

## WHEN DADDY DOESN'T WANT TO BE DADDY ANYMORE: AN ARGUMENT AGAINST PATERNITY FRAUD CLAIMS

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### INTRODUCTION

For wrongly convicted felons, improved DNA testing has increasingly provided the means by which innocence is proved and freedom from incarceration secured. Regularly, newspapers regale readers with stories of prisoners who were wrongly convicted and were proven innocent through advanced scientific testing.<sup>1</sup> Former Governor Ryan of Illinois made national headlines when he commuted the death penalty sentences of 156 inmates because new evidence revealed that many on death row were “innocent” of the crimes for which they were convicted.<sup>2</sup> Reliance on DNA testing is not relegated to criminal law, however. Improved genetic testing,<sup>3</sup> is changing how we define “traditional” families. While res judicata and

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<sup>1</sup> A search of any major newspaper for a one week period will almost certainly include a story about a person or persons who were recently exonerated of crimes for which they were convicted because of DNA evidence revealed a lack of culpability.

<sup>2</sup> See e.g., <http://www.cbsnews.com/stories/2002/12/30/national/main534639.shtml>, (last visited Dec. 16, 2003).

<sup>3</sup> See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547, 555-56 (2000) [hereinafter Glennon, *Somebody's Child*](explaining that by the 1980's, DNA or “genetic marker” testing provided probabilities of paternity greater than 99%); see also Weisberg, D. Kelly & Susan Appleton, *Modern Family Law*, 510 (2d ed. 2002)(describing both human leukocyte antigen (HLA) and modern genetic marker testing and their respective accuracy in establishing percentage probability of biological paternity).

estoppel principles have long existed to preserve the unitary, nuclear family, some states are moving away from these doctrines in favor of biological paternal certainty.<sup>4</sup> Thus, if a man is not the biological father of a child - and was either uncertain or unaware of this biological fact - he may petition to “disestablish” paternity.<sup>5</sup> These disestablishment petitions represent the emergence of a new family law phenomenon - paternity fraud.<sup>6</sup>

Many men who have either been adjudicated fathers or who have voluntarily acknowledged their paternal legal status<sup>7</sup> are now challenging the propriety of those legal determinations because genetic testing subsequently revealed their nonpaternity.<sup>8</sup> A grassroots

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<sup>4</sup> See *infra* Part IV.

<sup>5</sup> *Id.*

<sup>6</sup> Paternity fraud is now a part of the American vernacular, used by both lawmakers and laypersons alike to describe the situation in which a man who believes he is the biological father of a child and therefore functions as a parent, later learns that he has no biological connection to the child and seeks to disestablish paternity because of alleged “fraud.” A quick internet search reveals a multitude of websites devoted to the issue of paternity fraud and numerous newspaper and magazine articles have been written about this growing phenomenon, several of which are cited herein.

As used in this paper, paternity fraud refers to actions to disestablish paternity by an alleged nonbiological father. This article does not address cases in which paternity fraud has been an alleged cause of action in an interspousal tort case. See *e.g.*, .....

<sup>7</sup> See *infra* note 91 and accompanying text regarding voluntary acknowledgments of paternity.

<sup>8</sup> In Pennsylvania, two years after divorcing his wife, Gerald Miscovich became suspicious that his four-year-old son was not his biological child and took the child for genetic testing. *Miscovich v. Miscovich*, 688 A.2d 726 (1997). The testing confirmed that Gerald was not the biological father and he subsequently petitioned the court to admit the DNA testing to disestablish his paternity and to terminate his child support obligation. *Id.* Relying upon the marital presumption of paternity, the court denied his request. *Id.* at 732. Moreover, the court essentially characterized his attempts to disestablish paternity as “disgusting.” The court wrote: “We recognize that there is something disgusting about a husband

movement is underway to exonerate these innocent fathers from the “bonds of parentage.”<sup>9</sup>

Likening newly discovered evidence of nonpaternity to DNA testing that exonerates a felon, the U.S. Citizens Against Paternity Fraud website includes this motto: “If the Genes don’t fit, you must acquit.”<sup>10</sup>

Responding to growing concerns from men who no longer wish to pay child support for their nonbiological children, a number of states, by case or statute, permit men to disestablish paternity if they successfully offer scientific proof - i.e., DNA test results - that demonstrate a genetic impossibility of paternity.<sup>11</sup> The issue of paternity disestablishment has become a cause

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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.”

*Id.* (quoting Commonwealth ex rel. Goldman v. Goldman 184 A.2d 351, 355 (1962)). Miscovich is another paternity fraud legislation activist. *But see infra* notes 168 - 176 and accompanying text concerning a recent Pennsylvania decision which embraced the doctrine of paternity fraud and permitted an ex-husband to disestablish his paternity.

<sup>9</sup> *See, e.g.*, U.S. Citizens Against Paternity Fraud, <http://www.paternityfraud.com> (visited June 10, 2003). Carnell Smith, the founder of the organization and website, attempted several times to vacate his paternity judgment and support obligation in the State of Georgia. He became a lobbyist for paternity fraud reform and after Georgia recently passed its paternity fraud bill, Mr. Smith returned to court and had his child support obligation vacated. *Id.* Mr. Smith describes himself and his efforts as follows:

Carnell Smith is a married Christian, paternity fraud victim, DNA poster boy, non-custodial dad and self-avowed advocate for legislative reform to help children know their biological father and restore constitutional rights to fraud victims. \*\*I am looking for victims and supporters - worldwide!\*\*

*Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See e.g.*, Md. Family § 5-1038 (1995)(authorizing the set aside of a paternity judgment if blood or genetic testing excludes as the biological father the individual names as the father in the judgment); Ohio Stat. §§ 3119.961 and 3119.962 (199-)(similarly permitting the disestablishment of paternity based upon blood or genetic tests which exclude biological

célèbre for men who have unsuccessfully petitioned to disestablish their paternity subsequent to genetic testing which disproved their biological fatherhood. For instance, Patrick McCarthy learned after his divorce that his 14-year-old daughter was not biologically his. Although he tried to terminate his paternity and child support obligation, he was unsuccessful.<sup>12</sup> He has instead become a leading activist in the battle for “paternity fraud reform” and has founded New Jersey Citizens Against Paternity Fraud, an organization that recently paid \$50,000 for nine billboards along highways that show a pregnant woman and read “Is It Yours? If Not, You Still Have to Pay!”<sup>13</sup>

Nonbiological fathers like McCarthy equate their nonpaternity with a wrongful criminal conviction. As Mary Anderlik and Mark Rothstein have recently observed, “... those within the fathers’ rights movement ... tend to view family law through the lens of criminal law .... It is common to find the issue framed as one of justice or fairness, in the sense that evidence admissible to ‘convict’ should also be available to ‘exonerate.’”<sup>14</sup> But can/should family law be equated with criminal law? A wrongly convicted man should be exonerated: he has been the “victim” of “the system.” The analogy to a “wrongly” identified father is much more difficult to make: once a man has assumed all of the functions and responsibilities of parenthood, he *is* - in a very meaningful way - the child’s father. A man who learns years after his child’s birth that he

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paternity). *See infra* Part IVB for an analysis of these and other paternity fraud statutes.

<sup>12</sup> Kathy Boccella, “Men Seek ‘Paternity Fraud’ Law,” *The Philadelphia Inquirer*, December 23, 2002.

<sup>13</sup> *Id.*

<sup>14</sup> Anderlik, Mary R. & Mark A. Rothstein, *DNA Based Identity Testing and the Future of the Family: A Research Agenda*, 28 Am. J. L. M. 215, 220 (2001).

has no biological connection to his child may *feel* wrongly adjudicated and even tricked by the mother of the child. He may even believe he has been the victim of a federal and state system that forces mothers to name their baby's father in order to qualify for certain financial benefits.<sup>15</sup> To simply disestablish paternity, however, ignores the crucial difference between the criminal and family law contexts: the presence and best interests of a child.

Paternity fraud claims, when successful, do children and parents a great disservice. Paternity fraud statutes - predicated on the enhanced availability and reliability of genetic testing<sup>16</sup> - are being used to destroy established, functional families. Simply because we have the means to determine biological parentage with greater certainty does not mean that it is in the best interests of children to do so. And, just as advances in reproductive technologies force us to re-examine the legal and policy ramifications of redefining families, so, too, does paternity testing.

The American family has dramatically changed in recent years: the traditional nuclear family no longer represents the primary family unit.<sup>17</sup> In an era in which individuals and couples,

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<sup>15</sup> See *infra* Part IA discussing the link between the child support enforcement process and erroneous paternity establishment.

<sup>16</sup> As discussed above, paternity can be established with biological certainty, based on improved blood and genetic testing. Moreover, testing can be easily accomplished - now even home testing kits are available - and the tests are relatively inexpensive. See *e.g.*, Mary R. Anderlik, *Assessing the Quality of DNA-Based Parentage Testing: Findings From a Survey of Laboratories*, 43 *Jurimetrics J.* 291 (2003)(the author discusses the availability of home testing and other methods of parentage testing in assessing the need for parentage testing reform that better regulates both laboratory practices and who and when parties may undergo parentage testing).

<sup>17</sup> According to U.S. Census Bureau 2000 statistics, married-couple households with children made up only 24 percent of all households compared with 40 percent in 1970. Jason Fields and Lynne M. Casper, *America's Families and Living Arrangements*, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau 3 (June 2001).

heterosexual and homosexual, are embracing new reproductive technologies to create families<sup>18</sup>, the “biological connection” often does not assist in establishing legal parentage for “intended” parents. Couples and individuals alike may contract with sperm donors, egg donors, and/or gestational surrogates to create families.<sup>19</sup> As a result, reliance on biology as the *sole* means by which to determine legal parentage no longer makes sense. Functional parenthood - emphasizing the daily, routine, and even mundane aspects of everyday parenting - provides a more realistic approach to defining legal parentage, especially for nontraditional families.<sup>20</sup>

This paper explores the legal disconnect between two concurrent legal trends: 1) establishing parenthood and parental rights based on principles of functionality and estoppel; and

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<sup>18</sup> For example, the Uniform Parentage Act now provides a methodology by which legal parentage can be established for children born using anonymous sperm or egg donation and/or gestational surrogates. Uniform Parentage Act Articles 7 & 8, 9 U.L.A. 354 - 370 (2000).

<sup>19</sup> *E.g.*, *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998)(holding that a couple who had arranged for the birth of a child through donor insemination and a surrogate mother were in fact the child’s legal parents, despite the absence of any biological connection to the child, because the child would not have been born “but for the efforts of the intended parents”)(quoting *Johnson v. Calvert*, 851 P.2d 776, 782 (Ca. Ct. App. 1993)).

<sup>20</sup> Scholars have been addressing the need for expanded definitions of parenthood (i.e., beyond biology) for two decades. In a seminal article in 1984, Katharine Bartlett argued that courts must look beyond the traditional exclusivity model of parentage, in light of the decline of the nuclear family. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70. Va. L. Rev. 879 (1984). Nancy Polikoff has also argued that legal parenthood premised only upon biology leaves many children with nontraditional parents out in the cold. Nancy D. 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 (1990)[hereinafter, Polikoff, *Two Mothers*]. *See also*, Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 Wayne L. Rev. 1227 (1994)(recognizing the need to include nonbiological caretakers within the legal definition of parent based upon the best interests of the child); Richard Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hast. L. J. 597 (2002)(author argues that family law jurisprudence must expand beyond traditional notions of marriage and biology and should embrace functional parenthood).

2) disestablishing legal parenthood because of a lack of biological connection between parent and child. In Part One, I discuss the underlying causes of the paternity fraud phenomenon, including the influences of enhanced genetic testing and improved child support enforcement. In Part Two, I review the traditional establishment of parentage and the increasing recognition of legal rights for functional parents. In Part Three, I discuss the disestablishment of paternity, focusing primarily on cases which rely on principles of res judicata, estoppel, and finality of judgments to preclude paternity disestablishment and discuss why it has historically been difficult for men to challenge paternity in a range of contexts. Next, in Part Four, I review several recent cases and statutes that permit disestablishment of paternity in “fundamental fairness” to the nonbiological father. Finally, in Part Five I offer a proposed statute of limitations for paternity fraud actions which strikes a balance between the best interests of children in preserving intact father-child relationships while permitting nonbiological fathers a short window in which to challenge seemingly “unfair” paternity establishment. I conclude that permitting disestablishment of paternity without a reasonable statute of limitations does not serve the best interests of children and is damaging not only to the children involved but is also harmful to our emerging notions of family.

## **I. THE PATERNITY FRAUD PHENOMENON**

### *A. How Increased Emphasis on Child Support Enforcement Has Influenced the Paternity Fraud Debate*

Paternity fraud cases arise in several different contexts: 1) husbands seeking to disestablish paternity at the time of divorce; 2) ex-husbands seeking to disestablish paternity subsequent to a divorce; and 3) unmarried fathers seeking to disestablish paternity subsequent to

a paternity judgment or legal acknowledgment of parentage.<sup>21</sup> The circumstances leading to their respective paternity establishments are different but their concerns about paternity fraud are similar: they have no genetic relationship to the child they believed was their biological offspring and thus they no longer wish to be legally obligated to pay child support.<sup>22</sup> Particular to paternity cases, however, is the role of federal and state child support establishment and enforcement programs. The federal Office of Child Support Enforcement (“OCSE”) was established in 1975 as part of an amendment to the Social Security Act of 1975.<sup>23</sup> Under the Act, each state was required to develop its own child support enforcement program, although the Act clearly envisioned a cooperative effort between states and the federal government and states receive partial funding for these programs. Although states have discretion to operate their programs,

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<sup>21</sup> There is a large body of scholarship and caselaw addressing the ability of husbands to challenge paternity of a child born in wedlock at the time of divorce, i.e., the “marital presumption.” Because of the many legal and policy issues involved, that material is beyond the scope of this article and will be discussed only where necessary to analyze legal doctrine relevant to the second and third situations detailed above. For more information about challenging the marital presumption of paternity at the time of divorce, *see e.g.*, Glennon, *Somebody’s Child*, *supra* note 3 (providing a thorough background of the marital presumption, the competing policy concerns both for and against continued vitality of the marital presumption, and treatment of the marital presumption in the Uniform Parentage Act); Diane S. Kaplan, *Why the Truth is Not a Defense in Paternity Actions*, 10 *Tex. J. Women L.* 69 (2000)(examining three state models of the marital presumption).

<sup>22</sup> Murray Davis, a “duped dad” from Michigan, is another paternity fraud activist. As he explained in an interview, “Why should we continue to pursue, incarcerate or hold in financial bondage an individual who can prove his innocence via irrefutable evidence? Men are just kind of tired of being victimized.” Robert E. Pierre, “States Consider Laws Against Paternity Fraud,” *Washington Post*, October 14, 2002, Page A03.

<sup>23</sup> Ellman, Kurtz & Scott, *FAMILY LAW, CASES, TEXT AND PROBLEMS*, 576 (3d Ed. Michie).



federal law imposes certain requirements<sup>24</sup> and Congress has passed several laws relating to the federal child support enforcement program.<sup>25</sup> For example, the Family Support Act of 1988 (“FSA”) has set performance standards for state programs establishing paternity and states must meet a specified “paternity establishment percentage.”<sup>26</sup> In addition, the FSA incorporated additional requirements for state programs, such as income withholding from noncustodial parent’s wages, presumptive support guidelines for setting child support awards, periodic review and adjustment of some orders, and the development of statewide automated systems.<sup>27</sup>

Within the debate concerning paternity fraud, some men may feel victimized by a paternity and child support enforcement regime that has as its core mission the increased collection of child support, much of which is predicated upon first establishing a paternity order. In fiscal year 2002, the OCSE reports that paternity was established or acknowledged for more than 1.5 million children.<sup>28</sup> That number includes more than 687,000 court established paternity judgments and almost 830,000 in-hospital and other acknowledged paternities.<sup>29</sup> As the

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<sup>24</sup> *Id.*

<sup>25</sup> See generally, Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, paper presented at the International Society of Family Law North American Conference, Eugene, Oregon, June 2003 (on file with the author)[hereinafter Murphy, *Legal Images of Fatherhood*].

<sup>26</sup> Susan Appleton and Kelly Weisberg, *MODERN FAMILY LAW*, 506-07. (2d Ed. Aspen) (citing 42 U.S.C. § 652(g) (1994 & Supp. V 1999)).

<sup>27</sup> Ellman, *supra* note 23, at 576 n. 15.

<sup>28</sup> Child Support Enforcement (CSE) FY 2002 Preliminary Date Report at [http://www.acf.hhs.gov/programs/cse/pubs/2003reports/prelim\\_datareport/](http://www.acf.hhs.gov/programs/cse/pubs/2003reports/prelim_datareport/). (visited 5/30/2003).

<sup>29</sup> *Id.*

Maryland Court of Appeals noted in its decision in *Langston v. Riffe* - a case in which a nonbiological father had his paternity disestablished<sup>30</sup> - our current system of paternity and support establishment and enforcement may be flawed. The court wrote, "In the great majority of these cases, it is the State, on behalf of the mother, who initiates the proceeding against the putative father...[and] through its various agencies, litigates the matter to conclusion .... fathers often may not be present to challenge the proceeding or to provide a blood or genetic sample."<sup>31</sup>

The Massachusetts Supreme Judicial Court has also discussed the role of state agencies in establishing paternity<sup>32</sup> and wrote that it "recognize[d] the anomaly of enforcing the parental obligations of a man who was identified as a parent only (it seems) because the State insisted that the mother name [a child's] biological father where he has now established that he is not that man."<sup>33</sup> Further addressing the state's role in paternity establishment, the court wrote:

Where the State requires an unmarried woman to name her child's putative father, the department should require that the parties submit to genetic testing prior to the execution of any acknowledgment of paternity or child support agreement. To do otherwise places at risk the well-being of children born out of wedlock whose fathers subsequently learn, as modern scientific methods now make possible, that they have no genetic link to their children....<sup>34</sup>

I agree with the court that genetic testing prior to acknowledging paternity should be considered

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<sup>30</sup> 754 A. 2d 389 (Md. 2000).

<sup>31</sup> *Langston*, 754 A.2d at 409.

<sup>32</sup> *In Re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001)(holding that man who had genetic evidence disproving paternity could not vacate a paternity judgment entered more than five years earlier).

<sup>33</sup> *Id.* at 499.

<sup>34</sup> *Id.* at 499 n.21.

as a process norm to avoid later challenges to paternity.<sup>35</sup> If testing reveals nonpaternity, the man will exercise his choice to either deny paternity or to voluntarily accept the legal responsibility of parentage which he could not later deny.<sup>36</sup> However, men who do not undergo genetic testing prior to acknowledging paternity - because they do not wish to, believe that they are the biological father without testing, and the like - should not later be able to deny their paternity because they no longer wish to act as parents. Other parents can not choose a date on which they no longer wish to support - emotionally and financially - their child. Why should these nonbiological yet functional parents be permitted to vacate their parental obligations?

It is estimated that in 1999 alone, almost one-third of 280,000 paternity cases evaluated by the American Association of Blood Banks excluded the individual tested as the biological father of the child.<sup>37</sup> By extension, it is quite plausible that a significant number of the men who voluntarily acknowledge paternity during a divorce proceeding, by written document, or who are adjudicated legal fathers without the benefit of genetic testing are not actually the biological father of their child. But is disestablishment of paternity, often many years after entry of a

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<sup>35</sup> See June Carbone and Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 Wm. & Mary Bill Rts. J. 1011, 1066 - 1070 (2003)(the authors propose mandatory paternity testing of all children at birth to estop paternity challenges).

<sup>36</sup> Carbone and Cahn suggest that if subsequent to genetic testing which reveals lack of biological paternity a nonbiological father signs a voluntary acknowledgment he may not, under any circumstances, challenge the acknowledgment. *See id.*

<sup>37</sup> *See e.g.*, *In re the Marriage/Children of: Betty L.W. v. William E.W.*, 569 S.E.2d 77, 88 (W.Va. 2002)(Maynard, J. dissenting). In her article assessing the quality of DNA-based parentage testing, Mary R. Anderlik writes that the American Association of Blood Banks Annual Report Summary for 2000 reveals an overall exclusion rate of 27.9% for domestic accredited laboratories. *See* Anderlik [Jurimetrics], *supra* note 16, at 4 (citation omitted).

paternity judgment, an appropriate method of redress? Paternity fraud jurisprudence has at its core the difficulty of balancing competing best interests: those of the child and the child's nonbiological yet legal father. Whose rights are paramount? Whose should be paramount? And can we characterize this issue as one of "genetic innocence"?

*B. An Introduction to the Biological v. Functional Parenthood Debate*

As our societal understanding of "family" grows, changes, and moves away from the traditional, nuclear family, an interesting disconnect has emerged. As newspaper columnist Ellen Goodman has observed, these scientific advances force us to ask, "What does make a father? Diapers or DNA?"<sup>38</sup> She aptly continues, "...family law seems to be going in two directions at once. We are giving more recognition to non-biological relationships.... [a]nd more weight to DNA."<sup>39</sup> In recent years, scholars, judges, and legislators have begun to recognize the importance of functional parenthood. For example, several states have permitted nonbiological lesbian coparents to maintain visitation and custody petitions because of their intent to parent and their history of parenting.<sup>40</sup> Similarly, other nonbiological parents such as stepparents, grandparents, and foster parents have been able to maintain greater access to the children they have helped to raise.<sup>41</sup> Thus, biology is not the sole criterion for determining parent-child

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<sup>38</sup> Ellen Goodman, *What Makes A Father?* Baltimore Sun, May 1, 2001 at 11A.

<sup>39</sup> *Id.*

<sup>40</sup> See e.g., *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)(holding that former nonbiological lesbian mother could bring action for visitation with child she had helped to raise); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000)(same); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)(same).

<sup>41</sup> See *infra* notes 65-69 and accompanying text.

relationships. Moreover, it should not be the decisive criterion for determining such relationship.

As one judge has noted, “A father-child relationship encompasses more (and greater) considerations than a determination of whose genes the child carries. Sociological and psychological components should be considered. The laws governing adoptions have acknowledged that parentage is comprised of a totality of factors, the least significant of which is genetics.”<sup>42</sup>

What determines a parent has been the subject of much scholarship and whether primacy should be placed on a genetic focus or a functional one is the subject of much debate. There are compelling arguments in favor of the primacy of biological parentage yet many scholars are now embracing nontraditional definitions of parentage and family.<sup>43</sup> It is interesting to note, for example, that both the American Law Institute (“ALI”) and the 2002 revised version of the Uniform Parentage Act (“UPA”) recognize the fact that parental status and legal parenthood may be established without regard to biological connection.<sup>44</sup>

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<sup>42</sup> Hulett v. Hulett, 544 N.E.2d 257, 263 (Brown, J. concurring).

<sup>43</sup> **BIO PRIMACY SCHOLARS HERE.** This is contrast with the many scholars who advocate broadening the definition of parent to include functional parents. *See supra* note 20.

<sup>44</sup> The ALI Principles include establishment of a legal parent child relationship without regard to genetic connection in a variety of circumstances. *See infra* notes 84-89 and accompanying text. Moreover, the UPA also includes presumptions of legal parenthood that are not predicated on biology. For example, the UPA presumes a man’s legal fatherhood if “for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.” UPA § 204 (a)(5) (2002). In fact, the UPA 2000 had originally eliminated this presumption but it was put back in with the 2002 amendments. Comment to § 204 as amended 2002. By including this presumption of paternity, the UPA drafters make certain that legal parenthood can be established for nonbiological fathers. Moreover, UPA § 204 further states that presumptions may only be rebutted pursuant to the procedures of Article 6, which allows courts to use estoppel principles to deny requests for genetic testing “in the interests of preserving a child’s ties to the presumed or acknowledged father who openly held himself out

While many courts are confronting the complexity of establishing parenthood for nonbiological parents and recognizing legal mechanisms for such establishment, they are similarly being confronted by men with proof of nonpaternity who are requesting disestablishment of paternity. These two trends are happening coterminously and demonstrate a nearly schizophrenic approach to defining legal parenthood. Within the particular context of paternity fraud, the same disconnect between genetic and functional parenthood emerges. Despite scientific advances and biological certainty of nonparentage, several courts have denied petitions to disestablish paternity because of the effect of that action on the child.<sup>45</sup> These courts place a premium on the best interests of the child and value the parent-child relationship as something more than shared DNA. At the other end of the spectrum, a number of courts and legislatures have established procedures whereby a legally established father can disestablish paternity if he has scientific proof.<sup>46</sup> These opinions and statutes suggest that either 1) the best interests of the child have no place in a parentage determination, but only matter for custody,

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as the child's father regardless of whether he is in fact the genetic father." Comment to UPA § 204 (2002).

<sup>45</sup> *E.g.*, *Cheryl*, 746 N.E.2d 488 (because the father had actively pursued his parental relationship with his nonbiological daughter, he could not seek to disestablish his paternity more than five years after the entry of a paternity judgment). *See infra* Part IIIB for detailed discussion of *Cheryl* and additional cases in which requests to disestablish paternity are rejected.

<sup>46</sup> *E.g.*, *Langston*, 754 A.2d 389 (Maryland Court of Appeals heard three appeals concerning disestablishment of paternity based upon genetic testing which conclusively established nonpaternity. The court, adhering to a Maryland statute permitting an action to disestablish paternity upon a showing of genetic nonpaternity, permitted each plaintiff, including a man who filed his action for nonpaternity nine years after entry of the paternity judgment, to disestablish his paternity). *See infra* Part IVA for a discussion of *Langston* and additional cases and statutes permitting paternity disestablishment.

visitation, and the like<sup>47</sup> or 2) the best interests of the child is knowing her or his biological father.<sup>48</sup> While it is true that courts do not consider the best interests of the child in initial paternity determinations, it is disingenuous, at best, to suggest that the best interests of the child do not matter when *disestablishing* the legal parentage of a man the child has always considered her or his father.

To fairly balance the competing interests between a legal, yet nonbiological father, and his child, the alleged nonbiological father should have a limited time in which to challenge his paternity: specifically, either 1) two years from the date on which a presumption of paternity, as defined by the UPA,<sup>49</sup> applies to create a legal parental relationship or 2) two years from the date

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<sup>47</sup> *Id.* at 431-432 (Court specifically stated that the best interests analysis applies only to matters related to paternity such as custody and visitation but is inapplicable to the paternity determination itself).

<sup>48</sup> *E.g.*, Williams v. Williams, 2003 WL 1923755, \*3 (Miss. 2003).

<sup>49</sup> UPA § 204, as amended in 2002, provides:

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

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce...;

(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with the law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce...;

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with the law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) he agreed to be and is named as the child's father on the child's birth certificate; or

(C) he promised in a record to support the child as his own; or

(5) for the first two years of the child's life, he resided in the same household with the

on which a legal paternity judgment is established in the absence of genetic marker or blood testing and only if it is in the child's best interest.<sup>50</sup> A short time period in which to challenge paternity largely protects the emotional and financial attachments children make with their fathers. Children are the victims of "paternity fraud" - with paternity fraud laws, they are at risk of being rendered fatherless - and need their interests protected more than nonbiological fathers who had opportunities to challenge their paternity prior to paternity adjudications.

## **II. TRADITIONAL ESTABLISHMENT OF PARENTAL RIGHTS AND THE EMERGENCE OF FUNCTIONAL PARENTHOOD**

### *A. Traditional Bases of Parentage Establishment*

Typically, parenthood is established by biology or adoption.<sup>51</sup> Thus, it has been simple to regard the child's birth or adoptive mother as the child's legal mother.<sup>52</sup> Historically, fatherhood

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child and openly held the child out as his own.

(b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.

<sup>50</sup> See *infra* Part V for a detailed analysis of my proposed statute of limitations.

<sup>51</sup> E.g., UPA § 201, 9B U.L.A. 309 (2000).

<sup>52</sup> With the advent of reproductive technology, situations now arise whereby the issue of legal maternity is more difficult to establish. Courts and legislatures are now confronted with conflicts between birth mothers, egg donor mothers, gestational surrogates, and the like. For example, *Johnson v. Calvert*, 851 P.2d 776 (Cal. Ct. App. 1993), involved a dispute between the egg donor mother and the birth/gestational mother. The court concluded that under California's version of the UPA, both women could assert valid claims of maternity, but the court viewed intent as the deciding factor in determining parentage. Because the egg donor mother and her husband had contracted with the surrogate to bear a child that they would raise, the court found the egg donor mother's intent to parent the child more compelling than the wishes of the surrogate. *Id.* at 780-782.

The law is playing "catch-up" with these technological advancements and the revised UPA includes an entire Article concerning gestational agreements and how parenthood should be legally established pursuant to a validly executed agreement under Article Eight. See UPA Article Eight, 9B U.L.A. 360-370 (2000).



was established through marriage: a legitimate child was “born in lawful wedlock or within a competent time afterwards.”<sup>53</sup> In modern times, a woman’s husband is presumed to be the legal father of a child she bears during the marriage or within 300 days of the termination of the marriage.<sup>54</sup>

In contrast, children born out of wedlock were *filius nullius* - no one’s son - and had no right to support or inheritance from their parents.<sup>55</sup> Well into the twentieth century, nonmarital children had no right to inheritance or support from their fathers<sup>56</sup> and the gap between the rights of marital and nonmarital children remained wide. Beginning in the 1960’s, the Supreme Court issued a series of opinions which held that discrimination against nonmarital children was unconstitutional.<sup>57</sup> All states now have procedures by which to compel fathers to provide support or their nonmarital children.<sup>58</sup>

In 1973, the Uniform Parentage Act was promulgated to create equality for children born

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<sup>53</sup> Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 4.1 (2d ed. West 1988)(quoting 1 Blackstone, *Commentaries on the Law of England*, 446, 454 (Cooley 4<sup>th</sup> ed. 1899)).

<sup>54</sup> Clark, *supra* note 56 at § 4.4.

<sup>55</sup> Glennon, *Somebody’s Child*, *supra* note 3, at 553.

<sup>56</sup> *Id.*

<sup>57</sup> See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 *Buff. L. Rev.* 341, 346 (2002)[hereinafter “*Micah*”] *citing* *Levy v. Louisiana*, 391 U.S. 68 (1968)(ruling that Louisiana’s Wrongful Death Act violated the Equal Protection Clause by denying recovery to a nonmarital child for the death of the mother); and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)(nonmarital child permitted to recover damages for father’s death under a state workers’ compensation law).

<sup>58</sup> Clark at § 4.4.

in and out of wedlock by introducing various means by which a man may be established as a child's legal father.<sup>59</sup> Once paternity is established, the legal father has all of the benefits and responsibilities of legal parenthood. Legal parenthood assures a child of the right to receive financial support, qualify as a dependent on her parent's health insurance, collect Social Security benefits, sustain an action for wrongful death, recover under workmen's compensation, and, in many states, to inherit from her parent.<sup>60</sup> Legal parenthood includes many intangible benefits, too, such as the authority to make medical, educational, religious, and moral decisions on behalf of a child.<sup>61</sup> Once a legal parent-child relationship is established, so, too, is the right to maintain a relationship with the child even if the child's parents separate. Divorce and paternity statutes provide fathers with custody and visitation rights, thereby preserving the father's emotional bond with his child.<sup>62</sup>

As noted above, historically, fatherhood could be established not only by biology, but through marriage, without any biological connection to the child. As modern paternity jurisprudence developed, so, too, did legal notions of fatherhood. Although the legal rights of marital fathers was well entrenched, several Supreme Court opinions, beginning with *Stanley v. Illinois*,<sup>63</sup> began to recognize the rights of unmarried, biological fathers. Through a series of

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<sup>59</sup> UPA Prefatory note (1973), 9B U.L.A. 289 (2001).

<sup>60</sup> *Micah* at 346.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 405 U.S. 645 (1972)(following the death of their mother, Stanley's children were removed from their home in compliance with an Illinois statute that presumed an unmarried, biological father was unfit to raise the children; the Court found that Stanley's due process and

cases addressing the rights of unmarried biological fathers with respect to their legal right to have notice prior to the adoption of their biological children by other men, the Court developed the “biology plus” test, which recognized that biological fathers who have actively asserted their parental rights must receive notice of the child’s mother’s intent to have the child adopted.<sup>64</sup> In articulating the “biology plus” test, the Court made clear that mere biology alone is insufficient to protect a biological father’s legal rights and, moreover, that biology is only the gateway to parenthood, but that it takes more than biology to be a parent.

*B. The Growing Recognition of Functional Parenthood*

Most recently, state courts have begun to recognize parental rights of nonbiological parents, illustrating the growing chasm within family law jurisprudence. Despite heightened (and

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equal protection rights were violated and that the state must provide him with an opportunity to establish fitness prior to the children’s removal).

<sup>64</sup> In a series of three opinions, the Court made clear that recognition of legal fatherhood was dependent upon more than mere biology. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court held that a man who had not sought to establish a relationship with his son could not prevent the child’s adoption by the mother’s husband, thereby upholding a Georgia adoption statute that required only the mother’s consent to adoption unless the father had taken steps to legitimate his parental relationship. Next, in *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court held that a New York adoption statute violated the petitioner’s right to equal protection because it required consent of the mother only to the adoption proceeding. Unlike the father in *Quilloin*, the father in *Caban* had lived with his children and after he moved out of the home, continued to contribute to their support and to see his children frequently (even having custody of them briefly). Finally, in *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court upheld a statute which imposed a time limitation for a putative father to establish a relationship with his child and held that due process does not require notice to a biological father who has not assumed any responsibility for his child nor manifested any parental function. The Court wrote, “The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” *Id.* at 262

For a greater analysis of the development of the biology plus principle, *see generally*, MODERN FAMILY LAW, *supra* note 26, at 526-528. *See also*, Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 U.C.L.A. L. Rev. 637 (1993); Murphy, *Legal Images of Fatherhood*, *supra* note 25 at 9-11.

I argue, misplaced) emphasis on biological connection in the paternity fraud context, more courts are recognizing the rights of functional parents to establish legal relationships with the children they have parented. For example, stepparents,<sup>65</sup> grandparents,<sup>66</sup> foster parents,<sup>67</sup> and gay and lesbian coparents<sup>68</sup> have increasingly been recognized as functional parents entitled to maintain custodial or visitation relationships with children they have helped to raise. Moreover, advances in reproductive technology have caused courts to evaluate the legal parenthood of nonbiological parents who contract with either a surrogate, egg donor, and/or sperm donor and to make a determination of legal parenthood. Several of these courts have recognized that the “intended”

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<sup>65</sup> See e.g., *Nunn v. Nunn*, 791 N.E.2d 779 (Ind. At. App. 2003)(discussing Indiana statute which permits de facto custodians to establish custodial and/or visitation rights; in this case, a stepfather); *Miller v. Miller*, 478 A.2d 351 (N.J. 1984)(invoking principles of equitable estoppel to uphold stepfather’s duty of child support).

<sup>66</sup> See e.g., *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000)(finding where grandparents had functioned as children’s parents for significant periods of time, visitation pursuant to state Grandparents Visitation Act was appropriate and constitutional); see also Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUMBIA L. REV. 337, 396-401 (2002)(Professor Dolgin reviews several grandparent visitation cases from New York and California, several of which permit grandparent visitation).

<sup>67</sup> See e.g., *Smith v. O.F.F.E.R.*, 431 U.S. 816 (1977)(Supreme Court recognized liberty interest in foster families in preserving relationships with children in their care); see also Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. Rev. Of Law & Social Change 245, 277-281 (2000-2001)(Professor Velte discusses how *Smith* can be used by foster parents to maintain an ongoing relationship with their foster children and may also stand for the proposition that other third parties may have a similar liberty interest in maintaining a relationship with a child they have helped to raise).

<sup>68</sup> See e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)(holding that lesbian coparent was a de facto parent and probate court properly entered order permitting visitation between lesbian coparent and child); *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995)(holding that lesbian coparent was a psychological parent and could maintain an action for visitation with her nonbiological child).

parent should trump the parent with a biological connection to the child.<sup>69</sup> Significantly, courts are recognizing that biology is not the only means by which to establish legal parenthood and parental rights. Thus, the reliance upon biological connection to disestablish paternity is seemingly at odds with current efforts to expand the legal definition of family and to recognize the legal rights of persons who are not otherwise legal parents through biology or adoption.

Before addressing the specific grounds for establishing legal parentage rights for persons without a biological or adoptive connection with a child, it is worth noting that these principles are predicated upon a nonbiological parent's desire to parent. This is in direct contrast with the paternity fraud cases in which men do not wish to parent. But the underlying principles of estoppel are designed to protect the child's best interests, emotionally and financially. To create a legal dichotomy between establishing parentage and disestablishing parentage seemingly ignores the child's best interests in the latter situation. If courts recognize the importance of maintaining parental relationships in other contexts, why should biology be the determinative factor in disestablishing parentage?

In fact, many recent studies demonstrate that genetic familial connections are less important than actual parenting. One recent study of adoptive, two-parent biological, single-mother and step-parent households revealed that genetic connections are less significant than previously believed. The authors found only limited support for the hypothesis that biological ties with two parents would significantly advantage children.<sup>70</sup> Another recent study found

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<sup>69</sup> *Buzzanca*, 72 Cal. Rptr. 2d 280 (intended parents should be legal parents, not sperm and egg donors nor gestational surrogate); *Johnson*, 851 P.2d 776 (egg donor/ intended mother should be legal mother rather than gestational surrogate/birth mother).

<sup>70</sup> Lansford, Jennifer E. et al., "Does Family Structure Matter? A Comparison of

positive outcomes for nongenetic children and noted that these outcomes suggest that “the absence of a genetic relationship, in itself, does not lead to difficulties for parents or children.”<sup>71</sup>

One judge, addressing new reproductive technologies and its effects on family formations, has argued that estoppel is critical to achieving what is in the child's best interests, preserving an intact parent-child relationship. Even though nonbiological fathers can allege that the child's mother fraudulently misrepresented that he was, in fact, the biological father, those allegations should have no bearing on the application of estoppel, because the father has assumed that functional, parental role, regardless of the genetic connection. Judge Tamilya wrote:

As a matter of law and public policy, this type of fraud is vitiated by the acknowledgment of paternal responsibility. The variables of human nature, emotion and relationship are such that it is impossible to say six or seven years after acceptance, and when the relationship has soured, what would have been the appellant's reaction had he known the true identity of the biological father. With the wide range of activities engaged in today via artificial insemination, in vitro fertilization, surrogate parentage, and almost inconceivable matches resulting in children to parents who cannot conceive together, even this relationship might have been accepted by a husband who desired to preserve a marriage with a wife who desired to have a child which appellant could not produce. The state of confusion that exists in marital and nonmarital relationships in today's society requires that the fullest protection possible be provided to the children created through these relationships.<sup>72</sup>

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Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households,” 63 *Journal of Marriage and Family* 840, 849 (August 2001).

<sup>71</sup> Golombok, Susan and Clare Murray, “Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation,” 40 *J. Child Psychology & Psychiatry* 519, 525 (1999)(determining that genetic and nongenetic families did not differ with respect to quality of parenting or the psychological development of the child).

<sup>72</sup> *Kohler v. Bleem*, 654 A.2d 569, 580 (Tamilya, J. dissenting)(majority determined that estoppel principles were inapplicable because the mother had misrepresented to ex-husband that he was child's father and that estoppel does not apply if one party has engaged in fraud; court thus permitted ex-husband's motion to vacate paternity order post divorce).

As Judge Tamilia discussed, there are a multitude of methods by which families are being formed and biology is but one component. In fact, biology may be irrelevant to a determination of parentage in certain cases. For instance, a California court was asked to determine the legal parents of a baby born to a surrogate mother and anonymous semen donor at the request of a married couple.<sup>73</sup> The court concluded that the married couple were the child's legal parents because they intended to parent the child and but for their intention, the child would not have been born.<sup>74</sup> In another case, a court was required to determine which woman was a child's mother: the surrogate, gestational mother or the egg donor.<sup>75</sup> Again, focusing on the intent of one party over the other, the court concluded that the party who intended to parent the child was indeed the legal parent.<sup>76</sup>

In other cases, functioning as a parent has caused courts to recognize a party's right to maintain an ongoing relationship with a child he or she has helped to raise. For instance, in *Rubano v. DiCenzo*, the Supreme Court of Rhode Island held that a nonbiological lesbian mother who had coparented the child, intended to coparent the child, and functioned as a parent for a period of five years, could successfully argue that she was a legal parent of the child based on the combined application of estoppel principles and the Uniform Parentage Act.<sup>77</sup> Similarly, in *V.C.*

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<sup>73</sup> *Buzzanca*, 72 Cal. Rptr. 2d 280.

<sup>74</sup> *Id.*

<sup>75</sup> *Johnson*, 851 P.2d 776.

<sup>76</sup> *Id.*

<sup>77</sup> 759 A.2d 959 (2000) In *Rubano*, a former same-sex partner petitioned for visitation with son with whom she had lived and helped raise for four years. *Id.* The Supreme Court of

*v. M.J.B.* the New Jersey Supreme Court held that a nonbiological lesbian coparent had functioned as a psychological parent and was entitled to visitation with the twins she had intended to parent and had helped to raise.<sup>78</sup> And in *Youmans v. Ramos*, the Massachusetts Supreme Judicial Court held that a child's aunt was a de facto parent, whose custodial rights trumped the nonmarital father's rights.<sup>79</sup>

Several states have enacted legislation specifically recognizing the rights of de facto parents. In Indiana, for example, the legislature, in 1999, amended statutes governing certain custody proceedings to recognize the rights of de facto parents.<sup>80</sup> The Indiana statute defines a de facto guardian, in part, as “a person who has been the primary caregiver for, and financial support of, a child who has resided with that person for at least: (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age.”<sup>81</sup> Using

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Rhode Island held that the former same-sex partner could prove her legal parentage pursuant to Rhode Island's version of the Uniform Parentage Act by establishing a de facto or psychological parent relationship, using standards similar to those articulated in the ALI Principles. *Id.* at 974-75. Significantly, the court specifically noted that biological parentage was not a requirement to proving parentage under the statute and that de facto parentage could sufficiently establish a legal parent-child relationship. *Id.* at 968. For a full discussion of the *Rubano* case, see *Micah, supra* note 57, at 383-389.

<sup>78</sup> *V.C. v. M.J.B.*, 748 A.2d 539 (2000). Similar to the *Rubano* case, *V.C.* involved a former same-sex partner who petitioned for custody and visitation rights with the twins she had helped to parent since their birth (she had also participated in the pregnancy). Although the court did not hold that a legal parent child relationship existed, the court recognized that *V.C.* was a psychological parent (similar to parent by estoppel, discussed below) and awarded her ongoing visitation with the twins.

<sup>79</sup> 711 N.E.2d 165 (1999).

<sup>80</sup> *Nunn v. Nunn*, 791 N.E.2d 779, 783 (2003)(discussing new statute).

<sup>81</sup> Indiana Code Section 31-9-2-35.5.



the Indiana statute, the court of appeals of Indiana has recognized the right of a stepfather to maintain a claim of custody and visitation with the daughter that he had actively parented and cared for since her birth.<sup>82</sup> Kentucky and Minnesota have similarly enacted statutes recognizing the legal rights of de facto parents.<sup>83</sup>

In addition to cases and state statutes recognizing the rights of nonbiological parents, both the UPA and ALI recognize that nonbiological parents may be entitled to the same rights and recognition as biological parents when they have functioned as a parent in a variety of respects. The American Law Institute has promulgated Principles governing the allocation of custodial and decision-making responsibility for children and defines “parent” as a legal parent, parent by estoppel, or a de facto parent.<sup>84</sup> A legal parent is defined as an individual who is defined as a parent under other state law.<sup>85</sup> A parent by estoppel is defined as:

an individual who, though not a legal parent, ... (ii) lived with the child for at least two years and (a) over that period had a reasonable good-faith belief that he was the child’s biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) thereafter continued to make reasonable, good-

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<sup>82</sup> *Nunn*, 791 N.E.2d (where man had functioned as child's parent since birth and had actively fostered a parent-child relationship, biological mother could not preclude stepfather from maintaining custody and visitation action if such ongoing relationship would be in child's best interests).

<sup>83</sup> Kent. Rev. Stat. § 403.270(1); Minn. Stat. 257C.01 (2003). See Lowell F. Schechter, *“De Facto Custodians” or “De Facto Parents”*: *Alternative Approaches to Child Custody Reform*, Draft, Presented at the International Society of Family Law North American Conference, June 2003 in Eugene Oregon (on file with author)(Professor Schechter reviews the de facto custodian statutes of Kentucky, Indiana, and Minnesota and discusses their application. He also reviews the ALI Principles and compares the Principles with the state statutes noted herein).

<sup>84</sup> ALI Principles of the Law of Family Dissolution § 2.03 (1)(Tent. Draft No. 4 2000).

<sup>85</sup> ALI Principles § 2.03 (1)(a).

faith efforts to accept responsibilities as the child's father, even if that belief no longer existed; or (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, a part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together with full parental rights and responsibilities, when the court finds that recognition as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's legal parent (or, if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child's best interests.<sup>86</sup>

A de facto parent is defined, in part, as someone who regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.<sup>87</sup> This emphasis both on functional parenthood and the child's best interests within the ALI Principles further serves to reinforce the necessity of looking beyond biology in parentage establishment and disestablishment.

Additionally, the ALI Principles recognize the importance of intent and/or time period of functional parenting for making a legal determination of parentage. Just as the UPA has incorporated a two-year statute of limitations for challenging a presumption of paternity or rescinding an acknowledgment of paternity, the ALI similarly recognizes that a two-year period of functional parenthood makes enough impact on the child that that period is sufficient to establish the rights and privileges of legal parenthood.<sup>88</sup> Moreover, the ALI recognizes the

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<sup>86</sup> ALI Principles § 2.03 (1)(b).

<sup>87</sup> ALI Principles § 2.03(1)(c).

<sup>88</sup> As reprinted above, two of the means by which a person may be deemed a parent by estoppel involve living with the child for at least two years. § 2.03 (1)(b)(ii) and (iv). Moreover, the ALI Principles includes in its definition of de facto parent a requirement that the individual lived with the child “for a significant period of time not less than two years.” § 2.03 (1)(c). Thus, in *creating* functional families, a two year period has been deemed significant enough to warrant full or partial legal parental status. My argument suggests that if two years is significant

importance of intent in determining the rights of functional parents. For example, a woman who actively participates in the conception, pregnancy, and birth of a child with her lesbian partner and further has an oral or written agreement to coparent that child may be recognized as a parent by estoppel even if she resides with the child for fewer than two years.<sup>89</sup>

Similarly, the UPA recognizes both biological and nonbiological bases of establishing legal fatherhood. The UPA provides several ways by which a father-child relationship may be established, including: 1) an un rebutted presumption of the man's paternity of a child under Section 204;<sup>90</sup> 2) an effective acknowledgment of paternity by the man, with the agreement of the mother, in a written document that has the same force and effect as an adjudication of paternity;<sup>91</sup> 3) an adjudication of the man's paternity in a judicial proceeding;<sup>92</sup> and 4) a divorce decree indicating that the man is the father of a child born during the marriage.<sup>93</sup> These four bases of paternity noted above include two which are not predicated on biology. Within the paternity

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enough to warrant such legal recognition, we should not permit men who have functioned as parents for a greater length of time to disestablish their parental relationships.

<sup>89</sup> § 2.03 (1)(b)(iii) and Official Comment.

<sup>90</sup> UPA § 201(b)(1).

<sup>91</sup> UPA § 201(b)(2). As part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 666 (a)(5)(C), (the Welfare Reform Act) Congress conditioned federal child support enforcement funds on a requirement that states enact laws that greatly strengthen the effect of a man's voluntary acknowledgment of paternity. Thus, a valid, unrescinded and unchallenged acknowledgment of paternity is given the same force and effect as a judicial determination of paternity. Prefatory Comment, UPA Article 3, 9 U.L.A. 313 (2000).

<sup>92</sup> UPA § 201(b)(3), 9B U.L.A. (2002).

<sup>93</sup> UPA § 637(c), 9B U.L.A. (2002). A divorce decree is determinative on the issue of paternity, under this section.

presumptions of UPA § 204, is a presumption predicated on openly holding out a child as his own and residing within the same household as the child for two years.<sup>94</sup> The Comment for this section explains that the presumption of “holding oneself out as the father” has the same two-year durational requirement as the marital presumption. Once the presumption arises, it is subject to challenge in only limited circumstances and is also subject to estoppel principles.<sup>95</sup>

Moreover, adhering to the common law presumption, a mother’s husband is presumed to be the child’s father, regardless of whether he is indeed the biological father.<sup>96</sup>

### **III. ENFORCING PATERNITY JUDGMENTS AND REJECTING CLAIMS OF PATERNITY FRAUD**

#### *A. Challenging Paternity Under the UPA and State Civil Procedure Rules*

The UPA not only provides various mechanisms by which a man can be established as a legal father, it also provides several ways by which the non-existence of a parent-child relationship can be established. First, as noted above, presumptions of paternity can be rebutted by a judicial proceeding; however, the UPA includes a two-year statute of limitations during which the presumptions can be rebutted, except in situations where the presumed father did not cohabit with the child and the presumed father never held the child out as his own.<sup>97</sup>

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<sup>94</sup> UPA § 204(a)(5).

<sup>95</sup> UPA § 204 Comment.

<sup>96</sup> UPA § 204 (a)(1), 9B U.L.A. (2002).

<sup>97</sup> UPA § 607 (2002). The Comment to § 607 explains that if the presumed father never cohabited with the mother and child, did not engage in intercourse at the probable time of conception and the presumed father never held the child out as his own, then the presumption should not be limited by the two-year statute of limitations. The drafters reason that in such a circumstance, nonpaternity is generally assumed by all of the parties and the concerns of preserving an intact family and the child’s best interests are not implicated. *Id.*

Furthermore, an acknowledgment of paternity generally may be rescinded only within 60 days from the effective date or the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue pertaining to the child.<sup>98</sup> After the sixty-day period has elapsed, a signatory to an acknowledgment of paternity may challenge the acknowledgment only if the challenge is made within two years after the filing of the acknowledgment and if he can prove fraud, duress, or material mistake of fact.<sup>99</sup>

As the provisions above suggest, the UPA seeks to balance the rights of nonbiological father and child by including a two-year statute of limitations throughout the Act for challenging legal parenthood. It applies for challenges to presumptions of paternity, rescissions of acknowledgment of paternity, and third-party challenges to an adjudication of paternity. The only instance for which the two-year statute of limitations is extended is when the presumed father never cohabited with the child and never held the child out as his own. In that instance,

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<sup>98</sup> UPA § 307. “A signatory may rescind an acknowledgment of paternity ... by commencing a proceeding to rescind before the earlier of: 1) 60 days after the effective date of the acknowledgment ... or 2) the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.” Pursuant to 42 U.S.C. § 666(a)(5)(c)(D)(ii) in order to retain federal child support subsidies, state law must provide signatories with a right of rescission of an acknowledgment of paternity. Comment to UPA § 307.

<sup>99</sup> UPA § 308. This section ensures that a legal father will not seek to disestablish his legal parenthood more than two years after he acknowledged paternity and further reinforces the principle that a man who voluntarily acknowledges paternity should not be able to change his mind, even if he later learns that he has no genetic connection to the child. The requirement of fraud, duress or material mistake of fact reinforces the principle that he has voluntarily undertaken the rights and responsibilities of parenthood and should not be relieved of those responsibilities. Moreover, by maintaining a two-year statute of limitations even in instances of fraud, duress or material mistake of fact, the UPA drafters seem to recognize that after a two-year period, the father and child will have a relationship that cannot be severed without harm to the child and thus cannot be disestablished regardless of the circumstances.

the UPA drafters profess, neither the child nor the mother would have relied on the paternity presumption and a challenge even ten years later would not appear to harm the child's best interests.<sup>100</sup> For all other presumptions of paternity, acknowledgments of paternity, and adjudications of paternity, the two-year statute of limitations applies. A two-year statute of limitations serves a reasonable purpose of ensuring that the best interests of the child are met, by preserving an intact parent-child relationship, while providing a legal but nonbiological father with a reasonable amount of time to disestablish paternity if circumstances warrant.<sup>101</sup>

There are several contexts in which a man may challenge a paternity judgment. First, a man who was married to the child's mother may learn subsequent to a divorce proceeding that he is not the child's biological father.<sup>102</sup> Often, courts apply principles of res judicata and estoppel to preclude paternity disestablishment in these situations.<sup>103</sup> The UPA provides that a divorce decree that expressly identifies a child as a "child of the marriage" or similar words or the divorce decree provides that the husband will pay support for the child has the binding effect of a

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<sup>100</sup> See *supra* note 97. The statute of limitations that I propose does not include this exception. While I understand the UPA drafters' position that there is little emotional reliance on paternity in those circumstances, there are still financial and practical considerations that militate against such a result, namely access to governmental benefits and assistance and/or inheritance benefits. See *supra* notes 59-62 and accompanying text for discussion of the legal and tangible benefits to a child of a legal parental relationship.

<sup>101</sup> But see Brie S. Rogers, Note, *The Presumption of Paternity in Child Support Cases: A Triumph of Law over Biology*, 70 U. Cin. L. Rev. 1151 (2002)(author argues that the UPA approach is too restrictive and that two years does not provide a sufficient time period in which to challenge paternity).

<sup>102</sup> For information concerning paternity challenges during divorce proceedings, see *supra* note 21.

<sup>103</sup> See *e.g.*, *infra* notes 131-145 and accompanying text.

determination of parentage.<sup>104</sup> Similarly, a man who has acknowledged paternity or was the declared a legal father pursuant to a paternity judgment may also learn subsequent to those proceedings that he has no biological connection to the child. The UPA provides that a signatory to an unrescinded acknowledgment of parentage and a man adjudicated as a legal father in a judicial proceeding are also bound by those judgments.<sup>105</sup> Furthermore, the UPA provides that a man seeking to challenge the paternity judgment may challenge the adjudication only under state law relating to appeal, vacation of judgments, or other judicial review.<sup>106</sup>

Typically, then, in their attempts to vacate a final paternity judgment, nonbiological fathers use their state's equivalent of Fed. R. Civil Procedure 60(b), which permits a court to vacate a final judgment in the instance of fraud, duress, material mistake or other equitable reason.<sup>107</sup> For Rule 60(b) motions based upon allegations of fraud, mistake, or newly discovered evidence, the motion must be made within one year after the judgment was entered.<sup>108</sup> A motion

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<sup>104</sup> UPA § 637(c).

<sup>105</sup> UPA § 637(a).

<sup>106</sup> UPA § 637(e).

<sup>107</sup> Fed. R. Civ. P. 60(b). The rule provides:  
On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied...; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

<sup>108</sup> *Id.*

under Rule 60(b)(6), which permits the court to vacate a judgment for “any other reason justifying relief,” must be made within a reasonable time. Determining what constitutes a reasonable time is particularly troublesome in the paternity fraud context.<sup>109</sup> Is it fair to require a man to support a child for another ten years if he knows the child is not his? But is it fair to vacate the judgment if he held himself out as the child’s father for the previous ten years? It is also difficult to determine what constitutes a fraud upon the court or an intentional misrepresentation.<sup>110</sup> Has the mother acted fraudulently if she did not reveal the possibility that another man might be the biological father of the child? Is that a fraud upon the court to warrant application of Rule 60(b) relief?<sup>111</sup> And, even if the mother’s conduct is deemed fraudulent, is it fair to the child and in the child’s best interests to sever the father-child relationship?

*B. Cases Enforcing Paternity Judgments*

It has been difficult for legal fathers to disestablish paternity subsequent to a paternity judgment or divorce decree.<sup>112</sup> As discussed above, a paternity judgment has binding effect and

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<sup>109</sup> As discussed *infra*, cases in which courts deny paternity disestablishment claims, are often predicated in part on the notion that too much time has elapsed and it would be unfair to the child to disestablish paternity. Alternatively, however, several courts have permitted paternity disestablishment claims after many years. *See* Part IVA.

<sup>110</sup> *E.g., compare* *In Re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001)(mother’s actions of not telling adjudged father that he may not be biological father does not constitute fraud upon the court) with *Doran v. Doran*, 820 A.2d 1279 (Pa. 2003)(court held that mother’s misrepresentation of paternity was fraud and legal father could thus disestablish paternity).

<sup>111</sup> *See e.g.,* Nadine E. Roddy, “The Preclusive Effect of Paternity Findings in Divorce Decrees” 10 *Divorce Litigation* 169, 172 (1998)(discussing the fraud exception to *res judicata* and citing cases in which the court determined that former husbands were not able to prove fraud to invoke the exception).

<sup>112</sup> *Id.* at 184 (“...the vast majority of states have held that [divorced husbands] are precluded from subsequently challenging a divorce decree’s finding of paternity even when the



cannot easily be challenged. With the increased reliability and certainty of genetic testing, however, more men are challenging judgments of paternity and seeking relief, in particular, from child support obligations. Many courts have denied such paternity disestablishment petitions, largely relying on the doctrines of res judicata, estoppel, or preclusion of the claim under Rule 60(b), either independently or in combination. Below, I discuss several cases illustrating the complex balancing between the best interests of the child and fairness to the nonbiological father.

In 2001, the Massachusetts Supreme Judicial Court denied the petition of a man who sought paternity disestablishment more than five years after he voluntarily acknowledged paternity of his daughter, Cheryl.<sup>113</sup> Cheryl was born on August 29, 1993.<sup>114</sup> Cheryl's mother received public assistance for Cheryl and in November 1993, the Massachusetts Department of Revenue ("DOR"), on behalf of the Department of Transitional Assistance, filed a complaint to establish paternity and a support order for Cheryl.<sup>115</sup> The DOR moved for a temporary order of support and an order that the father, mother, and child submit to genetic marker testing.<sup>116</sup> On December 16, 1993, the father and mother executed a voluntary acknowledgment of paternity and the father also executed a support agreement.<sup>117</sup> The father did not submit to genetic testing

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wife misrepresented the husband's paternity or concealed the husband's nonpaternity from the husband and the court.").

<sup>113</sup> *In Re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001).

<sup>114</sup> *Id.* at 491.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

prior to executing the acknowledgment and the record does not explain why. The same day, a judge entered a judgment of paternity.<sup>118</sup>

Following entry of the judgment, the father behaved as though he were Cheryl's father and she always referred to him as "Daddy"; he and his family visited and bonded with Cheryl; on two occasions he sought to expand his visitation rights with Cheryl; and he generally fostered a "substantial relationship" with her.<sup>119</sup> After his child support obligation was increased in 1999, Cheryl's father for the first time made a motion for genetic testing and asserted that he doubted he was her biological father and further alleged that he had doubted his paternity as early as Cheryl's birth and had information confirming his nonpaternity when Cheryl was two years old.<sup>120</sup> Twice his motions for genetic testing and reduction in child support were denied and he then took Cheryl for genetic testing without the knowledge of her mother.<sup>121</sup> The tests revealed he was not Cheryl's biological father and in January 2000, he moved to vacate the paternity judgment and further moved for reimbursement of all the child support he had paid since 1993.<sup>122</sup> In May 2000, the parties were ordered to submit to genetic testing and the judge further indicated that if the tests revealed that the father was not Cheryl's biological parent, he would be

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<sup>118</sup> *Id.* at 492.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* As grounds for his motion for genetic marker testing, Cheryl's father alleged that he bore little resemblance to Cheryl; that two friends of the mother told him subsequent to his paternity acknowledgment that he was not Cheryl's father; that testing of his semen in June 1996 indicated a low sperm count and infertility; and that Cheryl's mother had told him he was not Cheryl's father. *Id.* at 493.

<sup>121</sup> *Id.* at 493.

<sup>122</sup> *Id.*

entitled to relief, because “the father’s ‘interests in no longer being obligated to support a child not his own’ outweighed Cheryl’s interests ‘in maintaining a relationship with someone she believed to be her biological father.’”<sup>123</sup>

Pursuant to Mass. R. Civ. Proc. 60(b), the father moved to have the judgment vacated. It appears that he relied on either the application of R. 60(b)(5), entitling him to have the judgment vacated if it is no longer equitable that the judgment should have prospective application, or application of R. 60(b)(6), permitting vacation of the judgment for any other equitable reason. Because the father moved to vacate the judgment based on newly discovered genetic evidence, the mother argued that the father was actually making a motion pursuant to 60(b) (1)-(3) and that his claims were time barred because not made within one year.<sup>124</sup> The court, noting the importance of the finality of paternity judgments, addressed the timeliness of the father’s motion. The court noted that the special needs of children must be protected and that “consideration of what is in a child’s best interests will often weigh more heavily than the genetic link between parent and child.”<sup>125</sup> Furthermore, where the father and child have a substantial parent-child relationship, as was evident in this case, “an attempt to undo a determination of paternity is potentially devastating to child who has considered the man to be the father.”<sup>126</sup> Balancing the interests of Cheryl against her legal father’s, the court determined that Cheryl’s interests

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<sup>123</sup> *Id.* at 494.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 495 (citing *State ex rel J.Z.*, 668 So.2d 566, 569 (Ala. 1995)).

<sup>126</sup> *Id.* at 496 (citing *Hackley v. Hackley*, 426 Mich. 582, 598 n. 11 (1986)).

outweighed his, despite conclusive evidence of nonpaternity.<sup>127</sup>

The father further argued that his petition should not be time barred because the mother perpetrated a fraud upon the court by failing to disclose that the father may not have been biologically related to Cheryl.<sup>128</sup> The court stated that a fraud on the court must involved the “most egregious conduct” involving the “corruption of the judicial process itself.”<sup>129</sup> Here, the actions of Cheryl’s mother did not meet the legal definition of fraud and the court denied the father’s petition. The court further noted that it could not protect Cheryl from learning that her legal father was not biologically related to her or that it could force her father to continue his emotional relationship with her; but it did specifically note that it could protect her financial security and other legal rights.<sup>130</sup> While not specifically articulating the principles of paternity by estoppel, the court essentially used those principles by denying the father’s challenge because of his prior actions and his efforts to foster a relationship with her. Part of the importance of the finality of the judgment, it seems, is the court’s concern that Cheryl’s interests be protected through continuity and stability of the father-child relationship. Where a father has affirmatively

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<sup>127</sup> *Id.* at 499.

<sup>128</sup> *Id.* at 498.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 498-99.

sought out a relationship with a child, he cannot later claim genetic nonpaternity as a means of discharging his parental obligation.

Courts have similarly denied divorced fathers the right to disestablish paternity years after entry of a divorce decree, i.e., years after legal fatherhood has been established. In *Godin v. Godin*,<sup>131</sup> the Supreme Court of Vermont denied the request of a former husband who sought to vacate his paternity six years after the entry of a divorce decree. In *Godin* the former husband became suspicious that he was not the biological father of Christina after hearing family rumors that he might not be her father and based on questioning by Christina herself.<sup>132</sup> Although he did not challenge paternity at any time during divorce proceedings and, in fact, stipulated to his paternity of Christina, he “realized” that ten months elapsed between Christina’s alleged conception and her birth.<sup>133</sup> He sought genetic marker testing and vacation of that part of the divorce decree that established his paternity.

Christina was fifteen-years-old when her father sought to disestablish paternity. Despite that fact, Mr. Godin alleged that his ex-wife had perpetrated a fraud upon the court by alleging that Christina was his child and that the court should set aside his paternity and child support obligation.<sup>134</sup> The court determined that merely alleging that Mr. Godin was Christina’s

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<sup>131</sup> 725 A.2d 904 (1998).

<sup>132</sup> *Id.* at 906.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* In a rather draconian response to the Supreme Court of Vermont, the Vermont legislature has introduced legislation that would create the crime of “paternity fraud.” If the mother is found guilty of this crime, she can be subject to a fine and imprisonment. Furthermore, the legal father can sue the mother for restitution and may also sue the biological father. *See* Vt. H. 0735 (2002).

biological father did not constitute fraud and, moreover, Mr. Godin could have easily challenged paternity based on the elapsed time between alleged conception and birth at the time of divorce; this was not newly discovered evidence to warrant relitigation of the issue.<sup>135</sup> Denying Mr. Godin's request for genetic testing and vacation of his paternity obligation, the court noted that Mr. Godin lived with Christina, as her father, for the first eight years of her life and continued to treat her as his daughter for six years thereafter.<sup>136</sup> The court continued, "It is thus readily apparent that a parent-child relationship was formed, and it is that relationship, and not the results of a genetic test, that must control."<sup>137</sup> Recognizing that parenthood encompasses more than mere biology, the court also wrote, "the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to 'biology' of the presumed parent have become more common."<sup>138</sup>

Similarly, the Supreme Court of Appeals of West Virginia held that a divorced father was precluded from challenging the paternity of his eleven year old daughter, Crystal.<sup>139</sup> Five years after entry of the divorce decree, William filed a petition to terminate child support on the ground that he was not Crystal's biological father.<sup>140</sup> William argued that the best interests of the child would not be served by rigid application of res judicata and suggested that it was preferential for

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<sup>135</sup> *Id.* at 908-09.

<sup>136</sup> *Id.* at 910-11.

<sup>137</sup> *Id.* at 911.

<sup>138</sup> *Id.* at 910.

<sup>139</sup> *Betty L.W. v. William E.W.*, 569 S.E.2d 77 (W. Va. 2002).

<sup>140</sup> *Id.* at 80-81.

Crystal to know the identity of her biological father.<sup>141</sup> The court disagreed: William had held himself out as Crystal's father and had exercised his right of visitation with her following the divorce.<sup>142</sup> Thus, the court determined that "undeniable harm" would result to her if paternity were vacated.<sup>143</sup> The court further recognized that William himself had enjoyed the benefits of his representation as Crystal's father, including her love and affection. In making its ruling, the court placed great emphasis on the right of the child. The court discussed that while courts generally address children's rights within the larger context of competing adults' rights, the current trend is to give greater weight to children's rights.<sup>144</sup>

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<sup>141</sup> *Id.* at 81.

<sup>142</sup> *Id.* at 86.

<sup>143</sup> *Id.* (The court, citing its opinion in *Michael K.T. v. Tina L.T.*, wrote that the "reviewing court must examine the issue of whether an 'individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.'" 387 S.E.2d 866, 871 (1989).

<sup>144</sup> *Id.* Specifically, the court relied upon the decisions in *Wade v. Wade*, 536 So.2d 1158, 1160 (Fla. Dist. Ct. App. 1988), in which the court refused to vacate a paternity finding where the father had enjoyed the benefits of fatherhood, including the child's love and affection and *In Re Paternity of Cheryl*, 746 N.E.2d 488 discussed *supra*. In contrast, Judge Maynard in his dissent framed the issue, in part, as between the rights of the nonbiological father, who had unwittingly supported a child for eleven years, and the mother who had committed paternity fraud. *Id.* at 87-88. Judge Maynard actually noted Vermont's introduction of criminal legislation concerning paternity fraud and while writing that that particular result would be too harsh, he continued, "...certainly we can find a middle ground between jailing those who intentionally misrepresent paternity and rewarding them for their deception." *Id.* at 88.

Judge Maynard also suggested that a child has a right to know his or her biological father, but offered no support for that contention other than the importance of medical history. While knowledge of one's medical history is certainly important, that does not address the parent-child relationship. Why would Judge Maynard terminate an actual parent-child relationship upon the mere hope that the child may learn the identity of her or his biological father? Moreover, there is no guarantee that the biological father will choose to establish a parental relationship with the child. Judge Maynard's argument does not persuade me because it ignores the actual, functional parent-child relationship and looks merely at the promise of a parent-child relationship due to

Courts that do not permit paternity disestablishment claims place the best interests of the child ahead of the best interests of the nonbiological father. In these cases, the child has an interest in maintaining the legal, financial, and oftentimes emotional security which stem from the paternity adjudication. The finality of the judgment serves an important purpose for the child - stability - which is deemed more significant than genetic "truth."<sup>145</sup> While the father in these

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mere genetics. As the cases in Part IV illustrate, however, several courts agree with Judge Maynard that biological history alone may be a sufficient reason to disestablish paternity.

<sup>145</sup> Even in cases in which the child and father have not enjoyed an emotionally significant parent-child relationship, a court may recognize the importance of preserving the legal relationship, if for no other reason than preserving the child's legal identity and legal rights. For example, twelve years after J.T. was adjudicated the father of S.Z., he filed a motion seeking to set aside the paternity judgment. In *Ex Parte State of Alabama ex rel J.Z.*, the Supreme Court of Alabama determined that no extraordinary circumstances existed to justify relief from a paternity judgment twelve years after its entry, even if blood or genetic testing revealed that J.T. was not S.Z.'s biological father. 668 So.2d 566 (Ala. 1995). In 1980, the state brought a paternity action on behalf of the mother to establish J.S.T. as the legal father of S.Z. J.T. moved for blood tests, but did not appear for blood testing nor did he appear at subsequent hearings; thus, a default judgment was entered. *Id.* at 568. Between January 1981, when the default judgment was entered, and 1992, when J.T. received notice of a tax lien, he was in and out of jail, had little or no contact with the child, and (as noted by the trial court) neither the mother nor child relied on J.T.'s adjudication of legal fatherhood.

When the state sought to enforce J.T.'s child support obligation, he claimed that he had been unaware of the default judgment and requested blood tests in addition to filing a Rule 60(b)(6) motion to set aside the paternity judgment. The Supreme Court of Alabama ruled that twelve years did not constitute a reasonable time under Rule 60(b)(6) to bring a motion to vacate the paternity judgment, that the interests of finality required that the litigation not be reopened, and that an order for blood testing should not be granted. *Id.* at 570-571. Moreover, the court determined that J.T., even as a pro se litigant, had a responsibility to be aware of the proceedings against him and he could not claim that he had no knowledge of the judgment for twelve years.

The court briefly addressed the importance of the finality of paternity judgments, although it did not formally address the best interests of the child. However, the emphasis on the importance of the finality of paternity adjudications allows me to infer that the court was very concerned with the effect vacating a twelve year old paternity judgment would have on the child.

Moreover, in the difficult challenge to balance the best interests of children and their nonbiological fathers, the court was able to put the best interests of the child first because the father had engaged in such an unreasonable delay and had slept on his rights. Had the father sought blood testing twelve years earlier - or even moved for blood tests soon after the default



cases is not relieved of his parental responsibilities, he is also rewarded with an ongoing parent and child relationship. As *Cheryl, Godinand Betty W.* suggest, these nonbiological fathers have often nurtured positive relationships with their children and have derived emotional benefit from the parent-child relationship much as the children have. Ignoring the reality of the nonbiological father's functional parenthood places too much emphasis on biology and ignores the other aspects of fatherhood. Moreover, heightened emphasis on biology contrasts with the trend of legalizing the parent child relationship based solely on those other aspects of parenthood and *not* biology.

#### **IV. PATERNITY DISESTABLISHMENT CASES AND STATUTES**

In contrast to the cases in which the best interests of the child prevail and paternity disestablishment is not permitted, several courts have permitted the petitions. Moreover, several states have enacted statutes which specifically permit paternity disestablishment under certain circumstances. Several of those cases and statutes are discussed below.

##### *A. Cases Permitting Paternity Disestablishment*

Although many courts have rejected the attempts of legal fathers to disestablish paternity based on genetic testing subsequent to a paternity judgment, recently several courts have allowed nonbiological fathers to disestablish their nonpaternity. The Maryland Court of Appeals determined in *Langston v. Riffe*<sup>146</sup> that the issue of paternity disestablishment does not require a balancing test between the competing best interests of child and adjudicated father. In fact, the court stated that the best interests of the child have no place in the disestablishment of paternity

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judgment entered - the court would likely have decided this case differently.

<sup>146</sup> 754 A.2d 389.

because the child's best interests are not considered in establishing paternity in the first instance.<sup>147</sup> *Langston* actually involved three separate paternity appeals in which men previously adjudicated to be the father of a child moved to set aside those judgments based on new evidence that he was not the father.<sup>148</sup> In all three cases, the men voluntarily acknowledged their paternity and did not request blood or genetic testing prior to acknowledging paternity. Subsequently, the men learned that they may not be the biological father of the child and sought genetic testing. The main issue before the Court of Appeals was phrased as follows: "...whether the trial court must consider the 'best interests of the child' prior to ruling on whether to allow the post-declaration blood or genetic testing and the reconsideration of paternity."<sup>149</sup> The court held that a putative father who seeks to set aside a paternity declaration is automatically entitled to such test without consideration of the child's best interests.<sup>150</sup>

In stark contrast with the decision in *Paternity of Cheryl*, the Mississippi Supreme Court recently held that a paternity judgment could be vacated more than nine years after its entry. In *M.A.S. v. Mississippi Department of Human Services*,<sup>151</sup> the father, M.A.S., agreed that he was

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<sup>147</sup> *Id.* at 406. Discussing the ability of men formerly adjudicated as fathers to obtain genetic testing, the court wrote, "...the Legislature intended for blood or genetic tests to be made available ... to any putative father seeking to challenge a paternity declaration previously entered against him in which such blood or genetic evidence was not introduced. *Moreover, an examination of the best interests of the child has no place in that determination.*" (Emphasis added).

<sup>148</sup> *Id.* at 390.

<sup>149</sup> *Id.* at 392.

<sup>150</sup> *Langston* involved detailed analysis of Maryland statutes permitting disestablishment of paternity. The statute is discussed *infra* at Part IV B.

<sup>151</sup> 842 So.2d 527 (Miss. 2003).

the father of S.M. and signed an acknowledgment of paternity when he was seventeen years old and agreed to pay child support.<sup>152</sup> DNA testing performed in an unrelated matter revealed that MAS was not the biological father of SM.<sup>153</sup> He sought to set aside the paternity and child support orders. Pursuant to Miss. R. Civ. P. 60(b)(6), the court set aside the paternity judgment, determining that it would be “profoundly unjust” to require M.A.S. to continue making child support payments.<sup>154</sup> Although the court noted that collateral estoppel would generally preclude M.A.S.’ claim, the court found that the new DNA evidence proving M.A.S.’ nonpaternity was extraordinary and compelling enough to warrant vacation of the prior judgment, despite the nine year interval.<sup>155</sup>

Rather than placing emphasis on the child’s best interests in preserving the parent-child relationship, the court’s focus centered on the best interests of the father, M.A.S. The court noted multiple times that requiring the nonbiological father to continue making support payments would be manifestly unjust.<sup>156</sup> The court further noted that “DHS and the mother have not been prejudiced by the failure to seek relief sooner. The mother received child support payments for approximately ten years from the wrong person.”<sup>157</sup> In so doing, the court did not hold M.A.S. responsible for voluntarily signing the acknowledgment of paternity despite his request for a

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<sup>152</sup> *Id.* at 528.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 529-531.

<sup>156</sup> *Id.* at 531.

<sup>157</sup> *Id.* at 530.

blood test. In fact, the court placed no responsibility upon M.A.S. and instead saw him as a “hero” who had supported another man’s child for nearly ten years. The language used by the court is telling, however; by writing specifically of the fact that neither the mother nor the state agency suffered any prejudice, the court completely ignored the child’s interests. The court never referred to the effect of its decision on the child, but only on the nonbiological father. The court did not discuss the relationship between M.A.S. and S.M., how the relationship benefitted them both, how M.A.S. had received the benefits of parenting for nearly ten years, or that S.M. would likely be traumatized by this decision. The entire focus was on the injustice to M.A.S. and the court did not consider the injustice, stigma, or emotional trauma for S.M.

Three months after issuing its decision in *M.A.S.*, the Supreme Court of Mississippi ruled that a divorced husband could disestablish paternity of his child nine years after the child’s birth. In *Williams v. Williams*, the court “refuse[d] to sanction the manifest injustice of forcing a man to support a child which science has proven not to be his.”<sup>158</sup> The facts of *Williams* reveal that the parties separated when the child, Marcus, was approximately one month old and they divorced about two years later.<sup>159</sup> The divorce decree provided that Willie was Marcus’ father. Willie and Marcus did not have a close relationship and did not regularly see each other, although they did have several visits. During one visit, Willie noticed that Marcus bore little resemblance to him.<sup>160</sup> Thus, Willie had a genetic test which confirmed that Marcus was not his

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<sup>158</sup> *Williams v. Williams*, 2003 WL 1923755, \*3 (Miss.)

<sup>159</sup> *Id.* at \*1.

<sup>160</sup> *Id.*

biological son.<sup>161</sup> Willie then sought to disestablish his paternity. His petition to disestablish paternity was denied based on res judicata and collateral estoppel; thus, he decided to bring a petition on behalf of Marcus against himself, Marcus' mother, and the man Willie thought was, in fact, Marcus' biological father.<sup>162</sup> Genetic testing proved that neither man was Marcus' biological father.<sup>163</sup> The chancellor denied Willie's petition and Willie appealed.

Relying on *M.A.S.*, the court stated that finality should yield to fairness. The court reasoned that although the child may be an innocent victim of his parent's problems, "the law will not compel one who has stood in the place of a parent to support the child after the relationship has ceased."<sup>164</sup> Addressing the issue of the child's best interests, the court merely stated, "[w]e believe that the best interest of the child, in the factual scenario presented, is to know the identity of the natural father."<sup>165</sup> The court engaged in no additional discussion of Marcus' best interests.

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<sup>161</sup> The way the facts are presented, it appears that Willie had a private paternity test conducted, without the prior approval of the court. The court makes no mention of a motion for paternity testing. It is also unclear whether Willie sought the mother's permission before submitting Marcus to paternity testing. *Id.* at \*1.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (Citing *NPA v. WBA*, 380 S.E.2d 178, 181 (Va. 1989)(holding that husband who had held child out as his own for four years should not be liable for ongoing child support after genetic testing proved the child was not biologically related).

<sup>165</sup> *Id.* at \*3. The court offered no explanation why knowledge of Marcus' biological father would serve his interests better than maintaining an existing, nine-year parent-child relationship. More significantly, the court was offered compelling evidence that the mother did not know the identity of Marcus' father. Thus, by absolving Willie of all parental responsibility, the court effectively bastardized Marcus. The court offered no compelling rationale for its result. In addition, the court's blind faith that knowing one's biological father serves a child's best interests contains two major flaws. First, there is no evidence to suggest that the biological father would want to engage in parent-child relationship, thus the court is terminating a functional

Moreover, the record reflected that the mother did not know the identity of Marcus natural father.<sup>166</sup> While the court specifically noted that Willie and Marcus did not have a substantial relationship, the court further noted that courts may terminate support obligations (and, by inference, disestablish paternity) when the child and legal father have a more substantial relationship.<sup>167</sup>

A recent Pennsylvania opinion similarly discounts the best interests of the child and focuses solely upon the rights of the nonbiological father to have his paternity judgment vacated. In *Doran v. Doran*,<sup>168</sup> the ex-husband moved to vacate his child support obligation after genetic testing revealed that his probability of paternity was zero percent. Doran had never questioned paternity prior to or during the parties' divorce, at which time the child, Billy, was five years old.<sup>169</sup> A year or so later, however, Doran questioned his paternity, but his former wife told him

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relationship in the hopes that another one will magically materialize. Second, studies suggest that nonbiological parents can and do "parent" every bit as well as biological parents and that there is no substantive advantage to being raised by two biological parents. *See supra* notes 70-71 and accompanying text.

<sup>166</sup> *Id.* at \*1.

<sup>167</sup> *Id.* (Citing *NPA*, 380 S.E.2d 178 and *In Re Bethards*, 526 N..2D 871 (Iowa Ct.App. 1994)).

<sup>168</sup> *Doran v. Doran*, 820 A.2d 1279 (Pa. 2003). This case represents a significant change for the Pennsylvania judiciary, which had previously decided in 1997 that an ex-husband could not disestablish paternity despite genetic proof of nonpaternity. *Miscovich*, 688 A.2d 726, discussed *supra* at note 8. In *Miscovich*, the court characterized the ex-husband's attempt to disestablish paternity as disgusting. Despite similar facts, the Pennsylvania court changed course in *Doran* and emphasized its disgust with the wife who did not reveal her child's biological father.

<sup>169</sup> *Id.* at 1281.

he was Billy's father.<sup>170</sup> Several years later, Doran questioned his paternity again and convinced his ex-wife to allow Billy to go for genetic testing. The testing revealed Doran's nonpaternity.<sup>171</sup> He then moved to vacate the child support order and underlying paternity order. Furthermore, he "as gently as possible removed himself from the child's life in a way which he felt would cause the child the least amount of anguish and hurt."<sup>172</sup>

Beginning its analysis, the court first examined the applicability of the marital presumption and whether it should preclude Doran's claim of nonpaternity. The court noted that the marital presumption of paternity was designed to preserve intact families and, in light of the parties' divorce, did not apply.<sup>173</sup> More significantly, however, the court stated that estoppel did not apply in this case because of the wife's fraud.<sup>174</sup> The court said that Doran would never had

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (quoting Decision, 6/13/02, at 1-3).

<sup>173</sup> *Id.* at 1283. "The policy underlying the presumption of paternity is the preservation of marriages ...The presumption only applies in cases where that policy would be advanced by the application; otherwise, it does not apply." *Id.* (quoting *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999)).

<sup>174</sup> "The presumption that a child born during a marriage is a child of the marriage and the doctrine of paternity by estoppel grew out of a concern for the protection of the family unit; where that unit no longer exists, it defies both logic and fairness to apply equitable principles to perpetuate a pretense. In this case, application of estoppel would punish the party that sought to do what was righteous and reward the party that has perpetrated a fraud." *Id.* at 1283-84 (quoting *Sekol v. Delsantro*, 763 A.2d 405, 410 (Pa. Super. 2000)).

Interestingly, the court writes of concern for the protection of the family unit but never engages in a discussion concerning protection for the child. While the parties are no longer married, why does the court seem eager to further disintegrate the family unit by disestablishing paternity? Isn't the purpose of estoppel to protect the parent and child relationship, not merely to preserve an intact nuclear family? See *supra* Part IIB for a discussion of functional parenthood, including parent by estoppel, and its use to protect multiple types of nontraditional parent-child

held himself out as Billy's father, acted as a parent, provided him emotional and financial support if not for the ex-wife's misrepresentation of Doran's paternity.<sup>175</sup> The court quoted and adopted in large part the trial judge's opinion; the characterizations of both parties by the trial judge reflect the rhetoric of paternity fraud activists who paint the nonbiological father as a hero who supported another man's child as a result of the deceit of the child's mother. In evaluating the actions of both parties, the trial court wrote about Billy's mother, "[u]nfortunately, her deceit, falsehoods and misrepresentations gave Mr. Doran no reason but to treat the child as his own - with love, care and respect, as only a decent human being would do under the circumstances."<sup>176</sup>

What I find most fascinating about the characterization is that it depicts Doran as a loving, caring father; if so, why is he so anxious to sever all ties with this child? Even though he has no genetic tie to Billy, he has fostered a loving, parenting relationship - no different from an adoptive father, stepfather, or other nonbiological parent. How is the parent-child relationship any different now that the father knows he shares no genetic material with his son? Nowhere in the opinion does the court address Billy's best interests and the trauma he likely experienced when, at age eleven, his father "gently removed himself" from his life. Moreover, the court does not see beyond biology, even while lauding the many other aspects of fatherhood Doran

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relationships.

<sup>175</sup> *Id.* at 1284-85.

<sup>176</sup> *Id.* at 1284 (quoting Decision, 6/13/02, at 5-6).



exhibited. By dismissing the functional aspects of parenthood as secondary to biology, the court trivializes Doran's years of parenting and renders Billy fatherless.

*B. Statutes Permitting Paternity Disestablishment*

Several states have enacted legislation explicitly permitting paternity disestablishment upon a clear showing of genetic impossibility of paternity.<sup>177</sup> These statutes enable courts to circumvent the typical strictures of the finality of judgments; specifically, these statutes provide a loophole to the typical Rule 60(b) application. Some paternity set-aside statutes contain no statute of limitations and allow for a paternity challenge at any time;<sup>178</sup> others contain various limitations on the time during which a petitioner may challenge paternity.<sup>179</sup> Additionally, several statutes mandate that a court shall set aside a paternity judgment if blood or genetic tests clearly prove an absence of biological connection between a legal father and his child.<sup>180</sup> Others

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<sup>177</sup> See generally, Louis J. Tesser, "Dad or Duped? Post-Appeal Challenges to Paternity Judgments," 25-Fall Fam. Advoc. 29 (2002)(author discusses several paternity fraud statutes and the various approaches states have used in permitting paternity disestablishment).

<sup>178</sup> E.g. paternity fraud statutes in Georgia and Iowa contain no statute of limitations O.C.G.A. § 9-7-54 (2002)(permitting a petitioner to bring a motion to set aside a determination of paternity *at any time*); IA St. § 600B.41A(3)(a)(establishment of paternity may be overcome if the action is filed prior to the child reaching majority).

<sup>179</sup> See e.g., AS § 25.27.166 (b)(2) (2002)(Alaska's disestablishment of paternity statute provides that a petition to disestablish paternity may be brought "only within three years after the child's birth or three years after the petitioner knew or should have known of the father's putative paternity of the child, whichever is later...."); Minn. Stat. Ann. § 257.57 (b)(2003)("For the purpose of declaring the nonexistence of the father and child relationship ... only if the action is brought within two years after the person bringing the action has reason to believe that the presumed father is not the father of the child, *but in no event later than three years after the child's birth.*")(emphasis added).

<sup>180</sup> E.g., Arkansas Code Ann. § 9-10-115 (year). The Arkansas statute provides, in part: When any man has been adjudicated to be the father of a child or is deemed to be the father of a child pursuant to an acknowledgment of paternity without the benefit of scientific

grant courts discretion to set aside the paternity judgment.<sup>181</sup>

Illustrative of statutes mandating paternity disestablishment without a statute of limitations is the Maryland statute. In 1995, Maryland enacted MD Family § 5-1038 which allows a paternity judgment to be set aside if a blood or genetic test establishes the exclusion of the individual named as the father in the order.<sup>182</sup> Moreover, any party may request a blood or genetic test at any time, even after the entry of the final paternity order, if blood or genetic testing

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testing for paternity and as a result was ordered to pay support, he shall be entitled to one (1) paternity test...at any time during the period of time that he is required to pay child support upon the filing of a motion challenging the adjudication or acknowledgment of paternity ..." § 9-10-115(e)(1)(A).

The statute further provides that "[i]f the test administered under subdivision (e)(1)(A) of this section excludes the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity as the biological father of the child and the court so finds, the court shall set aside the previous finding or establishment of paternity and relieve him of any future obligation of support as of the date of filing." § 9-10-115 (f)(1).

<sup>181</sup> E.g., Illinois...

<sup>182</sup> **MD Family § 5-1038 Finality of Orders; alteration**

(a)(1) Except as provided in paragraph (2) of this subsection, a declaration of paternity is final.

(2)(i) A declaration of paternity may be modified or set aside:

1. In the manner and to the extent that any order or decree of an equity court is subject to the revisory power of the court under any law, rule, or established principle of practice and procedure in equity; or
2. If a blood or genetic test done in accordance with s 5-1029 of this subtitle establishes the exclusion of the individual named as the father in the order.

(ii) Notwithstanding subparagraph (i) of this paragraph, a declaration of paternity may not be modified or set aside if the individual named in the order acknowledged paternity knowing he was not the father.

(b) *Except for a declaration of paternity*, the court may modify or set aside any order or part of an order under this subtitle as the court considers just and proper in light of the circumstances and in the best interests of the child.

(emphasis added).

did not occur prior to the entry of the order.<sup>183</sup> As discussed above, the Maryland Court of Appeals in *Langston v. Riffe* interpreted these statutes to exclude any consideration of the best interests of the child and to place all emphasis on the blood or genetic test results.<sup>184</sup> The Maryland statute contains no statute of limitations and, as such, a claim to disestablish paternity may be brought at any time. As *Langston* reveals, a man may have been adjudicated the legal father or even acknowledged paternity of a child and then request genetic testing years after the judgment or order of paternity was entered. Without any consideration of the child's best interests, the court will permit such testing and if the test reveals that the man is not the biological father, paternity may be disestablished.<sup>185</sup>

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<sup>183</sup> MD Family § 5-1029. Blood or Genetic Tests

(b) *In general* –On the motion of the Administration, a party to the proceeding, or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child....

(f) *Laboratory report as evidence* –(1) Subject to the provisions of paragraph (3) of this subsection, the laboratory report of the blood or genetic test shall be received into evidence if:  
(i) definite exclusion is established; or  
(ii) the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3%.

<sup>184</sup> 754 A.2d at 406. The court wrote:

We hold...that the Legislature intended for blood or genetic tests to be made available, upon a motion, to any putative father seeking to challenge a paternity declaration previously entered against him in which such blood or genetic test evidence was not introduced. Moreover, an examination of the best interests of the child has no place in that determination.

<sup>185</sup> The statute does not mandate that paternity shall be disestablished; instead, the language of the statute (as reproduced supra note \*\*\*) provides that a declaration of paternity may be modified or set aside. However, the set aside provision contains no best interests requirement. Interestingly, the statutory subsection concerning "other orders subject to modification," (e.g., support and/or arrearages) does include a best interests test. Without best interests language concerning the paternity set aside, it is unlikely that a court will feel obligated to maintain a paternity order when genetic testing reveals biological nonpaternity. In particular,

Georgia recently enacted a paternity set-aside statute as well, which contains no statute of limitations and in certain instances, provides for mandatory paternity disestablishment. Georgia's statute allows a man to bring a motion to set aside paternity by filing an affidavit that newly discovered evidence has come to his knowledge since entry of the judgment and the results from scientifically credible parentage-determination genetic testing finds that there is zero percent probability that the male is the child's biological father.<sup>186</sup> The statute further provides that the court *shall* grant relief if the court finds that the test was properly conducted, that the man has not adopted the child, that the child was not conceived by artificial insemination, that the man did not act to prevent the biological father from asserting his paternal rights, and that the man has not done any of the following acts *knowing* that he is not the biological father: 1) married the child's mother; 2) acknowledged paternity in a sworn statement; 3) been named, with his consent, as the child's father on the birth certificate; 4) been required to support the child based on a written promise; 5) received notice from any agency requiring him to submit to genetic testing which he

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the court's holding that best interests of the child should not be considered either in making a determination to permit genetic testing nor "in the consideration of paternity" means that Maryland judges will have little discretion in paternity set aside cases. *Id.* at 411.

<sup>186</sup> O.C.G.A. 19-7-54(a) (2002) provides:

In any action in which a male is required to pay child support as the father of the child, a motion to set aside a determination of paternity *may be made at any time* upon the grounds set forth in this Code section. Any such motion shall be filed in the superior court and shall include:

- (1) An affidavit executed by the movant that the newly discovered evidence has come to movant's knowledge since the entry of judgment; and
- (2) The results from scientifically credible parentage-determination genetic testing ... and administered within 90 days prior to the filing of such motion, that finds that there is a 0 percent probability that the male ordered to pay such child support is the father of the child for whom support is required.  
(emphasis added).

disregarded; and 6) signed a voluntary acknowledgment of paternity.<sup>187</sup>

As noted, the Georgia law contains no statute of limitations and furthermore does not provide for any best interests analysis. Thus, it is possible for a man who has acted as a child's father for ten years but who had no knowledge of his genetic nonpaternity may petition for paternity disestablishment and the court must set aside the judgment upon a showing of genetic nonpaternity. Even if the result would be injurious to the child, the court is given no discretion under the statute. Moreover, the statute further provides that even if a man is not entitled to the mandatory, automatic relief discussed above (because he does not meet each necessary requirement), he may petition for paternity disestablishment nonetheless. Georgia O.C.G.A. 19-7-54(c) provides that if the petitioner fails to make the requisite showing under 19-7-54(b), the court may still enter an order as to paternity as otherwise provided by law.<sup>188</sup> This section similarly contains no best interests of the child analysis and contains no statute of limitations. Georgia thus provides both mandatory and discretionary relief without any time limitation or consideration of the child's best interests.

Similarly, the Ohio legislature has enacted Ohio Stat. §§ 3119.961 and 3119.962<sup>189</sup> which

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<sup>187</sup> O.C.G.A. 19-7-54 (b) (2002)(emphasis added).

<sup>188</sup> O.C.G.A. 19-7-54(c)(2002).

<sup>189</sup> Ohio Stat. 3119.961 (2002); Ohio Stat. 3119.962 (2002) provides:  
(A)(1) Upon the filing of a motion for relief under section 3119.961 of the Revised Code, a court shall grant relief from a final judgment, court order, or administrative determination or order that determines that a person or male minor is the father of a child or from a child support order under which a person or male minor is the obligor if all of the following apply:(a) The court receives genetic test results from a genetic test administered no more than six months prior to the filing of the motion for relief that finds that there is a zero per cent probability that the person or male minor is the father of the child.(b) The person or male minor has not adopted the child.(c) The child was not conceived as a result of artificial insemination.....(2) A court shall not deny relief

allows a court to grant relief from a paternity judgment. Rather than relying on the provisions of Rule 60(b), the statute provides that a court shall grant relief from a paternity and/or child support order if the man can provide genetic tests which disprove paternity, if he has not adopted the child, and if the child was not conceived as a result of artificial insemination. In fact, § 3119.961 specifically provides that *notwithstanding the provisions of Rule 60(b)*, the court shall vacate the orders.<sup>190</sup> Even if the man was required to pay support, held himself out as a father, signed the birth certificate and so forth, those actions will not bar a claim for relief under

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from a final judgment, court order, or administrative determination or order that determines that a person or male minor is the father of a child or from a child support order under which a person or male minor is the obligor solely because of the occurrence of any of the following acts if the person or male minor at the time of or prior to the occurrence of that act did not know that he was not the natural father of the child:(a) The person or male minor was required to support the child by a child support order.(b) The person or male minor validly signed the child's birth certificate...

(c) The person or male minor was named in an acknowledgment of paternity of the child that a court entered upon its journal...(d) The person or male minor was named in an acknowledgment of paternity of the child that has become final...(e) The person or male minor was presumed to be the natural father of the child under any of the circumstances listed in section 3111.03 of the Revised Code....(g) The person or male minor was determined to be the father of the child in a parentage action under Chapter 3111. of the Revised Code.(h) The person or male minor otherwise admitted or acknowledged himself to be the child's natural father.(B) A court shall not grant relief from a final judgment, court order, or administrative determination or order that determines that a person or male minor is the father of a child or from a child support order under which a person or male minor is the obligor if the court determines, by a preponderance of the evidence, *that the person or male minor knew that he was not the natural father of the child before any of the following*:(1) Any act listed in divisions (A)(2)(a) to (d) and (A)(2)(f) of this section occurred.(2) The person or male minor was presumed to be the natural father of the child under any of the circumstances listed in divisions (A)(1) to (3) of section 3111.03 of the Revised Code.(3) The person or male minor otherwise admitted or acknowledged himself to be the child's father.

(emphasis added).

<sup>190</sup> Ohio Stat. 3119.961: (A) *Notwithstanding the provisions to the contrary in Civil Rule 60(B)* and in accordance with this section, a person may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person or a male minor ... is the father of a child.... (emphasis added).

3119.962 unless it is proven by a preponderance of the evidence that he engaged in those actions and *knew* that he was not biologically related to the child. Furthermore, sec. 3119.967 provides that a party is entitled to relief under 3119.962 regardless of whether the judgment, order, or determination from which relief is sought was issued prior to, on, or after October 27, 2000.<sup>191</sup> Thus, the legislature has, in effect, provided a statutory scheme to circumvent the application of Rule 60(b) and the principle of *res judicata* as long as the petitioner can provide genetic evidence of nonpaternity.

Interestingly, two Ohio courts of appeal have declared these statutes unconstitutional. In *Van Dusen v. Van Dusen*,<sup>192</sup> the Ohio Court of Appeals for the Tenth District held that these statutes violated the separation of powers doctrine because the legislature essentially dictated to the courts what to do with paternity judgments “rendered months, years, or even decades earlier” despite the fact that such statute was in direct conflict with Rule 60(b). The court continued:

Such a disregard for the traditional powers of the other branches of government is especially egregious in the context of parenting and parentage matters. The legislature has in effect ordered the courts to enter new judgments taking away the only father a child has ever known if a DNA test indicates that the father and child are not genetically linked. Such a legislative mandate overlooks how complex the parent-child relationship is. A person who has served as a parent for many years is still in many ways a parent to the child, no matter whose genes and chromosomes are involved. If this were not so, no adult could successfully adopt a child and raise the child to adulthood.

The courts are in the best position to look out for the best interests of a child. The best interests are not automatically served by severing a parent-child relationship just because the parent and child were mistaken about their joint genetic

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<sup>191</sup> Ohio Stat. 3119.967 (2002) provides, in part: .....[A] party is entitled to obtain relief under section 3119.962 of the Revised Code regardless of whether the judgment, order, or determination from which relief is sought was issued prior to, on, or after October 27, 2000.

<sup>192</sup> 784 N.E.2d 750 (Ohio 2003).

heritage.<sup>193</sup>

The Sixth District Court of Appeals of Ohio, relying on *Van Dusen*, has similarly held that the Ohio statute is unconstitutional, contrary to the best interests of children, and violative of longstanding principle of res judicata. In *Poskarbiewicz v. Poskarbiewicz*,<sup>194</sup> an ex-husband sought to vacate a paternity judgment almost 15 years after the divorce proceedings. He had unsuccessfully challenged paternity several times and, after the enactment of 3119.962, provided genetic tests that disproved his biological paternity. The court determined that vacating the judgment would not be in the best interests of the child and, as noted above, declared the statute unconstitutional. Like the *Van Dusen* court, the *Poskarbiewicz* court focused on the need for stability in these actions, stating:

While we are mindful of the occasional situation in which an individual may be ordered to pay support for a genetically unrelated child, the need for stability and repose in child support and paternity actions far outweighs the harm of disturbing long-standing court orders.<sup>195</sup>

Some statutes, however, attempt to strike a better balance between the rights of nonbiological fathers and children. Rather than permitting open-ended paternity challenges, these statutes incorporate either a short statute of limitations within the paternity set-aside procedure and/or require courts to use discretion in reopening paternity and further require courts

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<sup>193</sup> *Id.* at 752.

<sup>194</sup> 787 N.E.2d 688 (Ohio 2003).

<sup>195</sup> *Id.* at 690.



to consider the best interests of the child.

For example, Alaska's statute provides that the petitioner must file within three years of the child's birth or three years from the time that the petitioner knew or should have known that he might not be the child's biological father.<sup>196</sup> Because the statute allows a petitioner as long as three years after he *knew or should have known* of his possible nonpaternity, this statute in effect provides no substantive limitation on the petitioner's ability to file for paternity disestablishment during the child's minority, if he does not learn of his nonpaternity until the child is fifteen. He would still have three years to file his petition. No best interests of the child standard is included within the statute, thus a child could consider a man her father for her entire minority, just to have that man legally disestablished as her father at her eighteenth birthday. Therefore, while the statute seemingly includes a short statute of limitations, it is too open-ended and does not serve to balance the child's interests, unlike the time limitations included in the UPA and proposed in this paper.

In contrast, the Minnesota statute contains a strict three year time limit after the child's birth in which to challenge paternity if the man was married to or attempted to marry the child's mother.<sup>197</sup> The three year statute of limitations similarly applies if new genetic testing reveals

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<sup>196</sup> Alaska Stat. § 25.27.166.

<sup>197</sup> Minn. Stat. § 257.57(b) (West 2003) provides that for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55 (1)(a), (b), or (c), the action may be brought only within two years after the person bringing the action has reason to believe he is not the father, "but in no event later than three years after the child's birth." Minn. Stat. § 257.55(1) includes presumptions of paternity that arise: (a) if the father and mother are or have been married to each other and the child is born during the marriage or within 280 days after the marriage is terminated; (b) if the father and mother attempted to marry each other prior to the child's birth and the child is born during attempted marriage or within 280 days of the attempted marriage's termination; or (c) after the child birth, the father and mother attempted to

that the man previously presumed to be the father is not.<sup>198</sup> A shorter statute of limitations - six months - applies if the man voluntarily acknowledged his parentage.<sup>199</sup> However, the Minnesota statute contains no statute of limitations for a challenge to paternity if paternity is presumed based upon the man having received the child into his home and openly holding the child out as his own.<sup>200</sup> This statute strikes a better balance for children, by not permitting too many open-ended challenges to paternity, but is still deficient concerning the presumption of openly holding oneself out as the child's father. In such a circumstance, the child truly has formed and developed an emotional attachment and reliance on her father and to permit the father to challenge his paternity at any time, without any consideration of the child's best interests, could be devastating.

None of the statutes discussed above provide satisfactory protection for a child's best interests. The statute either does not include a reasonable statute of limitations, thereby permitting a father to challenge paternity at almost any time until the child's majority, and/or the

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marry and although the marriage is invalid, the father has either acknowledged his paternity in writing, with his consent is named as the father on the child's birth certificate, or he is obligated to support the child under a written promise or court order.

<sup>198</sup> Minn. Stat. § 257.57 Subd. 2 (3) provides that for the purpose of declaring the nonexistence of the father and child relationship presumed under § 257.55, subdivision 1 (f), the party has three years after obtaining the results of blood or genetic tests. Minn. Stat. § 257.55 subdivision 1(f) provides that a man is presumed to be the child's father if blood or genetic testing establishes a statistical probability of paternity of 99% or greater.

<sup>199</sup> Minn. Stat. § 257.57 Subdivision 2 (2).

<sup>200</sup> Minn. Stat. § 257.57 Subdivision 2 (1) provides that a party can bring an action at any time to declare the nonexistence of a father and child relationship that is presumed under Minn. Stat. § 257.55 (d)(presuming a father and child relationship while the child is under the age of majority if the man receives the child into his home and openly holds the child out as his biological child).

statute does not require courts to consider a child's best interests. Legislatures must place children's best interests as the paramount concern in the paternity fraud struggle and limit the means by which paternity can be disestablished.

## **V. A PROPOSED STATUTE OF LIMITATIONS FOR PATERNITY FRAUD CLAIMS**

Current case law and statutes that permit paternity fraud actions often do not consider the best interests of the child. The legal trend of permitting paternity disestablishment is at odds with the trend of recognizing the legal rights of nonbiological parents who have actively cultivated parent-child relationships with their children. The trend toward recognition of functional parenthood places the best interests of the child at the forefront of the legal analysis. To preserve a child's right to have an adult remain in her life, courts now look beyond biology in recognizing the rights of parents by estoppel and de facto parents. Similarly, the best interests of the child should be paramount in the paternity fraud context. Even though the scenarios differ, in that the nonbiological father no longer wishes to have a legal and emotional relationship with his child, from the child's perspective there may be no appreciable difference. To the child, both types of individuals are "parent." Recognizing, though, that there may be circumstances in which the nonbiological father feels deceived by the fact of his legal parental relationship, I propose a short statute of limitations during which a man may challenge his paternity.

To fairly balance the competing interests between a legal, yet nonbiological father, and his child, the alleged nonbiological father should have a limited time in which to challenge his paternity: specifically, either 1) two years from the date on which a presumption of paternity, as

defined by the UPA,<sup>201</sup> applies to create a legal parental relationship or 2) two years from the date on which a legal paternity judgment is established in the absence of genetic marker or blood testing and only if it is in the child's best interest. Concerning the first portion of my proposed statute of limitations, UPA § 204 contains several presumptions of paternity, including 1) marriage to the child's mother and 2) residing with the child and holding himself out as the child's father.<sup>202</sup> Under UPA § 607, a presumption of paternity can be challenged only within two years, except in specific circumstances.<sup>203</sup> Because the presumptions of paternity in UPA § 204 incorporate the marital presumption of paternity, my proposed statute of limitations would not permit an ex-husband to challenge paternity, unless he divorced the wife within two years of the child's birth and then sought to disprove paternity within the same two-year period. My reason for this strict time limitation is that the ex- husband has in almost all instances fostered a parent-child relationship with the child and has thus assumed a functional parental role even in the absence of biological parenthood.

Unlike the first portion of my proposed statute of limitations, which will often operate as a strict two-year statute of limitations from the time of the child's birth, this second portion of my proposed statute of limitations may give the acknowledged or adjudicated father more time after the child's birth to challenge paternity (although he would only have two years from the time of his legal adjudication to challenge paternity). This portion of my proposed statute of limitations will apply to nonmarital fathers who sign voluntary acknowledgments of parentage or who are

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<sup>201</sup> See *supra* note 49 for the complete text of UPA § 204, as amended in 2002.

<sup>202</sup> UPA § 204(4).

<sup>203</sup> UPA § 607.

adjudicated as fathers. These legal proceedings may not occur immediately following the child's birth. It is possible that the mother and child had no reliance on the nonmarital father until he was legally adjudicated as such. Thus, my proposed statute of limitations gives him two years from the time he is legally established as the child's father to file a petition to disestablish paternity if he realizes subsequent to the legal proceeding that he is not the biological father. If he had lived with the child and held the child out as his own, a presumption of parenthood would apply, and the strict two-year statute of limitations would be in effect.<sup>204</sup> Moreover, by incorporating the best interest of the child standard, a court may still deny a man's petition to disestablish paternity - even if it is filed within two year from the date of paternity establishment - if such disestablishment action would not be in the best interest of the child.<sup>205</sup>

A two-year period in which to challenge legal fatherhood largely comports with the two-year statute of limitations contained within the UPA to challenge paternity and/or presumptions of paternity.<sup>206</sup> Furthermore, the two-year period is consistent with certain provisions within the ALI Principles for establishing a functional relationship with a child.<sup>207</sup> Since functional or presumed parenthood can be established based upon a two-year period,<sup>208</sup> it would be

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<sup>204</sup> See UPA § 204(5).

<sup>205</sup> See *infra* note 209 for a discussion of UPA § 608 and the application of the best interest of the child standard to a court's determination whether to authorize genetic marker testing. A similar analysis would apply here.

<sup>206</sup> UPA §§ 307, 308, and 607. See *supra* notes 97-99 for the text of each section.

<sup>207</sup> See *supra* notes 86-89 and accompanying text. The ALI Principles look both to the time that the functional parent has lived with or fostered a parental relationship with the child as well as other factors which are detailed below.

<sup>208</sup> *E.g.*, ALI Principles § 2.03(1)(b) and UPA § 204(5).

incongruous to disestablish paternity after an even greater length of time. Finally, by using a two-year statute of limitations in which to challenge legal paternity, the rights of a nonbiological father are recognized and preserved while ensuring that a child is not deprived of a parent after a significant bond has developed between the parties.

Additionally, the alleged nonbiological father should be required to seek court approval for blood or genetic marker testing; he should not have testing done without court approval, as such testing may not be in the child's best interests.<sup>209</sup> Such a requirement is in accordance with the UPA which requires courts to consider the best interests of children prior to authorizing blood or genetic marker testing in a proceeding to determine the parentage of a child with a presumed or acknowledged father.<sup>210</sup> Moreover, the requirement that a court review and

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<sup>209</sup> UPA § 608 incorporates principles of estoppel and provides courts with authority to deny motions for genetic testing, even within the two year time limitations articulated above, if such testing would not be in the child's best interests. It provides, in part:

(a) In a proceeding to adjudicate the parentage of a child having a presumed father or to challenge the paternity of a child having an acknowledged father, the court may deny a motion seeking an order for genetic testing of the mother, the child, and the presumed father or acknowledged father if the court determines that:

(1) the conduct of the mother or the presumed or acknowledged 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 or acknowledged father.

(b) In determining whether to deny a motion seeking an order for genetic testing under this section, *the court shall consider the best interest of the child* ....[factors omitted] (emphasis added).

As noted in the Comment to § 608, "In appropriate circumstances, the court may deny genetic testing and find the presumed or acknowledged father to be the father of the child." Supp. 27. The Comment further notes that, "[b]ecause § 607 places a two-year limitation on challenging the presumption of parentage, the application of this section should be applied in those meritorious cases in which the best interest of the child compels the result and the conduct of the mother and presumed or acknowledged father is clear." *Id.*

<sup>210</sup> *Id.*

consider the child's best interests appropriately places heightened emphasis on the child's rights.

## **CONCLUSION**

If the Genes Don't Fit- You're Still the Father. Genetic connection is but one of a myriad of elements that define parentage. More families are being created without two-parent genetic connections to the child. As we move toward a more comprehensive definition of family, we should not sever existing family units because of a lack of biological connection between a parent and child. By so doing, courts ignore both the best interests of children and the larger social value of including multiple types of families.

In trying to balance the best interests of fathers and children, however, the balance seems best struck when a short statute of limitations, coupled with a best interests analysis requirement, is used. A two-year statute of limitations from the triggering of a presumption of parenthood or the legal establishment of paternity by acknowledgment or judgment provides the father with an opportunity to challenge a paternity judgment, without causing too much disruption to the child. If the man does not challenge his paternity within two years of its establishment by presumption or judgment he should not be able to bring an action to disestablish his paternity years later. Even though it may seem unfair to the father - that he is "supporting another man's child" - he is, in fact, supporting his own. Years of functioning as a parent should not be dismissed as a "favor" to the mother and child. A legal and often emotional parent-child relationship was formed, despite the lack of biological connection between the father and child. Open-ended paternity challenges are not fair to the child and often do not accurately reflect the parenting role the father played. Furthermore, open-ended paternity challenges do not accurately reflect modern family trends and the importance of functional parenthood and, in fact, serve as a backlash against

functional parenthood. Functioning as a parent should be held superior to mere biological parenthood.