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CONCLUSION

We find that Ellis should be and hereby is disbarred from the practice of law in Nebraska, effective immediately. Ellis is hereby ordered to comply with all terms of Neb. Ct. R. § 3-316 forthwith and shall be subject to punishment for contempt of this court upon failure to do so. Ellis is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

ALISHA C., APPELLEE, V.
JEREMY C., APPELLANT.
808 N.W.2d 875

Filed February 24, 2012. No. S-11-233.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
2. **Parent and Child: Paternity: Presumptions: Evidence.** Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed, and this presumption may be rebutted only by clear, satisfactory, and convincing evidence.
3. **Jurisdiction: Divorce: Paternity: Child Support.** The district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of a dissolution decree.
4. **Divorce: Paternity: Child Support.** Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.
5. **Divorce: Paternity: Child Support: Res Judicata.** A dissolution decree that orders child support is res judicata on the issue of paternity.
6. **Divorce: Modification of Decree: Paternity: Evidence: Res Judicata.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
7. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
8. ____. A statute is not to be read as if open to construction as a matter of course.
9. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

10. ____. In the absence of ambiguity, courts must give effect to statutes as they are written.
11. **Statutes: Legislature: Presumptions.** In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.
12. **Parent and Child: Paternity.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
13. **Statutes: Legislature: Public Policy.** It is properly the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded for further proceedings.

James H. Hoppe and Jerrod P. Jaeger for appellant.

Kevin Ruser, of University of Nebraska Civil Clinical Law Program, and Troy J. Bird and Austin A. Leighty, Senior Certified Law Students, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Jeremy C. and Alisha C. were married in September 2001. By 2006, they were separated. Throughout their separation, they would periodically reunite, only to separate again. One such reunion occurred on February 14, 2007.

In March 2007, Alisha discovered that she was pregnant and that the baby had been conceived sometime around February 14. Alisha did not recall having intercourse with anyone other than Jeremy during the period of conception. She was recovering from a methamphetamine addiction, however, and testified that this affected her memory.

Alisha informed Jeremy that he was going to be a father. When Jeremy expressed doubts about his paternity, Alisha told him she was "110 percent sure" he was the father because she had been with no one else during that time. Alisha told Jeremy that if he did not believe her, he could get a paternity test once

the baby was born. Jeremy, however, lacked the funds to pay for genetic testing.

Brady C. was born in November 2007. After further reassurances from Alisha that she was "110 percent sure" he was the father, and inquiries into whether the child looked like him, Jeremy signed the birth certificate as Brady's father. Jeremy was not asked to sign a notarized acknowledgment of paternity as described by Neb. Rev. Stat. § 43-1408.01 (Reissue 2008). After Brady's birth, Jeremy saw Brady approximately once a week. He still had doubts as to whether he was Brady's father, but Alisha continuously assured him that he was.

In January 2009, Alisha filed for dissolution of the marriage. On August 11, Jeremy signed a property settlement and custody agreement which had attached to it a parenting plan. The agreement referred to Brady as "the minor child of the parties." Jeremy agreed to visitation with Brady one evening a week and on Jeremy's birthday and Father's Day. Jeremy agreed to pay $498 per month in child support commencing August 1 and to be responsible for 70 percent of childcare expenses. He agreed to pay Brady's health insurance in the event Medicaid coverage became unavailable.

The district court entered a decree of dissolution on September 17, 2009, when Brady was almost 2 years old. Jeremy was not present or represented at the dissolution hearing, but he had previously entered a voluntary appearance on January 28, 2009. The court noted that one child, Brady, was born as issue of the marriage. The court found the terms and provisions of the property settlement and custody agreement to be fair and equitable and incorporated the provisions of the agreements into its decree of dissolution.

Approximately 1 month later, Jeremy's mother agreed to pay for a paternity test. The test was conducted shortly thereafter, and the parties agree the test demonstrated that Jeremy is not Brady's biological father. On November 17, 2009, 61 days after the dissolution decree, Jeremy filed a "Complaint to Set Aside Legal Determination of Paternity." The determination of paternity referred to in the complaint was the decree of dissolution. Jeremy alleged that a decree modifying or setting aside the custody and child support order was warranted on the grounds

of fraud or newly discovered evidence, or under the provisions of Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2008).

The district court denied the complaint. The court found that the evidence did not support a claim of fraud and that the claim of newly discovered evidence did not afford relief because Jeremy failed to exercise due diligence in raising the issue of paternity in a timely manner. The court found that the provisions of §§ 43-1401 to 43-1418 did not apply as a matter of law to a child born during the course of a marriage. An order of garnishment in aid of execution of Jeremy's child support obligations was issued in March 2010.

Jeremy appeals the district court's February 18, 2011, order denying his "Complaint to Set Aside Legal Determination of Paternity," insofar as it sought relief under § 43-1412.01.

II. ASSIGNMENT OF ERROR

Jeremy assigns that the district court erred in finding that §§ 43-1401 to 43-1418 do not apply to minor children born during a marriage.

III. STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.[1]

IV. ANALYSIS

The sole issue in this appeal is whether the disestablishment of paternity provision, § 43-1412.01, applies to adjudicated fathers who were married to the child's biological mother at the time of conception. This presents an issue of first impression for our court. To better understand the arguments currently before us, we explore the law before the passage of § 43-1412.01, the statutory scheme in which § 43-1412.01 is found, and similar statutory provisions in other states.

1. Nebraska Law Before Passage of § 43-1412.01

(a) Presumption of Paternity

[2] Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born

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[1] *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence.[2] The testimony or declaration of a husband or wife is not competent to challenge the paternity of a child.[3]

The marital presumption of paternity has a long history that derives from what became known as Lord Mansfield's Rule. At a time when biological paternity was difficult to establish,[4] Lord Mansfield's Rule protected children from illegitimacy by assuming a child born during the marriage belonged to the husband and prohibiting the husband and wife from testifying against each other to overcome this presumption.[5]

With the advent of genetic testing, this marital presumption of paternity can now be overcome by scientifically reliable evidence that the husband is not the biological father of the child.[6] Genetic testing can also establish paternity of children born out of wedlock.[7]

(b) Dissolution Decrees and Res Judicata

[3] The parentage of a child born during a marriage is traditionally contested, if at all, in dissolution proceedings.[8] The marital presumption of paternity can be rebutted at that time.[9] The district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of a dissolution decree.[10]

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[2] See, *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991); *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977).

[3] *Id.*

[4] Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 Md. L. Rev. 246 (2006).

[5] Kristen K. Jacobs, *If the Genes Don't Fit: An Overview of Paternity Disestablishment Statutes*, 24 J. Am. Acad. Matrim. Law. 249 (2011) (citing *Goodright v. Moss*, (1777) 98 Eng. Rep. 1257 (K.B.); 2 Cowp. 591).

[6] See, e.g., *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996).

[7] See § 43-1412.

[8] See, *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965). See, also, *Schmidt v. State*, 110 Neb. 504, 194 N.W. 679 (1923).

[9] See *id.*

[10] *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

[4] Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.[11] When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone. In *DeVaux v. DeVaux*,[12] we explained that a trial court necessarily makes such a finding when it orders child support, for "the trial court could not have ordered child support without finding that [the presumed father] was the father of the child."

[5] As a result, any dissolution decree that orders child support is res judicata on the issue of paternity.[13] Under common law, it cannot be relitigated except under very limited circumstances through a motion to vacate or modify the decree. Accordingly, in *DeVaux*, we held that the district court erred in failing to grant the ex-husband's demurrer to the mother's application to modify the decree to reflect that the ex-husband was not the child's biological father.[14] As a matter of policy, we said: "'There is no more forceful example of the rationale underlying the requirement of finality of judgments than the chaos and humiliation which would follow from allowing [persons] to challenge, long after a final judgment has been entered, the legitimacy of children born during their marriages.'"[15]

A party to any final judgment can make a motion to vacate or modify the judgment on the grounds of fraud by the successful party or "newly discovered material evidence which

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[11] *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). But see, *R.E. v. C.E.W.*, 752 So. 2d 1019 (Miss. 1999); *Cornelius v. Cornelius*, 15 P.3d 528 (Okla. Civ. App. 2000); *McDaniels v. Carlson*, 108 Wash. 2d 299, 738 P.2d 254 (1987).

[12] *DeVaux v. DeVaux, supra* note 11, 245 Neb. at 616, 514 N.W.2d at 644. See, also, *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999).

[13] See *DeVaux v. DeVaux, supra* note 11.

[14] *Id.*

[15] *DeVaux v. DeVaux, supra* note 11, 245 Neb. at 619-20, 514 N.W.2d at 646 (quoting *Hackley v Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986)).

could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial."[16] But the standard for showing fraud or newly discovered evidence is high. In *DeVaux*, we explained that the mother's awareness of her extramarital sexual relations meant that she could not file a successful motion for new trial on the basis of newly discovered evidence that her former husband was not the biological father of her child. Neither the mother's former ignorance of blood testing availability nor her belated realization regarding possible parentage was sufficient to show due diligence as required for a motion for new trial.[17] "'[R]easonable diligence,'" we explained, "means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful."[18]

Similarly, to demonstrate fraud, the party seeking to set aside the judgment must prove that he or she exercised due diligence at the former trial and was not at fault or negligent in the failure to secure a just decision.[19] In *In re Estate of West*,[20] we said that in order to vacate a judgment or order under § 25-2001(4) because of fraud, the movant must prove: (1) the judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.

In *McCarson v. McCarson*,[21] we reversed the trial court's grant of summary judgment in favor of the ex-husband who sought to modify a dissolution decree and child support order,

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[16] See Neb. Rev. Stat. § 25-2001(4)(c) (Reissue 2008).

[17] *DeVaux v. DeVaux, supra* note 11.

[18] *Id.* at 623, 514 N.W.2d at 648.

[19] See *Nielsen v. Nielsen*, 275 Neb. 810, 749 N.W.2d 485 (2008).

[20] *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987).

[21] *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

on the basis of fraud, to reflect he was not the child's father. The dissolution decree had been entered after a voluntary appearance, but while the ex-husband was stationed in Japan. The ex-husband, who was not represented by counsel, signed the decree. It was undisputed that the ex-wife committed fraud insofar as she knew at the time of filing for dissolution that the child was not her husband's. Yet she did not reveal that information to the court or to her husband.

Nevertheless, we found that the ex-husband did not make a successful claim of fraud, because he failed to rebut evidence introduced by the ex-wife that he knew or should have known he was not the child's biological father.[22] This evidence consisted of the ex-husband's previous initiation of a "punishment proceeding" against the ex-wife for adulterous conduct.[23] Also, the ex-wife submitted an affidavit in which she testified that the ex-husband had told her many times he knew the child could not be his. Finally, in a previously dismissed petition for dissolution filed by the ex-husband shortly after the child's birth, the ex-husband alleged he was not the child's biological father.

Concurrent independent equity jurisdiction allows the court to modify its own decrees, but such authority is similarly rarely utilized.[24] Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified, in the absence of fraud or gross inequity.[25] There are no published cases in Nebraska where a paternity determination in a dissolution and support decree was set aside under the court's independent equity jurisdiction.

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[22] *Id.*

[23] *Id.* at 542, 641 N.W.2d at 70.

[24] See, *DeVaux v. DeVaux, supra* note 11; *Portland v. Portland*, 5 Neb. App. 364, 558 N.W.2d 605 (1997).

[25] See, *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988); *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975).

2. § 43-1412.01

[6] Subsequent to our decisions in *McCarson* and *DeVaux*, the Legislature passed 2008 Neb. Laws, L.B. 1014. Section 43-1412.01, derived from that bill, provides a means to "set aside" a "final" legal determination of paternity, including an obligation to pay child support. Section 43-1412.01 thus clearly overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father. The question is whether an adjudicated father who was married to the child's biological mother at the time of conception may take advantage of the provisions of § 43-1412.01.

Section 43-1412.01 states in full:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child. The filing party shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending complaint for relief from a determination of paternity under this section, but only from the date that notice of the complaint was served on the nonfiling party. A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.

It is conceded that Jeremy does not fall under any of the three exclusions set forth in § 43-1412.01. Most notably, Jeremy did

not sign a notarized acknowledgment of paternity. The statute itself is broadly worded as applicable to "[a]n individual," who "may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity." Nevertheless, Alisha argues we should read § 43-1412.01 as applying only to legally determined fathers who were not married to the child's mother at the time of conception or birth. Stated differently, Alisha believes that § 43-1412.01 applies to paternity determinations concerning only out-of-wedlock children. She argues it has no applicability to determinations of paternity regarding children born during a marriage.

In making this argument, Alisha relies on the applicable definitions section of the statutory scheme in which § 43-1412.01 is found. Those definitions, adopted in 1941 and last modified in 1994, state that "[f]or purposes of sections 43-1401 to 43-1418," a "[c]hild shall mean a child under the age of eighteen years born out of wedlock."[26] Further, a

> [c]hild born out of wedlock shall mean a child whose parents were not married to each other at the time of birth, except that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth.[27]

While § 43-1412.01 admittedly makes no reference to the term "child" as such, Alisha argues we must read § 43-1412.01 in pari materia[28] with the definitions section. Doing so, we must exclude its application to paternity determinations that were not of a "child" as defined in § 43-1401(1). Alisha points out that the final reading of L.B. 1014 includes the provision that "[t]he Revisor of Statutes shall assign . . . section 47 of this act within sections 43-1401 to 43-1418 and any reference to such sections shall be deemed to include section 47 of this act . . . ."[29] Thus, Alisha argues it was the Legislature's intent

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[26] § 43-1401(1).

[27] § 43-1401(2).

[28] See *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

[29] 2008 Neb. Laws, L.B. 1014, § 73, p. 702.

that § 43-1412.01 be viewed as part of a statutory scheme which deals exclusively with out-of-wedlock births and simply has no applicability to children born or conceived during a marriage.

(a) Statutory Scheme

We agree that many of the provisions of §§ 43-1401 to 43-1418 concern the child support obligations of the "father of *a child* whose paternity is established either by judicial proceedings or by acknowledgment."[30] Many of the statutes provide a means of establishing paternity of "a child."[31] And they are meant to establish liability for the child's support "in the same manner as the father of a child born in lawful wedlock is liable for its support."[32] Many of these provisions were enacted before genetic testing became the principal means of establishing paternity. In 1984, the Legislature passed additional provisions relating to genetic testing "[i]n any proceeding to establish paternity . . . ."[33] Section 43-1414 states that the court, on its own motion, or upon request by a party, the Department of Health and Human Services, or other authorized attorney, shall require "the child, the mother, and the alleged father to submit to genetic testing."[34] The cost of the testing is borne by the requesting party, and if testing is by the court's own motion, the assessment of cost is determined by the court.[35] Additional laws were passed in 1994 requiring hospital officials to present an unwed mother and the child's father, if readily available, with documents and written instructions for a notarized acknowledgment of paternity. Some of these provisions were intended to comply with federal welfare reform which required expedited procedures for establishing support obligations on out-of-wedlock fathers.[36]

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[30] § 43-1402 (emphasis supplied).

[31] See §§ 43-1402, 43-1403, 43-1406, 43-1407, 43-1408.01, and 43-1411.

[32] § 43-1402.

[33] § 43-1414(1). See, also, §§ 43-1414 to 43-1418.

[34] § 43-1414(1) and (2).

[35] § 43-1418.

[36] See 42 U.S.C. § 666 (2006).

Section 43-1409 states that the signatory to a notarized acknowledgment of paternity can rescind the acknowledgment within the earlier of 60 days or the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order. After the rescission period, the acknowledgment becomes a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger.[37]

(b) Virginia Has Language Similar to That of § 43-1412.01

Section 43-1412.01 is one of the most recent additions to the paternity laws in Nebraska. The legislative history pertaining to § 43-1412.01 is not helpful. We observe, however, that the language of § 43-1412.01 appears to have been modeled after a Virginia statute adopted in 2001. Va. Code Ann. § 20-49.10 (2008) states in full:

> An individual may file a petition for relief and, except as provided herein, the court may set aside a final judgment, court order, administrative order, obligation to pay child support or any legal determination of paternity if a scientifically reliable genetic test performed in accordance with this chapter establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child. The petitioner shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending petition for relief from a determination of paternity, but only from the date that notice of the petition was served on the nonfiling party.

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[37] § 43-1409.

> A court shall not grant relief from determination of paternity if the individual named as father (i) acknowledged paternity knowing he was not the father, (ii) adopted the child, or (iii) knew that the child was conceived through artificial insemination.

Few opinions have been issued in Virginia interpreting § 20-49.10, and no reported decision in Virginia has involved the issue of disestablishment of a presumed father's paternity. However, in 2004, the Circuit Court of Virginia, Spotsylvania County, determined in an unreported decision that the paternity of a child born within wedlock and established by a dissolution and support decree could be set aside under § 20-49.10.[38] In *Taylor v. Taylor*,[39] after a de novo hearing, the court reversed the juvenile court's determination that the presumed father of a 12-year-old child should not be granted relief from child support obligations pursuant to § 20-49.10. Although the dissolution decree and award of child support were res judicata, the court found that § 20-49.10 granted relief and allowed further exploration of the issue of paternity when a scientifically reliable genetic test established that the petitioner was excluded as the father. The court observed that this statutory avenue to set aside the final determination of paternity appeared applicable "regardless of lapse of time."[40]

The court also observed that the statute stated a court "'may'" set aside an earlier paternity adjudication.[41] The parties agreed the statute thereby required consideration of the child's best interests before setting aside a paternity determination.

The court ultimately found that the paternity determination should be set aside and the child support obligation terminated. The court considered the totality of the circumstances and the

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[38] *Taylor v. Taylor*, Nos. CH03-926, CH03-929, 2004 WL 1462261 (Va. Cir. June 3, 2004) (unpublished opinion). See, also, Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 Ariz. St. L.J. 809 (2006).

[39] *Taylor v. Taylor, supra* note 38.

[40] *Id.*, 2004 WL 1462261 at *1.

[41] *Id.*

fact that genetic tests conclusively showed that the petitioner was not the father of the child. The court stated that the ex-husband's decision "to allow his anger at [his ex-wife] to disrupt his relationship with this 12-year-old boy" was "unfortunate," but it also noted that the ex-husband had already ceased all contact with the boy.[42] The court concluded that "refusing to grant [the ex-husband] the statutory relief will not of itself mend the broken bond, nor will it magically create a father-son relationship that does not exist."[43]

(c) Reading § 43-1412.01

[7-10] We find that the plain language of § 43-1412.01 similarly indicates a broad application that encompasses paternity determinations of children born during a marriage. While statutes relating to the same subject are in pari materia and should be construed together,[44] we do not view § 43-1412.01 as open to construction. A statute is not to be read as if open to construction as a matter of course.[45] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[46] In the absence of ambiguity, courts must give effect to statutes as they are written.[47]

On its face, § 43-1412.01 broadly applies to "[a]n individual." It plainly encompasses setting aside "a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination." We

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[42] *Id.* at *2.

[43] *Id.*

[44] See *Mahnke v. State, supra* note 28.

[45] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[46] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[47] *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

have said that a dissolution decree which orders child support is a legal determination of paternity.[48]

[11] And it is precisely because many other paternity statutes expressly refer to "a child"—defined as a child born out of wedlock in § 43-1401(1)—that it is significant § 43-1412.01 does not use that term. In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.[49] The Legislature is also presumed to know the language used in its statutes, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.[50] The Legislature, fully cognizant of the other paternity statutes, could have easily limited the applicability of § 43-1412.01 to children born out of wedlock in any number of ways. The statute could have said it was applicable to "[a]n individual" who has been adjudicated as the father of "a child." It could have limited disestablishment to setting aside "a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity" of "a child." It could have limited the statute's scope to an adjudicated father of "a child." It instead stated broadly that it was applicable to "[a]n individual" seeking to set aside "any" legal determination of paternity. We cannot read into the statute a limitation which plainly is not there.

We further observe that if § 43-1412.01 is not applicable to adjudicated fathers of children born during a marriage, it is unclear to whom it would apply. As discussed, § 43-1412.01 does not apply to fathers by notarized acknowledgment. Indeed, in *Cesar C. v. Alicia L.*,[51] we held that a mother in a custody dispute could not introduce evidence negating the paternity of a father who had signed a notarized acknowledgment. And we

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[48] See, e.g., *DeVaux v. DeVaux, supra* note 11; *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992).

[49] *Bass v. Saline County*, 171 Neb. 538, 106 N.W.2d 860 (1960).

[50] See *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[51] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

said that "'"it would be unreasonable to allow a man . . . to undo his voluntary acknowledgment years later . . . when his paternity was based *not on a mere marital presumption* that he was the child's father but on the conscious decision to accept the legal responsibility of being the child's father."'"[52]

Paternity of out-of-wedlock children is usually established through DNA testing. Although there are other procedures for establishing paternity of out-of-wedlock children, it is hard to imagine, as a practical matter, a circumstance after 2008 in which an out-of-wedlock child's paternity would be established by means other than notarized acknowledgment or genetic testing. In fact, procedures for using genetic testing to establish paternity were enacted in 1984, rendering it unlikely that the biological relationship of any child currently the subject of a child support order was not established by those means.

Thus, the only people for whom genetic testing would likely disestablish paternity under § 43-1412.01 are those men whose paternity was decreed in a dissolution order based on the presumption of paternity and without resort to genetic testing. If § 43-1412.01 were read as inapplicable to those presumed fathers, it would be largely meaningless.

We can presume that the Legislature, having already written a limited procedure for setting aside notarized acknowledgment of paternity, sought to provide a means of relief for other kinds of adjudicated fathers. The legislative history, sparse as it is, lends support to our reading of the statute as being applicable to both adjudicated fathers who were married to the child's mother and those who were not. The legislative history refers broadly to "individual[s]" who may seek relief under the statute in the same manner as the statute does itself.[53]

Furthermore, the Legislature is deemed to be aware of existing Supreme Court precedent when it enacts legislation.[54]

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[52] *Id.* at 990, 800 N.W.2d at 257 (emphasis supplied) (quoting *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 890 N.E.2d 944, 322 Ill. Dec. 25 (2008)).

[53] L.B. 1014, § 47, p. 687.

[54] *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

It is reasonable to surmise that the Legislature, in enacting § 43-1412.01, sought to provide a possible remedy to ex-husbands like the one in *McCarson*[55] and like the present appellant—men with no biological ties to the child who have become bound by a final child support determination as a result of ignorance of the law and transient wishful thinking.

We see no reason why the common-law presumption of paternity is inconsistent with our reading of § 43-1412.01 as being broadly applicable to men who were married to the biological mother at conception. Generally, statutes which effect a change in the common law are to be strictly construed.[56] But even if § 43-1412.01 were open to construction, the presumption does not mean that fathers of children born during a marriage have more value than those of children born out of wedlock. In other words, the presumption does not indicate that adjudicated fathers who were married to the biological mother should be bound by final adjudications of paternity, while fathers of children born out of wedlock should not. The presumption of paternity merely creates a default assumption absent sufficient evidence to the contrary. And § 43-1412.01 effects no change in that presumption or the kind of evidence deemed sufficient to overcome the presumption.

We observe that the presumption of paternity has never been placed on all men who had sexual relations with the child's mother around the time of conception, presumably because it would be impractical to do so. But genetic testing can now relieve presumed fathers of their traditional support obligations, while at the same time imposing support obligations on men who engaged in out-of-wedlock relations which resulted in the child's conception. While the presumption of paternity has not changed, its role in protecting children has become less vital with the advent of genetic testing and the shifting focus of the law from marital to biological ties.[57]

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[55] *McCarson v. McCarson, supra* note 21.

[56] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[57] See Jacobs, *supra* note 5.

(d) Other Jurisdictions

Disestablishment of paternity statutes allowing courts to set aside paternity determinations for children born during a marriage are not uncommon. Several states have adopted disestablishment of paternity statutes which explicitly allow men to ask a court to set aside a final adjudication based on the marital presumption of paternity.[58] Some other states' statutes do not explicitly include paternity determinations of children born during a marriage, but are interpreted as including presumed fathers under the broad language of the statutes.[59]

Such statutes have largely been in response to a "disestablishment movement" which began after high profile cases in which men felt defrauded by the child support system which forced them to support children they were not genetically related to.[60] However, they represent a "wide variety of approaches and vary in terms such as time limits, standing, requirements for filing, allotted discretion of the court, and the statutes' effects on child support regarding past and future obligations."[61]

For instance, Oregon sets forth a 1-year statute of limitations for any disestablishment action when the original paternity determination was the result of neglect, and 1 year from the discovery of fraud or other misconduct if the original determination was obtained by fraud, misrepresentation, or

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[58] See, Iowa Code Ann. § 600B.41A (West Cum. Supp. 2011); Mo. Ann. Stat. § 210.826 (West 2010); Mont. Code. Ann. § 40-6-105(3) (2007). See, also, Ga. Code Ann. § 19-7-54 (Supp. 2009); La. Civ. Code Ann. art. 187 to 189 (2007); Ohio Rev. Code Ann. §§ 3119.961 and 3119.962 (LexisNexis 2008); Or. Rev. Stat. § 109.072 (2007); Va. Code Ann. § 20-49.10. Compare, Ala. Code § 26-17-607 (2009); Ariz. Rev. Stat. Ann. § 25-812 (Cum. Supp. 2009); La. Code Ann. § 9:399.1 (Cum. Supp. 2012).

[59] See, *Ex parte State ex rel. A.T.*, 695 So. 2d 624 (Ala. 1997); *Johnston v. Johnston*, 979 So. 2d 337 (Fla. App. 2008); *Ashley v. Mattingly*, 176 Md. App. 38, 932 A.2d 757 (2007).

[60] See Jacobs, *supra* note 5 at 257.

[61] *Id.* at 259. See, also, Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547 (2000).

misconduct.[62] Florida and Iowa, on the other hand, allow a disestablishment action to be brought any time before the child reaches the age of majority.[63] Alabama, Maryland, and Virginia appear to impose no time limits to their disestablishment of paternity actions.[64]

Some state laws impose a best interests analysis on the court before it may grant a presumed father's request to disestablish paternity. Oregon mandates that the court shall vacate a judgment of paternity upon proof that the man is not the biological father—unless the court finds that to do so would be substantially inequitable, giving consideration to the interests of the parties and the child.[65] Iowa law provides that the court, upon proof that the established father is not the biological father, may preserve the paternity determination only if it finds that it is in the best interests of the child to do so. This analysis considers the child's age, the length of time since the establishment of paternity, the previous relationship between the child and the established father, and the possibility that the child could benefit from establishing the child's actual paternity.[66]

Maryland has also read its statutes as allowing the court to set aside a paternity determination of children born during a marriage only after consideration of the child's best interests.[67] In *Ashley v. Mattingly*,[68] the court rejected an argument that the broadly worded disestablishment of paternity statutes were

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[62] Or. Rev. Stat. § 109.072(2)(d). See, also, Mo. Ann. Stat. § 210.854 (West Cum. Supp. 2012) (2-year statute of limitations).

[63] Fla. Stat. Ann. § 742.18(2)(g) (West 2010); Iowa Code Ann. § 600B.41A(3)(a).

[64] See, Ala. Code § 26-17-607; Md. Code Ann., Fam. Law § 5-1038 (LexisNexis 2006); Va. Code Ann. § 20-49.10; *Taylor v. Taylor, supra* note 38. See, also, Jacobs, *supra* note 38.

[65] Or. Rev. Stat. § 109.072(7).

[66] Iowa Code Ann. § 600B.41A(6).

[67] See *Ashley v. Mattingly, supra* note 59. See, also, *Kamp v. Department of Human Services*, 410 Md. 645, 980 A.2d 448 (2009). But see *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007).

[68] *Ashley v. Mattingly, supra* note 59.

applicable only to out-of-wedlock children. Maryland law states that a declaration of paternity in a final order can be set aside if scientific testing establishes that the named father is not the biological father.[69] A subsection of that statute states: "Except for a declaration of paternity, the court may modify or set aside any order or part of an order under this subtitle as the court considers just and proper in light of the circumstances and in the best interests of the child."[70] The court in *Ashley* noted that these provisions are found in Maryland's paternity act, which is largely aimed at addressing putative fathers of children born outside of marriage. Nevertheless, implicit paternity determinations of presumed fathers in dissolution decrees could be set aside under the plain language of the act. But the act required consideration of the child's best interests before setting aside a paternity determination for a child born in wedlock. It did not impose such a best interests analysis for children born out of wedlock.[71]

Other state statutes do not set forth a best interests analysis in the context of disestablishment of paternity. At least one court has held that unless a statute provides to the contrary, "the 'best interests of the child' standard generally has no place in a proceeding to reconsider a paternity declaration."[72]

(e) § 43-1412.01 Imposes Best Interests Analysis

[12] We do not consider Jeremy's petition, filed after the dissolution decree, as having been filed out of time. And we conclude that, like the disestablishment of paternity statutes in Virginia and other states, § 43-1412.01 gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.

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[69] Md. Code Ann., Fam. Law § 5-1038.

[70] § 5-1038(b).

[71] See, *Ashley v. Mattingly, supra* note 59; *Kamp v. Department of Human Services, supra* note 67.

[72] *Langston v. Riffe*, 359 Md. 396, 425, 754 A.2d 389, 404 (2000).

Section 43-1412.01 provides that the court

> *may* set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination.

(Emphasis supplied.) "Unless such construction would be inconsistent with the manifest intent of the Legislature . . . [w]hen the word may appears, permissive or discretionary action is presumed."[73] Section 43-1412.01 also states that the "court shall appoint a guardian ad litem to represent *the interest of the child*." (Emphasis supplied.)

We read the statute as thus granting discretion to the trial court in determining whether to grant disestablishment. The court's discretion should consider both the adjudicated father's and the child's interests. While the statute fails to precisely detail what circumstances should be considered in weighing the interests of the parties, we believe it would be appropriate for the court to consider the child's age, the length of time since the establishment of paternity, the previous relationship between the child and the established father, and the possibility that the child could benefit from establishing the child's actual paternity. Because the district court believed it was prohibited as a matter of law from granting relief under § 43-1412.01, it did not consider the respective interests of the parties in the case. The matter will need to be remanded for further proceedings.

(f) Public Policy Is Province of Legislature

[13] It is apparent that a child can be harmed when an adjudicated father seeks to set aside a previously final paternity determination. But the harm is no greater for a child born during a marriage than for a child born out of wedlock. With changing societal values regarding illegitimacy and the advent of genetic testing, the marital presumption has become less important as

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[73] Neb. Rev. Stat. § 49-802 (Reissue 2010).

a tool for ensuring a child's support by both parents,[74] and the legal environment has become more concerned with biological ties to fatherhood.[75] Ultimately, the Legislature has determined that an adjudicated father—of a child born either in or out of wedlock—may ask that a court set aside a support order if genetic testing proves he is not the child's biological father. The Legislature has determined that the trial court has discretion in determining whether to grant such relief, considering the interests of both the adjudicated father and the child. It is properly the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[76]

V. CONCLUSION

The district court erred in concluding that Jeremy could not rely on § 43-1412.01 as a matter of law because he was married to the child's mother when the child was conceived. However, no evidence was presented and considered with regard to the respective interests of Jeremy and Brady. We reverse the judgment and remand the cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

GERRARD, J., not participating in the decision.

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[74] See Jacobs, *supra* note 5.

[75] See, *id.*; Singer, *supra* note 4.

[76] *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).