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Note

Sex, Lies, and Genetic Tests: Challenging the Marital Presumption of Paternity Under the Minnesota Parentage Act

Deborah A. Ellingboe

[M]otherhood is a matter of fact and fatherhood a matter of opinion
....¹

When Christopher Kelly and his married lover, Pamela Cataldo, learned that she was pregnant with Kelly's child, they planned to raise the child together.² The couple even asked doctors to perform in utero tests to confirm Kelly's paternity.³ After

1. Howard Richler, *Move Over Bill, Matthew is the Big Name in Town*, THE GAZETTE (Montreal), Jan. 16, 1993, at J2.

A mother's identity is generally only an issue when babies are switched at birth. Ronald J. Richards, Comment, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 610 n.5 (1989). Men, however, can seldom be certain they are the father of their children. William F. Allman, *The Mating Game*, U.S. NEWS & WORLD REP., July 19, 1993, at 56, 63. Medical sociologists have attempted to document rates of "non-paternity," in which a father falsely assumes a child to be his own. Sharon Kingman, *One in Ten Fathers' May Not Be a Parent*, THE INDEPENDENT, Oct. 4, 1991, at 3. Some studies say that as many as one in three fathers falsely believe their children to be their own. *Id.* Other studies say that non-paternity rates are closer to one in ten. *Id.* Many of these studies, however, are anecdotal and have no basis in fact. *Id.*

Non-paternity, of course, is not a modern concept. William Shakespeare, for example, expressed his skepticism of the certainty of paternity:

We are all bastards,
And that most venerable man which I
Did call my father was I know not where
When I was stamped.

WILLIAM SHAKESPEARE, CYMBELINE, act 2, sc. 5.

2. Kelly v. Cataldo, 488 N.W.2d 822, 824 (Minn. Ct. App. 1992). Kelly and Mrs. Cataldo allegedly were lovers between June 1987 and February 1988, and again between spring 1989 and September 1990. *Id.* Mrs. Cataldo has been married to Michael Cataldo since 1979. *Id.*

3. *Id.* Kelly and Mrs. Cataldo voluntarily completed genetic tests in December 1990. *Id.* In January 1991, they received an oral report from Mrs. Cataldo's obstetrician, who told the couple that the tests conclusively established Kelly as the child's father. *Id.* According to Kelly, Mrs. Cataldo also acknowledged his paternity through letters and telephone calls. *Id.*

the child's birth,⁴ Kelly sought to become part of his daughter's life.⁵ Mrs. Cataldo, however, decided that she wanted to raise the baby with her husband, Michael Cataldo.⁶ She severed Kelly's contacts with his daughter after only three visits.⁷ Kelly then filed a paternity suit in Minnesota court.⁸

Before 1989, Mr. and Mrs. Cataldo would have been secure from Kelly's paternity claims, protected by a legal fiction called the marital presumption of paternity.⁹ The marital presumption presumes a man to be a child's father if he and the child's mother are married when the child is born or were married at the probable time of conception.¹⁰ In 1989, however, Minnesota amended its parentage act.¹¹ The amended act still recognizes

4. Kelly and Mrs. Cataldo's daughter, M.C., was born May 13, 1991. *Id.*

5. *Id.* Kelly, a Massachusetts resident, visited his daughter three times in Minnesota between May and July 1991. *Id.*

6. *Id.* at 824-25. Mrs. Cataldo and her husband have another daughter, born in November 1988. *Id.* at 824. Mr. Cataldo said he considered both children his family members. *Id.* at 825.

7. *Id.* at 824. Mrs. Cataldo discontinued his visits in July 1991. *Id.* Kelly alleged that Mrs. Cataldo told him she wanted her daughter to have a normal life. *Id.*

8. *Id.* at 825. Kelly filed suit in October 1991. *Id.* He asked the court to establish his joint legal and physical custody of his daughter. *Id.*

9. The marital presumption evolved to protect illegitimate children, who at one time could not inherit or receive support from their fathers. Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 588-89 (1991). At common law, however, a presumption in favor of the mother's husband only allayed the burden of illegitimacy for children whose mothers were married. *Id.* at 589. Still, for those children, the presumption provided almost certain protection. When the presumption first arose in England, a party could only rebut it by showing that the mother's husband was either out of the country or impotent at the time of the child's conception. *Id.* Furthermore, under an evidentiary rule known as Lord Mansfield's Rule, neither husband nor wife could testify to lack of access between them. *See, e.g.*, C.C. v. A.B., 550 N.E.2d 365, 371 (Mass. 1990).

When the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act (UPA) in 1973, its main goal was to protect illegitimate children. UNIF. PARENTAGE ACT, 9B U.L.A. 287-88, (1987). At the time the Commissioners drafted the UPA, a number of states treated legitimate and illegitimate children differently. For example, illegitimate children had no right of action for the wrongful death of their parents. *Id.* In addition, they often could not collect worker's compensation benefits for their parents' death. *Id.* To better protect the rights of illegitimate children, the UPA set up provisions by which to identify a child's legal father. *Id.* at 289. These provisions collect "a network of presumptions" which, based on external circumstances, declare a particular man to be the probable father. *Id.* One example of such external circumstances is the marriage of the mother to a particular man. *Id.*

10. UNIF. PARENTAGE ACT § 4, 9B U.L.A. at 298-99.

11. Minnesota Parentage Act, MINN. STAT. §§ 257.51-74 (Supp. 1989) (current version at MINN. STAT. §§ 257.51-75 (1992 & Supp. 1993)).

the marital presumption of paternity, but it also includes a presumption of paternity based on blood or other genetic tests.¹²

Despite the 1989 amendment, however, it is unclear whether biological fathers¹³ may sue for paternity when a marital presumption of paternity already exists. By adopting a presumption of paternity based on genetic testing, Minnesota appeared to create new rights¹⁴ in biological fathers by offering

12. Minnesota Parentage Act, MINN. STAT. § 257.55(1)(f) (1992). When the marital presumption of paternity first arose, it arguably embodied the most sensible approach to determining legal paternity. "The common-law rules designed to deal with the issue of paternal identification, and particularly the marital presumption, reflected the social attitudes and scientific knowledge of their time." Kisthardt, *supra* note 9, at 593. With divorce becoming more common in the United States, however, non-traditional families carry less of a stigma than they once did. *Id.* at 640-41. Neither children nor parents stand out any longer in American society if the child has parents outside the "traditional" family. *Id.*

Furthermore, modern blood and genetic tests have revolutionized paternal identification. When the courts first began to use blood tests to help establish a child's parentage, the tests spoke exclusively to non-paternity. P.H. ANDRESEN, *THE HUMAN BLOOD GROUPS UTILIZED IN DISPUTED PATERNITY CASES AND CRIMINAL PROCEEDINGS* 33 (1952). In other words, the tests could say to a high degree of probability whether a particular man was not a child's father. The early tests were less accurate, however, in determining a child's father.

Some courts now use blood tests to establish paternity. Richards, *supra* note 1, at 612. Although the blood tests cannot conclusively establish the paternity of an alleged biological father, they can narrow a class of likely fathers through probability formulae. *Id.* at 615 n.21. Thus, blood test experts can establish a particular probability that a given party is a child's father. *Id.* One type of blood test, the human leukocyte antigen (HLA) tissue typing test, can determine paternity with a 98% probability. *Id.* at 612 n.11.

A new type of testing, DNA fingerprinting, boasts even greater accuracy than blood testing in establishing paternity. *Id.* at 613. DNA fingerprinting, which creates "individual-specific representations of the DNA configurations of the [alleged] father, the mother, and the child," positively identifies the child's father, rather than determining a probable father by non-exclusion. *Id.*

With such changes in societal values and scientific knowledge, some states, like Minnesota, have enacted presumptions of paternity based on genetic tests. *See infra* note 25. Still, according to Texas District Court Judge John D. Montgomery, the law has been slow in acknowledging these changes. "Because so many people have lifestyles which antiquate a traditional notion of 'family,' and since science has so revolutionized human reproductive technology that concepts of mother and father are ambiguous, it may well be past time to rethink the law's definitions of 'mother,' 'father,' and even 'parents.'" John D. Montgomery, *Who's My Legal Daddy? A Bedtime Story for the '90s*, HOUS. LAW., May-June 1992, at 20, 25.

13. This Note will use the phrase "biological father" as a shorthand for a man alleging himself to be a child's biological father.

14. Some scholars disapprove of discussions of "rights" within family law. *See Kisthardt, supra* note 9, at 585. They assert that such a focus favors the individual and destroys the family. *Id.* They also assert that "rights" propo-

them an opportunity to establish their paternity.¹⁵ Yet in some states with similar provisions for genetic testing, the courts refuse to allow biological fathers standing to assert their paternity when a marital presumption of paternity exists.¹⁶ Minnesota courts have yet to resolve this issue.¹⁷

The purpose of this Note is to examine whether the 1989 amendment to the Minnesota Parentage Act (MPA)¹⁸ allows a biological father standing to sue for paternity when a marital presumption already exists. Part I surveys various states' paternity statutes, judicial interpretations of these statutes, and the policies supporting these interpretations. Part II analyzes the MPA and concludes that because the MPA creates rights in biological fathers, biological fathers should have standing either under the current amended MPA or as a constitutional right to assert their paternity, even when a marital presumption of paternity already exists. This Note further concludes that once such biological fathers assert their paternity, courts should use the child's-best-interests test to determine which of two conflicting presumptions should prevail.

I. A STATE-BY-STATE SURVEY OF PATERNITY STATUTES AND THE RIGHTS OF BIOLOGICAL FATHERS

A. STATE PARENTAGE ACTS AND THE UPA

Although state parentage statutes are not uniform,¹⁹ many share common characteristics.²⁰ In particular, several states

nents fail to engage in moral discourse. *Id.* Legitimate individual rights do exist, however, that may conflict with family rights. *Id.* at 587.

15. Before genetic testing, a party could introduce only limited evidence relating to paternity. *See supra* note 9 and accompanying text. To rebut the marital presumption, a party had to prove either that the husband was impotent or had no access to his wife at the time of conception. *Id.* Furthermore, many states did not allow introduction of such evidence by anyone outside the marriage. Kisthardt, *supra* note 9, at 594. "Such intrusions on the privacy of the parties, particularly when there was an existing marriage, were considered unwarranted." *Id.* By allowing biological fathers to present genetic tests to show paternity, states create a new evidentiary resource for biological fathers which, theoretically, carries the right to use the resource in a relevant action.

16. *See infra* note 34.

17. Kelly v. Cataldo, 488 N.W.2d 822, 823 n.1 (Minn. Ct. App. 1992).

18. MINN. STAT. §§ 257.55(1)(f), 257.57 (Supp. 1989) (current version at MINN. STATE. §§ 257.55(1)(f), 257.57 (1992 & Supp. 1993)).

19. *See* Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 373-74 (1988).

20. In the preface to the UPA, the Commissioners noted: "While perhaps no one state now includes all these presumptions in its law, the presumptions

have adopted provisions of the Uniform Parentage Act (UPA)²¹ that describe presumptions of paternity.²² The UPA presumes a man to be a child's natural father if he and the child's natural mother are married or were married at the probable time of conception; if he receives the child into his home and holds the child out as his own; or if he acknowledges his paternity of the child in a writing filed with an appropriate state agency.²³ The UPA does not include a presumption of paternity based on genetic testing.²⁴ Only four UPA states, including Minnesota, have adopted an additional presumption of paternity based on such tests.²⁵

are based on existing presumptions of 'legitimacy' in state laws and do not represent a serious departure." UNIF. PARENTAGE ACT, 9B U.L.A. at 289.

21. Eighteen states have adopted the Uniform Parentage Act: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. UNIF. PARENTAGE ACT, 9B U.L.A. 3 (Supp. 1993).

22. The UPA contains the following presumptions of paternity:

§ 4. [Presumption of Paternity]

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage [ends];

(2) before the child's birth, he and the child's natural mother have attempted to marry each other . . . , although the attempted marriage is or could be declared invalid, and [the child is born during the attempted marriage or within 300 days after the marriage ends];

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, . . . although the attempted marriage is or could be declared invalid, and [he acknowledges his paternity, is named on the birth certificate, or must support the child];

(4) while the child is [a minor], he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing

UNIF. PARENTAGE ACT § 4, 9B U.L.A. at 298-99.

23. *Id.*

24. *Id.*

25. Those states that have adopted a presumption of paternity based on genetic testing include: Colorado, COLO. REV. STAT. ANN. § 19-4-105(1)(f) (West Supp. 1993); Minnesota, MINN. STAT. § 257.55(1)(f) (1992); North Dakota, N.D. CENT. CODE § 14-17-04(1)(f) (1991); and Ohio, OHIO REV. CODE ANN. § 3111.03(A)(6) (Anderson Supp. 1992).

Typically, these statutes follow the UPA. *See supra* note 22 and accompanying text (setting forth the UPA presumptions of paternity). The statutes also contain a sixth presumption based on genetic testing. For example, the North Dakota Century Code states that a man is presumed to be the natural father of a child if he falls within one of the five provisions contained in the UPA, or "[i]f genetic tests show that he is not excluded and the statistical probability of his parentage is ninety-five percent or higher." N.D. CENT. CODE § 14-17-04(1)(f).

The UPA's presumptions of paternity determine not only whom the law will likely recognize as a child's father, but also who has standing to bring an action to prove paternity or to establish the nonexistence of a father-child relationship. In general, according to the UPA, only a child, the natural mother, or a man presumed under the act to be the child's father may bring an action to establish paternity.²⁶ Furthermore, if the child's natural mother and presumed father are married, only the child, the child's natural mother, or the mother's husband may bring an action to declare the *nonexistence* of the presumed father's paternity.²⁷ Under the UPA, therefore, a biological father may

26. UNIF. PARENTAGE ACT § 6, 9B U.L.A. at 302. This section is as follows:
 § 6 [Determination of Father and Child Relationship; Who May Bring Action; When Action May Be Brought]

(a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or

(2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. . . .

(b) Any interested party may bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed under Paragraph (4) or (5) of Section 4(a).

Id. § 6, at 302-03.

27. *Id.* § 6(a)(2). A handful of UPA states, and some non-UPA states, also limit those who may bring an action to declare the nonexistence of a husband's paternity to the child, the child's mother, and the mother's husband. Those UPA states whose parentage statutes limit those parties that may bring an action to declare the non-existence of a husband's paternity include Alabama, ALA. CODE § 26-17-6 (1992); California, CAL. FAM. CODE § 7630 (West 1993); Colorado, COLO. REV. STAT. ANN. § 19-4-107 (West Supp. 1993); Illinois, ILL. ANN. STAT. § 750 ILCS 45/7 (Smith-Hurd 1993); Missouri, MO. ANN. STAT. § 210.826 (Vernon Supp. 1993); North Dakota, N.D. CENT. CODE § 14-17-05 (1991); and Wyoming, WYO. STAT. § 14-2-104 (Supp. 1993).

Some non-UPA states have enacted stricter standards regarding which parties may challenge the marital presumption of paternity. Oregon, for example, has created a conclusive presumption of paternity in husbands who live with their wives and were not impotent or sterile at the time their child was conceived. OR. REV. STAT. § 109.070(1) (1990).

Other states' statutes allow any interested party, including presumed and alleged fathers, to bring an action to determine the existence or nonexistence of the parent-child relationship. UPA states whose statutes allow any interested party standing to bring an action to declare the nonexistence of any presumed father-child relationship include Delaware, DEL. CODE ANN. tit. 13, § 805(a) (Supp. 1992); Hawaii, HAW. REV. STAT. § 584-6(a) (Supp. 1992); Montana, MONT. CODE ANN. § 40-6-107(1) (1993); Nevada, NEV. REV. STAT. ANN.

not bring an action either to establish his own paternity or to declare the nonexistence of a husband's paternity.²⁸

§ 126.071(1) (Michie 1993); New Mexico, N.M. STAT. ANN. § 40-11-7(A) (Michie 1989); and Washington, WASH. REV. CODE ANN. § 26.26.060(1)(a) (West 1986).

The Washington Uniform Parentage Act, for example, provides:

A child, a child's natural mother, a man alleged or alleging himself to be the father, a child's guardian, a child's personal representative, the state of Washington, or any interested party may bring an action at any time for the purpose of declaring the existence or nonexistence of the father and child relationship.

WASH. REV. CODE ANN. § 26.26.060(1)(a).

The Kansas Parentage Act does not use the term "interested party" in describing who may bring an action to establish paternity. Rather, Kansas allows the child or any person on behalf of such a child to bring an action. KAN. STAT. ANN. § 38-1115(a) (1986).

Some non-UPA states have adopted statutes that do not contain provisions regarding actions to declare the nonexistence of a father-child relationship. Rather, the statutes speak only to which parties may bring actions to determine paternity. Georgia, for example, allows "one who is alleged to be the father" to bring an action to determine paternity, without stating whether alleged fathers may also bring actions to determine the nonexistence of another man's paternity. GA. CODE ANN. § 19-7-43(a)(5) (Harrison 1991).

28. A biological father is not a man presumed to be the child's father under the relevant paragraphs of the UPA. UNIF. PARENTAGE ACT § 4, 9B U.L.A. at 298-99. A biological father, therefore, has no standing to bring an action to declare the nonexistence of a father-child relationship established under the marital presumption of paternity. *Id.* at 302-03.

The UPA does not clearly define what it means to either establish one's paternity or declare the nonexistence of one's paternity. *Id.* Courts have developed conflicting interpretations of the provisions.

Some courts, for example, read the provisions separately. *See, e.g.,* Kelly v. Cataldo, 488 N.W.2d 822, 826 (Minn. Ct. App. 1992) ("Appellant's petition does not expressly ask the court to adjudicate the nonexistence of Michael Cataldo's father and child relationship with M.C., but it does ask that appellant be adjudicated as father."). Under this approach, an action to establish paternity can create conflicting presumptions of paternity in two or more men, which the court may then weigh in finally adjudicating paternity. *Id.* ("Once the conflict is decided, . . . the court's decree rebuts any contrary presumption."). By contrast, an action to determine the nonexistence of one's paternity can be brought, for example, by a mother's husband who suspects he is not a child's father. *See* UNIF. PARENTAGE ACT § 6(a)(2). A child's mother can also bring such an action to declare the nonexistence of her husband's paternity and, simultaneously, declare the existence of a biological father's paternity. *See In re Marriage of Ross*, 783 P.2d 331, 333 (Kan. 1989).

Other courts read the above provisions as interdependent, so that an action to establish paternity carries with it a request that the court declare the nonexistence of any other existing presumptions of paternity. *See Presse v. Koenemann*, 554 So.2d 406, 411 (Ala. 1989). The Alabama Supreme Court stated that its parentage act does not allow a third party to assert paternity "to the exclusion of a man who was married to the child's mother when the child was conceived and born." *Id.* at 411; *see infra* note 32. Alabama courts, therefore, do not weigh conflicting presumptions of paternity. Instead, Alabama courts treat actions to establish paternity as actions to disestablish (or to de-

B. STATE COURT INTERPRETATIONS OF PARENTAGE ACTS

State statutory provisions fail to provide clear guidance for determining whether a biological father has standing to assert his paternity when a marital presumption of paternity already exists.²⁹ In particular, it is unclear whether a biological father must first have standing to declare the nonexistence of an existing presumption of paternity before he may seek to establish his own paternity.³⁰ To address the statutory silence or ambiguity regarding this issue, courts have developed contrasting approaches to determine when a biological father may bring an action to declare his paternity.³¹

1. Denial of Standing

Some courts mechanically deny biological fathers standing to assert paternity whenever a marital presumption of paternity already exists.³² Under this approach, even biological fathers

clare the nonexistence of) any other existing presumptions of paternity. *Presse*, 554 So.2d at 411.

29. The Supreme Court of Washington, for example, held that when an alleged biological father attempts to assert his paternity when the child's mother is married to another man, the court must determine the child's best interests before allowing the biological father to proceed with his action. *McDaniels v. Carlson*, 738 P.2d 254, 262 (Wash. 1987) (en banc) ("Where someone outside the family files a paternity action, the trial judge should consider the impact upon the child in deciding whether the action may proceed."). The Washington Uniform Parentage Act, however, does not refer to the child's best interests in defining who may bring an action to determine paternity. WASH. REV. CODE ANN. § 26.26.060(1)(a). Instead, the act states that a man alleging himself to be the child's father may bring an action at any time to declare the existence of the father-child relationship. *Id.*

30. This uncertainty stems from the ambiguity of the phrase "declare the nonexistence of a presumption of paternity." See *supra* note 28 for conflicting judicial interpretations of the phrase.

31. Minnesota is a UPA state and, as such, Minnesota courts generally turn first to other UPA states in interpreting the MPA. See *Spaeth v. Warren*, 478 N.W.2d 319, 323 (Minn. Ct. App. 1991). The approaches used by non-UPA states to determine when a biological father may bring an action, however, are generally consistent with the UPA provisions and often follow the approaches of UPA states. See *supra* note 20 (stating that UPA presumptions are based on common law).

32. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Presse v. Koenemann*, 554 So.2d 406 (Ala. 1989); *B.H. v. K.D.*, 506 N.W.2d 368 (N.D. 1993).

In *Presse*, for example, the Alabama Supreme Court held that a biological father does not have standing under the state's parentage act to initiate an action to establish paternity. 554 So.2d at 411. In *Presse*, Jean Ann (*Presse*) Koenemann had an affair with Lynn Koenemann while married to Norman *Presse*. *Id.* at 408. This affair produced a child, Shelly Rene *Presse*. *Id.* Three years after Shelly's birth, Jean Ann and Norman *Presse* divorced, and Jean

who have substantial contact with their children may not sue to secure paternal rights.³³ Courts that follow this approach also deny biological fathers standing despite parentage act provi-

Ann married Koenemann. *Id.* The couple then sought to establish Koenemann's paternity and to change Shelly Rene's surname. *Id.* The trial court let the couple's suit proceed and, based upon the couple's testimony and the results of blood tests, declared Koenemann her biological father. *Id.* The Alabama Supreme Court reversed. *Id.* at 411.

The supreme court first found that *res judicata* barred Jean Ann's action to disestablish Norman Presse's paternity. *Id.* The court found that Norman Presse's paternity had been established during the couple's divorce. *Id.* The court then found that the Alabama Uniform Parentage Act absolutely barred Koenemann's action to establish paternity:

We cannot accept the proposition that our Legislature, in adopting the UPA, intended for a third party to be able to assert his paternity, to the exclusion of a man who was married to the child's mother when the child was conceived and born, simply because the third party has since married the man's divorced wife and, in so doing, allowed the child into his home.

Id.

Thus, although Lynn Koenemann also fit the definition of a presumed father, in that he took the child into his home and held her out as his own, the court denied him standing to assert his paternity in the face of a marital presumption of paternity. *Id.* Under the *Presse* approach, a marital presumption of paternity must *already* be in place in order for a court to deny a biological father standing to assert paternity. If, however, a biological father files a paternity action before a marital presumption of paternity arises, the biological father typically may proceed with his action. *See* *Fuss v. Superior Court*, 279 Cal. Rptr. 46, 50 (Cal. Ct. App. 1991).

33. In *Michael H.*, Michael, the biological father, and Carole, the mother, had an affair that resulted in a child, Victoria, in 1981. 491 U.S. at 113. The birth certificate listed Carole's husband, Gerald, as Victoria's father, and he claimed her as his own. *Id.* at 113-14. During Victoria's first three years, however, she and her mother lived occasionally with Michael, who also held Victoria out as his child. *Id.* at 114. In 1982, Michael sought to establish his paternity and right to visitation. *Id.* Victoria, through a guardian ad litem, filed a cross-complaint and asserted she should be allowed to maintain filial relationships with both Michael and Gerald. *Id.* The California Superior Court dismissed Michael's action to establish paternity, stating that California law allows only a husband or wife to rebut the marital presumption of paternity. *Id.* at 115. The court also denied Victoria and Michael's motions for visitation, stating that California law does not allow visitation against the wishes of the mother when the alleged father has been prevented from establishing his paternity. *Id.* at 115-16. The court of appeal affirmed the trial court's judgment and denied Michael's and Victoria's petitions for rehearing. *Id.* at 116.

The U.S. Supreme Court affirmed the California court, holding that the California statutes that deny biological fathers standing to assert paternity when a marital presumption of paternity exists do not violate the Constitution. *Id.* at 121, 123-24. "Where [a] child is born into an extant marital family, the natural father's unique opportunity [to develop a relationship with his offspring] conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." *Id.* at 129.

sions that allow for a presumption of paternity based on genetic tests.³⁴ These courts assert, as a matter of policy and law, that the sanctity of the family outweighs the interests of the biological father in establishing paternity.³⁵

The United States Supreme Court, in *Michael H. v. Gerald D.*,³⁶ upheld the constitutionality of denying biological fathers standing to assert paternity when a marital presumption of paternity already exists.³⁷ The Court, in examining a California statute establishing a conclusive presumption of paternity in the mother's husband,³⁸ stated that the federal due process clause does not provide biological fathers with a protected liberty interest in asserting paternity.³⁹

34. In *B.H. v. K.D.*, for example, the Supreme Court of North Dakota held that a biological father lacks standing to assert paternity when a marital presumption of paternity already exists. 506 N.W.2d 368, 374 (N.D. 1993). The court so held despite an amendment to the North Dakota Uniform Parentage Act declaring a man to be a child's presumed father if genetic tests indicate his probability of parentage to be at least ninety-five percent. *Id.* at 375. The court stated that the biological father, who had requested the trial court to compel blood testing of the parties, could not be found a presumed father absent the results of such tests. *Id.* Consequently, the biological father lacked standing to commence an action to request blood tests. *Id.* The court stated, "One cannot commence an action without standing, based only on the hope that standing may later materialize." *Id.*

35. See, e.g., *Michael H.*, 491 U.S. at 129 n.7 (discussing the government's interest in protecting the "unitary family.").

36. 491 U.S. 110.

37. *Id.* at 129-30.

38. The California statute at issue in *Michael H.* stated that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621(a) (West Supp. 1989), quoted in *Michael H.*, 491 U.S. at 115.

39. *Michael H.*, 491 U.S. at 129-30 (noting that "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted").

The Court's decision in *Michael H.* met with waves of criticism. See, e.g., Kisthardt, *supra* note 9; Catherine A. Filhiol, Note, *Michael H. v. Gerald D.: Upholding the Marital Presumption Against a Dual Paternity Claim*, 50 LA. L. REV. 1015 (1990); Martin Guggenheim, *Scalia Says Father Doesn't Know Best*, LEGAL TIMES, July 10, 1989, at 15; see also T. Carmen Loconto, Note, *The Substantial Relationship Test: The Putative Father Gains Standing to Rebut the Presumption of Legitimacy—C.C. v. A.B.*, 14 W. NEW ENG. L. REV. 79 (1992) (comparing the Supreme Court decision to alternative state court approaches to paternity adjudication); Pamela S. Nagy, Comment, *Smith v. Cole: Triumph in Family Court*, 40 CASE W. RES. L. REV. 1157 (1989-90) (same). Nevertheless, because the Supreme Court settled the issue in *Michael H.*, this Note does not focus on the constitutionality of denying biological fathers standing to assert paternity.

2. Child's-Best-Interests Test

Courts that follow the child's-best-interests test permit biological fathers standing to establish paternity, but only when a trial court first determines it to be in the best interests of the child.⁴⁰ If a marital presumption of paternity already exists, a biological father must convince a trial court that his interest in establishing paternity outweighs the interest of the child's mother and her husband in maintaining their family integrity.⁴¹ This approach forces the courts to consider the merits of a biological father's claim in order to resolve the procedural issue of whether the biological father has standing.⁴² Unlike a mechanical denial of standing, the child's-best-interests test accommodates competing theories of child psychology. This test enables courts to balance a child's need for stability within the parent-

40. In *M.F. v. N.H.*, the New Jersey Superior Court stated that New Jersey statutes specifically grant standing to "any man 'alleging himself to be the father'" to bring an action to establish paternity. 599 A.2d 1297, 1299 (N.J. Super. Ct. App. Div. 1991); see also *Ban v. Quigley*, 812 P.2d 1014, 1017-18 (Ariz. Ct. App. 1990) (stating that any alleged father has standing to assert paternity, even if the mother is married to another man at the time the child is born).

Before biological fathers may compel blood tests to prove their paternity, however, they must show that such an action will be in the child's best interests. See *M.F.*, 599 A.2d at 1300 ("We are . . . satisfied that mere standing does not ensure that the action may proceed and that blood tests may be ordered."). See *infra* part II.B. for an argument that courts should apply the child's-best-interests test after a biological father has attained standing to assert paternity, rather than to determine standing.

41. In *Turner v. Whisted*, the Maryland Court of Appeals instructed the trial court:

[C]onsider the extent of [the alleged biological father's] commitment to the responsibilities of parenthood, and balance his interest in establishing his status as [the child's] natural father against the [couple's] interest in protecting the integrity of the familial relationships already formed. This balance of interests should be considered in connection with the court's paramount concern of protecting [the child's] best interests.

607 A.2d 935, 940 (Md. 1992); see also *Ban*, 812 P.2d at 1017 (employing the child's-best-interest test); *M.F.*, 599 A.2d at 1300 (same); *McDaniels v. Carlson*, 738 P.2d 254, 261 (Wash. 1987) (en banc) (same).

42. Once a biological father has shown in a pre-trial hearing that his paternity action is in the child's best interests, the trial court compels blood tests of the parties. See *M.F.*, 599 A.2d at 1300. "[B]efore blood tests may be ordered, the trial court must make a finding . . . that establishment of plaintiff's paternity and the rebuttal of the husband's paternity will serve the best interests of the child." *Id.* Presumably, because the court has already weighed the child's best interests in a pre-trial hearing, if the blood tests establish a presumption of paternity in the biological father, that presumption will prevail over an existing marital presumption.

child relationship against a child's need to learn the truth about his or her natural father.⁴³

3. Substantial-Relationship Test

Under a third approach, courts consider whether a biological father has developed a substantial relationship with the child before allowing him standing to assert paternity.⁴⁴ As with the child's-best-interests test, the substantial-relationship test forces biological fathers to prove the merits of their case before they may gain standing to proceed with their action.⁴⁵ The substantial-relationship test allows courts to determine whether the traditional family unit is worth protecting against attack by a biological father who can establish a substantial relationship with the child.⁴⁶ These courts analyze the relationship between the biological father and the child to determine "emotional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative father to attending to the child's needs, the consistency of the putative father's expressed interest, . . . and any other factors which bear on the nature of the alleged parent-child relation-

43. *McDaniels*, 738 P.2d at 261. In *McDaniels*, the Washington Supreme Court stated:

A paternity suit, by its very nature, threatens the stability of the child's world. . . . It may be true that a child's interests are generally served by accurate, as opposed to inaccurate or stipulated, paternity determinations. . . . However, it is possible that in some circumstances a child's interests will be even better served by no paternity determination at all.

Id. (citation omitted); see also *M.F.*, 599 A.2d at 1302 (concluding that the "determination of the child's best interests must be based on all of the factors which weigh upon the issue of the benefit or detriment of the child.").

44. See *C.C. v. A.B.*, 550 N.E.2d 365, 372 (Mass. 1990) (reasoning that "the existence of a substantial relationship between a putative father and the child is an appropriate prerequisite for the commencement of an action [by the putative father to establish paternity]").

45. Presumably, as under the child's-best-interests test, biological fathers who show a substantial relationship with their children at the pre-trial hearing will prevail at trial if blood tests establish their paternity. See *id.* (stating that the "existence or nonexistence of a substantial relationship between the putative father and child is relevant in evaluating both the rights of the parent and the best interests of the child") (quoting *R.R.K. v. S.G.P.*, 507 N.E.2d 736, 742 (Mass. 1987) (Liacos, J., concurring)).

46. See *id.* at 373. Some commentators also support the substantial-relationship approach. They suggest that the Constitution requires that a biological father show a substantial relationship with his child before having allowed standing to assert paternity in the face of a marital presumption. See Dallas, *supra* note 19, at 369; Loconto, *supra* note 39 (praising the Massachusetts Supreme Court's adoption of the substantial-relationship test).

ship."⁴⁷ Courts typically allow standing in cases in which "it will certainly come as no surprise to the marital family that there is a question as to paternity."⁴⁸

4. Standing as a Constitutional Right

Finally, some courts allow biological fathers standing to assert paternity as a matter of right under their state constitutions.⁴⁹ Following a due process analysis that is broader than the United States Supreme Court's reasoning in *Michael H.*,⁵⁰ these state courts reason that modern morals and values dilute the policy rationale for denying biological fathers standing to assert paternity.⁵¹ These courts also examine whether statutory codes or common law establish rights in biological fathers in general.⁵² If state law grants biological fathers significant rights, these courts tend to hold that states violate a biological father's due process rights when they deny him standing to establish paternity.⁵³

47. See *C.C. v. A.B.*, 550 N.E.2d 365, 372 (Mass. 1990).

48. *C.C.*, 550 N.E.2d at 373.

49. See, e.g., *In re J.W.T.*, No. D-1742, 1993 WL 233448 (Tex. June 30, 1993); *R. McG. and C.W. v. J.W. and W.W.*, 615 P.2d 666 (Colo. 1980) (en banc).

50. See *supra* notes 36-39 and accompanying text.

51. See *In re J.W.T.*, No. D-1742, 1993 WL 233448, at *4-5 (Tex. June 30, 1993). In *J.W.T.*, the Texas Supreme Court found that the concerns that motivated the Texas legislature to establish the marital presumption of paternity had largely receded. *Id.* at *5. The court found that the stigma of illegitimacy, for example, had "diminished to the point that the Texas Family Code no longer employs the term." *Id.* In addition, the court found that the marital presumption is no longer necessary to establish paternity: "Current methods of scientific testing provide more reliable and less intrusive means of determining paternity." *Id.*

52. *Id.* at *6-7. In *J.W.T.*, the Texas Supreme Court examined cases in which the courts found due process rights in biological fathers of illegitimate children. *Id.* The court then stated, "While these cases recognized only the importance of providing due process to fathers of illegitimates, we conclude that the right to be heard does not cease merely because the mother is married." *Id.* at *7. For an examination of the development of Texas family law, see Montgomery, *supra* note 12, at 20.

53. See, e.g., *J.W.T.*, No. D-1742, 1993 WL 233448, at *9. The Texas Supreme Court stated, "We do not say that our Constitution guarantees every natural father ties with his illegitimate offspring. We do say that one who is arbitrarily prevented from attempting to establish any relationship with his natural child is denied due course of law under . . . our Texas Bill of Rights." *Id.*; see also *R. McG. and C.W.*, 615 P.2d at 672 (holding unconstitutional the Colorado UPA provision denying a biological father standing to bring an action).

C. THE MINNESOTA PARENTAGE ACT AND RIGHTS OF BIOLOGICAL FATHERS

1. The Parentage Act and *Kelly v. Cataldo*

The Minnesota Parentage Act (MPA), based on the Uniform Parentage Act, took effect in 1980.⁵⁴ At that time, the MPA contained the same five presumptions of paternity set forth in the UPA.⁵⁵ The MPA also adopted the UPA's provisions concerning standing.⁵⁶ A biological father, therefore, could not be considered a presumed father based on genetic tests.⁵⁷ Furthermore, the MPA did not grant biological fathers standing to bring an action to declare the nonexistence of a husband's paternity.⁵⁸ When first enacted, therefore, the MPA did not allow biological fathers standing either to assert their own paternity or to declare the non-existence of another man's paternity.⁵⁹ In addition, the MPA provision containing presumptions of paternity also included a subdivision regarding conflicting presumptions.⁶⁰ The subdivision stated, "If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."⁶¹

In 1989, the Legislature amended the MPA to create a presumption of paternity based on genetic testing.⁶² To provide a biological father access to create this presumption of paternity, the Legislature also amended the MPA to allow him to bring an

54. MINN. STAT. §§ 257.51-.74 (1980) (current version at MINN. STAT. §§ 257-.51-.75 (1992 & Supp. 1993)); MARGARET M. MARRINAN & JODIE METCALF, TECHNICAL NOTES: PARENTAGE 1 (1985).

55. MINN. STAT. § 257.55(a)-(e); *see supra* note 22 and accompanying text.

56. MINN. STAT. § 257.57.

57. *Id.* § 257.55.

58. *Id.* § 257.57.

59. *Id.* §§ 257.55, 257.57.

60. *Id.* § 257.55(2).

61. *Id.* The full text of § 257.55(2) is as follows:

Subd. 2. A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

62. The amended MPA maintained the five UPA presumptions of paternity, and included the following presumption of paternity based on genetic tests: "Evidence of statistical probability of paternity based on blood testing establishes that the likelihood that the man is the father of the child, calculated with a prior probability of no more than 0.5 (50 percent), is 99 percent or greater." MINN. STAT. § 257.55(1)(f) (1992 & Supp. 1993); *see also supra* note 22 (discussing the five UPA presumptions of paternity).

action "at any time" to affirmatively establish *his* paternity through genetic tests.⁶³ The amended statute, however, retained the provision that fails to expressly grant a biological father standing to bring an action to declare the *nonexistence* of a *husband's* paternity.⁶⁴ In addition, the amendment did not affect the provision regarding conflicting presumptions of paternity.⁶⁵

Minnesota courts have yet to determine whether the amended statute allows biological fathers standing to assert paternity when the child's mother is married to another man and, thus, a marital presumption of paternity already exists.⁶⁶ Minnesota courts could focus on the MPA's failure to grant a biological father standing to bring an action to declare the nonexistence of a husband's paternity and conclude that biological fathers therefore lack standing to assert their own paternity in the face of a marital presumption.⁶⁷ By contrast, the courts could give effect to the language which states that a biological father may bring an action "at any time" to establish his paternity.⁶⁸ If the courts adopt the latter interpretation, biological fathers would be able to assert paternity even when a marital presumption of paternity is already in place.⁶⁹

A similar issue arose in *Kelly v. Cataldo*.⁷⁰ The Minnesota Court of Appeals, however, decided *Kelly* on other grounds and did not address whether the MPA grants biological fathers standing to assert paternity in the face of a marital presump-

63. MINN. STAT. § 257.57(2)(1).

64. According to the MPA, a child, the child's natural mother, or the mother's husband (or former husband, if he and the child's mother were married within 280 days of the child's birth) may bring an action to declare the nonexistence of the marital presumption of paternity. *Id.* § 257.57(1)(b). A biological father seeking to establish paternity based on genetic testing has standing only to declare the nonexistence of a presumption of paternity established by section 257.55(1)(d)-(f) (fathers who accept children into their home and hold them out as their own, fathers who have filed an acknowledgment of paternity with the state registrar of vital statistics, or fathers who establish paternity through genetic tests). *Id.* § 257.57(2)(1)-(2).

65. *Id.* § 257.55(2); see *supra* note 61 and accompanying text.

66. *Kelly v. Cataldo*, 488 N.W.2d 822, 823 n.1 (Minn. Ct. App. 1992).

As mentioned above, statutory provisions do not provide a consistent guide for determining whether courts will allow a biological father standing to assert paternity when a marital presumption of paternity already exists. See *supra* part I.B.

67. See *supra* part I.B.1.

68. MINN. STAT. § 257.57(2)(1).

69. See *Kelly*, 488 N.W.2d at 826.

70. 488 N.W.2d 822.

tion.⁷¹ Nevertheless, *Kelly* illustrates how a case could arise in which a court must consider whether a biological father has standing to assert his paternity. In *Kelly*, the plaintiff, Christopher Kelly, brought suit to declare his paternity of a child born to his married lover, Pamela Cataldo.⁷² Kelly relied on the results of genetic tests⁷³ that conclusively established that he is the child's biological father.⁷⁴ Mrs. Cataldo, however, denied that Kelly fathered her child.⁷⁵ The trial court dismissed Kelly's suit, reasoning, in part, that even if the test results had created a presumption of Kelly's paternity, he had no standing to bring the action because a greater presumption of paternity existed in Michael Cataldo, Pamela Cataldo's husband.⁷⁶

On appeal, Kelly argued that to deny him standing to assert paternity violated his due process rights.⁷⁷ He also reported that he had obtained a written record of the genetic tests that indicated he fathered Mrs. Cataldo's child.⁷⁸ The appeals court did not rule on the due process claim and remanded the case on other grounds.⁷⁹ In addition, the appeals court declined to address whether the trial court's denial of standing was proper.⁸⁰

71. See *infra* notes 77-79 and accompanying text.

72. 488 N.W.2d at 824; see also *supra* notes 2, 8 and accompanying text.

73. 488 N.W.2d at 824. Kelly, who had only received an oral report of the test results, was unable to produce the tests themselves at the trial court level. *Id.*

74. *Id.* at 825.

75. *Id.* She also refused to sign a waiver releasing the results of the genetic tests. *Id.* Kelly had petitioned the trial court to compel Pamela Cataldo to sign the releases necessary to obtain the test records. *Id.* at 824. The trial court refused to order disclosure of the records. *Id.* Kelly also asked the trial court to compel current tests to determine whether he is the biological father of Mrs. Cataldo's child. *Id.* at 825. The trial court refused. *Id.*

76. *Id.* at 825. The court also stated that the genetic tests to which Kelly referred were not before the court and, therefore, could not establish Kelly's paternity. *Id.*

77. *Id.* at 828.

78. *Id.* at 825. The test results demonstrate a .994167 probability that Kelly is the father of Mrs. Cataldo's child. *Id.*

79. *Id.* The court of appeals held that the trial court erroneously refused to join the child as a party in proceedings. *Id.* The court also stated, however, that it might consider Kelly's constitutional claim after a trial in which the child appears:

Our review of [Kelly's constitutional] arguments is premature in light of the scant record before us, the absence of an appearance for the child, and the lack of a prior trial court decision shaping the application of statutory law to the case and addressing the constitutional arguments in the context of that application.

Id. at 828.

80. *Id.* at 825, 828. According to the appeals court, the issue before it in *Kelly* was whether a court could determine an alleged biological father's stand-

Instead, the appeals court directed the trial court, on remand, to consider the results of the genetic tests that Kelly produced, and to weigh the conflicting marital and biological presumptions.⁸¹ The appeals court, therefore, avoided deciding whether Kelly had standing to compel the trial court to order blood tests to establish his paternity, yet allowed Kelly standing to force the trial court to weigh the conflicting presumptions of paternity.⁸²

2. Statutory and Common Law Rights of Biological Fathers in Minnesota

If Minnesota courts were to interpret the MPA as denying biological fathers standing to assert paternity when a marital presumption of paternity exists, the courts could still find that the Minnesota Constitution guarantees biological fathers the right to assert paternity.⁸³ Indeed, biological fathers in Minnesota possess a number of statutory and common law rights in this and other areas. For example, biological fathers of children who have no other presumed father clearly are entitled to estab-

ing in Kelly's circumstances without joining the child as a party. *Id.* at 825. The appeals court then refused to consider whether Kelly had standing to proceed with his action before the child was joined as a party. *Id.* at 828.

81. *Id.* at 828 ("[A]ppellant has gained access to the genetic testing results, and this evidence will now come before the trial court on remand."). Although the appeals court seemed to approve allowing Kelly standing to proceed with his suit when it directed the trial court to consider the genetic test results, the appeals court also implied that Kelly's standing to proceed with his action could only be determined after the trial court balanced the competing presumptions of paternity presented in the case. *Id.* at 826 ("It is evident that the child's role in the case invites an *ad hoc* determination of the weight attributed to the two competing parental presumptions existing here.") (emphasis added).

82. Because the trial court must consider the genetic test results, the appeals court dismissed Kelly's claim that the trial court erred in refusing to compel blood tests. *Id.* at 828. The appeals court thereby evaded "the difficult issue which arises when a proceeding . . . is initiated by a man who shows reason to believe testing will demonstrate his presumptive parenthood but who has no present evidence of genetic testing." *Id.*

Furthermore, because the trial court must consider Kelly's genetic test results, it may no longer rely on its prior ruling dismissing Kelly's suit for lack of such test results. *Id.* at 825. The trial court, therefore, must reevaluate the case based on the competing statutory presumptions of paternity. *Id.* at 828.

83. See *supra* part I.B.4; see also *infra* notes 125, 128 (quoting the text of the Minnesota Constitution's due process clause and describing the Minnesota Supreme Court's approach to construing clauses in the state Constitution that mimic clauses in the federal Constitution).

lish their paternity, both at common law⁸⁴ and under the MPA.⁸⁵

In addition, in most proceedings involving children, courts must consider the child's best interests.⁸⁶ This may be true even if applicable statutory provisions fail to require such consideration.⁸⁷ For example, the Minnesota Supreme Court stated in the context of adoption proceedings that Minnesota courts have well-established independent authority to determine a child's best interests.⁸⁸ Barring biological fathers from asserting their

84. *In re Zink*, 119 N.W.2d 731 (Minn. 1963).

85. MINN. STAT. § 257.57(3). According to this subdivision, a biological father may always bring an action to establish the paternity of a child whose natural mother is unwed:

An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under section 257.55 may be brought by the child, the mother or personal representative of the child, the public authority chargeable by law with the support of the child, the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

Id.

86. See *Kelly v. Cataldo*, 488 N.W.2d 822, 826 n.5 (Minn. Ct. App. 1992). In another Minnesota court of appeals case, *Spaeth v. Warren*, the court found that it did not need to consider the child's best interests in adjudicating paternity. 478 N.W.2d 319, 322 (Minn. Ct. App. 1991). The court stated that "Minnesota courts have not interpreted the parentage act to require a best interests analysis." *Id.* The court in *Kelly*, however, significantly narrowed the *Spaeth* ruling: "[*Spaeth*] does not purport to govern circumstances where the child is a necessary party [to the proceeding]. In addition, *Spaeth* does not address the conflicting presumptions arising where a man claims parenthood of a child born to the marriage of others." *Kelly*, 488 N.W.2d at 826 n.5.

According to the MPA, a child is a necessary party in any action to declare the nonexistence of the father-child relationship, or in any action to assert paternity in which the mother denies the existence of the father-child relationship. MINN. STAT. § 257.60(3). According to *Kelly*, therefore, every case involving conflicting presumptions of paternity requires analysis of the child's best interests. 488 N.W.2d at 826.

87. The Minnesota Legislature, for example, specifically excised that portion of the UPA that addresses a child's best interests. *Spaeth*, 478 N.W.2d at 323. Nevertheless, Minnesota courts have found that some UPA proceedings require a child's-best-interests analysis. See *supra* note 86 and accompanying text.

88. *In re D.L.*, 486 N.W.2d 375, 379 (Minn.), *cert denied*, 113 S. Ct. 603 (1992). Although this case addresses Minnesota's adoption statutes, the court's language may encompass any case in which a child's welfare is at stake. *Id.*; see also *State ex rel. Larson v. Halverson*, 149 N.W. 664, 665 (Minn. 1914) ("It is thoroughly settled law that the parent's right to the care, custody, and control of his minor children is paramount to all other considerations, save the best interests of the child . . ."). *But see Spaeth*, 478 N.W.2d at 323 ("A child's best interests simply are irrelevant to the biological determination.").

paternity, however, prevents the courts from fully exploring a child's best interests.

The Minnesota Legislature also favors placing children with blood relatives, and the courts have supported this decision.⁸⁹ This policy, according to the Minnesota Supreme Court, "reflects the common-sense notion that blood relatives are most likely to look out for one another's interests, through good times and bad."⁹⁰

II. PROVIDING A BIOLOGICAL FATHER STANDING TO ASSERT PATERNITY UNDER THE MINNESOTA PARENTAGE ACT

Minnesota courts may interpret the MPA's provisions on standing to assert paternity a number of ways.⁹¹ The MPA does not expressly grant a biological father standing to bring an action to declare the nonexistence of a husband's paternity.⁹² Thus, Minnesota courts could deny a biological father standing to assert his own paternity when a marital presumption already exists, rather than allow him standing to compel blood tests and thereby create conflicting presumptions of paternity.⁹³ The courts, however, should decline such an interpretation of the

89. *In re D.L.*, 486 N.W.2d at 380. This preference appears not only at common law, but in various statutory provisions. *Id.*

90. *Id.*

91. *See supra* part I.B.1-4. *Kelly v. Cataldo*, which likely represents the first opportunity Minnesota courts will have to examine this issue, does not present the most compelling paternity case; the biological father has not developed such a substantial relationship with his child that a court's refusal to hear his case would seem greatly unjust. 488 N.W.2d 822, 824, (Minn. Ct. App. 1992) (stating that the biological father had visited his child three times before the child's natural mother cut off his contacts). The case, however, could still support any of the four approaches to interpreting the MPA. *See infra* part II.A-B.

Another approach to interpreting parentage acts not discussed in this Note is to award dual paternity rights. *See Smith v. Cole*, 553 So.2d 847 (La. 1989). Through dual paternity, a court may legally recognize both a child's biological father and a presumed father. *Id.* at 851. Two states, Louisiana and Nebraska, currently employ this approach. *Id.*; *State v. Mendoza*, 481 N.W.2d 165 (Neb. 1992). Certainly, the approach has some advantages that the other approaches this Note considers cannot offer. *See Smith*, 553 So.2d at 851 (discussing how dual paternity allows a child to establish true parentage, allows the state to sue biological fathers for child support, and allows biological fathers the chance to develop relationships with their children, all without upsetting the marital presumption of paternity). The Minnesota Parentage Act, however, bars Minnesota courts from adopting dual paternity. *Kelly*, 488 N.W.2d at 826. Therefore, this Note will not consider that approach.

92. *See supra* notes 58, 64 and accompanying text.

93. *See supra* note 34.

MPA in favor of an interpretation that allows a biological father standing to assert paternity in the face of a marital presumption. Indeed, the MPA does not explicitly require a biological father to establish the nonexistence of a husband's paternity before he may assert his own paternity.⁹⁴ Furthermore, Minnesota's statutory scheme and common law, as well as policy considerations, support an interpretation of the MPA that would allow a biological father standing to assert paternity.

A. FINDING STANDING UNDER THE MINNESOTA PARENTAGE ACT

1. Interpreting the Act

The 1989 amendment to the MPA created a presumption of paternity based on genetic testing.⁹⁵ The amendment also granted a biological father standing to assert paternity.⁹⁶ According to the MPA, a biological father may bring an action "at any time [to declare] the *existence* of the father and child relationship."⁹⁷ A biological father may not, however, bring an action to declare the *nonexistence* of any father-child relationship based on the marital presumption.⁹⁸ Only the child, the child's natural mother, or the natural mother's husband may bring such an action.⁹⁹

Some state courts interpreting similar statutes hold that biological fathers who may not bring an action to declare the nonexistence of a husband's paternity are also foreclosed from establishing their own paternity.¹⁰⁰ North Dakota, for example, adopted a parentage act nearly identical to Minnesota's parentage act.¹⁰¹ The Supreme Court of North Dakota, in interpreting the statute, concluded that because a biological father may not declare the nonexistence of a husband's paternity,¹⁰² a biological father also lacks standing to compel blood tests, even though such tests may establish his paternity.¹⁰³ According to the

94. See *supra* note 63 and accompanying text.

95. See *supra* note 62 and accompanying text.

96. MINN. STAT. § 257.57(2)(1).

97. *Id.* § 257.57(2)(1) (emphasis added).

98. *Id.* § 257.57(1)(b).

99. *Id.*

100. See *supra* notes 32, 34 and accompanying text.

101. In particular, both acts contain a presumption of paternity based on genetic tests. MINN. STAT. § 257.55(1)(f); N.D. CENT. CODE § 14-17-04(1)(f). In addition, both vest standing to declare the existence or nonexistence of paternity in the same people. MINN. STAT. § 257.57; N.D. CENT. CODE § 14-09-03.

102. B.H. v. K.D., 506 N.W.2d 368, 373 (N.D. 1993).

103. *Id.* at 375. The court stated, "[The biological father] argues that the blood tests, if positive to his cause, would allow him standing to rebut the [mar-

North Dakota court, therefore, the biological father would have needed standing to declare the nonexistence of the husband's paternity before he could obtain standing to compel blood tests to establish his paternity.¹⁰⁴ The North Dakota statute, however, like its Minnesota counterpart,¹⁰⁵ does not grant the biological father standing to declare the nonexistence of a marital presumption.¹⁰⁶ Thus, the court barred the biological father from asserting his own paternity and precluded the weighing of conflicting presumptions that would ultimately determine legal paternity.¹⁰⁷

Because the MPA does not expressly condition a biological father's right to bring an action to establish his paternity, however, Minnesota courts should not follow the Supreme Court of North Dakota when interpreting the MPA. Instead, Minnesota courts should find that the MPA does not require a biological

ital presumption of paternity]. . . . [W]e believe [this argument] is fundamentally flawed. . . . One cannot commence an action without standing, based only on the hope that standing may later materialize." *Id.* This argument, however, ignores that language in the North Dakota Century Code that allows the courts to weigh conflicting presumptions of paternity. N.D. CENT. CODE § 14-17-04(2).

The court seemed most disturbed, however, with the potential for abuse that could result if it granted a biological father standing to assert paternity. *Id.* The court stated:

Without the requisite test results, an individual like [the alleged biological father] cannot bring such an intrusive action, disrupting an established family, hoping that tests ordered by the court will subsequently vest him with standing to proceed. Too much irreparable damage will have occurred to the family in the meantime; the potential for abuse is too great.

Id.

Furthermore, in *B.H.*, the natural mother admitted that she had intercourse with the biological father around the time of her child's conception, but stated that the act was not consensual. *Id.* at 370. Therefore, the court likely was not sympathetic to the alleged biological father's arguments.

The court did state that if the genetic tests existed before the biological father brought suit, he may have had standing to assert paternity. *Id.* at 375. Thus, it does not necessarily follow from the reasoning of this case that a biological father never has standing to assert paternity when a marital presumption of paternity exists in another man. In *Kelly v. Cataldo*, for example, Kelly and Pamela Cataldo submitted to blood testing before Kelly brought suit. 488 N.W.2d 822, 824 (Minn. Ct. App. 1992). In *Kelly*, however, Pamela Cataldo refused to authorize a release so that Kelly could submit the tests into evidence. *Id.* at 825.

104. *B.H.*, 506 N.W.2d at 375.

105. See *supra* note 101 and accompanying text.

106. *B.H.*, 506 N.W.2d at 374.

107. *Id.* at 378. North Dakota's parentage act contains a provision on conflicting presumptions of paternity that is identical to the provision contained in the MPA. N.D. CENT. CODE § 14-17-04(2); see *supra* note 61 and accompanying text.

father to declare the nonexistence of another man's paternity before establishing his own. The MPA states that an alleged father may bring an action "at any time" to establish his paternity through genetic tests.¹⁰⁸ The MPA does not state that an alleged father must first establish the nonexistence of another man's paternity.¹⁰⁹ Thus, rather than read such a requirement into the MPA, Minnesota courts should follow the plain language of the statute and allow alleged biological fathers standing to bring suit at any time to establish paternity.

Furthermore, the MPA provides for cases in which courts may face conflicting presumptions of paternity.¹¹⁰ The MPA states, "If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."¹¹¹ This provision, then, strongly implies that an alleged father need not declare the nonexistence of another man's paternity before attaining standing to assert his own. If two or more presumptions of paternity arise, the men involved obviously did not declare the nonexistence of each other's paternity before gaining standing to assert their own paternity. Thus, courts should read the MPA to allow any man to establish his own presumption of paternity without first seeking to declare the nonexistence of other existing presumptions of paternity.¹¹²

Besides being consistent with statutory language, an interpretation of the MPA that allows a biological father standing to assert paternity in the face of a marital presumption also better serves various policy considerations. Originally, the marital presumption arose to protect the family and to minimize the stigma attached to illegitimate children.¹¹³ The stigma surrounding illegitimate children, however, has virtually van-

108. MINN. STAT. § 257.57(2)(1).

109. *Id.* §§ 257.51-75.

110. *Id.* § 257.55(2).

111. *Id.*

112. Parentage act provisions on declaring the nonexistence of a presumption of paternity have purposes other than displacing one presumption of paternity in favor of another. *See supra* note 28 and accompanying text. This supports a conclusion that parentage act drafters did not intend for provisions on declaring the nonexistence of a presumption of paternity to control who has standing to assert paternity.

113. Nagy, *supra* note 39, at 1165.

ished.¹¹⁴ The remaining policy rationale behind the inviolability of the marital presumption, then, is protection of the family.

Although states may elect a statutory scheme that attempts to protect the marital family by denying a biological father standing to assert paternity,¹¹⁵ in some cases such a statute would not meet this objective. Indeed, a statute that denies a biological father standing to assert paternity when the mother of his child is married to another man often applies after the marital family is already damaged.¹¹⁶ In *Kelly v. Cataldo*, for example, Christopher Kelly and Pamela Cataldo had biological tests performed that established Kelly's paternity.¹¹⁷ Furthermore, according to Kelly, Mrs. Cataldo told him that her husband knew of their affair.¹¹⁸ No party involved in that case should have been surprised to discover that Mr. Cataldo did not father his wife's child. A denial of standing for biological fathers, therefore, may not protect the inviolability of the marital family to the extent its supporters suggest.

Furthermore, Kelly began to establish a relationship with his alleged child before Pamela Cataldo discontinued his visits.¹¹⁹ In cases in which biological fathers establish a substantial relationship with their children, an outright denial of standing to assert paternity fails to protect the "family" bonds that the biological father has created with his child.¹²⁰ Admit-

114. *Id.*; see *supra* note 12. In fact, the UPA does not use the term "illegitimate" when referring to children born out of wedlock. UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. at 296-344.

115. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989).

116. See, e.g., *Michael H.*, 491 U.S. at 113-15. In *Michael H.*, the mother, Carole D., had an adulterous affair with the plaintiff, Michael H. *Id.* at 113. After Carole D. gave birth to her daughter, Victoria, she lived at times with Michael H. and at times with another man before returning to her husband, Gerald D. *Id.* at 114-15. Furthermore, Carole D. maintained her affair with Michael H. after he filed suit to assert his paternity of Victoria. *Id.* at 114. Carole's continuing affairs, therefore, and not the paternity suit were what damaged her relationship with her husband.

117. *Kelly v. Cataldo*, 488 N.W.2d 822, 824 (Minn. Ct. App. 1992).

118. *Id.* at 825.

119. *Id.*

120. In *Michael H.*, the United States Supreme Court upheld the constitutionality of a California statute that establishes a conclusive presumption of paternity in a mother's husband, stating that the state is free to favor the rights of the marital family over those of the biological father. 491 U.S. at 129; see *supra* note 33. The Court could also have recognized, however, that a biological father and his child are as much a "family" as are a mother, husband, and child.

Professor Martin Guggenheim, in criticizing the Supreme Court's decision in *Michael H.*, stated, "Once fathers are meaningfully involved in their children's lives and not merely biologically connected, it is unconstitutional to treat them differently from mothers." Guggenheim, *supra* note 39, at 15.

tedly, Kelly's three visits¹²¹ are not compelling. Nevertheless, cases arise in which this argument has merit.¹²² In such cases, to deny the biological father standing to assert paternity contravenes the policy underlying the rule. Indeed, courts often sever rather than strengthen family ties when they deny a biological father access to his child.¹²³

Minnesota courts, then, should not interpret the MPA to deny biological fathers standing to assert paternity when a marital presumption of paternity already exists. The statute does not compel such an interpretation. Furthermore, this interpretation does not always serve the policies underlying the marital presumption of paternity and often runs against changing social norms. Many families do not need the marital presumption to protect them from disruption. In addition, in some cases the marital presumption itself, not actions brought by biological fathers, interferes with established family bonds.

2. Standing as a Constitutional Right

Even if Minnesota courts were to find that the amended MPA denies biological fathers standing to assert paternity when a marital presumption of paternity exists, the courts should find that the Minnesota Constitution protects an alleged biological father's right to assert paternity.¹²⁴ Admittedly, a constitutional challenge to a statute that denies a biological father standing to assert paternity faces an uncertain fate.¹²⁵ The

121. *Kelly*, 488 N.W.2d at 824.

122. In *Michael H.*, for example, both the biological father and the guardian ad litem for the child requested that the court allow the father and child to maintain contact. 491 U.S. at 115. A psychologist who examined the child found that she had developed a significant attachment to her biological father and thought of him as her dad. *Id.*

123. "Absent some compelling reason, the law should not act to disrupt a relationship that the child has formed." Kisthardt, *supra* note 9, at 630. Furthermore, forcing a child to sever ties with a parent does not necessarily strengthen the remaining family unit. "Children will often fantasize about the missing adult and become resentful toward those who are responsible for the termination of the relationship." *Id.* at 631.

124. A Minnesota appeals court faced a constitutional challenge to the MPA in *Kelly v. Cataldo*, 488 N.W.2d 822 (Minn. Ct. App. 1992). The court, however, remanded the case on other grounds without reaching the constitutional claim. See *supra* part I.C.1.

125. It is unclear whether the Minnesota Supreme Court construes the Minnesota Constitution's due process clause more liberally than the United States Supreme Court construes the federal due process clause. The Minnesota Supreme Court has stated that "[t]he due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d

United States Supreme Court rejected a constitutional challenge to such a statute in *Michael H. v. Gerald D.*¹²⁶ Minnesota courts, therefore, could follow the Supreme Court's decision in *Michael H.* and uphold the MPA's constitutionality if the courts interpret the MPA to deny biological fathers standing to assert paternity when a marital presumption of paternity already exists.¹²⁷ Minnesota courts should find, however, that the Minnesota Constitution compels a different result than that reached in *Michael H.*¹²⁸

The Supreme Court of Texas recently took this approach when it upheld a constitutional challenge to a Texas statute that denied biological fathers standing to assert paternity.¹²⁹ The

448, 453 (Minn. 1988). The Minnesota Supreme Court has also indicated, however, that it is willing to construe provisions of the Minnesota Constitution differently than the United States Supreme Court construes similar provisions of the federal Constitution. See *State v. Davidson*, 481 N.W.2d 51, 56 (Minn. 1992) ("We have stated that in appropriate cases we will construe liberties more broadly under the state constitution than under the federal . . ."); *State v. Russell*, 477 N.W.2d 886, 902 (Minn. 1991) (Coyne, J., dissenting) ("[T]his court may, and when the scope of a provision in the Minnesota Constitution differs from that of its federal counterpart frequently does, construe the Minnesota Constitution to afford greater individual rights than are afforded by the United States Constitution.").

126. 491 U.S. 110 (1989); see *supra* part I.B.1. Some state courts follow this decision. See, e.g., *Presse v. Koenemann*, 554 So.2d 406, 418 (Ala. 1989); *B.H. v. K.D.*, 506 N.W.2d 368, 373-75 (N.D. 1993).

127. A petitioner in Minnesota would find it difficult to convince the courts his case is any more compelling than the case the Supreme Court rejected in *Michael H.* See *supra* note 33.

Christopher Kelly, the petitioner in *Kelly* who challenged the MPA's constitutionality, had even less contact with his child than Michael H. had with his daughter. Kelly visited his daughter three times before bringing suit to determine paternity. *Kelly*, 488 N.W.2d at 824. Michael H., by contrast, lived with his daughter off and on for three years before seeking to adjudicate paternity. *Michael H.*, 491 U.S. at 114.

Furthermore, California and Minnesota are both UPA states. See *supra* note 21 and accompanying text. Because Minnesota courts favor turning to UPA states in interpreting the MPA, see *supra* note 31 and accompanying text, a Minnesota court may follow California's approach and decide that the state may deny biological fathers standing to assert paternity without violating the constitution. But see *supra* note 38 and accompanying text (offering the text of the California parentage act, which contains a conclusive presumption of paternity in favor of the mother's husband). The MPA's marital presumption of paternity, by contrast, is rebuttable rather than conclusive. MINN. STAT. §§ 257.55(2), 257.57(1).

128. The Minnesota Constitution's due process clause states: "No person shall . . . be deprived of life, liberty or property without due process of law." MINN. CONST. art. I, § 7.

129. *In re J.W.T.*, No. D-1742, 1993 WL 233448, at *1 (Tex. June 30, 1993). The Texas Constitution's due course of law provision states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . .

court stated that “[s]ignificant twentieth century changes in the resolution of issues affecting the family[, as] reflected in statutes, demographics, alteration of social attitudes toward illegitimates, and decisions of the Texas courts,” compelled its holding.¹³⁰ For example, the Texas common law accords “great respect for the biological bond between parent and child.”¹³¹ In addition, the Texas Family Code allows alleged fathers of children of unwed mothers to establish their paternity.¹³² Thus, the court found that Texas may not deny biological fathers standing to assert paternity without violating the Texas Constitution’s due process clause.¹³³

Similarly, Minnesota courts should sustain a constitutional challenge to the MPA¹³⁴ if the courts find that the MPA denies a biological father standing to assert paternity.¹³⁵ Minnesota courts may justify such a holding with the same support that the Supreme Court of Texas offered for its holding.¹³⁶ For example, while Texas law recognizes the bond between a child and a biological parent, Minnesota common law recognizes the desirability of placing children with blood relatives.¹³⁷ In addition, both common law and the MPA allow biological fathers of children who have no presumed father to establish their paternity.¹³⁸ Furthermore, the MPA now allows biological fathers to establish paternity through genetic tests.¹³⁹ Because the MPA offers biological fathers an avenue to establish paternity through genetic tests, and because Minnesota law freely allows biological fathers of children born to unwed mothers to declare paternity, Minnesota courts should find, as the Supreme Court of Texas did, that “the right to be heard does not cease merely because the mother

except by the due course of the law of the land.” *Id.* at *2 (quoting TEX. CONST. art. I, § 19).

130. *Id.* at *4.

131. *Id.* at *6. The court further stated, “[W]e recognized that “[t]he natural right which exists between parents and their children is one of constitutional dimensions.” *Id.* (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)).

132. *Id.*

133. *Id.* at *9.

134. See *supra* note 124 and accompanying text.

135. Minnesota courts need not rely on the Supreme Court’s interpretation of the U.S. Constitution in *Michael H. v. Gerald D.* See *supra* part I.B.1. Rather, the Minnesota courts may declare the MPA to be in violation of the Minnesota Constitution. See *supra* notes 125, 128 and accompanying text.

136. See *supra* notes 129-133 and accompanying text.

137. See *supra* note 89 and accompanying text.

138. See *supra* notes 84-85 and accompanying text.

139. See *supra* note 62 and accompanying text.

is married."¹⁴⁰ Changes in societal attitudes and family law, then, compel a holding that denying a biological father's standing to assert paternity violates his constitutional rights.¹⁴¹

B. BEYOND STANDING: A PROPOSED APPROACH FOR CASES INVOLVING CONFLICTING PRESUMPTIONS OF PATERNITY

Once a biological father attains standing to bring an action to assert his paternity, a court must either make the biological mother and any presumed father a party to the action, or give them notice and a chance to be heard.¹⁴² The biological mother and her husband typically oppose suits brought by the biological father because they intend to show that the husband is the child's father.¹⁴³ Consequently, a court must weigh the competing presumptions of paternity to adjudicate paternity.¹⁴⁴

Thus, a finding either that the MPA grants biological fathers standing to assert paternity, or that biological fathers have a state constitutional right to such standing, leaves open the question of which of two conflicting presumptions of paternity should control once a biological father establishes his paternity. According to the MPA, courts that face conflicting presumptions of paternity must favor "the presumption which on the facts is founded on the weightier considerations of policy

140. *In re J.W.T.*, No. D-1742, 1993 WL 233448, at *7 (Tex. June 30, 1993).

141. With changes in societal attitudes and family law, a better approach to cases in which a biological father and a presumed father both seek paternal rights would be to award dual paternity. *See supra* note 91. Dual paternity allows the law to recognize a child's biological father without unduly disrupting a marital family. *See supra* note 91. In this way, if both fathers are interested in raising and supporting the child, the courts may consider whether such an arrangement would be in a child's best interests, rather than arbitrarily select one man to be the child's legally recognized father. *See supra* note 91. The MPA, however, precludes courts from awarding dual paternity rights. *See supra* note 91. Unfortunately, then, such an approach is beyond the scope of this Note.

142. MINN. STAT. § 257.60. This section states in relevant part:

The biological mother, each man presumed to be the father under section 257.55, and each man alleged to be the biological father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and shall be given an opportunity to be heard.

143. *See, e.g., supra* notes 75-76 and accompanying text.

144. MINN. STAT. § 257.55(2).

and logic."¹⁴⁵ The MPA does not state, however, what policy or logic considerations the court must weigh.¹⁴⁶

In weighing conflicting presumptions of paternity, Minnesota courts should use the child's-best-interests test. Rather than use this test as some courts do to determine when a biological father may gain standing to assert paternity,¹⁴⁷ however, Minnesota courts should apply the test after a biological father has already gained standing to assert paternity. This approach would allow Minnesota courts to consider the same factors that other state courts consider when employing the child's-best-interests test,¹⁴⁸ while escaping the confusion of mixing the merits of a paternity case with the procedural right of standing to assert paternity.¹⁴⁹

When a statute does not specify what policy considerations apply in custody cases, Minnesota courts consistently turn to the child's-best-interests test.¹⁵⁰ In fact, the court in *Kelly v. Cataldo* advocated this approach when it remanded the case for want of a guardian ad litem for the child.¹⁵¹ The court stated that "[t]he best interests of the child are one dimension" for the trial court to consider in deciding the case on remand.¹⁵²

The child's-best-interests standard also satisfies the policy considerations that parentage acts promote.¹⁵³ The UPA, for example, originally evolved to protect the rights of illegitimate children.¹⁵⁴ The Commissioners, therefore, meant for the UPA's provisions to primarily benefit children.¹⁵⁵ As such, any actions brought underneath the UPA or similar state parentage acts

145. *Id.* § 257.55(2). In *Kelly v. Cataldo*, the natural mother and her husband urged the court to adopt a general preference for one presumption over another. 488 N.W.2d 822, 826 (Minn. Ct. App. 1992). The court declined, stating that the legislature "left no room for our general statement of a dominant presumption." *Id.* at 827. Rather, "the legislature has directed the courts . . . to examine the case 'on the facts.'" *Id.*

146. MINN. STAT. § 257.55.

147. *See supra* part I.B.2.

148. *See supra* note 41 and accompanying text.

149. *See supra* note 42 and accompanying text.

150. In 1914, the Minnesota Supreme Court stated that the supremacy of a child's best interests was "thoroughly settled law." *State ex rel. Larson v. Halverson*, 149 N.W. 664, 665 (Minn. 1914); *see supra* notes 86-88 and accompanying text.

151. 488 N.W.2d 822, 827 (Minn. Ct. App. 1992).

152. *Id.*

153. *See supra* notes 9, 12.

154. *See supra* note 9.

155. According to the drafters of the UPA, "the Act is largely concerned with the *sine qua non* of equal legal rights—the identification of the person against whom these rights may be asserted." UNIF. PARENTAGE ACT, 9B U.L.A. at 289.

should ultimately address the welfare of the children involved.¹⁵⁶

In addition, parentage acts are said to promote family integrity.¹⁵⁷ A child's-best-interests test can help a court determine which of two presumptions of paternity to recognize to best preserve family integrity. Of course, family integrity is sometimes best preserved by recognizing legal paternity in a biological mother's husband.¹⁵⁸ In other cases, when the child has established family bonds with both the biological father and the mother's husband,¹⁵⁹ courts may best serve family integrity by recognizing legal paternity in a biological father.¹⁶⁰

Moreover, the child's-best-interests test is a better approach than the substantial-relationship test. If adopted, this substantial-relationship test, like the child's-best-interests test, would apply after a biological father has gained standing to assert his paternity, not as a tool to determine standing.¹⁶¹ The substantial-relationship test, however, unlike the child's-best-interests test, would allow courts to recognize legal paternity only in biological fathers who have had the opportunity to develop relation-

156. Certainly, an act that denies all biological fathers standing to assert paternity may serve a child's best interests by preserving that child's marital family against disruption. *See supra* text accompanying note 115 (noting that states may conclude that children are best served by denying biological fathers standing to rebut a marital presumption of paternity). As the cases that deal with conflicting presumptions of paternity illustrate, however, such an inflexible rule will inevitably produce bad results for some children. *See supra* notes 32-34 (describing cases in which a child's-best-interests analysis might have produced different results).

157. *See supra* note 35 and accompanying text.

158. The Washington Supreme Court, which employs the child's-best-interests test to determine whether a biological father may gain standing to assert paternity in the face of a marital presumption, stated that in some cases a child is best served when the court does not allow paternity adjudication. *See supra* note 43.

159. *See supra* note 33 and accompanying text.

160. The Maryland Court of Appeals, for example, uses the child's-best-interests test to weigh the competing interests of the biological father and the marital family. *See supra* note 41 and accompanying text. Maryland courts, therefore, take into account a biological father's commitment to parental responsibilities, as well as family relationships already formed within the marital family, in adjudicating paternity. *Id.*

161. As with the child's-best-interests test, some courts use the substantial-relationship test in a pre-trial hearing to determine whether a biological father has standing to assert paternity when a marital presumption of paternity already exists. *See supra* part I.B.3. The substantial-relationship test described here, however, applies *after* a biological father has gained standing to assert paternity. The test helps determine whether the biological father's presumption of paternity prevails over the husband's marital presumption in adjudicating paternity.

ships with their children.¹⁶² This limitation presents a number of problems.

First, by limiting courts to recognizing legal paternity only in biological fathers who have established substantial ties with their children, the courts discourage biological fathers from bringing suit shortly after the child is born.¹⁶³ Fathers who bring paternity actions early in their children's lives have had less time to establish substantial relationships with their children and, thus, have less chance of establishing a prevailing presumption of paternity. Courts should seek, however, to encourage early paternity adjudication. As some courts recognize, "[a] paternity suit, by its very nature, threatens the stability of the child's world."¹⁶⁴ This threat only increases as the child gets older.¹⁶⁵ Courts, therefore, should be wary of relying on the substantial-relationship test, which encourages delays in paternity adjudication.

Second, the substantial-relationship test punishes those biological fathers who have not received the opportunity to establish ties to their children.¹⁶⁶ Under this test, a natural mother can bar a biological father from gaining paternity rights merely by limiting his contact with his child.¹⁶⁷ Limiting such contact, however, may not best serve the child. If, for example, a biological father can show that his resources and desire to raise his child exceed those of the natural mother and her husband, courts should recognize legal paternity in the biological father, rather than deny him paternal rights and duties.¹⁶⁸ Application

162. See Dallas, *supra* note 19, at 376-77.

163. *Id.* at 385 ("[D]efining a minimum custodial period, or, in the alternative, a minimum frequency of visitation, as a guideline would be reasonable . . .").

164. *McDaniels v. Carlson*, 738 P.2d 254, 261 (Wash. 1987) (en banc).

165. See *Kisthardt*, *supra* note 9, at 593 (stating that the UPA limits the time in which a person may assert paternity "to force consideration of the issue of parentage before long-term relationships are established between the presumed father and the child").

166. In *Kelly v. Cataldo*, for example, Christopher Kelly visited his daughter only three times before the child's mother severed his ties. 488 N.W.2d 822, 824 (Minn. Ct. App. 1992).

167. *Id.*; see Dallas, *supra* note 19, at 384 n.93 ("Theoretically, a couple could conceal a child or simply prevent the putative father from visiting the child and thereby developing a relationship with her.").

168. Cases in which a biological father can prove that he would be a superior parent to the mother and her husband are likely rare. They are not, however, implausible. According to social scientists who have studied human mating habits, women who are unfaithful to their husbands look for men with "healthier genes for their offspring." Allman, *supra* note 1, at 61 ("Outside affairs also allow women to shop for better partners."). If women do seek "better partners"

of the substantial-relationship test would prevent such fathers from gaining paternal rights, because this test looks only at established relationships, not potential relationships.¹⁶⁹

Finally, rejecting the substantial-relationship test does not prevent a court from considering such relationships when weighing two presumptions of paternity. Under the child's-best-interests test, proof of a substantial relationship between a biological father and his child is relevant to the court's decision.¹⁷⁰ The substantial-relationship test, however, fails to fully consider the child's best interests.¹⁷¹ Thus, the child's-best-interests test is more comprehensive and provides a better basis than the substantial-relationship test for courts to analyze conflicting presumptions of paternity.

CONCLUSION

By allowing a biological father to establish paternity through genetic tests, the 1989 amendment to the Minnesota Parentage Act offers biological fathers a new avenue through which to assert paternal rights. According to the amended act, this new avenue is available to biological fathers "at any time" to establish the existence of the father-child relationship. Biological fathers, therefore, should be able to assert paternity even when a marital presumption of paternity already exists. Furthermore, if the amended act does not allow biological fathers standing to assert their paternity when a marital presumption

to father their children, it follows that biological fathers may have better resources with which to raise their children than do mothers' husbands.

169. See Dallas, *supra* note 19, at 384.

170. New Jersey courts, which use the child's-best-interests test, consider a biological father's established relationship with his child when determining the child's best interests. *M.F. v. N.H.*, 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991). For example, New Jersey courts look to the "consistency of the putative father's interest in the child," as well as "[c]ontinuity of established relationships." *Id.*

171. Within the substantial-relationship test, the courts do consider whether *continuing* the relationship with the child's father is in the child's best interests. *C.C. v. A.B.*, 550 N.E.2d 365, 373 (Mass. 1990) ("We do not address the issue of what rights this plaintiff may have if he succeeds in establishing paternity. The overriding principle in determining those rights must be the best interest of the child."). The substantial-relationship test, however, bars courts from considering whether *establishing* a relationship with an alleged biological father is in the child's best interests. See *supra* notes 166-169 and accompanying text; see also Dallas, *supra* note 19, at 384 n.93 ("Where the putative father has not first developed a relationship with the child, current Supreme Court doctrine gives him no right to claim access to her; potential relationships between biological parents and children are not protected.").

of paternity exists, the courts should find that biological fathers have a constitutionally protected right to such standing.

If a biological father's assertion of paternity creates conflicting presumptions of paternity in two men, courts should use the child's-best-interests test to analyze which presumption should prevail. This approach allows the courts flexibility in dealing with modern, non-traditional families, while protecting all interested parties.