Or. App. at 7-8. No such ground was alleged in this case. Second, citing *Vinson v. Vinson*, 57 Or. App. 355, 644 P.2d 635, rev. den. 293 Ore. 456; 650 P.2d 928 (1982), the court said that "the fact that a judgment may be erroneous based on a subsequent decision of another court does not deprive the prevailing party of the ability to rely on that judgment when faced with a collateral attack. To hold otherwise would undermine the conclusive character of judgments and create uncertainty and confusion about their finality." 187 Or. App. at 8-9. Thus, the court held that the mother was barred by res judicata from attacking the stipulated judgment.

*See also State ex rel. Adult & Fam. Serv. Div. v. Evans*, 126 Or. App. 592, 860 P.2d 891 (1994). The mother brought a filiation suit against Evans, who signed a stipulated order that included an admission of paternity and agreement to pay child support. The judge signed the stipulation, but no decree was entered. Eight years later, DHS moved to modify the order to comply with child support guidelines. Evans argued that the court lacked jurisdiction to modify because legal paternity had never been established. The court of appeals agreed that his admission contained in the stipulated order was not sufficient to establish legal paternity because he had not signed under oath, as required by statute. However, the court held that Evans was

judicially estopped to deny that his admission of paternity was sufficient. The court explained, “judicial estoppel bars a party from asserting a position in a judicial proceedings that is inconsistent with one successfully asserted in an earlier judicial proceeding.” 126 Or. App. at 595.

## B. Administrative challenges under ORS Chapter 416

ORS 416.415(3) provides that when the state initiates proceedings to establish child support, it may also seek an order establishing paternity if the child has no legal father. If the person to whom notice of the proceedings is sent does not respond, the agency may enter an administrative order establishing paternity by default. ORS 416.415(7)(a); 416.430(2). This order establishes legal paternity for all purposes. ORS 416.430(3). When a true copy of this order, along with accompanying documentation of return of service and other information required by ORS 18.042(2), are filed in the circuit court and registered by the clerk of the court, the order has the force and effect of a circuit court order. ORS 416.440(3).

ORS 416.443 says that a party to a paternity order established administratively may petition to reopen the administrative proceeding within one year of the order being registered in circuit court under ORS 416.440 if no genetic tests have been done. The administrator shall order genetic testing. See also OAR 137-055-3140.

## C. Judicial challenges under ORS Chapter 109

2005 Oregon Laws ch. 160, sec. 9, which sunsets on Jan. 2, 2008, authorizes a child’s mother or legal father to petition the court to reopen judicial or administrative findings of paternity under very limited circumstances. First, the relief is available only if no blood test evidence was admitted at the time the order was entered. Second, the order or judgment challenged must have been entered default and no longer be subject to appeal. Third, the petition to reopen must be filed within two years of the date of the order. Finally, the petition must be accompanied by an affidavit stating that the petitioner has discovered new evidence since the order or judgment was entered and by “results of blood tests, administered within 90 days before the petition is filed, that show a zero percent probability that the legal father is the biological father of the child.” Section 9(2) and (3).

## II. Third party challenges to judicial findings of paternity

One section of ORS Chapter 109 creates a very limited right for some third parties to challenge paternity findings directly. Any other challenge by a third party would be brought indirectly by filing a filiation suit or other suit that put the prior finding of paternity into question. The Oregon appellate courts have not discussed the extent to which such a collateral attack is barred for equitable or policy reasons.

### A. Direct third party challenges under ORS 109.070

The provisions of Chapter 416 and Chapter 109 discussed above do not apply to third parties. The only Oregon statute that allows anyone other than a party to challenge a finding of paternity concerns voluntary acknowledgments of paternity. Under ORS 109.070(1)(d), a

voluntary acknowledgment of the paternity of a child born to an unmarried woman that is signed by the mother and the biological father establishes legal paternity for all purposes once it is filed with the Center for Health Statistics. ORS 109.070(3) allows a challenge to a voluntary acknowledgment to be brought on the grounds of fraud, duress or material mistake of fact by the child or, if the child is in the care and custody of the state as a dependent child pursuant to the provisions of ORS chapter 419B, by DHS or the administrator of the state Division of Child Support of the Department of Justice.

#### B. Filiation suits and other actions as collateral attacks on prior findings of paternity

A filiation suit constitutes a collateral attack on an earlier finding of paternity if the suit alleges that someone other than the legal father is the child's biological father. In *Dept. of Human Resources v. Shinall*, 148 Or. App. 560, 941 P.2d 616 (1997), discussed above, the court held that the mother's filiation suit filed against Mr. B in 1993 constituted a collateral attack on a 1989 default order naming Mr. A as the child's father. In an analogous situation the court of appeals held that filing a filiation suit can be a collateral attack on an adoption decree. In *Chamberlain v. Williams*, 134 Or. App. 506, 895 P.2d 805 (Or. App. 1995), the court held that a filiation suit filed after an adoption had been granted with the consent of a child's alleged father constituted a collateral attack on the adoption decree because it inherently challenged the identity of the child's legal father.

No Oregon appellate cases discuss other circumstances in which a suit claiming that a man is the father of a child constitutes a collateral attack on an earlier finding that another man was the child's father, though it is possible such suits could be filed, e.g., a claim could be filed in probate, alleging that the decedent was the claimant's father, when a court had previously declared another man to be the father. If the probate court addressed the merits of the claim, it would necessarily be entertaining a collateral attack on the earlier finding of paternity.

#### C. Limitations on third party collateral attacks on paternity findings

As discussed above, in *Shinall* the court of appeals held that principles of res judicata barred a mother from challenging an earlier finding of paternity by filing a filiation suit. Under standard res judicata (or claim preclusion) principles, a person who was not party to the original suit would not be barred by res judicata unless he or she was in privity with a party. See the discussion in *Bloomfield v. Weakland*, 339 Or. 504, 511, 123 P.3d 275 (2005). Thus, a person or entity with standing to bring a filiation suit under ORS 109.125 can effectively collaterally attack a prior finding of paternity unless barred under equitable principles or for policy reasons. No Oregon court has addressed such a claim, and few courts in other states have.

Most of the cases involving putative fathers' efforts to establish paternity when a child already has a legal father involve children born to married women. Courts in a number of states preclude such filiation suits, even though the state statutes provide that the presumption that a woman's husband is the father can be rebutted, on the basis that rebutting the presumption would be contrary to the child's best interests. E.g., *In re Jesusa V.* 85 P.3d 2 (Cal. 2004); *Dept. of Health & Rehab. Serv. v. Privette*, 617 So.2d 305 (Fla. 1993); *Stubbs v. Calendra*, 841 A.2d 361 (Md. Spec. App. 2004); *Evans v. Wilson*, 856 A.2d 679 (Md. 2004). The usual rationale for these holdings is that it is contrary to the best interests of the child to allow the suit when the husband and child have a parent-child relationship and the husband wants to remain the child's legal

father. This position is not universal, however. Some courts take the view that ascertaining the biological truth of the child's parentage is paramount. E.g., *In the Interest of J.W.T.*, 872 S.W.2d 189 (Tex. 1994); *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999). Other courts permit a paternity suit to challenge the marital presumption where the marriage is effectively over, the putative father has a relationship with the child, or both. E.g., *GDK v. State*, 92 P.3d 84 (Wy. 2004); *B.S. & R.S. v. T.M.*, 782 A.2d 1031 (Pa. Super. Ct. 2001); *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999).

At least one court has held that equitable principles may prevent a putative father from challenging paternity that was established by voluntary acknowledgment. In *Koos v. Wilson*, 2005 Iowa App. LEXIS 243 (Mar. 31, 2005), the court did not allow the mother's ex-boyfriend to pursue his paternity suit when the child, who was five-and-a-half, had been living for an extended period with the acknowledged father. The court said that the ex-boyfriend had waited too long and had "waived" his right to establish paternity.

### III. Equitable estoppel to deny paternity

Res judicata principles apply only when a party has litigated the issue of paternity in an earlier case. Where res judicata does not apply, a challenge may nevertheless be barred by equitable estoppel. In the last 25 years the Oregon Court of Appeals has applied the principle of equitable estoppel to prevent a mother from introducing evidence to prove that her husband was not a child's father when the husband sought custody or visitation with the child. In none of the cases was the husband conclusively presumed to be the child's father, and in several the couple knew from the outset that the man was not the child's biological father. The crucial claims in the cases were, instead, that the mother had represented to the man that he could assume the role of father and that he had relied on this representation by establishing a parent-child relationship with the child. The principle of these cases is not limited to representations by mothers to their husbands and could apply in any circumstance when one person makes representations regarding paternity or legal parenthood upon which another relies.

In *Johns and Johns*, 42 Or. App. 39, 599 P.2d 1230 (1979), the child was conceived before marriage, and the mother filed for divorce not long after the child was born, alleging that the child was born of the marriage and seeking custody and child support. She was awarded custody and child support at the pendente lite hearing. When the mother did not appear at the final divorce hearing, custody was awarded to the husband by default. More than a year later the mother moved to set aside the decree, claiming that the husband was not the father. The parties disagreed whether the husband knew that he was not the biological father. The court of appeals upheld the trial court holdings that the mother was estopped to deny paternity and that it was in the child's best interests that the husband be awarded custody. The court found that the mother had represented to the husband, the court and to state of Oregon authorities that he was the father, and he had relied by establishing a parent-child relationship over two and a half years. She also made the representations in documents to the court. "Mother cannot be allowed to assert or deny the heritage of her child as one or the other may appear to temporarily be to her advantage." 42 Or. App. at 44, 599 P.2d at 1233.

Eight years later in *Hodge and Hodge*, 84 Or. App. 62, 733 P.2d 458, rev. den. 303 Or. 370, 738 P.2d 199 (1987), the court held that a mother was estopped to deny that her husband was the father of her child where she had signed the birth certificate that identified him as the father and never raised a doubt about his paternity until she filed for divorce. The court said,

“Having allowed husband to establish the emotional ties of a child-parent relationship, wife cannot at this late date deny him and the child the benefits of the relationship.” 84 Or App at 65.

Twice in 1997 the court of appeals invoked equitable estoppel to prevent a mother from denying her husband’s paternity. In *Moore and Moore*, 146 Or. App. 661, 934 P.2d 572 (1997), aff’d on other grounds 328 Ore. 513, 982 P.2d 1131 (1999), the husband filed for divorce and sought custody, and the mother offered blood test evidence showing that he was not the biological father. The court found that the mother was estopped from denying the father’s paternity, even though the evidence did not show that she misled him into believing he was the father. The court relied on the mother’s representations that the husband was the father to third parties, her representation he was the father in an administrative support proceeding, and the length of time that she allowed to elapse before challenging his paternity. 146 Or. App. at 669. In *Sleeper and Sleeper*, 145 Or. App. 165, 9292 P.2d 1028 (1997), the parties knew from the outset that the husband, who was the primary caretaker, was not the biological father of his wife’s children born during the marriage. The court of appeals held that the wife was estopped to deny paternity, saying that both had represented to the world that he was the father, and the husband had developed a long-term, continuing relationship with the children. The court concluded that the husband clearly relied on his wife’s representations that even if the children were not his biological children, he was their “father.”

In only one case, *Warren and Joeckel*, 61 Or. App. 34, 656 P.2d 329 (1982), has the court of appeals rejected a man’s claim that the mother was estopped to deny his paternity. After the child was conceived the mother at different times identified both Warren and Joeckel as the father. She married Joeckel and then filed for divorce when child was about two, alleging that the child was a child of the marriage. Then she amended the petition to deny that he was father and identified Warren as father. Warren filed a filiation proceeding that was consolidated with the divorce, and the court declared him to be the father, based on blood test evidence. The husband appealed, arguing, i.a., that he had relied on the wife’s promise to live with him and treat the child as theirs. The court held that the facts did not establish that he husband had in fact relied sufficiently to invoke estoppel.