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Civil Procedure - Collateral Estoppel as a Bar to Post-Divorce Litigation of Paternity - Tedford v. Gregory

Meghan R. Dimond

CIVIL PROCEDURE—Collateral Estoppel as a Bar to Post-Divorce Litigation of Paternity—*Tedford v. Gregory*

I. INTRODUCTION

In *Tedford v. Gregory*,[1] the New Mexico Court of Appeals held that where a husband admits paternity in a divorce proceeding, he is barred by collateral estoppel not only from later questioning paternity himself, but also from seeking reimbursement of child support when his paternity is disproved in a proceeding to which he is not an original party. The Court's decision illustrates the problems particular to collateral estoppel when it is based on an earlier divorce proceeding. In divorce actions, unlike other legal proceedings, the parties more often elect a speedy resolution of the dispute instead of a longer, more complete resolution.[2] Thus, the collateral estoppel effect of a divorce proceeding requires a careful analysis both of the elements of the doctrine and equitable considerations peculiar to each case.

II. STATEMENT OF THE CASE

At the age of twenty, Jeanne brought action pursuant to the Uniform Parentage Act (UPA)[3] alleging that Donald Wayne Gregory was her biological father and seeking retroactive child support.[4] Gregory did not admit paternity, but filed a third-party claim against Tedford,[5] who was married to Jeanne's mother, Nina, when Jeanne was born and who had financially supported Jeanne since the Tedfords' divorce when Jeanne was fourteen months old, believing her to be his child.[6] Tedford then filed a counterclaim against Gregory and a cross-claim against Jeanne seeking reimbursement for child support as well as additional financial support he expended on Jeanne's behalf in the event that Gregory was determined to be Jeanne's biological father.[7]

Court-ordered blood and genetic tests indicated a 99.9994% probability that Jeanne was the biological daughter of Gregory and not Tedford.[8] The trial court declared Gregory to be Jeanne's biological father and awarded Jeanne $50,000 in past child support.[9] The court also awarded Tedford $40,900.07 against Gregory as partial reimbursement[10] for the $82,873.65 that the parties stipulated Tedford had spent in support of Jeanne.[11] All three parties appealed the court's judgment.

Before the Court of Appeals, Gregory argued that: (1) the court erred in determining that he was the biological father of Jeanne, (2) the award of $50,000 in child support was not supported by substantial evidence, and (3) Tedford's claim

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1. 125 N.M. 206, 959 P.2d 540 (Ct. App. 1998).
2. *See, e.g.*, John H. Grieve, *Preclusion, Children and Paternity: Why Are the Children Caught in the Middle?*, 30 J. FAM. L. 629, 633 (noting that parents may be more concerned with expeditious dissolution of their marriage than with conclusively establishing paternity).
3. *See* N.M. STAT. ANN. §§ 40-11-1 to -23 (1986) (amended 1997).
4. *See Tedford*, 125 N.M. at 209, 959 P.2d at 541.
5. *See id.*
6. *See id.* at 210, 959 P.2d at 544.
7. *See id.* at 209, 959 P.2d at 543.
8. *See id.* at 210, 959 P.2d at 544.
9. *See id.*
10. *See id.*
11. *See id.*

for reimbursement against Gregory should have been barred under principles of collateral estoppel.[12] Jeanne also argued that the lower court erred in three ways: (1) in calculating its award of retroactive child support, (2) in refusing to award reasonable fees and costs against Gregory, and (3) in refusing to impose sanctions against Gregory for his bad-faith denial of paternity in the face of conclusive genetic testing.[13] Tedford argued that he should have been awarded full reimbursement for his expenditures on Jeanne's behalf and that he was wrongly denied attorneys fees and costs against Gregory.[14]

The Court of Appeals affirmed the trial court's decision determining that Jeanne's biological father was Gregory and awarding her retroactive child support.[15] However, it found that the trial court's award of $50,000 in retroactive child support was not in accord with the statutory guidelines for calculating child support and that the deviation from the guidelines was unsubstantiated. Therefore, it reversed the trial court's award and remanded in order to determine the proper method for calculating the award according either to the child support guidelines in the UPA, or to specifically enumerated equitable considerations.[16] The Court also reversed the trial court's award of $40,900.07 to Tedford as partial reimbursement for the payment of child support, finding that since Tedford had admitted being Jeanne's biological father in his petition for divorce from Nina, he was collaterally estopped from contesting Jeanne's paternity, regardless of the results of the genetic testing.[17]

III. BACKGROUND

Before *Tedford*, the New Mexico Court of Appeals in *Callison v. Naylor*[18] had applied collateral estoppel based on an earlier divorce proceeding to prevent a husband's action to contest the paternity of a child born to his wife during their marriage. The husband had admitted paternity by filing a petition for divorce that listed the child as "born of the marriage."[19] The court held that the husband's admission, which was not disputed by the child's mother at the time of the divorce, sufficiently established that the child's paternity was "actually litigated and

12. *See id.* at 209, 959 P.2d at 543.
13. *See id.*
14. *See id.*
15. *See id.* at 211, 959 P.2d at 545 (finding that Jeanne's UPA action to establish paternity and recover retroactive child support is maintainable despite her age because she filed her lawsuit within the applicable twenty-one year statute of limitations); *id.* at 212, 959 P.2d at 546 (concluding that the best-interest-of-the-child standard is inapplicable to bar a paternity determination since Jeanne is not a minor); *id.* at 213, 959 P.2d at 547 (holding that Jeanne was not a party to the Tedford's divorce proceeding nor was she in privity with her mother; therefore, her claims against Gregory are not barred by collateral estoppel); *id.* (refusing to bar Jeanne's claim on grounds of equity in spite of Gregory's allegations (1) that she failed to disclose to Tedford information she received from her mother regarding her paternity, (2) that she failed to promptly inform Tedford of her lawsuit against Gregory, and (3) that she continued to seek and accept support from Tedford while her suit against Gregory was pending, finding that it was not inequitable for Jeanne to wait until she was emancipated before filing her action against Gregory); *id.* at 214, 959 P.2d at 548 (rejecting Gregory's argument that Jeanne would be unjustly enriched with a second child support award because Gregory's duty to support his daughter should be unaffected by any money she may have received from other sources).
16. *See id.* at 216, 959 P.2d at 550.
17. *See id.* at 217, 959 P.2d at 551.
18. 108 N.M. 674, 777 P.2d 913 (Ct. App. 1989).
19. *See id.* at 676, 777 P.2d at 915.

determined by a valid and final judgment," and thus ruled that collateral estoppel barred the husband from later challenging paternity.[20]

In reaching its decision, the Court noted the three traditional elements of collateral estoppel: (1) the subject matter or cause of action in the two suits was different, (2) the ultimate facts or issues involved in both proceedings were actually litigated in the previous suit, and (3) those ultimate facts or issues were necessarily determined.[21] The Court in *Callison* also recognized that New Mexico had modified the traditional fourth element of collateral estoppel, rejecting the "same parties or privy" element and instead allowing collateral estoppel so long as the party against whom collateral estoppel is invoked had a full and fair opportunity to litigate the issue in the first lawsuit.[22]

Applying these elements of collateral estoppel, the Court in *Callison* held that the daughter against whom the alleged father brought his UPA claim for non-paternity was able to invoke collateral estoppel to bar her alleged father's claim even though she was not a party to the divorce nor in privity with her mother in that proceeding.[23] Collateral estoppel was held applicable "[a]lthough the father did not technically 'lose' on the issue of parentage in the divorce proceeding, since he voluntarily agreed to the paternity."[24] Thus, the *Callison* court suggested that the "actual litigation" element of collateral estoppel was met by the alleged father's admission of paternity in the divorce proceeding. The court also concluded that the alleged father had a full and fair opportunity to litigate the issue of paternity in the divorce proceeding.[25] In the Court's view, collateral estoppel was proper because at the time of his divorce, the alleged father knew he was apart from his wife when the child was conceived.[26] Accordingly, his claim that his ex-wife told him only after the divorce that he was not the child's biological father was treated as irrelevant.[27]

In response to the *Callison* court's willingness to apply collateral estoppel, the alleged father relied on public policy, arguing that the court's decision to bar his claim would also prevent the child from litigating her paternity in the future.[28] Finding this argument to be nothing more than an attempt to force the child to litigate an issue that the alleged father himself was precluded from relitigating, the court rejected it.[29] Further, the court looked to a comment contained in the UPA, which provides that it is "unreasonable to bar the child's right of action by reason

20. *See id.* at 676, 777 P.2d at 915; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) (stating the general rule of issue preclusion that when an issue is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties).

21. *See Callison*, 108 N.M. at 676, 777 P.2d at 915.

22. *See id.* (citing Silva v. State, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987)).

23. *See id.*

24. *Id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

of another person's failure to bring a paternity action."[30] The *Callison* Court went on to hold:

> [I]n the event that in the future [the child] should wish to bring an action against a third party under the Uniform Parentage Act, we doubt that a judgment founded on collateral estoppel would preclude her from doing so. Such an action would be brought to determine whether a parent-child relationship exists between [the child] and a third party, an issue that has not been litigated in either the divorce proceeding or in this case. To hold otherwise would be tantamount to permitting a party bound by a prior judgment to extend that judgment to bind additional parties, simply by the filing of a complaint known to be without merit, in anticipation that the complaint would be dismissed on the basis of collateral estoppel.[31]

Consequently, the father's UPA petition was dismissed without consequences for any future paternity action that might be brought by the child.

IV. RATIONALE

The Court's treatment of Tedford's claim for reimbursement of child support relies on *Callison* for the proposition that where a divorce decree establishes that a child was born of the marriage, the parties and those in privity with them may not later challenge the child's paternity.[32] Also in support of this proposition, the Court cites two cases from other jurisdictions,[33] *Clay v. Clay*[34] and *In re Paternity of JRW*.[35] Thus, the Court ruled that Tedford was collaterally estopped from denying paternity and seeking reimbursement of support from another man even when that man is proven to be the biological father.

Due to its reliance on these opinions, the *Tedford* Court largely omits analysis of the elements of collateral estoppel. Its only consideration is to note that New Mexico courts have adopted the modern approach to collateral estoppel and have therefore discarded the "same parties" requirement.[36] Thus, Jeanne and Gregory, though not parties to the Tedfords' divorce, were both able to utilize collateral estoppel against Tedford based on the earlier divorce decree since Tedford was a party to that original proceeding.

The Court in *Tedford* neglected to notice any difference between an action seeking to relitigate paternity and one simply for reimbursement of child support in light of a paternity determination initiated by another party. Without addressing this distinction, the Court jumped from the rule that Tedford would be barred from relitigating paternity to hold that he would also be barred from seeking

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30. *See id.* at 676-77, 777 P.2d at 915-16 (citing UNIFORM PARENTAGE ACT § 7, 9 U.L.A. 306 (1987)).

31. *See id.* at 677, 777 P.2d at 916.

32. *See* Tedford v. Gregory, 125 N.M. 206, 216, 959 P.2d 540, 546 (Ct. App. 1998).

33. *See id.* at 217, 959 P.2d at 551.

34. 397 N.W.2d 571, 575 (Minn. Ct. App. 1986) (cited for its holding that where the husband acknowledged paternity of a child in divorce proceedings, the doctrine of res judicata precludes post-dissolution proceedings).

35. 814 P.2d 1256, 1264 (Wyo. 1991) (cited for its holding that justification of the doctrines of res judicata and collateral estoppel include prevention of inconsistent decisions, preclude piecemeal litigation, and conservation of judicial resources).

36. *See Tedford*, 125 N.M. at 217, 959 P.2d at 551.

reimbursement following Jeanne's own relitigation of the paternity issue. The Court held that Tedford is barred by collateral estoppel both from contesting the issue of Jeanne's paternity and from asserting a claim for reimbursement against Gregory or Jeanne.[37]

Although the Court noted in conclusion that equitable considerations may warrant a claim for reimbursement of child support in certain cases, such considerations were determined to be inapplicable in *Tedford* since the doctrine of collateral estoppel was found to apply.[38] As a result, collateral estoppel prevented Tedford from reimbursement for his past child support payments from either Jeanne or Gregory regardless of equitable considerations and the fact that he indisputably was not the parent of Jeanne.

IV. ANALYSIS

The Court's decision to bar Tedford's reimbursement claim represents an unwarranted conclusion. The Court must have believed its decision was easy in light of *Callison* and the cases it cited from other jurisdictions. However, analysis of the elements of collateral estoppel shows that the Court erred in concluding that collateral estoppel barred Tedford's reimbursement claims. Moreover, Tedford's case is not only procedurally and factually distinguishable from the cases the court relied on, but it also contains equitable factors not present in the other cases that compel a different result.

A. *Actual Litigation and a Full and Fair Opportunity to Litigate Paternity in Divorce Proceedings*

Perhaps the *Tedford* Court's most egregious error was its blanket reliance on *Callison* as a precedent and its resultant failure to analyze whether the elements of collateral estoppel were met with respect to Tedford's claims. In particular, the Court failed to confront the question of whether Jeanne's paternity was ever actually litigated during the course of the Tedford's divorce, and if actual litigation was present, whether Tedford had a full and fair opportunity to litigate the issue at the time of his divorce.

1. Actual Litigation

The Second Restatement of Judgments states that "[a] judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."[39] Among the reasons the Restatement accepts for a party's failure to actually litigate important issues in prior actions are a lack of motivation due to a small amount in controversy and an inconvenient forum.[40] Regardless of the reason that the parties failed to actually litigate an issue, a comment to the Restatement explains that the interests that inspired collateral estoppel—conserving judicial resources, maintaining consistency, and avoiding the

37. *See id.*
38. *See id.* (citing Anonymous Wife v. Anonymous Husband, 739 P.2d 794, 798 (Ariz. 1987)).
39. RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1980).
40. *See id.*

oppression or harassment of the adverse party—are less compelling when the issue to be precluded has not been actually litigated.[41] Most importantly, however, the drafters' commentary specifically indicates that an issue is not actually litigated "if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial."[42] Thus, the Tedford divorce proceeding could not have provided a basis for precluding Tedford's later action for reimbursement of child support since his admission of paternity was admitted by his ex-wife prior to the introduction of any evidence on the subject.

Despite the Restatement and despite its own admission that the alleged father "did not technically 'lose' on the issue of parentage in the divorce proceeding,"[43] the *Callison* Court nevertheless applied collateral estoppel to bar the alleged father's action. The Court specifically held it was the alleged father's uncontroverted admission that the child was "born of the marriage" in his original petition for divorce that was sufficient to establish actual litigation.[44]

In the absence of actual litigation, such an application of collateral estoppel was not legitimate. Nevertheless, the *Tedford* Court adopted the *Callison* Court's understanding of collateral estoppel, applying the doctrine to bar Tedford's claim on the basis of his divorce-petition admission, which Nina did not dispute, that Jeanne was born of their marriage.

2. Full and Fair Opportunity to Litigate

The court in *Callison* also held that the alleged father had a full and fair opportunity to litigate the paternity question during his divorce.[45] In that case the alleged father argued he lacked a full and fair opportunity to litigate paternity during the divorce for two reasons: (1) his ex-wife told him after their divorce that he was not the biological father of her child, and (2) he did not have access to his ex-wife at the time of the child's conception.[46] The *Callison* Court determined that since the alleged father must have been aware of his lack of access to the mother at the time of conception, his failure to litigate paternity in the divorce was not due to a lack of a full and fair opportunity to do so.[47]

Similarly, the other cases cited in *Tedford* are also distinguishable from *Tedford* in that the alleged fathers in those cases had reasons to challenge paternity at the time of their divorces, whereas Tedford did not. In *Clay*, the court acknowledged that there was testimony to indicate the alleged father knew before his divorce that the child in that case was not his biological son.[48] Likewise, evidence presented in

41. *See id.*
42. *See id.*
43. Callison v. Naylor, 108 N.M. 674, 676, 777 P.2d 913, 915 (Ct. App. 1989).
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See* Clay v. Clay, 397 N.W.2d 571, 573 (Minn. Ct. App. 1986) (referring to a letter from a custody investigator to the judge presiding over the divorce in which the investigator stated that Clay was alleging the son was not his, and noting that Clay (a) testified in a post-dissolution hearing that he had reason to believe the child was not biologically related to him at the time he signed the stipulation regarding paternity and (b) admitted that he did not challenge paternity during the divorce because he couldn't afford the legal fees).

JRW indicated that the mother and alleged father were separated more than nine months prior to the birth of the child whose paternity he sought to challenge.[49] Further, the alleged father in *JRW* stated in his answer and counterclaim to the mother's complaint for divorce that "[the mother] is on her proof that [the alleged father] is the father of [the daughter] since the possibility is remote."[50] Despite this allegation, the alleged father ultimately agreed to a property settlement agreement obligating him to pay monthly child support on behalf of the daughter.[51]

By contrast to *Callison*, *Clay*, and *JRW*, the record in *Tedford* is void of any information that would lead a reasonable person to believe that Tedford knew or should have known that Jeanne may not have been his biological daughter. There is no evidence that the Tedfords were apart when Jeanne was conceived.[52] The only indication from the evidence is that Tedford honestly believed Jeanne to be his biological child.[53] Further, the evidence indicates that both Tedford's ex-wife and Jeanne purposely sought to keep information about Gregory and Jeanne's paternity from Tedford.[54] Had Nina disputed Tedford's divorce-petition admission of paternity, Tedford would have been afforded a full and fair opportunity to litigate Jeanne's paternity. Because Nina denied Tedford this opportunity and because Tedford had no other reason to suspect he was not Jeanne's father at the time of his divorce, *Tedford* is factually distinguishable from *Callison*, *Clay*, and *JRW* as to the element of a full and fair opportunity to litigate. Thus, Tedford's failure to contest his paternity of Jeanne at the time of his divorce is more likely a result of a lack of a full and fair opportunity to do so than in *Callison*, *Clay*, or *JRW*.

The *Tedford* Court should not merely have relied on the flawed *Callison* opinion. Tedford was deprived of a full and fair opportunity to litigate the issue of paternity in the course of his divorce proceedings. Moreover, the paternity issue was not actually litigated when Tedford unsuspectingly filed his petition alleging that Jeanne was a child born of the marriage.

B. Relitigation vs. Reimbursement

The *Tedford* Court also failed to address significant procedural distinctions as compared with *Callison*—specifically the difference between an alleged father who

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49. *See In Re* Paternity of JRW, 814 P.2d 1256, 1258 (Wyo. 1991).

50. *See id.*

51. *See id.*

52. *See Tedford*, 125 N.M. at 210, 959 P.2d at 544 (noting that Tedford did not file for divorce from his ex-wife until fourteen months after Jeanne's birth and stating that he listed Jeanne as one of four children born of their marriage in his petition for divorce); *id.* at 213, 959 P.2d at 547 (reciting Gregory's equitable arguments against Jeanne's recovery based on contentions that she failed to disclose information from her mother regarding her paternity, that she failed to promptly inform Tedford of her paternity suit against Gregory, and that she continued to seek and accept financial support from Tedford during the pendency of this lawsuit).

53. *See id.* at 213, 959 P.2d at 547 (noting the parties' stipulation that Tedford contributed a total of approximately $82,873.65 to Jeanne's care and support, including over $37,000 for college expenses paid after Jeanne reached the age of majority).

54. *See id.* at 213, 959 P.2d at 547 (again, reciting Gregory's equitable arguments against Jeanne's recovery of child support against him); *id.* (finding that Jeanne discovered that Tedford was not her biological father when she was sixteen years old, four years before filing this action); *id.* at 210, 959 P.2d at 544 (observing that Tedford's ex-wife had filed a paternity suit against Gregory in order to determine Jeanne's paternity and to request an award of retroactive child support in December 1994, two months prior to the instant action).

files his own UPA action to determine paternity and one who simply responds to the results of another party's UPA action. This distinction bears legal significance in that Tedford need not formally dispute paternity in order to recover reimbursement for past child support since Jeanne has already proven that Tedford is not her parent. Tedford initially initiated no inquiry into Jeanne's paternity. To the contrary, Tedford believed himself to be Jeanne's biological father up to and possibly even during the initial stages of Jeanne's UPA claim.[55] His belief was so strong that Tedford did not just pay the required amount of child support for Jeanne,[56] but he contributed more to her support, even continuing his financial support after she reached eighteen in order to pay for Jeanne's college education and related expenses.[57] Further, Tedford's claim for reimbursement was contingent upon Jeanne's ability to establish her paternity claim against Gregory.[58] Had Jeanne abandoned her claims against Gregory or had the results of the paternity test been different, Tedford would not have pursued any claim for reimbursement against Jeanne related to her paternity.

Tedford's presentation of his claim as a contingent one was never confronted by the Court of Appeals. The Court's error in this respect produces grave consequences for divorcing men who may realize no reason to challenge the paternity of children born during their marriage at the time of their divorce but who later find out, as the result of the child's own paternity action, that they are not biological fathers at all. Men in this position are left without financial reimbursement through no fault of their own as a result of their reasonable reliance upon their former spouse's representations regarding the child's paternity. The situation is only worsened when the divorced father's discovery is made after years of providing parental support. Thus, the procedural distinction as between *Tedford* and the cases cited in support of the decision, particularly *Callison*, should have persuaded the Court to look upon *Tedford* independently from *Callison*.

C. Equitable Considerations

In denying Tedford's claims, the Court admitted that equitable considerations "may warrant a claim for reimbursement from an individual who has furnished child support . . . ."[59] For this proposition, the Court cited an Arizona case, *Anonymous Wife v. Anonymous Husband*.[60]

In that case, a mother and her husband raised a child together for ten years, all parties having full knowledge that the child was conceived from the mother's

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55. *See id.* at 210, 959 P.2d at 544 (stating that Tedford believed Jeanne to be his daughter); *id.* at 213, 959 P.2d at 547 (noting Gregory's equitable defenses to Jeanne's paternity claim, which alleged that Jeanne failed to promptly inform Tedford of her lawsuit against Gregory and that she continued to seek and accept support from Tedford during the pendency of her lawsuit against Gregory).

56. *See id.* (acknowledging the Tedfords' property settlement agreement, according to which Tedford was to pay $100 per month as child support for Jeanne).

57. *See id.* at 213, 959 P.2d at 547 (noting the parties' stipulation that Tedford contributed a total of approximately $82,873.65 in support of Jeanne, including $45,127.31 in support between the time of his divorce and Jeanne's eighteenth birthday, and $37,746.34 in support after she reached the age of majority, primarily for college expenses).

58. *See id.* at 209, 959 P.2d at 543.

59. *Id.* at 217, 959 P.2d at 551.

60. 739 P.2d 794, 798 (Ariz. 1987).

extramarital affair and that the child was not biologically related to the husband.[61] Nonetheless, upon the mother's divorce, the court in *Anonymous* awarded the mother's ex-husband partial reimbursement for his share of community funds spent in support of the child against the child's biological father.[62] The *Anonymous* court acknowledged that the husband's request for reimbursement was made relatively late (when the child was ten years old) and that the biological father's financial affairs would be disrupted as a consequence of any reimbursement award.[63] The court was

> also mindful, however, that the financial affairs of the husband were disrupted for ten years—a period of time during which the natural father not only enjoyed the full use of his unrestricted personal funds, but also sat idly by and watched someone else fulfill his legal and moral obligations to a child he knew was his own.[64]

The court further stated that "[i]f a natural parent abdicates his or her parental duties . . . the law implies a promise by the irresponsible natural parent to reimburse the individual responsible for providing necessaries to the child."[65] Based on these policies, the court in *Anonymous* determined that "the scales of equity greatly favor the husband and preclude us from holding that the defense of laches is available to the father."[66]

While it cites *Anonymous* for the proposition that equitable considerations may apply, the *Tedford* Court cryptically determines either that such considerations are never applicable where collateral estoppel is, or that such considerations are inapplicable to the specific facts in *Tedford*.[67] The latter is not justifiable under the logic of *Anonymous*. For if the "scales of equity" would favor reimbursement for a husband like the one in *Anonymous*, who knew he was not biologically related to a child and paid child support anyway, they should undoubtedly favor a man in Tedford's position, who unknowingly paid child support on behalf of a child to whom he was not biologically related. Further tipping the scales of equity in favor of Tedford is the fact that Nina intentionally deceived him regarding his paternity of Jeanne by not contesting his divorce-petition admission.

These equitable factors also set *Tedford* apart from *Callison* and other cases cited by the *Tedford* court, in which collateral estoppel was applied to bar the relitigation of paternity without consideration of equitable factors. While the alleged father in *Callison* brought his paternity action in response to a court order to pay arrearages of over $11,000 in child support,[68] there is no evidence that Tedford ever sought to escape his financial obligations toward Jeanne. As in *Callison*, the alleged fathers

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61. *See id.* at 796-797.

62. *See id.* at 799 (ordering the natural father to reimburse the ex-husband for his share of the community's expenditures in support of the child for three years prior to the filing of the husband's cross-claim for reimbursement).

63. *See id.* at 798.

64. *Id.* at 798-99.

65. *Id.* at 797.

66. *Id.* at 799.

67. *See Tedford*, 125 N.M. at 217, 959 P.2d at 551.

68. *See* Callison v. Naylor, 108 N.M. 674, 675, 777 P.2d 913, 914 (Ct. App. 1989).

in both *Clay v. Clay*[69] and *In re Paternity of JRW*[70] also raised the issue of paternity in response to actions brought by mothers for child support.[71] *Tedford*, on the other hand, did not arise as a result of Tedford's desire to avoid paying child support, but from his legitimate expectation that he would be reimbursed for child support he paid as a result of fraud perpetrated by his ex-wife and presumed daughter. Consequently, there is less reason, equitably speaking, to bar Tedford from recovering reimbursement than there would be to prevent the alleged fathers in *Clay* and *JRW* from challenging paternity. The persuasive value of the public policy against "deadbeat dads" bears no weight against Tedford's claim for reimbursement, since Tedford was not the type of "deadbeat dad" who forfeits equitable protection.

In sum, the *Tedford* Court's failures with respect to Tedford's claims lie in three areas—the failure to examine the elements of collateral estoppel in light of the particular facts presented, the refusal to distinguish between a paternity dispute and a request for reimbursement of child support, and the denial of equity.

VI. IMPLICATIONS

In future cases, *Tedford* is likely only to lengthen the painful process of divorce. After the Court's decision in *Tedford*, divorce attorneys would be remiss if they did not encourage their male clients to deny paternity as a matter of course in a divorce proceeding. *Tedford* illustrates that where ex-husbands do not do so, collateral estoppel will prevent them from litigating the paternity of children born during their marriage at any time after the divorce action. Collateral estoppel will bar such a post-divorce action even for ex-husbands like Tedford, whose ex-wives deceptively allowed them to believe they fathered children during their marriages. The consequences of precluding paternity litigation are not likely to affect husbands who litigate paternity during their divorces. However, the implications of preclusion based on a divorce judgment may have unacceptable consequences for ex-husbands who are prevented from litigating paternity under the best interest of the child standard, and the consequences for ex-husbands who unknowingly admit paternity due to their spouse's fraudulent misrepresentations are unduly burdensome.

If increased litigation of paternity in divorce proceedings were *Tedford*'s only ramification, the decision would be bearable for soon-to-be ex-husbands. Although a challenge to the paternity of children born during their marriage is likely to provoke hostility from ex-wives and children, thereby lengthening and magnifying the already difficult process of divorce, it is clear from *Tedford* that such a tactic is necessary in order to avoid the perhaps more painful situation that ultimately confronted Tedford. Having initially litigated paternity in the divorce, these ex-husbands should expect to be barred from any relitigation of paternity in a later

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69. 397 N.W.2d 571 (Minn. Ct. App. 1986).

70. 814 P.2d 1256 (Wyo. 1991).

71. *See Clay*, 397 N.W.2d at 574 (noting that the alleged father failed to pay child support and that the County had brought an action for unpaid child support in response, resulting in a court order against the alleged father for $1,725 in back support); *JRW*, 814 P.2d at 1258, n.1 (stating that "[t]he record, in tragic form, shows the initiative cause for contested parentage was . . . collection activity to secure support" and noting the lower court's finding that "the underlying basis for the Petition is a desire to avoid payment of Court-ordered support").

proceeding, as paternity was clearly an issue actually litigated and necessarily decided in the divorce proceeding, in which the ex-husbands had a full and fair opportunity to participate.

But given that courts regularly bar husbands from litigating the paternity of children born during their marriage via the best-interest-of-the-child standard,[72] collateral estoppel of the paternity issue on the basis of a divorce proceeding may be unfair to ex-husbands. "According to the best interest of the child approach, the trial court does not automatically assume that a paternity determination is in the best interest of the child."[73] While the Court refused to apply this standard in *Tedford*, it noted the standard's applicability "[w]here a child is young and has already established a close emotional bond with the presumed father, and where the trial court determines that it would be detrimental to the child's welfare to compromise the continuity of that established relationship."[74] In cases where the best-interest-of-the-child standard does apply, it is unclear whether the standard would apply to bar future litigation of paternity. Presumably, any husband who was denied the opportunity to litigate paternity during his divorce on this basis would not admit paternity in the divorce pleadings as Tedford did. But even if an ex-husband were to inadvertently admit paternity, collateral estoppel should not apply since the ex-husband in that case would undoubtedly have lacked a full and fair opportunity to previously litigate paternity.

Unbearable unfairness will result, however, when an ex-husband does not seek to litigate paternity in his divorce action, choosing instead to rely upon his spouse's representation that children born during the marriage are biologically related to him. Ex-husbands in these circumstances appear to be left with no opportunity for reimbursement of child support according to the Court's reasoning in *Tedford*. However, ex-husbands may be able to reopen the divorce court's original determination of paternity and reverse that judgment's preclusive effect.

Rule 60(B) of the New Mexico Rules of Civil Procedure lays out six grounds upon which a party may be granted relief from a previous judgment, including a catch-all provision which allows a court to vacate an earlier judgment "for any other reason justifying relief."[75] While the doctrine of collateral estoppel seeks to affect the public policy concerns of judicial efficiency and finality of judgments,[76] Rule 60(B) reflects the judiciary's countervailing policy concern for correction of error.[77] Over time, the balance between policy concerns for efficiency and finality on the one hand, and correction of error on the other "tips in favor of finality." Rule 60 provides the last great hope for litigants who hope to escape the effects of an earlier judgment.[78]

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72. *See, e.g., Tedford*, 125 N.M. at 211-212, 959 P.2d at 545-46 (addressing Gregory's argument that the Court should not determine whether he was the biological father of Jeanne since such decision was contrary to the best interests of Jeanne).

73. *Id.* at 211, 959 P.2d at 545.

74. *Id.*

75. *See* N.M. R. CIV. P. 1-060(B).

76. *See* 12 M.E. OCCHIALINO, WALDEN'S CIVIL PROCEDURE IN NEW MEXICO 1 (2d ed. 1996).

77. *See* 13 *id.* at 1.

78. *See id.* at 2.

Under the rule, if a motion to reopen a judgment is made within one year after the divorce, grounds for reopening include: 1) mistake, inadvertence, surprise, or excusable neglect, 2) newly discovered evidence which by due diligence could not have been discovered earlier, and 3) fraud, misrepresentation, or other misconduct of an adverse party.[79] Even after a judgment has stood unchallenged for more than one year, parties may still seek to reopen it provided such a motion is made within a reasonable time and: 1) the earlier judgment is void, 2) the judgment has been satisfied, released or discharged, or 3) for any other reason justifying relief.[80]

In a case like *Tedford*, where the evidence indicates that the ex-husband's former wife knew her daughter was not biologically related to the ex-husband and did not dispute his admission of paternity, the reopening of the court's finding of paternity seems merited on grounds of the spouse's fraud or on grounds of newly discovered evidence. Fraud and misrepresentation under Rule 60(B) require the same elements as in the ordinary tort sense—misrepresentation of a fact, known to be untrue by the maker, made with intention to deceive and to induce the other party to act and rely upon it to his detriment.[81]

A successful Rule 60(B)(2) motion to reopen judgment on the grounds of newly discovered evidence requires six elements: (1) the new evidence must be such as will probably change the result if a new trial is granted, (2) it must have been discovered since the trial, (3) it must be such as could not have been discovered before the trial by the exercise of due diligence, (4) it must be material to the issue, (5) it must not be merely cumulative to the former evidence, and (6) it must not be merely impeaching or contradicting to the former evidence.[82]

Besides proving fraud and meeting the Rule 60(B)(2) standard that newly discovered evidence must not have been discoverable by the exercise of due diligence prior to trial, movants must also make these motions within one year from the original judgment.[83] In *Tedford*'s case, neither motion would be of help since he discovered he was not Jeanne's parent over eighteen years after his divorce. Still, Rule 60(B)(6) provides relief after one year and may apply to Tedford's case, provided he is able to demonstrate exceptional circumstances other than those advanced under any of the other subsections of Rule 60(B).[84]

Tedford may also be able to reopen his divorce judgment on a basis independent from Rule 60 upon demonstration of fraud upon the court.[85] Parties seeking to reopen a judgment on this basis must allege and provide evidence of: (1) a previous judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the

79. *See* N.M. R. Civ. P. 1-060(B)(1), (2), & (3).
80. *See* N.M. R. Civ. P. 1-060(B)(4), (5), & (6).
81. *See* Unser v. Unser, 86 N.M. 648, 653-54, 526 P.2d 790, 795-96 (1974).
82. *See* Hill v. Burnworth, 85 N.M. 615, 617, 514 P.2d 1312, 1314 (Ct. App. 1973).
83. *See* N.M. R. Civ. P. 1-060(B)(6).
84. *See, e.g.*, Thompson v. Thompson, 99 N.M. 473, 660 P.2d 115 (1983).
85. *See* Sanders v. Estate of Sanders, 122 N.M. 468, 474-475, 927 P.2d 23, 29-30 (Ct. App. 1996) (assuming, but not deciding, that New Mexico would recognize independent actions to set aside judgments for fraud upon the court).

part of the defendant; and (5) the absence of any adequate remedy at law.[86] Further, the party seeking to reopen a previous judgment must show that the fraud referred to in the third element goes beyond simple fraud, and is such as would involve the integrity of the judicial entity.[87] "Fraud upon the court embraces only that species of fraud which does or attempts to defile the court itself or which is perpetrated by officers of the court so that the judicial system cannot perform in a usual manner."[88]

Previous holdings indicate it is questionable whether Nina Tedford's silence in response to Tedford's admission of paternity would sufficiently establish fraud upon the court. In *Moya*, the New Mexico Supreme Court held that one party's perjury could be construed as fraud upon the court sufficient to reopen a previous judgment.[89] However, the Court of Appeals subsequently held in *Sanders* that fraud between the parties to a previous judgment, without more, is not fraud upon the court.[90]

Whether or not the arguments for reopening a divorce judgment would prevail, their plausibility serves to demonstrate that collateral estoppel of post-divorce paternity litigation may actually work against judicial efficiency and finality, the interests that collateral estoppel was designed to further. A careful, case-by-case analysis of the elements of collateral estoppel in paternity cases would ensure that the doctrine was not applied, as it was in *Tedford*, to prolong litigation and resolution of paternity.

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86. *See id.* at 472, 927 P.2d at 27.
87. *See id.* at 475, 927 P.2d at 30.
88. Moya v. Catholic Archdiocese of New Mexico, 107 N.M. 245, 247, 755 P.2d 583, 585 (1988).
89. *See Moya*, 107 N.M. at 248, 755 P.2d at 586.
90. *See Sanders*, 122 N.M. at 475, 927 P.2d at 30.