

SILENT PARTNER

ADVISING ON PATERNITY CLAIMS

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Counseling on paternity matters involves three subjects: estoppel, tissue-testing, and trial procedures. The intent of this paper is to summarize the law as to paternity, not to review the requirements of service regulations (e.g., AR 608-99, etc.).

ESTOPPEL. Litigation as to paternity may be barred by a prior judicial determination establishing a soldier as the father of a child. The most common example of this is the adjudication of paternity that is present in most divorce decrees. An essential element of the complaint or petition for divorce or the judgment of divorce or dissolution in many states. The purpose of this requirement is to bar subsequent litigation of paternity matters that should have been settled in connection with the divorce pleadings. Accordingly, the court will ordinarily deny any attempt by the former husband to open up the issue of paternity as to the children shown to be his on the face of the divorce judgment.

The servicemember may also be estopped from litigating paternity if he has signed a paternity affidavit, an acknowledgement of paternity, a complaint for divorce (alleging that he is the father of a certain child born of the marriage), an answer admitting that he is the father of a certain child born of the marriage, or other such documents. Usually an order for custody or for child support will effectively bar the soldier from reopening the issue of paternity, especially if that matter could have been litigated in connection with the custody or support issue. For a more detailed explanation of estoppel and preclusion, see Sullivan, "Proving Paternity by Presumption and Preclusion," 132 Mil.L.Rev. 99 (1991).

When the mother is faced with a denial of paternity or an attempt to open up this issue, her best tactic in this situation is to challenge immediately the right of the man to raise the issue of paternity at this stage of the proceedings. In civil cases, this is by way of an affirmative defense or a "plea in bar" alleging collateral estoppel or res judicata.

From the standpoint of the member in this situation, the only course of action is to try to attack the validity of the matter asserted as estoppel. Perhaps the soldier was not served (personally or by publication) with the complaint for support or the petition for divorce. Possibly he was not given sufficient time to answer before a judgment was taken by plaintiff. Maybe he has a defense under the Soldiers' and Sailors' Civil Relief Act. In rare cases, the plaintiff obtains an order or judgment adjudicating the issue of paternity by fraud, coercion, undue influence, or collusion.

A change of heart by the soldier is seldom a defense. All too often, however, the proffered defense by the soldier amounts to: "She told me the kid was mine and I believed her; now that I have to pay child support, I don't believe her." Or, in the actual words of one commander replying to a complaint involving paternity and nonsupport, "We have reason now to question the legality of this child."

TISSUE TESTS. When the matter is not barred as above, then a party may move the court for paternity testing and the court may order the mother, child and alleged father to submit to tissue-typing tests, formerly known as blood tests. The moving party may be required to pay the cost in advance. Blood samples used to be collected for this testing, but it is common now to use skin cells from inside the mouth, collected with a cotton swab. For detailed information on DNA testing, check out the Department of State's website, www.travel.state.gov/dna.html.

The table below lists some North Carolina diagnostic laboratories that perform issue test analysis in paternity cases. The tests produce an accuracy factor of about 99 percent (some claim as accurate as 99.9%), which (when translated into non-scientific terms) means that 99 out of a hundred falsely accused men will be excluded from paternity.

LabCorp	http://www.labcorp.com/paternity/
1440 York Court Extension Burlington, NC 27215	Phone: (800) 742-3944 Fax: (336)585-2125
Fees as of 10/15/01: Please contact LabCorp for current rates: \$210 per person when mother, child and alleged father are tested (includes specimen collection) \$315 per person when only child and alleged father are tested (includes specimen collection) \$200 per person in addition to \$210 per person for STAT case results (5 calendar days)	LabCorp's Identity Department utilizes over 900 specimen collection facilities throughout the United States. Upon account set-up, LabCorp will identify the facility nearest to your location and make all specimen collection arrangements.
Genetic Design, Inc.	http://www.informagen.com/Resource_Informagen/Full/241.html
7017 Albert Pick Road Greensboro, NC 27409-9654	Phone: (336) 668-3210 Fax: (336) 665-3966
Fees upon request	Genetic Design Inc. provides paternity testing services in the United States.
GeneCare	http://www.paternity-genecare.com
P. O. Box 3015 Chapel Hill, NC 27515-3015	Phone: (800) 277-4363
Fees upon request	GeneCare offers 7-10 days turnaround time, expert witness testimony, strict

	chain of custody procedures for court evidence, and international service.
Genelex	http://www.genelex.com/paternitytesting/
12277 134th Court N.E. Redmond, WA 98052	Phone: (800) 523-3080
Fees as of 10/15/01: Please contact Genelex for current rates: \$475 for standard legal test	Genelex offers 10-day turnaround and STAT results in one day. Has implemented state-of-the-art technology in high throughput and robotic sample handling allowing for across-the-board improvement in services.
DNA Diagnostics Center	www.dnacenter.com/paternity.html
205 Corporate Court Fairfield, OH 45014	Phone: (800) 613-5768 Fax: (513) 881-7803
Fees as of 10/17/01: Please contact DNA Diagnostics Center for current rates: \$420 for Standard (1 child, 1 alleged father with/without mother tested) \$475 for urgent 5 working day service \$695 Concorde 3 working day service \$1,390 Unique 1 working day service	DNA Diagnostics Center has a standard 9- business day turnaround time, but can handle urgent testing needs as well. They state that they will arrange for partial payments/payment plans, but payment must be received in full before test results will be released. Prenatal DNA paternity testing may also be performed.

The cost of testing depends on the tests performed and whether the case is one handled under the IV-D Program or not. A quick call to the above phone numbers will allow the legal assistance attorney to give some guidelines to the client on costs.

Accurate identification is necessary for all individuals taking the tests. The mother and child are often tested at a difference place and/or time than the alleged father. When the test results are returned, the usual situation is that the man is either excluded (zero percent probability of paternity) or he is "strongly included," meaning that the probability of paternity is in excess of 97 percent. When the probability of paternity is 97% or greater, there is a presumption of paternity for the alleged father; when the probability of paternity of less than 85%, there is a presumption of non-paternity under NCGS 8-50.1 (B1). With such results available, it is now much easier to counsel the mother or the alleged father as to matters involving paternity, child support, inheritance rights, medical history, and the like.

It is important to remember, however, that the tissue tests do not "prove" paternity -- they merely indicate whether a man is "included" in the group of men with such genetic characteristics so as to qualify them by blood type to be the father of the child. Pure "proof" of paternity is, in reality, in the eyes of God, at least with the tests that we have available at present. It is still possible to contest and "beat the case" in paternity matters with a probability of paternity in excess of 99 percent.

Techniques of trial will vary from case to case. In addition to tissue-testing results, the alleged father may attempt to prove lack of access or that the mother was living in open and notorious cohabitation with another man, so as to show that the defendant is unlikely to be the father of the child. The mother, on the other hand, may try to use the facial features and physical appearance of the child (especially if the child is not an infant), and his or her resemblance to the alleged father, in conjunction with tissue-testing results to establish paternity at trial.

Trial of a paternity and nonsupport case can be lengthy, complex and expensive. Many mothers rely on the child support enforcement agency to handle such a case, rather than relying on private counsel.

When counseling the alleged father, be sure to advise him of the importance of acknowledging paternity, paying support, and communicating with the mother and/or child if he wishes to prevent the termination of his parental rights and then the adoption of the child. For those fathers who do not acknowledge their children, refuse to pay support and do not remain in contact with the child, there is a significant danger of loss of parental rights, which means that the father's consent is not necessary for a sep-parent adoption in the future. To stop this, certain actions are required by the father. For example, under North Carolina law, G.S. 48-3-603 and 48-2-206, consent of the putative father is required if he has:

- acknowledged his paternity of the child, and
- has provided (consistent with his financial means) reasonable and consistent payments-
 - for the support of the mother during or after the pregnancy,
 - or the support of the child,
 - or both (including medical expenses, living expenses or other tangible means of support), and
- has regularly visited or communicated (or attempted to visit or communicate) with the mother during or after the term of pregnancy, or with the child, or with both of them.

If your client doesn't want the adoption to take place, he will need to be diligent in regard to these actions. It is VERY IMPORTANT that you read, digest and understand the most recent North Carolina Supreme Court case in this area, In re Adoption of Byrd, 2001 LEXIS 934.

You also need to be able to counsel the alleged father as to service of process and jurisdiction regarding paternity and support. For a valid judgment of paternity, *in personam* jurisdiction over the defendant must be obtained. An *in rem* jurisdiction judgment is not entitled to full faith and credit. For a good starting point, read Brondum v. Cox, 292 N.C. 192, 239 S.E.2d 687 (1977).

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