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YOU ARE THE FATHER!

AN ARGUMENT FOR COURT-ORDERED PRENATAL PATERNITY TESTING AND CHILD SUPPORT IN TENNESSEE

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I. INTRODUCTION

As long as the concept of monogamy has existed, humans have looked for ways to escape it. Unfortunately, children, a natural consequence of sexual activity,[2] are often harmed by the lack of a supportive family structure in single-family households.[3] To correct this, Tennessee courts often order child support from one parent to another using the

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[2] *See generally* DR. JILLIAN ROBERTS, WHERE DO BABIES COME FROM? (2015).

[3] Isabel V. Sawhill, *Are Children Raised With Absent Fathers Worse Off?*, BROOKINGS (July 15, 2014), https://www.brookings.edu/opinions/are-children-raised-with-absent-fathers-worse-off/.

provisions provided in the Tennessee Code.[4] As a result, this is why paternity determinations are an important court function. One aspect courts have neglected, however, is child support for expecting mothers during pregnancy. Prenatal child support for expecting mothers would help alleviate some prenatal costs and make the father invested in the child before birth. Unfortunately, these equitable prenatal outcomes are impossible under Tennessee law for unwed mothers, mothers with multiple partners, or fathers who suspect infidelity. That is why this paper advocates for passing legislation allowing courts to order prenatal paternity tests and prenatal child support.

This paper first discusses the history of paternity testing. Second, it analyzes the current legal state with a focus on Tennessee. Third, it argues for court-ordered prenatal paternity testing. Finally, it includes proposed legislation allowing the court to order prenatal paternity testing.

II. HISTORY OF PATERNITY TESTING

There are two types of children who need paternity established: (1) the child born out of adultery and (2) the child born out-of-wedlock.[5] Both children are "illegitimate," and their difference lies in the mother's marital status.[6] Children of adultery are born to a woman married to a man other than the child's father.[7] On the other hand, out-of-wedlock children are born to mothers who are not married.[8] An out-of-wedlock child was traditionally called a "bastard" child.[9]

A. PATERNITY IN THE PRE-DNA-TESTING WORLD

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[4] *See generally* TENN. CODE ANN. §§ 36-5-101 to -3111 (2021) (explaining how courts should endeavor to reach decisions in the realms of child and spousal support).

[5] E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J. OF L. AND HEALTH 1, 8 (1993). *See also Leviticus* 20:10 (King James).

[6] Shapiro et al., *supra* note 5.

[7] *Id.*

[8] *Id.*

[9] *Id.*

The ancient world dealt with illegitimate children rather bluntly—pregnant, unmarried, or adulterous women met execution.[10] After execution, paternity no longer needed to be established. However, this is not to say there were no illegitimate children, but those who were, particularly in Rome, had no rights to child support or succession.[11] Roman children were considered *filius nullius*, Latin for a child of no one, and could only acquire these rights through adoption.[12]

English common law adopted the concept of *filius nullius,* and out-of-wedlock children could not seek child support from either parent.[13] Instead, the common law relegated these children to the status of the destitute.[14] English parishes and boroughs often assisted these children.[15] The drain that out-of-wedlock children put on the welfare state of Renaissance England prompted Parliament to pass the Poor Law Act of 1576, which authorized the punishment of both parents of the child and required both parties to make payments to the system.[16] This Act finally made it relevant for a court to determine a child's paternity.

English children of adultery, however, had a slightly different problem. Since there was no way to test a child's paternity, children of married women were presumed to be fathered by the woman's husband.[17] This presumption was so strong that it was unable to be challenged in any way.[18] Lord Coke, a legal scholar of the period, summed it up well in 1628:

> But we terme them all by the name of bastards that are borne out of lawfull marriage. By the Common Law, if the husband be within the foure seas, that is, within the jurisdiction of

[10] *Id.* at 9.
[11] *Id.* at 10.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Judy Dahl, *We Presume Too Much: Abandoning the Presumption of Legitimacy in Certain Adoption Matters*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 693, 698 (2020).
[18] *Id.*

> the king of England, if the wife hath issue, no proofe is to be admitted to prove the childe a bastard (for in that case, *filiatio non potest probari*) unless the husband hath an apparent impossibilitie of procreation; as if the husband be but eight yeers old, or under the age of procreation, such issue is Bastard, albeit he be born within marriage. But if the issue be born within a month or a day after marriage, between parties of full lawfull age, the childe is legitimate.[19]

This rule even kept mothers from testifying to their child's paternity.[20] Due to its draconian nature, this presumption, along with common law discriminations against illegitimate children, kept children from establishing relationships with and inheriting from their rightful fathers.[21] The English courts, however, had their reasons, stated as follows:

> [t]he primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity [sic] of States and families . . . ."[22]

The presumption spread to the United States through their colonial connection and absorbed into the common law.[23] By the 1930s, the presumption had become rebuttable.[24] Still, Judge Cardozo, writing for the New York

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[19] EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 244 (London, Co. of Stationers 1628).
[20] Goodright v. Moss, 2 Cowp. 591; 98 Eng. Rep. 1257 (1777).
[21] *See* Dahl, *supra* note 17.
[22] Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (citations omitted).
[23] *See* Dahl, *supra* note 17.
[24] *Id*.

Court of Appeals, held that "the presumption will not fail unless common sense and reason are outraged by a holding that it abides."[25]

B. "BALD EAGLE" EVIDENCE

Establishing Paternity before DNA was an extremely fact-based inquiry—those facts being the child's physical attributes compared to the putative father.[26] This evidence was called "bald eagle" evidence.[27] Ancient Carthage can first attribute this sort of inquiry, where a special committee examined children once they reached the age of two.[28] If they did not closely enough resemble their father, Ancient Carthaginians killed them.[29]

English Courts allowed "bald eagle" evidence as early as the 17th Century, and American courts followed suit, adopting it through the common law.[30] Though it was popular and, frankly, the only real evidence in a paternity suit, courts understood that it was ripe for abuse.[31] Some jurisdictions went as far as to ban "bald eagle" evidence altogether.[32] The Maine Supreme Court reasoned that:

> [w]hile it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. . . . And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would

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[25] In re Findlay, 170 N.E. 471, 473 (N.Y. 1930).
[26] *See* Shapiro, *supra* note 5, at 16.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 16-17.
[31] *Id.* at 17.
[32] *Id.*

> be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father.[33]

Today, the admittance of "bald eagle" evidence varies widely by jurisdiction. For example, in Tennessee, paternity cases require a genetic test to establish parentage, except in rare cases,[34] so "bald eagle" evidence is generally not used.

C. BLOOD GROUP TESTING

The discovery and proliferation of safe and easy blood group testing in Europe changed paternity actions forever.[35] But, unfortunately, American courts were slow to adopt blood group paternity tests and entirely excluded them at first.[36] Though physicians discovered the science behind the tests in 1900, U.S. courts did not admit them until the 1930s.[37] The tests were seen as expert testimony and required an expert to testify along with the evidence.[38] It wasn't until the 1945 California case of *Berry v. Chaplin*, involving Hollywood film star Charlie Chaplin, that the test was evidence on its own.[39]

Blood group testing is not accurate for the individual, but to what blood type the tested person is.[40] It tests for the father's blood group—A, B, AB, or O—and tests to see whether the child's blood type is compatible with the putative father's.[41] Suppose the putative father's blood type is incompatible. In that case, the test can reasonably exclude him as the biological father, but the test cannot conclude a person is the child's father based solely on their blood type.[42] That is why this sort of test is considered "exclusionary."[43]

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[33] Clark v. Bradstreet, 15 A. 56, 56-57 (Me. 1888).
[34] TENN. CODE ANN. § 24-7-112 (2021).
[35] *See* Shapiro, *supra* note 5 at 19-20.
[36] *Id.* at 20.
[37] *Id.* at 24.
[38] *Id.* at 23.
[39] *Id.* at 21.
[40] *Id.* at 20.
[41] *Id.*
[42] *Id.* at 21.
[43] *Id.*

Today, because of the ease and accuracy of DNA tests, this test is rarely used.

D. DNA TESTING

DNA was discovered in 1953 by James Watson, Francis Crick, Maurice Wilkins, and Rosalind Franklin.[44] Its discovery gave humanity—but most notably for this paper, courts—the ability to distinguish between individuals except identical twins.[45] As safe, accurate, and cost-effective tests became more available, courts began to allow it as evidence, much like their allowance of blood group tests.[46] Thus, by the early 1990s, the acceptance of DNA profiling was universal.[47]

One of the only issues with DNA profiling is the chain of custody, though, in paternity actions, this is of little concern. In criminal cases, where the standard is beyond a reasonable doubt, the chain of custody potentially means the difference between a conviction and an acquittal. Some courts early on were reluctant to place faith in evidence given, unaccompanied, to a lab and then trust the results when they came back. This process was never much of an issue in paternity actions since most jurisdictions have a standard of preponderance of the evidence or by clear and convincing evidence.[48] Tennessee's standard is by a preponderance of the evidence.[49]

III. CURRENT TENNESSEE LAW

To legally establish paternity in Tennessee, a party must file a complaint to establish parentage with a court of competent jurisdiction.[50] A party may indeed file an action

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[44] *James Watson, Francis Crick, Maurice Wilkins, and Rosalind Franklin*, SCIENCE HISTORY INS. (Dec. 4, 2017), available at https://www.sciencehistory.org/historical-profile/james-watson-francis-crick-maurice-wilkins-and-rosalind-franklin.
[45] *See* Shapiro, *supra* note 5 at 29.
[46] *Id*. at 38.
[47] *Id*.
[48] *Id*.
[49] TENN. CODE ANN. § 36-2-304(b)(3) (2021).
[50] TENN. CODE ANN. § 36-2-305 (2021).

before the child is born, but only certain aspects of the case may happen before birth.[51] One of those aspects is "the performance of genetic testing."[52] Though this implies the legislature's intent to allow prenatal paternity tests, there is no evidence that any court in Tennessee has ever ordered such a test. There is only one appellate opinion that even deals with prenatal paternity tests.

In *In re Madilene G.R.*, the Tennessee Court of Appeals first encountered prenatal paternity testing.[53] One of the grounds alleged at the underlying trial to terminate the putative father's rights was that he failed "to pay a reasonable share of prenatal, natal, and postnatal expenses . . . ."[54] As part of the abandonment ground, the mother also alleged the father failed "to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child."[55] The Rutherford County Chancery Court terminated the father's rights based on this second ground.[56] On appeal, the putative father argued that he wasn't sure he was the father until the child's birth.[57] The mother asserted that the father offered to take a paternity test, but he never took one.[58] In response, the Court of Appeals briefly touched on prenatal paternity tests in *dicta:* "if Father was justifiably suspicious of Mother's assertion that he was the child's father, he and Mother should have pursued the appropriate prenatal [sic] testing, if available, provided prenatal paternity testing is available and safe for mother and the unborn child."[59] This opinion shows that, at least at the intermediate appellate level, Tennessee courts are open to the idea of prenatal testing as long as it is safe for the mother and unborn child.

A. PUTATIVE FATHER REGISTRY

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[51] *Id.*
[52] *Id.*
[53] In re Madilene G.R., No. M2012–01178–COA–R3–PT, 2013 WL 139564, at *1, *7 (Tenn. Ct. App. Jan. 10, 2013).
[54] *Id.* at *2.
[55] *Id.* at *4.
[56] *Id.* at *3.
[57] *Id.*
[58] *Id.*
[59] *Id.* at *7.

Tennessee Code Annotated section 36-2-318 governs the putative father registry.[60] The Division of Vital Records at the State Department of Health maintains the putative father registry. It lists all court-ordered legitimations and putative fathers who have filed with the registry before, or less than thirty days after, the child's birth and intends to seek legitimation of that child.[61] The purpose of the registry is to notify putative fathers if the child is pending adoption placement or the mother's rights are pending termination.[62] Additionally, at legitimation proceedings, the registry can be used as evidence.[63] Though the registry has little value under Tennessee law, other states have strict requirements around their registries and establishing paternity.

B. PRESUMPTION OF LEGITIMACY

However, this presumption of legitimacy still exists, though it is more refined and less draconian.[64] Under Tennessee law:

> (a) A man is rebuttably presumed to be the father of a child if:
> (1) The man and the child's mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
> (2) Before the child's birth, the man and the mother have attempted to marry each other in compliance with the law, although the attempted marriage is or could be declared illegal, void and voidable;
> (3) After the child's birth, the man and the mother have married or attempted to marry each other in compliance with the law although such marriage is or could be declared illegal, void, or voidable; and:

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[60] TENN. CODE ANN. § 36-2-318 (2021).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See* Dahl, *supra* note 17 at 699.

> (A) The man has acknowledged his paternity of the child in a writing filed under the putative father registry established by the department of children services, pursuant to § 36-2-318;
> (B) The man has consented in writing to be named the child's father on the birth certificate; or
> (C) The man is obligated to support the child under a written voluntary promise or by court order;
> (4) While the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as the man's natural child; or
> (5) Genetic tests have been administered as provided in § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of ninety-five percent (95%) or greater.[65]

In most states, there are two affirmative defenses against paternity: (1) incapability and (2) failure of a DNA test.[66] Incapability is a modernization of a four seas test of old—if a husband can prove he could not conceive that child, either by distance or by medical circumstances, he may rebut the presumption.[67] The standard to which the husband must prove varies by jurisdiction, but Tennessee's standard is by a preponderance of the evidence.[68]

Until 1997, only the legal parents or the child could question the presumption of legitimacy of a child born during a marriage.[69] Thus, a putative father had no right to question the presumption.[70] Today, however, Tennessee time-bars such claims of parentage after twelve months if the legal parents were married and living together at the time of conception and remained so through the petition's filing.[71]

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[65] TENN. CODE ANN. § 36-2-304 (2021).
[66] *See* Shapiro, *supra* note 5 at 15.
[67] *Id.*
[68] TENN. CODE ANN. § 36-2-304(b)(3) (2021).
[69] Evans v. Steelman, 970 S.W.2d 431, 433-34 (Tenn. 1998).
[70] *Id.*
[71] TENN. CODE ANN. § 36-2-304(b)(2)(A) (2021).

C. PRENATAL SUPPORT

"The purpose of the paternity statute is to require a biological father to support his child."[72] Unfortunately, Tennessee has no firm mechanism for prenatal child support despite this aim and willful prenatal non-support being an element of a ground for termination of parental rights.[73] Instead, the state relies on the mother and putative father—or fathers, depending on circumstances—to find a solution without court intervention. If the father refuses to help, the mother may only pursue termination once the child is born.

Other states allow courts to order prenatal child support or order the father to bear some pregnancy costs. Depending on how you read *Coxwell v. Matthews*, Georgia either mandates prenatal child support during pregnancy or allows for mothers to be reimbursed for it after the fact.[74] In Wisconsin,[75] Oregon,[76] and several other states, the mother can recover birth costs after the child is born. Accordingly, pregnancy-cost legislation seems to be the current national trend. Just a few months ago, Utah passed a law mandating that fathers pay half of the mother's pregnancy costs.[77]

1. PRENATAL SUPPORT IN TERMINATION ACTIONS

As mentioned above, failing to pay prenatal expenses was once ground to terminate parental rights.[78] Until 2019, the Tennessee Code Annotated provided that the court could terminate a putative father's rights if "[t]he person . . . failed,

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[72] *See* Shell v. Law, 935 S.W.2d 402, 408 (Tenn. Ct. App. 1996) (citation omitted).
[73] TENN. CODE ANN. § 36-1-102(1)(I) (2021).
[74] *See* Coxwell v. Matthews, 435 S.E.2d 33, 34 (Ga. 1993).
[75] *Your Guide to Repaying Birth Costs*, WIS. DEPT. OF CHILDREN AND FAMILIES, available at https://dcf.wisconsin.gov/files/publications/pdf/11777.pdf (last visited Jul. 27, 2021).
[76] *FAQs: Establishing Paternity*, OR. HEALTH AUTHORITY, available at https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Pages/paternityfaqs.aspx (last visited Jul. 27, 2021).
[77] Sophia Eppolito, *New Utah Law Requires Dads to Pay Prenatal Child Support*, WANE (Apr. 5, 2021, 5:57pm), available at https://www.wane.com/news/utah-dads-to-be-required-to-pay-half-of-pregnancy-costs/.
[78] In re Madilene G.R., No. M2012–01178–COA–R3–PT, 2013 WL 139564, at *4 (Tenn. Ct. App. Jan. 10, 2013).

without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth[.]"[79] Though petitions, like in *In re Madilene G.R.*, alleged there is no evidence that any court ever terminated a father's parental rights on this ground, the court never overturned.[80] Perhaps courts found this ground difficult to enforce when they could not safely ascertain the paternity of the child. A bill by state Representative Mike Carter and state Senator Ferrell Haile deleted this provision in 2019,[81] and, aside from abandonment, there is currently no termination ground dealing with a father's prenatal activity.[82]

Abandonment is another termination ground under Tennessee law.[83] Abandonment of a child occurs when the "biological or legal father has either failed to visit or failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child."[84] Section 36-1-102(1)(I) further states, "it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of [the] evidence."[85] Before a 2018 amendment, this code section required a willfulness finding along with a finding that the father's actions were not

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[79] TENN. CODE ANN. § 36-1-113(g)(9)(A)(i) (2013) (repealed by 2019 Pub. Acts, c. 36, § 3, eff. July 1, 2019).

[80] H.B. 287, 111 H.J. 717 (2019) (Statement of Rep. Carter). *See* In re Kah'nyia J., No. M2017–00712–COA–R3–PT, 2018 WL 2025217, *1 (Tenn. Ct. App., Apr. 30, 2018) (Trial court terminated father's rights for failure to provide prenatal support but this ground was overturned on appeal.).

[81] Act to amend Tennessee Code Annotated, Title 36, Chapter 1, Part 1; Title 36, Chapter 2 and Section 37-1-102, relative to adoption, S.B. 207, 111th Gen. Assemb. § 1 (2019). *See also* Act to amend Tennessee Code Annotated, Title 36, Chapter 1, Part 1; Title 36, Chapter 2 and Section 37-1-102, relative to adoption, H.B. 287, 111th Gen. Assemb. § 1 (2019).

[82] *See* TENN. CODE ANN. § 36-1-113 (2021).

[83] TENN. CODE ANN. § 36-1-113(g)(1) (2021).

[84] TENN. CODE ANN. § 36-1-102(1)(A)(iii) (2021).

[85] TENN. CODE ANN. § 36-1-102(1)(I) (2021).

reasonable.[86] The current statute moved willfulness from an element of abandonment to an affirmative defense.

IV. WHY TEST PRENATALLY?

So, if the General Assembly has already passed legislation allowing prenatal paternity tests[87] and the courts are generally open to allowing them,[88] why aren't they a regular facet of Tennessee paternity actions? Tennessee courts' reluctance is right in the reasoning in *Madilene G.R.*—they are afraid prenatal paternity tests are too invasive and unsafe for both the mother and the child.[89]

A. PRENATAL TESTS ARE SAFE, NON-INVASIVE, AND COST-EFFECTIVE

Until recently, prenatal paternity testing required amniocentesis or chorionic villus sampling.[90] These are the same procedures used to test for genetic disorders such as down syndrome, but they involve womb intrusion and carry a small risk of miscarriage.[91] Though the benefits have always been high, the costs outweighed them.

With recent DNA technology advancements, safer and more practical paternity tests are available for children before they are born.[92] These tests only require a blood sample from the mother and the putative father, and the lab can then extract fragments of the child's DNA from the mother's blood.[93] In addition, some newer tests don't even require blood from the putative father, requiring only a

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[86] In re D.L.B., 118 S.W.3d 360, 362 (Tenn. 2003). *See also* TENN. CODE ANN. § 36-1-102 (2018).
[87] TENN. CODE ANN. § 36-2-305 (2021).
[88] In re Madilene G.R., No. M2012–01178–COA–R3–PT, at *7 (Tenn. Ct. App. Jan 10, 2013).
[89] *Id.*
[90] Andrew Pollack, *Before Birth, Dad's ID*, N.Y. TIMES, Jun. 19, 2012, at B1, available at https://www.nytimes.com/2012/06/20/health/paternity-blood-tests-that-work-early-in-a-pregnancy.html.
[91] *Id.*
[92] *Id.*
[93] *Id.*

mouth swab instead.[94] Finally, the test compares these fragments to the putative father's DNA, much like a post-birth test.[95]

Prenatal DNA tests are also becoming cost-effective. Though initially prohibitively expensive, their costs have come down and are nearly comparable with their post-birth counterparts. The DNA Diagnostics Center ("DDC"), the company responsible for the most recent generation of—and the only one accredited with the American Association of Blood Banks—non-invasive prenatal paternity tests, prices their services at $1,699.00 per test.[96] Other prenatal tests are even lower—as little as $500.00—but these sometimes must be taken later in the pregnancy, or the company may not have the same procedures in place to make the sample admissible.[97] In the future, the cost will very likely come down, just as traditional DNA-test costs once did.

Finally, Prenatal DNA tests are accurate. The American Pregnancy Association, an endorser of the DDC, claims the non-invasive tests have a 99.9% accuracy rate.[98] Though disputed, academic papers as far back as 2012 corroborate this claim.[99] Because the accuracy rate is so high, this test is just as accurate as post-birth paternity tests.

B. SUPPORT DURING PREGNANCY

If the baby will be here in nine months,[100] what is the point of going to court to establish paternity before birth? There are valid reasons for both the mother and the father to seek prenatal paternity. The largest of these for the mother is child support during pregnancy. Under current

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[94] *Non-Invasive Prenatal Paternity Test*, DNA DIAGNOSTICS CTR., https://dnacenter.com/paternity-testing/non-invasive-prenatal-paternity-testing/?gphone=1-800-798-0580&gdnis=0580 (last visited Jul. 23, 2021).
[95] *Id.*
[96] *Non-Invasive Prenatal Paternity Test from DDC Accredited by AABB*, DNA DIAGNOSTICS CTR., https://dnacenter.com/blog/blog-dna-diagnostics-center-secures-aabb-accreditation-for-its-certainty-non-invasive-prenatal-paternity-test/ (last visited Jul. 23, 2021).
[97] *Id.*
[98] *DNA Paternity Test*, AM. PREGNANCY ASS'N., https://americanpregnancy.org/paternity-tests/dna-paternity-test/ (last visited Jul. 23, 2021).
[99] Pollack, *supra* note 91. *See also* Xin Guo et al., *A Noninvasive Test to Determine Paternity in Pregnancy*, 366 NEW. ENG. J. MED. 1743 (2012).
[100] ROBERTS, *supra* note 2.

law, there is no mechanism for court-ordered prenatal child support. If the father does not give prenatal child support, the mother has no immediate recourse. However, after the child's birth, she can petition the court to terminate the father's rights, but his non-support will only be a termination ground if she can prove it was "willful." Without prenatal paternity tests, this is a high bar. Fathers can argue that their non-support was not willful because they did not know they were the father.

Court-ordered prenatal child support would level the playing field. No longer would the mother be saddled with the entire pregnancy cost, but, rather, the father would pay some reasonable amount to offset the costs of those exceeding the mother's normal cost of living. This paper is not calling for entire pregnancy costs to be paid by men. Instead, this is an egalitarian argument born out of fairness as it took two to tango, i.e., make the child,[101] so both parties ought to bear some of the cost.

Georgia Supreme Court Justice Leah Sears said it best in her concurrence to *Coxwell v. Matthews*:

> It is generally understood that proper prenatal care is critical to assist a woman in meeting the demands of pregnancy, labor, and childbirth and to ensure that the young are protected from birth complications and abnormalities. If a child's mother has no prenatal care, that child's life can be an uphill climb. He or she has a greater risk of mental retardation, cerebral palsy, and even death. Special education and health care services for these children are costly to taxpayers. A healthy pregnancy and birth are essential for a healthy child. Therefore, the conclusion is inescapable that the duty to provide for a child's maintenance and protection incorporates expenses incurred by the mother due to pregnancy and birth.[102]

C. PARENTAL ACCOUNTABILITY

[101] ROBERTS, *supra* note 2.
[102] Coxwell v. Matthews, 435 S.E.2d 33, 35 (Ga. 1993).

Another reason to find out prenatal paternity is that it keeps parents, particularly fathers, accountable through the pregnancy. Just by the nature of childbirth, women have a nine-month head start in taking parental responsibility. There is an exacerbation in this gap when the mother has had multiple sexual partners, and the child's father is not conclusively known. Under the current system, it is unlikely that a handful of men will wait around for nine months to see who the father is. It is even less likely that any of those same men will offer prenatal child support if there is even a chance someone else could be the father.

By ordering prenatal paternity tests and establishing parentage before the child is born, courts can sort out this mess beforehand. The court would not have to wait months for the child's birth when the biological father could be providing prenatal child support, and other men could move on with their lives. Additionally, shortening the time between conception and establishment of parentage lessens the chance that a father moves out of the court's jurisdiction. A father moving out of the court's jurisdiction could complicate many things, including service of process and enforcement of court orders.[103] By establishing parentage as soon as seven weeks after conception,[104] courts can considerably lessen this possibility.

Holding fathers accountable during pregnancy may also make fathers more likely to stick around long-term. Perhaps when fathers invest financially in their children, they may also become emotionally invested. This outcome shows that the change in the law should incentivize more fathers to be active in their children's lives.

D. ARGUMENTS AGAINST PRENATAL TESTING

It seems the primary argument against prenatal paternity tests is their tie to the slow judicial system. Establishing paternity, prenatally or post-birth can be

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[103] A discussion of the Uniform Child Custody Jurisdiction and Enforcement Act is out of the scope of this paper, but by "complicat[ing the] . . . enforcement of orders," the author comments more on local reluctance to enforce a foreign jurisdiction's orders rather than a legal barrier.

[104] *Prenatal Paternity Test*, *supra* note 95.

cumbersome and time-consuming. It's not the testing center's fault, as the DDC has a turn-around time of about seven days.[105] Instead, it is an issue with the courts themselves. Suppose either party tries to act in bad faith by avoiding service or needlessly complicating the paternity action. In that case, the process could easily stretch past the time frame of a human gestation cycle. This case is a valid argument and one that there is no easy solution provided. Like many other time-sensitive legal questions, prenatal paternity actions will require trust in the efficiency of the court and good faith from all involved parties.

Another argument against prenatal testing is its limitations. Presently, the DDC's flagship test, "the Certainty," cannot differentiate between closely related potential fathers.[106] Additionally, women having multiple births cannot have the test accurately performed.[107] Post-birth paternity tests do not have these limitations, so detractors usually argue prenatal tests are not as useful as traditional post-birth testing. This paper is not arguing that prenatal tests should usurp post-birth tests, only that they would be helpful in the limited uses involving multiple partners who refuse to support the woman during her pregnancy. Additionally, the court may follow up with a paternity test post-birth to confirm the results if they feel so inclined.

Finally, the cost is still high. As stated before, the cost of the top-of-the-line test is $1699.[108] Though a Google search of prenatal paternity tests yields a plethora of options, some as low as $900, admissibility could become difficult based solely on the fact that the other tests do not have the endorsements or backing as DDC. The court could become wary of the chain of custody. This paper's proposed solution accounts for this. First, as competitors enter the market and gain more trust and recognition, costs will come down. This paper argues that Tennessee should be ahead of the curve in its legislation. Second, because the standard for proving paternity under this proposed statutory regime is by a preponderance of the evidence or by clear and convincing

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[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *DDC Accredited*, *supra* note 97.

evidence, the chain of custody needs to only rise to that standard, too.

V. A PROPOSED SOLUTION

This section sets out specific policy changes and their reasoning and predicts how they will interact with each other.

A. RECOGNIZE PRENATAL PATERNITY TESTS IN THE TENNESSEE CODE ANNOTATED

As discussed in earlier sections, non-invasive prenatal paternity tests are safe and will soon be cost-effective. Though their uses may be limited, they could bolster future family jurisprudence. Encouraging their use would put Tennessee ahead of the curve on this issue.

To make this happen, Tennessee Code Annotated section 24-7-112 should be amended by adding a subsection (c) and inserting the following language:

> In any proceeding in which the parentage of an unborn child is at issue, unless the individual has good cause, the court shall order the parties to submit to a non-invasive, prenatal paternity test upon the request of any party if the request is supported by an affidavit of the party making the request to the same standards as a traditional genetic test under this chapter. There shall be no difference in pleading between a prenatal and post-birth test.
>
> (1) On the motion of any party, or by order of the court, the father shall submit to another paternity test per subsection (a) within one hundred twenty (120) days after the child's birth to confirm the parentage of the child.

Under this statutory regime, this does not take away from the court's ability to order traditional post-birth paternity tests. Instead, it only emphasizes and codifies the existence and reliability of prenatal paternity tests. Additionally, this

statute requires the same level of pleadings and standards as a post-birth paternity test. Finally, if either party or the court remains not entirely convinced, they can always submit to another paternity test after the child's birth to confirm their parentage.

B. ESTABLISH PRENATAL CHILD SUPPORT FOR MOTHERS

Establishing prenatal child support for mothers is the primary driver of prenatal paternity tests. Rather than concoct some pre-birth child support schemes like the state's normal child support system, this paper argues for simple value exchange. After establishing paternity, the court would be free to order prenatal child support based on factors such as the father's income, the mother's income, and other reasonable factors the court deems appropriate. A test of reasonability based on the father's and mother's circumstances would govern any past child support. If the mother believes the father is not paying or giving enough child support, she may ask the court to find him in contempt.

Tennessee Code Annotated section 36-5-101 should be amended by adding subsection (n) and inserting the following:

> When paternity is established for a child born or to be born to parents unwed to each other, the court may order for the suitable prenatal, natal, and postnatal support of the child and mother by the father or out of the father's property, according to the nature of the case and the circumstances of the parties, the modification of said order shall remain under the court's jurisdiction. If paternity is established after the birth of the child but before the child is two (2) years old, the court may order the father to reimburse the mother for reasonable prenatal, natal, and postnatal expenses.

The legislature should make further adjustments to the requisite statutes to ensure the desired effect.

C. ESTABLISH LIMITED PRENATAL PARENTAL RIGHTS FOR BIOLOGICAL FATHERS

Once paternity has been established, and the pregnancy has progressed past the federally protected window for abortions, fathers should have limited rights to seek good-faith injunctions for a mother's behavior dangerous to the unborn child. For example, drug and alcohol use harms unborn children. The effects of said use may very likely result in a severe abuse finding against the mother,[109] which sometimes relieves the Tennessee Department of Children's Services from their reasonable efforts' requirement. In addition, it is an automatic termination ground should the mother have a termination-of-parental-rights' action brought against her.[110] Further, if the father knew of these actions and willfully chose not to prevent them, he can also have a severe abuse finding against him.[111] An injunction against prenatal alcohol and drug use would provide a father with the tools to do something other than sitting idly by during pregnancy.

This right has the propensity to be abused and should therefore be *extraordinarily limited*. Though the child's wellbeing is important, respecting the mother's autonomy is just as vital to both the mother's rights and the statute's constitutionality. A court may very well view this right as a restriction on abortion, meaning the statute must conform with *Roe v. Wade*[112] and *Planned Parenthood of Southern Pennsylvania v. Casey*.[113] That is why the right cannot be established or exercised before the unborn child's viability.

On the more extreme, yet unfortunately common, end of the spectrum, abusive relationships tend to escalate during pregnancy.[114] This "right" has the potential to escalate these relationships even further, as well as give abusers a new tool to control their victims. The father's good faith is an important factor in this proposed statute and is a necessary finding by the court in applying it. It would not only be wrong but judicially irresponsible to allow a father to

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[109] TENN. CODE ANN. § 37-1-102(b)(27) (2021).
[110] TENN. CODE ANN. § 37-1-166 (2021).
[111] TENN. CODE ANN. § 37-1-102(b)(27) (2021).
[112] Roe v. Wade, 410 U.S. 959 (1973).
[113] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[114] Eppolito, *supra* note 78.

unnecessarily restrict a mother's autonomy because she is pregnant with his child.

The legislature should establish a new code section, Tennessee Code Annotated section 36-2-323, titled "Limited Prenatal Rights of Biological Fathers" and insert the following:

> (a) On the good-faith showing that an unborn child is at the point of viability and that the mother's willful use of harmful substances could cause, or is causing, the unborn child immediate and irreparable harm, an established biological father may seek an injunction to the mother's use of harmful substances.
> (b) If this injunction is granted and subsequently violated, the father shall be granted primary custody of the child upon birth.
> (c) Any action arising out of this Section must be made by clear and convincing evidence.

D. REINSTATE NONPAYMENT OF PRENATAL EXPENSES AS A GROUND FOR TERMINATION

The reinstatement of nonpayment of prenatal expenses as a ground for termination has less to do with prenatal paternity tests and more to do with rectifying a change to the law made in 2019.[115] Though prenatal tests are not the reason, they make this law more viable. Before 2019, courts could terminate the biological father's rights if he "failed to pay a reasonable share of prenatal, natal, and postnatal expenses . . . ."[116] Even so, because of the courts' reluctance to order prenatal paternity tests, a father's rights were never successfully terminated under this ground.[117] Fathers could, at most, argue that they didn't know the child was theirs during the pregnancy and, at least, force the mother to frontload the prenatal and natal costs.

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[115] 2019 Pub. Acts, c. 36, § 3, eff. July 1, 2019.
[116] TENN. CODE ANN. § 36-1-113(g)(9)(A)(i) (2013) (repealed by 2019 Pub. Acts, c. 36, § 3, eff. July 1, 2019).
[117] H.B. 287, 111 H.J. 717 (2019) (Statement of Rep. Carter).

As it stands now, of course, the mother must pay her own natal and prenatal costs with no involuntary help from the father. Reinstating this termination ground would encourage biological fathers—now fully aware of their paternity thanks to prenatal paternity tests—to give prenatal child support to the child's mother. Therefore, the Legislature should amend the Tennessee Code Annotated section 36-1-113(g)(9)(A)(i) by deleting the current text and instead inserting the following:

> The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth and, if parentage is disputed, after paternity has been established per § 24-7-112.

E. THE BIG PICTURE

This statutory regime incentivizes establishing parentage, ordering prenatal child support, and setting the foundation for a better quality of life for the unborn child. It gives mothers access to prenatal child support they might not otherwise have. It gives fathers the ability to document and intervene when a mother's drug or alcohol abuse puts his unborn child in danger. Most of all, it encourages both parents to act in their child's best interests during pregnancy.

VI. CONCLUSION

"[I]f truth were everywhere to be shown, a scarlet letter would blaze forth on many a bosom . . . ."[118] Children born to unwed parents or as a result of adultery should have the same opportunities as those born to stable families. Tennessee law should incentivize cohesive families and stable relationships, and children should have every opportunity to flourish. Codifying prenatal paternity testing

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[118] NATHANIEL HAWTHORNE, THE SCARLET LETTER 102 (1850).

and the other changes this paper has argued for would further these end goals.