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# Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity

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# SOMEBODY'S CHILD: EVALUATING THE EROSION OF THE MARITAL PRESUMPTION OF PATERNITY

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* Associate Professor of Law, James E. Beasley School of Law at Temple University. I dedicate this article to my parents, John & Mary Glennon, whose constant love and support is a much treasured gift that too few children receive. I would like to thank Jane Baron, Jeffrey Dunoff, Richard Greenstein, Jana Singer and the participants in the Faculty Colloquium at Temple in April, 2000 for their thoughtful comments, and Emily Davis, Nancy Hudes, Lori Odessa, Nicole Thompson, Marina Volin, and Diana Weston, Jean Yelovich and Colleen Young for their research assistance and cheerful confidence in the importance of research. I would also like to thank Lisa Kelly and the members of the West Virginia Law Review for encouraging me to participate in their stimulating Family Law 2000 symposium and for their warm hospitality during the symposium.

## I. INTRODUCTION

The extensive public policy debates about the breakdown of the American family often focus on two important phenomena: the high percentage of marriages with children that end in divorce and the large numbers of children born to unmarried mothers.[1] Both trends have caused deep concern across the political spectrum, although the solutions proposed have differed widely.[2] Divorce, which increased dramatically beginning in the 1970's,[3] has gained widespread attention through evidence that it has undermined the financial security and overall development of many children of divorced parents.[4] These negative impacts of divorce on children have led to recent calls to make divorce more difficult, perhaps by returning to a fault-based divorce regime.[5] Others have advocated improving the divorce process for children through parent education on the effects of divorce and mediation to increase cooperative parenting by divorced parents.[6]

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1 *See* Mary Ann Mason, et al., *Introduction, in* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 1 (Mary Ann Mason, et al. eds. 1998) [hereinafter ALL OUR FAMILIES].

2 *See id.* at 3. While politicians have focused their concern for child well-being on divorce and single motherhood, many social scientists have focused on factors linked to poverty, including parental joblessness, low wage work, limited education, high ratio of children to adults in the home, frequent moves and social isolation, as powerful links to the poor physical and mental health, school achievement, and problematic social behaviors of children living in poverty. *See* Green Litton Fox, *Children's Well-Being: Clues and Caveats from Social Research*, 39 SANTA CLARA L. REV. 1075, 1077 (1999).

3 *See* Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States, in* THE FUTURE OF CHILDREN 29, 30 (Spring 1994).

4 *See* Richard E. Behrman & Linda Sandham Quinn, *Children and Divorce: Overview and Analysis,* THE FUTURE OF CHILDREN 4, 6 (Spring 1994); Judith S. Wallerstein, *Children of Divorce: A Society in Search of a Policy, in* ALL OUR FAMILIES 66, *supra* note 1; Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce,* THE FUTURE OF CHILDREN 143, 145-46 (Spring 1994); Robert Hughes, *Session #2, The Effects of Divorce on Children,* <http://www.hec.ohio-state.edu/famlife/divorce/effects.htm> (visited Jan. 2, 2001) (finding children from divorced families are on average somewhat worse off than children who have lived in intact families, demonstrating more difficulty in school, more behavior problems, more negative self-concepts, more problems with peers, and more trouble getting along with their parents).

5 Professor Lynn Wardle, a proponent of returning fault to divorce law, cites a growing literature by opponents and proponents of fault-based divorce regimes. *See* Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities,* 33 FAM. L. Q. 783, 784 nn. 4 & 5 (1999) [hereinafter Wardle, *Divorce Reform].*

6 *See, e.g.,* Robert M. Gordon, *The Limits of Limits on Divorce,* 107 YALE L.J. 1435 (1998); Barbara Stark, *Guys & Dolls: Remedial Nurturing Skills in Post-Divorce, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293 (1997).

The dramatic increase during the 1970's and 1980's in the number of unmarried mothers who gave birth to children has also drawn the sustained attention of policymakers.[7] Although the rate of births to unmarried mothers leveled off and then declined during the 1990's,[8] policymakers continue to focus on the greater risks faced by children born out of marriage.[9] Lawmakers have enacted punitive measures regarding single mothers, such as denying increased welfare benefits to women who have additional children while they are receiving financial assistance.[10] They have also required women applying for assistance to name the fathers of their children and seek child support from them.[11]

These punitive measures have been accompanied by efforts to improve the status of children born out of wedlock. The United States Supreme Court, recognizing that laws placing burdens on children born out of marriage manifested society's condemnation of the parents' conduct, has rejected statutes that penalize nonmarital children.[12] The Uniform Parentage Act of 1973 [hereinafter UPA (1973)] was adopted by a minority of states in the 1970's and 1980's. It sought to equalize the treatment of marital and nonmarital children and provided for paternal identification and support of children born out of marriage.[13] The identification of unwed fathers has been aided significantly by new technologies that identify or exclude men as biological fathers to a very high degree of certainty.[14]

Largely invisible to those engaged in these vociferous public debates about single motherhood and divorce has been a group of children whose status and family relationships have been dramatically altered by the intersection of these trends. They are children who appear to be born into marriage, but whose status as children of the marriage comes into question. These children are hit by a double whammy—first, they endure the trauma of divorce, and second, often either during

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7 *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL 66, U.S. (1985) (109th ed. 1989) (stating that between 1950 and 1986, the percentage of children born to unmarried women rose from 4% to 23.4%).

8 *See* Temporary Assistance for Needy Families (TANF) Program, Third Annual Report to Congress, August 2000, U.S. Department of Health and Human Services 92, <http://www.acf.dhhs.gov/programs/opre/annual3.doc> (reporting that the birth rate for unmarried women ages 15-44 was 46.9 in 1994, 44.8 in 1996, 44.0 in 1997, 44.3 in 1998 and 43.9 in 1999).

9 *See* Marsha Garrison, *Child Support Policy: Guidelines and Goals,* 33 FAM. L.Q. 157, 157-59 (1999) (reporting that children in single parent households are more likely to experience poor health, behavioral problems, delinquency, and low educational attainment than are their peers in intact families, and that as adults they have higher rates of poverty, early childbearing, and divorce).

10 *See* 42 U.S.C.A. § 602(a)(7)(A)(iii) (West 2000). The Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.), which changed welfare from a longterm entitlement program for needy families into a temporary assistance program, was motivated in large part by the belief that welfare had encouraged the birth and rearing of children outside of marriage. 42 U.S.C. § 601(a)(3) & (4).

11 *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act,* 30 FAM. L. Q. 519, 532-35 (1996).

12 *See infra* Part II.

13 *See* UNIF. PARENTAGE ACT (superseded 2000) [hereinafter UPA (1973)].

14 *See id.* at 289.

or subsequent to the divorce, their parentage is disputed.[15] Questions about their status may be raised at any age and at any time in the life of their parents' marriage or divorce. In earlier times, the marital presumption of paternity—the presumption that a child is fathered by his or her mother's husband—was largely irrebuttable.[16] Although all states continue to recognize a marital presumption of paternity in the husband, few continue to treat the presumption as irrebuttable or strictly limit the circumstances in which it can be rebutted.[17] Resolution of the deeply unsettling questions raised by challenges to the marital presumption of paternity has gained little attention from state legislatures and varies widely among state courts.[18]

State laws targeted at identifying and collecting child support from unwed fathers have had the collateral effect of widening the circumstances in which the marital presumption of paternity can be challenged.[19] Most states have expanded the categories of persons who may challenge the marital presumption and the circumstances in which such challenges are successful.[20] Although many state laws do not provide courts with clear direction, others now permit parties to successfully rebut the marital presumption of paternity through genetic testing.[21] These state laws express the legislative belief that biological ties are not only an adequate basis for parental responsibility, but that they are, except for adoption and technological reproduction, the *only* basis for legal father-child relationships that will withstand court challenge.

Courts, however, have often expressed uneasiness with this strong reliance on biology. They face situations in which a paternity determination based solely on the outcome of genetic testing will greatly disturb the status quo.[22] Quite suddenly, based on the results of genetic testing, men who are outside the legal family structure will gain rights and responsibilities toward one or more of the children in

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15 *See Pennsylvania Judiciary Committee Public Hearings on Senate Bill 516, DNA Testing to Determine Paternity* (Monday, April 12, 1999) [hereinafter Woodhouse Testimony] (written testimony by Professor Barbara Bennett Woodhouse, Professor of Law, University of Pennsylvania School of Law, submitted to House Judiciary Committee, at 6).

16 *See infra* Part II.

17 *See* discussion *infra* Part IV.A.

18 *See* discussion *infra* Part V.

19 *See, e.g.*, CAL. FAM. CODE § 7570 (West 1994) (declaring a compelling state interest in establishing paternity for all children.) The federal government requires states to establish procedures to identify the paternity of children born to unmarried mothers through the Omnibus Budget Reconciliation Act of 1993 and the Family Support Act of 1988. *See* W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261 (1999).

20 *See, e.g.*, ALA. CODE § 26-17A-1 (Supp. 1999) (removing time limitation for presumed father to use genetic testing to challenge paternity even after prior paternity adjudication); NEB. REV. STAT. § 43-1415 (2) (listing eight different types of parties who can bring a paternity action).

21 *See, e.g.*, IND. CODE § 31-14-7-1 (1997) (declaring that blood test results create a presumption of paternity regardless of mother's marriage to another man); Russell v. Russell, 682 N.E.2d 513, 516-17 (Ind. 1997) (finding that presumption of paternity created by genetic test results preempts presumption of paternity created by marriage to mother).

22 *See, e.g.*, Alinda V. v. Alfredo V., 177 Cal. Rptr. 839, 840-41 (Cal. Ct. App. 1981).

that family,[23] men who unknowingly established loving relationships with their wife's children will become legal strangers to those children,[24] and children will lose the only father they have ever known,[25] often with little hope of establishing a father-child relationship with another man.

This Article examines the tension between the trend toward basing parentage on biology and the heart-rending conflicts that courts must resolve. Many courts have applied a wide range of procedural and equitable doctrines to prevent deciding whether husbands, who later discover they are not genetically related to one or more of their children, should retain or lose legal fatherhood.[26] Courts often attribute their acceptance or rejection of these doctrines to briefly stated assumptions about fatherhood that have little or no theoretical or research-based support.[27]

Where do these legislative and judicial assumptions come from? The social iconography of fatherhood is based on both biology and marriage. The deep cultural assumption that fatherhood depends on both biology and marriage can be seen in the popular media. "Fathers" are married, biological fathers like Ozzie in "Ozzie and Harriet," Fred McMurray in "My Three Sons," Homer Simpson in "The Simpsons," and perhaps the greatest father icon of them all, Bill Cosby.[28]

Only recently has this iconography begun to fall apart, and this splintering has elicited deep social ambivalence.[29] When Dr. Peter Benton on the popular show "E.R." is told by the unmarried mother that he may not be the biological father of his son, he is deeply torn about whether to get genetic tests.[30] Even Mr. Fatherhood himself, Bill Cosby, was alleged to have fathered a daughter out-of-

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23 *See, e.g.*, Willmon v. Hunter, 761 S.W.2d 924, 926 (Ark. 1988).

24 *See, e.g*, Golden v. Golden, 942 S.W.2d 282, 284-85 (Ark. Ct. App. 1997) (rebutting husband's paternity on basis of genetic testing results in husband's loss of joint custody of child although husband's standing in loco parentis to child entitles him to challenge mother's custody on limited basis of mother's unfitness).

25 *See* Knill v. Knill, 510 A.2d 546, 551 (Md. 1986) (finding equitable estoppel not a bar to denial of duty to provide child support).

26 *See* discussion *infra* Part IV.C.3.

27 *See infra* Part V.

28 *See* Jamie Faulkner, *Fathers and Sins*, SYDNEY MORNING HERALD, November 8, 1996 *available in* 1996 WL 17458879; Noreen O'Leary, *A dose of daddy love 'Full House' is the real deal for young viewer*, THE FORT-WORTH STAR-TELEGRAM, Sept. 23, 1992 at 1; *Father's Day, Reflect on How He Has Changed*, THE COLUMBUS DISPATCH, June 16, 1996 at 02B; Angela Cook, Note & Comment, *Should the Right of Publicity Protection Be Extended to Actors in Characters They Portray?*, 9 DEPAUL L. J. ARTS & ENT. 309, 351 n. 69-71 (1999) (describing lovable fatherly character created by Bill Cosby).

29 Martha Minow has commented on a similar deep division in our lack of consensus on the definition of family. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 305 (1990).

30 *See* Bernard Weintraub, *After Major Surgery, ER is Back on Its Feet - For Time Being*, SEATTLE POST-INTELLIGENCER, Nov. 15, 1999 at D12, *available in* 1999 WL 6605139 (describing character of Dr. Peter Benton faced with decision of whether to obtain genetic testing of his son).

wedlock during his longterm marriage.[31]

We as a society do not know what to make of the separation of biological fatherhood and marriage. On the one hand, the cultural assumption that biological parentage and marriage are inseparable has worked to the detriment of loving, committed, non-traditional families headed by single parents or unmarried heterosexual or homosexual partners.[32] Our failure to confront and resolve the increasing separation of biological fatherhood and marriage, however, also disadvantages children of uncertain biological parenthood who are born into traditional marriages.

The deep social and cultural ambivalence occasioned by the splintering of fatherhood into scientifically-verifiable biological and social relationships is reflected in the doctrinal chaos in the law concerning the marital presumption of paternity. There is an extraordinary lack of consistency among the states and often within an individual state. This ad hoc approach to the situations facing children born during marriage whose paternity is called into question is deeply troubling.

Some commentators have focused on particular questions that arise, such as the constitutional rights of biological fathers to assert paternity over children born while the mother is married to another man.[33] Scholars have yet to methodically examine the wide variety of circumstances in which the marital presumption of paternity comes into question or to place the issues faced by these children into the broader contexts of divorce, the status of children born out of wedlock, technological advances in identification of biological relationships, and societal efforts to place responsibility for child support on parents, not on the broader society.[34] They have also failed to evaluate and examine the varying interests and needs of the involved individuals, and the treatment that has been accorded their various interests. The failure to resolve the difficult questions that arise in these situations is apparent in the recently adopted revision of the UPA.[35]

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31 *See* Tai Park, *The 'Inherently Wrongful' Doctrine in Federal Law*, N.Y.L.J. 1, March 7, 2000, at 1, col.1 (describing extortion conviction of Autumn Jackson, who claimed to be Bill Cosby's daughter and threatened to expose their relationship unless Cosby paid her a specified sum of money and explaining that no DNA tests were ever conducted to determine whether Cosby was her biological father, an allegation he vehemently denied).

32 *See, e.g.*, Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1993) [hereinafter Fellows, *Law of Legitimacy*](evaluating how the marital presumption of paternity disadvantages African-American women and children); Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMPLE POL. & CIV. RTS. L. REV 255, 258 (1998) (finding that in some jurisdictions second-parent adoption is available without relinquishment of rights of other parent only when current parent and proposed adoptive parent are legally married).

33 *See, e.g.*, David V. Hadek, *Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die*, 26 SW. U. L. REV. 359 (1997).

34 *But see* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219 (1999) (discussing a wide range of issues concerning this dilemma under Florida state law).

35 *See* National Conference of Commissioners on Uniform State Laws, Uniform Parentage Act (2000) (visited Jan. 20, 2001) <http://www.law.upenn.edu/bll/ulc/upa/upa00ps.htm> [hereinafter UPA (2000)].

This Article is a preliminary step toward the broader analysis needed to develop a consistent and sensitive approach to the difficult issues raised when the paternity of children born during marriage is called into question. Although most would agree that the legal regime should serve the interests of children caught in these conflicts, deep disagreements exist over what children's primary interests are, how best to protect them, and what should be done when the interests of children come into conflict with other important values, such as the rights of their mothers, presumed fathers, and alleged biological fathers.

As a start to this analysis, this Article provides background information on the changing status of children born out of wedlock and the technology that has recently evolved that permits a high degree of certainty in scientific testing to identify biological fathers. Second, this Article briefly outlines divorce trends over the last thirty years and the effects that the high divorce rate has had on the well-being of children. The Article then reviews the history of the marital presumption of paternity and analyzes the general, although as yet inconsistent, trend in state law to resolve all paternity disputes on the basis of genetic testing and the confusing and ill-fitting array of judicial doctrines many courts have employed when faced with these difficult issues. This Article also reviews the UPA (1973) and the UPA (2000) to evaluate their approaches to the paternity of children born during their mother's marriage.

Finally, the Article examines the widely differing assumptions that govern the courts' use of these doctrines and calls for a re-examination of those assumptions as part of a process of reconstructing the legal parentage of children born during marriage. Only careful scrutiny of these societal assumptions will enable us to evaluate and rethink the tangled doctrinal web that fails by any measure to protect the interests of the involved children.

## II. THE CHANGING STATUS OF NONMARITAL CHILDREN

Legal systems have long distinguished between children born to parents who are married and children born to unmarried parents. From Ancient Roman law to the development of English common law, children born to unmarried parents were filius nullius, no one's son.[36] They had no right to support or inheritance from their parents, and in some time periods in parts of Europe, they were actively discriminated against in all realms of life.[37]

Early American law picked up the discriminatory features of English common law, and well into the twentieth century, children born to unmarried parents were unable to obtain support or inherit from their unmarried fathers.[38] Initial efforts at reform by state legislation were sporadic.[39] As late as the 1960's,

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36 *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 2-5 (1971) [hereinafter KRAUSE, ILLEGITIMACY].

37 *See id.* at 3.

38 *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibilty and the Public Interest*, 24 FAM. L. Q. 1, 4 (1990)

39 *See* KRAUSE, ILLEGITIMACY, *supra* note 36, at 21-42.

substantive legal equality of children regardless of the marital status of their parents was not fully accepted.[40] Despite this, the rate of children born outside marriage increased dramatically.[41] Thus, the legal status and entitlements of children born outside marriage became a topic of deep concern and attention.[42]

One source of attention came through civil rights actions alleging that state laws that treated children born to unmarried parents differently than those born to married parents were discriminatory under the Equal Protection Clause of the Fourteenth Amendment. Beginning in 1968, a series of United States Supreme Court decisions required equal legal treatment of all children, regardless of the marital status of their parents.[43] For example, the Supreme Court rejected a state law that denied nonmarital children paternal child support, holding that

> once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother. For a State to do so is 'illogical and unjust.'[44]

In the wake of these decisions, the National Conference of Commissioners on Uniform State Laws adopted the UPA (1973).[45] It had two primary purposes: first, to create a model state statute that would implement the equal legal rights of children born to unmarried parents;[46] and second, to improve states' systems of child support enforcement.[47]

The UPA (1973) sought to improve and equalize the status of children born outside marriage in a variety of ways. The UPA (1973) stated that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[48] This statement, although widely accepted now, was only in the process of gaining acceptance in 1973.

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40 *See id.*

41 *See id.* at 257-61.

42 *See id.* at 260. Professor Krause notes that laws that discriminated against children on the basis of illegitimacy disproportionately negatively affected African-American children. *See id. See also,* UPA (1973), *supra* note 13, at 289; *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 249 (1976).

43 In *Levy v. Louisiana*, 391 U.S. 68, 72 (1968), the Supreme Court held that a Louisiana statute that denied illegitimate children the right to recover for the wrongful death of their mother was unconstitutional. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173-75 (1972), the Supreme Court held that workmen's compensation benefits related to the death of their father must be paid to dependent children, even if they were born out of wedlock and were never formally acknowledged by their father.

44 Gomez v. Perez, 409 U.S. 535, 536-38 (1973) (per curiam).

45 UPA (1973), *supra* note 13.

46 *See id.* at 289.

47 *See id.*

48 *Id.* § 2.

The UPA (1973) was also designed to ease the process of implementing these new equal rights. It set forth a variety of presumptions concerning the paternity of a child. Although it maintained the common law marital presumption, it included two additional presumptions of paternity intended to identify the legal father of children born outside of marriage.[49] It created presumptions of paternity where a man has received a minor child into his home and openly held out the child as his natural child and where a man has acknowledged his paternity in writing and filed that document with the appropriate body.[50]

Procedures to determine paternity when no presumption was applicable or a presumption was challenged were established by the UPA (1973). It also dealt with evidentiary issues, including the admission of blood tests and evidence of sexual intercourse between the mother and alleged father.[51] It required that parties be provided counsel and that children whose paternity is at issue be made parties to the action and provided legal representation.[52] In addition to establishing a court's power to enforce child support orders, it also provided for notice to alleged biological fathers prior to a child's adoption.[53] Throughout, the uniform act sought to ensure the support and protection of children born out of wedlock.

The protection of children born out of wedlock was hampered by the lack of accurate tests to prove paternity. Until the beginning of the twentieth century, there was no reliable scientific test available to identify the fathers of children born out of wedlock. In 1901, blood group testing was discovered by Dr. Karl Landsteiner at the University of Vienna.[54] Blood group testing identified genetic markers in the blood by analyzing specific blood type antigens.[55] Early types of blood group testing were often unable to exclude a man as the biological father.[56] By the late 1970's human leukocyte antigen (HLA) tests had become able to both exclude and establish the probability of biological paternity.[57] Scientific research

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49 *See id.* at 289.

50 *See* UPA (1973), *supra* note 13, § 4.

51 *See id.* §§ 11, 12.

52 *See id.* §§ 9, 19.

53 *See id.* §§ 17, 24.

54 *See* Ira Mark Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1135 (1979); Keefe & Failey, *A Trial of Bastardy is a Trial of the Blood*, 34 CORNELL L.Q. 72 (1948); 1 SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 3.09 (4th ed. 1981).

55 *See* Ronald J. Richards, Comment, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 612 (1989) [hereinafter *DNA Fingerprinting*]; Ellman, *supra* note 54, at 1135.

56 Dr. Landsteiner's 1901 discovery included only four blood type groups: A, B, AB and O. ABO typing could exclude a man as the biological father only about 14% of the time. In 1927, Dr. Landsteiner discovered M and N blood systems and exclusions became possible in about 33% of contested paternity cases. By 1940, Dr. Landsteiner's discovery of the Rh factor increased the exclusion rate to approximately 55%. *See* Patricia Bundschuh Blumberg, Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 VAND. L. REV.1587, 1589-90 (1983) [hereinafter Blumberg, *Disputed Parentage*].

57 *See* Ellman, *supra* note 54, at 1138.

moved ahead quickly, and by the late 1980's, DNA, or "genetic marker" testing provided probabilities of paternity greater than 99%.[58]

As genetic testing for paternity increased in accuracy, so, too, did judicial and legislative acceptance of test results as evidence. Courts first began to admit blood test evidence in paternity actions in the 1930's,[59] when blood test evidence could only occasionally exclude men as biological fathers.[60] Despite a growing acceptance of blood test evidence,[61] some courts refused to admit the results[62] or give them conclusive weight.[63] Legislative acceptance also came slowly. In 1952 the Uniform Act on Blood Tests to Determine Paternity[64] [hereinafter "UABT"] was proposed in an effort to resolve problems of admissibility and weight that should be given to the blood tests. One provision in the UABT made exculpatory blood test evidence determinative.[65] However, most states that adopted the UABT omitted this provision[66] In 1960 the Uniform Paternity Act[67] was formulated. It substantively followed the UABT but was adopted by few states.[68]

The UPA (1973) included a provision dealing with blood test results, but it lacked any clarity as to what courts should do with such evidence.[69] The UPA (1973) stated that "evidence relating to paternity may include . . . blood test results,

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58 *See* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity*, 57 LA. L. REV. 379, 388 (1997); Sylvia Ianucci, Note, *Establishing Paternity Through HLA Testing: Utah Standard for Admissibility*, 1988 UTAH L. REV. 717 [hereinafter *Utah Standard for Admissibility*].

59 *See* Ellman, *supra* note 54 at 1135. *See, e.g.*, Beach v. Beach, 114 F.2d 479, 480 (D.C. Cir. 1940).

60 *See* Ellman, *supra* note 54, at 1136. *See, e.g.*, State v. Damm, 252 N.W. 7 (S.D. 1933) (refusing to admit blood tests in case of first impression to determine paternity of child allegedly conceived during rape because of insufficiency of scientific fact); Commonwealth v. Krutsick, 30 A.2d 325, 327 (Pa. Super. Ct. 1943) (deciding tests not perfected enough to provide decisive proof as to paternity); Sheperd v. Sheperd, 765 N.W.2d 374, 377 (Mich. Ct. App. 1978) (ordering blood group testing as requested by the plaintiff to overcome presumption of paternity).

61 *See* Haugen v. Swanson, 16 N.W.2d 900, 902 (Minn. 1944); Walker v. Clark, 58 N.E.2d 773, 777 (Ohio 1944) (admitting expert testimony as to findings of recognized blood group test into evidence but determining that it was not conclusive.); Jordan v. Mace, 69 A.2d 670, 672 (Me. 1949).

62 *See* People v. Nichols, 67 N.W.2d 230, 232 (Mich. 1954) (finding that testimony concerning the results of blood tests to establish defendant's paternity was prejudicial to him and could not be admitted); Freeman v. Morris, 102 N.E.2d 450 (Ohio 1951) (determining that evidence regarding results of blood tests used to establish paternity is prejudicial and therefore not admissible).

63 The court in Hanson v. Hanson, 249 N.W.2d 452, 453 (Minn.1977), reviewed the weight accorded exclusionary test results among the jurisdictions. *See also* Berry v. Chaplin, 169 P.2d 442, 451 (Cal. Dist. App. 1946); State v. Camp, 209 S.E.2d 754, 755-56 (N.C. 1974) (admitting blood test evidence, but finding it not conclusive, allowing jury to find that defendant was the natural father despite the test results).

64 UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY § 4 (1952).

65 *See* Ellman, *supra* note 54, at 1136-37.

66 *See* Ellman, *supra* note 54, at 1137.

67 UNIF. ACT ON PATERNITY, 9B U.L.A 347 (1960).

68 *See* Ellman, *supra* note 54, at 1137.

69 *See* UPA (1973), *supra* note 13, § 12(3). *See also* Mary Kisthardt, *Of Fatherhood, Families and Fantasy*, 65 TUL. L. REV. 585, 589 (1991).

weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity."[70] The UPA (1973) recognized that genetic testing might be able to accurately identify paternity as well as exclude paternity. However, it did not guide courts as to how much weight to give such evidence in relationship to other kinds of evidence before it. Thus, although the UPA (1973) provided clear guidance in many cases, in those cases where two presumptions of paternity clashed, courts were given little guidance about how to reconcile these clashes.

Although the UPA (1973) greatly aided in the identification of the paternity of children born out of wedlock, such identification does not clarify the role of unwed fathers. Many children born out of wedlock are profoundly affected by the absence of paternal economic support and the absence of a loving father-child relationship. Until recently, federal and state law have focused solely on the economic implications of fatherlessness.[71] Enforcement of child support payments—rather than encouraging father-child bonding—is the centerpiece of federal and state law concerning children born out of wedlock. A primary emphasis is on preventing the public from providing financial assistance for children.[72] Thus, only impoverished women who turn to the state for financial assistance must identify their children's father and seek child support for their children.[73] Women who are economically self-sufficient and bear children out of wedlock may choose whether to name their child's father and seek child support from him.

Federal policymakers have focused on the high rates of children born to unmarried mothers who were receiving welfare assistance through the Aid to Families with Dependent Children program. The "Child Support Enforcement Act" passed in 1974 required states to establish the paternity of children born out of wedlock and secure support from the identified fathers.[74] Congress quickly followed this up with legislation that required the mothers of children born out of wedlock to cooperate with efforts to identify their children's father.[75] As a result, states needed objective scientific evidence to aid their efforts to identify biological

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70 Ellman, *supra* note 54, at 1137. *See also Utah Standard for Admissibility, supra* note 58, at 720; Blumberg, *Disputed Parentage, supra* note 56, at 1594, 1603 (citing Colorado, Hawaii, Minnesota, Montana, North Carolina, North Dakota, Washington and Wyoming as among states adopting the Uniform Parentage Act). California adopted the UPA (1973) but not the provision concerning statistical evidence of likelihood of paternity. Ten states retained statutes permitting introduction of blood tests as affirmative evidence in courts if deemed relevant. Other courts used judicial notice to admit statistical probabilities if no statute existed. *See id.*

71 Only recently have federal legislative efforts focused on a broader definition of "responsible fatherhood." To date, none of initiatives have become law. *See, e.g.*, H.R. 3073, 106th Cong. (1999).

72 For a discussion of the modern move from public support of children through welfare law to private support of children through child support law, see Laura W. Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare Law to Poor Law*, 33 FAM. L. Q. 705, 708-14 (1999).

73 *See* Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended in scattered sections of 42 U.S.C.).

74 *See Utah Standard for Admissibility, supra* note 58, at 719.

75 *See* 42 U.S.C.§ 602(26).

fathers accurately.[76] Genetic testing for paternity thus gained momentum through these federal efforts to obtain support from the fathers of children born to unmarried mothers who received welfare assistance.[77] Courts began accepting genetic test results into evidence to identify or exclude men as biological fathers.[78]

State use of genetic testing became mandatory for states that participated in the reformed welfare assistance program enacted by Congress in 1996.[79] The Personal Responsibility and Work Opportunity Reconciliation Act requires states to provide for and mandate genetic testing in contested paternity cases.[80] Any party can request the testing and the test results are "admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made."[81] These statutory requirements led to a great wave of paternity filings in the late 1990's.[82] The widespread use of genetic testing promises to expand even further. For example, the Maryland courts are now flooded with requests by men who were subject to earlier voluntary or involuntary (court-ordered) paternity to reopen the issue of their paternity for genetic testing to see if they are, in fact, biological fathers.[83]

The child support system for children born out of wedlock is based on the assumption that biological fatherhood is a sufficient basis for legal and financial responsibility for a child. Thus, the child support system focuses on the correct identification of the biological father. It is irrelevant whether there is a social parent-child relationship between the child and the parent. Paternity determination and child support enforcement are not designed to foster a social relationship between father and child.[84] In some instances, child support enforcement

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76 *See Utah Standard for Admissibility, supra* note 58, at 727.

77 *See* Blumberg, *Disputed Parentage, supra* note 56, at 1595-96.

78 *See* Allan Z. Litovsky & Kirsten Schultz, *Scientific Evidence of Paternity: A Survey of State Statutes*, JURIMETRICS J. 79, 82-83 (1998).

79 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (amending 42 U.S.C. § 666(a)(5) (1994)).

80 *See* 42 USC § 666(a)(5) (1994); Blakesley, *supra* note 58, at 380.

81 Blakesley, *supra* note 58, at 380-81.

82 *See, e.g., Pennsylvania House of Representatives Judiciary Committee Task Force on Domestic Relations Hearing on Custody, Family Court Reform and Economic Justice for Dependent Spo*uses (March 13, 1998) (statement of Judge Paul P. Pannepinto, Administrative Judge, Family Court Division, Philadelphia County Court of Common Pleas) (stating that Family Court had been flooded with requests for orders of paternity and child support).

83 In *Langston v. Riffe*, 754 A.2d 389, 410 (Md. 2000), the Court of Appeals of Maryland held that blood and genetic tests for paternity are available to putative fathers who want to challenge prior paternity declarations, including those entered prior to a 1995 statutory amendment permitting courts to set aside or modify paternity declarations based on blood or genetic tests. This case has led to a flood of petitions by men to disestablish their paternity. Interview with Jana Singer, Associate Dean and Professor of Law, University of Maryland School of Law (Sept. 10, 2000).

84 For example, the paternity acknowledgment forms that unwed fathers are typically asked to sign in the hospital upon the birth of their child inform fathers that signing the form will create liability for child support but no right to visitation or custody. *See* Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 248 (1999).

undermines the fragile father-child relationship that does exist, turning the parents into adversaries. For indigent nonmarital children, then, biology rules in the courtroom, if not in their lives.

## III. THE DIVORCE REVOLUTION AND ITS EFFECTS ON CHILDREN

Many challenges to a husband's paternity are made during divorce proceedings or after a divorce is final. Although many courts view legal actions to disestablish the husband's or ex-husband's paternity as separate analytically from the broader context of the divorce and dissolution action, children may experience the paternity dispute as part of the larger context of their parents' divorce.[85]

The United States witnessed a divorce revolution beginning in the 1960s. Prior to 1969, most states made divorce actions extremely difficult.[86] Even when married partners agreed that they both wanted a divorce, most states required them to show fault in order to obtain a divorce.[87] They were required to prove that either the husband or the wife had engaged in some serious misbehavior such as adultery, desertion, physical or mental abuse, drunkenness, imprisonment, drug addiction or insanity.[88]

Within a sixteen year period, states shifted away from a fault-based, restrictive approach to divorce to a no-fault divorce regime that shortened waiting periods and facilitated unilateral divorces.[89] During this time, the annual divorce rate increased from 2.5 per 1000 in 1965 to 5.2 per 1000 in 1980.[90] Now, sixty-five percent of all new marriages are predicted to end in the divorce.[91] In general, the law increasingly has left decisions about the regulation of marriage and family life to the involved parties.[92] Married partners are no longer viewed as beholden to each other for life. Rather, state legislatures and courts view each partner in a marriage as independent of the other. Even spouses who have not worked during the marriage are expected to become employable quickly and support themselves after divorce.[93]

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85 *See, e.g.*, Woodhouse Testimony, *supra* note 15, at 6.

86 *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 6 (1992).

87 *See id.*

88 *See* PETER N. SWISHER, ET AL., FAMILY LAW, CASES, MATERIALS AND PROBLEMS 769-70 (1999).

89 *See id.*

90 *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 138 (compiling data from the U.S. Dept. of Commerce).

91 *See* Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1558 (1998) (citing Larry L. Bumpass, *What's Happening to the Family? Interaction Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 485 (1990)).

92 *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

93 *See* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE 144, 147 (1999).

Increasingly, law and social mores have accepted this view of marriage partners as fundamentally independent persons who owe each other nothing after divorce. This individualist model, however, raises numerous difficult issues for the children born during the marriage. Despite their parents' new independence from each other, the children usually are still dependent on both of their parents. This misfit between the easy termination of marriage and the continuing needs of the children of the marriage for focused attention from both parents has drawn increasing attention from academics and policymakers.

Compared to children of intact marriages, children whose parents divorce suffer on virtually every measure of well-being, whether educationally, physically, psychologically or emotionally.[94] This suffering does not just occur at one point in time, as it usually does for the adults engaged in divorce. A twenty-five year study of children who were two to six years old at the time of the divorce reveals that unlike adults, children do not move beyond their parents' breakup in a short period of time. Instead, they experience its impact at each developmental stage. Due to the divorce, they may receive less supervision, may need to adjust to new stepparents and stepsiblings, and may face financial barriers to higher education. After divorce, children usually have less contact with one parent, and sometimes with both, particularly if the primary caretaker goes to work for the first time.[95] In young adulthood, they may fear that their own adult relationships will fail like those of their parents.[96]

In response to these concerns, legal analysts and state legislators have proposed a variety of approaches. Some have looked to ways to prevent the breakup of marriages in the first place. These ideas often focus on ways to make marriage more difficult to terminate. For example, Louisiana recently adopted the concept of "covenant marriage" which is much harder to terminate than the more traditional form of marriage.[97] The covenant marriage legislation permits spouses to choose a more binding, more permanent marriage by civil covenant that limits divorce to situations involving serious breaches of the marital covenant, and encourages the participation of the church, an institution thought to possess moral authority and be uniquely qualified to help preserve marriages.[98] Some have

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94 *See id.* at 1554.

95 *See* Robert Hughes, Jr., *Demographics of Divorce: An Internet Inservice Experience for Professionals* (visited Jan. 9, 2001) <http://www.hec.ohio-state.edu/famlife/divorce/index.htm> (reporting that over time the amount of contact between children and fathers diminishes: for those families who have been divorced less than two years, about 43% of fathers had contact; 33% of those who had been divorced three to five years ago had contact; 19% of those who had been divorced six to ten years continued contact; and only 12% of those that had been divorced over eleven years continued contact).

96 *See* REGAN, *supra* note 93, at 1555-56 (citing Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study, Presentation at the Second World Congress of Family Law and the Rights of Children and Youth in San Francisco, California (June 2-7, 1997)*, whose study sample included face-to-face interviews with 130 children and both parents, involving families from well-educated, middle-class Northern California homes).

97 *See* 1997 La. Acts 1380 (amending LA. CIV. CODE ANN. arts. 102 & 103 (West 1999), LA. REV. STAT. ANN. § 9:234, 9:245 (West 2000), and adding LA. REV. STAT. ANN. §§ 9:224(C), 9:225(A)(3), 9:272 to 9:275 and 9:307 to 9:309 (West 2000)).

98 *See* Spaht, *supra* note 91, at 1565; Wardle, *Divorce Reform, supra* note 90, at 787-88. Professor

looked to marriage education classes prior to and during marriage to help parents gain skills that will help them succeed in marriage.[99]

Other reformers have focused on the damage inflicted by the divorce process. They point out that the negative effects of divorce often are not great, and the detrimental effects of divorce are neither inevitable nor irreparable.[100] Three factors appear to be very important to children's post-divorce adjustment: first, the level of parental conflict; second, the degree of economic hardship after the divorce; and third, the quality of parenting by both parents after divorce.[101]

Researchers agree that parental conflict often associated with divorce has a particularly harmful effect on children.[102] Parents who maintain high levels of conflict may be responsible for higher levels of anxiety and poor school performance among their children.[103] When parental conflict is minimized, there are fewer differences between children from intact families as compared to those with divorced parents.[104]

Children are also harmed by post-divorce economic hardship. Economic hardship forces children to move away from familiar schools, surroundings, friends, and family members.[105] Their custodial parent, usually their mother, often must return to work or increase her work hours to earn enough money, as well as assume complete responsibility for maintaining a home. These increased responsibilities reduce her energy for parenting just when her children's needs increase. Financial difficulties are responsible for a large percentage of the negative impact of divorce on children.[106]

Third, children need positive post-divorce parenting, ideally from both parents. While the primary custodial parent's mental health and ability to maintain positive and consistent parenting is most essential to children, the research also suggests that children benefit from maintaining loving, consistent and supportive

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Wardle provides an overview of legislative efforts in a variety of states to curtail unilateral no-fault divorce. Wardle, *Divorce Reform, supra* note 90, at 786-90.

99 *See* PETER N. SWISHER ET AL, FAMILY LAW: CASES, MATERIALS, AND PROBLEMS, 6-10 (2d Ed. 1998).

100 *See* Amato, *supra* note 4. *See also* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION 200 (1994); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 FAM. & CONCILIATION CTS. REV. 29, 31 (1993) (finding that most children of divorce function within normal or average limits and are not as a group "disturbed") [hereinafter Kelly, *No Simple Answers*].

101 *See* ANNA DAVIS, ET AL., MITIGATING THE EFFECTS OF DIVORCE ON CHILDREN THROUGH FAMILY-FOCUSED COURT REFORM 4-7 (1997).

102 *See* Janet R. Johnston, *High-Conflict Divorce*, THE FUTURE OF CHILDREN, Spring 1994, at 165, 171-76; EMERY, *supra* note 100, at 205.

103 *See* John H. Grych & Frank D. Fincham, *Interventions for Children of Divorce: Toward Greater Integration of Research and Action*, 111 PSYCHOL. BULL. 434, 441 (1992) (citation omitted).

104 *See id.*

105 *See id.* at 444.

106 *See id.*

relationships with their noncustodial parent.[107]

Some researchers advocate substantive and procedural reforms to ameliorate the effects of divorce by implementing policies to reduce parental conflict, enhance post-divorce economic security for children, and improve the ability of parents to parent effectively and cooperatively after divorce. Some of the reforms advocated include: mandatory parenting education programs,[108] support groups for children,[109] mediation,[110] parenting plans,[111] expedited proceedings, unified family court systems,[112] and provisions to improve the financial security of children post-divorce.[113]

These reforms are unlikely to help children of divorce who also find themselves embroiled in a paternity dispute. These children are especially subject to many of the risk factors that researchers have identified: high conflict between the parents, economic hardship, and the potential loss of a psychological parent. Although courts faced with paternity disputes occasionally refer to these risks, they are rarely viewed as relevant to their decisionmaking.

## IV. THE DOCTRINE OF THE MARITAL PRESUMPTION OF PATERNITY

### A. *The Historical Development of the Marital Presumption of Paternity*

Dating back to the early 1700's, English common law provided that a child born to a married couple was presumed to be the issue of that couple.[114] The mother and presumed father could only rebut that presumption by proving that the husband

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107 *See* Amato, *supra* note 4, at 145-46; Kelly, *No Simple Answers*, *supra* note 100.

108 *See* Andrew Schepard, et al., *The Push for Parent Education: Blueprints for Helping Families Cope with Divorce*, 19 FAM. ADVOCATE 52 (1997).

109 *See, e.g.*, Neil Kalter, et al., *School Based Developmental Facilitation Groups for Children of Divorce: A Preventative Intervention*, 54 AM. J. ORTHOPSYCHIATRY 613 (1984).

110 *See* Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373 (1996); Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, THE FUTURE OF CHILDREN, Spring 1994, at 46, 53-55.

111 *See* DAVIS, ET AL., *supra* note 101 , at 28; Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 FAM. & CONCILIATION CTS. Rev. 286 (1995).

112 Under any assignment scheme, all judges who hear family law cases should receive ongoing education concerning the applicable law and child development concepts. Curriculum should include discussion of such issues as separation anxiety, continuity in relationships, and children's needs during and after divorce. This education is especially important because of the wide discretion judges are given in fashioning custody orders. *See* Joan B. Kelly, *The Determination of Child Custody*, *in* THE FUTURE OF CHILDREN 121, 136 (Spring 1994).

113 *See* June Carbone, *A Feminist Perspective on Divorce*, THE FUTURE OF CHILDREN 183, 194-96 (Spring 1994). *See also* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2257 (1994) (explaining that income-equalization reflects the "dominant family ecology," which suggests income of the family is jointly owned).

114 *See* JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 97(96) (1913). *See also*, Casenote, *The "Lord Mansfield Rule" as to "Bastardizing the Issue,"* 3 MD. L. REV. 79, 81 (1938) [hereinafter *The "Lord Mansfield Rule"*].

did not have access to his wife during the crucial period of conception.[115] The rules governing the admission of this evidence, however, were very strict. The husband had to prove total lack of access to his wife by demonstrating that he was "extra quatuor maria," beyond the seas, otherwise he would be presumed to be the child's father.[116] The varied goals advanced in support of the marital presumption and its strict application were to preserve family integrity and inheritance rights, protect against bastardy, and to help "local officials guard their purses."[117] If the marital presumption of paternity was successfully rebutted, the results were devastating: the child was declared a bastard, no longer entitled to support or inheritance from anyone.[118]

Early cases allowed wives to testify to non-access in illegitimacy cases without corroboration.[119] Beginning with the 1734 decision in *Rex v. Reading*, English courts required the wife's testimony regarding non-access by her husband to be corroborated by others.[120] Spousal testimony came to an end in 1777 when Lord Mansfield, in *Goodright v. Moss*, prohibited either spouse from testifying to non-access.[121] Lord Mansfield's Rule, as it came to be called, was widely followed because it supported the general public policy concerns of the time.[122]

These concerns appear to have focused not on the needs of individual children, but on society's need for stability and certainty in family relationships at a time when property, and therefore often a family's livelihood, was dependent on clear rules concerning patrilineal descent.[123] Even with these strict evidentiary rules, however, some men managed to prohibit their property from passing to their wives' illegitimate children. Lord Mansfield's Rule did not prevent others, such as

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115 *See The "Lord Mansfield Rule," supra* note 114, at 81.

116 According to Lord Blackstone, "as if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, extra quatuor maria, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards." 1 BLACKSTONE'S COMMENTARIES 457 (Lewis ed. 1814). *See also "The Lord Mansfield Rule," supra* note 114, at 81.

117 MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 202 (1985)

118 *See id.* at 197.

119 *See* Lloyd J. Planert, Note, *Proof of Illegitimacy in Paternity Proceedings*, 25 MARQ. L. REV. 148, 149 (1941) [hereinafter *Proof of Illegitimacy*].

120 *Rex v. Reading*, 94 Eng. Rep. 1113 (1734), *Rex v. Bedel*, 95 Eng. Rep. 245 (1737), and *Rex v. Luffe*, 101 Eng. Rep. 316 (1807), were the earliest cases in which courts admitted the wife's testimony in filiation cases but refused to sustain a verdict based solely on that testimony. Comment, *The Admissibility of a Parent's Testimony as to Non-Access to Prove Illegitimacy*, 73 U. PA. L. REV. 71 (1924) [hereinafter *The Admissibility of a Parent's Testimony*]; *see also The "Lord Mansfield Rule," supra* note 114, at 81.

121 *See* Goodright v. Moss, 98 Eng. Rep. 1257 (1777).

122 *See The "Lord Mansfield Rule," supra* note 114, at 85.

123 *See* Harry Willekens, *Long Term Developments in Family Law in Western Europe: An Explanation, in* THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES IN FAMILY LAW at 52-3 (eds. John Eekelaar & Thandabantu Nhlapo, 1998).

the husband's family and friends, from testifying to the husband's lack of access.[124] So even when the evidentiary rules were at their strictest, the marital presumption of paternity was not completely irrebuttable and did not always prevent the destabilization of family relationships.

Beginning in the early 1800's, U.S. courts accepted Lord Mansfield's Rule.[125] It was analogous to the privilege extended to "confidential communications" between a husband and wife.[126] The "confidential communications" rule prohibited husbands and wives from testifying as to what went on during their marriage.[127] U.S. courts applied the rule to divorce cases if the testimony could bastardize children born during the marriage.[128] In general, the courts asserted that the strict evidentiary rule protected children from becoming bastardized and prevented the immoral conduct of the parents from being revealed.[129]

By the end of the nineteenth and beginning of the twentieth century, U.S. courts abandoned the "confidential communications" doctrine and began to allow testimony of non-access as long as it did not "bastardize the issue."[130] This effectively limited the applicability of Lord Mansfield's Rule to bastardy cases.[131] For example, evidence of non-access could be admitted to prove adultery as the legal basis for obtaining a divorce but could not be used in a proceeding to bastardize the child.[132]

There were, however, many other ways to gain admission of evidence that would bastardize a child. As an English court noted in *Hargrave v. Hargrave*, this could be done by proving that the husband was

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124 *See* Mary Louise Fellows, *A Feminist Interpretation of the Law and Legitimacy*, 1998 J. WOMEN & L. 195, 196.

125 *See* Commonwealth v. Stricker, Browne Appendix at 47 (Pa. 1801) (first U.S. case citing and approving Lord Mansfield's Rule); Cross v. Cross, 3 Paige Ch. 139 (N.Y. Ch. 1832); Canton v. Bentley, 11 Mass 441, 442 (1841); Corson v. Corson, 44 N.H. 587, 587 (1863); Scanlon v. Walshe, 31 A. 498, 500 (Md. 1895). *See also Proof of Illegitimacy, supra* note 119, at 150; *The Admissibility of a Parent's Testimony, supra* note 120, at 72.

126 *See The "Lord Mansfield Rule," supra* note 114, at 82.

127 *See id.* at 83.

128 *See id.*

129 In *Tioga County v. South Creek*, 75 Pa. 433, 437 (1874), the Court stated,

> [m]any reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency . . . .

130 *The "Lord Mansfield Rule," supra* note 114, at 83.

131 *See id.* at 84.

132 *See* Koffman v. Koffman, 79 N.E. 780 (Ill. 1907).

> (1) incompetent, (2) entirely absent, so as to have no intercourse or communication of any kind with mother, (3) entirely absent at the beginning of the period during which the child must, in the course of nature, have been begotten, or (4) only present under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.[133]

The only evidence, therefore, which was inadmissible by either spouse was their own testimony of non-access.[134]

Lord Wigmore issued a scathing condemnation of Lord Mansfield's rule in the late nineteenth century.[135] He noted that if "decency" was the primary policy concern, it was inconsistent to permit a wife to testify to adultery but deny her permission to testify to non-access.[136] Furthermore, courts had undermined the rationale that the husband's or wife's testimony of non-access should not be admitted for fear of bastardizing the issue by permitting bastardization through other evidentiary means.[137] He argued that all pertinent facts should be admitted into evidence.[138] In the early 1900's, many states limited or abrogated Lord Mansfield's Rule, most likely based on Wigmore's condemnation.[139] Most states maintained a rebuttable presumption of legitimacy through statutes or common law.[140] Evidence of non-access, adultery, impotence, and sterility were all admissible to rebut the presumption.[141] Despite these common law bases for rebuttal, the marital presumption prevailed in all but a very limited set of circumstances through the first half of the twentieth century.[142]

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133 50 Eng. Rep. 546 (1846); *The "Lord Mansfield Rule," supra* note 114, at 85.

134 *See The "Lord Mansfield Rule," supra* note 114, at 85.

135 *See id.*

136 *See id.* at 85-86.

137 *See id.* at 86.

138 *See id.* at 85-86; GROSSBERG, *supra* note 117, at 220.

139 *See The "Lord Mansfield Rule," supra* note 114, at 86; GROSSBERG, *supra* note 117, at 221; Blumberg, *Disputed Parentage, supra* note 56, at 1603.

140 Blumberg, *Disputed Parentage, supra* note 56, at 1603. For example, the Iowa, Kansas, Louisiana, New Mexico, Vermont, and West Virginia legislatures adopted a rebuttable presumption, while Missouri, Pennsylvania, South Carolina, and Virginia maintain a common law rebuttable presumption. Some states established a rebuttable presumption of legitimacy when they adopted the Uniform Parentage Act. *See id.*

141 *See id.*

142 One important subset of cases in which the marital presumption did not prevail is when married white women gave birth to a child with African-American features. Courts refused to legitimate the African-American children of presumed white fathers, thus conferring upon them not only their support and inheritance rights, but also their racial status. *See* Fellows, *supra* note 124, at 500, 510.

### *B. Evolving Treatment of the Marital Presumption of Paternity*

As a result of the convergence of an increased focus on obtaining child support for nonmarital children, high divorce rate, and technologic prowess in identifying biological fathers, recent years have seen numerous challenges to and defenses of the marital presumption of paternity. These challenges to the marital presumption of paternity arise in many ways. Either the mother or the presumed marital father may challenge the presumption during or after divorce, regardless of the ages of the children. Putative biological fathers may assert their claims at any time, either with or without the mother's agreement. State welfare agencies may bring claims when mothers seek financial assistance for themselves and their children.

Like the human circumstances to which they respond, the recent legal doctrines that have emerged from challenges to the marital presumption of paternity are complex and confusing. This doctrinal chaos manifests itself through the dramatically different substantive and procedural law applied to challenges to the marital presumption of paternity in different states. Outcomes to such challenges vary greatly based on who brings the action, the timing of that action, and in many states, highly discretionary and fact sensitive determinations by the courts.

Although the UPA (1973) was primarily designed to ensure the accurate identification of the fathers of children born outside of wedlock, it also contained provisions that affected the paternity of children born to married mothers. Nineteen states have adopted these provisions in whole or in part.[143] Many other state legislatures have passed legislation that, although again primarily focused on the needs of nonmarital children, addresses the paternity of children born to married mothers. Despite these many state statutes, the outcome of challenges to the marital presumption of paternity often turns on the judicial application or rejection of traditional judicial doctrines such as equitable estoppel, collateral estoppel, and laches. The doctrinal chaos is deepened by the widely varying interpretations given to these traditional judicial doctrines in different states.

This section begins with an overview of the treatment of the marital presumption of paternity in the UPA (1973) and the recently adopted UPA (2000). It then highlights a few of the many different family situations in which the marital presumption of paternity is involved. It outlines the labyrinthine doctrine in this area, including the tension the courts experience among the various parties' interests in the compelling factual situations they face involving children who were ostensibly born into marriage. The section ends with an exploration and critique of the assumptions courts invoke to resolve the often heart-rending conflicts that come before them.

#### 1. Uniform Parentage Act of 1973

Although the drafters of the UPA (1973) focused on the rights of children born to unmarried parents, the UPA (1973) has also had a tremendous effect on the

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143 *See* UPA (1973), *supra* note 13, at 8.

rights of children born to married persons. The UPA (1973) permitted the child, the natural mother, and men who are presumed to be the father through marriage to the mother to bring actions to declare the existence or non-existence of the father and child relationship.[144] While actions to declare the existence of the father and child relationship could be brought by those parties at any time, actions to declare the non-existence of the father and child relationship were limited to a reasonable period of time "after obtaining knowledge of the relevant facts" and no later than five years following the birth of the child.[145] The choice of a five year period was not explained in the document, and the designation of five years is in brackets, indicating some lack of agreement about that time period.[146]

Notably, the UPA (1973) did not permit men who were not presumed fathers through marriage to bring paternity actions to assert their parental rights to children born during the mother's marriage.[147] Broad rights of any "interested persons" to bring such actions were limited to actions concerning children for whom there was no presumed father or where the presumption was based on the conduct of an unmarried father.[148]

The UPA (1973) permitted actions to declare the non-existence of paternity in presumed marital fathers, but it did not specify what kind of evidence was adequate to rebut the presumption. Traditionally, of course, the presumption could be rebutted only by evidence that the husband could not be the father due to lack of access to the mother, and many courts had added sterility or impotence as other grounds on which the presumption could be rebutted.[149] Instead of defining what kind of evidence would rebut the presumption, the UPA (1973) merely stated that the presumption may be rebutted by clear and convincing evidence, and that if two presumptions came into conflict with each other, courts should base their decisions on the presumption that "on the facts is founded on the weightier considerations of policy and logic." [150] The UPA (1973) did not include a presumption based on the results of genetic testing.[151] It did state that evidence relating to paternity "may include: . . . blood tests results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity."[152] Because this broad language gave no substance to the rebuttal standards, there has been no uniformity in the application of those rebuttal

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144 *See id.* § 6.

145 *See id.*

146 *See id.* § 6(c).

147 *See id.* § 6(a).

148 *See* UPA (1973), *supra* note 13, § 6(b).

149 KRAUSE, ILLEGITIMACY, *supra* note 36, at 16-17.

150 UPA (1973), *supra* note 13, § 4(b).

151 *Id.* § 4.

152 *Id.* § 12(3).

standards even among the states that adopted the UPA (1973).[153]

The circumstances in which the marital presumption of paternity can be successfully rebutted varies dramatically state by state and by factors such as the identity of the party who brings the action, the timing of the action, the marital status of the mother and the presumed father, and the specific promises made or actions taken by the presumed father or alleged unmarried biological father. Courts with similar statutes have reached dramatically different conclusions about the circumstances in which rebuttal of the marital presumption of paternity is appropriate.[154]

Central to these differences is the question of the role of genetic testing. In most states, scientific evidence of paternity creates a presumption of paternity.[155] In some states scientific evidence of paternity or nonpaternity creates a conclusive presumption.[156] In those states that do not treat the results of genetic testing as a conclusive presumption, courts must determine whether the results of the genetic testing are, by themselves, sufficient to rebut the marital presumption or if other factors, such as equitable estoppel or the best interests of the child, prevent the rebuttal of the marital presumption. These judicial decisions concerning whether genetic test results are sufficient to rebut the marital presumption of paternity appear to be based on assumptions about fatherhood. Courts rely on these briefly stated assumptions with little or no evidentiary support or analysis.[157]

### 2. Uniform Parentage Act of 2000

Unfortunately, the drafters of the newly revised UPA (2000) have not adequately tackled these thorny and deeply divisive issues.[158] The Prefatory Note to an earlier draft of the revision stated that the new draft was designed to focus on "protecting the child, who had no voice in often complex circumstances giving rise to the child's birth."[159] However, at least for children for whom the marital

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153 *Compare* IND. CODE ANN. § 31-14-6-3(1) (Michie 1997) (testing results and findings of the expert generally constitute conclusive evidence if the results and findings exclude a party as the biological father of the child); *with* CAL. FAM. CODE § 7554(b) (Deering 1996) (if experts disagree in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question shall be submitted upon all the evidence, including evidence based upon the tests.); *and* NEB. REV. STAT. § 43-1415(2) (1998) (testing results, whether or not such tests were ordered, that show a probability of 99% or more, create a rebuttable presumption of paternity).

154 *See* discussion *infra* Part IV.C.

155 *See* Litovsky & Schultz, *supra* note 78, at 85-86. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(f) (West Supp. 1999); OHIO REV. CODE ANN. § 3111.03(A)(5) (West Supp. 1999)

156 In 1998, Litovsky & Schultz reported that twenty-two states set a scientific standard for a conclusive presumption of nonpaternity, while only eight established a scientific standard for a conclusive presumption of paternity. *See* Litovsky & Schultz, *supra* note 78, at 85-86.

157 *See* discussion *infra* Part V.

158 *See* UPA (2000), *supra* note 35.

159 National Conference of Commissioners on Uniform State Laws, *Proposed Revision of the Uniform Parentage Act* (October, 1999) (visited January 9, 2001), <http://www.law.upenn.edu/bll/ulc/upa/upa1099.htm> [hereinafter 1999 Proposed Revision of the UPA].

presumption of paternity comes into dispute, the UPA (2000), which predominantly relies on the UPA (1973), fails to create certainty or consistency among the states.

The UPA (2000) both increases and decreases the disparity of treatment between married and unmarried fathers. Although married fathers continue to maintain their presumption of paternity, unmarried fathers are recognized only in two ways: through written acknowledgment of their paternity or through legal action against them or initiated by them to require genetic testing and a judicial finding of paternity.[160] Thus, unmarried fathers who behave similarly to married fathers by accepting children into their home and holding them out as their natural children are no longer presumed fathers, nor are there any time limitations on attacks on their paternal status.[161] However, unlike the UPA (1973), an alleged biological father of a child born to a married mother now has standing to bring an action to determine the existence or non-existence of the parent-child relationship.[162] Thus, a developed parent-child relationship between an unmarried father and his child receives no deference, but unmarried fathers are permitted to assert their parentage claims concerning children born to married mothers.[163]

The proposed draft removes the necessity of joining the child as a party.[164] Although this change was made to reflect the drafters' view of widespread practice,[165] it leaves the interests of children, whose paternity is at stake, unrepresented in these important proceedings.[166] Many courts have recognized the necessity of a legal advocate for the child where parents who are battling each other may not be focused on the best interests of the child whose paternity is the subject of the action.[167]

In limiting the timing for actions to rebut the marital presumption of paternity, the UPA (2000) follows the lead of a small number of states. It limits actions to rebut the marital presumption to two years following the birth of the child if the presumed father lived in the same household as the child or treated the

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160 *See* UPA (2000), *supra* note 35, § 204 (eliminating presumptions based on a man's receiving a child into his home and openly holding out the child as his natural child).

161 *See id.* § 606.

162 *See id.* § 602(3).

163 These claims are, however, limited to the two years following the birth of the child. *See id.* § 607.

164 *See id.* § 603.

165 *See* 1999 Proposed Revision of the UPA, *supra* note 159, § 603 cmt.

166 *See* UPA (2000), *supra* note 35, § 612. This section provides that a minor child is a permissible, although not necessary party, and that if the child is a party, or if the court finds that the interests of the minor child are not adequately represented, the court shall appoint an attorney ad litem to represent the child. *See id.*

167 *See e.g.*, Harris v. Harris, 753 So. 2d 774 (Fla. Dist. Ct. App. 2000) (requiring trial court to obtain a guardian ad litem for the child prior to termination of all visitation rights of the reputed father under a settlement agreement that acknowledges a lack of paternity); In the Matter of the Marriage of Ross, 783 P.2d 331, 336 (Kan. 1989)(guardian ad litem should conduct independent investigation in order to properly represent the best interests of the child); M. F. v. N.H., 599 A.2d 1297, 1302 (N.J. Super. 1991)(appointment of guardian ad litme is likely to be required to assist court in determining the best interests of the child).

child as his own.[168] Although the UPA (2000) limits the amount of time for certain challenges to the presumption, there is no clear explanation for the choice of a two year period of time. The reporter's notes to a 1999 draft state that the two-year period "allows an adequate period to resolve the status of a child within the context of an intact family unit; a longer period may have severe consequences for the child."[169] No evidentiary base is provided for the assumption that actions commenced at two years (and probably decided well after the child's second birthday) will not have severe consequences for children. It is also unclear why a later change of paternity will harm a child if the child's "father" was married to the mother, but will not create the same harm for a child if the "father" was not married to but cohabited with the child's mother.

The UPA (2000) does not clearly resolve the question of paternity in a contest between a biological father and a husband in an action brought within two years of the child's birth. In actions to adjudicate a husband's paternity, the court may deny a request for genetic testing if it finds by clear and convincing evidence that the conduct of the mother or the presumed father estops that party from denying parentage and it would be inequitable to disestablish the father-child relationship.[170] In making that determination, the court must consider the best interests of the child.[171] Once the court determines that genetic testing is proper, however, the court must adjudicate the genetic father as the legal father of the child.[172] If the action is brought more than two years after the birth of the child, the presumed father's paternity can no longer be contested by anyone, including the presumed father.[173] Given the dramatic differences in judicial interpretations of equitable estoppel, equity, and best interests of the child by the different state courts, this provision is unlikely to create uniformity in the judicial resolution of

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168 UPA (2000), *supra* note 35, § 605. Oklahoma has adopted a similar statute that refuses to permit any challenges to the marital presumption of paternity "if a child is born during the course of the marriage and is reared by the husband and wife as a member of their family without disputing the child's legitimacy for a period of at least two years." OKLA. STAT. tit. 10, § 3(B) (2000). California has also adopted a two year limitation on actions to disestablish the paternity of a presumed father. *See* CAL. FAM. CODE § 7541 (West 2000).

169 1999 Proposed Revision of the UPA, *supra* note 159, § 605 Cmt.

170 *See* UPA (2000), *supra* note 35, § 608. Section 608 states in part:

> (a) In a proceeding to adjudicate parentage under circumstances described in Section 607, a court may deny genetic testing of the mother, the child, and the presumed father if the court determines that:
> (1) the conduct of the mother or the presumed father estops that party from denying parentage; and
> (2) it would be inequitable to disprove the father-child relationship between the child and the presumed father.
> (b) In determining whether to deny genetic testing under this section, the court shall consider the best interest of the child . . . .

171 *See id.* § 608(b).

172 *See id.* § 631(2).

173 *See id.* § 607. The time constraint does not apply if: (1) the presumed father and the mother of the child did not cohabit or engage in sexual intercourse during the probable time of conception; and (2) the presumed father never openly treated the child as his own. *See id.* § 607(b).

challenges to the paternity of presumed fathers.

### C. *Challenges to the Marital Presumption of Paternity*

Although it is impossible to delineate the wide range of family situations in which the marital presumption of paternity is at issue, three scenarios recur, all involving the legal paternity of the presumed father who was married to the child's mother. These three situations include: (1) where an alleged biological father asserts paternity rights over a child whose mother and presumed father are married to each other; (2) where a husband or ex-husband denies paternity during or following a divorce from the mother; and (3) where a mother denies the paternity of her husband or ex-husband during or following a divorce. The facts of three cases, as set forth in the judicial opinions, are described below. Each case description is followed by a discussion of the statutory and case law and judicial doctrines that have been developed in response to each scenario.

#### 1. Alleged Biological Father Asserts Paternity Rights: *Rodney F. v. Karen M.*

Karen M. and her husband were married in 1985 and, in 1998, still lived together as husband and wife.[174] The marriage had problems, and twice Karen filed for divorce, although they never obtained a divorce.[175] From May of 1991 through July of 1992, Karen was involved in an affair with her co-worker, Rodney F.[176] During that time, Rodney and Karen rented two different apartments to use as meeting places.[177] Because Karen's husband frequently spent a week at a time offshore for the oil industry, Karen spent a considerable amount of time with Rodney in those residences.[178]

Karen continued to have sexual intercourse with her husband throughout her relationship with Rodney.[179] Karen became pregnant at the end of July, 1992.[180] In September of that year, she told her husband about the affair with Rodney and about the pregnancy.[181] Her husband was unaware of the affair until that time.[182] She also told Rodney about her pregnancy that month and reported that he

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174 *See* Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 401 (Cal. Ct. App. 1998).

175 *See id.*

176 *See id.*

177 *See id.*

178 *See id.*

179 *See Rodney F.*, 71 Cal. Rptr. 2d at 402.

180 *See id.* at 401.

181 *See id.*

182 *See id.*

expressed little interest in the pregnancy.[183] A baby girl was born in March, 1993.[184] She lived exclusively with Karen and her husband.[185] The child had no contact with Rodney F.[186] He however filed an action to establish his paternity and obtain joint legal and physical custody of the newborn.[187]

Rodney requested blood tests, which showed that there was a 99.5 percent probability that Rodney was the biological father.[188] Based on this evidence and his testimony about his sexual relationship with Karen during the period of conception, Rodney asked the court to recognize his paternity of the child and grant him visitation with his biological daughter.[189]

The California courts dismissed Rodney F.'s claims for paternity and visitation.[190] In California, as in many states that adopted the UPA (1973), alleged biological fathers may not bring paternity actions when the child has a legal father through the marital presumption of paternity.[191] Some states have permitted such actions only when the alleged biological father can prove the traditional criteria for disturbing a husband's paternity: evidence of impotence, imbecility, or absence from the wife's presence during the period of conception.[192]

Statutes that prohibit alleged biological fathers from asserting paternity when the mother remains married to her husband, who is presumed to be the father, have been subject to challenge by putative biological fathers as denials of their equal protection and due process rights.[193] The United States Supreme Court, in a plurality decision in *Michael H. v. Gerald D.*,[194] found that California's refusal to permit putative fathers to contest the paternity of children born during their mother's marriage to another did not violate the Due Process Clause of the

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183 *See id.*

184 *See Rodney F.*, 71 Cal. Rptr. 2d at 401.

185 *See id.*

186 *See id.*

187 *See id.*

188 *See id.* at 404.

189 *See Rodney F.*, 71 Cal. Rptr. 2d at 401.

190 *See id.* at 401, 404-405.

191 *See id.* at 401. Other states have found the presumption irrebuttable under common law, in the absence of any clear statutory law governing the situation. *See, e.g.*, Amrhein v. Cozad, 714 A.2d 409 (Pa. Super. Ct. 1998) (refusing to permit alleged biological father to rebut presumption because mother and husband are still married). Other states have excluded alleged biological fathers by statute, *see, e.g.*, S.D. CODIFIED LAWS § 25-8-57 (Michie 1999) (limiting parties who may dispute presumption of legitimacy of child born in wedlock to husband or wife or a descendent of one or both of them).

192 *See* Chandler v. Merrell, 353 S.E.2d 133 (S.C. 1987) (refusing to find that the marital presumption was rebutted in the absence of proof of one of these limited circumstances even though the mother and husband had died in an accident shortly after the birth of the child and the alleged biological father was seeking to intervene in adoption proceeding for the orphaned child).

193 *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

194 *Id.*

Fourteenth Amendment.[195] Justice Scalia, writing for the plurality, found that an unmarried father's right to assert paternity over a child born to a married woman was not sufficiently deeply embedded in our cultural traditions to establish it as a fundamental right.[196]

State courts have split on the issue of the asserted constitutional right of putative fathers to assert their paternity of children born to married mothers. Some state courts have followed the *Michael H.* decision and have found that the exclusion of putative fathers from those permitted to assert paternity does not violate due process or equal protection under either the federal or state constitutions.[197] Others have found quite the opposite—that denying standing to alleged biological fathers to assert paternity did violate either the due process or equal protection provisions of their state constitutions.[198] For example, the Iowa Supreme Court explicitly rejected Justice Scalia's reasoning that the rights of an unmarried father to assert paternity over a child born during the mother's marriage was not sufficiently established in our cultural traditions to create a fundamental right.[199] The Iowa Supreme Court found that the definition of a protected liberty interest under the Iowa Due Process Clause "recognizes the changing nature of society."[200]

Many other states have adopted statutes that permit men alleging themselves to be the biological fathers of marital children to bring actions to establish their paternity.[201] In some instances, courts have followed these statutes

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195 *Id.* at 119.

196 *See id.* at 125.

197 *See, e.g.*, Dawn D. v. Superior Ct., 952 P.2d 1139, 1145 (Cal. 1998); Hauser v. Reilly, 536 N.W.2d 865, 868 (Mich. Ct. App. 1995); Market v. Behm, 394 N.W.2d 239, 243-44 (Minn. Ct. App. 1986); Merkel v. Doe, 635 N.E.2d 70, 74 (Ohio Ct. C.P. 1993); Amrhein v. Cozad, 714 A.2d 409, 414 (Pa. Super. Ct. 1998); Evans v. Steelman, 970 S.W.2d 431, 434-35 (Tenn. 1998); A v. X, Y & Z, 641 P.2d 1222, 1223-24 (Wyo. 1982).

198 *See* R. McG. v. J.W., 615 P.2d 666 (Colo. 1980) (finding that denial of standing to putative father violated Equal Protection Clause of Colorado Constitution); Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) (determining that denial of standing to putative father violated due process rights under state constitution); *In re* J.W.T., 872 S.W.2d 189 (Tex. 1994) (ruling that statute denying putative father standing to challenge paternity violated due process clause of state constitution; superseded by statute in TEX. FAM. CODE ANN. § 160.101(a)(3) (West 1996)); State of West Virginia *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554 (W. Va. 1996) (holding that biological father who has developed substantial relationship with child gains liberty interest in father-child relationship that is protected by the due process clause of the West Virginia constitution). *But see* Merkel v. Doe, 635 N.E.2d 70 (Ohio Ct. C.P. 1993) (finding that state statute that permits putative fathers to assert their paternity of a child who was born during the mother's marriage and was being raised by the mother and her husband violates the mother and husband's fundamental interests in the privacy and integrity of their family relationships). Another Ohio Court declined to follow the *Merkel* court's interpretation. *See* Patrick T. v. Michelle L., 2000 WL 1752792 (Ohio App. Nov. 30, 2000).

199 *See* Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999).

200 *Id.* at 190.

201 *See, e.g.*, ARK. CODE ANN. § 9-10-104(a) (Michie 1987) (providing that any man alleging to be the father of an illegitimate child may petition the county court for a determination of the paternity of the illegitimate child); IOWA CODE § 600B.8 (1996) (authorizing paternity actions to be brought by the mother, or other interested person); IND. CODE § 31-14-4-1 (1999) (authorizing "[a] man alleging that he is the child's biological father or that he is the expectant father of an unborn child" to file a paternity action); MISS. CODE

and permitted alleged biological fathers to successfully assert their paternity based on the results of genetic testing.[202] However, other states' courts have adopted a variety of doctrines that either prevent successful paternity claims by alleged biological fathers or at the least erect additional barriers to their success.

For example, state law in Arizona permits paternity actions to be brought by the mother or father, or on behalf of a child born out of wedlock.[203] It allows the marital presumption of paternity to be rebutted by clear and convincing evidence and lists genetic testing which affirms at least a ninety-five percent probability of paternity as another source of a paternity presumption.[204] The legislation also provides that courts shall order genetic testing in paternity actions on the motion of one of the parties.[205] This legislation would appear to make paternity rulings, even those involving the marital presumption of paternity, dependent on the results of genetic testing.

Despite this apparently clear statutory mandate, Arizona courts have determined that although state law gives alleged biological fathers standing to assert their paternity when the mother and her husband are still married, they may obtain genetic testing only if the court first determines that a decision in favor of the alleged biological father's paternity would be in the best interests of the child.[206] The Arizona court added the best interests analysis in the absence of any statutory language directing it to include such a determination in a paternity proceeding.

A similar approach was adopted by a New Jersey court. State law provides that a plaintiff who alleges himself to be the father has standing to bring an action "for the purpose of determining the existence or nonexistence of the parent and child relationship."[207] It also provides that, upon the motion of a party in a

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ANN.§ 93-9-21 (1999) (requiring court to order paternity testing on motion of alleged biological father).

202 *See, e.g.*, Willmon v. Hunter, 761 S.W.2d 924, 926 (Ark. 1988) (finding that statute permits man alleging to be biological father of child with presumed father to assert paternity and that such an action does not violate any public policy of the state); Johnson v. Studley-Preston, 812 P.2d 1216, 1219-20 (Idaho 1991) (finding that statute permits alleged biological father to bring action); K.S. v. R.S., 669 N.E.2d 399, 401 (Ind. 1996) (determining that statute permits alleged biological father to bring paternity action despite intact marriage of mother and presumed father); Rafferty v. Perkins, 757 So. 2d 992, 995-96 (Miss. 2000) (determining that results of scientific paternity testing adequate to overcome marital presumption).

203 *See* ARIZ. REV. STAT. ANN. § 25-806(A) & (B) (West 2000).

204 *See id.* § 25-814(A)(1) & (2).

205 *See id.* § 25-807(C).

206 *See* Ban v. Quigley, 812 P.2d 1014, 1018 (Ariz. Ct. App. 1991); R.A.J. v. L.B.V., 817 P.2d 37, 41 (Ariz. Ct. App. 1991). *See also, In re* Marriage of Ross, 783 P.2d 331, 336 (Kan. 1989) (determining that duty of guardian ad litem is to make an independent investigation of the facts upon which the paternity petition is based and then to appear and represent the best interest of the child at the hearing); Turner v. Whisted, 607 A.2d 935, 940 (Md. 1992) (finding that alleged biological father should bring action under Estates and Trusts Article which gives court discretion to grant or deny request for blood tests based on the best interest of the child); *In re* the Paternity of "Adam", 903 P.2d 207, 211 (Mont. 1995) (adopting best interest of the child standard for deciding whether biological father should be recognized as legal father under Montana's UPA); *In re* Paternity of C.A.S., 468 N.W.2d 719, 728 (Wis. 1991) (holding that determination of best interest of the children must be made considering all factors which weigh upon the children's interest).

207 N.J. STAT. ANN. § 9:17-45 (West 1999).

contested case, the court "shall" order "the child, mother and alleged father to submit to blood tests or genetic tests."[208] Nevertheless, the New Jersey court found that "an action does not rise to the level of a 'contested case' until it has been judicially so designated."[209] Thus, while the alleged biological father had standing to file a complaint, that standing "does not ensure that the action may proceed and that blood tests may be ordered."[210] Like the Arizona court, the New Jersey court refused to order genetic testing until the alleged biological father proved that "establishment of [his] paternity and the rebuttal of the husband's paternity will serve the best interests of the child."[211]

In contrast, other state courts have developed doctrines to permit alleged biological fathers to assert paternity of children born during the mother's marriage despite explicit statutory provisions that forbid such actions. In Massachusetts, although state law forbids a man who is not married to the mother to petition for paternity "under this chapter" when the child was born during or within 300 days of the mother's marriage to another, the Supreme Judicial Court found that courts could hear such a petition under their equity jurisdiction.[212] The court determined that paternity actions could be brought by putative biological fathers who had developed a substantial relationship with their children.[213] Connecticut courts have also permitted actions by alleged biological fathers despite the absence of any statutory basis.[214] Instead of this "developed relationship" test, Connecticut courts "weigh the multiplicity of competing interests that may hang in the balance" prior to determining whether an alleged biological father may proceed with a paternity action.[215]

Thus, state courts have moved in both directions: in some cases, they have limited the reach of state laws that permit alleged biological fathers to pursue paternity actions; other state courts have created a common law right to bring such

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208 *Id.* § 9:17-48.

209 M.F. v. N.H., 599 A.2d 1297, 1299 (N.J. Super. Ct. App. Div. 1991).

210 *Id.* at 1300.

211 *Id.* The Arizona and New Jersey courts are not the only courts to create a best interests standard that is not contained in the state statutory law. *See, e.g.*, McDaniels v. Carlson, 738 P.2d 254 (Wash. 1987).

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

213 *See id.* at 372-73. The court left for another day the issue of what rights a putative father might have in a case where the mother has prevented him from developing a substantial relationship with the child. *See id.* at 373. Similarly, Florida courts have found that although state paternity law prevents alleged biological fathers from bringing paternity actions, men who have developed a substantial relationship with a child have standing to bring paternity actions. *See* Kendrick v Everheart, 290 So. 2d 53, 61 (Fla. 1980). The West Virginia Supreme Court has applied the "developed relationship" test in the context of identifying whether the putative father has a liberty interest in his relationship with the child. State of West Virginia *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554, 565-566 (W. Va. 1996).

214 The Connecticut Supreme Court found that although the state statute on paternity actions did not permit actions by alleged biological fathers when the child was born in wedlock, alleged biological fathers nevertheless retain the right to pursue an adjudication of paternity under a habeas corpus action brought under the court's equity jurisdiction. *See* Weidenbacher v. Duclos, 661 A.2d 988, 996 (Conn. 1995).

215 *Id.* at 1000.

actions despite the apparent rejection of such actions by the legislature. In both of the situations described here, however, alleged biological fathers could obtain an order for genetic testing only after showing either: (1) a finding of paternity in favor of the alleged biological father would be in the best interests of the child; (2) the alleged biological father had already developed a substantial relationship with the child; or (3) the overall balancing of the applicable interests demonstrates that it is better to recognize the alleged biological father's paternity.

Other courts have determined that the best interests of the child analysis should follow rather than precede the results of the genetic testing. For example, a Minnesota court was faced with a paternity challenge in which the alleged biological father's probability of paternity was greater than ninety-nine percent.[216] This placed the marital presumption in conflict with a second presumption listed in the controlling statute, a presumption based on the results of genetic testing.[217] The statute, which was patterned on the UPA (1973), directed the court to resolve these conflicts by applying the presumption that "is founded on the weightier considerations of policy and logic."[218] The court chose to employ the best interests of the child analysis in order to determine which of the presumptions should control in this instance.[219]

Judicial discretion to decide whether to order genetic testing when alleged biological fathers assert their paternity over a child born to a married mother is expressly granted by some state statutes.[220] For example, when any party in Wisconsin argues that establishing the paternity of the putative biological father is not in the best interests of the child, the court must make a judicial determination of the child's best interest.[221] If the court finds that such a paternity determination is not in the child's interest, it must refuse to order genetic testing.[222]

Timing may also affect the right of an alleged biological father to assert paternity. New York courts have applied the doctrine of equitable estoppel to prevent a putative father from challenging an ex-husband's paternity. In *Ettore I. v. Angela D.*,[223] the court applied the doctrine of equitable estoppel against a biological father who filed a paternity action when the child was almost three even though he knew he was the biological father since the child's birth.[224] Oklahoma

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216 *See In re* the Paternity of B.J.H., 573 N.W.2d 99 (Minn. Ct. App. 1998).

217 *See id.* at 103.

218 MINN. STAT. ANN. § 257.55(2) (West 1998).

219 *See In re* the Paternity of B.J.H., 573 N.W.2d at 99-101 (affirming the trial court's grant of paternity to the putative father as in the best interests of the child).

220 *See, e.g.*, WIS. STAT. ANN. § 767.458(1m) (West 1993).

221 *See id.*

222 *See id.*

223 513 N.Y.S.2d 733 (N.Y. App. Div. 1987). *See also,* Palmer v. Carter, 543 N.Y.S.2d 625, 626 (N.Y. Fam. Ct. 1989).

224 513 N.Y.S.2d at 739-40. *See also In re* D.B.S. by and through P.S. v. M.S., 888 P.2d 875, 885 (Kan. Ct. App. 1995).

prohibits any action to disestablish the presumptive father's paternity after two years if the child has lived with the mother and her husband as part of the family during that time.[225]

One state, Louisiana, has adopted a common law concept of dual paternity.[226] An alleged biological father may assert his paternity, if done in a timely manner and proven by genetic testing.[227] However, the establishment of the alleged biological father's paternity does not disrupt the rights and responsibilities of the legally presumed father, and the alleged biological father is only permitted visitation with the child if he demonstrates his worthiness to participate in the child's life.[228] If his participation in the child's life does not meet the best interests of the child, the legally recognized biological father retains a support obligation but cannot claim the privilege of parental rights.[229]

2. Presumed Father Denies Paternity During or Following Divorce From Mother: *NPA v. WBA*

WBA and NPA, husband and wife, were married in 1977.[230] They had a difficult marriage and separated for part of 1980 and 1981.[231] They both had sexual intercourse with others during their separation. Shortly after they reconciled, NPA found out that she was pregnant.[232] WBA was upset by his wife's pregnancy, and worried that he was not the father.[233] NPA testified that she told him that if he had any doubts about being the father he should have a blood test while she was in the hospital.[234] She also stated that she told him that if he didn't want to get a blood test, he should never raise the issue of their child's paternity again.[235] The husband, on the other hand, testified that NPA reassured him that he was the biological father and that he accepted this statement as true and did not request that blood tests be performed.[236] After the child's birth in May 1981, NPA and WBA brought the child home and raised him together.[237] WBA always treated the child as his own

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225 *See* David V.R. v. Wanda J.D., 907 P.2d 1025 (Okla. 1995).

226 *See* T.D. v. M.M.M., 730 So. 2d 873, 876 (La. 1999).

227 *See id.* at 876-77.

228 *See id.* at 877.

229 *See id.* at 876.

230 *See* NPA v. WBA, 380 S.E.2d 178 (Va. Ct. App. 1989).

231 *See id.* at 179.

232 *See id.*

233 *See id.*

234 *See id.*

235 *See NPA*, 380 S.E.2d at 179.

236 *See id.* at 181.

237 *See id.*

throughout the remaining years of the marriage, and the son was never told that there was any question about his parenthood.[238] A second child was born a few years after the son's birth, and she, too, was raised by NPA and WBA together.[239]

In 1985, NPA filed for a divorce from WBA.[240] For the first time during the children's lifetime, WBA asserted that he was not their biological father.[241] The trial court ordered HLA testing, which established that the five-year-old son was not WBA's biological child, while the three-year-old daughter was WBA's biological child.[242] Based on the test results and his wife's admission that she had sexual intercourse with another man during their separation, WBA moved to disestablish paternity of the son and to be freed of any support obligation toward him, although maintaining his relationship with and support for his daughter.[243]

Relying on the principle that a parent owes a duty of support only to his or her natural or legally adopted child, the Virginia court found that WBA was not the boy's father and owed him no duty of support.[244] A number of other state courts have also relied on this principle in holding that men who are presumed to be fathers through marriage may challenge their paternity at the time of divorce.[245]

The most common doctrine advocated by litigants in opposition to a husband's denial of paternity at the time of divorce is the doctrine of equitable estoppel. Equitable estoppel generally requires that a party show: (1) conduct or words amounting to a representation; (2) reasonable reliance; and (3) resulting prejudice.[246]

Those courts that have rejected the application of equitable estoppel against husbands who deny paternity generally focus on two aspects of equitable estoppel doctrine. First, if the husband did not know the real facts concerning the child's parentage, these courts may find that it would be unfair to hold the husband to his representations of fatherhood. Second, many courts find that the child has not been prejudiced by the husband's parenting and later withdrawal from that parenting.

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238 *See id.* at 182.

239 *See id.* at 179.

240 *See NPA*, 380 S.E.2d at 179.

241 *See id.* at 180.

242 *See id.*

243 *See id.*

244 *See id.* at 180-81.

245 *See, e.g.*, Gann v. Gann, 705 So. 2d 509, 510-11 (Ala. Civ. App. 1997) (holding that husband can rebut presumption by clear and convincing evidence based on genetic testing); Smith v. Smith, 845 P.2d 1090, 1092 (Alaska 1993) (holding same as *Gann v. Gann*); Gantt v. Gantt, 716 So. 2d 846, 847 (Fla. Dist. Ct. App. 1998); Doe v. Roe, 859 P.2d 922, 924 (Haw. Ct. App. 1993); *In re* Marriage of Adams, 701 N.E.2d 1131, 1134 (Ill. App. Ct. 1998) (finding that husband can dispute paternity in divorce proceedings within two years of obtaining knowledge of relevant facts); Cooper v. Cooper, 608 N.E.2d 1386, 1389 (Ind. Ct. App. 1993) (finding that husband who supported child during marriage can dispute paternity for "good cause").

246 These standard elements of equitable estoppel were outlined by the court in *B.E.B. v. R.L.B.*, 979 P.2d 514, 516 (Alaska 1999).

For example, in *Dews v. Dews*,[247] the court rejected equitable estoppel in part because the father did not know the real facts concerning the child's conception.[248] Therefore, the court reasoned, it would be unfair to apply estoppel to him where he did not knowingly misrepresent his parenthood to the child in question.[249] Courts have differed in their treatment of men who did know that they were not biological fathers yet held themselves out as the child's father anyway. Although some courts have found that letting a child call a man "daddy" and referring to the child in public as his daughter did not constitute misrepresentation,[250] others have considered a knowing acceptance of the role of parent one that cannot later be rejected.[251]

A second focus of judicial attention has been the alleged detriment to the child. Most courts have found that acceptance of the paternal role and provision of support during the marriage does not create reliance or detriment.[252] They have differed about both the existence and importance of emotional or financial harm to affected children. A number of such courts find that the emotional harm that the child experiences as a result of the husband's rejection of the child despite a longstanding parent-child relationship does not demonstrate reliance and detriment. Rather, these courts focus solely on financial harm, which they find arises only when the husband affirmatively prevents the mother and child from pursuing support from the biological father.[253]

Only a few states have applied equitable estoppel doctrine against husbands who deny paternity in divorce or post-divorce actions where the husbands did not know that they were not the biological father prior to the court action in

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247 632 A.2d 1160 (D.C. 1993).

248 *See id.* at 1168.

249 *See id.*; *see also,* Masters v. Worlsey, 777 P.2d 499, 503 (Utah Ct. App. 1989); NPA v. WBA, 380 S.E.2d 178, 182 (Va. Ct. App. 1989).

250 *See, e.g.*, K.A.T. v. C.A.B., 645 A.2d 570, 573 (D.C. Ct. App. 1994).

251 *See, e.g*, M.H.B. v. H.T.B., 498 A.2d 775, 779 (N.J. 1985) (estopping presumed father who knew he was not biological father yet represented to child and community that he was father from disclaiming his responsibility to child); Pietros v. Pietros, 638 A.2d 545, 547-48 (R.I. 1994) (estopping presumed father who knew that he was not biological father prior to marriage and promised to treat child as his own from escaping support obligation).

252 *See, e.g., In re* Marriage of A.J.N. & J.M.N., 414 N.W.2d 68, 71 (Wis. Ct. App. 1987) (rejecting asserted reliance or detriment based on husband's alleged promise to love and support child where mother did not know identity of biological father).

253 *See* B.E.B. v. R.L.B., 919 P.2d 514, 520 (Alaska 1999) (reviewing equitable estoppel case law in paternity disputes and determining that it will only recognize financial detriment under that doctrine); K.A.T. v. C.A.B., 645 A.2d 570, 573 (D.C. 1994) (refusing to find financial detriment solely on supposition that possibility of locating and obtaining support from biological father is now negligible); Knill v. Knill, 510 A.2d 546, 550 (Md. 1986) (finding detrimental reliance only when non-biological parent's conduct "actively interferes with the children's support from their natural parent"); Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984) (determining that equitable estoppel requires representation of support, reliance and financial detriment); Wiese v. Wiese, 699 P.2d 700, 703 (Utah 1985) (determining that presumed father's consent to have name placed on birth certificate does not meet element of detriment for purposes of equitable estoppel); *In re* Marrige of A.J.N. & J.M.N., 414 N.W.2d 68, 71 (Wis. Ct. App. 1987) (rejecting application of equitable estoppel against husband even where financial support for child from biological father was not an option).

which they denied paternity.[254] A larger number of states have been willing to apply equitable estoppel where the husband knew that he was not the biological father yet developed a loving parent-child relationship with the child anyway.[255] West Virginia has chosen yet a different path: where scientific tests disprove the husband's paternity, the court should determine whether an adjudication of nonpaternity would harm the child prior to deciding whether to admit the scientific evidence.[256]

Washington state courts mandate that in any proceeding that could disrupt the marital presumption of paternity, the court must determine the best interests of the child.[257] Thus, where a presumed father is the child's psychological father and continuation of the father-child relationship would provide the child with stability and continuity, Washington courts are extremely reluctant to permit presumed fathers to deny their paternity.[258]

Issues of timing can be considered important in many different ways: in relationship to the date of the child's birth; in relationship to the date upon which the presumed father gained reason to believe he was not the biological father; and in relationship to the termination of the marriage. Some states have applied strict statutes of limitations to actions by presumed fathers to disavow paternity. For example, Louisiana's statute bars actions more than one year after the child's birth.[259] Other states have adopted statutes of limitations of two or five years.[260]

The timeliness of applications to disavow paternity has also been determined in relationship to the date the presumed father discovered that he may

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254 *See, e.g.*, Judson v. Judson, 1995 WL 476848 (Conn. Super. Ct. July 21, 1995) (refusing to permit husband to deny paternity of twelve and six-year-old children in divorce proceeding although unclear whether court is applying estoppel or best interests of child); Watts v. Watts, 337 A.2d 350, 352 (N.H. 1975) (rejecting ex-husband's effort to deny paternity after discovery that children were not his biological offspring where had acknowledged children for fifteen years and stating that "[to] allow defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities").

255 *See, e.g.*, Pietros v. Pietros, 638 A.2d 545, 548 (R.I. 1994) (denying husband's petition to disestablish paternity upon divorce where knew child was not biological offspring, encouraged mother to keep child, and provided love and support to child during marriage).

256 *See* Michael K.T. v. Tina L.T., 387 S.E.2d 866, 870-71 (W. Va. 1989) (holding that court should examine factors such as duration and nature of parent-child relationship, facts surrounding discovery of nonpaternity, and harm to child if paternity were successfully disproved, including whether passage of time reduced chances of establishing paternity in biological father); William L. v. Cindy E.L., 495 S.E.2d 836, 839 (W. Va. 1997) (refusing to permit husband to deny paternity where had maintained father-child relationship for four years and was on notice that might not be biological father since shortly after child's birth).

257 *See, e.g., In re* Marriage of Wendy M., 962 P.2d 130 (Wash. Ct. App. 1998).

258 *See id.* at 133-34 (denying husband's petition to disavow paternity where presumed father is psychological parent and biological father, whom child has never seen, has been incarcerated for last six years).

259 *See* LA. CIV. CODE ANN. art. 189 (West Supp. 2001) (enforcing time limitation strictly unless the child is born more than 300 days after the parents are legally separated).

260 Oklahoma limits actions to establish or disestablish paternity to two years where the child lived for those two years with mother and husband as a member of family. *See* OKLA. STAT. ANN. tit. 10 § 3 (West 1998). Colorado provides five years. *See* R.E.H. v. J.M.H., 736 P.2d 1226, 1227 (Colo. Ct. App. 1986).

not be the biological father. For example, Washington's statute permits presumed fathers to bring actions to declare the nonexistence of the father and child relationship "only if the action is brought within a reasonable time after obtaining knowledge of relevant facts."[261] A few other courts have applied laches to claims where presumed fathers had knowledge of the relevant facts yet waited many years to bring their action to disavow paternity.[262]

Timing has also come into play in relationship to the dissolution of the marriage. Ex-husbands have been less successful in denying paternity after a final divorce decree has been entered than they have been while divorce proceedings are still ongoing. Some states have permitted ex-husbands to contest their liability for child support where the courts find that the mother committed fraud during the divorce proceeding[263] or that the husband was unaware of the child's existence at the time of the divorce.[264]

A large number of states, however, have barred ex-husbands from denying their paternity after the divorce proceeding is final. Many courts have employed the doctrine of collateral estoppel to prevent later disavowals of paternity.[265] Other

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261 WASH. REV. CODE ANN. § 26.26.060(1)(b) (West 1997). *See also In re* Paternity of K., 752 P.2d 393 (Wash. Ct. App. 1988) (reversing trial court's rejection of presumed father's petition to declare nonexistence of father-child relationship as untimely for failure to ascertain time at which presumed father became aware of facts which would lead him to question his biological paternity); Bergan v. Bergan, 572 N.W.2d 272, 274-75 (Mich. Ct. App. 1997).

262 *See* Arvizu v. Fernandez, 902 P.2d 830, 834 (Ariz. Ct. App. 1995) (applying laches where presumed father had waited twelve years and had neglected several opportunities to bring his claim to the court's attention); *In re* Marriage of Boer, 559 P.2d 529, 539 (Or. Ct. App. 1977) (finding that presumed father was barred by laches where he knew at time of child's birth that he was not biological father yet failed to raise nonparentage as defense at divorce).

263 *See, e.g.*, L.J. v. C.E.H., 835 P.2d 1265, 1267 (Colo. Ct. App. 1992) (refusing to apply five year statute of limitation to bring action to disavow paternity to ex-husband's defense of nonpaternity to support proceeding against him); Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990) (finding that equity favors reopening of judgment where ex-husband learned of nonpaternity in test that was obtained solely for purposes of medical treatment); Cain v. Cain, 777 S.W.2d 238, 239 (Ky. 1989) (permitting ex-husband to deny paternity twelve years after divorce and two years after discovery that wife had fraudulently led him to believe that he was father); Love v. Love, 959 P.2d 523, 526 (Nev. 1998) (finding that ex-husband not bound by res judicata if can show that ex-wife fraudulently concealed child's parentage in divorce proceeding); Hilaire v. DeBlois, 721 A.2d 133, 135 (Vt. 1998) (holding that ex-husband can be relieved of support obligation if demonstrates that wife committed fraud in divorce proceedings); Batrouny v. Batrouny, 412 S.E.2d 721, 723 (Va. Ct. App. 1991) (finding that wife's intentional representation to divorce court that child was born of marriage constituted fraud that permitted reopening of issue).

264 *See* Spears v. Spears, 784 S.W.2d 605, 606 (Ky. Ct. App. 1990); Masters v. Worsley, 777 P.2d 499, 502 (Utah Ct. App. 1989).

265 *See, e.g*, Benac v. State, 808 S.W.2d 797, 798 (Ark. Ct. App. 1991) (applying res judicata to North Carolina divorce decree which states that child is issue of the marriage and precluding father from obtaining tests to disprove paternity); Hotz v. Hotz, 214 Cal. Rptr. 658, 659-60 (Cal. Dist. Ct. App. 1985) (prior default judgment of divorce res judicata on issue of paternity); Davis v. Davis, 663 A.2d 499, 502 (D.C. 1995) (applying collateral estoppel where issue had actually been litigated in divorce proceeding); Luedtke v. Koopsma, 303 N.W.2d 112, 114 (S.D. 1981) (applying res judicata to prior divorce decree where ex-wife did not fraudulently prevent ex-husband from participating in prior proceeding); Sparks v. Sparks, 1989 Ky. App. LEXIS 139 (refusing to permit ex-husband to reopen divorce decree stating that there were three children born of the marriage); Miller v. Hubbert, 804 S.W.2d 819, 821 (Mo. Ct. App. 1991) (finding that mother's alleged false testimony concerning parentage of children was not extrinsic fraud which would justify denial of application of res judicata); Marriage of Holland, 730 P. 2d 410, 417 (Mont. 1986) (holding that issue of

courts have rejected motions for relief from judgment where the ex-husband failed to allege fraud that prevented him from fully and fairly presenting his side of the case[266] or there was no fraud committed by a mother who believed that husband was the biological father.

In some states, legislatures have responded to judicial applications of res judicata against ex-husbands who sought to disavow paternity post-divorce with statutory amendments that specifically permit men who have been adjudicated legal fathers to re-open such judgments at any time.[267]

### 3. Mother Denies Presumed Father's Paternity During or Following Divorce: *Cavanaugh v. deBaudiniere*

The mother, Aliette, was a French citizen and accomplished artist and scholar who studied in both France and Tokyo.[268] She first met her husband, Thomas, a native of Omaha, Nebraska, in 1973, and their relationship began in 1975.[269] Their relationship continued with some interruptions for the next thirteen years, when Aliette finally accepted one of Thomas' many proposals of marriage during a visit in San Francisco in late July of 1988.[270] While they were apart, and as

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paternity is res judicata where divorce decree listed child of marriage); John R. v. Lynn R., 688 N.Y.S.2d 218, 219 (Sup. Ct. App. Div. 1999); *but see*, Fairrow v. Fairrow, 559 N.E.2d 597, 599-600 (Ind. 1990) (permitting ex-husband who stumbled upon genetic information in effort to identify source of child's sickle cell anemia eleven years after divorce became final to challenge paternity due to public policy disfavoring support order against an ex-husband who is not child's father that outweighs importance of stability in legally established relationships between parent and child). A lower Indiana court later rejected genetic testing results when the man did not discover the evidence through medical tests for purposes other than to disprove paternity. *See* Pinter v. Pinter, 641 N.E.2d 101, 104-105 (Ind. Ct. App. 1994).

266 *See, e.g.*, Pinter v. Pinter, 641 N.E.2d 101, 104-05 (Ind. Ct. App. 1994); Pippin v. Jones, 856 P.2d 609, 611 (Okla. Ct. App. 1993); Mr. G. v. Mrs. G., 465 S.E.2d 101, 104 (S.C. Ct. App. 1995); Godin v. Godin, 725 A.2d 904, 909 (Vt. 1998).

267 *See, e.g.*, ALA. CODE § 26-17A-1 (Supp. 2000), which was amended in 1994 to permit adjudicated father to re-open paternity judgments at any time, and appears to have been passed in response to an Alabama court decision in *Ex parte W.J.*, 622 So. 2d 358, 361-62 (Ala. 1993), in which the court found that the presumed father could not reopen the divorce judgment when he had reason to know at the time of the divorce proceeding that he was not the biological father but had failed to act on that knowledge within a reasonable time. In addition, the Maryland legislature quickly overturned a judicial decision holding that an adjudicated father who did not request a blood test in the original paternity proceeding could not reopen the paternity declaration unless he was able to show fraud, mistake, or irregularity. *Tandra S. v. Tyrone W.*, 648 A.2d 439 (Md. 1994) was overturned by 1995 Md. Laws, Ch. 248, which allows adjudicated fathers to reopen and challenge the paternity declaration against them when they are excluded as the biological father by a post-declaration blood or genetic test. *See* MD. CODE ANN., FAM. LAW § 5-1038(2)(I)(2) (1999). *See also,* 750 ILL. COMP. STAT. ANN. 45/7(b-5) (West 1999) (permitting men to bring actions to declare the non-existence of the parent-child relationship subsequent to an adjudication of paternity if, as a result of genetic testing, it is discovered that the man is not the biological father of the child). The legislatures in Pennsylvania and New Jersey have also considered similar bills, although none have yet become law. *See* S. 516, 184th Leg., Reg. Sess. (Pa. 2000) (approved by the Pennsylvania Senate on June 5, 2000); Assem. Bill 2675, 209th Leg. (N.J. 2000).

268 *See* Cavanaugh v. deBaudiniere, 493 N.W.2d 197, 197 (Neb. Ct. App. 1992).

269 *See id.*

270 *See id.*

late as July 15 of 1988, Aliette had an affair with Terry Jaicomino.[271] When Aliette discovered in September of 1988 that she was pregnant, she felt sure that Thomas was the child's father.[272] Aliette and Thomas married, and a daughter, Tia, was born in March, 1989.[273] Thomas was named as the father on the birth certificate.[274] When Tia was nine months old, Aliette told Thomas that she believed that Tia looked like Jaicomino, and that Jaicomino could be the father.[275] Both parents continued to take care of Tia as their child.[276]

While Thomas initially thanked Aliette for her honesty, his behavior toward her changed, and they became increasingly estranged.[277] In June, 1991, Thomas hid Tia from Aliette and obtained an order giving him temporary custody of Tia.[278] Aliette denied in this proceeding that Thomas was Tia's biological father and obtained a blood test that demonstrated that Thomas was not the biological father.[279] The mother argued that she should have custody because Thomas had no biological relationship to Tia.[280] Both legal paternity and custody of Tia were presented to the court for resolution.[281]

The Nebraska court faced with this paternity dispute found that the mother was permitted to dispute her husband's paternity and that his nonpaternity could be determined on the evidence obtained from HLA testing.[282] Other state statutes and case law also permit mothers to contest their husband's paternity based on genetic tests requested at the time of divorce.[283]

Although many other states appear to permit mothers to contest their husband's paternity at the time of divorce, in practice many of these challenges are prevented by judicial application of equitable estoppel doctrine. Presumed fathers faced with their wives' efforts to disestablish their paternity often assert that they undertook the obligations of parenthood based on their wivess representations of fatherhood and that they wish to continue their father-child relationship. Courts

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271 *See id.*

272 *See id.*

273 *See Cavanaugh*, 493 N.W.2d at 197.

274 *See id.*

275 *See id.*

276 *See id.*

277 *See id.* at 201.

278 *See Cavanaugh*, 493 N.W.2d at 201.

279 *See id.*

280 *See id.*

281 *See id.*

282 *See id.* at 206.

283 *See, e.g.*, MO. ANN. STAT. § 210.826.1 (West 1996); Golden v. Golden, 942 S.W.2d 282 (Ark. Ct. App. 1997); Russell v. Russell, 682 N.E.2d 513, 517 (Ind. 1997); Thompson v. Thompson, 1995 WL 481480 (Ohio Ct. App. Aug. 10, 1995).

have been far more sympathetic to the equitable estoppel claims of presumed fathers than those of their children.

For example, in *Marriage of K.E.V.*,[284] the mother was equitably estopped from denying her husband's paternity where she had always acted as if her husband was the girl's father and he had acted on that belief.[285] Courts generally appear to assume that mothers know the biological facts of their child's parentage and apply equitable estoppel to their failure to inform their husband of that information.[286] Equitable estoppel has not been applied, however, where the mother informed the husband that he was not the biological father and he voluntarily continued the parent-child relationship.[287] A few courts have also found that a non-biological father acquired paternity rights through the doctrine of "equitable parent" and "equitable adoption."[288]

Timing has also been found to be important in the context of mothers' challenges to their husbands' paternity. Mothers have sometimes been prevented from raising the nonpaternity of their husbands because of a statute of limitations or a court's decision that the claim was not brought within a reasonable period of time.[289] In the post-divorce period, estoppel and laches have been employed to prevent mothers from asserting their ex-husbands' nonpaternity following a final divorce decree.[290] In addition, mothers have had little success with motions for

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284 883 P.2d 1246 (Mont. 1994).

285 *See id.* at 1253.

286 *See, e.g.*, Boyles v. Boyles, 466 N.Y.S.2d 762, 765 (N.Y. App. Div. 1983) (estopping mother who encouraged development of father-child relationship between husband and son from challenging husband's paternity upon divorce); Pettinato v. Pettinato, 582 A.2d 909, 912-13 (R.I. 1990) (equitably estopping wife from denying husband's paternity where attempting to illegitimize child "by attacking the legal presumption of paternity that she helped to bring about"); *In re* Paternity of D.L.H., 419 N.W.2d 283, 286 (Wis. Ct. App. 1987) (invoking equitable estoppel against mother who permitted husband to develop father-child relationship with child). At least one mother has successfully avoided possible estoppel, however, by bringing the action to establish paternity in someone other than her ex-husband by filing the petition for genetic testing as next friend of her child, J.W.L. *See In re* Paternity of J.W.L., 682 N.E. 2d 519, 520 (Ind. Ct. App. 1998).

287 *See* Crouse v. Crouse, 552 N.W.2d 413, 417 (S.D. 1996) (applying Iowa law).

288 *In re* Marriage of Gallagher, 539 N.W.2d 479, 482 (Iowa 1995) (remanding case to determine whether nonbiological father should be found to be an "equitable parent"); Atkinson v. Atkinson, 408 N.W.2d 516, 518-19 (Mich. Ct. App. 1987) (holding equitable estoppel did not preclude wife from admitting blood tests disproving her husband's paternity, but her husband had acquired paternity rights through the doctrines of "equitable parent" and "equitable estoppel").

289 *See* Riddle v. Riddle, 619 N.E.2d 1201, 1202 (Ohio Ct. C.P. 1992) (laches and equitable estoppel prevented mother from claiming the husband was not biological father where she had allowed him to believe he was father for more than five years).

290 *See In re* Donna M., 637 A.2d 795, 803 (Conn. App. Ct. 1994) (equitably estopping mother from denying husband's paternity where she asserted husband's paternity in divorce proceeding and ex-husband had paid child support based on belief that he was biological father); Ghrist v. Fricks, 465 S.E.2d 501, 507 (Ga. Ct. App. 1995) (estopping mother from disputing paternity after she signed divorce decree identifying former husband as father); *In re* Marriage of Klebs, 554 N.E.2d 298, 305 (Ill. App. Ct. 1993) (barring mother from bringing a subsequent action to vacate portion of divorce decree that established that child was born in marriage to first husband).

relief from divorce judgments.[291]

By and large, mothers have achieved little success in disestablishing the paternity of husbands or ex-husbands. Even where the state statutory language seems to permit such disestablishment, courts have been extremely reluctant to dissolve parent-child ties that presumed fathers want to maintain. Presumed fathers, not mothers, usually are able to choose whether they will continue to parent a nonbiological child post-divorce. In those few cases in which a presumed father's paternity was disestablished against his will, most of the courts employed the *in loco parentis* doctrine or other doctrines to continue a deposed father's right to shared custody or visitation.[292]

## V. UNCOVERING THE JUDICIAL ASSUMPTIONS ABOUT PATERNITY

The often heart-wrenching disputes involving the marital presumption of paternity take place in a social context in which fatherhood is receiving a lot of attention. It is the subject of research, academic conferences, policy initiatives, and political action groups. Researchers probe the importance of fathers to child development and the ways in which married and unmarried fathers parent their children, policymakers try to enforce child support obligations against unwed and divorced fathers, and local action groups work to enable unwed fathers to provide the parenting their children need.[293] Divorced fathers have joined forces to advocate for legislative and judicial changes that would increase their access to their children post-divorce. Gay men who are raising children in committed relationships seek legal protections for their parent-child relationships.[294] Stepfathers seek to continue parent-child relationships they maintained during their marriage to the children's mother.[295]

Although much of this activity seeks to affirm fathering roles, there are also efforts to limit paternal responsibilities. Divorced and unwed fathers drift away from their children at disappointingly high rates.[296] Many stepfathers are uninterested in maintaining paternal roles after divorce. Children who thought they were being parented by a father, biological or otherwise, may find themselves with

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291 *See, e.g.*, Worcester v. Worcester, 960 P.2d 624, 626 (Ariz. 1998).

292 *See, e.g.*, Cavanaugh v. deBaudiniere, 493 N.W.2d 197, 206 (Neb. Ct. App. 1992) (applying *in loco parentis* doctrine); Gilbert A. v. Laura A., 689 N.Y.S.2d 810, 811 (N.Y. App. Div. 1999) (finding that mother's involvement in development of father-child relationship between husband and son constituted extraordinary circumstance that may justify visitation with or custody of son by ex-husband).

293 *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER (1996); DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); Joe Jones, Director, Strive Baltimore, Address at the Association of American Law Schools Annual Meeting (Jan. 6, 2000) (describing his organization's program to encourage the involvement of unwed fathers in the lives of their children).

294 *See, e.g., In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995).

295 The Pennsylvania Supreme court recently awarded custody to a stepfather over the biological father. *See* Charles v. Stehlik, 744 A.2d 1255, 1257 (Pa. 2000).

296 *See* Judith Wallerstein, *Children of Divorce: A Society in Search of Policy*, *in* ALL OUR FAMILIES, *supra* note 1, at 66, 75.

no man who wants to be responsible for them once their "father's" relationship with their mother disintegrates.[297]

One source of all of this activity seems to be the felt need to redefine fathering in an era when fatherhood based on both biology and marriage is less dominant. Biological father-child relationships outside marriage and father-child relationships either within or outside marriage that are not based on biological ties or legal adoption are not new, but they are present at much, much higher rates than early in the twentieth century, a rate that accelerated quickly beginning in the 1970's.[298] Similarly, the technology to ascertain biological ties has developed quite recently.[299] Our cultural assumption that fatherhood is based on the twin links of biology and marriage has thus come under assault from two different directions: the increased number of children living with divorced or never married mothers and the new technologies readily available to ascertain a child's biological father.

What, then, is to be made of the splintering of our deeply held beliefs about fatherhood? Cases involving challenges to the marital presumption of paternity strike at the heart of this cultural belief. Judges must determine what, in fatherhood, truly matters. The conflicting doctrines they employ and outcomes they reach reveal their contradictory, and usually briefly stated, assumptions about fatherhood, its rights and responsibilities. Rarely do courts rely on expert evidence or legislative factfinding to support their conclusions.

The complex web of assumptions that have governed judicial decisionmaking in paternity disputes involving the marital presumption of paternity fall into several main categories. While these categories overlap and different assumptions are combined by different judges, they aid in the identification of the central choices that will need to be made to determine the future of the marital presumption of paternity. These categories include: the necessity of having a marital presumption of paternity; competing assumptions regarding the "true" basis of fatherhood; the extent to which the marital relationship should be privileged over other relationships; whether fairness to alleged or presumed fathers or the needs of children should be given primary consideration; the role of moral judgments in the decisionmaking process; and finally, whether children can have, and whether the law should recognize, more than one father.

Why worry about these unsupported assumptions? For children, relationships with parents and siblings are the most important relationships in their lives, and supportive, dependable, loving parenting is the most important factor in their healthy development into adults.[300] Conflicts that involve the marital presumption of paternity undermine these essential relationships, often unexpectedly. Whether two fathers compete to assert their paternity, their mothers try to sever social father-child relationships, or fathers abandon children upon

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297 *See* Woodhouse Testimony, *supra* note 15, at 6.

298 *See supra* note 7 and accompanying text.

299 *See* discussion *supra* Part II.

300 *See, e.g.*, Joan B.. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000).

discovering they are not biological fathers, children lose the predictability and security they so need. Law cannot protect all children from abandonment and conflict created by their parents, biological or social. However, few would argue that the current legal chaos and uncertainty surrounding the paternity of children born during a marriage adequately protects children.

### A. *Presuming the Presumption*

There is universal agreement among the courts that the marital presumption of paternity is centrally important. Justice Scalia and numerous other judges have described it as "a fundamental principle of the common law."[301] It is often described as "one of the strongest presumptions known to law."[302]

The drafters of the UPA (1973) adopted the importance of presumptions of paternity and sought to expand those presumptions to certain nonmarital fathers. The Prefatory Note assumes their utility:

> In order to identify the father, the Act first sets up a network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father. While perhaps no one state now includes all these presumptions in its law, the presumptions *are* based on existing presumptions of 'legitimacy' in state laws and do not represent a serious departure. Novel is that they have been collected under one roof. All presumptions of paternity are rebuttable in appropriate circumstances.[303]

In none of the judicial opinions is the utility of a presumption questioned – courts merely focus on the circumstances in which the presumption should be rebuttable. Given the increasing ease of rebutting the presumption, however, and the lack of security it currently provides to children born during their mother's marriage, it may be time to question the assumption that the marital presumption of paternity is beneficial and protects children. Certainty of biological paternity at birth may, in fact, better protect children given the prevalence of divorce.

### B. *Competing Assumptions Regarding the "True" Basis of Fatherhood*

A second important assumption is whether biological or social relationships form the dispositive basis of a father-child relationship.[304] Some

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301 Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

302 *See, e.g.*, Casbar v. Dicanio, 666 So. 2d 1028, 1029 (Fla. Dist. Ct. App. 1996); Brabham v. Brabham, 483 So. 2d 341, 342 (Miss. 1986); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 869 (W. Va. 1989).

303 UPA (1973), *supra* note 13, at 289. The marital presumption was preserved in the UPA (2000) without any explanation. *See* UPA (2000), *supra* note 35, § 204.

304 *See* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461,

courts have cited biology as the dispositive factor, relying on common law doctrine dating back to Sir William Blackstone's Commentaries, which stated:

> [T]he duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world: . . . By begetting them therefore they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[305]

This approach equates biology and fatherhood. Under this perspective, fatherhood is simply a biological relationship. Our child support system for nonmarital children is governed by the assumption that men are financially responsible for any children they created through their sexual intercourse with a woman.[306] The choice to have sexual intercourse carries with it the responsibility to provide for any children that result from the sexual relationship. The pre-eminence of the biological relationship in determining paternity is demonstrated in cases where biological fathers have unsuccessfully argued that they should not be responsible for child support because they were victims of statutory rape, the mother had fraudulently claimed that she was using birth control, or the mother refused to have an abortion or give the child up for adoption.[307]

In this view, defining fatherhood on any basis other than biology perpetuates a falsehood, one that the law should not countenance.[308] This unity of biology and fatherhood is so apparent to these courts that it needs no further substantiation or analysis. Biological ties are thus the source of legal father-child relationships.

What are the consequences of making biological relationships the dominant basis of legal fatherhood? If biological relationships trump all other sources of a father-child relationship, then all alleged biological fathers would be able to assert their paternity rights over children, whether they are born within marriage or not, or whether another man has parented the child for a substantial period of time. Likewise, at any point that genetic testing shows that a presumed father is not the "true" father, he would become a third party to the child, with no equal rights to custody with the mother in the event of divorce and with the right to simply walk away from parenting and child support once that information becomes known. Except for cases of legal adoption, paternal rights and responsibilities

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473-77 (evaluating the advantages and costs of basing legal fatherhood on biological paternity).

305 Knill v. Knill, 510 A.2d 546, 548 (Md. 1986) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *447).

306 *See* Harris, *supra* note 304, at 465.

307 *See id.* at 465 (collecting cases).

308 "I simply cannot agree with the majority's view that a government (through its courts) is entitled to determine in a particular case that one will be better off by the perpetuation of a falsity and the suppression of relevant, unprivileged facts." Monroe v. Monroe, 621 A.2d 898, 910 (Md. 1993) (Eldridge, J., concurring).

would attach to biological relationships and guide the courts' decisionmaking.

A second view with much less current support assumes that fatherhood and marriage go together. The legal commitment of marriage to the child's mother would form the basis of the opportunity to parent as well as the responsibility to do so. Some courts, as described below, highlight the protection of the marital relationship in resolving many of these disputes. However, at no time have the courts been willing to fully equate marriage to the mother and legal fatherhood. In Lord Mansfield's day, being beyond the seas, or the testimony of others of lack of access to sexual intercourse between the husband and wife, was sufficient to undermine the marital presumption of paternity.[309] One state that until recently closely adhered to the common law approach by limiting challenges to paternity to lack of access, sterility, and impotence still refused to impose paternal obligations where the parents were already separated by the time of the child's birth and the marriage did not create any opportunity to develop a parent-child relationship.[310]

A third view focuses on the existence of a social father-child relationship based on either biological connection or marriage to the mother as the primary determinant for paternity in a variety of situations. In these cases, marriage and biology are viewed as providing an opportunity to create a father-child relationship. The man's investment in the relationship with the child, not the existence or lack of the biological or marriage relationship, captures the courts' focus.[311] They have given little weight to the biological connection, some going as far as to find that proof of a biological connection, without more, is irrelevant to a determination of whether someone other than the husband and presumed father is the legal father.[312]

This approach, which places importance on caretaking relationships, has been used by a few courts to permit an alleged biological father to assert his paternity rights over a child born into an intact marriage where the man has a developed relationship with the child or it is in the child's interest to develop that social relationship.[313] It has also been used by some courts to protect the father-child relationships of presumed fathers who are not genetically related to the children they have parented and want to continue to parent.[314]

Courts adopting this approach have emphasized that actual caretaking, not biology, is the true test of fatherhood. One California court has argued that "[i]t is questionable whether it is to the child's benefit, emotionally and developmentally,

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309 *See The "Lord Mansfield Rule," supra* note 114, at 81.

310 *See, e.g.*, Martin v. Martin, 710 A.2d 61, 64-65 (Pa. Super. Ct. 1998). More recently, Pennsylvania courts have refused to apply the marital presumption of paternity where the marriage is no longer intact. *See, e.g.*, Sekol v. Delsantro, 763 A.2d 405 (Pa. Super. Ct. 2000).

311 *See, e.g.*, State *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554, 563 (W. Va. 1996) (finding that putative biological father who has made substantial personal investment in his relationship with child has liberty interest in maintaining such relationship).

312 *See* G.F.C. v. S.G., 686 So. 2d 1382, 1387 (Fla. Dist. Ct. App. 1997).

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

314 *See, e.g.*, Boyles v. Boyles, 466 N.Y.S.2d 762, 766 (N.Y. App. Div. 1983).

to establish biological parenthood for some abstract interest in truthfulness."[315] Instead, the court looked to the relationship between the child and the presumed father, which it found to be "more palpable than the biological relationship of actual paternity . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity...."[316]

Prioritizing the social relationship in determining paternity does not, however, always provide as much clarity as the biological approach to fatherhood. Courts that rely on the importance of social parenting have come to conflicting conclusions about the obligations of husbands who challenge their paternity of the children born during their marriage to the children's mother. While some courts have found that the social father-child relationship in the context of marriage is a sufficient basis for imposing the obligation of support throughout childhood, others have seen it as a voluntary social relationship that can be terminated by the father.[317]

Although most courts have limited their reliance on social relationships to those created only in the contexts of marriage or biological relationships, Professor Barbara Bennett Woodhouse and others have argued forcefully that courts should protect actual caretaking of children. They argue that male or female partners of mothers who nurture the mother and child through pregnancy and some period of childhood should not be denied legal parental status because they are not the biological parent of the child or marital partner of the mother.[318] A small number of courts have adopted this "functional" approach to parenting, often through the application of the *in loco parentis* doctrine.[319]

### *C. Privileging the Marital Relationship Over Other Family Relationships*

Courts universally agree that public policy requires them to privilege marital relationships over nonmarital relationships.[320] Courts often justify privileging the marital relationship on the ground that parenthood within marriage

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315 Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 123 (Cal. Ct. App. 1994).

316 *Id.* at 124 (quoting Estate of Cornelious, 198 Cal. Rptr. 543, 546 (Cal. 1984)).

317 *See* discussion *supra* Part IV.C.2.

318 *See* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parental Rights*, 14 CARDOZO L. REV. 1747, 1754-57 (1993) (arguing that unmarried partner of a biological mother who has nurtured mother and child throughout pregnancy and some period of childhood should not be robbed of legal parental status because he is not the biological father of the child); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 508-22 (1990) (defining legal parenthood to include "anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature," combining a functional approach with a degree of control by the child's legal parent).

319 *See, e.g.*, J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996) (finding that non-legal parent may have standing to seek partial custody of biological child of former lesbian partner if she can establish that she stood *in loco parentis* to child during relationship).

320 Some scholars, however, have disputed this assumption, *see, e.g.*, E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1998).

best protects children. Thus, courts should promote parenting within, not outside of, marriage. Even the drafters of the UPA (1973), who explicitly sought to equalize the legal status of all children, retained disparate treatment of children born within and outside of marriage. For example, although the UPA (1973) established presumptions that are not based on a marital relationship between the mother and the presumed father, it treated those presumptions differently.[321] Presumptions of paternity based on the conduct of the unwed father, such as accepting the child into his home and holding him out to others as his child, were eliminated in the UPA (2000).[322]

No court has argued that the marital family should be treated in exactly the same manner as the nonmarital family. Some scholars, however, have argued against this privileging of the marital relationship. Professor Gary Melton has argued that "the adoption of a broad definition of family often both brings law into harmony with changing social reality and promotes ends consistent with public policy . . . The degree of legal recognition that various relationships attain is likely to affect their stability and individuals' sense of satisfaction with them."[323] Scholars have also pointed to the ways in which the lack of recognition of nonmarital families has perpetuated a power imbalance between men and women.[324]

Despite the universal judicial assumption that marital relationships and families should be privileged in most contexts, courts and legislatures have developed different assumptions about what it means to protect marital relationships. At one end of the scale, a minority of states give the intact marital relationship broad protection from the efforts of an alleged biological father–holding the marital presumption to be irrebuttable in such a circumstance.[325] Courts that provide strong protection are generally quite vague about their reasoning, simply invoking the existence of an intact marriage and the policy that the state will support that intact marriage.[326] They simply state that denying a paternity petition by a putative biological father protects marriages.[327]

The unstated presumption about marriage is that the marital relationship

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321 UPA (1973), *supra* note 13.

322 UPA (2000), *supra* note 35, § 606.

323 Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851, 884-85 (1988).

324 *See* Mary Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender-neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

325 *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052 (Pa. 1999)

326 *See, e.g.*, Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399 (Cal. Ct. App. 1998) (court follows statute's mandate but questions creation of a "fictional family"); G.F.C. v. S.G., 686 So. 2d 1382 (Fla. Dist. Ct. App. 1997); Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999) (court states that policy of the state is to preserve intact marriages but did not apply such a policy because there was no longer an intact marriage).

327 *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1056 (Pa. 1999), in which the Pennsylvania Supreme Court stated, "[i]t is in precisely this situation, as was suggested in John M., that the presumption of paternity serves its purpose by allowing the husband and wife, despite past mistakes, to strengthen and protect their family."

could not survive the presence of the biological father. This is a somewhat curious presumption, because these are not situations where the husband is unaware of the claims of the biological father, which have already been brought to court.[328] Thus, the marital relationship has already had to survive knowledge of the original betrayal, the mother's sexual relationship with someone outside the marriage. The presumption that the biological father's assertion of paternity and visitation rights interferes with the intact marriage is interesting in a society in which numerous blended families negotiate the terrain of different parental relationships on a daily basis.[329] Yet this threat is considered so clear to courts making this assumption that they consider it unnecessary to take evidence on or analyze why a child's relationship with a different father is such a threat to the "intact" family unit.[330]

This protection of family relationships that were developed in the context of marriage may continue after the marriage has ended, protecting the parent-child bonds formed during the marriage.[331] Other courts, however, treat protection of the marital relationship as more important than the parent-child relationship.[332]

Thus, some courts allow presumed fathers to disestablish paternity upon divorce even though they knew or strongly suspected that they were not biological fathers but chose to fill the role of father during the marriage anyway.[333] To these courts, the presumed father acted properly by deciding not to challenge the child's paternity during the marriage because that would have threatened the marital relationship.[334] Once the marriage ends in divorce, however, the nonbiological father-child relationship is treated as a mere adjunct to the marriage, terminable with the end of the marriage. If the only important relationship in the family is the marriage relationship, then divorce terminates that relationship and the need to "[preserve] the family unit."[335]

Thereafter, the presumed father bears no further responsibility to the child, because his relationship to the child no longer serves to keep the marriage together. This type of protection of the marriage is usually justified as protecting the best interests of the children born during the marriage. However, where presumed fathers are able to protect their father-child relationships from intrusion during

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328 *See, e.g.*, Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399 (Cal. Ct. App. 1998) (upholding California law denying paternity action brought by biological father but noting that "where all the parties know who is the biological father, there is no reason to assume the integrity of the 'family' will be in jeopardy if visitation is allowed").

329 This view does have its academic supporters as well. *See, e.g.*, Hadek, *supra* note 33.

330 *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052 (Pa. 1999).

331 *See, e.g., In re* Marriage of Freeman, 53 Cal. Rptr. 2d 439 (Cal. Ct. App. 1996) (stating that "the state has a well-recognized interest in preserving and protecting the dignity of parental relationships, especially when a marriage is being dissolved and instability is being introduced into a child's life").

332 *See* Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999) (holding that presumption of paternity applies only to intact marriages).

333 *See, e.g.*, Knill v. Knill, 510 A.2d 546, 550 (Md. 1986).

334 *See id.*

335 Michael K.T. v. Tina L.T., 387 S.E.2d 866, 870 (W. Va. 1989); Aicia R. v. Timothy M., 34 Cal. Rptr. 2d 868 (Cal. Ct. App. 1994).

marriage but terminate them upon divorce, it is the interests of presumed fathers, not children, that seem to be best served. Rather than assuring that children's parental relationships are protected, these courts may simply be ensuring that presumed fathers can have it both ways: it is their choice upon divorce to maintain or terminate their nonbiological father-child relationships.[336]

In contrast to this view of the marriage relationship as the locus of judicial protection, other courts have viewed the family relationships to be protected more broadly. Once again, the protection of the relationships is related to the original marital context. However, within this broader perspective, some courts have assumed that all relationships developed within that context are entitled to protection that does not end upon divorce. For example, in *In re Marriage of Freeman*,[337] the court found that the state "has a well-recognized interest in preserving and protecting the dignity of parental relationships, especially when a marriage is being dissolved and instability is being introduced into a child's life."[338]

Through legal doctrines such as the best interests of the child or equitable estoppel, some courts have determined that the public policy interest in protecting marital families includes protecting the parent-child relationship even after the collapse of the marriage. Washington state courts apply a "best interests of the child" analysis to efforts by presumed fathers to disestablish paternity at the time of divorce.[339] In *Miscovich v. Miscovich*,[340] a Pennsylvania court found that although the marriage had ended, "a parent-child bond was formed."[341] This parent-child bond was adequate to estop the presumed father from contesting his paternity of the child.[342]

At the other end of the spectrum, the intact marital family relationship is given only a minimum of protection. In those instances, nonmarital biological fathers may assert their paternity over a child born during a marriage with few limitations.[343] Likewise, the nonbiological father is subject to loss of paternity by action of the mother.[344]

The universal judicial and legislative presumption that marital families should receive protections not available to other families and the conflicting

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336 *See* Mary Louise Fellows, *The Kingdom of the Fathers*, 10 L. & INEQ. J. 137 (1991).

337 53 Cal. Rptr. 2d 439 (Cal. Ct. App. 1996).

338 *Id.* at 448

339 *In re* Marriage of Wendy M., 962 P.2d 130, 132 (Wash. Ct. App. 1998).

340 688 A.2d 726 (Pa. Super. Ct. 1998).

341 *Id.* at 733. *See also* Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999); Sekol v. Delsantro, 763 A.2d 405 (Pa. Super. Ct. 2000).

342 *See id.*

343 *See, e.g.*, K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) (holding that Indiana law permits a man who claims to be the biological father of a child born during the marriage of the child's mother and another man to file a paternity action while that marriage remains intact).

344 *See, e.g.*, Russell v. Russell, 682 N.E.2d 513 (Ind. 1997).

assumptions courts make about protection of the marital family need to be carefully evaluated.

### *D. Prioritizing Fairness to Men or the Protection of Children*

In these disputed parentage cases, the interests and rights of the parties are in deep conflict. Rarely does the interest of the mother, who is seen as the wrongdoer, receive any attention.[345] Mothers' expressed preferences are generally ignored or disregarded, or they may not even be mentioned.[346]

The courts do often explicitly recognize, however, that the rights and interests of the presumed father, alleged biological father, and child may well be in conflict. The interests of the two possible fathers and the child compete for center stage. Some courts appear to prioritize fairness to men as the most important factor, whether the men are seeking freedom from support for nonbiological children or legal protection for a parent-child relationship. In contrast, other courts prioritize the "best interests of the child" in all of their decisions.[347]

What are the often contested assumptions about the meaning of fairness to men? The issue of choice seems to be at the heart of all of the competing assumptions. Courts hesitate to impose the burdens of parenthood unless presumed fathers voluntarily assumed longlasting parental obligations toward the child.[348] Courts and legislators have long assumed that the sexual relationship that created the biological relationship is an adequate basis for determining a man to be a voluntary father.[349] Among the courts that assume that voluntariness is a key concern in decisions concerning nonbiological presumed fathers, however, there are differences in what constitutes a voluntary relationship. Some courts focus on knowledge as choice, finding that it would be unfair to place continued support obligations on a man who developed a parent-child relationship with his wife's children unaware that he was not the biological father.[350] In these cases, lack of

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345 One Washington court explicitly stated that there are three entities with interests that are implicated in paternity determinations: "the child, the putative parent, and the State." *In re* Marriage of Wendy M.., 962 P.2d 130, 132 (Wash. Ct. App. 1998).

346 This absence of the mother raises serious concerns about judicial fairness that requires further exploration that is beyond the scope of this preliminary exploration of the issues raised by the marital presumption of paternity. Mary Louise Fellows has explored some of the feminist concerns about the marital presumption of paternity in *A Feminist Interpretation of the Law and Legitimacy*, 7 TEX. J WOMEN & L. 195 (1998) [hereinafter Fellows, *A Feminist Interpretation*].

347 *See, e.g.*, McDaniels v. Carlson, 738 P.2d 254 (Wash. 1987).

348 Presumed fathers who have discovered after divorce that they are not the biological father of their children have also become passionate advocates for freeing men from parental responsibilities they believe they have been defrauded into forming. *See, e.g.*, Robert Schwaneberg, *The Ties That Bind - What Happens When Genetic Testing Proves the Child is Not Yours After All,* THE STAR-LEDGER, March 18, 2001, *available in* 2001 WL 16668197(reporting that man who learned post-divorce that daughter was not his biological offspring engaged in advocacy that inspired legislator to offer legislation permitting men in this situation to rebut paternity with the results of genetic testing).

349 *See* Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 737-39.

350 *See, e.g.*, Dews v. Dews, 632 A.2d 1160 (D.C. 1993).

knowledge of a child's biological parentage is key to freeing the presumed father from his support obligations.[351] The lack of knowledge presumably made him unable to make a free choice to parent or not parent the child. Others, however, have seen the acceptance of parental responsibilities for a lengthy period of time, even without knowledge of the lack of a biological relationship, as a sufficient basis of voluntariness.[352]

Courts that face situations where the presumed father assumed a parental role cognizant of the lack of a biological relationship have arrived at opposite conclusions. Some have found that assumption of the obligations of parenthood with knowledge by the presumed father that he was not the biological father equals a voluntary assumption of permanent parenthood.[353] Others have gone in the other direction: assumption of parental responsibilities for a child even with the knowledge that there is no biological father-child relationship does not evidence voluntariness concerning continued support after divorce from the child's mother.[354] This approach is justified as permitting presumed fathers to choose to assume the role of parent during the marriage without fear of later financial repercussions.[355]

Fairness to biological fathers who are not married to the mothers has also been of great concern. Some courts have focused on the importance of the biological connection, and several have given it constitutional weight.[356] Although some courts believe that all unwed fathers have a constitutional right to have their timely assertions of paternity recognized,[357] others have determined that it would not be fair to deny these men the joys of fatherhood without at least a hearing on whether it would be in the child's interest to have their paternity acknowledged.[358] Other courts that have focused on fairness to biological fathers note that because the biological relationship is an adequate basis for a judicial determination of paternity and its accompanying support obligation, it is not fair to impose that burden on biological fathers without also permitting them to assert their paternity

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351 *See id.* at 1168.

352 *See* Watts v. Watts, 337 A.2d 350 (N.H. 1975). See also, OKLA. STAT. ANN. tit. 10 § 3 (West 1998), which makes child a member of the family if the child lives with the mother and husband for two years as an uncontested member of the family.

353 *See, e.g.*, M.H.B. v. H.T.B., 498 A.2d 775 (N.J. 1985); Pietros v. Pietros, 638 A.2d 545 (R.I. 1994).

354 *See, e.g.*, C.H.H. v. H.H., 696 So. 2d 1076 (Ala. Civ. App. 1996); B.E. B. v. R.L.B., 979 P.2d 514 (Alaska 1999).

355 *See* B.E.B. v. L.T.B., 979 P.2d at 519. Courts analogize these presumed fathers to stepfathers, who are able to assume financial and emotional responsibility for their spouse's children without automatically volunteering to support them after divorce. *See, e.g*, Dews v. Dews, 632 A.2d 1160, 1167 (D.C. 1993).

356 *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999).

357 *See, e.g., In re* J.W.T., 872 S.W.2d 189 (Tex. 1994).

358 *See, e.g., In re* the Paternity of "Adam," 903 P.2d 207 (Mont. 1995).

rights when they choose to do so.[359]

Although some courts have assumed that their focus should be fairness to presumed and putative fathers, other courts have assumed that they should place the best interests of the child at the center of their analysis.[360] Thus, some courts that recognize the biological father's right to claim paternity will only order genetic testing or enter a judgment of legal paternity in the biological father when it serves the best interests of the child.[361]

The most difficult conflicts between father and child arise when a presumed father wants to terminate a longstanding father-child relationship. While most courts recognize that abandonment by a child's psychological father is devastating to a child,[362] they have differed dramatically in their views whether that is a legal detriment from which the child deserves judicial protection. This issue has come up in several different doctrinal contexts, making apparent conflicting assumptions about children and their needs and experiences.

One harm to the child that has received some judicial attention is the social injury that may result from the removal of the "cloak of legitimacy" from the child.[363] Other courts have found that the social stigma and legal disabilities of illegitimacy have diminished dramatically, severely reducing this concern.[364]

Some courts also consider whether children have been harmed by being denied the opportunity to develop a relationship with their natural father.[365] These courts have held to this position even where the husband no longer wishes to parent or support the child, once again focusing on the harm to the child:

> [T]he law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized. Relying upon the representation of the parental relationship, a child naturally and normally extends his love and affection to the putative parent. The representation of parentage inevitably obscures the identity and whereabouts of the natural father, so that the child will be denied the love, affection and support of the natural father. As time wears on, the fiction of parentage reduces the likelihood that the child will ever have the opportunity of knowing or receiving the love of his natural father.

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359 *See, e.g,* Callender v. Skiles, 591 N.W.2d 182, 191 (Iowa 1999).

360 *See, e.g.*, Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872 (W. Va. 1989). The court states, however, that the preference for the interests of the child may not prevail if there is "proof of fraudulent conduct which prevented the putative father from questioning paternity". *Id.*

361 *See, e.g.*, Ban v. Quigley, 812 P.2d 1014, 1017-18 (Ariz. Ct. App. 1991); M.F. v. N.H., 599 A.2d 1297, 1300 (N.J. Super. Ct. App. Div. 1991).

362 *See, e.g.*, B.E.B. v. R.L.B., 979 P.2d 514, 519 (Alaska 1999).

363 Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Dist. Ct. App. 1961).

364 *See* Michael K.T. v. Tina L.T., 387 S.E.2d 866, 869-70 (W. Va. 1989); State *ex. rel.* of J.R. v. Mendoza, 481 N.W.2d 165, 172 (Neb. 1992).

365 *See, e.g., Michael K.T.*, 387 S.E.2d at 872.

> While the law cannot prohibit the putative father from informing the child of their true relationship, it can prohibit him from employing the sanctions of the law to avoid the obligations which their assumed relationship would otherwise impose.[366]

In sharp contrast, however, are decisions that the child's undeveloped relationship with his or her biological father is a legally recognizable harm only when the presumed father has actively interfered with the child's receipt of financial support from his or her biological father.[367]

Judicial conflicts about whether a child's best interests lie in knowing the identity of his biological father or in maintaining whatever father-child relationship already exists are also apparent.[368] Although some courts treat the determination of this priority as a factual question to be determined on a case-by-case basis,[369] others have made this judgment as a matter of law, applicable to all situations.[370]

Finally, some courts have focused more on the emotional injury to the child. As the dissenter in *Knill v. Knill*[371] pointed out, "nothing could be more devastating to the fragile psychology of a child than the sudden breach of a long-established paternal relationship followed by being proclaimed a bastard and left without a father."[372] Those courts that focus on the emotional injury to the child generally also reach their conclusions without the benefit of expert testimony. They make numerous assumptions about the nature of children's relationships with their fathers and whether they will experience an emotional loss from the termination of those relationships. For example, one court found it doubtful that a two year old child "relied in any meaningful sense on any representation of paternity that the husband may have made."[373] The court came to this conclusion without the aid of any expert testimony on the understanding or attachment levels of young children to their parents.[374]

In other cases, judges barely mention the emotional injury to the child, and

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366 *Id.* at 871-72 (quoting Gonzalez v. Andreas, 369 A.2d 416, 419 (Pa. Super. 1976)).

367 *See, e.g.,* Knill v. Knill, 510 A.2d 546, 550 (Md. 1986); Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984).

368 *In re* Marriage of Swanson, 944 P.2d 6, 11 (Wash. Ct. App. 1997).

369 *See id.* The court emphasized the importance of the role of the guardian ad litem in fully investigating and making a report and recommendation to the court concerning the interests of the individual child involved in a paternity action. *See id.*

370 *See In re* the Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992) (stating that "there is a substantial public policy in correctly identifying parents and their offspring. Proper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons").

371 510 A.2d 546 (Md. 1981).

372 *Id.* at 556 (Murphy, C.J., dissenting). *See also In re* Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (stating that "[w]hen there are changes of the parent figure or other hurtful interruptions, the child's vulnerabilities and the fragility of the relationship becomes clear") (citations omitted).

373 A.R. v. C.R., 583 N.E.2d 840, 843 (Mass. 1992).

374 *See id.*

if they do, they blame the mother for causing that emotional injury.[375] In these cases, the courts argue that the father's action to disavow paternity demonstrates that the emotional bond between the father and the child has already been broken, and that the courts are powerless to protect the child from this outcome.[376] They question the assumption that maintaining the legal father-child relationship will encourage the father to maintain the emotional bond. Rather, as the Alaska Supreme Court argued:

> It is far from obvious that precluding a non-biological father from challenging paternity can effectively protect his child's emotional well-being. . . . Of course, it is arguable that if the father knows that he will not be able to shirk his support obligation by challenging paternity, he might be deterred from attempting the challenge. But any such deterrence would be more than offset by the risk that a court order requiring the non-biological father to pay support might itself destroy an otherwise healthy paternal bond by driving a destructive wedge of bitterness and resentment between the father and his child. In short, [such a] rule is not grounded in reality. . . . [and an] emotional harm standard is not likely to accomplish this commendable goal.[377]

Overall, courts have been much more sympathetic to the claims of presumed fathers that they be permitted to continue their relationships with their nonbiological children than to similar assertions made on behalf of children. For example, the same Maryland court that permitted a presumed father to deny paternity of a fourteen-year-old son he had always treated as his own allowed a willing presumed father to maintain his father-child relationship if it were in the child's best interests.[378] This approach had the effect of protecting the father-child relationship at the option of the father, not the child.

At times, courts fail to recognize the Catch-22 they may create for children. For example, courts may refuse to permit unmarried alleged biological fathers to assert paternity in order to protect the marital family.[379] However, they

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375 *See, e.g.*, Masters v. Worlsey, 777 P.2d 499, 503 (Utah Ct. App. 1989).

376 *See* B.E.B. v. R.L.B., 979 P.2d 514, 519 (Alaska 1999).

377 *Id.*

378 *See* Monroe v. Monroe, 621 A.2d 898, 904 (Md. 1993). The factors that the Court stressed should be considered included the stability of the child's current home environment, whether there is an ongoing family unit, and the child's physical, mental and emotional needs. *See id.* at 901-02. Interestingly, however, the Maryland Court of Appeals considered the best interests of the child relevant only to the issue whether the trial court should have ordered blood tests. Even though the Court found that the trial court should not have admitted the test results, since the blood test results had already been admitted into evidence, "the cat is now out of the bag and cannot now be stuffed back in." *Id.* at 905. Instead, the court remanded the case for a custody analysis that viewed the presumed father's claims as those of a third party against the biological mother's claim, which required him to show "exceptional circumstances" in order to be granted custody. *Id.* at 906-07.

379 *See* G.F.C v. S.G., 686 So. 2d 1382, 1386 (Fla. Dist. Ct. App. 1997).

may permit presumed fathers to deny their paternity at any time because of the public policy that a person is not obliged to provide support for a child who is neither his adopted or natural child.[380] These conflicting assumptions can leave children vulnerable to abandonment and inadequate financial support. An alleged biological father who wishes to create a legal and loving relationship with his biological children may be discouraged from even asserting his claim, yet the children he is not permitted to parent may later be abandoned by the presumed father, the very man whose existence prevented their birth father from initiating that relationship.[381]

Even more troubling than the lack of any evidentiary basis for the assumptions most courts make in this area are the power imbalances that emerge. Children are often excluded from these proceedings that determine relationships and responsibilities central to their lives. Fathers, both presumed and biological, often control the existence of the parent-child relationship.[382] Although these power imbalances may reflect social reality, they also highlight the incredible vulnerability children have in their parent-child, and in particular, their father-child relationships. Because young children give their unquestioning love to their parents, many of these cases make clear the need to design policies to protect them in those relationships.

### *E. Morality and the Marital Presumption of Paternity*

Courts express diverse opinions about the morality of the actions of the involved adult parties. They hold differing views of the morality of presumed fathers who seek to terminate longstanding father-child relationships. Those courts that reject equitable estoppel in this context find that a presumed but nonbiological father who treats a child as his own child has acted in accord with the State's "public policy of strengthening the family, the basic unit of civilized society."[383] They consider it honorable for the non-biological presumed father to treat a child as part of his family despite the lack of a biological connection.[384] Because, in this view, the presumed father has acted above and beyond the call of duty by

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380 *See* DeRico v. Wilson, 714 So. 2d 623 (Fla. Dist. Ct. App. 1998). This would not be permitted, however, where a presumed father has through judicial process resisted the efforts of a biological father to obtain paternity. S.B. v. D.H., 736 So. 2d 766, 767 (Fla. Dist. Ct. App. 1999).

381 Indeed, one divorce lawyer has publicly stated that he would consider it malpractice to fail to suggest to a male client that he consider paternity testing during the divorce proceedings. *See* Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science*, THE NEW YORK TIMES, March 11, 2001, *available in* 2001 WL 15482052 (quoting Robert Miller, a Texas lawyer. "'I now advise every man who's getting a divorce to get paternity testing.' Mr. Miller said. 'I don't like it much, but now it seems like it could be malpractice not to warn them'").

382 *See In re* Marriage of Adams, 701 N.E.2d 1131, 1134 (Ill. App. Ct. 1998) (stating that "[respondent] cites no authority to show a court has the authority to permit the wishes and best interests of a child to create a parent-child relationship where none legally exists").

383 Knill v. Knill, 510 A.2d 546, 552 (Md. 1986).

384 *See id.*; *see also,* T.P.D. v. A.C.D., 981 P.2d 116, 120-21 (Alaska 1999) (finding that it is reasonable for presumed father to delay initiating a proceeding to disestablish paternity while still married because such a proceeding would put a strain on the marriage).

supporting the child to begin with, he should not be penalized for such admirable conduct by being forced to continue supporting the child once he no longer chooses to do so.[385]

A presumed father's efforts to renounce his paternity after he has voluntarily developed a father-child relationship with the child has struck a few courts as reprehensible. In one of the leading cases that found that men were estopped from denying their paternity, Justice Tobriner stated for the majority that there is "an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child's support, announces, and relies upon, his bastardy."[386] One Pennsylvania court has recently stated:

> We recognize that there is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he had been accepting and recognizing as his own. . . . Where the husband has accepted his wife's child and held it out as his own over a period of time, he is estopped from denying paternity.[387]

Another court responded to the former husband's characterization of his continuing liability as a father as a charade by describing it as "an attempt to foster responsible parenting."[388] The court also expressed the hope that, for a man who had cared for the child for eight years prior to distancing himself, his "heart would follow his money."[389]

Although they take differing views of the morality of the presumed and putative biological father's morality, most courts easily condemn the mother's actions.[390] For example, mothers who failed to tell husbands that they were not the father are often considered to have engaged in fraud.[391] Interestingly, a mother's motivation to keep the child's biological identity secret—saving her marriage—is

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385 *See Knill*, 510 A.2d at 552; *see also* B.E.B. v. R.L.B., 979 P.2d 514, 519 (Alaska 1999).

386 Clevenger v. Clevenger, 11 Cal. Rptr. 707, 716 (Cal. Dist. Ct. App. 1961).

387 Miscovich v. Miscovich, 688 A.2d 726, 732 (Pa. Super. Ct. 1997) (quoting Goldman v. Goldman, 184 A.2d 351, 355 (Pa. Super. Ct. 1962), *aff'd* 720 A.2d 764 (1998)). Although the Pennsylvania Supreme Court has recently rejected the presumption of paternity to cases where the marriage is no longer intact, it does apply estoppel. *See id. See also* Fish v. Behers, 741 A.2d 741 (Pa. 1999).

388 Dye v. Geiger, 554 N.W.2d 538, 541 (Iowa 1996).

389 *Id.*

390 *See, e.g.*, Masters v. Worsley, 777 P.2d 499, 503 (Utah Ct. App. 1989) (denying mother's claim of equitable estoppel because she "acted inequitably in leading the children and [her ex-husband] to believe that [the ex-husband] was their biological father").

391 *See, e.g.*, Marriage of K.E.V., 883 P.2d 1246, 1253 (Mont. 1994); Vanderbilt v. Vanderbilt, 679 N.E.2d 909 (Ind. Ct. App. 1997) (mother knew near time of birth that husband was not biological father so barred by laches from rebutting husband's paternity).

seen as a wrongful intent.[392] Her motives in later seeking to disestablish paternity are also brought into question—she may be found to be seeking to disestablish paternity only to gain sole custody or free the child for adoption by her new husband.[393]

Cases in which the presumed father knew that the child was not biologically connected to him but believed that the child was conceived through artificial insemination, not an adulterous affair, provide an interesting challenge to the courts' assertions that it is either biology or a developed relationship in the context of a marital family that matters. States generally determine that fathers who consent to the use of reproductive technologies are the legal fathers of the children created through use of these reproductive technologies.[394] Courts have viewed a mother's misrepresentation that the child was conceived as a result of artificial insemination when the child was actually conceived during an adulterous affair as a material difference that protects the presumed father from the responsibilities of legal fatherhood. In this instance, it is the mother's adulterous relationship, not the lack of biological connection, that becomes the "relevant fact."[395] The court's judgment concerning the morality of the mother's actions rather than the absence of a biological relationship carried the most weight with these courts.

This raises the interesting possibility that it is in fact the mother's conduct, not the absence of a biological connection, that is the source of many courts' unwillingness to consider presumed fathers to still be the legal fathers. Although many courts say little about the fact of betrayal, it may well be more important than their stated reasoning would imply.

### *F. For Love or Money?*

What is the essence of legal paternity? Are these paternity disputes about who a child loves, or who loves a child? Are they veiled attempts to hang on to lost affairs or exact revenge on spouses for their adultery or some other marital wrong?[396] Or are paternity cases merely about financial support?[397] And

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392 *See, e.g., In re* Marriage of Gallagher, 539 N.W.2d 479, 482 (Iowa 1995).

393 *See, e.g., In re* Marriage of K.E.V., 883 P.2d 1246, 1249 (Mont. 1994) (describing mother as seeking to deny paternity only to obtain sole custody); *In re* Marriage of Ross, 783 P.2d 331, 336 (Kan. 1989) (finding that mother brought action to free child for adoption by new husband).

394 *See, e.g.,* ARK. CODE ANN. § 9-10-201(a) (Michie 1998); N.M. STAT. ANN. § 40-11-6(A) (Michie 1997).

395 *See, e.g.*, Dews v. Dews, 632 A.2d 1160, 1163 (D.C. 1993) (refusing to apply equitable estoppel because mother told husband that child was conceived through artificial insemination when child was actually conceived through adulterous affair); *In re* the Marriage of Adams, 701 N.E.2d 1131, 1133 (Ill. App. Ct. 1998) (denying application of estoppel to husband despite ten-year father-child relationship when presumed father believed child was born as a result of artificial insemination, not an adulterous affair); Kohler v. Bleem, 654 A.2d 569, 576 (Pa. Super. Ct.), *appeal denied* 664 A.2d 541 (Pa. 1995) (finding that presumptive father who had accepted child until he discovered that the child was not born by artificial insemination but by wife's adulterous affair with neighbor not bound by estoppel).

396 *See, e.g., In re* Matter of Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (stating that "the child is placed in jeopardy whenever a parent's claim for the child is based solely or predominantly on motives to score over a warring partner after divorce by replacing the legally presumed father with the biological

increasingly, are they about paying into the state coffers money the state is spending to provide for the welfare of the child and his mother?[398]

Some courts assume that paternity determinations are about parent-child relationships. As described above, these courts may focus on the emotional injury to a child who is suddenly rejected by her psychological father, or the great loss that would be encountered by a presumed father whose wife or ex-wife seeks to disestablish his paternity.[399] Other courts, however, focus on the financial ramifications of paternity determinations—they are about who must financially support children during their minority.[400] At times, the supposedly interested parties and their desires seem irrelevant. At stake is the public's financial interest in obtaining recompense for its support of children through welfare programs.[401]

### *G. Can Children Have More Than One Father?*

The idea that a child can have two fathers has been widely rejected.[402] In instances where blood tests show that a presumed father is not the biological father, some courts treat the formerly presumed father as a third party in his efforts to obtain custody or visitation.[403] In these cases, the courts refuse to acknowledge that the child's experience is that the nonbiological father is, indeed, his or her father. They treat nonbiological fathers as third persons or stepfathers whose rights to care and custody of children are subservient to those of biological mothers.[404]

One state has clearly recognized dual paternity, and decisions in two other states point toward the possibility of the recognition of dual paternity. Louisiana courts have permitted putative biological fathers to bring an action to establish paternity within a reasonable time of a child's birth without destroying the legal paternity of the mother's husband.[405] The Louisiana courts have argued that dual

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father").

397 *See, e.g.*, B.E.B. v. R.L.B., 979 P.2d 514, 519 (Alaska 1999) (application of equitable estoppel unlikely to protect child from emotional harm; thus, court will limit use of equitable estoppel to situations involving financial harm).

398 *See, e.g.*, T.P.D. v. A.C.D., 981 P.2d 116 (Alaska 1999) (describing case brought when mother applied for public assistance shortly after separation from husband and Child Support Enforcement Division brought action for child support against presumed father); State v. Rogers, 902 S.W.2d 243 (Ark. App. 1995) (concerning paternity of child in action brought by Child Support Enforcement Unit).

399 *See, e.g*, Riddle v. Riddle, 619 N.E.2d 1201, 1203 (Ohio Ct. Common Pleas 1992).

400 *See, e.g.*, K.A.T. v. C.A.B., 645 A.2d 570, 573-74 (D.C. 1994).

401 *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1551 (West 1998) (authorizing public agency to bring paternity action to seek reimbursement for monies spent on support of child).

402 *See, e.g.*, G.F.C. v. S.G., 686 So. 2d 1382, 1386 (Fla. Dist. Ct. App. 1997) (stating that "there is no such thing as dual fathership").

403 *See* Lipiano v. Lipiano, 598 A.2d 854, 857 (Md. Ct. Spec. App. 1991).

404 *See* Sider v. Sider, 639 A.2d 1076, 1086 (Md. 1994) (ruling that husband who is not biological parent only permitted custody if demonstrates that biological parent is unfit or exceptional circumstances make such custody detrimental to the best interest of the child).

405 *See* Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1990).

paternity gives the child the best of both worlds: the child can enjoy legitimacy as to his mother's husband, but can also obtain child support, wrongful death benefits or inheritance rights from his biological father.[406] It also permits the biological father who bears these responsibilities to prove his worthiness to participate in the life of his child.[407]

Professor Mary Louise Fellows has argued that states should give serious consideration to the concept of dual paternity, which may more clearly reflect the realities of a child's complex life. She asks why courts have been reluctant to adopt the dual paternity approach:

> Is it because it would destroy the husband's power to prevent the biological father from interfering in the husband's relationship with his wife's child and would lead to public and legal acknowledgment that the husband had "lost control of his wife to another man?" Is it also because dual paternity would thwart a biological father who now can use the marital presumption as a shield to avoid paternal responsibilities? Dual paternity would increase the risk of forced fatherhood outside of marriage and decrease the control of fatherhood inside of marriage. Both of these consequences have little to do with children's welfare.
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> With the increasing prevalence of families created through reproductive technology, families headed by same-sex couples, non-secret adoptions, and blended families, it becomes easier for the law to imagine and work out the details of dual paternity. . . .What can be said in favor of dual paternity is that it may be the right solution in some family circumstances. . . . Dual paternity should not be dismissed merely on the basis of tradition because, as I have tried to show, tradition frequently overlooked concerns for equality and fairness.[408]

These arguments concerning the benefits of dual paternity are worth further exploration and consideration. It is premature to reject them when only recently have we been confronted with the technology that can reveal biological secrets that otherwise would have been hidden from view.

## VI. CONCLUSION

The conflicting assumptions briefly outlined here cut to the core of developing conceptions of the marital presumption of paternity. The lack of uniformity among the states is largely the result of assumptions that courts believe

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406 *See* T.D..v. M.M.M., 730 So. 2d 873, 876 (La. 1999).

407 *Id.* at 877.

408 Mary Louise Fellows, *A Feminist Determination of the Law and Legitimacy*, 7 TEX. J. WOMEN & L. 195, 207 (1998).

are so obvious that they do not require any evidentiary foundation. Although the legal trend is toward relying solely on biological ties to define paternity, the dramatic disparities among the courts in their assumptions about the appropriate determinants of paternity demonstrate the need to further analyze them and develop a consensus about their validity. Some of these assumptions also raise concerns that the treatment of the marital presumption of paternity reflects the power of the different groups involved. By favoring families formed by marriage over families formed without legal marriage, the presumption negatively affects the parental rights of gay and lesbian couples and heterosexual unwed couples who raise children together.[409]

The marital presumption of paternity also provides greater protection to presumed fathers — those who want to maintain their father-child relationships and those who want to rebut the presumption upon divorce — letting presumed marital fathers have it both ways. Mothers are given little control over the decision of their child's paternity, and when they attempt to exert control, they are viewed as selfish or prevented from having their wishes considered because of their "unclean hands." Nominal equality in family law disappears in this situation where the mother's, but not the husband's, infidelity becomes consequential.[410]

Other situations also point to a lack of balance between men and women. Several states have given constitutional weight to a putative biological father's concerns, and those states that have rejected or limited his rights focus either on the rights of the presumed father or the best interests of the child, not the choice of the mother. Presumed fathers who have been forced to pay for their nonbiological children's support also seem to wield considerable political power. In several states, they have been able to legislatively reverse judicial decisions holding them responsible for supporting their nonbiological children post-divorce, even if they did not challenge the marital presumption during the divorce itself.[411] In addition, tort actions by husbands against the mothers for fraud or intentional infliction of emotional distress for deceiving them about the biological heritage of children born during their marriage are gaining judicial acceptance. This acceptance demonstrates a judicial willingness to condemn the actions of mothers.[412]

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409 *See generally* J. Shoshana Ehrlich, *Co-Parent Visitation: Acknowledging the Reality of Two Mother Families*, 9 LAW & SEX. 151 (1999-2000).

410 See, for instance, NPA v. WBA, 380 S.E.2d 178 (Ct. App. Va. 1989) (child conceived during the couple's separation, during which both husband and wife "dated other people." Husband did not contest the wife's testimony that he was told that she had sexual intercourse with others during their separation, yet he is treated as an innocent party who acted under a mistaken belief, and the child's loss of the father's love and support is not his fault). Judicial condemnation of women who did not reveal the biological paternity of their child to their husbands is reflected in earlier paternity actions too. *See, e.g.*, Winner v. Winner, 177 N.W. 680, 682 (Wis. 1920) (stating that "the concealment by the woman of the paternity of her child is a fault so grievous that there is no excuse or palliation for it").

411 *See supra* note 267 and accompanying text.

412 Several state courts have permitted causes of action for fraud and/or intentional infliction of emotional distress to go to a jury. *See* Koelle v. Zwiren, 672 N.E.2d 868 (Ill. App. Ct. 1996); G.A.W., III v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999); Koepke v. Koepke, 556 N.E.2d 1198, 1199 (Ohio Ct. App. 1989); Miller v. Miller, 956 P.2d 887 (Okla. 1998). Two state courts have rejected this cause of action. *See* Doe v. Doe, 747 A.2d 113 (Md. 2000); Nagy v. Nagy, 258 Cal. Rptr. 787 (Cal. Ct. App. 1989) (allowing a

The most disturbing feature of the trends in the law regarding the marital presumption of paternity, however, is the failure to protect the interests of children. As the Washington Supreme Court stated in *State v. Santos*,[413] "[d]espite the numerous burdens and benefits of being a father . . . it is the child who has the most at stake in a paternity proceeding."[414] Courts often protect the choices of adults over the best interests of children. Thus, even men who have clear reason to be suspicious of their paternity are often commended for not pursuing genetic testing to verify their biological fatherhood because it could destabilize their marriage. Yet, little attention is given to children, who later experience abandonment by a beloved father and who may have little chance at that point to establish a loving father-child relationship with their biological father. Courts do not seem to consider the possibility that, given the ready availability of genetic testing whenever the marriage relationship deteriorates, children may be better protected by ensuring at birth that their presumed father is willing, in light of all of the relevant information, to assume a permanent father-child relationship toward them. Although courts often repeat the rhetoric that the marital presumption of paternity protects children, this presumption should be carefully scrutinized, and its workings rethought from the ground up.

The analysis of the eroding marital presumption of paternity may be for naught. In a society in which few adults can make lifetime commitments to each other, there may be too few fathers willing to make such a commitment to the children who enter their lives, whether by marriage or procreation. The sad reality of children's lives may be that they will be lucky to have one parent consistently love and care for them throughout their lives. The retreat from the marital presumption of paternity may, however, provide an opportunity to design an approach that will "foster responsible parenting" so that children will have the strongest possible opportunity in these insecure times to have the consistent love and support of their fathers.

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non-biological parent to recover damages for developing a close relationship with a child misrepresented to be his and performing parental act is not a 'damage' which should be compensable under law."). One state court has permitted the husband to sue the wife's paramour for intentional infliction of emotional distress. *See* C.M. v. J.M., 726 A.2d 998 (N.J. Super. Ct. 1999). For an argument on behalf of recognizing such torts, see Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L.REV. 449 (2000).

413 702 P.2d 1179 (Wash. 1985).

414 *Id.* at 1180.