S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 131

Constitutionality of Mandatory Deoxyribonucleic Acid ("DNA") Testing for Paternal Identification in Child Support Cases

QUESTIONS

1. If DNA testing for paternal identification were required before child support is ordered by a court, would such a requirement violate the Tennessee or the United States Constitutions?

2. When a person has been incorrectly identified as a child's father and when the person has made child support payments pursuant to a court order, may the child support collecting agency refund those payments to him?

3. May a person who has been incorrectly identified as a child's father and who has paid child support pursuant to a court order seek restitution from the child's biological father?

OPINIONS

1. No. If DNA testing for paternal identification were required before child support is ordered by a court, such a requirement would not violate the Tennessee or the United States Constitutions.

2. No. When a person has been incorrectly identified as a child's father and when the person has made child support payments pursuant to a court order, the child support collecting agency cannot refund those payments to him because that would constitute a retroactive modification of a child support order.

3. Yes. A person who has been incorrectly identified as a child's father and who has paid child support pursuant to a court order may seek restitution from the child's biological father by filing an action for return of necessaries paid on behalf of the child.

ANALYSIS

I.

As an initial matter, we note that, under Tennessee law, DNA testing is not always required to prove paternity before a court sets support. As a general proposition, men may be rebuttably presumed to be legal fathers without the need of DNA tests. Tenn. Code Ann. §§ 36-2-304(a)(1)-(a)(4). DNA testing, however, is required in contested paternity cases where the court or the Tennessee Department of Human Services ("DHS") in cases under Title IV-D of the Social Security Act, 42 U.S.C. §§ 651, *et seq*., "shall order the parties and the child to submit to genetic tests to determine the child's parentage upon the request of any party" provided that the requesting party submits an appropriate affidavit.[1] Tenn. Code Ann. § 24-7-112(a)(1)(A). We assume that the question posed, subject to the exception noted in footnote one, extends the DNA testing requirement to all child support cases, even those in which paternity is not disputed.

There are three relevant constitutional provision under which required DNA testing to prove paternity before a court orders child support could be attacked: the protection against unreasonable searches and seizures, equal protection and substantive due process. We will discuss each in turn.

A. Unreasonable Searches and Seizures

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .." U.S. Const. amend. IV. Similarly, the Declaration of Rights of the Tennessee Constitution guarantees, in relevant part, "that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures[.]" Tenn. Const. art. 1, § 7. As the Tennessee Supreme Court has observed, the Fourth Amendment and Article 1, § 7 are identical in "purpose and intent" and Tennessee courts treat federal cases interpreting the Fourth Amendment as "particularly persuasive." *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968)). Article 1, Section 7, however, may afford citizens "even greater protection." *Id.* In the context of the question posed, because Tennessee courts have afforded the same level of protection under the Tennessee Constitution as under the Fourth Amendment, *see State v. Blackwood*, 713 S.W.2d 677, 679 (Tenn. Crim. App. 1986), we will limit our discussion to the United States Constitution.

As a threshold matter, we must determine whether the Fourth Amendment's protections are

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[1] A man may also assume paternity without a DNA test when he properly executes a voluntary acknowledgment of paternity ("VAP"), which constitutes a "legal finding of paternity." Tenn. Code Ann. § 24-7-113(a). If the VAP is not rescinded within 60 days of its execution, a signatory to a VAP may challenge it within five years only "on the basis of fraud, whether extrinsic or intrinsic, duress, or material mistake of fact." *Id.* § 24-7-113(e)(1). The legal father must establish that there is a substantial likelihood that fraud, duress, or material mistake of fact existed in the execution of the VAP and "then, and only then," shall the court order parentage tests. *Id.* § 24-7-113(e)(2). For purposes of this Opinion, we assume that the VAP provisions are inapplicable. If the VAP provisions were applicable, they would substantially limit a legal father's ability to obtain a DNA test to prove paternity.

applicable to a State-mandated requirement for DNA testing to determine paternity in child support cases before a court orders payment of support. Because the Supreme Court has repeatedly applied the Fourth Amendment to civil matters, *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985); *Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967), compulsory DNA testing to establish paternity in child support cases must comport with this constitutional provision.

We also conclude that the collection of a man's genetic material for the purpose of conducting a DNA test to determine paternity constitutes a "search" or a "seizure" under the Fourth Amendment. The United States Supreme Court has recognized that the collection of blood from an individual implicates the Fourth Amendment. *See Skinner v. Ry. Labor Executives' Assoc.*, 489 U.S. 602, 616 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966).

The Fourth Amendment protects an individual from unreasonable searches or seizures. *Skinner*, 489 U.S. at 619. To determine the reasonableness of a search requires "balancing the need to search against the invasion which the search entails." *Ortega*, 480 U.S. at 719; *Camara*, 387 U.S. at 536-37. Typically, a search or seizure must be conducted "pursuant to a judicial warrant issued upon probable cause." *Skinner*, 489 U.S. at 619. The Supreme Court, however, has recognized exceptions to the warrant requirement in cases when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)). In cases "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624.

We believe that a mandatory DNA testing requirement to determine paternity in child support cases before a court orders payment of support would fit within the "special needs" exception to the warrant requirement. While our research has not uncovered the existence of any law that requires proof of paternity through a compulsory DNA test before child support is ordered, we conclude that such a requirement would be buttressed by several legitimate state interests. The Tennessee Court of Appeals has identified, in the related context of parentage disputes, key State interests that are apposite to our analysis of whether the Fourth Amendment would permit compulsory DNA testing in child support cases:

> First, the State has an interest in eliminating uncertainty and confusion regarding a child's parentage. Second, the State has an interest in enforcing a biological father's obligation to support his children in order to prevent them from entering the welfare rolls . . .. Finally, the State has an interest in enabling children to ascertain the identity of their biological parents for medical or other health reasons.

State ex rel. Cihlar v. Crawford, 39 S.W.3d 172, 184-85 (Tenn. Ct. App. 2000). We find that the interests articulated in *Crawford*, especially the interest of eliminating any uncertainty about a child's parentage, "justify establishing a procedure for resolving parentage disputes," *id.* at 185, that could constitutionally include a DNA testing requirement to prove paternity in child support cases before any support is ordered. Conducting a DNA test for the purpose of correctly identifying a child's biological father would clearly further that State's interest. In addition, while individuals have a reasonable expectation of privacy in their genetic code, we conclude that the intrusion at issue here — a DNA test to prove paternity — would be minimal. The question posed suggests that there are cases in which men are incorrectly identified as a child's biological father. In such circumstances, it would be in their best interest to subject themselves to a DNA test to rule themselves out as a child's biological father. Thus, given that the intrusion under these circumstances actually should be favored by individuals who may have been incorrectly identified as a child's biological father and given that the State's interest is compelling, we conclude that the proposal in the question would likely withstand a Fourth Amendment challenge.

In our view, a statutory provision prescribing a compulsory DNA test for the purpose of identifying a child's biological father before any support is ordered would not violate the Fourth Amendment and would be consistent with the Supreme Court's cases authorizing compulsory collection of blood samples without warrants in other civil contexts. *Cf. Skinner*, 489 U.S. at 622 (stating that a warrant was not necessary in mandatory drug and alcohol testing for railroad employees); *Griffin*, 483 U.S. at 873 (same with search of probationer's home); *Ortega*, 480 U.S. at 725 (same with work-related search of an employee's desk and office); *T.L.O.*, 469 U.S. at 337-42 (same with search of student's property in school grounds by school officials); *Schmerber*, 384 U.S. at 770 (same with respect to compulsory blood tests administered to individual who was arrested for driving under the influence).

B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part, that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. The analytical framework of an equal protection challenge under the United States and Tennessee Constitutions is identical. *See State v. Robinson*, 29 S.W.3d 476, 480-81 (Tenn. 2000). Further, both clauses "confer essentially the same protection upon the individuals subject to those provisions." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (citations omitted).

As the Tennessee Supreme Court has aptly noted, "[t]he concept of equal protection espoused by the federal and [by] our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Initially, the level of scrutiny to be applied depends upon the rights asserted. *Caudill v. Foley*, 21 S.W.3d 203, 211 (Tenn. Ct. App. 1999). Because imposing a DNA testing requirement in child support cases to prove *paternity* affects men, a specific class of individuals on the basis of gender, it is subject to heightened scrutiny. *Cf. Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003) (citations omitted). "Parties who seek to

defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996). Explaining the heightened scrutiny standard, the United States Supreme Court stated "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Elam*, 104 S.W.3d at 461. The burden of justification rests entirely with the State. *United States v. Virginia*, 518 U.S. at 533. Moreover, the State's justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

We begin our analysis by noting that, generally, proof of paternity will often be an issue in cases when a child is born out of wedlock and in which the parents did not attempt to marry each other.[2] The question presented suggests that there are cases in which the biological mother is[3] unsure as to the biological father's identity, and incorrectly identifies a biological father. We must determine, therefore, whether, in light of these concerns, imposing a mandatory DNA testing requirement to prove paternity in child support cases violates the equal protection provisions of the Tennessee and United States Constitutions. As noted above, the State possesses several compelling objectives in the accurate resolution of paternity and child support disputes. *See Crawford*, 39 S.W.3d at 184-85. We also acknowledge that the "State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). Indeed, "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent." *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972).

We conclude that a requirement for compulsory DNA testing to prove paternity in child support cases would likely withstand an equal protection challenge because the classification serves important State objectives and is substantially related to their achievement. Requiring DNA testing to prove paternity would insure accuracy in identifying a child's biological father for purposes of setting child support. Commentators agree that DNA tests used to prove parentage consistently yield ninety-nine percent accuracy rates. *See, e.g.*, Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. 1409 in* Nguyen v. INS, 20 Law & Ineq. 275, 296 (2002); Christopher L. Blakesley, *Scientific Testing and Proof of Paternity*, 57 La. L. Rev. 379, 388 (1997). Children born out of wedlock particularly would benefit from a DNA testing requirement, insuring that their biological father is correctly identified, and allowing them to receive support from that individual. We do not believe that a DNA testing requirement to prove paternity would be fueled by gender stereotypes in violation of *United States v. Virginia*, but by the realities associated with the circumstances of a child's birth. While the biological mother's identity is, by nature, beyond dispute, the same certainty does not accompany that of the biological father's. In these cases, it is in the State's prerogative to correctly identify a child's biological father.

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[2] When the parties are married, the statutory rebuttable presumptions of paternity apply, *see* Tenn. Code Ann. § 36-2-304(a), and the child will have a legal father *ab initio*.

[3] For purposes of this question, we assume that the woman giving birth to a child was not a surrogate mother.

C. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment not only guarantees "fair process," but also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *accord Parks Properties v. Maury County*, 70 S.W.3d 735, 744 (Tenn. Ct. App. 2001). Substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

Although a father bringing a substantive due process challenge against compulsory DNA testing to prove paternity might contend that this requirement infringes on his right to bodily integrity and privacy, *see Rochin v. California*, 342 U.S. 165 (1951), we conclude that the alleged right at issue is better framed as whether a man has a right *not* to be correctly identified as a child's biological father so that he may avoid paying child support. The alleged right, as we perceive it, is neither "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), nor "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Because the asserted right does not meet the standards set forth in *Moore* and *Palko*, the State's regulation will be upheld if it is "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. For the reasons we articulated in the previous sections of this Opinion, we also conclude that compulsory DNA testing to prove paternity in child support cases would not offend the Substantive Due Process clause.

II.

As to the question of reimbursement of child support paid by DHS, the child support collecting agency,[4] under Tennessee law, child support orders cannot be modified retroactively:

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. *Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed* and notice of the action has been mailed to the last known address of the opposing parties. If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at

[4] Tenn. Code Ann. § 36-5-116(a)(1).

> the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk.

Tenn. Code Ann. § 36-5-101(f)(1) (2005) (emphasis added).[5] *See also Rutledge v. Barrett*, 802 S.W.2d 604, 605-07 (Tenn. 1991); *Alexander v. Alexander*, 34 S.W.3d 456, 460 (Tenn. Ct. App. 2000). In light of these authorities, we conclude that when a person has been incorrectly identified as a child's father and when the person has made child support payments pursuant to a court order to DHS, the child support collecting agency cannot refund those payments to him because that would constitute a retroactive modification of a child support order.

III.

The Court of Appeals has recognized that recovery, in a separate legal action, of child support paid pursuant to a court order by a person incorrectly identified as a child's father is possible. *White v. State ex rel. Armstrong*, 2001 WL 134601, *4 n.8 (Tenn. Ct. App. 2001); *cf. State ex rel. Mock v. Decker*, 2005 WL 3447682, *3 (Tenn. Ct. App. 2005); *State ex rel. Rushing v. Spain*, 2005 WL 2922440, *2 (Tenn. Ct. App. 2005); *Peychek v. Rutherford*, 2004 WL 1269313, *3-*4 (Tenn. Ct. App. 2004); *Benson v. Benson*, 1996 WL 284731, *2 (Tenn. Ct. App. 1996); *Hartley v. Thompson*, 1995 WL 296202, *3 (Tenn. Ct. App. 1995); *Foust v. Foust*, 1992 WL 145007, *1 (Tenn. Ct. App. 1992); *Oliver v. Oczkowicz*, 1990 WL 64534, *2 (Tenn. Ct. App. 1990). In this lawsuit, known as an action for recovery of necessaries, the person must show that the support paid was "for the children's necessaries" that were "not being supplied by the custodial parent." *Netherton v. Netherton*, 1993 WL 49556, *2 (Tenn. Ct. App. 1993). A person seeking recovery of payment for necessaries must bring such an action against the biological father within six years after the necessaries were provided. *Peycheck*, 2004 WL 1269313, at *3. An action for recovery of necessaries does not violate the prohibition against retroactive modification of child support orders under Tenn. Code Ann. § 36-5-101(f)(1). The Court of Appeals distinguished the allowable credits for necessaries from the proscribed modifications of child support orders, reasoning that the credit is not a modification because it "recognizes that the obligor parent provided the support the court ordered in the first place." *Benson*, 1996 WL 284731, at *2 (citing *Netherton*, 1993 WL 49556, at *2).

Necessaries include providing for "appropriate food, shelter, tuition, medical care, legal services, and funeral expenses" for the child, as needed. *Peycheck*, 2004 WL 1269313, at *3. The trial court determines the appropriateness and the need for the necessaries, which depend "on the parent's ability to provide." *Id.* In light of these principles, it is our opinion that a person who was incorrectly identified as a child's father and who has paid child support may obtain recovery of necessaries paid on behalf of the child from the biological father within six years after providing the necessaries.

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[5] This provision was previously codified at Tenn. Code Ann. § 36-5-101(a)(1).

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

JUAN G. VILLASEÑOR
Assistant Attorney General

Requested by:

Honorable Barbara Cooper
State Representative
House of Representatives
38 Legislative Plaza
Nashville, TN 37243