



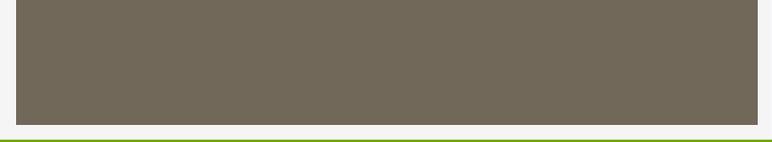
***“I want a
genetic test.”***

Presented by:

Magistrate Timothy P.
Thurtle, Circuit Court for
Anne Arundel County

When are these requests made?

- A request for a genetic test may be made at the start of a case or many years after a case has been concluded.



The request may be made in different types of cases.

- The request could be made in a divorce case where the parties were married, or the request could be made in a custody or child support case where the parties were never married to each other.

- What do you need to know before considering such a request?

**A Magistrate's Three
Question Approach to
determine whether a
party is entitled to a
genetic test to disestablish
paternity
(under Maryland Law)**

The purpose of these presentation is to provide a basic understanding of the law when paternity has **already** been established and the Court is presented with a request for genetic testing to disestablish paternity.

Step 1:

Has paternity already been established?

- The first step is to determine if paternity has in fact been established?
- It should not be assumed that paternity has already been established.

a) If paternity has been established by an affidavit of parentage or by an order, a copy of that document should be obtained to verify that the document exists and who is actually listed on the document as the father of the child(ren). Proceed to Step 2.

See Example Affidavit of Parentage on Next Slide.

State of Maryland
AFFIDAVIT OF PARENTAGE

SEND White Copy and Yellow Copy To:
Department of Health and Mental Hygiene, Division of Vital Records
P.O. Box 68760
Baltimore, MD 21215-0620

DVR USE ONLY

IMPORTANT NOTICE TO PARENTS

1. A completed Affidavit of Parentage is a legal document and constitutes a legal finding of paternity.
2. Completion of the Affidavit is voluntary. Do not complete this Affidavit until you have read or have had read to you, the instructions for completion and the notice regarding your rights and responsibilities.
3. The Affidavit may not be signed by the biological mother if she was legally married at the time of conception or birth of the child. The Affidavit may be signed by the father regardless of his marital status.
4. If either of you is not sure that the man signing the Affidavit is the biological father of the child, you should not complete the Affidavit at this time. You should first have a genetic test. Genetic testing can provide certainty if you have any doubts regarding the parentage of the child.
5. If you are under the age of eighteen (18), you may complete the Affidavit without the permission of an adult or legal guardian. You may want to seek the advice of a parent or legal guardian before signing this form.
6. This Affidavit creates legal rights and obligations relating to your child, and may impact custody, child support and visitation. Therefore, it may be beneficial to talk to a lawyer before signing the Affidavit.

Child

NAME - FIRST	MIDDLE	LAST
DATE OF BIRTH (MONTH, DAY, YEAR)	PLACE OF BIRTH (CITY, COUNTY, STATE)	HOSPITAL

Mother

NAME - FIRST	MIDDLE	LAST
DATE OF BIRTH (MONTH, DAY, YEAR)	CURRENT ADDRESS (NUMBER, STREET, CITY, STATE, ZIP, COUNTY)	
SOCIAL SECURITY NUMBER*	* MY INITIALS IN THIS BOX CERTIFY THAT I DO NOT HAVE A SOCIAL SECURITY NUMBER	AREA CODE AND PHONE NUMBER

Father

NAME - FIRST	MIDDLE	LAST
DATE OF BIRTH (MONTH, DAY, YEAR)	CURRENT ADDRESS (NUMBER, STREET, CITY, STATE, ZIP, COUNTY)	
SOCIAL SECURITY NUMBER*	* MY INITIALS IN THIS BOX CERTIFY THAT I DO NOT HAVE A SOCIAL SECURITY NUMBER	AREA CODE AND PHONE NUMBER

BEFORE SIGNING, READ OTHER SIDE OF THIS FORM

I consent to the admission of paternity and acknowledge that the man named above is the only possible father of my child. I solemnly affirm under penalties of perjury that the contents of this affidavit are true and correct to the best of my knowledge, information, and belief. I understand that this affidavit will establish the paternity of my child and will authorize the entry of the father's name on my child's birth certificate. I have been given oral notice and have read or had read to me the notice regarding legal rights and responsibilities resulting from acknowledging paternity.

I acknowledge that I am the natural father of the child named above. I solemnly affirm under penalties of perjury that the contents of this affidavit are true and correct to the best of my knowledge, information and belief. I understand that this affidavit will establish paternity of the child and will authorize the entry of my name on the child's birth certificate. I have read or had read to me the notice regarding the legal rights and obligations resulting from acknowledging paternity. I understand that I am free to refuse to sign this admission of paternity.

SIGNATURE OF MOTHER	DATE SIGNED	SIGNATURE OF FATHER	DATE SIGNED
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TO BE COMPLETED BY WITNESS(ES) AT THE HOSPITAL, CLINIC OR OTHER FACILITY OR A NOTARY		
WITNESS/NOTARY (SIGNATURE and TITLE)	DATE WITNESSED	DATE WITNESSED

WITNESS/NOTARY (SIGNATURE and TITLE)	DATE WITNESSED
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NAME OF HOSPITAL, CLINIC OR OTHER FACILITY	NAME OF HOSPITAL, CLINIC OR OTHER FACILITY
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DHR/CSEA 1040 (Revised 3/2005) Previous editions are obsolete and should be destroyed.

DISTRIBUTIONS: ORIGINAL WHITE COPY - DVR, YELLOW COPY - CSEA, PINK COPY - MOTHER, SOLID/GRAY COPY - FATHER

RIGHTS AND RESPONSIBILITIES

1. You have a right to obtain genetic testing. If you have any doubts as to the paternity of this child, you should request genetic testing before signing the Affidavit. If you would like more information about genetic testing, please call the Maryland Child Support Enforcement Administration at (410) 767-7034.
2. A completed and signed Affidavit of Parentage creates a legal finding of paternity. No further legal action is required to establish paternity. The father's name will be placed on the child's birth certificate.
3. The legal parents of the minor child are the joint natural guardians of their minor child. This means that both parents are jointly responsible for the support of their child. It also means that the child will be able to benefit from the parents' health care coverage, receive inheritance, or receive Social Security or Veterans' dependent or survivor benefits, if eligible.
4. Once this Affidavit is signed by both parties, the father will have equal rights to custody of the child. If a dispute arises concerning issues of custody, visitation and child support, a court may use this Affidavit as evidence to resolve the dispute.
5. The personal information requested is required to establish paternity and/or to enable the Division of Vital Records to contact a parent in the event that the information provided on the Affidavit is insufficient.
6. The Affidavit will be filed with the Division of Vital Records, and will be available upon request to the parents, the legal guardian, and the Child Support Enforcement Administration. The information provided in the Affidavit may be used by the Child Support Enforcement Administration to assist in providing child support services to either parent.
7. The legal finding of paternity, established by completion of the Affidavit, can be reversed only if:
 - a. Within 60 days of signing, either party named in the Affidavit signs a written rescission. (You may obtain a rescission form by calling the Maryland Department of Health and Mental Hygiene, Division of Vital Records at 410-764-3182);
 - b. Within 60 days of signing, either party named in the Affidavit appears in court in a proceeding related to the child and informs the court of his or her decision to rescind; or
 - c. After the expiration of the 60 day period, a court orders a rescission after the party challenging the Affidavit proves fraud, duress or material mistake of fact.
8. Rescission of the Affidavit will terminate the father/child relationship, but court action will be necessary to remove the man's name from the birth certificate.
9. If you challenge the Affidavit in court after the 60 day period, your legal responsibilities for the child, including child support obligations, will continue unless and until a court relieves you of those responsibilities.

If you have any questions about this Affidavit, contact the Maryland Department of Health and Mental Hygiene, Division of Vital Records at (410) 764-3182.

INSTRUCTIONS FOR COMPLETION OF AFFIDAVIT OF PARENTAGE

1. Press firmly with a ballpoint pen and print all information except your signatures.
2. Sign and date the form.
3. This form must be witnessed or notarized. If you complete this form in a hospital, the hospital staff may act as your witness. Each parent must sign the Affidavit in the presence of a notary public if you take the form home. The mother and father do not have to have the same witness/notary.
4. An incomplete Affidavit may prevent paternity being established by means of the Affidavit.

Mail the white and yellow copies of the notarized form intact to:
Department of Health and Mental Hygiene
Division of Vital Records
PO Box 68760
Baltimore, MD 21215-0020

b) If there is no presumptive father (by a marriage) or legal father for the child, then the Court should order a genetic test to determine paternity of child, if there is a request for such testing.

Step 2:

How Was Paternity Established?

- If paternity has been established, the second step is determining how paternity was established. The reason why it is essential to determine how paternity was established is because what you need to prove to have the Court order a genetic test or to disestablish paternity is dependent on how paternity was established. In Maryland, there are at least five ways to establish paternity.

Establishing paternity of a child in Maryland – 5 Ways:

1. Marital Presumption
2. Affidavit of parentage
3. Paternity Declaration
4. Paternity by conduct
5. Adoption

Paternity breakdown



1. Marital Presumption



- Pursuant to § 1-206(a) of the Estates and Trusts Article of the Maryland Code, there is a marital presumption that a child born or conceived during a marriage is a child of both spouses.
- Also, § 5-1027(c) of the Family Law Article of the Maryland Code provides that "[t]here is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception."
- Under this marital presumption, to challenge paternity the Court is to determine if this challenge is in the child's best interest before ordering a genetic test.
- Thus, there is no right to a genetic test prior to the Court making a determination of whether it is in the child's best interest to have a genetic test. However, if the Court determines that it is in the child's best interest, the Court may then and probably should order a genetic test.

2. Affidavit of Parentage:

- An Affidavit of Parentage is a binding legal document for unmarried individuals to execute that establishes paternity of a child.
- If paternity was established by an Affidavit of Parentage, § 5-1028(d) of the Family Law Article provides the parties with 60 days to rescind such an acknowledgment.
- After the expiration of the 60 days, the challenger must show fraud, duress or material mistake of fact to have this finding of paternity set aside.
- Section 5-1028 of the Family Law Article is silent as to whether a genetic test may be obtained in support of such a request. Whether you have a right to a genetic test appears to be murky at this time in light of the recent decision by the Court of Appeals in *Davis v. Wicomico County Bureau of Support*, 447 Md. 302 (2016) since a concurring Judge and three dissenting Judges (which would be a majority) appear to agree that a litigant who signed an Affidavit of Parentage has a right to a genetic test. Even armed with a genetic test which excludes any reasonable possibility of paternity, §5-1028 of the Family Law Article requires a finding of fraud, duress or material mistake of fact to set aside an Affidavit of Parentage.

3. Paternity Declaration



- If paternity was established by a paternity declaration under § 5-1032 of the Family Law Article, the challenger has an absolute right to a genetic test under § 5-1029(b) and § 5-1038(a)(2).
- What is a paternity declaration? When the Court enters an Order adjudicating the alleged father as the child's father, this finding is considered a paternity declaration. This determination could occur on the Court's child support enforcement docket when a paternity case has been filed or in a custody case when paternity has not been established.
- Even if a genetic test excludes the individual named as the child's father, pursuant to § 5-1038(a)(2)(ii) of the Family Law Article, the Court may modify or set aside the declaration of paternity. The Court has discretion to determine if there are any equitable defenses (such as laches and/or estoppel) to decline to vacate the paternity declaration. The leading case on this type of paternity challenge is *Langston v. Riffe*, 359 Md. 396 (2000). There is no best interest analysis used under this challenge.

4. Paternity by Conduct

- o Section 1-208 of the Estates and Trusts Article provides for a finding of paternity if the child was born to parents who were not married to each other if:
 - (1) there has been a judicial determination of paternity;
 - (2) the alleged father has acknowledged himself in writing to be the father;
 - (3) the alleged father has openly and notoriously recognized the child to be his child; or
 - (4) the alleged father has subsequently married the mother and has acknowledged himself orally or in writing to be the child's father.

5. Adoption

- The only way to set aside an adoption would be under the court's revisory power pursuant to Maryland Rule 2-535(b) by showing fraud, mistake or irregularity.



Step 3:

Where was Paternity Established?

- The third step of this process is determining where paternity has already been established.
- While this may not seem important when both parties are Maryland residents and no one is bringing this issue to the Court's attention and while it also may not be a common occurrence, this question is critical.

A. If paternity of the child was established by an Affidavit of Parentage in another state, some states have a statute of limitations that prohibit the challenging of those affidavits after a certain time period. If the time has expired to challenge such a finding in that state, this State cannot disestablish paternity under Maryland law if the law of the state where paternity was established precludes such relief. See *Burden v. Burden*, 179 Md. App. 348 (2008) (holding that as South Dakota's Affidavit of Parentage law had a three year statute of limitations to challenge paternity, Maryland (even with no statute of limitations to challenge paternity in this State) could not rescind that Affidavit which established paternity).

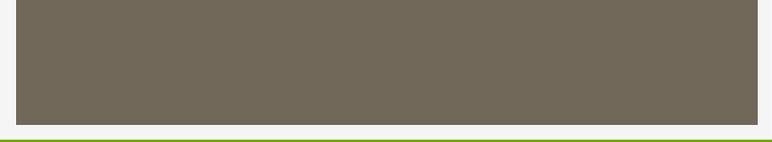
B. Even if the foreign jurisdiction does not have a time limit to disestablish paternity, if the case before the Court is a child support case brought pursuant to the filing of a UIFSA action, there is no right to request a paternity test or right to challenge paternity in Maryland.

In sum, whether a genetic test is ordered or if a paternity finding/judgment should be set aside will depend on how and where paternity was actually established.



Practice Tips for Attorneys

1. If paternity was established by an Affidavit of Parentage, any request to disestablish paternity should be filed as a Complaint/Petition/Motion to Disestablish Paternity. When only a Motion for Genetic Test is filed or there is an oral request for such a test without an underlying request to disestablish paternity, such relief, if granted, may not be sufficient in and of itself to disestablish paternity because you still have to prove fraud, duress or a material mistake of fact that would justify setting aside the Affidavit.
2. When filing a Complaint to Disestablish Paternity it is very important to provide information on how paternity was established and I would encourage that a copy of the Affidavit of Parentage, paternity declaration, birth certificate or other legal document that established paternity be attached.



3. I would also encourage that you include where the child was born in your underlying pleading because if that child was born out of state there may be time limits when paternity can be challenged.

4. When citing legal authority for challenging paternity, I would encourage you to cite cases that are specifically related to the basis of your challenge.

5. If you are seeking establishment of paternity when the child already has a legal father by a marital presumption, the mother's husband (or ex-husband) as the child's legal father must be joined as a party. Paternity must be disestablished against the child's legal father before paternity can be established against the putative father.

6. Pursuant to *Walter v. Gunter*, 367 Md. 386 (2002), if the Court vacates a paternity Order, any child support arrearage is also terminated.

7. No right to challenge paternity established in another state in a child support case brought as a UIFSA Action under § 10-327 of the Family Law Article

8. Review the relevant case law, especially, *Davis v. Wicomico County Bureau of Support*, 447 Md. 302 (2016).

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