INTRODUCTION

Nationwide, biological fathers owe over $92.3 billion in unpaid child support.1 Nearly eighteen million children in the United States are without the child support that is due.2 Adam Day ("Adam") could have been among these children.3 Adam's parents divorced before he was four years old.4 For twelve years, Robert Day ("Robert") believed he was Adam's father.5 Then, several years after he divorced Adam's mother, Robert learned that his ex-wife had an affair at the beginning of their marriage and Adam was not his child.6 Upon learning this, Robert sued Adam's mother for fraud, assumpsit, and intentional infliction of emotional distress.7

In Day v. Heller,8 the Supreme Court of Nebraska refused to recognize claims in tort or assumpsit against an ex-wife and mother who misrepresented to her ex-husband their child's true biological paternity.9 The court reasoned public policy barred all of Robert's claims.10 The court maintained having a close and loving parent-child relationship imposed on an ex-husband was not the type of harm the law should seek to remedy, even if that relationship was imposed by an ex-wife's misrepresentation of the child's biological paternity.11 The court determined that, if forced to decide between adopting a tort that brings with it all the negative consequences of a custody dispute or asking a deceived ex-husband to go without compensation for his emo-

2. Id.
5. Id., 653 N.W.2d at 476.
6. See id. at 935-36, 653 N.W.2d at 477 (stating Robert and Robin married on August 30, 1986 and Adam was born on July 14, 1987).
10. Day, 264 Neb. at 944, 653 N.W.2d at 482.
11. Id. at 939, 653 N.W.2d at 479.
tional injury, the court would ask the ex-husband to go without compensation.  

As this Note will demonstrate, the Day court's decision undermined prior decisions that put the onus to pay child support directly on the biological father. This Note will discuss the problems in the Supreme Court of Nebraska's ruling in Day, based on prior paternity and child support cases. This Note will begin by explaining the facts and holding of Day. Next, this Note will review prior Nebraska paternity and child support cases, wherein the court placed the responsibility on the biological father to pay child support and allowed the biological mother to obtain retroactive support years after the child's birth or the couple's divorce. This Note will also review other jurisdictions' decisions and secondary authority which have addressed this issue. This Note will then explain how the Day court ignored prior case law which emphasized the importance of the biological father and prior case law, which would have permitted Robin to seek retroactive child support from Adam's true biological father. This Note will contend that, in effect, the Day court forced Robert to stand in loco parentis to Adam, even though he had not chosen to do so. This Note will further contend the court misconstrued secondary authority and relied on the wrong cases instead of using its own prior precedent. Finally, this Note will argue, had the court used its own prior precedent, the court should have found public policy did not bar Robert's claim. Thus, the conclusion of this Note will discuss why the court's decision in Day sent the wrong message.

FACTS AND HOLDING

In Day v. Heller, Robert Day ("Robert") and Robin Heller ("Robin") married on August 30, 1986. Robin gave birth to a boy, Adam Day ("Adam"), on July 14, 1987. Nearly four years later, the

12. Id. at 944, 653 N.W.2d at 482.
13. See infra notes 414-55 and accompanying text.
14. See infra notes 414-507 and accompanying text.
15. See infra notes 23-105 and accompanying text.
16. See infra notes 106-268 and accompanying text.
17. See infra notes 269-390 and accompanying text.
18. See infra notes 391-472 and accompanying text.
19. See infra notes 473-507 and accompanying text.
20. See infra notes 508-72 and accompanying text.
21. Id.
22. See infra notes 573-95 and accompanying text.
23. 264 Neb. 934, 653 N.W.2d 475 (2002).
district court dissolved Robert and Robin's marriage.\textsuperscript{26} The court granted custody of Adam to Robin and gave Robert visitation rights.\textsuperscript{27} The court ordered Robert to make monthly child support payments to Robin and to pay for Adam's medical insurance.\textsuperscript{28} The court later ordered Robert to increase his child support payments and to pay for half of Adam's daycare expenses.\textsuperscript{29} In total, Robert estimated that he paid $56,000 in support of Adam.\textsuperscript{30}

Robert eventually remarried and, in July 1997, Robert's wife gave birth to their daughter.\textsuperscript{31} Following his daughter's birth, Robert became suspicious of the fact Adam was born three weeks after Robin's supposed due date.\textsuperscript{32} Robert was advised by his wife's doctor that ordinarily there would be no reason for a physician to let a healthy infant and mother go over term in a pregnancy. \textsuperscript{33} Upon hearing this, Robert began to count back in time.\textsuperscript{34} As he counted back from the date of Adam's birth to the probable date of Adam's conception, Robert realized Adam likely was conceived on a date that Robert and Robin were apart.\textsuperscript{35} In April 1999, DNA testing determined Robert was not Adam's father.\textsuperscript{36} Subsequently, Robin's new husband, Patrick Heller, adopted Adam with Robert's consent.\textsuperscript{37}

On February 15, 2000, Robert sued Robin in the District Court of Sarpy County, Nebraska, claiming fraud, assumpsit, and intentional infliction of emotional distress.\textsuperscript{38} Under these three causes of action, Robert sought damages for the amounts he paid directly for Adam's care and general damages for emotional distress.\textsuperscript{39} In his allegation of fraud, Robert argued Robin had purposely and willfully deceived him by concealing the fact that he was not Adam's biological father.\textsuperscript{40} Robert claimed Robin misrepresented Adam's true paternity with the

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\textsuperscript{26} Id. The Supreme Court of Nebraska did not indicate which district court dissolved the marriage. Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id. The court initially ordered Robert to pay $270 per month. Id.
\textsuperscript{29} Id. The court later required Robert to pay for half of Adam's uninsured medical expenses. Id.
\textsuperscript{31} Brief of Appellant at 11, Day, (No. A-00-928).
\textsuperscript{32} Id.
\textsuperscript{33} Day, 264 Neb. at 936, 653 N.W.2d at 477.
\textsuperscript{34} Brief of Appellant at 11, Day, (No. A-00-928).
\textsuperscript{35} Day, 264 Neb. at 936, 653 N.W.2d at 477.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{39} Day, 264 Neb. at 936-37, 653 N.W.2d at 477-78. The court noted these costs included the amounts Robert paid for child support, daycare, health insurance, and medical expenses. 264 Neb. at 937, 653 N.W.2d at 477-78. Robert sought damages for attorney's fees as well. Id.
\textsuperscript{40} Id. at 936, 653 N.W.2d at 477.
\end{flushleft}
purpose that Robert would rely on it, and Robert did in fact rely on it.\textsuperscript{41} Robert also claimed Robin's concealment directly and proximately caused him to suffer damages.\textsuperscript{42} In his allegation of assumpsit, Robert argued he had paid for child support, daycare expenses, and medical insurance for Adam since the marriage ended in 1991.\textsuperscript{43} Robert claimed these payments unjustly enriched Robin because Robert was not Adam's biological father.\textsuperscript{44} In his allegation of intentional infliction of emotional distress, Robert argued Robin purposely and recklessly misrepresented to him for twelve years that he was Adam's father, all along knowing this was untrue.\textsuperscript{45} Robert claimed that Robin's conduct went beyond all possible bounds of decency because it was so outrageous in character and extreme in degree.\textsuperscript{46} Given his emotional bond with Adam, Robert claimed he suffered lasting emotional distress.\textsuperscript{47}

Robin argued that, under claim and issue preclusion, the announcement of paternity in their dissolution decree barred all three of Robert's claims.\textsuperscript{48} Though the court rejected Robin's argument, the court concluded Robert's claims raised no genuine issues of material fact.\textsuperscript{49} As such, Sarpy County District Court Judge George Thompson granted Robin's motion for summary judgment.\textsuperscript{50}

Robert appealed the decision of the district court to the Court of Appeals of Nebraska, arguing the trial court erred in granting Robin's motion for summary judgment.\textsuperscript{51} Robert contended the trial court erred in holding that he failed to state a cause of action based on fraud, assumpsit, or intentional infliction of emotional distress.\textsuperscript{52} The court of appeals reversed the district court's decision.\textsuperscript{53} Chief Judge John Irwin, writing for the court, determined the trial court had attempted to decide the factual issues of the case instead of deciding whether any legitimate issues of material fact existed.\textsuperscript{54} The court also determined neither claim nor issue preclusion barred Robert's ac-

\begin{itemize}
\item 41. \textit{Id.}
\item 42. \textit{Id.}
\item 43. \textit{Id.}
\item 44. \textit{Id.} The court noted Robert claimed Robin should repay him because of the principles of fairness and justice. \textit{Id.}
\item 45. \textit{Id.}
\item 46. \textit{Id.}
\item 47. \textit{Id.}
\item 48. \textit{Id.} at 937, 653 N.W.2d at 478.
\item 49. \textit{Id.} at 934-35, 653 N.W.2d at 475.
\item 50. \textit{Id.} at 937, 653 N.W.2d at 478.
\item 51. \textit{Day}, 10 Neb. App. at 886, 889, 639 N.W.2d at 158, 161.
\item 52. Brief for Appellant at 2-3, 21, \textit{Day}, (No. A-00-928).
\item 53. \textit{Day}, 10 Neb. App. at 890, 639 N.W.2d at 162.
\item 54. \textit{Id.} at 887, 890, 639 N.W.2d at 160, 162.
\end{itemize}
The court observed the issue of whether a plaintiff could bring a tort claim against a former spouse after the completion of marriage dissolution proceedings was an issue of first impression in Nebraska.

Robin appealed the decision of the court of appeals to the Supreme Court of Nebraska, arguing the court of appeals erred in deciding claim and issue preclusion did not bar Robert’s claims and in finding factual issues remained, which precluded summary judgment. The Supreme Court of Nebraska reversed the decision of the court of appeals, concluding Robert’s fraud, assumpsit, and intentional infliction of emotional distress claims were contrary to public policy. Justice William Connelly, writing for a unanimous court, declared the case did not turn on the first impression question of whether a tort action against a former or current spouse was prohibited. Instead, the court believed the case turned on the question of whether Nebraska would recognize a tort or assumpsit claim against a mother for misrepresentation and concealment of her child’s parentage. According to the supreme court, the court of appeals had implicitly acknowledged that a party could maintain actions of tort and assumpsit against a mother who had misrepresented a child’s biological paternity.

The court divided Robert’s argument into two parts: (1) his fraud and assumpsit claims and (2) his intentional infliction of emotional distress claim. The court determined the first part of Robert’s argument involved recovery for the creation of a parent-child relationship between Robert and Adam. The court interpreted the second part of Robert’s claim as involving recovery for the emotional injury he suffered due to Robin’s misrepresentation of biological fatherhood, which threatened the destruction of the parent-child relationship.

The court initially addressed Robert’s claims of fraud and assumpsit and concluded the claims were contrary to public policy. The court noted Robert’s petition merely stated that his fraud and assumpsit claims were for Robin’s misrepresentation, which caused Rob-

55. Id. at 894-95, 639 N.W.2d at 165.
56. Id. at 895, 639 N.W.2d at 165.
57. Day, 264 Neb. at 937, 653 N.W.2d at 478.
58. Id. at 944, 653 N.W.2d at 482. The court remanded the case to the court of appeals with directions for the court of appeals to affirm the district court’s decision, granting summary judgment to Robin. Id.
59. Id. at 935, 938, 653 N.W.2d at 476, 478.
60. Id. at 938, 653 N.W.2d at 478.
61. Id. at 937, 653 N.W.2d at 478.
62. Id. at 938, 653 N.W.2d at 479.
63. Id.
64. Id.
65. Id. at 939, 653 N.W.2d at 479.
ert to invest the time, money, and emotion in Adam that he would not have invested had he known he was not Adam's biological father.\textsuperscript{66} The court asserted, by his petition, Robert in effect was saying, "He is not my son; I want my money back."\textsuperscript{67} Therefore, the court maintained Robert's fraud and assumpsit claims focused only on the burdens of Robert's relationship with Adam and ignored the benefits.\textsuperscript{68} The court opined that having a close and loving parent-child relationship imposed on Robert was not the type of harm the law should seek to remedy, even if that relationship stemmed from the wife's misrepresentation of the child's biological paternity.\textsuperscript{69} The court declared a tort or assumpsit cause of action which sought recovery for the creation of a parent-child bond in essence tells the child, "I wish you had never been born."\textsuperscript{70} The court stated it refused to allow a parent to use a tort or assumpsit claim as a way to send such a message.\textsuperscript{71}

The court then addressed Robert's intentional infliction of emotional distress claim.\textsuperscript{72} The court decided it could interpret the emotional distress claim in two different ways.\textsuperscript{73} Under the first interpretation, the court determined to the degree that Robert's claim sought recovery simply for the creation of a parent-child bond, the claim was barred for the same reasons as the fraud and assumpsit claims.\textsuperscript{74} The court reasoned Robert was trying to recover simply for the anger he felt in learning he was not Adam's father.\textsuperscript{75} The court decided Robert's emotional distress claim also was subject to a second interpretation because the court should interpret the general pleadings liberally in Robert's favor.\textsuperscript{76} Under this second and more liberal interpretation, the court stated Robert merely sought to recover for the emotional injury he suffered when Robin's misrepresentation and concealment of Adam's true paternity threatened to destroy Robert's relationship with Adam.\textsuperscript{77} The court therefore devised

\begin{align*}
\text{66.} & \text{ Id.} \\
\text{67.} & \text{ Id.} \\
\text{68.} & \text{ Id.} \\
\text{69.} & \text{ Id. (citing Nagy v. Nagy, 258 Cal. Rptr. 787 (Cal. Ct. App. 1989)).} \\
\text{70.} & \text{ Id. (citing Linda L. Berger, \textit{Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships}, 33 Loy. L.A. L. Rev. 449 (2000)).} \text{ The court maintained Ms. Berger's article supported a tort when misrepresentation of biological paternity endangers an existing parent-child bond, but questioned a tort which would allow a father to recover when misrepresentation has created a parent-child bond.} \text{ Id.} \\
\text{71.} & \text{ Day, 264 Neb. at 939, 653 N.W.2d at 479.} \\
\text{72.} & \text{ Id.} \\
\text{73.} & \text{ Id. at 940, 653 N.W.2d at 480.} \\
\text{74.} & \text{ Id.} \\
\text{75.} & \text{ Id.} \\
\text{76.} & \text{ Id. (citing Fitzpatrick v. U.S. West, Inc., 246 Neb. 225, 229, 518 N.W.2d 107, 112 (1994).} \\
\text{77.} & \text{ Id. at 939-40, 941, 653 N.W.2d at 479-80.}
\end{align*}
that Robert's petition essentially stated that Robert and Adam had a loving relationship before Robert knew Adam was not his biological son; that finding out the truth damaged Robert's relationship with Adam; and that Robert suffered emotional distress because of this damage.\(^7\)

The court stated whether the judicial system could remedy Robert's injury by recognizing an emotional distress claim for the destruction of the parent-child bond posed a more difficult question than recognizing the same claim for the creation of the parent-child bond.\(^7\)

The court acknowledged a sudden revelation that there is no biological connection between a parent and child can cause "grief, anxiety, shock, and fear."\(^8\) The court then noted other jurisdictions had conflicting opinions on whether to recognize such an emotional distress claim and the court admitted many jurisdictions made persuasive arguments on both sides of the issue.\(^8\) The court asserted remedying all human wrongs was not within its authority.\(^8\) The court opined that attempting to remedy such wrongs might cause more harm than simply leaving them alone.\(^8\) The court concluded the law should not hold a mother legally responsible for the tort of emotional distress when her misrepresentation of the child's paternity jeopardized an existing parent-child bond.\(^8\)

The court reasoned a claim of emotional distress would put the child at risk by "unavoidably thrusting" the child and the parent-child relationship into the center of the lawsuit.\(^8\) The court noted a child's emotional growth and mental well-being were directly related to the amount of discord between the child's parents.\(^8\) The court acknowledged, ordinarily, the mere potential for disagreement between par-

\(^7\) Id. at 941, 653 N.W.2d at 480.
\(^8\) Id. (citing Nagy v. Nagy, 258 Cal. Rptr. 787 (Cal. Ct. App. 1989)).
ents was insufficient to bar an otherwise legitimate tort claim.\textsuperscript{87} However, the court stated Robert had put forward a tort that presented a “particularly unique brand of intrafamilial warfare” because the quality of the parent-child bond would necessarily become the focus of the lawsuit.\textsuperscript{88} The court maintained the closer a parent was to his child before discovering he was not the child’s biological father, the greater the possibility for disturbance and the more likely that a disturbance to the parent-child bond would cause the parent severe emotional distress.\textsuperscript{89}

Accordingly, the court was concerned the child would become embroiled in the center of the lawsuit.\textsuperscript{90} The court mentioned, in many instances, the mother would ask her child to disprove the father’s depiction of the parent-child relationship and the child, therefore, would become a potential witness as to the nature of the relationship.\textsuperscript{91} The court reasoned the temptation would be great for one parent to manipulate the child’s view of the other parent and either parent could attempt to use the child as a tool for that parent’s advantage.\textsuperscript{92}

The court asserted a custody dispute was the only other type of action, besides the one proposed by Robert, that was between parents and centered on the quality of the parent-child bond.\textsuperscript{93} The court stated there were several well-established negative consequences of an acrimonious custody dispute.\textsuperscript{94} However, the court noted custody disputes were essential to the resolution of a parental relationship and the court could not force parents to remain married.\textsuperscript{95} Therefore, although a custody dispute may be bitter, it is the only option when parents decide to separate.\textsuperscript{96} Thus, the court was willing to allow a child to endure such bitterness in a custody dispute, but the court stated there was not a similarly convincing reason to simply embrace a new tort claim of emotional distress where the quality of the parent-child bond would be at the center.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} The court reasoned that Robert’s claim was “unlike a claim involving a battery or car accident.” \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.} (citing Steve H. v. Wendy S., 67 Cal. Rptr. 2d at 95 (Cal. Ct. App. 1997) (quoting Bock v. Lindquist, 278 N.W.2d 326 (Minn. 1979))).
\item \textsuperscript{93} \textit{Id.} at 943, 653 N.W.2d at 481.
\item \textsuperscript{94} \textit{Id.} at 943, 653 N.W.2d at 481-82 (citing Linda D. Elrod, \textit{Reforming the System to Protect Children in High Conflict Custody Cases}, 28 WM. MITCHELL L. REV. 495, 496-97 (2001) (stating these consequences include depression and a higher risk of psychological illness, substance abuse, and failure in education)).
\item \textsuperscript{95} \textit{Id.} at 943, 653 N.W.2d at 482.
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Id.}
\end{itemize}
The court further opined that allowing such a tort claim would send a confusing message. The court imagined situations in which, in exercising a judgment against a mother, a claimant could take away a mother's only vehicle or garnish a mother's salary. The court maintained it would be inherently contradictory to allow a claimant to base a tort claim on his love for his child and then garnish the income of the child's mother, which the mother needed for that child's well-being. The court declared the only legitimate reason to embrace the tort would be to compensate Robert for the emotional harm he suffered. The court stated, though it was not unsympathetic to Robert, when forced to decide between adopting a tort that brings with it all the negative consequences of a custody dispute or asking Robert to go without compensation for his emotional injury, the court would ask Robert to go without compensation.

The court concluded Robert's fraud, assumpsit, and intentional infliction of emotional distress claims were contrary to public policy. The court determined Robin was entitled to summary judgment. The court reversed the decision of the court of appeals and remanded the case to the court of appeals with directions to enter a new order affirming the district court's grant of summary judgment for Robin.

BACKGROUND

A. NEBRASKA CASE LAW PUTS THE ONUS ON THE BIOLOGICAL FATHER TO PAY CHILD SUPPORT

In Younkin v. Younkin, the Supreme Court of Nebraska declared the determination of paternity was a fundamental fact needed to sustain an order of child support. In Younkin, Gary Younkin (“Gary”) married Jeanne Younkin (“Jeanne”) in July 1980. Two years later, Jeanne petitioned the District Court of Kearney County,

98. Id. at 944, 653 N.W.2d at 482.
99. Id.
100. Id. The court acknowledged supporters of the tort believe it affirms social values. Id.
101. Id.
102. Id.
103. Id., 653 N.W.2d at 482.
104. Id.
105. Id.
108. Younkin, 221 Neb. at 135, 375 N.W.2d at 895.
Nebraska, for dissolution of their marriage. Among other things, Jeanne alleged that she was pregnant with Gary's child.

At trial, Gary did not offer evidence regarding Jeanne's pregnancy or the paternity of the unborn child. Later, Judge Bernard Sprague, writing for the court, signed a dissolution decree, which Jeanne's counsel had prepared. The decree gave Jeanne custody of the child and required Gary to pay child support and medical expenses related to the pregnancy and birth. The decree also required Gary to make alimony payments.

Gary filed an initial motion with the district court to vacate or modify the decree, alleging Jeanne's pregnancy and maternity expenses were exorbitant and his child support obligation was excessive. Later, Gary filed another motion to vacate or modify the decree, alleging that after the child's birth, he became aware of factors that led him to believe he was not the child's father. Gary asserted the court should adjust the decree to clear him of his obligation to pay child support and medical expenses related to the child's birth. Additionally, Gary filed a motion requesting blood tests to determine whether he was the child's father. Gary also filed a motion requesting Jeanne's medical records related to her pregnancy and postnatal care because he had not received such documents from Jeanne earlier.

The district court found for Jeanne, determining the court would not receive evidence in support of Gary's motions to vacate or modify the dissolution degree. Judge Sprague, writing for the court, reasoned the court had discretion to decide whether to receive such evidence. Additionally, the court overruled Gary's motions requesting the blood tests and medical record production.

Gary appealed the decision of the district court to the Supreme Court of Nebraska, arguing the trial court erred in overruling his mo-
tions to vacate or modify the dissolution decree.\textsuperscript{123} Gary also argued the court erred in denying him the opportunity to offer proof in support of his motions, and in not sustaining his motion for discovery regarding blood tests and document production.\textsuperscript{124} The Supreme Court of Nebraska affirmed part of the district court's decision, and reversed and remanded part of the decision.\textsuperscript{125} Justice Thomas Shanahan, writing for the majority, reasoned Gary's motion sufficiently raised the issue of paternity, an issue the earlier trial did not resolve.\textsuperscript{126} The court declared Gary was entitled to an evidentiary hearing on the paternity issue.\textsuperscript{127} The court therefore determined the district court abused its discretion in denying Gary's discovery request.\textsuperscript{128}

In discussing Gary's motion to vacate the dissolution decree, the court noted Gary had disclaimed paternity of the child.\textsuperscript{129} The court declared paternity, by the man judicially required to pay child support, was an essential fact necessary to uphold a support order.\textsuperscript{130} The court opined that questions regarding potential liability for prenatal and postnatal care for mother or child turn on the question of paternity.\textsuperscript{131} Therefore, the court stated blood tests regarding paternity and medical reports regarding Jeanne's pregnancy were reasonably calculated to lead to the discovery of admissible evidence.\textsuperscript{132} The court noted, although Gary did not raise the issue of paternity in the dissolution hearing, it hesitated to require that Gary have already raised paternity because in some cases such a requirement could cause immeasurable and unneeded pain to all involved parties.\textsuperscript{133}

Chief Justice Norman Krivosha dissented, reasoning the trial court did not abuse its discretion in denying Gary an evidentiary hearing.\textsuperscript{134} Justice Krivosha opined that the evidence provided was not enough to prove such abuse.\textsuperscript{135} Justice Krivosha believed Gary's allegations were vague and Gary had ample time to raise the paternity issue before the entry of the dissolution decree.\textsuperscript{136}

\textsuperscript{123} Id. at 135, 375 N.W.2d at 895. Gary appealed the decision to the Supreme Court of Nebraska because, at the time, Nebraska did not have a Court of Appeals. Id.

\textsuperscript{124} Id. at 138, 375 N.W.2d at 897.

\textsuperscript{125} Id. at 144, 375 N.W.2d at 900.

\textsuperscript{126} Id. at 135, 144, 375 N.W.2d at 895, 900.

\textsuperscript{127} Id. at 144, 375 N.W.2d at 900.

\textsuperscript{128} Id.

\textsuperscript{129} Id. at 143, 375 N.W.2d at 900.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 143-44, 375 N.W.2d at 900.

\textsuperscript{133} Id. at 144, 375 N.W.2d at 900.

\textsuperscript{134} Id. at 144-45, 375 N.W.2d at 900 (Krivosha, J., dissenting).

\textsuperscript{135} Id. at 145-46, 375 N.W.2d at 901 (Krivosha, J., dissenting).

\textsuperscript{136} Id. at 146, 375 N.W.2d at 901 (Krivosha, J., dissenting).
Six years after Younkin, in State v. Mendoza, the Supreme Court of Nebraska held, in a paternity proceeding for support for a child born outside of marriage, evidence of the performance of acts under section 43-1409 of the Nebraska Revised Statutes was not conclusive, but constituted pertinent evidence of a biological relationship. Section 43-1409 stated, in part, that a man may provide a written statement that he was a child's father or perform acts, such as providing support, which reasonably demonstrated he considered himself to be the child's father. In such case, the man would be considered as having acknowledged the child's paternity.

In Mendoza, the State of Nebraska sought judgment in the District Court of Lancaster County, Nebraska, against Jose Mendoza ("Mendoza"), alleging Mendoza was the biological father of J.R. ("J.R.") and sought child support from Mendoza. Mendoza denied paternity. The trial court found for the State of Nebraska, determining Mendoza was J.R.'s father. Judge Earl Witthoff, writing for the court, ordered Mendoza to pay child support to J.R.'s mother, P.C. ("P.C."). The court stated, because Mendoza was J.R.'s father, the law required Mendoza to support J.R.

Mendoza appealed the decision of the trial court to the Supreme Court of Nebraska. Mendoza argued the trial court erred in failing to find the actions of another man, Jesus Castillo ("Castillo"), who acknowledged he was J.R.'s father, barred the lawsuit against Mendoza. Mendoza also argued the trial court erred in failing to grant Mendoza's motion to join Castillo as an indispensable party in the lawsuit.

The Supreme Court of Nebraska affirmed the decision of the trial court, reiterating the duty of a biological father to support his child. Justice C. Thomas White, writing for a unanimous court, reasoned section 43-1409 was designed to help courts identify the biological fa-

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139. Mendoza, 240 Neb. at 155-56, 481 N.W.2d at 170.
140. Id.
141. Id. at 150, 481 N.W.2d at 167.
142. Id.
143. Id.
144. Id., 481 N.W.2d at 165, 167.
145. Id., 481 N.W.2d at 167.
146. Id. at 152, 481 N.W.2d at 168. The Supreme Court of Nebraska did not explain the basis for taking the case directly from the district court. Id.
147. Id.
148. Id.
149. Id. at 159, 166, 481 N.W.2d at 172, 176.
MISREPRESENTED PATERNITY

The court rejected Mendoza's "disingenuous attempt to turn the statute on its head" and force upon Castillo the obligations Mendoza held as the biological father.

Regarding section 43-1409, Mendoza argued, because Castillo became J.R.'s "legal father," it was Castillo's duty to support J.R., not Mendoza's. Mendoza relied on Nebraska's "long-standing public policy" of preventing the bastardization of children in advocating his interpretation of the statute. However, the court reasoned Mendoza's argument overstated the significance of public policy in construing the statute.

The court discussed case law in other states to make its point that Mendoza had misinterpreted the statute. The court maintained the Nebraska legislature did not create such a statute to shelter biological fathers from their support responsibilities. The court determined just because a presumed father had accepted paternal obligations, either by intent or default, that did not mean the benefits thereby went to the biological father. The court declared it was biological paternity or maternity that required parents to provide for their children. The court stated it would be inequitable to give a biological father extensive rights if the court did not also impose on the biological father corresponding duties.

Four years later, in Quintela v. Quintela, the Court of Appeals of Nebraska determined a paternity test, indicating there was no possibility an ex-husband was the father of the child born during the marriage, provided sufficient evidence to rebut the presumption of legitimacy. The court stated the evidence precluded imposing child support on an ex-husband based on the legal presumption that he was the child's father. In Quintela, Pedro Quintela ("Pedro") appealed a dissolution decree in the District Court of Sarpy County, Nebraska. Pedro married Dianna Quintela ("Dianna") in June 1986.

150. Id. at 150, 163, 481 N.W.2d at 167, 174.
151. Id. at 163, 481 N.W.2d at 174.
152. Id. at 156, 481 N.W.2d at 170.
153. Id. at 157, 481 N.W.2d at 171.
154. Id.
155. Id. at 155-64, 481 N.W.2d at 170-74.
156. Id. at 158-59, 481 N.W.2d at 172 (quoting Smith v. Cole, 553 So. 2d 847, 854 (La. 1989)).
157. Id. (quoting Smith, 553 So. 2d at 854).
158. Id. (quoting Smith, 553 So. 2d at 854).
159. Id. at 159, 481 N.W.2d at 172.
162. Quintela, 4 Neb. App. at 401, 544 N.W.2d at 115.
163. Id. at 397, 544 N.W.2d at 111.
in Jackson County, Mississippi, while the pair was in the Navy.\textsuperscript{164} In January 1991, Dianna gave birth to a son, Joshua ("Joshua").\textsuperscript{165} Some time in mid-1991, Pedro and Dianna stopped living together and, in late 1992, Dianna and Joshua relocated to Nebraska.\textsuperscript{166}

In October 1993, Dianna petitioned for a separation from Pedro in the District Court of Sarpy County, Nebraska, asserting Joshua was Pedro’s son.\textsuperscript{167} Pedro denied Joshua was his son and asked for a blood test to determine paternity.\textsuperscript{168} At trial, the paternity test showed there was a zero percent chance Joshua was Pedro’s son.\textsuperscript{169}

According to testimony by Dianna, all parties involved agreed Joshua was not Pedro’s son.\textsuperscript{170} Dianna testified she knowingly gave the hospital Pedro’s name as the father of Joshua, even though she knew Joshua was not Pedro’s son.\textsuperscript{171} Dianna also stated Pedro treated Joshua as if Joshua were his son until the parties separated around the time of Joshua’s first birthday.\textsuperscript{172} Dianna further testified Pedro continued to send her child support until the beginning of 1994.\textsuperscript{173}

The district court found for Dianna, declaring both parties were estopped from denying paternity and Joshua was considered the child born from the couple’s marriage.\textsuperscript{174} Judge Ronald Reagan, writing for the court, reasoned Pedro had acknowledged the paternity of Joshua.\textsuperscript{175} Additionally, the court articulated its concerns about Joshua’s best interests.\textsuperscript{176} The court therefore instructed Pedro to pay child support despite the results of the blood test.\textsuperscript{177}

Pedro appealed the decision of the district court to the Court of Appeals of Nebraska, arguing the district court erred in deciding paternity and obligating Pedro to pay child support for Joshua when the child was not his biological son.\textsuperscript{178} The court of appeals reversed the decision of the district court and remanded the case to the district

\begin{itemize}
\item 164. Id., 544 N.W.2d at 113.
\item 165. Id.
\item 166. Id.
\item 167. Id., 544 N.W.2d at 111, 113. The court indicated Dianna amended her petition in January 1994, still claiming Joshua was Pedro’s son. Id., 544 N.W.2d at 113.
\item 168. Id. at 397-98, 544 N.W.2d at 113. The court noted Dianna replied, affirmatively stating Joshua was Pedro’s son. Id. at 398, 544 N.W.2d at 113.
\item 169. Id. at 398-99, 544 N.W.2d at 114.
\item 170. Id. at 399, 544 N.W.2d at 114.
\item 171. Id.
\item 172. Id.
\item 173. Id. The court stated Dianna also testified Pedro called Joshua and sent him cards for his birthday. Id.
\item 174. Id.
\item 175. Id. at 397, 399, 544 N.W.2d at 111, 114.
\item 176. Id. at 399, 544 N.W.2d at 114.
\item 177. Id.
\item 178. Id. at 400, 544 N.W.2d at 115.
\end{itemize}
court, finding Pedro was not given a full and fair hearing on the question of paternity and its accompanying rights and duties. Judge John Irwin, writing for the majority, reasoned that, absent actual harm to Joshua, the court should not require Pedro to continue paying child support merely on a theory of paternity by estoppel. The court explained under the doctrine of paternity by estoppel, the principles of equitable estoppel are applied to paternity cases. The court noted the district court may have used paternity by estoppel to reach its decision, but determined the Supreme Court of Nebraska had never used the theory to impose a support obligation on someone claiming misrepresented paternity.

Regarding the theory of paternity by estoppel, the court stated the supreme court's decision in *Mendoza* suggested Nebraska would not use paternity by estoppel unless there was financial harm. The court decided against imposing paternity by estoppel on Pedro because the record failed to show any harm to Joshua. The court declared it would proceed with caution in imposing a duty of support on a man who had not adopted a child and was not the child's natural parent, but who had voluntarily undertaken to support the child and act as a parent. The court maintained the duty to support a child rested first and foremost with the natural parents and the law should not punish a man who took on that task, without any duty to do so ordinarily, if he should later abandon it.

The court of appeals observed the law presumed a child born during a marriage was the legitimate offspring of the married couple. The court also observed, when there is no biological or adoptive connection between a husband and his wife's child, the Supreme Court of Nebraska has recognized certain rights and duties may arise when a husband chooses to stand in loco parentis to a child. The court explained that a man standing in loco parentis is one who has placed himself in the circumstances of a lawful parent by assuming the duties that go along with being a parent, but who has not gone through

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179. *Id.* at 411, 544 N.W.2d at 120.
180. *Id.* at 397, 410, 544 N.W.2d at 113, 120.
181. *Id.* at 405, 544 N.W.2d at 117.
182. *Id.*
183. *Id.* at 408, 544 N.W.2d at 119.
184. *Id.* at 409, 544 N.W.2d at 119.
187. *Id.* at 401, 544 N.W.2d at 115.
188. *Id.*
the formalities of legal adoption. The court stated the rights, duties, and liabilities of a man standing in loco parentis corresponded to those of a legal parent. The court noted the assumption of the parent-child relation was a question of intention, and that intention may be demonstrated by the actions and statements of the person alleged to be in that relation. The court therefore determined, even if Pedro had chosen to stand in loco parentis, Pedro's denial of Joshua's paternity and his challenge to Dianna's child support request showed Pedro wanted to end any parental relationship.

The court further stated the district court found Pedro acknowledged paternity, even though neither Pedro nor Dianna anticipated paternity being an issue at the hearing. According to the court, since blood tests had conclusively determined Joshua was not Pedro's son, all parties thought paternity and child support payments would not be a question at trial. The court declared if the court were to have ordered Pedro to pay child support, an order for which he may have had a valid defense, the court at least should have given Pedro notice and the opportunity to have been heard and offer his own evidence.

Judge Edward Hannon dissented in part, reasoning further proceedings were not needed. Judge Hannon stated he would instead reverse the trial court's decision, directing the court to determine Pedro was not Joshua's father and to cancel child support. Judge Hannon noted, though the trial judge may have carried a burden in looking after Joshua's rights, the judge should never forget the fact that even with the rights of children, the judge must act as an impartial arbiter, not an advocate, in the adversarial system.

After Quintela, the Supreme Court of Nebraska reiterated the importance of the biological father's duty to support his child.
State on Behalf of Hopkins v. Batt, the State of Nebraska initiated a paternity proceeding in the District Court of Sarpy County, Nebraska, to determine who the biological father of Keith Hopkins, Jr. ("Keith") was. In Batt, the court determined Richard Filbert II ("Filbert") was Keith's biological father and ordered him to pay child support. Chyrlyn Batt ("Batt") married Keith Hopkins ("Hopkins") in August 1985 and gave birth to her fourth child, Keith, in April 1992. In October 1993, the District Court of Sarpy County dissolved the marriage. After modifying the dissolution decree, the court awarded Hopkins custody of the couple's two older children and Batt custody of the two younger children, including Keith.

In 1995, the State of Nebraska petitioned the district court on behalf of Keith, asking for a determination that Keith was Filbert's biological son and that the court should therefore require Filbert to support Keith. The named defendants in the action were Filbert and Batt; Hopkins was not involved. Filbert answered the State, denying paternity and asserting several defenses. At trial, Batt testified she had sexual intercourse with Filbert, and genetic testing established Filbert was Keith's father. Judge George Thompson, writing for the court, found Keith was Filbert's biological son and ordered Filbert to pay child support for Keith. Filbert appealed the decision of the district court to the Court of Appeals of Nebraska, arguing the district court erred in rejecting his defenses to the claim of paternity. The Supreme Court of Nebraska removed the case from the district court to its own docket.

201. Batt, 253 Neb. at 854, 573 N.W.2d at 429.
202. Id.
203. Id.
204. Id.
205. Id. The court indicated, in the original dissolution decree, Batt was awarded custody of all four children and Hopkins was ordered to pay child support of $1,214 per month. Id. After the two older children decided to live with Hopkins, the decree was modified and Hopkins' child support payment was decreased to $400 per month. Id. at 854-55, 573 N.W.2d at 429.
206. Id. at 855, 573 N.W.2d at 429.
207. Id.
208. Id. The court noted Filbert asserted issue preclusion, equitable estoppel, claim preclusion, latches, and mootness as defenses. Id.
209. Id., 573 N.W.2d at 430. The court stated genetic testing determined a 99.98% likelihood of paternity. Id.
210. Id. at 854, 855, 573 N.W.2d at 425, 430. The court gave custody of Keith to Batt, subject to reasonable visitation by Filbert. Id. at 855, 573 N.W.2d at 430.
211. Id. at 856, 573 N.W.2d at 430.
212. Id. The supreme court removed the case pursuant to its power to regulate its own docket and that of the court of appeals. Id.
The Supreme Court of Nebraska affirmed the decision of the district court, finding each of Filbert's assignments of error meritless. Justice Kenneth Stephan, writing for a unanimous court, declared a child's biological parent had the most important obligation of support. The court reasoned, despite whatever payments Hopkins made, Filbert was responsible for giving Keith complete support.

The court acknowledged that, without a biological connection between a husband and his wife's child, a husband may acquire rights and duties when he chooses to stand in loco parentis to the child. However, the court determined the doctrine of in loco parentis would not protect Filbert from the responsibilities of paternity. The court noted Batt had returned the child support payments for Keith to Hopkins, and there was no evidence to indicate Hopkins intended to stand in loco parentis to Keith.

Two years after Batt, in Weinand v. Weinand, the Supreme Court of Nebraska concluded the law could not force an ex-husband to pay child support for his ex-wife's child when he was not the child's biological father. In Weinand, Mark Weinand ("Mark") and Debra Weinand ("Debra") appealed the decree of dissolution, which ended their seven-year marriage. Mark and Debra were married in December 1990. In July 1995, Debra gave birth to a daughter, Nicole ("Nicole"). Mark and Debra separated in February 1997, and Nicole remained with Debra. After the separation, Bradley Sinsel ("Sinsel") moved in with Debra and Nicole; thereafter, Sinsel treated Nicole like his daughter.

In May 1997, Debra petitioned for dissolution of her marriage to Mark in the District Court of Buffalo County, Nebraska. Debra asked the court for custody of Nicole and permanent child support. However, while the dissolution was pending, paternity tests deter-
mined Sinsel, not Mark, was Nicole’s biological father. Despite this determination, Mark continued to maintain a relationship with Nicole. Mark saw Nicole two to three times a week, and voluntarily paid monthly child support.

In the dissolution action, District Court Judge John Icenogle approved a marriage settlement agreement between Mark and Debra. The agreement stated Mark would make child support payments for Nicole and Mark stood in loco parentis to Nicole. In its own dissolution decree, the district court stated Mark should make child support payments because of his continued connection with Nicole.

Mark appealed the decision of the district court to the Court of Appeals of Nebraska, arguing the district court erred in requiring him to make child support payments. Mark asserted the court should have ordered Sinsel to pay child support. Debra cross-appealed the decision, arguing the child support amount was inadequate. Using its power to regulate caseloads, the Supreme Court of Nebraska took the appeals.

The Supreme Court of Nebraska vacated the portion of the district court’s dissolution decree requiring Mark to pay child support for Nicole. Justice John Gerrard, writing for a unanimous court, began by reasoning Nicole simply was not Mark’s child; therefore, by divorce, Mark was Nicole’s ex-stepfather. The court held, when a minor child lived with and was supported by both of his or her natural parents, the responsibility for child support was solely on those parents. In making this determination, the court turned to section 42-364 of the Nebraska Revised Statutes. Section 42-364 stated, in

228. Id. The court indicated the Buffalo County Attorney filed a paternity suit against Sinsel, claiming Nicole was Sinsel’s biological child. Id. Sinsel acknowledged paternity. Id.
229. Id. at 148-49, 616 N.W.2d at 4.
230. Id. at 149, 616 N.W.2d at 4. The court stated Mark paid about $300 per month in child support. Id. The court also stated Mark visited Nicole on Tuesday and Thursday afternoons and alternating Sundays. Id.
231. Id. at 147, 149, 616 N.W.2d at 1, 4.
232. Id. at 149, 616 N.W.2d at 4.
233. Id.
234. Id. at 149, 150, 616 N.W.2d at 4-5.
235. Id. at 150, 616 N.W.2d at 4-5.
236. Id. at 150, 616 N.W.2d at 5.
237. Id. at 149, 616 N.W.2d at 4.
238. Id. at 156, 616 N.W.2d at 8.
239. Id. at 147, 150, 616 N.W.2d at 3, 5.
240. Id. at 152, 616 N.W.2d at 6.
241. Id. Nebraska Revised Statute section 42-364 provided, in relevant part: (1) When dissolution of a marriage or legal separation is decreed, the court may include a parenting plan developed under the Parenting Act, if a parenting plan has been so developed, and such orders in relation to any minor child and the child's maintenance are justified. . .
part, when calculating the amount of support to be paid by a parent, the court must consider each parent's earning power and the guidelines provided by the Nebraska Supreme Court. Reading section 42-364, the court opined Nebraska divorce law did not impose on any person, other than a parent, an obligation to pay for the support of a minor child. The court maintained, because Sinsel admitted paternity and had begun living with and supporting Nicole, there was no question as to who Nicole's natural parents were.

Additionally, the court noted Mark was not standing in loco parentis to Nicole. The court stated a person electing to stand in loco parentis to a child must have put himself in such circumstances by assuming the requisite parental responsibilities; the rights, obligations, and liabilities of such a person are equivalent to those of a legally recognized parent. The court declared the doctrine of in loco parentis referred to someone who has completely put himself in the circumstances of a lawful parent by carrying all responsibilities incident to the parental relationship. The court stated it should only find a parent-child relationship if the entirety of the situation demonstrated the stepparent intended to take the place of the lawful parent. The court indicated this meant not only that the stepparent provide monetary support to the child, but also that the stepparent teach and care for the child's general well-being.

B. NEBRASKA CASE LAW PERMITS RECOVERY OF RETROACTIVE CHILD SUPPORT FROM THE BIOLOGICAL FATHER

In State on Behalf of Matchett v. Dunkle, the Supreme Court of Nebraska recognized a right to retroactive child support. In Dunkle, the State of Nebraska petitioned the District Court of Douglas County, Nebraska, on behalf of Peggy Matchett's ("Matchett") minor child to establish Scott Dunkle ("Dunkle") as the child's biological fa-

\[(6)\) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court [. . .] for the establishment of child support obligations.


242. Weinand, 260 Neb. at 151, 616 N.W.2d at 5-6 (emphasis supplied).

243. \(Id\). at 151-52, 616 N.W.2d at 6.

244. \(Id\). at 152, 616 N.W.2d at 6.

245. \(Id\).

246. \(Id\). at 152-53, 616 N.W.2d at 6.

247. \(Id\).

248. \(Id\). at 154, 616 N.W.2d at 7.

249. \(Id\).


ther and require Dunkle to pay child support. Matchett herself later was added as a plaintiff in the lawsuit.

At trial, blood tests confirmed Dunkle's paternity. Judge John Clark, writing for the court, ordered Dunkle to pay prospective child support, but declined to order retroactive child support. Matchett appealed the decision of the district court to the Court of Appeals of Nebraska, arguing the lower court erred in refusing to award retroactive support. The court of appeals affirmed the decision of the district court. The court reasoned it lacked the statutory foundation to establish rules for allowing retroactive child support. The court acknowledged the philosophy of section 43-1402 appeared to require equal support for both legitimate and illegitimate children. However, the court declared it would not allow retroactive child support until the legislature specifically enumerated terms for such support.

Matchett appealed the decision of the court of appeals to the Supreme Court of Nebraska, arguing that both the district court and the court of appeals erred in finding the lower courts had no power to award retroactive child support in cases like hers. The Supreme Court of Nebraska reversed the decision of the court of appeals, concluding Matchett was entitled to receive retroactive child support. The court, in a per curiam opinion, began by examining section 43-1402 of the Nebraska Revised Statutes. The court stated the sole issue of the case was whether the statute empowered the court to grant retroactive child support. Section 43-1402 provided, in rele-

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253. Dunkle, 244 Neb. at 640, 508 N.W.2d at 581.
254. Id. at 641, 508 N.W.2d at 581.
255. Id. at 640, 641, 508 N.W.2d at 580, 581-82. The Supreme Court of Nebraska did not provide the basis for the district court's decision not to order retroactive child support. Id.
256. Id. at 641, 508 N.W.2d at 582.
257. Id.
258. Id. at 643, 508 N.W.2d at 583.
259. Id.
260. Id.
261. Id. at 641, 508 N.W.2d at 581.
262. Id. at 644-45, 508 N.W.2d at 583.
263. Id. at 640, 642-44, 508 N.W.2d at 581, 582-83. Section 43-1402 of the Nebraska Revised Statutes stated, in relevant part:

The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support. The mother of a child shall also be liable for its support.

264. Dunkle, 244 Neb. at 640, 508 N.W.2d at 581.
vart part, that when an illegitimate child's paternity was established by judicial proceedings or by acknowledgment, the father of the child was liable for child support to the same extent and manner as if the child were legitimate.\textsuperscript{265} The court determined the plain language of the statute stated a child born to unmarried parents must be supported in the same way as a child born to married parents; therefore, the court determined the support must begin at birth.\textsuperscript{266} The court declared a parent was obligated to give his child life's necessities.\textsuperscript{267} The court therefore concluded Dunkle had to provide child support, even if it was retroactive.\textsuperscript{268}

C. Cases Addressing the Issue of Whether Public Policy Bars Claims Based on Misrepresented Paternity

1. Cases Holding Public Policy Bars Claims Based on Misrepresented Paternity

In \textit{Nagy v. Nagy},\textsuperscript{269} the California Court of Appeal concluded an action by an ex-husband to recover for his ex-wife's fraud was contrary to public policy.\textsuperscript{270} In \textit{Nagy}, Peter Nagy ("Peter") sued Sabina Nagy ("Sabina") in the Superior Court of Los Angeles, California, after learning during divorce proceedings that the son born during their marriage was not his child.\textsuperscript{271} Peter married Sabina in December 1973.\textsuperscript{272} Ten years later, Sabina gave birth to a son, Christopher Nagy ("Christopher").\textsuperscript{273} Subsequently, in 1986, Peter and Sabina divorced.\textsuperscript{274} In the course of dissolution proceedings, Peter learned Christopher was not his son.\textsuperscript{275} Sabina disclosed this information to Peter at a witness's deposition.\textsuperscript{276} Later, a paternity test proved Peter was not Christopher's father.\textsuperscript{277} Despite Sabina's misrepresentation, Superior Court Judge Irving Shimer dismissed Peter's suit.\textsuperscript{278}

Peter appealed the decision of the superior court to the California Court of Appeal, Second District, Division Seven, arguing he effectively pled claims for intentional infliction of emotional distress and...

\textsuperscript{265} Id. at 642-43, 508 N.W.2d at 582.
\textsuperscript{266} Id. at 643, 644, 508 N.W.2d at 583.
\textsuperscript{267} Id. at 643, 508 N.W.2d at 583.
\textsuperscript{268} Id. at 644-45, 508 N.W.2d at 583.
\textsuperscript{269} 258 Cal. Rptr. 787 (Cal. Ct. App. 1989).
\textsuperscript{271} Nagy, 258 Cal. Rptr. at 787, 788, 789.
\textsuperscript{272} Id. at 788.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 789.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 787, 789. The California Court of Appeal did not discuss the basis for this dismissal. \textit{Id}. 
Associate Justice Fred Woods, writing for the majority, declared the issue was whether Peter had effectively pled intentional infliction of emotional distress and fraud, and if so, whether there were compelling reasons that precluded compensation for such injuries. The court concluded, under the facts of the case, an action for fraud violated public policy. The court determined allowing a non-biological father to receive damages for performing paternal acts and developing a close bond with a child who was misrepresented to be his son was not a damage which the law should compensate. The court likened Sabina's misrepresentations to a betrayal, and therefore reasoned the law should not provide a remedy.

Discussing Peter's claim of emotional distress, the court noted Peter did not learn of the misrepresentation until a witness's deposition during the dissolution proceeding itself. The court stated in order for Peter to have suffered emotional distress because of the misrepresentation, Peter must have known about the misrepresentation. The court maintained the witness's statement during the deposition was privileged under the California Civil Code, which provided an absolute privilege to the statement as long as it was reasonably connected with a legal action and made to further litigation. The court reasoned the witness's statement had a reasonable connection to the dissolution and therefore, the privilege defeated any claim of intentional infliction of emotional distress that Peter would make. Thus, the court declared it would not allow an action for intentional infliction of emotional distress based on the witness's statement.

Associate Justice Earl Johnson, Jr. concurred with the majority, reasoning public policy slightly outweighed Peter's right of recovery. Justice Johnson wrote a separate opinion, diverging from the primary grounds for the majority's opinion, because he believed Peter had alleged true injuries in his claim for fraud and he disagreed with the majority's determination that privilege barred Peter's intentional infliction of emotional distress claim. He opined that, under some-
what different facts, a lawsuit like Peter's could survive public policy concerns.292 Justice Johnson maintained it was difficult to conceive of a more devastating emotional setback or one more intended to cause emotional distress.293 He reasoned Peter was not claiming his damages were the close bond he developed with Christopher or the paternal acts he performed.294 Instead, Justice Johnson stated Peter's damages were the loss of the investment of time, money, and emotion.295 Justice Johnson disagreed with the majority's opinion that Peter merely alleged betrayal.296 Justice Johnson felt Peter sued Sabina for her deliberate fraud — her three and a half years of purposeful misrepresentation that Christopher was Peter's child.297

Eight years after Nagy, in Steve H. v. Wendy S.,298 the California Court of Appeal concluded the negative consequences from permitting an ex-husband's cause of action against an ex-wife, who misrepresented their child's paternity, outweighed the social benefit.299 In Steve H., Steve H. ("Steve") sued Wendy S. ("Wendy") for the emotional injury he suffered after Wendy challenged Steve's paternity during proceedings to dissolve their marriage.300 Steve married Wendy in January 1990; in November, Wendy gave birth to a daughter, Stephanie ("Stephanie").301 A day after Stephanie was born, Wendy realized Steve was not the child's father; however, she did not tell him at that time.302

In 1993, Steve and Wendy separated, and Steve petitioned for dissolution of the marriage and sole custody of Stephanie.303 In order to interfere with the relationship between Steve and Stephanie, Wendy induced Steve into taking a paternity test knowing the test would show Steve was not Stephanie's father.304 However, the family court, considering dissolution and custody, found Steve was entitled to a pre-

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292. Id. at 792 (Johnson, J., concurring).
293. Id. at 793 (Johnson, J., concurring).
294. Id. at 792 (Johnson, J., concurring).
295. Id. (Johnson, J., concurring).
296. Id. at 793 (Johnson, J., concurring).
297. Id. (Johnson, J., concurring). Justice Johnson stated, "Betrayal' may not be a recognized cause of action; fraud is such an action." Id. (Johnson, J., concurring).
300. Steve H., 67 Cal. Rptr. 2d at 91.
301. Id.
302. Id. The court noted Wendy had a sexual relationship with another man, H.T., prior to and throughout her marriage to Steve. Id.
303. Id.
304. Id. The court explained Wendy devised an elaborate scheme to induce Steve into taking the paternity test. Id. Wendy told Steve she had been raped and Steve was not Stephanie's father in order to get Steve to take the test. Id. The court noted, "Of course, the rape story was false." Id. at 91 n.2.
2003] MISREPRESENTED PATERNITY 221

summation of paternity and therefore, the law considered Steve to be Stephanie's legal father.305

In 1994, Steve filed suit against Wendy in the Superior Court of Los Angeles County, California.306 In his second amended complaint, Steve alleged abuse of process and intentional infliction of emotional distress.307 Superior Court Judge Stephen O’Neil dismissed Steve’s complaint.308

Steve appealed the decision of the superior court to the California Court of Appeal, Second District, Division One, seeking to reinstate his claim for intentional infliction of emotional distress.309 The California Court of Appeal affirmed the superior court’s dismissal of Steve’s case.310 Associate Justice Stephen Masterson, writing for the majority, stated that, under Nagy, Steve’s claim clearly was precluded to the extent he sought damages for the close and loving relationship created with Stephanie.311 The court then noted, although the foundation for Steve’s claim was Wendy’s attempt to destroy his relationship with Stephanie, the case still posed adverse risks to Stephanie as an innocent child.312 The court reasoned both sides would use Stephanie as a witness at trial, and the child would in turn become a pawn.313 The court opined the law should try to minimize the emotional toll on children involved in dissolution proceedings; the court stated it would not advance that goal by permitting Stephanie to become the focus of her parent’s post-dissolution action.314 Moreover, given Wendy’s actions and because Steve’s request for sole custody was part of his dissolution petition, the court decided each parent tried to use the litigation to take Stephanie from the other parent.315

Associate Justice Miriam Vogel dissented, reasoning the majority reached an antiquated result, which did little more than wish for a

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305. Id. at 91 n.2.
306. Id. at 90, 92.
307. Id. at 92. Steve’s original 1994 complaint alleged fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. Id.
308. Id. at 90, 92.
309. Id.
310. Id. at 98.
311. Id. at 90, 93.
312. Id. at 93.
313. Id. at 94. The court also reasoned, at trial, a jury would certainly hear details of Wendy’s affair and her false story about being raped. Id. at 93-94.
314. Id. at 94.
315. Id. The court also determined Steve’s claim was contrary to the reasoning for California’s abolition of so-called “heart-balm” actions, which previously permitted claims of alienation of affection, criminal conversation, breach of a promise to marry, etc. Id. at 95. The court stated California law abolished “heart-balm” actions because certain sexual or interpersonal choices are now considered beyond the realm of tort liability. Id.
society that no longer existed. Justice Vogel stated she would not allow Wendy to use Stephanie as a shield to escape liability. She declared she was offended both by the majority's decision to deny Steve a remedy for the harm he suffered because of Wendy and by the underlying “paternalistic chauvinism” of the cases cited by the majority.

2. Cases Holding Public Policy Does Not Bar Claims Based on Misrepresented Paternity

In Koelle v. Zwiren, the Appellate Court of Illinois determined public policy did not bar tort claims based on misrepresented paternity. In Zwiren, Erik Koelle (“Erik”) sued Jan Zwiren (“Jan”) for fraud, intentional infliction of emotional distress, and equitable relief after Jan deceived Erik into believing he was her child’s father. In the 1970s, Jan was involved with Erik’s father. Erik, a teenager at the time, saw Jan as a maternal figure and loved and respected her. Jan had a forceful presence and a powerful influence on Erik. After Erik’s father and Jan separated in the late 1970s, Erik and Jan maintained a close relationship. Erik began seeking advice from Jan on personal and professional matters. In the fall of 1983, Jan initiated sexual intercourse with Erik. In July 1984, Jan gave birth to a daughter, Jane Roe (“Jane Roe”). She later told Erik that he was Jane Roe’s father.

For eight years, Erik was very active in Jane Roe’s life, and they had a warm father-daughter relationship. However, according to Erik, the situation was extremely emotionally draining. Even
before learning he was Jane Roe's father, Erik struggled with guilt because of his relationship with Jan.\textsuperscript{332} Although he enjoyed fatherhood, Erik felt extreme anxiety over the illicit nature of his behavior.\textsuperscript{333}

As a result, Erik began seeing a counselor and eventually told close friends about the situation.\textsuperscript{334} Some of Erik’s friends questioned whether Erik was actually Jane Roe’s father and suggested Erik get a paternity test.\textsuperscript{335} After much reluctance, Erik allowed the test, which conclusively determined Erik was not Jane Roe’s father.\textsuperscript{336}

Erik filed suit against Jan in the Circuit Court of Cook County, Illinois, alleging fraud and intentional infliction of emotional distress.\textsuperscript{337} Erik also brought a claim for equitable relief, requesting a mandatory injunction that would grant him visitation rights.\textsuperscript{338} Erik further requested Jane Roe to be told he was not her father.\textsuperscript{339} Circuit Court Judge Everette Braden dismissed the complaint.\textsuperscript{340} Erik filed an amended complaint, alleging fraud and intentional infliction of emotional distress.\textsuperscript{341} Circuit Court Judge Thomas Durkin dismissed the complaint, holding Erik should have been skeptical when told he was Jane Roe’s father and therefore, the applicable statutes of limitations barred his claims.\textsuperscript{342} Judge Durkin also found Erik failed to state a claim upon which relief could be granted because love and affection were not something for which Erik could receive compensation.\textsuperscript{343}

Erik appealed the decisions of the trial court to the Appellate Court of Illinois, First District, First Division, arguing the trial court erred in dismissing his claims.\textsuperscript{344} The Appellate Court of Illinois reversed the judgment of the trial court on all grounds.\textsuperscript{345} Justice Robert Buckley, writing for a unanimous court, determined the trial court misunderstood the nature of Erik’s claims.\textsuperscript{346} The court reasoned

\textsuperscript{332} \textit{Id.}
\textsuperscript{333} \textit{Id.} The court stated Erik felt guilty because Jan was twice his age and had once been a mother figure to him. \textit{Id.}
\textsuperscript{334} \textit{Id.}
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id.} at 869, 871.
\textsuperscript{338} \textit{Id.} at 871.
\textsuperscript{339} \textit{Id.}
\textsuperscript{340} \textit{Id.} at 869, 871. The Appellate Court of Illinois did not give the basis for this dismissal. \textit{Id.}
\textsuperscript{341} \textit{Id.} at 871-72.
\textsuperscript{342} \textit{Id.} at 869, 872.
\textsuperscript{343} \textit{Id.} at 872.
\textsuperscript{344} \textit{Id.} at 869-70.
\textsuperscript{345} \textit{Id.} at 875.
\textsuperscript{346} \textit{Id.} at 869, 875.
Erik did not seek compensation for love and affection. Instead, the court stated Erik sought compensation for the harm he suffered because of Jan's fraud and for the pain and anxiety he felt due to Jan's intentional infliction of emotional distress.

In addition, the court rejected a claim by Jan that public policy barred Erik's lawsuit because of the "intrafamilial warfare" that may harm the child. The court declared Jan herself caused any injury Jane Roe may have suffered. The court found public policy should not protect people who engage in behavior like Jan's, and the court would not allow Jan to use Jane Roe to avoid liability for the consequences of her deceit.

Three years after Zwiren, in G.A.W. v. D.M.W., the Court of Appeals of Minnesota also determined public policy did not bar claims for misrepresented paternity. In G.A.W., an ex-husband ("G.A.W.") sued his former wife ("D.M.W.") for fraud, negligence, and emotional distress. G.A.W. and D.M.W. married in 1988. D.M.W. gave birth to two children during the marriage. In 1996, D.M.W. filed an action to dissolve the marriage. G.A.W. learned during the dissolution proceedings that the children born during the marriage were not his own. Accordingly, the parties reached a settlement which released G.A.W. from paying any future child support.

In 1997, G.A.W. filed suit against D.M.W. in the District Court of Hennepin County, Minnesota, alleging fraud, negligence, and emotional distress. The district court granted summary judgment to D.M.W. Judge Peter Lindberg found public policy barred G.A.W.'s claims and Minnesota law did not recognize such claims.

G.A.W. appealed the decision of the district court to the Court of Appeals of Minnesota, arguing the district court erred in determining

347. Id. at 875.
348. Id. The court noted Erik had strong feelings of anxiety and difficulty in developing relationships and Erik had abandoned his career goals. Id.
349. Id. at 875.
350. Id.
351. Id.
352. 596 N.W.2d 284 (Minn. Ct. App. 1999).
354. G.A.W., 596 N.W.2d at 284.
355. Id. at 284, 286.
356. Id. at 286.
357. Id.
358. Id. The court stated that D.M.W. did not reveal that she had affairs while married to G.A.W. Id.
359. Id.
360. Id. at 284, 286.
361. Id. at 286.
362. Id. at 284, 286-87. Judge Lindberg also found claim and issue preclusion barred G.A.W.'s action. Id. at 286-87.
MISREPRESENTED PATERNITY

The Court of Appeals of Minnesota agreed with G.A.W., concluding public policy did not bar his claims. Judge Thomas Kalitowski, writing for a unanimous court, reviewed similar cases in other jurisdictions. The court noted the claims raised by G.A.W. concerned torts recognized under Minnesota law and that interspousal immunity no longer applied. The court therefore concluded there was no established legal barrier preventing someone from bringing claims for fraud, misrepresentation, or intentional infliction of emotional distress against a former spouse. The court opined if the Minnesota legislature intended to abolish such torts, then the legislature would have acted accordingly.

D. SECONDARY AUTHORITY DISCUSSING THE SPLIT AMONG JURISDICTIONS ON THE ISSUE OF MISREPRESENTED PATERNITY

In *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*, Linda Berger discussed whether courts should recognize marital claims of intentional infliction of emotional distress based on intentional deceit when those claims obstruct the creation or the continuation of parent-child relationships. The article reviewed the current landscape of emotional distress claims between spouses. In particular, the article examined the progression of emotional distress claims based on interference with parent-child relationships, beginning with California's continual rejection of these claims and then discussing the recent acceptance of these claims by other states. The article then evaluated the arguments for and against permitting emotional distress claims.

363. *Id.* at 284, 286. The court indicated G.A.W. also argued the court erred in deciding claim and issue preclusion barred his action. *Id.* at 286.
364. *Id.* at 290.
365. *Id.* at 284, 289-90.
366. *Id.* at 290.
367. *Id.*
368. *Id.* at 289. The court noted in 1978 the Minnesota legislature abolished "heartbalm" actions such as breach of promise, alienation of affection, criminal conversation, and seduction. *Id.* The court also determined claim and issue preclusion did not bar G.A.W.'s case. *Id.* at 291.
371. *Id.*
372. *Id.*
According to Berger, the argument against permitting spousal claims of intentional infliction of emotional distress rested in part on the historical view that such problems were family affairs and therefore, were not for the legal system to solve.\textsuperscript{373} Berger stated courts were concerned it would be improper to interfere in familial relationships and perhaps even impossible to remedy familial harms.\textsuperscript{374} Berger indicated many courts also were concerned about the “best interests” of the children and this concern supported the argument against permitting claims for intentional infliction of emotional distress.\textsuperscript{375} Additionally, Berger noted courts were concerned about spouses colluding for insurance purposes or a vengeful spouse filing fraudulent claims.\textsuperscript{376}

Specifically regarding claims for misrepresented paternity, Berger discussed the rationale some courts used in ruling against an ex-husband seeking relief.\textsuperscript{377} Berger stated that, with its emotional power, an argument that the creation of a parent-child bond is not “damage” carries strong influence.\textsuperscript{378} According to Berger, the argument comes from a personal reaction that alleging such damage in essence tells a child, “I wish you had never been born,” and past reluctance to acknowledge the immeasurable value of social relationships due to the difficulty of calculating damages.\textsuperscript{379}

Berger also discussed the rationale other courts used in deciding in favor of an ex-husband seeking relief.\textsuperscript{380} According to Berger, the argument for permitting spousal claims of intentional infliction of emotional distress rested in part on the notion that where a wrongful act has occurred, there should be legal responsibility.\textsuperscript{381} Berger stated emotional distress claims were allowed because such claims sought compensation, not for the support payments incurred, but for the emotional losses suffered.\textsuperscript{382} Berger noted because paternity already had been determined, some courts reason the children involved

\begin{footnotesize}
\begin{itemize}
    \item 373. \textit{Id.} at 459.
    \item 374. \textit{Id.} at 462.
    \item 375. \textit{Id.} at 463.
    \item 376. \textit{Id.}
    \item 378. \textit{Id.} at 521.
    \item 379. \textit{Id.}
    \item 381. \textit{Id.} at 485.
    \item 382. \textit{Id.} at 501-502.
\end{itemize}
\end{footnotesize}
did not have to be parties or witnesses; therefore, the “best interest” concern was irrelevant.\textsuperscript{383} Berger further noted one may argue monetary damages could not possibly compensate for emotional loss.\textsuperscript{384} However, Berger maintained such damages also could not compensate for the loss of a limb, but no one questioned such damages in personal injury lawsuits.\textsuperscript{385}

Thus, Berger’s article presented both sides of the argument for and against allowing emotional distress claims.\textsuperscript{386} The article endorsed recognition of emotional distress claims between spouses when one parent had intentionally interfered with the parent-child relationship.\textsuperscript{387} Berger stated parenthood creates a relationship with both emotional effects and legal dimensions.\textsuperscript{388} Berger noted parenthood cannot be dissolved by saying “I don’t love you anymore.”\textsuperscript{389} However, Berger maintained recognizing protectable interests in the creation and continuance of a parent-child relationship, and allowing liability for intentional disruption of that relationship may assure both parents and children that the law will protect their expectations of stability in the relationship.\textsuperscript{390}

\section*{ANALYSIS}

In \textit{Day v. Heller},\textsuperscript{391} the Supreme Court of Nebraska refused to recognize claims in tort or assumpsit against an ex-wife and mother who misrepresented to her ex-husband their child’s true biological paternity.\textsuperscript{392} The court denied Robert Day (“Robert”) the right to recover under fraud, assumpsit, or intentional infliction of emotional distress.\textsuperscript{393} Specifically, the court determined it would not recognize such claims against a deceiving mother because public policy barred them.\textsuperscript{394} The court maintained that having a close and loving parent-child relationship imposed on someone was not the type of harm the law should seek to remedy, even if a mother’s misrepresentation of the child’s biological paternity imposed such a relationship.\textsuperscript{395} The court determined, if forced to decide between adopting a tort that brings

\begin{itemize}
\item \textsuperscript{383} \textit{Id.} at 503.
\item \textsuperscript{384} \textit{Id.} at 521-22.
\item \textsuperscript{385} \textit{Id.}
\item \textsuperscript{386} \textit{Id.} at 451.
\item \textsuperscript{387} \textit{Id.} at 531.
\item \textsuperscript{388} \textit{Id.}
\item \textsuperscript{389} \textit{Id.}
\item \textsuperscript{390} \textit{Id.}
\item \textsuperscript{391} 264 Neb. 934, 653 N.W.2d 475 (2002).
\item \textsuperscript{392} \textit{Day v. Heller}, 264 Neb. 934, 937, 938, 944, 653 N.W.2d 475, 478, 482 (2002).
\item \textsuperscript{393} \textit{Day}, 264 Neb. at 944, 653 N.W.2d at 482.
\item \textsuperscript{394} \textit{Id.}
\item \textsuperscript{395} \textit{Id.} at 939, 653 N.W.2d at 479.
\end{itemize}
with it all the negative consequences of a custody dispute or asking a deceived ex-husband to go without compensation for his emotional injury, the court would ask the ex-husband to forego compensation.\textsuperscript{396}

The birth of a child brings lasting responsibilities to the child’s parents.\textsuperscript{397} In Nebraska, if those parents are married, the law presumes the child born to them is the legitimate child of the marriage.\textsuperscript{398} If those parents then divorce, each parent retains a duty to support the child.\textsuperscript{399} In ordinary cases of disputed paternity, the interests and rights of all those involved are in great conflict.\textsuperscript{400} Generally, courts focus on the interests of the father or the child because courts see the mother as the wrongdoer.\textsuperscript{401} Some courts prioritize fairness to men, while others prioritize the child’s “best interest.”\textsuperscript{402}

In particular, the Supreme Court of Nebraska has dealt with the issues of disputed paternity and subsequent child support obligations for years.\textsuperscript{403} However, prior to \textit{Day}, the court had not yet determined whether to recognize claims for misrepresented paternity.\textsuperscript{404} Courts in other jurisdictions have come to differing conclusions in deciding whether to recognize such claims.\textsuperscript{405} After considering approaches taken elsewhere, the \textit{Day} court concluded, although persuasive arguments existed on both sides, the law should not hold a mother legally responsible in tort when her misrepresentation of paternity endangers an existing parent-child bond.\textsuperscript{406} The court stated it would rather ask

\begin{itemize}
\item \textsuperscript{396} \textit{Id.} at 944, 653 N.W.2d at 482.
\item \textsuperscript{397} \textsc{Mary L. Boland, Your Right to Child Custody, Visitation, and Support} 7 (2000).
\item \textsuperscript{398} \textsc{Neb. Rev. Stat.} § 42-377 (Reissue 1998) (stating “Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-381 shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown”).
\item \textsuperscript{399} \textsc{Neb. Rev. Stat.} § 42-364 (Reissue 1998).
\item \textsuperscript{400} Theresa Glennon, \textit{Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity}, 102 \textsc{W. Va. L. Rev.} 547, 594 (2000).
\item \textsuperscript{401} \textit{Id.}
\item \textsuperscript{402} \textit{Id.}
\item \textsuperscript{404} \textit{Day}, 264 Neb. at 938, 653 N.W.2d at 478.
\item \textsuperscript{406} \textit{Day}, 264 Neb. at 942, 653 N.W.2d at 481.
\end{itemize}
a deceived father to go uncompensated than potentially cause detriment to a child.407

This Analysis will examine prior paternity and child support cases to demonstrate the problems with the Day court's reasoning.408 This Analysis will begin by illustrating prior Nebraska decisions in which the court put the onus on the biological father to pay child support, emphasizing the importance of the biological father.409 Next, this Analysis will demonstrate that a woman in Robin's situation could have sought retroactive child support from the child's true father, making her misrepresentation to Robert unnecessary.410 This Analysis will then explain how the Day court in effect forced Robert to stand in loco parentis to Adam, even though Robert had not chosen to do so.411 Finally, this Analysis will place Day in the context of similar cases in other jurisdictions.412 Specifically, this Analysis will scrutinize the cases on which the court relied and its use of secondary authority.413

A. THE SUPREME COURT OF NEBRASKA IGNORED NEBRASKA CASE LAW WHICH PUT THE ONUS ON THE BIOLOGICAL FATHER TO PAY CHILD SUPPORT

1. The Supreme Court of Nebraska Ignored Prior Cases Which Emphasized the Importance of the Biological Father

In Day, the Supreme Court of Nebraska undermined its prior decisions, which had placed the obligation to pay child support on the biological father.414 The court stated, by his claims, Robert was in effect saying, "He is not my son; I want my money back."415 The court also stated a claim that sought recovery for the creation of a parent-child bond in essence tells the child, "I wish you had never been born."416 Regarding Robert's action for intentional infliction of emotional distress in particular, the court maintained Robert's petition merely stated Robert and Adam had a loving relationship before Rob-

407. Id. at 944, 653 N.W.2d at 482. The court stated: We are not unsympathetic to a plaintiff who has been led to believe that a child is his when in fact the child is not. But, forced to choose between adopting a tort that carries all the detrimental effects of a custody battle or asking a plaintiff to go uncompensated for his emotional pain, we choose the latter. Id.

408. See infra notes 414-507 and accompanying text.
409. See infra notes 415-55 and accompanying text.
410. See infra notes 455-72 and accompanying text.
411. See infra notes 473-507 and accompanying text.
412. See infra notes 508-72 and accompanying text.
413. Id.
414. See infra notes 415-55 and accompanying text.
415. Day, 264 Neb. at 939, 653 N.W.2d at 479.
416. Id.
ert knew Adam was not his biological son; finding out the truth damaged Robert's relationship with Adam; and Robert suffered emotional distress because of this damage. 417

By focusing on the emotionally charged aspects of Robert's case and public policy arguments, the Day court ignored binding Nebraska precedent and made no mention of the practical aspect of the case — the responsibility of Adam's biological father to pay child support. 418 For example, in Younkin v. Younkin, 419 an ex-husband filed a motion to vacate or modify his divorce decree because after his child's birth, which was during the divorce proceeding, he became aware of factors that led him to believe he was not the child's father. 420 The Supreme Court of Nebraska determined the ex-husband's motion sufficiently raised the issue of paternity and the earlier divorce proceeding did not resolve that particular issue. 421 The court maintained the ex-husband was entitled to an evidentiary hearing on the paternity issue and he had disclaimed paternity of the child. 422 The court declared paternity, by the man judicially required to pay child support, was an essential fact necessary to uphold a support order. 423 Unlike the Younkin court, the Day court determined an ex-husband was responsible for child support despite paternity tests proving he was not the biological father. 424 Thus, the Day court ignored precedent and undermined prior decisions like Younkin which put the onus to pay child support on the biological father. 425

Additionally, in State on Behalf of J.R. v. Mendoza, 426 the state sought judgment against a man, alleging that the man was a child's biological father and seeking child support from him. 427 The man argued, under section 43-1409 of the Nebraska Revised Statutes, the actions of another man, who had acknowledged he was the child's father,
barred the lawsuit against him. However, the Supreme Court of Nebraska disagreed, reiterating the duty of the biological father to support his child. The court stated it would be inequitable to give a biological father extensive rights if the court did not also impose on the father corresponding duties. The court reasoned section 43-1409 was designed to help courts identify the biological fathers of children born outside of marriage, not to help biological fathers evade their duties of support. Unlike the Mendoza court, the Day court allowed a non-biological father to sustain the burdens ordinarily imposed on a biological father. As a result, the Day court ignored prior precedent which put the onus to pay child support on the biological father. The court's ruling in Day thus undermined its prior decisions which emphasized the importance of the biological father's duty to support his child.

Moreover, in Quintela v. Quintela, an ex-husband appealed his divorce decree. The ex-husband argued the lower court erred in deciding paternity and obligating him to pay child support when paternity tests proved the child was not his biological son. The Court of Appeals of Nebraska determined a paternity test, indicating there was no possibility that the ex-husband was the father of the child born during the marriage, provided sufficient evidence to rebut the presumption of legitimacy. The court declared the duty to support a child rested first and foremost with the natural parents. The court opined it would proceed with caution in imposing a duty of support on a man who had not adopted a child and was not the child's natural

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428. Mendoza, 240 Neb. at 152, 481 N.W.2d at 168. Section 43-1409 stated, in part: A man may provide a written statement that he is a child’s father or perform acts, such as providing support, which reasonably indicate that he considers himself to be the father of the child, and in such case the man will be considered to have acknowledged the child’s paternity.

429. Id. at 159, 481 N.W.2d at 172.

430. Id. at 158-59, 481 N.W.2d at 172 (quoting Smith v. Cole, 553 So. 2d 847, 854 (La. 1989)).

431. Id. at 159, 481 N.W.2d at 172 (quoting Smith v. Cole, 553 So. 2d 847, 854 (La. 1989)).

432. Compare Mendoza, 240 Neb. at 163, 481 N.W.2d at 174 (rejecting a biological father’s “disingenuous attempt to turn the [paternity] statute on its head” and force on another man the obligations the biological father himself held), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating an ex-husband’s fraud and assumpsit claims focused only on the burden of his relationship with his son and ignored the benefits).

433. See supra notes 419-32 and accompanying text.

434. See supra notes 419-33 and accompanying text.


437. Quintela, 4 Neb. App. at 397, 544 N.W.2d at 113.

438. Id. at 401, 544 N.W.2d at 115.

439. Id. at 410, 544 N.W.2d at 120 (quoting K.B. v. D.B., 639 N.E.2d 725, 730 (Mass. App. Ct. 1994)).
Unlike the Quintela court, the Day court determined an ex-husband was responsible for child support despite paternity tests proving he was not the biological father. The Day court ignored prior precedent and imposed a duty of support on a man who was not the child's natural or adoptive parent. Thus, the Day court undermined its prior decisions which put the onus to pay child support on the biological father.

Further, in Weinand v. Weinand, the Supreme Court of Nebraska concluded an ex-husband could not be forced to pay child support for his ex-wife's child when he was not the child's biological father. The ex-husband argued the lower court erred in requiring him to make child support payments and asserted the court should have ordered the child's biological father to pay child support. The supreme court agreed, reasoning the child simply was not the ex-husband's child; therefore, by divorce, the ex-husband was merely the child's ex-stepfather. The court held when a minor child lived with and was supported by both of his or her natural parents, the responsibility for child support was solely on those parents. The court opined Nebraska divorce law did not impose an obligation to pay for the support of a minor child on any person other than a parent. Unlike the Weinand court, the Day court decided it was acceptable to allow an ex-husband to pay years of child support for a child that was not his own. The Day court imposed an obligation to pay for the support of a child on a man who was not the child's parent. Therefore, the Day court ignored prior precedent which placed the onus to pay child support on the biological father.

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441. *Compare Quintela*, 4 Neb. App. at 410, 401 N.W.2d at 120 (declaring the court would proceed with caution in imposing a duty of support on a man who has not adopted a child and is not the child's natural parent), *with Day*, 264 Neb. at 936, 944, 653 N.W.2d at 477, 482 (stating the court was sympathetic to an ex-husband who had been misled to think a child was his yet denying the ex-husband compensation when paternity tests later proved the child was not).
442. *See supra* notes 419-41 and accompanying text.
443. *See supra* notes 419-42 and accompanying text.
446. Weinand, 260 Neb. at 150, 616 N.W.2d at 4-5.
447. *Id.* at 150, 616 N.W.2d at 5.
448. *Id.* at 151-52, 616 N.W.2d at 6.
449. *Id.* at 151-52, 616 N.W.2d at 6.
450. *Compare Weinand*, 260 Neb. at 152, 616 N.W.2d at 6 (concluding an ex-husband could not be forced to pay child support for his ex-wife's child when he was not the biological father), *with Day*, 264 Neb. at 944, 653 N.W.2d at 482 (forcing an ex-husband to pay child support for his ex-wife's child when he was not the biological father).
451. *Id.*
452. *See supra* notes 419-51 and accompanying text.
By focusing on the emotionally charged aspects of Robert's case and public policy arguments, the Day court made no mention of Nebraska case law or the practical aspect of the case — the responsibility of Adam's biological father to pay child support. Thus, in Day, the Supreme Court of Nebraska undermined its prior decisions which placed the responsibility for child support on the biological father and which acknowledged that an ex-husband who was not the child's biological father should not have to pay to support the child. Therefore, the Supreme Court of Nebraska erred in denying Robert's request for relief and allowing Robert to sustain the burdens that should have been imposed on Adam's true biological father.

2. The Supreme Court of Nebraska Ignored Case Law Which Permitted a Biological Mother to Recover Retroactive Child Support from a Biological Father

According to the Day court, Robert brought his case against Robin because Adam was not his son and Robert "wanted his money back." In part, Robert sought damages for the amounts he had paid in child support. Denying Robert relief, the court stated it could imagine a situation where allowing an ex-husband such relief would financially detriment the child. However, the court should have recognized, at any time, Robin could have sought retroactive child support from Adam's true father. Thus, instead of allowing Robert to sustain the burdens of biological paternity, the court should have imposed those burdens on Adam's biological father.

A court can order a biological father to pay retroactive child support to a child's mother or even to a man who has supported the child based on a false belief that the child was his own. Retroactive support ordinarily is ordered from the date the child was born to the date paternity was adjudicated. Nationwide, courts are liberal in awarding retroactive support and do not unduly limit the biological father's responsibility.

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454. See supra notes 414-53 and accompanying text.
455. See supra notes 414-54 and accompanying text.
456. Day, 264 Neb. at 939, 653 N.W.2d at 479.
457. Id. at 937, 653 N.W.2d at 477-78.
458. Id. at 944, 653 N.W.2d at 482. The court stated its concern that a successful claimant could garnish a mother's salary or take away a mother's only car. Id.
459. See infra notes 461-72 and accompanying text.
460. Id.
461. 1 DISPUTED PATERNITY PROCEEDINGS § 5.02 (Matthew Bender 5th ed., 2003).
462. Id.
463. Id.
Since State on Behalf of Matchett v. Dunkle, the Supreme Court of Nebraska has allowed retroactive child support. In Dunkle, the State of Nebraska filed a petition to determine a child's biological father and require him to pay child support. The court determined the sole issue in the case was whether section 43-1402 of the Nebraska Revised Statutes empowered the court to grant retroactive child support. The court concluded the biological father had to pay and declared that a parent was obligated to give his or her child life's basic necessities.

In contrast to the Dunkle court, the Day court allowed an ex-husband to pay child support for years for a child that was not his own. Furthermore, unlike the Dunkle court, the Day court let a biological father get out of his child support obligation all together. The Day court made no mention of Adam's biological father or of Robin's ability to obtain retroactive child support from him. Therefore, the Day court erred in allowing Robert to sustain the burdens of biological paternity instead of imposing those burdens on Adam's true biological father.

3. The Supreme Court of Nebraska, In Effect, Used the Doctrine of In Loco Parentis Even Though the Doctrine was Inapplicable to Day v. Heller

The Day court's review of the factual circumstances surrounding the misrepresentation of biological paternity did not explicitly discuss the doctrine of in loco parentis. However, the court reasoned as though Robert had elected to stand in loco parentis when it determined that Robert was not entitled to get his money back. The Day

466. Dunkle, 244 Neb. at 640, 508 N.W.2d at 581.
467. Id. at 640, 508 N.W.2d at 581.
468. Id. at 643, 644-45, 508 N.W.2d at 583.
470. Compare Dunkle, 244 Neb. at 643, 644-45, 508 N.W.2d at 583 (concluding the biological father had to pay retroactive child support and stating a biological parent is obligated to give his or her child life's basic necessities), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (characterizing a deceived ex-husband's request to recover his child support payments as saying, "He is not my son; I want my money back").
472. See supra notes 455-71 and accompanying text.
474. See infra notes 476-507 and accompanying text.
court refused to grant Robert relief despite the fact that he was deceived into standing in loco parentis to Adam.475

Previously, in Quintela, the Court of Appeals of Nebraska determined a paternity test, indicating there was no possibility that an ex-husband was the father of the child born during the marriage, provided sufficient evidence to rebut the presumption of legitimacy.476 Discussing the doctrine of in loco parentis, the court explained a man standing in loco parentis is one who put himself in the circumstances of a lawful parent by assuming the duties that go along with being a parent, but who has not gone through the formalities of legal adoption.477 The court noted the assumption of the parent-child relation was a question of intention, which may be demonstrated by the actions and statements of the person alleged to be in that relation.478 The court determined the ex-husband’s denial of the child’s paternity and his challenge to the ex-wife’s request for child support showed, even if he had stood in loco parentis, he now wanted, and should be allowed, to put an end to any parental relationship.479 Unlike the Quintela court, the Day court imposed the duties of a parent on an ex-husband despite the fact paternity tests proved he was not the biological parent.480 Therefore, in effect, the Day court forced Robert to stand in loco parentis even though he had not chosen to do so.481

In addition, in State on Behalf of Hopkins v. Batt,482 the State of Nebraska initiated a paternity proceeding to determine a child’s biological father after his mother and her husband divorced.483 When

475. Compare Weinand, 260 Neb. at 153-54, 616 N.W.2d at 7 (stating “the term ‘in loco parentis’ refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations”), with Day, 264 Neb. at 935, 653 N.W.2d at 477 (stating Robert paid child support, medical expenses, and daycare costs under the belief he was the child’s biological father).

476. Quintela, 4 Neb. App. at 401, 544 N.W.2d at 115.

477. Id. at 401-02, 544 N.W.2d at 116 (quoting Hickenbottom v. Hickenbottom, 239 Neb. 579, 592, 477 N.W.2d 8, 17 (1991) (quoting Austin v. Austin, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946))).

478. Id. at 402, 544 N.W.2d at 116 (quoting Hickenbottom v. Hickenbottom, 239 Neb. 579, 592, 477 N.W.2d 8, 17 (1991) (quoting Austin v. Austin, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946))).

479. Id.

480. Compare Quintela, 4 Neb. App. at 402, 544 N.W.2d at 116 (determining an ex-husband’s denial of a child’s paternity and his challenge to his ex-wife’s request for child support showed, even if he had stood in loco parentis, he now wanted to put an end to any parental relationship), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child relationship imposed on an ex-husband, including the obligation to pay child support for the child, was the type of harm the law should attempt to remedy).

481. See supra notes 473-80 and accompanying text.


the court then ordered the biological father to pay child support, he
appealed the decision, arguing the district court erred in rejecting his
defenses to the paternity claim.484 One of those defenses was that the
court should have applied the doctrine of in loco parentis to the
mother's ex-husband.485 The Supreme Court of Nebraska affirmed
the decision of the district court, finding that each of the biological
father's defenses were without merit.486 The court reasoned that de-
spite whatever payments the woman's ex-husband made, the biologi-
cal father was still responsible for giving the child complete
support.487 The court acknowledged, without a biological connection
between a husband and his wife's child, the man may acquire rights
and duties when he chooses to stand in loco parentis to the child.488
However, the court determined the doctrine of in loco parentis would
not protect the real biological father from his paternity obligation.489
The court noted the mother had returned the child support payments
for the child to her ex-husband and there was no evidence to indicate
the ex-husband intended to stand in loco parentis with the child.490
Unlike the Batt court, the Day court imposed the duties of a parent on
an ex-husband despite the fact that paternity tests proved he was not
the biological parent.491 As a result, the Day court effectively forced
Robert to stand in loco parentis even though he had not chosen to do
so.492

Furthermore, in Weinand, the Supreme Court of Nebraska va-
cated a portion of a district court's dissolution decree, which required
an ex-husband to pay child support for his ex-wife's child after pater-
nity tests showed the ex-husband was not the child's biological fa-
ther.493 The court reasoned the child simply was not the ex-husband's
biological child; therefore, by divorce, the ex-husband was merely the
child's ex-stepfather.494 The court noted the ex-husband was not

484. Batt, 253 Neb. at 854, 573 N.W.2d at 429.
485. Id. at 860, 573 N.W.2d at 432.
486. Id. at 854, 866, 573 N.W.2d at 429, 435.
487. Id. at 866, 573 N.W.2d at 435.
488. Id. at 861, 573 N.W.2d at 433.
489. Id. at 862, 573 N.W.2d at 433.
490. Id. at 862, 866, 573 N.W.2d at 433, 435.
491. Compare Batt, 253 Neb. at 866, 573 N.W.2d at 435 (reasoning despite whatever
payments had been made by the woman's ex-husband, the biological father was still
responsible for giving the child complete support and stating that the doctrine of in loco
parentis would not protect the real biological father from his paternity obligation), with
Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child
relationship imposed on an ex-husband, including the obligation to pay child support for
the child, was the type of harm the law should attempt to remedy).
492. See supra notes 473-91 and accompanying text.
493. Weinand, 260 Neb. at 156, 616 N.W.2d at 8.
494. Id. at 150, 616 N.W.2d at 5.
standing in loco parentis to the child. The court stated a person electing to stand in loco parentis to a child must have put himself in the circumstances by assuming the requisite parental responsibilities, and that the rights, obligations, and liabilities of such a person are equivalent to those of the legally recognized parent. The court declared the doctrine of in loco parentis referred to someone who had completely put himself in the circumstances of a lawful parent by carrying all responsibilities incident to the parental relationship and that the court should only find a parent-child relationship if the entirety of the situation demonstrated that the ex-husband intended to take the place of the lawful parent. Unlike the Weinand court, the Day court imposed the duties of a parent on an ex-husband despite the fact that paternity tests proved he was not the biological parent. Thus, in practical effect, the Day court forced Robert to stand in loco parentis even though he had not chosen to do so.

Though the Day court did not explicitly discuss the doctrine of in loco parentis, the court reasoned as though the ex-husband had elected to stand in loco parentis when it determined that Robert was not entitled to get his money back. Robert did not elect to stand in loco parentis to Adam. The Day court allowed Robert to carry such obligations even though the entirety of the situation demonstrated Robert had no choice in the matter. Thus, the Day court erred in refusing to grant Robert relief and forcing him to bear burdens that he did not elect to bear.

By focusing on the emotionally charged aspects of Robert's case and public policy arguments, the court in Day ignored binding Nebraska precedent. Additionally, the court made no mention of the responsibility of Adam's biological father to pay child support. Instead, the court effectively forced Robert to stand in loco parentis to

495. Id. at 152, 616 N.W.2d at 6.
496. Id. at 152-53, 616 N.W.2d at 6.
497. Id. at 153-53, 616 N.W.2d at 7.
498. Compare Weinand, 260 Neb. at 150, 616 N.W.2d at 5 (reasoning the child simply was not the ex-husband's biological child; therefore, by divorce, the ex-husband was merely the child's ex-stepfather), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child relationship imposed on an ex-husband, including the obligation to pay child support for the child, was not the type of harm the law should attempt to remedy).
499. See supra notes 473-98 and accompanying text.
500. See supra notes 473-99 and accompanying text.
501. See supra notes 23-105 and accompanying text.
502. Id.
503. See supra notes 473-99 and accompanying text.
504. See supra notes 414-99 and accompanying text.
Adam, even though he had not elected to do so. Thus, the Day court erred in determining public policy barred Robert’s claims and refusing to grant him relief.

B. THE SUPREME COURT OF NEBRASKA MISCONSTRUED THE SECONDARY AUTHORITY ON WHICH IT RELIED IN DAY v. HELLER

In Day, the Supreme Court of Nebraska described Robert’s fraud and assumpsit claims as seeking recovery for the creation of a parent-child relationship with Adam. The court described Robert’s intentional infliction of emotional distress claim as seeking recovery for the emotional harm suffered when the misrepresentation led to the threatened destruction of a parent-child relationship. The court concluded the law should not hold a mother legally responsible when her misrepresentation of the child’s paternity endangered an existing parent-child relationship.

In reaching its conclusion that public policy barred Robert’s claims, the Day court relied on secondary authority. In particular, the court cited Linda Berger, Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships. The court claimed, according to Berger’s article a tort or assumpsit cause of action that attempts to recover for the creation of a parent-child bond in essence tells the child, “I wish you had never been born.”

A portion of Berger’s article focused on claims like Robert’s for misrepresented paternity. Berger discussed the rationale some courts use in deciding against an ex-husband seeking relief. Berger stated, with its emotional power, an argument like the one in Nagy v.

506. See supra notes 473-99 and accompanying text.  
507. See supra notes 414-506 and accompanying text.  
508. Day, 264 Neb. at 939, 653 N.W.2d at 479.  
509. Id. at 941, 653 N.W.2d at 480.  
510. 2 DISPUTED PATERNITY PROCEEDINGS § 29.05 (Matthew Bender 5th ed., 2003).  
511. Day, 264 Neb. at 941-44, 653 N.W.2d at 480-82.  
512. Id. at 939, 941, 943-44, 653 N.W.2d at 479, 480, 482.  
513. Id. at 939, 653 N.W.2d at 479.  
514. See id. at 938, 653 N.W.2d at 478 (stating Robert’s claims were for misrepresented paternity); Linda L. Berger, Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships, 33 LOY. L.A. L. REV. 449, 501 (2000) (discussing other cases for misrepresented paternity).  
Nagy,\textsuperscript{516} that the creation of a parent-child bond is not "damage," carries strong influence.\textsuperscript{517} According to Berger, the argument stems from a personal reaction that alleging such damage in essence tells a child, "I wish you had never been born," and past reluctance to acknowledge the immeasurable value of social relationships due to the difficulty of measuring damages.\textsuperscript{518}

However, Berger also discussed the rationale other courts used in deciding in favor of an ex-husband seeking relief.\textsuperscript{519} Berger's article noted that although one may argue that monetary damages cannot possibly compensate for emotional loss, such damages also cannot compensate for the loss of a limb, but no one questions such damages in personal injury lawsuits.\textsuperscript{520} Thus, Berger's article presented both sides of the argument, for and against allowing claims like Robert's.\textsuperscript{521} In addition, the article endorsed recognition of emotional distress claims between spouses when there had been intentional interference with the parent-child relationship.\textsuperscript{522}

The Day court stated Berger's article advocated recognizing a tort where misrepresentation of biological fatherhood endangered an existing parent-child bond and questioned recognizing a tort that permitted recovery for the creation of a parent-child bond.\textsuperscript{523} Contrary to the court's description in Day, Berger's article merely assessed the arguments for and against claims like Robert's; the article actually concluded one spouse's purposeful and unjustified intrusion with a parent-child relationship should lead to liability for resulting emotional harm.\textsuperscript{524} Berger maintained that recognizing protectable interests in the creation and continuance of a parent-child relationship, and allowing liability for intentional disruption of that relationship may assure both parents and children that their expectations of stability in the relationship will be protected.\textsuperscript{525} Thus, the Day court

\textsuperscript{516} 258 Cal. Rptr. 787 (Cal. Ct. App. 1989).
\textsuperscript{517} Berger, 33 Loy. L.A. L. Rev. at 521.
\textsuperscript{518} Id.
\textsuperscript{519} Id. at 501-02 (citing Koelle v. Zwiren, 672 N.E.2d 868 (Ill. App. Ct. 1996) (determining public policy did not bar claims for misrepresented paternity); G.A.W. v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999) (determining public policy did not bar claims for misrepresented paternity)).
\textsuperscript{520} Id. at 521-22.
\textsuperscript{521} Id. at 451.
\textsuperscript{522} Id. at 531.
\textsuperscript{523} Day, 264 Neb. at 939, 653 N.W.2d at 479.
\textsuperscript{524} See id. at 938, 653 N.W.2d at 479 (stating Robert's claims were for misrepresented paternity); Berger, 33 Loy. L.A. L. Rev. at 451 (discussing arguments for and against allowing claims for misrepresented paternity).
\textsuperscript{525} Berger, 33 Loy. L.A. L. Rev. at 531.
misconstrued Berger's article in determining public policy barred Robert's claims.526

C. The Supreme Court of Nebraska Should Have Relied on Other Cases, Followed Binding Nebraska Precedent, and Determined Public Policy Did Not Bar Claims for Misrepresented Paternity

In Day, the Supreme Court of Nebraska determined public policy barred claims in tort and assumpsit against an ex-wife and mother who misrepresented to her ex-husband the child's true biological paternity.527 In reaching its decision, the Day court relied in part on cases from other jurisdictions.528 The court noted other jurisdictions had conflicting opinions and admitted many of the jurisdictions made persuasive arguments.529

For example, in Nagy v. Nagy,530 the California Court of Appeal determined public policy barred an ex-husband from recovering compensation when his ex-wife deceived him into believing the child born during their marriage was his own.531 The court determined that allowing a non-biological parent to receive damages for developing a close bond with a child misrepresented to be his and performing paternal acts was not a "damage" which the law should compensate.532 In a concurring opinion, Associate Justice Earl Johnson, Jr. argued public policy only slightly outweighed the ex-husband's right of recovery.533 Justice Johnson believed the ex-husband had alleged true injuries in his claim for fraud.534 Justice Johnson opined, under somewhat different facts, a lawsuit like the ex-husband's could survive public policy concerns.535 Justice Johnson declared it was difficult to conceive of a more devastating emotional setback or one more intended to cause emotional distress than misrepresentation of paternity.536 Justice Johnson maintained the ex-husband was not alleging that his damages were the close bond he developed with the child, but instead his loss of the investment of time, money, and emotion.537 Like the Nagy court, the Day court declared public policy barred an

526. See supra notes 508-25 and accompanying text.
527. Day, 264 Neb. at 938, 653 N.W.2d at 478-79.
528. Id. at 939, 942, 653 N.W.2d at 479, 481.
529. Id. at 941-42, 653 N.W.2d at 480-81.
532. Nagy, 258 Cal. Rptr. at 791.
533. Id. at 792 (Johnson, J., concurring).
534. Id. (Johnson, J., concurring).
535. Id. (Johnson, J., concurring).
536. Id. at 793 (Johnson, J., concurring).
537. Id. at 792 (Johnson, J., concurring).
ex-husband from recovering compensation when his ex-wife deceived him into believing the child born during their marriage was his own. However, instead of relying on the Nagy court's public policy arguments, the Day court should have looked to its own prior precedent which emphasized the duty of the biological father to pay child support. Thus, the court did not need to decide Day on public policy grounds. The court should have decided the case based on prior Nebraska case law and allowed Robert the opportunity to seek relief.

Like Nagy, in Steve H. v. Wendy S., the California Court of Appeal concluded the adverse consequences from permitting an ex-husband's cause of action against an ex-wife who deceived him about their child's paternity outweighed the social benefit. The court reasoned the ex-husband's claim clearly was precluded to the extent he sought damages for the close and loving bond created with the child. The court noted, though the foundation for the ex-husband's claim was his ex-wife's attempt to destroy his relationship with the child, the case still posed adverse risks to the child who remained completely innocent. Like the Steve H. court, the Day court declared public policy barred an ex-husband from recovering compensation when his ex-wife deceived him into believing that the child born during their marriage was his own. However, the Day court did not need to decide the case on public policy grounds. The court should have relied on its own prior precedent and allowed Robert the opportunity to recover on his claims.

538. Compare Nagy, 258 Cal. Rptr. at 791 (maintaining allowing an ex-husband to recover damages against his ex-wife for developing a close bond with a child misrepresented to be his was not a "damage" which the law should compensate), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child relationship "imposed" on Robert was not the type of "harm" the law should seek to remedy, even if that relationship was "imposed" by a misrepresentation of the child's biological paternity).

539. See supra notes 527-38 and accompanying text.
540. See supra notes 527-39 and accompanying text.
541. See supra notes 527-40 and accompanying text.
544. Steve H., 67 Cal. Rptr. 2d at 90, 93.
545. Id. at 93.
546. Compare Steve H., 67 Cal. Rptr. 2d at 97 (concluding the social benefit from permitting an ex-husband's cause of action against the ex-wife who deceived him about their child's paternity was outweighed by the adverse consequences to the child), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child relationship "imposed" on Robert was not the type of "harm" the law should seek to remedy, even if that relationship was "imposed" by a misrepresentation of the child's biological paternity).
547. See supra notes 527-46 and accompanying text.
548. See supra notes 527-48 and accompanying text.
Conversely, in *Koelle v. Zwiren*, the Appellate Court of Illinois determined public policy did not bar tort claims based on misrepresented paternity. The court declared the child’s mother herself caused any harm the child may suffer. The court found public policy should not protect people engaging in behavior like the mother’s, and the court would not allow the mother to use her child to avoid liability for the consequences of her deceit. The court reasoned the deceived father did not seek compensation for love and affection, and the lower court had misunderstood the nature of his claims. The court indicated the non-biological father sought compensation for the harm he suffered because of the mother’s fraud and for the pain and anxiety he felt due to the mother’s intentional infliction of emotional distress. Unlike the *Zwiren* court, the *Day* court determined public policy barred the ex-husband’s claims because, when forced to choose between adopting a tort which would adversely affect the child or asking the deceived father to go without compensation, the court would choose the latter. However, the *Day* court should have relied on its own prior precedent, which clearly put the onus to pay child support on the biological father. Had the court used its own precedent and then followed a case like *Zwiren*, the *Day* court should have determined that public policy did not bar Robert’s claims.

Like *Zwiren*, in *G.A.W. v. D.M.W.*, the Court of Appeals of Minnesota also determined public policy did not bar claims for misrepresented paternity. In *G.A.W.*, an ex-husband sued his former wife for fraud, negligence, and emotional distress. The court concluded public policy did not bar his claims. The court noted the ex-husband’s claims concerned torts recognized under Minnesota law. The court concluded, given the abolition of interspousal immunity, there was no established legal barrier preventing someone from bring-

551. *Zwiren*, 672 N.E.2d at 875.
552. Id.
553. Id.
554. Id. The court noted Erik had strong feelings of anxiety and difficulty in developing relationships and Erik had abandoned his career goals. Id.
555. *Compare Zwiren*, 672 N.E.2d at 875 (declaring any harm the child may suffer was caused by the child’s mother herself), with *Day*, 264 Neb. at 944, 653 N.W.2d at 482 (declaring the only legitimate reason to embrace the tort would be to compensate the ex-husband for the harm he had suffered).
556. *See supra* notes 549-55 and accompanying text.
557. *See supra* notes 549-56 and accompanying text.
558. 596 N.W.2d 284 (Minn. Ct. App. 1999).
559. 596 N.W.2d 284, 290 (Minn. Ct. App. 1999).
560. 596 N.W.2d at 284.
561. Id. at 290.
562. Id.
ing such claims against a former spouse. The court opined that if the Minnesota legislature intended to abolish such torts, it would have done so. Unlike the G.A.W. court, the Day court determined public policy barred the ex-husband's claims because, when forced to choose between adopting a tort that would adversely affect the child or asking the deceived father to go without compensation, the court would choose the latter. The Day court should have relied on a case like G.A.W., instead of the cases on which it relied. If it had done so, the court could have used its own prior precedent, which placed the duty of child support on the biological father, and determined public policy did not bar Robert's claims.

In Day, the Supreme Court of Nebraska refused to recognize claims in tort or assumpsit against an ex-wife for misrepresenting to her ex-husband their child's true biological paternity. Like Nagy and Steve H., the Day court declared public policy barred an ex-husband from recovering compensation when his ex-wife deceived him into believing the child born during their marriage was his own. Unlike Zwiren and G.A.W., the Day court determined public policy barred the ex-husband's claims because, when forced to choose between adopting a tort which would adversely affect the child or asking the deceived father to go without compensation, the court would choose the latter. However, instead of relying on cases outside Nebraska, the Day court should have used its own prior precedent which

563. Id.
564. Id. at 289.
565. Compare G.A.W., 596 N.W.2d at 290 (stating there was no established legal barrier preventing someone from bringing emotional distress claims against a former spouse), with Day, 264 Neb. at 944, 653 N.W.2d at 482 (declaring the only legitimate reason to embrace the tort of intentional infliction of emotional distress would be to compensate the ex-husband for the harm he had suffered).
566. See supra notes 549-65 and accompanying text.
567. See supra notes 549-66 and accompanying text.
568. Day, 264 Neb. at 937, 938, 944, 653 N.W.2d at 478, 482.
569. Compare Nagy, 258 Cal. Rptr. at 791 (maintaining allowing an ex-husband to recover damages against his ex-wife for developing a close bond with a child misrepresented to be his was not a "damage" which the law should compensate), and Steve H., 67 Cal. Rptr. 2d at 97 (concluding the social benefit from permitting an ex-husband's cause of action against the ex-wife who deceived him about their child's paternity was outweighed by the adverse consequences to the child), with Day, 264 Neb. at 939, 653 N.W.2d at 479 (stating having a close and loving parent-child relationship "imposed" on Robert was not the type of "harm" the law should seek to remedy, even if that relationship was "imposed" by a misrepresentation of the child's biological paternity).
570. Compare Zwiren, 672 N.E.2d at 875 (declaring any harm the child may suffer was caused by the child's mother herself), and G.A.W., 596 N.W.2d at 290 (stating there was no established legal barrier preventing someone from bringing such claims against a former spouse), with Day, 264 Neb. at 944, 653 N.W.2d at 482 (declaring the only legitimate reason to embrace the tort would be to compensate the ex-husband for the harm he had suffered).
placed the responsibility for child support on the biological father. The court could have cited its own cases and then relied on cases like *Zwiren* and *G.A.W.* to show that public policy did not bar Robert's claims.

**CONCLUSION**

In *Day v. Heller*, the Supreme Court of Nebraska was called upon to right a wrong. For twelve years, Robin Heller ("Robin") deceived Robert Day ("Robert") into believing the child born during their marriage was his own. It was not until several years after the couple divorced that Robert discovered the truth. When Robert requested the court make Robin compensate him for her deceit, the Supreme Court of Nebraska denied his request, stating public policy stood as a bar. The court refused to recognize claims in tort or assumpsit against an ex-wife and mother who misrepresented to her ex-husband their child's true biological paternity.

In *Day*, the Supreme Court of Nebraska undermined prior decisions, which emphasized the importance of the biological father and put the onus to pay child support directly on the biological father. The court also ignored prior case law that would have permitted Robin to seek retroactive child support from Adam's true biological father. In effect, the court forced Robert to stand in loco parentis to Adam, even though he had not chosen to do so. Moreover, the *Day* court misconstrued the secondary authority on which it relied. Had the court used its own prior precedent, the court should have found public policy did not bar Robert's claims. Instead, the court set a precedent that punishes the wrong man and was neither realistic nor helpful. In Nebraska, there is already

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571. *See supra* notes 527-70 and accompanying text.
572. *See supra* notes 549-71 and accompanying text.
573. 264 Neb. 934, 653 N.W.2d 475 (2002).
574. *See supra* notes 21-100 and accompanying text.
576. *Day*, 264 Neb. at 936, 653 N.W.2d at 477.
577. *Id.* at 935, 653 N.W.2d at 476.
578. *Id.*
579. *See supra* notes 414-54 and accompanying text.
580. *See supra* notes 455-72 and accompanying text.
581. *See supra* notes 473-507 and accompanying text.
582. *See supra* notes 508-26 and accompanying text.
583. *See supra* notes 527-72 and accompanying text.
584. *Id.*
another Robert Day. Meet Dwayne A. Dale ("Dale"), who, over the course of nine years, was led to believe he was the father of a little girl. Although the girl lived with her mother, Dale provided for her health insurance, medical expenses, school meals, swimming and piano lessons, and clothing. Most importantly, Dale was very involved in his daughter's life. He was the only father the girl ever knew. However, after Dale filed a paternity action in order to obtain custody of the girl, paternity tests showed that he was not her biological father. When Dale sued the girl's mother for misrepresenting paternity, the Court of Appeals of Nebraska, following the precedent set in Day, concluded Dale's claim was barred by public policy.

The Day court made its determination based on public policy grounds. The court declared that allowing a claim like Robert's would tell a child, "I wish you had never been born." The court stated it would not send such a message. The court refused to recognize Robert's claims in order to protect Adam and other children from the inevitable "intrafamiliar warfare" that would come with such litigation. However, in the long run, Adam would be better protected by a court system that discouraged deceit and encouraged taking responsibility for one's actions. The court made its decision based on its so-called "public policy." Perhaps, though, Adam and others like him would have been better served if the court had made its decision based on something as simple as its own past precedent, and "right and wrong."

Alison Dempsey — '05

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585. See infra notes 586-91 and accompanying text.
588. Id. According to the court, Dale worked nights and eventually quite his second job to have more time to care for his daughter. Id.
590. Id.
591. Id. at *3. Despite learning he was not the girl's biological father, Dale asked the court to grant him visitation. Id. at *1, *2.
592. Day, 264 Neb. at 935, 653 N.W.2d at 476.
593. Id. at 939, 653 N.W.2d at 479.
594. Id.
595. Day, 264 Neb. at 942, 653 N.W.2d at 481.