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The Cradle Will Rock Intentional Misrepresentation of Paternity

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The Cradle Will Rock

By Lacy A. Daniel

Intentional Misrepresentation of Paternity

The 2012 Tennessee Supreme Court decision of *Hodge v. Craig* is a case of potential importance primarily to family law practitioners, and more generally to other civil law practitioners.¹ *Hodge v. Craig* paves the way for a putative father to seek damages when a mother has misrepresented that he is her child's father. Of significance to tort litigators more generally, is the court's guidance in suggesting future use of the term "intentional misrepresentation" rather than "fraud" or "fraudulent misrepresentation," to avoid confusion because of the use of "different names for the same tort."²

The Facts and Procedural History of *Hodge v. Craig*

In *Hodge v. Craig*, the Tennessee Supreme Court granted ex-husband, Chad Craig's appeal, recognizing a common law claim for intentional misrepresentation of paternity by his ex-wife, Tina Marie Hodge.³

Furthermore, the Supreme Court determined that Mr. Craig's damages award for intentional misrepresentation was not a prohibited retroactive modification of child support.⁴

"The primary holding of *Hodge v. Craig* is that a putative father may maintain an action for intentional misrepresentation based upon a mother's false statements as to the paternity of a child. A large portion of the opinion is devoted to a discussion of public policy surrounding that question."⁵ Ultimately the *Hodge v. Craig* court "determined that public policy does not prevent the former spouse of a child's mother from pursuing a common-law damage claim based on her misrepresentations regarding the identity of the child's biological father."⁶

This case involved Chad Craig and Tina Marie Hodge, a couple who became involved in an intimate relationship when they were both 16 years old and juniors at Mt. Pleasant High School.⁷ They were married on December 20, 1991, after Ms. Hodge became pregnant and after she assured Mr. Craig that the child could only be his child. Kyle Chandler Craig was born on June 11, 1992.

Mr. Craig and Ms. Hodge divorced in February 2001. Initially, Mr. Craig and Ms. Hodge shared joint custody of Kyle, with Ms. Hodge designated as the primary residential parent, and Mr. Craig paying child support to Ms. Hodge. In 2005, Mr. Craig assumed the role of primary residential parent for Kyle, and Ms. Hodge paid child support to Mr. Craig.

In February 2007, Mr. Craig confirmed (through a DNA test) his recently raised suspicions that he was not 15-year-old Kyle's biological father. Mr. Craig told Ms. Hodge about the test result. After initially telling Mr. Craig that he was "crazy," Ms. Hodge told Kyle that Mr. Craig was not his biological father.⁸

Mr. Craig expressed his desire to maintain their relationship as before, but "Kyle told him that 'it's not the same now' and that he wanted to live with Ms. Hodge."⁹ Kyle and Mr. Craig had little contact after Kyle learned the news. In

July 2007, the trial court entered an order granting Ms. Hodge's request for custody of Kyle and terminating her obligation to pay child support to Mr. Craig.

In February 2008, Mr. Craig sued Ms. Hodge based on intentional and/or negligent misrepresentation, alleging that "Ms. Hodge told him that she was sure that the baby [Kyle] was his and that 'the baby could be no one else's' when she knew or should have known that he was not the child's biological father."¹⁰

The trial court found that "Ms. Hodge 'purposely defrauded [Mr. Craig] into believing Kyle was his child, knowing she had sexual relations with Joey Hay at the time and a count of one's fingers would have revealed Joey Hay could be the father.'"¹¹ For damages suffered as a result of Ms. Hodge's fraud, intentional misrepresentation, and negligent misrepresentation, the trial court awarded Mr. Craig "\$23,030.24, 'representing the total child support paid,' ... \$2,214.20, 'representing medical expenses and insurance premiums paid,' ... \$1,181.75 'for TRH Health Plans,' ... \$100,000 'for the emotional distress suffered' and \$8,451.71 in attorney's fees."¹²

On appeal, the Court of Appeals upheld the trial court's finding of intentional misrepresentation, but "reversed the damage award for child support, medical expenses, and insurance premiums because it amounted to retroactive modification of the earlier child support order."¹³ The appellate court also reversed the \$100,000 emotional distress award, concluding that noneconomic damages were not appropriate in a misrepresentation claim.¹⁴ Since it had reversed all compensatory damages, the court vacated the award of attorney's fees.

Mr. Craig appealed to the Tennessee Supreme Court, raising two issues.¹⁵ First, "whether Ms. Hodge's representations regarding the paternity of her son can support a claim of common-law fraud, intentional misrepresentation, or negligent misrepresentation."¹⁶ Second, "whether a damage award derived from Mr. Craig's post-divorce payments of child support, medical expenses, and

medical insurance premiums is an impermissible retroactive modification of a child support order."¹⁷

Domestic Torts

At first glance, this case may not seem that significant to a family law practitioner. Domestic torts are not uncommon in Tennessee, as spousal tort immunity was abolished in 1983.¹⁸ Tennessee courts have recognized various domestic tort actions relating to misrepresentation, including (1) a suit by an ex-husband against his ex-wife for fraud in misrepresenting the value of the marital home,¹⁹ (2) an ex-wife suing ex-husband for fraud, deceit, and coercion in executing their Marital Dissolution Agreement,²⁰ (3) ex-wife's suit against ex-husband and his employer for fraud and conspiracy in concealing ex-husband's earnings,²¹ (4) negligent transmission of a venereal disease,²² and (5) the right to bring a claim for misrepresentation concerning contraception.²³ These cases involve disputes between adults and do not implicate a child's interests.

Perhaps what is different in the intentional misrepresentation of paternity tort that the Tennessee Supreme Court recognized in *Hodge v. Craig*, is that the child's well-being must be balanced against the interests of the parties, i.e., the State of Tennessee and the parents.

Policy Issues

"Paternity fraud is not a modern concept — it is probably as old as paternity itself. In the days of the common law, British lawmakers addressed the issue despite the lack of modern technology and genetic testing. One of the oldest British laws [dating back to 1576] concerning paternity was titled, 'Acte for the setting of the Poore on Worke, and for the avoyding of Ydleness.'"²⁴ Simply stated, "[p]aternity fraud occurs when a mother makes a representation to a man that the child is genetically his own even though she is aware that he is not, or may not be, the father of the child."²⁵

Paternity laws seek to balance the

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rights of the child with those of the putative father, the biological father, the mother, and the state.²⁶ In a 2007 Note, Stephen Sherman argues that “courts must reach a middle ground between the harsh presumption of paternity and the lax modern rules that allow suits to be pursued at almost any time after the birth of the child.”²⁷ Sherman advocates an 18-month statute of limitations in which a putative father could file suit without negatively affecting the child’s “social and mental well-being.”²⁸

Tennessee Paternity Issues Before ‘Hodge v. Craig’

In a 2005 opinion, the Tennessee Supreme Court briefly summarized the recent history of Tennessee paternity laws enacted in response to evolving public policy.

In 1997, the Tennessee General Assembly completely overhauled the statutes concerning paternity and legitimation. See 1997 Tenn. Pub. Acts ch. 477. The primary purpose of this change was to streamline and to simplify the formerly separate causes of action for paternity and legitimation by combining them into a single parentage action. See *Tenn. Code Ann.* §§ 36–2–101 to –115 (1996) (paternity) and §§ 36–2–201 to –210 (1996) (legitimation), repealed by 1997 Tenn. Pub. Acts ch. 477 (codified at *Tenn. Code Ann.* §§ 36–2–301 to –322 (2001)); Tape H–C & FA # 1 (Tennessee House of Representatives Children and Family Affairs Committee March 26, 1997) (“This bill is an effort to try to revise our statutes and bring us into the 20th century and develop one system for determining and establishing the parentage of children born out of wedlock.”) (statement of Rep. Kim McMillan). The 1997 legislation was also designed to correct a particular constitutional infirmity of the prior statutes.²⁹

As the *Hodge v. Craig* court explained,

Two provisions in the 1997 Act and in a 1998 amendment to the Act reflect the General Assembly’s awareness of the existence of actions to rebut or disestablish paternity and the possibility that a person found not to be a child’s biological father could pursue a claim for damages against the child’s biological parents. *Tenn. Code Ann.* § 36–2–304(b)(3), enacted in 1998, states that “[t]he standard of proof in an action to rebut paternity shall be by preponderance of the evidence.” Similarly, *Tenn. Code Ann.* § 36–2–309(b) states, in part, that “[n]othing in this subsection (b) shall preclude the issuance of a judgment against the mother or actual biological father of the child or children in favor of the person subsequently found not to be the father of the child or children.”³⁰

“Hodge v. Craig is significant for recognizing the right of a putative father to bring an action for intentional misrepresentation based upon a mother’s false statements as to the paternity of a child.”

Steioff v. Steioff in 1992, *Granderson v. Hicks* in 1998, *State ex rel. Taylor v. Wilson* in 2005, *Ex rel. Kimbrough v. Hales* in 2012, and *Ex rel. Russell v. W.* in 2003 all serve to illustrate how the necessary balancing of interests in paternity cases has played out in Tennessee courts prior to *Hodge v. Craig*.

In *Steioff v. Steioff*, the appellate court ruled that eight years was not a reasonable time within which to raise the issue of paternity.³¹ The parties divorced in 1983, and the court awarded custody of the parties’ minor child to the mother and ordered the ex-husband to pay \$25

per week in child support.³² Ex-husband paid the child support for a brief period, but in 1990, the District Attorney General filed a contempt petition on behalf of the mother alleging ex-husband owed \$10,500.³³ Ex-husband sought relief from the 1983 decree pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure alleging that the child was not his child and requesting a blood test, pursuant to *Tenn. Code Ann.* section 24-7-112.³⁴ Ex-husband claimed that he learned after the divorce from “outside sources” that the child was not his child.³⁵ The Court of Appeals upheld the trial court’s denial of ex-husband’s Rule 60.02 motion and blood test request, finding that eight years was too late to raise the issue.³⁶

In *Granderson v. Hicks*, an unreported decision, the Court of Appeals found that the trial court erred by dismissing the putative father’s allegation of fraud by the child’s mother in obtaining a voluntary acknowledgement of paternity from him.³⁷ The appellate court noted that:

Tenn. Code Ann. § 24-7-118(e)(2) requires the trial court to conduct a hearing in cases in which the putative father alleges fraud in the procurement of the voluntary acknowledgment of paternity. After the hearing, if the trial court finds “a substantial likelihood” of fraud “in the execution of the acknowledgment of paternity,” it must order parentage tests, even if the relief is requested after the five-year statute of limitations has lapsed, provided the trial court also finds that this relief “will not affect the interest of the child, the state, or any Title IV-D agency.”³⁸

In *State ex rel. Taylor v. Wilson*, another unreported case, the appellate court reversed the juvenile court’s dismissal of the father’s Tennessee Rule of Civil Procedure 60.02 request for relief from his voluntary legitimation (based on mutual mistake) of one of two children and the related custody, parentage and support orders.³⁹ After entry of the orders, the father learned that he was not the biological father of

one of the children he had originally acknowledged as his child.⁴⁰ In granting prospective relief to the father, the court analyzed the “burdens that granting relief or failing to grant relief will place on all who have an interest in the proceeding,” i.e., the father, mother, child, and State.⁴¹

Tennessee, like other states, as noted by the *Hodge v. Craig* court,⁴² has set aside paternity adjudications where the mother misrepresented the identity of the child’s biological father.⁴³ For example, on July 25, 2012, in *Ex rel. Kimbrough v. Hales*, the Tennessee Court of Appeals found, in an unreported case, that the paternity provision in the divorce decree, declaring Mr. Hales not to be the father of the child his ex-wife, Ms. Kimbrough, was carrying at the time of the divorce, void as against public policy.⁴⁴ Mr. Hales and Ms. Kimbrough were married Oct. 25, 1990, and Mr. Hales was granted a divorce based on inappropriate marital conduct on May 28, 1991.⁴⁵ In 2010, relying on a 2009 DNA Test report indicating a 99.999998 percent probability that Mr. Hale was the biological father of the child, the State moved to establish the ex-husband’s paternity and for Rule 60.02 relief.⁴⁶ The trial court found the 1991 paternity determination *res judicata* and denied the Rule 60.02 motion.⁴⁷ The appellate court found the paternity provisions of the divorce decree void as against the public policy that a child not be illegitimated, or denied support by a natural or adoptive parent, by written agreement or court order.⁴⁸

Conversely, in an earlier 2003 case, *Ex rel. Russell v. W.* the appellate court found that the paternity dispute was raised too late.⁴⁹ The father was aware early on that he might not be the father, and thus, the court concluded that he waived the issue and the matter was *res judicata*.

Recognizing the Tort of Intentional Misrepresentation of Paternity
In *Hodge v. Craig*, the court considered these competing family, individual, and

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Announcement from the Membership Maven



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state interests, noting that the “legislative process provides the most appropriate forum within which to balance these competing interests,”⁵⁰ but finding that the Tennessee “General Assembly has not directly addressed the issues or interests implicated in this case.”⁵¹

The court acknowledged its authority to act within the public policy parameters of the State of Tennessee to continue developing the common law of domestic torts.⁵² The court noted that “misrepresentations to a prospective spouse that he is an unborn child’s biological father ‘[go] to the essence of the marital relationship.’”⁵³ Finding no public policy favoring or opposing the claim or remedy sought, the court determined that a “former spouse of a child’s mother”⁵⁴ may pursue an “intentional misrepresentation”⁵⁵ claim, but not a negligent misrepresentation⁵⁶ claim, “against the child’s mother for her . . . misrepresentations regarding the identity of the child’s biological father.”⁵⁷

The court’s recognition of an intentional misrepresentation tort claim in *Hodge v. Craig* rested on Tennessee law, but the court found similar situations in other states.⁵⁸ Five other states recognize similar claims for fraud or intentional misrepresentation by the putative father against the mother based on her misrepresentations regarding the child’s biological father.⁵⁹ Additionally, New Jersey recognized a claim by the putative father against the biological father.⁶⁰ The court noted several examples of states that found a basis to set aside a paternity adjudication where the mother misrepresented the identity of the child’s biological father.⁶¹

The court outlined the elements of intentional misrepresentation as follows:

[A] plaintiff must prove: (1) that the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that the defendant either knew that the representation was false or did not believe

it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation.⁶²

The measure of damages for a non-business intentional misrepresentation claim is:

The recipient of [an intentional]



Collins Hayman. Photo by Jenny Jones

misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value of what he has received in [the] transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the recipient’s reliance upon the misrepresentation.⁶³

The *Hodge v. Craig* court found that the record supported the trial and appellate courts’ conclusions that Mr. Craig presented sufficient evidence to prove his claim of intentional misrepresentation against Ms. Hodge.⁶⁴ Ms. Hodge, recklessly without knowing whether it was true, told Mr. Craig that no one else

could be the child’s father.⁶⁵ Her statement was false when made and Ms. Hodge knew she had had sex with another man besides Mr. Craig.⁶⁶ Mr. Craig justifiably relied on her representation and married her believing that she was carrying his child.⁶⁷ Mr. Craig suffered monetary damages, including his payment of child support, medical expenses, and insurance premiums.⁶⁸

The Tennessee Supreme Court determined that Mr. Craig’s damage award was “not a retroactive modification of a child support obligation” nor did it make changes in his child support obligation in contravention of *Tenn. Code Ann.* section 36-5-101(f)(1).⁶⁹ The award did not reduce or extinguish any child support owed by Mr. Craig because he was under no obligation to pay support when the judgment was entered and he did not owe any child support arrearage.⁷⁰ The court found that the “trial court did not err by ascertaining the amount of this pecuniary loss by considering the amount of child support, medical expenses, and insurance premiums Mr. Craig had paid on Kyle’s behalf following the parties’ divorce.”⁷¹

What Questions Does ‘Hodge v. Craig’ Settle?

Hodge v. Craig is limited to the specific factual circumstances of the case, “a lawsuit filed by the former spouse of a child’s biological mother seeking damages for intentional misrepresentation of the child’s parentage.”⁷²

Hodge v. Craig does not change the statutory prohibition against retroactive application of child support modifications. The Court of Appeals waited to hear the Supreme Court’s decision in *Hodge* before reaching a decision in *Christopher A. D.* as discussed below.

We conclude that the holdings in *Hodge* do not affect the application of the statute prohibiting retroactive modification of child support to the case before us. *Hodge* involved a claim for misrepresentation and a request for damages caused by that misrepresentation. That is not the situation herein. The action in this

appeal was initiated by a petition to modify support that specifically asked the court “to modify child support retroactively.”⁷³

...

The case before us does not involve a claim of misrepresentation of parentage. It is undisputed that Father is the father. Instead, it alleges a misrepresentation of income by Father in a hearing regarding the appropriate amount of child support.⁷⁴

...

A child support order is not subject to challenge based on equitable defenses such as fraud, because to do so would “defeat the very purpose of the amendment.” Rutledge, 802 S.W.2d at 607. Consequently, we must hold that the Juvenile Court in the instant case lacked the authority to modify Father’s support obligation for any time prior to Mother’s filing of her petition on Oct. 22, 2008.⁷⁵

The implication of the court’s ruling in Christopher A. D. is that in this type of situation, where there is fraudulent misrepresentation, an action for damages should be brought, not an action for retroaction modification of child support.

In January 2013, the Court of Appeals in Madilene G.R. considered *Hodge v. Craig* for the “complex legal and moral issues that arise out of disputed paternity actions where, as in [Madilene G.R.], paternity was uncertain during two very relevant time frames that are at issue, and [] recognize[d], as the Supreme Court did, that such cases implicate the interests of family, a putative biological father, the child, the prospective adoptive parents and the public policy of the State of Tennessee. This is because ‘[c]ases based on a mother’s [representations or] misrepresentations regarding the identity of a child’s biological father present difficult and intractable problems that are ‘much more complicated than a bad girl, good guy scenario.’”⁷⁶

In Madilene G.R. “an unmarried man

is told by an unmarried woman with whom he recently had sexual relations that he is the father of her unborn child, yet the man is so skeptical, that he refuses to renew a relationship with the expectant mother and refuses to provide pre-natal support.”⁷⁷ “The biological father of the child at issue appeals the termination of his parental rights and the dismissal of Father and Step–Mother’s petition for custody and counter-petition for stepparent adoption.”⁷⁸ Madilene G.R. is not a case alleging paternity fraud, but its examination of *Hodge v. Craig* indicates that the *Hodge v. Craig* decision may also provide a useful reference point regarding the multiple interests and the complex legal and moral issues in a paternity dispute.

What Questions Does ‘Hodge v. Craig’ Leave Open?

The *Hodge v. Craig* court noted that it was not required to address whether the measure of damages in this case was correct.⁷⁹ Mr. Craig did not take issue with the Court of Appeals vacating his \$100,000 award for intentional infliction of emotional distress.⁸⁰ Furthermore, Ms. Hodge did not object to using child support, medical expenses, and insurance premiums as the measure of damages.⁸¹

The court very specifically limited its holding:

Our decision in this case is limited to the factual circumstances before us — a lawsuit filed by the former spouse of a child’s biological mother seeking damages for intentional misrepresentation of the child’s parentage. This case does not require us to address other circumstances, including similar disputes between persons who were never married or persons who are separated but not divorced. Determining the appropriateness of actions for intentional misrepresentation of parentage in these and other circumstances can be made only in the appropriate case.⁸²

Our holding is limited to the circumstances in the record showing, without

dispute, that at all times during this proceeding, Mr. Craig did not owe back child support to Ms. Hodge. Nothing in this opinion should be construed as preventing others who owe back child support from filing an intentional misrepresentation claim similar to the one filed by Mr. Craig in this case. If a party owing back child support prevails, the trial court, rather than forgiving the past due child support, will be required to offset the judgment by the amount of the past due child support owed at the time suit was filed.⁸³

Conclusion

Hodge v. Craig is significant for recognizing the right of a putative father to bring an action for intentional misrepresentation based upon a mother’s false statements as to the paternity of a child. Ultimately, the cases that follow will develop a clearer outline of the boundaries of this tort. Additionally, the court clarified general future use of the term “intentional misrepresentation” to describe this sort of tort (beyond the context of paternity), rather than “fraud” or “fraudulent misrepresentation.” [ATA](#)



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Journal and earned a certificate in natural resources law, along with her law degree from the University of New Mexico School of Law in 2011. She returned to her home state of Tennessee to begin her law practice. Daniel developed this article with support and advice from Judge James G. Martin III, of the 21st Judicial District. Judge Martin presented an earlier draft of the article (titled “Paternity Fraud”) on April 4, 2013, at the Domestic Law Forum of the Tennessee Association for Justice.

Notes

1. *Hodge v. Craig*, 382 S.W.3d 325 (2012).
2. *Id.* at 342-43.
3. *Id.* at 342-44.
4. *Id.* at 346-48.

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