The Plight of Putative Father: Public Policy v. Paternity Fraud

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I. INTRODUCTION

It seems both fair and logical to think that a putative father, or a man who is not the biological father of his child, should cease paying child support once he has disestablished paternity. Surprisingly, in West Virginia and several other jurisdictions, a putative father who has disestablished paternity is often forced to pay child support if he is divorced and the child at issue was born during his marriage. This problem is more prevalent in cases of divorce because parties are expected to resolve all issues concerning the marriage, such as child custody, child support, alimony, property settlements, and paternity, in a divorce proceeding. If a putative father is not aware that paternity is at issue, how is he expected to raise the issue of paternity in a divorce proceeding? Many courts share the opinion that a final divorce order is a final adjudication on the merits of all issues concerning a marriage.1 Therefore, if a final divorce order has been rendered and a putative father subsequently discovers that he is not the biologi-

cal father of a child born during his marriage, he is barred, by the doctrine of res judicata, from raising the issue of paternity.2

While the core of this Note focuses on the doctrine of res judicata as it relates to final divorce decrees, using the West Virginia case of Betty L.W. v. William E.W.3 as a point of reference, this article also discusses paternity fraud, the most common reason why putative fathers are faced with this precarious circumstance. While West Virginia courts have openly recognized fraud as an exception to the doctrine of res judicata,4 public policy often dictates whether a court will allow a putative father to cease making child support payments.5 West Virginia public policy strongly encourages the West Virginia judiciary to consider the best interests and rights of a child when deciding any matter related to a child's welfare.6 As a result, the interests of putative fathers, who are victims of paternity fraud, and the best interests of the innocent children involved, become increasingly more difficult to reconcile. Accordingly, this paper predicts the West Virginia judiciary's response to the current trend developing in paternity fraud cases and explores the reasons for the difficulty in reaching West Virginia's solution to this problem.

Part II of this Note, entitled "Res Judicata," contains an introduction to the leading case, Betty L.W., a definition and explanation of the doctrine of res judicata, an exploration of the issues that arise when res judicata is applied to cases of divorce, and a discussion regarding the various exceptions to res judicata. Part III concentrates on the most significant exception to res judicata – fraud. In this part, fraud and fraudulent concealment will be defined in length. This part also contains a discussion of cases dealing with fraud and paternity disestablishment, the legislature's motivation behind instituting the harsh standard required to prove paternity fraud, the various types of fraud, and the public policy considerations that emerge upon the application of fraud to paternity disestablishment cases. Part IV, "The West Virginia Supreme Court of Appeals' Analysis of Betty L.W.,” contains a critical examination of crucial errors in the court's analysis of Betty L.W. Part V, "States that Refuse to Apply Res Judicata in Paternity Disestablishment Cases,” contains an explanation of the public policy concerns that other states have in applying res judicata to paternity disestablishment cases. Finally, in Part VI, "West Virginia's Solution?,” the article discusses the reasons for the difficulty in reaching West Virginia's solution to the problems that arise when the doctrine of res judicata is applied to cases involving paternity fraud.

2 See id. at 887.
3 569 S.E.2d 77 (W. Va. 2002) (per curiam).
6 See id.
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II. RES JUDICATA

Betty L.W. is West Virginia’s latest and most significant case concerning the West Virginia Supreme Court of Appeals’ use of res judicata to preclude a putative father from pursuing a paternity disestablishment cause of action. As such, Betty L.W. will be a source of reference when exploring various theories throughout this article. In Betty L.W., Betty filed for divorce in July of 1996. During her marriage to William, she gave birth to three children: Ruth, born in 1981; Stacy, born in 1984; and Crystal, born in 1989. In her initial divorce petition, Betty alleged that the three girls were “born of the parties’ marriage” and in William’s answer he agreed. In addition, both parties stated, in an agreed upon divorce order, that “three children had been born of the marriage.” From 1996 through 2001, custody shifted between the parties. William initially had custody of Ruth, and then gained custody of Stacy while custody of Ruth shifted to Betty. While William never had custody of Crystal, he did exercise his right to visit Crystal. In 2001, William discovered through DNA testing that he was not Crystal’s biological father and petitioned the court to terminate his child support obligation on the basis that Crystal was not his child. The family law master and the lower court denied this petition based on the doctrine of res judicata, reasoning that paternity was previously established in the divorce decree. The West Virginia Supreme Court of Appeals agreed with the family law master and the lower court and denied William’s petition based on the doctrine of res judicata.

Res judicata “refers to ‘claim preclusion’” because it precludes parties from relitigating the same cause of action. Res judicata was created pursuant

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7 569 S.E.2d at 77.
8 Id. at 80.
9 Id.
10 Id.
11 Id.
12 Id. at 80 n.2.
13 Id.
14 Id.
15 Id. at 80-81.
16 Id. at 81.
17 Id. at 86.
to public policy. The purpose of the doctrine is to avoid the "expense and vexation attending relitigation of causes of action which have been fully and fairly decided." The doctrine is also designed to "conserve [] judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." In *Blake v. Charleston Area Medical Center, Inc.*, the West Virginia Supreme Court of Appeals defined the term "cause of action" for the purposes of res judicata and explained how courts determine whether a subsequent cause of action differs from a prior cause of action. A "cause of action" is "the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." In order to determine whether a cause of action is identical, for res judicata purposes, the court must determine "whether the same evidence would support both actions and issues." If the "two cases require substantially different evidence to sustain them," the subsequent case is not barred by res judicata because the causes of action are not identical. The court further explained that a lawsuit might be barred based on the doctrine of res judicata if three elements are satisfied: (1) there must have been a "final adjudication on the merits in the prior action"; (2) the two actions must involve the same parties or parties in privity with those same parties; and (3) the cause of action in the subsequent proceeding "either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action."

The court elaborated on the third element. The court explained that when applying the third element, it is necessary to consider whether or not the "party bringing the subsequent lawsuit was, during the prior action, able to foresee the consequences of his/her failure to raise the subsequently raised issue in the prior action." Furthermore, "where a plaintiff bringing a subsequent lawsuit was not able to discover or otherwise ascertain his/her claim until after the

19 *See id.*
22 498 S.E.2d at 41.
23 *Id.* at 48-50.
24 *Id.* at 48 (quoting White v. SWCC, 262 S.E.2d 752, 756 (W. Va. 1980)).
25 *Id.* (quoting White, 262 S.E.2d at 756).
26 *Id.* (quoting White, 262 S.E.2d at 756).
27 *Id.* at 49.
28 *Id.*
final adjudication of the prior action, his/her subsequent suit may not automatically be precluded on the basis of res judicata." 29

According to Blake, res judicata may not bar a subsequent cause of action if the existence of the claim is not discoverable until after the final adjudication of the matter. 30 Thus, one would be inclined to believe that William should have been able to institute a subsequent action to cease child support payments for Crystal since he discovered, after his final divorce order, that he was not Crystal’s biological father. However, the doctrine of res judicata is all encompassing; it can bar a subsequent cause of action if a claim raised in a subsequent cause of action is merely related to a prior cause of action. 31 The court stated,

"[a]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." 32

Therefore, even though William disestablished paternity after the final divorce order, the doctrine of res judicata barred his subsequent action to terminate child support because the issues of child support and paternity are within the purview of a divorce proceeding. 33

A. Res Judicata in Divorce

West Virginia has frequently recognized that any matter relating to a divorce order cannot be adjudicated after a final divorce order has been rendered. 34 Thus, even if the issue of paternity was not formally raised or adjudicated in a divorce proceeding, the subsequent adjudication of any issues relating

29 Id.
30 Id.
31 Id. at 48-49.
32 Id. (quoting Sayre’s Adm’t v. Harpold, 11 S.E. 16, 17 (W. Va. 1890)).
34 See Nancy Darlene M. v. James Lee M., Jr., 400 S.E.2d 882, 885 (W. Va. 1990), amended by 464 S.E.2d 79 (W. Va. 1995). “It is a general principle that an ‘adjudication in a divorce or annulment action concerning the paternity of a child is res judicata as to the husband or wife in any subsequent action or proceeding.’” Id. (quoting Donald M. Zupanec, Annotation, Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incident Thereto, 78 A.L.R.3d 846, 853 (1977)).
to a divorce, such as paternity, custody, property settlements, child support, or alimony, may be barred by the doctrine of res judicata.\(^{35}\)

There are three main reasons why courts find a correlation between the issue of paternity and a divorce proceeding. The primary reason is that when a child is born during a marriage, there is an automatic presumption, though rebuttable, that the parties are the biological parents of that child.\(^{36}\) As a result, paternity becomes an issue in an action for divorce even though paternity may not have been specifically addressed.\(^{37}\) Secondly, when filing a divorce petition or when responding to a divorce petition, both parties must acknowledge the children born during their marriage.\(^{38}\) Accordingly, if a putative father and his ex-wife agree in a final divorce order that a child was born during their marriage, there is an “implication” that the parties have established paternity at the close of a divorce proceeding.\(^{39}\) Finally, the most compelling reason that courts relate the issue of paternity to a divorce proceeding is that a divorce proceeding is the appropriate forum to dispute paternity between married couples. The West Virginia Supreme Court of Appeals explained, “'[i]t is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits.’”\(^{40}\) Often times a negative finding of paternity is the catalyst for divorce.

\(^{35}\) See id. at 885-87.

In Hackley ... the husband filed a petition seeking blood testing over 2 years after the divorce decree became final. The Michigan Supreme Court stated that the child support order in a divorce decree was an adjudication of paternity. Further, it asserted that a finding in a divorce decree that the child was born of the marriage conclusively established paternity. The court concluded that because the husband did not appeal the divorce, he was barred by virtue of res judicata from relitigating the issue in a subsequent proceeding.


\(^{37}\) “[A]lthough family court may not make specific findings regarding paternity in a divorce action, paternity may be implied ....” Beyer v. Metze, 482 S.E.2d 789, 791 (S.C. Ct. App. 1997) (quoting Zupanec, supra note 34, at 848 n.4).

\(^{38}\) Betty L. W., 569 S.E.2d at 78-81.

\(^{39}\) See Spears, 784 S.W.2d at 607. “Res judicata has been held to bar subsequent proceedings where there have been paternity findings or implications made in a prior divorce decree or support order.” Id.

\(^{40}\) See Nancy Darlene M., 400 S.E.2d at 885-86 (quoting Sayre's Adm'r v. Hapold, 11 S.E. 16 (W. Va. 1890)).
B. Exceptions to Res Judicata

The West Virginia Supreme Court of Appeals has recognized a few limited exceptions to the doctrine of res judicata. For instance, Rule 60(b) of the West Virginia Rules of Civil Procedure allows a party to obtain relief from a final judgment. Rule 60(b) states,

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Accordingly, a father who wishes to disestablish paternity has one year from the time a final divorce order has been rendered to prove mistake, inadvertence, surprise, excusable neglect, unavoidable cause, newly discovered evidence, fraud, misrepresentation, misconduct, or any other element that would justify relief from a final judgment. While one year seems to be a reasonable amount of time to prove a number of these claims, for William in Betty L.W., and in cases where ex-wives seek to conceal the identity of their child's biological father through fraud or misrepresentation, one year is insufficient.

One alternative to the Rule 60(b) exception exists in the doctrine of res judicata itself. In Blake, the court recognized that an exception to res judicata exists where the party instituting the subsequent lawsuit bases his/her claim on "fraud, mistake, concealment, or [a] misrepresentation by the defendant of the

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41 W. VA. R. Civ. P. 60(b).
42 Id.
43 Id. (illustrating that after one year, any matter related to a final divorce decree is res judicata in a subsequent hearing). Thus, after the expiration of the eight-month appeal period, the [alimony and child support] order of the Circuit Court of Mineral County in 1975 became final and enforceable. Robinson v. Robinson, 288 S.E.2d 161, 163 (W. Va. 1982).
second suit [that] prevented the subsequent plaintiff from earlier discovering or litigating his/her claims.” The court also explained the public policy concerns that facilitated the creation of this exception. The court recognized that a defendant “cannot justly object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant’s own fraud.” Additionally, the court noted that “the result is the same when the defendant was not fraudulent, but by an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action.”

III. FRAUD AND FRAUDULENT CONCEALMENT

The fraud exception to res judicata is the most popular remedy in paternity disestablishment cases. There has been a dramatic increase in paternity fraud cases within the past six years.

In 1999 alone, almost one-third of 280,000 paternity cases evaluated by the American Association for Blood Banks excluded the individual tested as the biological father of the child. In a period of only one-year, that is almost 100,000 men who were falsely accused of being the father of a child which they simply did not father.

Victims have assumed a more active role in combating paternity fraud. Several organizations such as US Citizens against Paternity Fraud and Mensactivism.org have been established to provide information about paternity fraud, to assist putative fathers in getting DNA testing to determine paternity, and to inform paternity fraud victims about the existing laws regarding paternity fraud.

Unfortunately, lack of awareness has prevented many putative fathers from raising the issue of fraud in paternity disestablishment cases. A clear understanding of fraud and how it relates to paternity disestablishment cases may encourage victims of paternity fraud to examine their legal options. Accordingly, this section defines fraud and fraudulent concealment, explains each element of fraudulent concealment in light of paternity disestablishment cases, discusses the government’s motivation behind instituting a heightened standard when proving paternity fraud, and discusses other types of fraud not recognized in West Virginia.

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44 498 S.E.2d 41, 49 (W. Va. 1997).
45 Id.
46 Id. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. j (1982)).
47 Id. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. j (1982)).
In West Virginia, fraud or fraudulent concealment is defined as ""all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another.""\(^{49}\) In order to prove fraud, the essential elements are

"(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it."\(^{50}\)

As stated above, an action for fraudulent concealment may "arise by the concealment of truth."\(^{51}\) Fraudulent concealment involves the deliberate nondisclosure of material facts aimed at preventing another from learning the truth.\(^{52}\) In order for a party to prevail on a claim of fraudulent concealment, he or she needs to "demonstrate that [the] defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry."\(^{53}\) The Restatement (Second) of Torts § 550 Comment b explains the type of "wrongful behavior" that amounts to fraudulent concealment.\(^{54}\) This comment states,

[Fraudulent concealment may arise] when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or when the defendant frustrates an investigation . . . . Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do no exist or cannot be discovered.\(^{55}\)


\(^{50}\) \textit{Id}. (quoting Lengyel v. Lint, 280 S.E.2d 66, 69 (W. Va. 1981)).

\(^{51}\) \textit{Id}. (quoting Teter v. Old Colony Co., 441 S.E.2d 728, 734 (W. Va. 1994)).

\(^{52}\) \textit{Id}. (quoting Van Deusen v. Snead, 441 S.E.2d 207, 209 (Va. 1994)).

\(^{53}\) \textit{Id}. at 753 (quoting Lock v. Schreppeler, 426 A.2d 856, 860 (Del. Super. Ct. 1981)).

\(^{54}\) Restatement (Second) of Torts § 550 cmt. b (1977).

\(^{55}\) \textit{Id}.
If a punitive father can prove that his ex-wife falsely represented that he was the biological father of their child, fraudulent concealment might be the most feasible remedy for putative fathers who wish to institute a subsequent paternity action after a final divorce order has been rendered. However, a putative father must bear in mind that fraudulent concealment is a difficult cause of action to prove because "[m]ere silence in the absence of a duty to speak . . . cannot suffice to prove fraudulent concealment." In order for courts to determine whether the concealment of a child's biological father amounts to fraud, the mother must have a legal duty to disclose paternity to the putative father. According to Doe v. Doe, concealment on the basis of fraud can impose a duty to speak when a "marital or other confidential relationship" exists.

A putative father must also be able to prove, by "clear and convincing evidence," that his ex-wife knowingly concealed the true paternity of their child. As far as a wife's awareness of her child's paternity, courts do not require that a wife be certain that her husband is not the father of their child;


The trial court apparently applied the principle that a divorce decree which establishes the paternity of a child is a final determination of paternity and is res judicata in any future proceedings. An exception to this rule is when the father is misled into believing that he is the father, and therefore does not challenge paternity at the time of the divorce, because the wife fraudulently conceals the child's parentage.


Generally, where a final judgment in a prior divorce proceeding adjudicates the issue of paternity, the father is bound by that judgment and may not resurrect the issue in a subsequent child support or contempt proceeding brought against the father by the Department of Human Resources. However, there are exceptions to that general rule, one of which must be where the prior judgment was obtained by fraud . . . . If ever there was fraud that would cause setting aside a divorce judgment ordering a man to pay child support, concealing another man's paternity of the child would be such fraud.

Id. (citation omitted).


62 See B.O. v. C.O., 590 A.2d at 316. "[I]t is well settled that fraud is proved when it shown [sic] that the false representation was made knowingly, or in conscious ignorance of the truth, or recklessly without caring whether it be true or false." Id. (quoting Warren Balderston Co. v. Integrity Trust Co., 170 A. 282 (Pa. 1934)).
rather, courts look to the wife's intent.\textsuperscript{63} A pertinent exemplification of this element is illustrated in \textit{B.O. v. C.O.}.\textsuperscript{64} In \textit{B.O. v. C.O.}, a superior court in Pennsylvania recognized that,

\begin{quote}
We can not say that B.O.'s representation that C.O. was Brandon's father, was made knowingly or in conscious ignorance of the truth. Prior to Brandon's conception, B.O. was engaging in sexual relations with C.O., and thus we cannot conclude that she knew he was not the father at the time she made the representations concerning his paternity. However, as much can not be said of her second statement. Short of her having an inability to recall having had sexual intercourse with a man during the period of conception, of which there is no evidence or allegation, she must have known that her representation that she had been faithful to C.O. for five years prior to conception was false.\textsuperscript{65}
\end{quote}

Accordingly, a mother may be liable for fraud if she made a statement as to the paternity of her child with knowledge or belief that the matter is not as she represents it to be, she "does not have the confidence in the accuracy of the representation that is stated or implied, or [she] knows that there is not the basis for the representation that is stated or implied . . . ."\textsuperscript{66} While West Virginia law does not impose an affirmative duty upon mothers to disclose their uncertainties as to the paternity of their children in a divorce petition, mothers do have a responsibility to execute a divorce petition with truth and accuracy.\textsuperscript{67}

Fraudulent concealment also requires inducement.\textsuperscript{68} In \textit{B.O.}, the Supreme Court of Pennsylvania looked to the mother's behavior to determine inducement.\textsuperscript{69} The facts of this case revealed that B.O. falsely represented that C.O. was Brandon's father.\textsuperscript{70} B.O. stated that she had not "slept with anyone else within the last five years."\textsuperscript{71} She made this statement at trial and in two

\begin{footnotes}
\item[63] \textit{Id.}
\item[64] \textit{Id.}
\item[65] \textit{Id.}
\item[66] \textit{Id.} at 315 n.1.
\item[67] \textit{See generally} W. VA. CODE § 48-5-401 (2001).
\item[68] \textit{See} Kessel v. Leavitt, 511 S.E.2d 720, 752 (W. Va. 1998). An essential element of fraud is that "[t]he act claimed to be fraudulent was the act of the defendant or induced by him." \textit{Id.} (quoting Lengyel v. Lint, 280 S.E.2d 66 (W. Va. 1981)).
\item[69] \textit{B.O.}, 590 A.2d at 315.
\item[70] \textit{Id.}
\item[71] \textit{Id.}
\end{footnotes}
letters sent to C.O., even though test results excluded C.O. as the father.\footnote{Id.} The court found that these statements were made to induce C.O. into believing that he was Brandon's father.\footnote{Id. at 316.} The court stated, "[t]here can be no question that the misrepresentations were made as an inducement for . . . [the putative father] to acknowledge Brandon as his son, and assume his financial obligation to support him."\footnote{Id.}

Fraudulent concealment may also arise if a mother takes affirmative measures to prevent a putative father from investigating the paternity of their child.\footnote{See Kessel v. Leavitt, 511 S.E.2d 720, 753 (W. Va. 1998).} Thus, a mother's failure to notify the putative father that she was unfaithful during their marriage may be construed as fraud-inducing behavior.

Furthermore, fraudulent concealment requires proof that a putative father was justified in believing that he biologically fathered his child.\footnote{See B.O., 590 A.2d at 316. In determining fraud the court decided that the wife's misrepresentations were justifiably relied upon. Id.} The simple fact that a child was born during a marriage does not create an irrebuttable presumption that a putative father was justified in believing that he fathered his child.\footnote{See Lefler v. Lefler, 776 So.2d 319, 322 (Fla. Dist. Ct. App. 2001). The court held that a putative father was "'barred by estoppel and res judicata from raising the issue of a fraud upon the court,' reasoning that [the putative father] ' . . . had reason to believe that he was not the biological father, and thus had the opportunity to defend against [the mother's] allegations.'" Id. (quoting Dep't of Revenue v. Edden, 761 So.2d 436 (Fla. Dist. Ct. App. 2000)).} If a putative father was aware of his wife's infidelity, courts may find that he was unjustified in believing he was the biological father of his child regardless of whether the child was born during his marriage.\footnote{See Gonzalez v. Andreas, 369 A.2d 416 (Pa. Super. Ct. 1976) (holding that since the [putative father] knew that his wife had previously borne two illegitimate children he did not reasonably rely on her representations).} Conversely, if a putative father was unaware that his wife had been unfaithful, he is likely to convince a court that he was justified in believing that he was the biological father of his child.\footnote{See B.O., 590 A.2d at 316.}

In addition to considering whether a putative father was aware that his wife was unfaithful, courts may also consider the "character, intelligence, experience, age and mental and physical condition of the parties" to determine whether a putative father was justified in believing that he biologically fathered his child.\footnote{Id.} In B.O., the court recognized that the putative father "was a man of
limited intelligence and limited experience in the world." 81 "He always lived with his mother who took care of him, and had never before had a serious girlfriend." 82 "He was also known to be subject to the influence of others, and overly trusting." 83 Based on this information, the court found that "[i]t would not be reasonable to expect C.O. to question Appellant's representations concerning his paternity." 84

The last element necessary to prove fraudulent concealment is injury. 85 While there are several damages that may occur as a result of fraudulent concealment, the most obvious injury to a putative father in paternity cases is that he is forced to assume a child support obligation for a child that he has not biologically fathered. 86 A putative father is legally compelled to make child support payments for a maximum of eighteen years unless the parties agree to an extended period of support. 87 If a relationship has been established between the putative father and the child, it is probable that the putative father would continue to assume some financial obligation in the support of the child regardless of a court order. However, there is a considerable difference between a voluntary child support obligation in comparison to a forced child support obligation.

In addition to paying child support, a putative father may suffer mental and emotional distress from learning that he is not the biological father of the child or children with whom he has developed a meaningful relationship. In Day v. Heller, 88 the court recognized that "[h]aving a close and loving parent-child relationship suddenly destabilized by a revelation that there is no biological relationship has the potential to cause grief, anxiety, shock, and fear." 89 The court assessed the degree of injury based on the level of closeness between a putative father and the child. 90 While jurisdictions are split on whether to allow a putative father to recover for intentional infliction of emotional distress in a

81 Id.
82 Id.
83 Id.
84 Id.
85 See supra note 50 and accompanying text.
86 See B.O., 590 A.2d at 316-17. "The damages are evident, as he committed himself to provide support payments for a period that could exceed eighteen years, even though he is not the father." Id.
88 653 N.W.2d 475 (Neb. 2002).
89 Id. at 480.
90 Id. at 481. "The closer the plaintiff was to the child before he learned that he was not the biological father, the greater the potential for disruption and the more likely that a disruption to the relationship would cause him severe emotional distress." Id.
paternity fraud case, courts have recognized that putative fathers do suffer injury as a result of fraudulent concealment.\textsuperscript{91}

As seen above, paternity fraud is a difficult cause of action for a putative father to prove. However, it is necessary to know that it is no coincidence that the standard is heightened for proving paternity fraud. States have an interest in ensuring that a child's paternity is acknowledged regardless of whether this acknowledgement is made by a child's biological father or their putative father. The federal government has set up a program that will allow states to receive federal funds if they comply with the requirements of title IV-D,\textsuperscript{92} which requires states to establish paternity and support orders for at least 75% of cases referred to that state's IV-D agency.\textsuperscript{93} States are required to submit a state plan,\textsuperscript{94} which "consists of written documents furnished by the State to cover its Child Support Enforcement program under title IV-D of the [Social Security] Act"\textsuperscript{95} and describe "the nature and scope of its program ... giving assurance that it will be administered in conformity with the specific requirements stipulated in title IV-D."\textsuperscript{96} Under Title 45 Part 305.61 of the Code of

\textsuperscript{91} Id. at 480. "Not surprisingly, other courts have reached conflicting conclusions in deciding whether to recognize similar claims [of intentional infliction of emotional distress claims in paternity fraud cases]." Id.

\textsuperscript{92} 45 C.F.R. § 305.1(a) (2004).

The term IV-D case means a parent (mother, father, or putative father) who is now or eventually may be obligated under law for the support of a child or children receiving services under the title IV-D program. A parent is a separate IV-D case for each family with a dependent child or children that the parent may be obligated to support. If both parents are absent and liable or potentially liable for support of a child or children receiving services under the IV-D program, each parent is considered a separate IV-D case. In counting cases for the purposes of this part, States may exclude cases closed under § 303.11 and cases over which the State has no jurisdiction. Lack of jurisdiction cases are those in which a non-custodial parent resides in the civil jurisdictional boundaries of another country or federally recognized Indian Tribe and no income or assets of this individual are located or derived from outside that jurisdiction and the State has no other means through which to enforce the order.

\textsuperscript{93} Id. § 305.63(c)(2). "IV-D Agency means the single and separate organizational unit in the State that has the responsibility for administering or supervising the administration of the State plan under title IV-D of the Act." Id. § 301.1.

\textsuperscript{94} Id. "The State plan means the State plan for child and spousal support under section 454 of the Act." Id.

\textsuperscript{95} Id. § 301.13.

\textsuperscript{96} Id. § 301.10.

The State plan is a comprehensive statement submitted by the IV-D agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with the specific requirements stipulated in title.

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Federal Rules, states will receive a monetary penalty by the federal government if they fail to comply with the title IV-D requirements. This irresistible program serves as an incentive for states to enact rigid laws with regard to allowing fathers to renounce paternity acknowledgments.

A. Types of Fraud

Some jurisdictions decide whether res judicata prevents a subsequent paternity cause of action based on the distinction between intrinsic and extrinsic fraud. In Evans v. Gunter, the South Carolina Court of Appeals explained the difference between intrinsic and extrinsic fraud. The court stated,

Intrinsic fraud refers to fraud presented and considered in the judgment assailed, including perjury and forged documents presented at trial. Extrinsic fraud refers to fraud which are collateral or external to the matter tried such as misleading acts which prevent the movant from presenting all of his case. It is some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deception should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments."100

According to Evans and many other courts, intrinsic fraud is not sufficient to evoke the fraud exception to res judicata. The court must find that the fraud

IV-D, the regulations in Subtitle A and this chapter of this title, and other applicable official issuances of the Department. The State plan contains all information necessary for the Office to determine whether the plan can be approved, as a basis for Federal financial participation in the State program.

Id. § 305.61.

A State will be subject to a financial penalty and the amounts otherwise payable to the State under title IV-A of the Act will be reduced in accordance with § 305.66 . . . if on the basis of . . . the results of an audit under § 305.60 of this part, the State failed to substantially comply with one or more of the requirements of the IV-D program, as defined in § 305.63 . . . .

Id.


Id. at 46.

Id. (quoting HARRY M. LIGHTSEY & JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 405 (2d ed. 1985)).

Id.
alleged was extrinsic in nature in order to allow a subsequent paternity hearing.\footnote{102}

While the West Virginia Supreme Court of Appeals has recognized intrinsic and extrinsic fraud, it has only referred to this distinction in a limited number of cases.\footnote{103} Rule 60(b) of the West Virginia Rules of Civil Procedure clearly states "fraud (whether heretofore denominated intrinsic or extrinsic)."\footnote{104} The West Virginia Supreme Court of Appeals has not delivered an opinion with a detailed explanation of the difference between intrinsic and extrinsic fraud. Even in cases where the court provides a lengthy explanation of the principals of fraud, as in \textit{Kessel v. Leavitt},\footnote{105} the court has not recognized the sub-classifications of intrinsic and extrinsic fraud.

In addition to extrinsic and intrinsic fraud, some jurisdictions have recognized another type of fraud: fraud on the court.\footnote{106} According to the Court of Appeals in Indiana, "if a party establishes that an unconscionable plan or scheme was used to improperly influence the court's decision, and that such acts prevented the losing party from fully and fairly presenting his case or defense, then 'fraud on the court exists.'"\footnote{107} For example, in the case of \textit{In re the Marriage of M.E. and D.E.},\footnote{108} a putative father discovered that he was not the father of his child almost three years after his divorce.\footnote{109} The mother and the putative father filed a joint petition to modify and set aside the paternity finding; however, the trial court refused to amend the paternity finding to terminate child support.\footnote{110} The appellate court reversed the trial court decision and found fraud.

A decision of paternity will not operate as res judicata where extrinsic fraud existed in the original proceeding. Where a claim is fraudulently advanced and that fraud is so successful that the other party is not aware that he has a particular claim or defense, this may be a sufficient basis for equitable relief.

\textit{Id.}.

\footnote{102} See \textit{M.A.F. v. G.L.K.}, 573 So. 2d 862 (Fla. Dist. Ct. App. 1990) (holding that the wife's concealment of the true parentage constituted extrinsic fraud upon the court, such that the husband's petition to set aside would not be barred by res judicata); see also \textit{Love v. Love}, 959 P.2d 523, 526 (Nev. 1998).

\footnote{103} See \textit{Miller v. County Comm'n of Boone County}, 539 S.E.2d 770, 776 (W. Va. 2000).

\"[E]vidence of fraud or any other like matter which involves extrinsic evidence is not admissible before a board of canvassers on a recount and can be presented only at election contest proceedings.\" \textit{Id.} (quoting \textit{State ex rel. Patrick v. County Court}, 165 S.E.2d 822, 824 (W. Va. 1969)).

\footnote{104} W. VA. R. CIV. P. 60(b).

\footnote{105} 511 S.E.2d 720 (W. Va. 1998).


\footnote{107} \textit{Id.} (quoting \textit{In re Paternity of Tompkins}, 518 N.E.2d 500, 507 (Ind. Ct. App. 1988)).

\footnote{108} \textit{Id.}

\footnote{109} \textit{Id. at 580.}

\footnote{110} \textit{Id.}
on the court because "the perpetrated scheme misled the court as to the child's paternity, prevented the child from having his day in court, and defrauded the court with the fabricated paternity petition."\textsuperscript{111}

There is no evidence that West Virginia recognizes fraud on the court, intrinsic fraud, or extrinsic fraud, with respect to paternity fraud or otherwise.\textsuperscript{112} The West Virginia Supreme Court of Appeals has adopted another approach when dealing with paternity fraud cases.

\section*{B. West Virginia's Application of the Fraud Exception}

West Virginia Code section 16-5-12(i)(4)(A) allows a parent to rescind a paternity acknowledgement after sixty days if he or she can provide "specific allegations concerning the elements of fraud, duress or mental mistake of fact."\textsuperscript{113} While the court in Betty L.W.\textsuperscript{114} made reference to this fraud exception, it failed to make mention of the fraud exception in the doctrine of res judicata and failed to seriously explore the issue of fraud altogether. The court may have neglected to explore fraud because William did not raise the issue of fraud. Regardless of whether William raised the issue of fraud, the court's opinion suggests that the fraud exception to res judicata would still be insufficient to allow a subsequent paternity cause of action.\textsuperscript{115} The court recognized the following language from Withrow v. Webb:\textsuperscript{116} "[e]ven if the principle of res judicata were not applicable, it would seem to us that to grant the motion for a blood-grouping test on this record, would open the door to unwarranted challenges of paternity, violate public policy, and clearly result in irreparable harm to the child."\textsuperscript{117} By citing this language, the court suggests that West Virginia public policy would prohibit the court from allowing a subsequent paternity cause of action regardless of whether William raised the fraud exception to res judicata.\textsuperscript{118}

\textsuperscript{111} Id. at 582-83.

\textsuperscript{112} While Rule 60(b) of the West Virginia Rules of Civil Procedure briefly references intrinsic and extrinsic fraud, W. VA. R. CIV. P. 60(b), the West Virginia Supreme Court of Appeals has never mentioned intrinsic or extrinsic fraud in an opinion, except when quoting Rule 60(b), nor has the Court discussed or defined intrinsic or extrinsic fraud.

\textsuperscript{113} W. VA. CODE § 16-5-12(i)(4)(A) (Supp. 2004).

\textsuperscript{114} 569 S.E.2d 77 (W. Va. 2002) (per curiam).

\textsuperscript{115} Id. at 83.


\textsuperscript{117} Betty L.W., 569 S.E.2d at 83 n.9 (quoting Withrow, 280 S.E.2d at 26).

\textsuperscript{118} See id. at 88 (Maynard, J., dissenting). "The majority, however, obviously subordinates the punishment of paternity fraud and the relief of its victims to what it considers to be the best interests of the child." Id.
Although West Virginia did not consider the fraud exception to res judicata in Betty L.W., West Virginia has allowed a subsequent paternity cause of action when there is evidence that a mother committed fraud.\textsuperscript{119} In G.M. v. R.G., the appellant was a putative father who sought a rehearing after he learned that he was not the biological father of a child for which he “acknowledged”\textsuperscript{120} paternity.\textsuperscript{121} In this case, the West Virginia Supreme Court of Appeals recognized that a prior paternity acknowledgement could be challenged on the basis of fraud and the court remanded the case in order to let the appellant develop evidence of fraud.\textsuperscript{122}

Even though the West Virginia Supreme Court of Appeals allowed the putative father to bring a subsequent cause of action based on fraud in G.M., this decision was influenced by the fact that the parties involved in this case had never been divorced, or for that matter married.\textsuperscript{123} When parties have not undergone a divorce, paternity, for the purposes of a child support award, is established by a “paternity acknowledgement, rather than a divorce answer and decree.”\textsuperscript{124} In addition, West Virginia Code section 16-5-12(i)(4)(A) allows a single putative father to rescind a paternity acknowledgement after 60 days if he can provide “specific allegations concerning the elements of fraud, duress or mental mistake of fact.”\textsuperscript{125} Thus, a single putative father simply has to “acknowledge” paternity, in accordance with West Virginia Code section 16-5-12 in order to be liable for child support.\textsuperscript{126} Once he has acknowledged paternity, he has the protection of West Virginia Code section 16-5-12, which allows him to rescind his paternity acknowledgment in the event that he is not the biological father of his child.\textsuperscript{127} As a result, parties who wish to disestablish paternity and who have never undergone a divorce are not affected by the doctrine of res judicata.


\textsuperscript{120} See W. VA. CODE § 16-5-12(i) (Supp. 2004).

\textsuperscript{121} G.M., 566 S.E.2d at 890.

\textsuperscript{122} See id.

\textsuperscript{123} See id.


\textsuperscript{125} W. VA. CODE § 16-5-12(i)(4)(A).

\textsuperscript{126} W. VA. CODE § 48-24-106 (2001).

\textsuperscript{127} Id.
The standard for divorced parties differs in comparison to single parties. While single parties must acknowledge paternity, a child’s paternity is presumed when the child’s mother is a married woman.\(^{128}\) Once the couple undergoes a divorce, the parties typically list the children born of the marriage in the divorce degree thereby memorializing paternity in the divorce decree.\(^{129}\) Since the standards are different, the court’s ruling in *G.M.* would not have been applicable to *Betty L.W.*, even if William raised the issue of fraud in *Betty L.W.*, because William and Betty were not privy to options available under West Virginia Code section 16-5-12.\(^{130}\)

Because, there are few West Virginia cases that expressly litigate paternity fraud cases, one can only speculate as to how the West Virginia Supreme Court of Appeals will handle such cases. Paternity fraud cases will probably be decided based entirely on West Virginia public policy. Since West Virginia has a strong public policy of ensuring the rights and interests of West Virginia children in cases concerning paternity, it is likely that West Virginia may align with the majority in refusing to allow putative fathers to recover in cases of paternity fraud.

**C. West Virginia’s Public Policy and its Relationship to Fraud**

In *Betty L.W.* the West Virginia Supreme Court of Appeals relied on the case of *Michael K.T. v. Tina L.T.* to discern West Virginia’s policy regarding the rights of children in paternity disestablishment cases.\(^{131}\) In *Michael K.T.*, the parties were married in 1983 and gave birth to Brittany T. in 1985.\(^{132}\) Michael sought a divorce against Tina in 1987 based on irreconcilable differences, one-year separation, cruel and inhuman treatment, and adultery.\(^{133}\) In addition, Michael sought a court determination that no children were born during their mar-

\(^{128}\) See *Betty L.W.*, 569 S.E.2d at 81.


\(^{130}\) See *Betty L.W.*, 569 S.E.2d at 83.

An adjudication of paternity, which is expressed in a divorce order, is *res judicata* as to the husband and wife in any subsequent proceeding. Therefore, the provisions of *W.Va.Code*, 48A-7-26 [1986], part of the Revised Uniform Reciprocal Enforcement of Support Act, *W.Va.Code*, 48A-7-1 to 48A-7-41, as amended, which authorizes the adjudication of paternity under certain circumstances is not applicable if an adjudication of paternity is expressed in the divorce order.

*Id.* (quoting Nancy Darlene M. v. James Lee M., Jr., 400 S.E.2d 882, 883 (W. Va. 1990)).

\(^{131}\) *Id.* at 81.


\(^{133}\) *Id.*
riage based on his allegation that Brittany T. was not his child. 134 Two blood tests were performed and both tests conclusively revealed that Michael was not Brittany T.'s biological father. 135 The family law master found that the two blood tests, which found that Brittany T. was not Michael's biological child, along with the fact that Tina L.T. admitted to having sexual intercourse with another man, was overwhelming evidence that Michael was not Brittany T.'s father. 136 Conversely, the circuit court refused to follow the family law master's recommendations with respect to declaring that Michael was not Brittany T.'s father. 137 The court ordered that Brittany T. be declared Michael's legitimate child and directed Michael to pay $345.00 per month for child support and maintenance. 138

The court recognized that several factors must be considered in order to decide whether to admit the blood test results to disestablish paternity. 139 These factors include:

(1) the length of time following when the putative father first was placed on notice that he might be the biological father before he acted to contest paternity; (2) the length of time during which the individual desiring to challenge paternity assumed the role of father to the child; (3) the facts surrounding the putative father's discovery of non-paternity; (4) the nature of the father/child relationship; (5) the age of the child; (6) the harm which may result to the child if paternity were successfully disproved; (7) the extent to which the passage of time reduced the chances of establishing paternity and a child support obligation in favor of the child; and (8) all other factors which may affect the equities involved in the potential disruption of the parent/child relationship or the chances of undeniable harm to the child. 140

The court remanded the case back to the circuit court to consider these factors. 141

134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id. at 872.
140 Id.
141 Id. at 873.
While the court in Betty L.W. recognized that its opinion in Michael K.T. "did not specifically address issues of res judicata," the court referred to this case to discern the "rights of the child."

More specifically, the court reasoned that a child’s rights need to be considered when a putative father seeks, through blood testing, to disclaim paternity and "rebut the presumption of legitimacy which has attached to a child born of a valid marriage." The court looks at the facts and circumstances of each case in order to equitably determine whether the case warrants the admission of blood test results.

Even though the court in Michael K.T. acknowledged that a child’s rights need to be considered in determining whether to allow blood testing to disestablish paternity, the court also recognized that blood testing could be used to disprove paternity if the court found evidence of a mother’s fraudulent conduct. The court stated, "absent evidence of fraudulent conduct which prevented the putative father from questioning paternity, this Court will not sanction the disputation of paternity through blood test evidence." While this statement seems to suggest that evidence of paternity fraud may be a suitable basis upon which to allow a putative father to institute a subsequent cause of action in a paternity disestablishment case, this is merely an assumption given that the court has yet to decide a case concerning paternity fraud as an exception to res judicata in paternity disestablishment cases. However, this may be an unfounded assumption given the court’s position with regard to the best interests and/or rights of a child in paternity disestablishment cases:

Given the serious and long-lasting effects of bastardization, resolution of the paternity issue should be accomplished with the active participation of the court, rather than involvement that is limited to reviewing a previously-executed document [a stipulation agreeing to bastardize the child at issue]. This is necessary to guarantee that the issue of paternity is not being used as a bargaining tool, perhaps to secure a favorable monetary award or some other preferred attainment. But, more importantly, it is required to secure proper consideration of the facts of the case in light of the best interests of the child and with due regard to the rights of the child.

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143 Id. (quoting Michael K.T., 387 S.E.2d at 867).
144 See id.
145 Michael K.T., 387 S.E.2d at 872.
146 Id.
Considering the court's vested interest in the best interests and/or rights of children in paternity disestablishment cases, it is unlikely that the court would allow a putative father to institute a subsequent paternity action when the result may affect a child's relationship with his or her father or the child's receipt of support payments. Unfortunately, West Virginia has limited case law dealing with paternity fraud in comparison to other jurisdictions. As a result, it may be practical to explore other jurisdictions' unique processes for dealing with paternity fraud cases.

D. How Other States are Dealing with Paternity Fraud

Several states are beginning to take affirmative measures in handling paternity fraud cases. Georgia recently enacted a statute that allows a putative father to file a motion to set aside a motion of paternity. This statute only permits a putative father to file a motion to set aside paternity if he has not:

(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support; (B) Acknowledged his paternity of the child in a sworn statement; (C) Been named as the child's biological father on the child's birth certificate with his consent; (D) Been required to support the child because of a written voluntary promise; (E) Received written notice from the Department of Human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded; (F) Signed a voluntary acknowledgement of paternity as provided in Code Section 19-7-46.1; or (G) Proclaimed himself to be the child's biological father.

Unfortunately, in most cases where a putative father seeks to disestablish the paternity of a child born during his marriage, he has already done one of the following acts throughout his marriage or during the divorce process: "been named as the child's biological father on the child's birth certificate with consent," "signed a voluntary acknowledgement of paternity," or has "proclaimed himself to be the child's biological father." Therefore, even though Georgia

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148 See id.

The best interests of the child is the polar star by which decisions must be made which affect children. Furthermore, a child has a right to an establishment of paternity and a child support obligation, and a right to independent representation on matters affecting his or her substantial rights and interests.

Id.

149 See GA. CODE ANN. § 19-7-54 (2004).

150 Id. § 19-7-54(b)(5)(A)-(G).

151 Id.
intended to thwart paternity fraud cases by instituting section 19-7-54 of the Georgia Code, this statute has not become a solution for putative fathers who pay child support for children born during their marriage.

While in the minority, Utah is one jurisdiction that has allowed a putative father, who disestablished paternity after a final divorce decree, to institute a subsequent action based on fraud. The Utah Court of Appeals, in Masters v. Worsley,\textsuperscript{152} allowed a putative father to institute a subsequent hearing based on allegations of paternity fraud.\textsuperscript{153} Masters' wife was unfaithful during their marriage.\textsuperscript{154} Throughout the marriage and after the marriage ended, she denied being unfaithful.\textsuperscript{155} As a result, Masters was under the impression that he fathered all five of the children born during his marriage, and thus, he agreed to pay child support in the final divorce order.\textsuperscript{156} After Masters discovered that he only fathered two of the five children born during his marriage, he sought to institute an action "for modification of the divorce decree on the basis of fraud."\textsuperscript{157} The trial court refused to hear Masters' fraud claim and granted his ex-wife's motion for summary judgment.\textsuperscript{158} The appellate court reversed the trial court's motion for summary judgment and found that Masters' ex-wife committed fraud.\textsuperscript{159}

Similarly, a Virginia court charged a mother with fraud because she represented in a divorce order that the putative father was the biological father of their child.\textsuperscript{160} The mother admitted that she had "misrepresented a material fact in the divorce proceeding."\textsuperscript{161} As a result of this misrepresentation, the trial court found that the putative father was not the child's biological father and declined to hold him responsible for child support.\textsuperscript{162} The Virginia Court of Appeals later affirmed this decision and held that the mother's conduct successfully satisfied the elements of fraud.\textsuperscript{163}

\textsuperscript{152} 777 P.2d 499 (1989).
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 500.
\textsuperscript{155} Id. at 502.
\textsuperscript{156} Id. at 500.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 504.
\textsuperscript{161} Id. at 723.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 723-24.
Florida, a jurisdiction that recognizes the distinction between intrinsic and extrinsic fraud, held a mother liable for extrinsic fraud after fraudulently concealing the paternity of her child. In the case of M.A.F. v. G.L.K., a putative father was informed, four years after his divorce, that he was not the biological father of his child. The court held that res judicata did not prohibit a putative father from instituting a subsequent cause of action because "when a wife knows that her husband is not the father of the children, and the husband does not know, concealment of that knowledge in a divorce proceeding involving child support is extrinsic fraud upon the court."

Regardless of jurisdiction, paternity fraud cases are becoming more frequent throughout the United States. While William in Betty L.W. had the makings to institute a persuasive paternity fraud case, William did not raise the issue of paternity fraud. Perhaps this suggests a lack of awareness about paternity fraud among victims of fraud in West Virginia. Nonetheless, it is crucial that the West Virginia Supreme Court of Appeals establish an effective method for dealing with paternity fraud cases to provide justice to putative fathers and the children involved.

IV. THE WEST VIRGINIA SUPREME COURT OF APPEALS' ANALYSIS OF BETTY L.W.

In Betty L.W., the West Virginia Supreme Court of Appeals justified the use of the doctrine of res judicata based on the application of West Virginia precedent, particularly Nancy Darlene M. v. James Lee M. and N.C. v. W.R.C. While these cases are similar to Betty L.W., because they both concern the issue of paternity disestablishment, the West Virginia Supreme Court of Appeals was incorrect in using these cases to justify its use of res judicata in Betty L.W. because of critical factual differences. This section will introduce Nancy Darlene M. and N.C. and compare and contrast these cases with Betty L.W. to highlight the court's error in using these cases to justify its holding in Betty L.W.

In Nancy Darlene M., Nancy and James were married in 1974 and gave birth to L.D.M. in 1979. In 1980, Nancy filed for divorce and in the divorce decree, both she and James asserted that L.D.M. was born of the mar-

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165 Id.
166 Id. at 863.
167 Id.
170 Id. at 883.
Nancy gained custody and James was instructed to pay child support in the amount of $250.00 per month. At the time of the divorce, James was in the Marine Corps stationed in California. Due to his failure to pay child support, Nancy filed a petition to enforce the child support obligation initiated by and through the Marion County prosecutor’s office and filed in the Superior Court of Orange County, California. The California court ordered Nancy and the child to submit blood testing. Because Nancy failed to comply with this request, the California court entered an order which denied Nancy’s child support enforcement petition finding that James was not the father of the child. Despite this finding and with the assistance of the Marion County Child Advocate Office, Nancy successfully caused James’ wages to be attached. In 1988, James filed a motion with the family law master of West Virginia to terminate child support payments. At the hearing before the family law master, James admitted that he “observed the appellant [Nancy] having sexual intercourse with another male in February, 1979, and that in April, 1979, when the appellant discovered that she was pregnant, she informed the appellee [James] that he was not the father of the unborn child.” The family law master found that paternity had been settled by the West Virginia circuit court and suggested a reinstatement of Nancy’s child support payments in the amount of $250.00 per month. The West Virginia Supreme Court of Appeals held that “the paternity determination issue in this case had been adjudicated, and, therefore, such determination is res judicata.”

In Nancy Darlene M., James admitted that he observed Nancy having sex with another man during their marriage. He also admitted that Nancy told him that he was not L.D.M.’s father. Even though he had knowledge that he was not the father, he still acknowledged paternity in the divorce de-
Based on these facts, the court could have relied on the doctrine of equitable estoppel along with the doctrine of res judicata to find James liable for child support.\textsuperscript{185} Prior to the onset of \textit{Nancy Darlene M.}, the West Virginia Supreme Court of Appeals, in \textit{Michael K.T.}, explained the premise behind precluding a subsequent paternity hearing based on the doctrine of equitable estoppel.\textsuperscript{186} The court stated,

\begin{quote}
[e]ven if blood test evidence excludes paternity in a given case, the trial judge should refuse to permit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.\textsuperscript{187}
\end{quote}

The theory behind the application of equitable estoppel is that “undeniable harm” would befall a child if that child’s putative father was allowed to disestablish paternity after he held himself out to be that child’s father.\textsuperscript{188} Thus, in \textit{Nancy Darlene M.}, the court was able to conclude that James held himself out to be L.D.M.’s father based on the fact that James admitted to paternity in the divorce petition after he was told that he was not L.D.M.’s father.\textsuperscript{189} Therefore, since James acknowledged that he was L.D.M.’s biological father, with information to the contrary, the court could have precluded a subsequent hearing on the bases of equitable estoppel as well as the doctrine of res judicata.\textsuperscript{190}

In \textit{Nancy Darlene M.}, James could not claim the benefit of an exception to the doctrine of res judicata because the issue of paternity could have been addressed during the divorce proceeding.\textsuperscript{191} James was explicitly informed that he was not L.D.M.’s father.\textsuperscript{192} Fraud, as an exception to res judicata, is not applicable to this case because Nancy did not fraudulently conceal L.D.M.’s paternity. Fraud is based on “acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious

\textsuperscript{184} Id. at 883.
\textsuperscript{185} Id. at 886-87.
\textsuperscript{187} Id. at 871.
\textsuperscript{188} Id. at 871-72.
\textsuperscript{189} Nancy Darlene M., 400 S.E.2d at 886.
\textsuperscript{190} Id. at 887.
\textsuperscript{191} Id. at 886.
\textsuperscript{192} Id. at 884.
to another, or by which undue and unconscientious advantage is taken of another." As a result, James was precluded from asserting the fraud exception as a basis upon which to support a subsequent paternity cause of action.

The distinctions between Nancy Darlene M. and Betty L.W. are apparent. James, in Nancy Darlene M., was told that he was not L.D.M.'s biological father before he signed the divorce decree. Conversely, William in Betty L.W. did not learn that he was not Crystal's biological father until after he signed the divorce decree. While the West Virginia Supreme Court of Appeals stated that James' argument in Nancy Darlene M. was "substantially similar" to the argument forwarded by William in Betty L.W., there are fundamental and material differences between these two cases. In Nancy Darlene M., the issue of paternity could have easily been raised during the divorce proceeding, but in Betty L.W., paternity could not have been raised because William was not given notice that he was not Crystal's biological father.

Furthermore, in Nancy Darlene M., the West Virginia Supreme Court of Appeals could have employed both the principals of equitable estoppel and res judicata to prevent a subsequent paternity hearing. Equitable estoppel, however, could not have been applied in Betty L.W. because, in this case, William did not hold himself out to be Crystal's father with knowledge to the contrary. Moreover, in Betty L.W. the fraud exception, if raised, may have prevented the court from exercising the doctrine of res judicata. The fraud exception was not an option in Nancy Darlene M. Therefore, the court's use of Nancy Darlene M., as a basis upon which to decide Betty L.W., was erroneous.

In Betty L.W., the Supreme Court of Appeals of West Virginia also applied the case of N.C. v. W.R.C. to further its argument regarding the principal of res judicata. In N.C., the parties, N.C. and W.R.C., married in February of 1980 and divorced in November of 1980. While separated, the couple continued to have sexual relations. N.C. discovered that she was pregnant and the couple remarried in March of 1981. In 1981, N.C. petitioned for a second

194 Nancy Darlene M., 400 S.E.2d at 884.
196 Id. at 82.
197 Id. at 81.
199 Betty L.W., 569 S.E.2d at 82-83.
200 N.C., 317 S.E.2d at 794.
201 Id.
202 Id.
divorce. W.R.C. sought an annulment based his allegation that "the appellee [N.C.] was pregnant with the child of another man at the time of the remarriage." The trial court refused to grant an annulment and the Supreme Court of Appeals affirmed the trial court's decision based on the doctrine of res judicata. The court reasoned "[t]he dilemma in which the appellant [W.R.C.] now finds himself resulted from his fault or negligence in not raising the issue of paternity through appropriate proceedings prior to the final disposition of his second divorce." Further, "[t]he principal assertion upon which the appellant based his petition, namely, the lack of resemblance between the child and the appellant, was available to him prior to the final disposition of his second divorce."

Similar to Nancy Darlene M., the court's reliance on N.C. in Betty L.W. was also misplaced. In Betty L.W. the court stated that in N.C., "this Court affirmed the circuit court's decision that the husband was not entitled to relief because he had failed to raise 'the issue of paternity through appropriate proceedings prior to the final disposition' of the divorce." Based on this statement, it would appear as though N.C. and Betty L.W. are factually similar, but this is far from true. In N.C., the court was dealing with a situation where the putative father had reason to believe he was not the biological father of the child, and despite this knowledge he failed to question paternity in the divorce proceeding. W.R.C. sought a subsequent paternity hearing based on the fact that there was a lack of resemblance between the child and W.R.C. Similar to Nancy Darlene M., this is a situation where the issue of paternity could have easily been introduced in the divorce proceeding. As the court stated, the lack of resemblance between the putative father and child was not a new fact that was introduced after the divorce. Thus, according to the doctrine of res judicata, the putative father was prohibited from instituting a subsequent suit.

The key distinction between Betty L.W. versus Nancy Darlene M. and N.C. is that the putative fathers in Nancy Darlene M. and N.C. had notice that they were not the biological fathers of their children. This notice precluded the

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203 Id.
204 Id. at 795.
205 Id. at 795-97.
206 Id. at 797.
207 Id.
209 N.C., 317 S.E.2d at 797.
210 Id.
211 Id.
putative fathers in *Nancy Darlene M.* and *N.C.* from arguing fraud or initiating a subsequent paternity cause of action. Unlike the putative fathers in *Nancy Darlene M.* and *N.C.*, William in *Betty L.W.* was not put on notice that he was not Crystal’s biological father. The court’s failure to expressly recognize this key distinction between the cases may have been the predicate behind its decision to disallow William to undergo a subsequent paternity cause of action.

V. STATES THAT REFUSE TO APPLY RES JUDICATA IN PATERNITY DISESTABLISHMENT CASES

A number of jurisdictions outside of West Virginia have rejected the application of res judicata to paternity disestablishment cases largely because of public policy.212 These courts have recognized that the application of res judicata to paternity disestablishment cases unjustly affects both the putative father and his child.213 This section will highlight cases in jurisdictions that refuse to apply res judicata to paternity disestablishment cases and pinpoint the public policy considerations behind this decision.

In *Spears v. Spears,*214 the Court of Appeals of Kentucky recognized that “res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice, or so as to work an injustice.”215 *Spears* acknowledged that even though there may be compelling reasons to preclude a subsequent paternity cause of action based on res judicata, “the doctrine ‘must at times be weighed against competing interests, and must, on occasion, yield to other policies.’”216

In *Langston v. Riffe,*217 the Court of Appeals of Maryland adopted the following quotation from the Court of Appeals of Kentucky: “‘to apply res judicata to preclude [the father] from challenging paternity, when blood testing has shown that he is not the father, would work an injustice.’”218 Likewise, the Court agreed with several statements made in a dissenting opinion from a New Hampshire court.219 Paternity determinations affect “inheritance rights, citizen-

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212 See, e.g., Spears v. Spears, 784 S.W.2d 605, 607 (Ky. Ct. App. 1990). “It is further stated . . . that the doctrine ‘must at times be weighed against competing interests, and must, on occasion, yield to other policies.’” Id. (quoting 46 AM. JUR. 2D JUDGMENTS § 402 (1990)).

213 See id. at 608. “[I]t would be highly unfair and unjust to Clarence [the putative father], and potentially to the child, if res judicata is ruled to be a bar to his CR 60.02 motion.” Id.

214 784 S.W.2d 605 (Ky. Ct. App. 1990).

215 *Spears*, 784 S.W.2d at 607 (quoting 46 AM. JUR. 2D JUDGMENTS § 402 (1990)).

216 Id. (quoting 46 AM. JUR. 2D JUDGMENTS § 402).

217 754 A.2d 389 (Md. 2000).

218 Id. at 404 n.13 (quoting *Spears*, 784 S.W.2d at 607).

219 Id. at 403 n.11.
ship, and the child’s knowledge of his or her medical history.”\textsuperscript{220} If a putative father is precluded from relitigating the issue of paternity, a child may never know the identity of his true father and may be “prevented from inheriting or receiving benefits from his actual father, who might be more financially stable than the putative father.”\textsuperscript{221} Further,

"[A]ccurate determinations of paternity are critical, not simply because a child is entitled to financial support from his or her father, but also because a child may later be in need of a blood transfusion or an organ transplant from a compatible family member. A child may face decisions about marriage and child-bearing based on the risk of passing on what the child believes are inherited conditions.”\textsuperscript{222}

Another public policy concern that results from applying res judicata to paternity disestablishment cases is that a child’s biological father is relieved from taking financial and personal responsibility for his child.\textsuperscript{223} The Court of Appeals of Kentucky stated, “it would be unfair . . . to decree a man to be . . . [the child’s] father even though the man bears no relationship to him.”\textsuperscript{224} The court reached this conclusion based on Kentucky Revised Statute section 406.111, which affirmatively states, “[i]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.”\textsuperscript{225}

Some states have found ways to circumvent the application of res judicata to paternity disestablishment cases.\textsuperscript{226} They have explicit laws in place to address the course of action that should be taken when blood testing or DNA

\textsuperscript{220} \textit{Id.} (quoting Tandra S. v. Tyrone W., 648 A.2d 439, 451 (Md. 1994) (Eldridge, J., dissenting)).

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.} (quoting \textit{Tandra S.}, 648 A.2d at 451 (Eldridge, J., dissenting)).

\textsuperscript{223} \textit{See} Crowder v. Commonwealth, 745 S.W.2d 149, 151 (Ky. Ct. App. 1988). “Yet the Commonwealth could never seek reimbursement legally due from . . . [the child’s] father because a stranger to . . . [the child] would be deemed his father, and he would be relieved from payment of support.” \textit{Id.}

\textsuperscript{224} \textit{Id.}


tests conclusively reveal that a putative father is not the biological father of his child.\textsuperscript{227}

While the West Virginia Supreme Court of Appeals is known for making decisions based on the best interests and rights of the children involved in paternity disestablishment cases,\textsuperscript{228} as seen above, these jurisdictions have also considered the best interests and rights of the children at issue. The difference between West Virginia and the aforementioned jurisdictions is the difference in public policy objectives. These jurisdictions value a child’s right to have his or her biological father legally acknowledged rather than the child’s putative father.

VI. \textsc{West Virginia’s Solution?}

Thus far, this note has addressed the problems that result from applying the doctrine of res judicata after a final divorce decree has been rendered, the exceptions to the doctrine of res judicata, and the competing interests of putative fathers and children involved in paternity fraud cases. The most critical issue that remains to be discussed, however, is West Virginia’s solution to the problem that arises from applying the doctrine of res judicata to cases where putative fathers are victims of paternity fraud. Unfortunately, there are several reasons why West Virginia will encounter significant difficulty in reaching a practical and worthwhile solution. Thus, the goal of this section is to explain how West Virginia public policy bars West Virginia from adopting the solutions undertaken in other states, discuss other reasons for West Virginia’s difficulty in uncovering a solution that appeases both the children and putative fathers involved, and propose a probable solution to the present problem.

Even though more states are beginning to allow putative fathers to cease paying child support when a child’s paternity has been fraudulently concealed, this solution is unlikely to resonate with the West Virginia judiciary because the West Virginia judiciary highly favors the best interests and rights of a child. Accordingly, it is unlikely that the West Virginia Supreme Court of Appeals will uphold a solution, despite its practicality and ingenuity, if such solution offends West Virginia public policy. Thus, before suggesting in-haste that West Virginia follow the lead of other states that have resolved this problem, I find it necessary to contrast West Virginia public policy with that of other states in order to reach a meaningful solution.

Despite the fact that other states allow putative fathers to cease making child support payments based on their public policy,\textsuperscript{229} this remedy proves futile in West Virginia. It is unlikely that the West Virginia Supreme Court of Ap-

\textsuperscript{227} See KY. REV. STAT. ANN. § 406.111; N.J. STAT. ANN. § 9:17-43 (West 2004); OHIO REV. CODE ANN. §§ 3111.03, 3119.962 (West 2005).

\textsuperscript{228} See supra note 148 and accompanying text.

\textsuperscript{229} See supra notes 214, 226, and 227 and accompanying text.
peals would allow putative fathers to cease making child support payments, even in the presence of fraudulent conduct. In doing so, there is a great chance that the rights and best interests of West Virginia children would be compromised in light of West Virginia's unique economic status. In considering the best interests and rights of a child, the West Virginia Supreme Court of Appeals examined the following: the amount of time the child was led to believe that he or she was fathered by the putative father, the relationship between the child and the putative father, the age of the child, the child's right to child support, and "all other factors which may affect the equities involved in the potential disruption of the parent/child relationship or the chances of undeniable harm." Given West Virginia public policy, the precedent set by the West Virginia Supreme Court of Appeals, and the standard cited above, it is safe to assume that the court will determine that the best interests and rights of children supersede a putative father's interest in instituting a subsequent paternity cause of action on the basis of paternity fraud.

This is not to suggest that other states do not place great weight on the best interests and rights of a child in considering paternity fraud cases. In fact, a West Virginia case has recognized that the trend in the United States court system has moved toward considering the best interests and rights of a child in making decisions concerning paternity disestablishment. However, it is also known that United States courts have consistently allowed fraud to be an exception to the most stringent rules. "Absent evidence of fraudulent conduct which prevented the putative father from questioning paternity, this Court will not sanction the disputation of paternity through blood test evidence if there has been more than a relatively brief passage of time." Given this reasoning, many states are undeniably justified in allowing a putative father to cease making child support payments when a child's paternity has been fraudulently concealed.


See id.


See Betty L.W., 569 S.E.2d at 86; see also Wyatt v. Wyatt, 408 S.E.2d 51, 54 (W. Va. 1991) (stating that "[t]he duty of a parent to support a child is a basic duty owed by the parent to the child"); State ex rel. W. Va. Dep't of Health and Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669, 674 (W. Va. 2000) (stating that "the State has a broad role in the enforcement of child support, including the establishment of paternity in disputed cases").

Cleo A.E., 438 S.E.2d at 889.

See id. "Although historically courts have addressed issues affecting children primarily in the context of competing adults' rights, the present trend in courts throughout the country is to give greater recognition to the rights of children, including their right to independent representation in proceedings affecting substantial rights." Id. (emphasis added).

The West Virginia Supreme Court of Appeals has a valid concern in seeking to protect the rights and interests of children in paternity disestablishment cases. Crystal's best interests and rights were probably the court's principal motivations behind the court's conclusion in Betty L.W. 237 However, forcing a putative father to continue to pay child support while the fraud-inducing mother escapes punishment is hardly just.

While West Virginia may not be receptive to allowing a putative father to cease making child support payments in cases where a mother has committed paternity fraud, the most attractive alternative, which would oblige both the interests of the putative father and the children involved, is to punish the fraud-inducing mother. While punishing the fraud-inducing mother seems like a straightforward solution to paternity fraud, this solution becomes complicated when trying to determine a punishment that seeks both to deter women from committing paternity fraud while ensuring that the best interests and rights of a child are protected. Monetary sanctions extract money from a child's household thus compromising the best interests of the child and diminishing the rationale behind ordering a putative father to continue making child support payments. Similarly, imprisonment detracts from the best interests of a child because the child would then be separated from his or her mother.

Because states have not yet determined a means of punishing fraud-inducing mothers without causing injury to the child or children involved, the current reality is that fraud-inducing mothers in West Virginia have and will continue to escape punishment in paternity fraud cases. However, if the West Virginia Supreme Court of Appeals genuine concern for protecting the best interests and rights of West Virginia children is the driving factor behind forcing putative fathers to continue paying child support in paternity fraud cases, there should be some method to ensure that child support payments made by putative fathers to fraud-inducing mothers are used solely for the benefit of the child. West Virginia Code section 48-13-802(a) gives the court the authority to "direct that a portion of child support be placed in trust and invested for future educational or other needs of the child." 238 Further, this statute also gives the court the power to name a trustee of the trust:

The court may prescribe the powers of the trustee and provide for the management and control of the trust. Upon petition of a party or the child's guardian or next friend and upon a showing of good cause, the court may order the release of funds in the trust from time to time. 239

237 569 S.E.2d at 86.
239 Id. § 48-13-802(c).
Similar to West Virginia Code section 48-13-802(a), the legislature could enact a statute that requires a putative father, who has proved paternity fraud, to deposit child support payments into a trust managed by a court appointed trustee. The fraud-inducing mother should only be allowed to withdraw the funds upon proof that the funds would be used for the direct benefit of the child. Furthermore, if the fraud-inducing mother is allowed to withdraw from the child support fund, she should be required to produce receipts for all purchases made using the funds. This system would ensure that the fraud-inducing mother is using the child support for its intended purpose. In addition, this system would deter fraud-inducing mothers from committing paternity fraud.

While this suggestion is mild in its effect because it does not fully ensure that the rights and interests of children and putative fathers are protected, a fair and just solution that serves the interest of defrauded putative fathers while conforming to West Virginia public policy will be difficult to ascertain for the reasons stated above. While a more detailed and practical solution may be well beyond the scope of this article, the purpose of this article is to call attention to the serious and intensifying problem of the affects of res judicata on paternity disestablishment and paternity fraud as an exception to res judicata.

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