

NOTES

VOLUNTARY ACKNOWLEDGMENTS OF PATERNITY: SHOULD BIOLOGY PLAY A ROLE IN DETERMINING WHO CAN BE A LEGAL FATHER?

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INTRODUCTION

Today's modern family encompasses relationships that the law never anticipated. Courts face the realities of single parents, unmarried parents, same-sex marriages, and reproductive technology. In the early 1970s, the norm was a traditional family, consisting of a married couple and their offspring, living together in the same household.¹ The father financially supported his family, sharing with his wife the care, custody, and control of their children. By the early 1970s, however, the number of unmarried mothers began to increase dramatically, doubling in percentage from 1960.² Between 1970 and 1992 the number of births to unmarried women in the United States increased from eleven percent to thirty percent of all births,³ and between 1992 and 2002 the number increased to thirty-four percent.⁴ By 1994, forty percent of women in their thirties had given birth to an illegitimate child.⁵ Added to this already complicated social environment is the fact that the rate of paternal discrepancy, that is when married women bear children not biologically their husbands', is

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1. U.S. BUREAU OF THE CENSUS, FAMILIES, BY PRESENCE OF OWN CHILDREN UNDER 18: 1950 TO PRESENT (Sept. 15, 2004), at <http://www.census.gov/population/socdemo/hh-fam/tabFM-1.xls>.

2. Child Trends Data Bank, *Percentage of All Births That Were to Unmarried Women, by Race and Hispanic Origin, Selected Years, 1960-2003*, at <http://www.childtrendsdatbank.org/figures/75-Figure-1.gif> (last visited Mar. 25, 2005); KEN BRYSON, U.S. BUREAU OF THE CENSUS, CENSUS BRIEF: AMERICA'S CHILDREN AT RISK 1 (Sept. 1997), at <http://www.census.gov/prod/3/97pubs/cb-9702.pdf>.

3. Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, 48 NAT'L VITAL STATS. REPS. No. 16, at 17 (2000) (percentages rounded up).

4. Brady E. Hamilton et al., *Births: Preliminary Data for 2002*, 51 NAT'L VITAL STATS. REPS. No. 11, at 1, 3 (2003) (percentages rounded up).

5. AMARA BACHU, U.S. BUREAU OF THE CENSUS, FERTILITY OF AMERICAN WOMEN: JUNE 1994, CURRENT POPULATION REPORTS, P20-482, at v (1995).

approximately ten to fifteen percent between stable couples, either married or cohabiting.⁶

The erosion of the traditional family has affected all aspects of modern society and has rendered no area more ambiguous than fatherhood. Paternity disputes, ranging from custodial and child support issues to both the establishment and dissolution of paternity, are now customary in family courts.⁷ The traditional tools for dealing with such issues have been replaced by statutes that acknowledge these modern realities.⁸

Federal policy favors establishing the paternity of an “illegitimate” child born to an unmarried woman or to a woman and a man other than her husband, so as to provide the child the same opportunities available to children born in wedlock—proper care, maintenance, education, protection, and support.⁹ Historically, the mother had to file a paternity suit in order for her child to have a legally recognized relationship with his unwed father.¹⁰ In the past ten years the federal government has enacted legislation intended to simplify the procedures by which a man can establish legal paternity.¹¹

The current framework set forth in Title 42, Chapter 7, Title IV, Part D of the

6. Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 56-57 n.21 (2002) (citing R. ROBIN BAKER & MARK A. BELLIS, HUMAN SPERM COMPETITION: COMULATION, MASTURBATION, AND INFIDELITY 199 (1995)).

7. Victoria Schwartz Williams & Robert G. Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity*, JUDGES' J., Summer 1989, at 2 (“The sharply increasing volume of nonmarital births and the severe social consequences engendered by failing to establish paternity pose a challenge to the public agencies, including the courts, to process these cases more quickly and effectively.”).

8. The federal statute that specifically deals with the issue of paternity is 42 U.S.C. § 666 (2000). See also FLA. STAT. § 742.11 (West 1997) (discussing the presumed status of a child conceived by means of artificial or in vitro insemination or donated eggs or pre-embryos); N.H. REV. STAT. § 168-B:3(I)(e) (2003) (discussing the presumption of paternity in a case involving artificial insemination).

9. See Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 59-60 (2003).

Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government provided dependent's benefits, inheritance, and an accurate medical history for the child.

Id. (quoting U.S. COMMISSION ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992)).

10. Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 35 (2003).

11. 42 U.S.C. § 666(a) (2000).

Social Security Act (“Title IV-D”)¹² provides for two distinct methods of establishing paternity. First, either the mother or father can file a paternity suit, in which a genetic test will be ordered only upon request.¹³ In such cases, paternity will follow only if the test reveals biological paternity in the man. The court may then enter an order of paternity and for child support.¹⁴ Second, the parents can voluntarily acknowledge paternity through an informal civil procedure.¹⁵ Title IV-D consists of a series of federal mandates that states must abide by in order to receive federal funds, and calls for the establishment of a non-judicial means for a non-marital father to achieve legal paternity.¹⁶ Under Title IV-D, a voluntary acknowledgment of paternity, even in the absence of a court order or genetic testing, is the equivalent to a *legal finding of paternity*.¹⁷ Thus, in an effort to ensure support for a child born out of wedlock, the government has made it virtually effortless to become a legally recognized father. The proper execution of a paternity acknowledgment is a final judgment, entitled to “full faith and credit in other states.”¹⁸ Child support will not automatically follow, but must be requested by the parent in a separate hearing.¹⁹

This Note explores the complex background that has evolved into today’s paternity laws and, in particular, the voluntary acknowledgment of paternity. In creating an acknowledgment that carries the legal equivalent of a judicial decree, it appears that the government intended to bar future challenges by a man who voluntarily signed an affidavit with the knowledge that he is not the child’s biological father. Taking this one step further, a mother, after consenting to a paternity affidavit by a man she knows is not the biological father of her child, should not be allowed to contest his paternity at a later date.

The voluntary paternity affidavit has the potential to be a powerful tool—both in the lives of children and in family courts. Finality of paternity judgments supports the best interests of the child by not disrupting the father-child bond or rendering a child fatherless, despite the biological realities. In practice, however, many states differ on the issue of who can be a father. In

12. *Id.* § 666(a)(5).

13. *Id.* § 666(a)(5)(B).

14. *Id.* § 666(a)(5)(D)(i)(II); *see also id.* § 666(a)(5)(M).

15. *Id.* § 666(a)(5)(C). This statute provides for “a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father” can execute a paternity acknowledgment, there must be appropriate notice such that the parents are apprised of the legal consequences, rights, and responsibilities of taking such action. *Id.* § 666(a)(5)(C)(i).

16. *Id.* § 666(a)(5)(C).

17. *Id.* § 666(a)(5)(D)(ii).

18. *Id.* § 666(a)(5)(C)(iv).

19. Courts generally enter orders for child support; however, many states have established independent administrative processes for order establishment. Roberts, *supra* note 10, at 36 n.12. 42 U.S.C. § 667 requires that states provide for such guidelines. “The parties might also enter a voluntary agreement about support, but this agreement is not usually enforceable and must be reduced to a judgment to make it so.” Roberts, *supra* note 10, at 36 n.12.

some states, once a man establishes that he is not the biological father he is swiftly released from all responsibility, despite having knowingly executed a voluntary acknowledgment of paternity.²⁰ These divergent policies create a dilemma as to whether there should be paternity affidavits and, if so, how should they be treated by the individual states. Circuits are split on whether a non-biological father can sign a voluntary acknowledgment of paternity and become the “legal” father, and if so, the manner in which they should be treated by the individual states.²¹

Part I of this Note outlines a brief history of illegitimacy, from the common law marital presumption of paternity and the stigma associated with illegitimacy, through the evolution of the Uniform Parentage Act of 1973 and its revolutionary approach to this issue. Part II focuses on current statutes, namely Title IV-D, which is federally mandated to the states in exchange for funding. The discussion centers on the voluntary acknowledgment of paternity, and the exact procedures contemplated by Title IV-D with respect to the establishment of paternity. Due to the legally binding nature of the voluntary acknowledgment of paternity, and the rights and responsibilities that follow, one might imagine that there would be a formal notice requirement, such that any man who established his paternity this way would be fully apprised of the legal significance. However, the requisite notice to acknowledging parents is minimal, and this particular section of Title IV-D is left primarily to state discretion.

In Part III, the discussion continues chronologically with the Uniform Parentage Act of 2000, amended in 2002, and concentrates on the changes from the 1973 version and the current relationship to Title IV-D provisions. Although the Uniform Parentage Act is a non-mandatory model act, it does provide guidance on many issues left unanswered by Title IV-D. Part IV addresses an enormous issue left untouched by Title IV-D, namely the role of the biological father in voluntary acknowledgments of paternity. Title IV-D makes no rule as to whether this informal paternity establishment process should be restricted to biological fathers only, while the Uniform Parentage Act of 2002, however, clearly narrows the process towards the natural, biological father.

Thus, the formative debate emerges in Part V, which focuses on the divergent paths taken by the states in complying with Title IV-D, particularly in cases of paternity disestablishment. When a man brings an action to disestablish his paternity after the sixty day rescission period has expired, Title IV-D says that he can only bring such a challenge on the grounds of fraud, duress or material misrepresentation.²² This discussion focuses on how the states have interpreted this federal law. The inconsistencies from state to state are staggering. At the core of this discussion is whether a non-biological father can establish legal paternity and maintain the rights and responsibilities associated with a biological father’s voluntary acknowledgment of paternity.

Part VI addresses the best interests of the child, where this consideration fits

20. *See infra* Part IV.

21. *See infra* Part IV.

22. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

in the law and the judicial decision-making process. Finally, Part VII responds to the implications of state discretion under Title IV-D and discusses various propositions related to the paternity establishment process. Among these proposed ideas is the notion that there should not be a voluntary paternity acknowledgment process because it does not serve its intended purpose. In addition, this Note considers strict enforcement of all voluntary paternity affidavits such that no one would be able to successfully challenge legal paternity in the future, taking into account what additional requirements must be implemented to support absolute finality of judgment. Mandatory genetic testing would only create additional systemic problems and is rejected as a potential solution. The optimum proposed solution consists of creating an additional bureaucratic layer geared to resolve many of these cases prior to adjudication.

I. HISTORICAL BACKGROUND

A. *The History of Illegitimacy*

Traditional law governing parenthood was framed long before the advent of modern sociological and scientific changes. A child born to unwed parents was considered illegitimate in the eyes of the law, and was subsequently treated as inferior to a child born in wedlock. An illegitimate child had no right to child support and was stigmatized by his status in a society of traditional ideals.²³

In the days before genetic testing, a child rarely knew for certain the identity of his biological father. Consequently, the law formulated a series of presumptions designed to protect children from the stigma of being labeled illegitimate.²⁴ The traditional marital presumption of paternity settled any questions of paternity on the assumption that the mother's husband was the biological father.²⁵ At common law this presumption could only be rebutted by

23. See *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

24. See *id.* at 124-25.

25. Battle Robinson & Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL LAW 23, 24 (2001). Three general policies support this rule:

[1] "[T]he best interests of the child. If a child is born into a marriage and establishes a father-child relationship with the husband, it is generally in the child's interest to maintain that relationship as it provides him/her both financial and psychological benefits."

[2] "[T]he peace and stability of the marital relationship. If a husband and wife hold a child out as a child of the marriage, a stranger who comes forth and alleges to be the father of the child may disrupt the marriage. This is not in the interests of the husband and wife, the child or the society as a whole."

[3] "[T]he public fisc. If a husband successfully challenges the paternity of a child thought to be his, the child might well need public assistance to replace the lost financial support the husband had provided."

Id. (quoting Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 53 (2000)).

proof of the husband's impotence, sterility, or lack of access to the wife during the calculated period of conception.²⁶

In 1777, the societal desire to eliminate illegitimacy manifested itself through Lord Mansfield's Rule, which brought an end to spouses testifying against one another. The declarations of a husband or wife could not be used to bastardize a child born during the marriage.²⁷ Children born *out of wedlock* however, were left fatherless in the eyes of the law as there were no applicable presumptions. Paternity actions could be brought, but in the absence of genetic testing capabilities, the outcome would depend solely on the man's access to the woman during the time of the child's conception. It was her word against his, and the burden of proof rested on the mother.²⁸ This system typically left the child illegitimate and without access to financial support.

Beginning in 1968, the United States Supreme Court handed down a number of decisions that eliminated the distinctions between children born to married mothers and those born to unmarried mothers.²⁹ These decisions seem to rest on the rationale that the illegitimate child, by virtue of a status for which he is not responsible and which has no relation to his worth as an individual, has been the object of discriminatory legal doctrines having no substantial social purpose.

B. *The Uniform Parentage Act of 1973*

In 1973, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Parentage Act ("UPA 1973") in order to promote the equalization of legitimate and illegitimate children in the eyes of the law. This Act revolutionized the means for establishing paternity and ensuring child support for children who would otherwise have been illegitimate under the common law. The message was simple and clear: "The parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents."³⁰ Believing this message to be mandated by the Constitution, the drafters devised the UPA 1973 to replace those state laws that

26. *Michael H.*, 491 U.S. at 124.

27. *Voss v. Shalala*, 32 F.3d 1269, 1272 n.3 (8th Cir. 1994). Lord Mansfield's Rule of 1777 was first proclaimed in *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (K.B. 1777). *But see* *Serafin v. Serafin*, 258 N.W.2d 461, 462 (Mich. 1977) (allowing husband to present evidence to rebut presumption of legitimacy of child, and stating that Lord Mansfield's Rule is widely accepted, but can no longer be strictly enforced).

28. *See* IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT PROBLEMS* 891-92 (2d ed. 1991).

29. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that a Louisiana wrongful death statute was unconstitutional because it discriminated against illegitimate children by prohibiting them from recovering for the wrongful death of their mother); *Glonn v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968) (holding that the same Louisiana wrongful death statute was unconstitutional because it barred a mother's recovery for the wrongful death of her illegitimate child); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (guaranteeing an illegitimate child the right to support from his natural father).

30. UNIF. PARENTAGE ACT § 2 (1973).

were unconstitutional or under constitutional scrutiny.³¹

Although the UPA 1973 provides for the establishment of a parent-child relationship with the “natural” father,³² what the drafters meant by the term “natural” father is not clearly defined. Did the early drafters envision biological fathers as the only ones to whom the rights and responsibilities of fatherhood could extend? The Act has been interpreted as “identifying the birth mother and the natural (read genetic) father as the legal parents, except for the case of adoption.”³³

In addition to the narrow presumptions found at common law, the UPA 1973 sets forth various circumstances in which a man was presumed to be the “natural” father.³⁴ The majority of presumptions require the man to be married to the mother at some point, and leave little room for non-marital fathers to be the presumed father.

In the minority of states that adopted the UPA 1973, there are, however, additional ways for paternity to be *presumed* through conduct which does not require marriage.³⁵ If, “while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child” he is presumed to be the child’s father.³⁶ The presumption governs, unless rebutted, but does not establish legal paternity.³⁷ The same applies to a voluntary acknowledgment of paternity under the UPA 1973, which creates a presumption rebuttable by “clear and convincing evidence.”³⁸ Thus, the presumption arising from a paternity acknowledgment under the UPA 1973 is more easily challenged than that created out of a marriage, because it is not equivalent to legal paternity and is subject to rebuttal.³⁹

31. *Id.* prefatory cmt.

32. *Id.* § 3.

33. Uniform Law Commissioners, *Summary UPA 2002*, Introductions and Adoptions of Uniform Acts, at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Jan. 20, 2005).

34. UNIF. PARENTAGE ACT § 4.

35. Roberts, *supra* note 9, at 36.

36. UNIF. PARENTAGE ACT § 4(a)(4).

37. A child born during marriage is presumed legitimate. This presumption is not conclusive although it may be rebutted only by direct, clear, and convincing evidence. *See, e.g., R.D.S. v. S.L.S.*, 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

38. UNIF. PARENTAGE ACT § 4(b).

39. Any interested party was permitted to bring an action at any time to determine the existence or non-existence of the father-child relationship *presumed* under section (4) or (5). *Id.* § 6(b). *Compare id.* § 6(a):

A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action (1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or (2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant

II. TITLE IV-D

A. *Voluntary Acknowledgments of Paternity*

Title IV-D established a child support enforcement program in which a primary goal was to establish paternity.⁴⁰ In exchange for federal funding, Title IV-D requires states to establish informal procedures for establishing paternity. Today, as a condition for receipt of federal funding under Title IV-D, states must have an approved plan for child and spousal support that meets all the requirements of 42 U.S.C. § 654. Title IV-D provides in relevant part: "A State plan for child and spousal support must . . . provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan . . ." ⁴¹ States must have expedited paternity establishment procedures, both non-judicial and judicial,⁴² and all states must implement a procedure by which a man can voluntarily acknowledge his paternity.⁴³

Informal procedures may be administered in the hospital at the time of the child's birth, or later in an appropriate state agency's offices. However, both the mother and the putative father "must be given notice, orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights and . . . responsibilities that arise from, signing the acknowledgment."⁴⁴ Ultimately, in creating a non-judicial means for fathers to obtain legal paternity, Congress devised a way to save time and money by eliminating the need to go before a court to receive a final paternity judgment. California's family code summarizes the primary government objective:

A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest.⁴⁵

The voluntary acknowledgment becomes a "legal finding of paternity," and

facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

40. 42 U.S.C. § 651 (2000).

41. *Id.* § 654(4)(A).

42. *Id.* § 666(a)(2); 45 C.F.R. § 302.70(a)(2)-(5)(iii) (2004).

43. 42 U.S.C. § 666(a)(5)(C).

44. *Id.* § 666(a)(5)(C)(i).

45. CAL. FAM. CODE § 7570(b) (West 2004).

a signatory has only sixty days to rescind the acknowledgment.⁴⁶ Once the sixty day time limit has expired, a paternity affidavit can only be challenged in court on the “basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger.”⁴⁷

B. Minimum Requirements

The Secretary of the Department of Health and Human Services is responsible for devising and regulating the services offered by hospitals and birth record agencies,⁴⁸ and must identify other state bodies authorized to offer voluntary paternity acknowledgments.⁴⁹ The only formalities associated with this voluntary acknowledgment concern the substance of the affidavit and what notice must be given to the mother and father at the time of signing. Under Title IV-D, the minimum requirements are the inclusion of the parent’s social security numbers and any elements found to be “common” to the States.⁵⁰ Although the intention was to keep the procedure informal, the Department of Health and Human Services felt that higher notice requirements were warranted in order to equate a paternity acknowledgment to a final judgment and to ensure that potential fathers were aware of the legal consequences of their actions.

Beginning in 1996, the Department of Health and Human Services created a task force to recommend the minimum data requirements.⁵¹ The goal of this group, comprised of both federal and state actors, was to create a tool that was both “user-friendly”⁵² and comprehensive.⁵³ Although a voluntary paternity acknowledgment establishes legal paternity at the time of execution, the information may be needed in the future to establish child support orders. In order to create such a tool, the group reviewed existing paternity affidavits from every state, identifying the common elements, and distinguishing between those that must be required and those that could be optional.⁵⁴ Based on the task force’s recommendations, in 1998 the Office of Child Support Enforcement established the minimum data requirements that must be included in all state paternity affidavits.⁵⁵ Mandatory data includes the names and birth dates of the mother, father, and child, the social security numbers and addresses of the mother

46. 42 U.S.C. § 666(a)(5)(D)(ii)(I).

47. *Id.* § 666(a)(5)(D)(iii).

48. *Id.* § 666(a)(5)(C)(iii)(II)(aa).

49. *Id.* § 666(a)(5)(C)(iii)(II)(bb).

50. *Id.* § 652(a)(7).

51. Office of Child Support Enforcement, U.S. Department of Health & Human Services, Action Transmittal, OCSE-AT-98-02 (Jan. 23, 1998), available at <http://www.acf.hhs.gov/programs/cse/pol/AT/at-9802.htm> (explaining the “[r]equired [d]ata [e]lements for [p]aternity [a]cknowledgment [a]ffidavits” to “State Agencies administering child support enforcement plans approved under Title IV-D of the Social Security Act”).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

and father, and the birthplace of the child.⁵⁶ In addition, there must be notice of the legal significance of the acknowledgment and the sixty day rescission period, signed by both parents indicating their understanding of the “rights, responsibilities, alternatives and consequences.”⁵⁷ The group also identified information that, although important, is left to state discretion.⁵⁸

III. THE UNIFORM PARENTAGE ACT OF 2000, AMENDED IN 2002

Although the UPA 1973 was instrumental in establishing the paternity of children born out of wedlock, a gap in protection of rights remained with respect to unwed fathers.⁵⁹ In 2000, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Parentage Act of 2000 (“UPA 2000”), and made it their “official recommendation . . . on the subject of parentage,” superceding all previous uniform acts on the subject.⁶⁰ The UPA 2000 was amended in 2002 (“UPA 2002”) in response to objections by the American Bar Association Section of Individual Rights and Responsibilities and the American Bar Association Committee on the Unmet Legal Needs of Children, concerning insufficient provisions to deal with the continued inequality of illegitimate children.⁶¹

Specifically, the amended version adopted additional presumptions of paternity that were not found in either the 1973 or 2000 versions, and are not contingent upon marriage.⁶² Although the general goal has not changed since 1973, the UPA 2002 is “both more streamlined and comprehensive than the original”⁶³ in response to the realities of modern society, including artificial reproduction procedures, adoption and gestational agreements.

56. *Id.*

57. *Id.*

58. *Id.* Of these optional elements, the following are strongly recommended: 1) Sex of Child; 2) Father’s Employer; and 3) Maiden Name of Mother. *Id.* Additional information specified as optional is: 1) Daytime Phone Number; 2) Birthplace (mother and father); 3) Ethnicity of Father; 4) Medical Insurance; 5) Place Where Acknowledgment or Affidavit was Completed; 6) Offer of Name Change (child); 7) Minors: Signature Line for *Guardian Ad Litem* or Legal Guardian; 8) Three-Way Signature Offered on Form (husband, wife and biological father); 9) An advisory to parents that they may wish to seek legal counsel or obtain a genetic test before signing; and 10) A statement concerning the custody status of the child vis-à-vis State law. *Id.*

59. Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 557 (2000).

60. UNIF. PARENTAGE ACT prefatory note (2000). Previous Uniform Acts include the UPA 1973, the UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT (UPUFA 1988), and the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA 1988). The latter two were recommended to be withdrawn and replaced by the UPA 2000. *Id.*

61. UNIF. PARENTAGE ACT prefatory note (amended 2002).

62. *Id.* § 204(a).

63. Press Release, National Conference of Commissioners on Uniform State Laws, New Uniform Parentage Act Now Available (Nov. 25, 2002), available at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=84>.

Although states have discretion in deciding whether or not to adopt some or all of the UPA 2002, there are sections driven by Title IV-D which *are* required for all states.⁶⁴ The all-encompassing nature of the federal act renders it nonspecific, such that the UPA 2002 aims to serve as a supplement, complete with clear and comprehensive procedures for compliance. The United States government believes that a “simple civil process for voluntarily acknowledging paternity”⁶⁵ will increase the amount of child support collected, especially from non-marital fathers.⁶⁶ In promoting this federal aim, the UPA 2002 encourages states to adopt non-judicial procedures to establish paternity early in the child’s life.

Legal paternity may in fact be the most substantial issue that differentiates the UPA 1973 from the UPA 2002, in which a legal father-child relationship is established when a man voluntarily acknowledges his paternity.⁶⁷ A voluntary acknowledgment of paternity is to be treated as “equivalent to an adjudication of paternity,”⁶⁸ not merely a presumption of paternity as it was under the UPA 1973.⁶⁹ A man who fulfills the requirements of Article 3 becomes the legal “acknowledged father.”⁷⁰

IV. THE BIOLOGY FACTOR

In its effort to simplify paternity establishment through voluntary acknowledgments, Title IV-D ignored one salient question—whether paternity affidavits are intended only for biological fathers. Under both the federal statute and the UPA 2002, a man may voluntarily acknowledge his paternity as long as the mother consents. Neither Title IV-D nor the UPA 2002 requires a genetic test prior to the establishment of paternity, an indication that the “acknowledged father” may not always be the genetic father.

Whether Congress intended to create a means by which a child born out of wedlock, and to an unconcerned “genetic” father, can still have a father-child relationship with his “acknowledged” father is a principal question facing courts in cases to disestablish paternity after the sixty day rescission period.⁷¹ Courts

64. UNIF. PARENTAGE ACT § 304 (compare to 42 U.S.C. § 666(a)(5)(C)(i) (requiring a “simple civil process” for voluntary acknowledgment of paternity)); UNIF. PARENTAGE ACT § 305 (compare to 42 U.S.C. § 666(a)(5)(D)(ii) (requiring that an acknowledgment of paternity be a legal finding of paternity) and 42 U.S.C. § 666(a)(5)(M) (directing that acknowledgments be filed with the state registry of birth records)).

65. 42 U.S.C. § 666 (a)(5)(C)(i) (2000).

66. UNIF. PARENTAGE ACT art. 3 cmt. (amended 2002).

67. *Id.* § 302(a)(5).

68. *Id.* § 305(a).

69. UNIF. PARENTAGE ACT § 4(5) (1973).

70. UNIF. PARENTAGE ACT § 102(1) (amended 2002).

71. *See Faucheux v. Faucheux*, 772 So. 2d 237, 239 (La. Ct. App. 2000) (A man may proceed with an action to rescind his previous acknowledgment of paternity of his wife’s daughter, who was born before their marriage, where the man claimed that even though he knew he was not the child’s father, he signed the affidavit anyway because his wife threatened to take their son to another state.

are divided as to whether a voluntary paternity acknowledgment should be binding on non-biological fathers and biological fathers alike and whether genetic proof is enough to release a non-genetic father from all responsibility.⁷² Courts have also addressed situations in which non-biological fathers were aware of their status at the time they executed the acknowledgment.⁷³ These ongoing questions result in wholly inconsistent state court decisions, handed down on a case-by-case basis.⁷⁴ In response, the UPA 2002 seeks to elaborate on some of the gaps left by Title IV-D.

Title IV-D does not call for the acknowledging man to assert his *genetic parentage* of the child. However, in order to prevent circumvention of adoption laws, UPA 2002 makes this distinction explicit,⁷⁵ by requiring that he swear under oath that he is the genetic father.⁷⁶ In executing a paternity acknowledgment, “both the man and the mother acknowledge his paternity, under penalty of perjury, without requiring the parents to spell out the details of their

The court found that a paternity affidavit is a nullity if the affidavit is executed by someone other than the biological father.); State *ex rel.* W. Va Dep’t of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669, 677 (W. Va. 2000) (The court held that a challenge to the affidavit after the sixty-day period based on fraud, duress, or material mistake of fact is simply a threshold matter which does not *require* that the affidavit be set aside. Rather, once the threshold is met, the court must then determine whether setting the affidavit aside is in the child’s best interest.).

72. See *In re C.A.F.*, 114 S.W.3d 524 (Tenn. Ct. App. 2003). In *C.A.F.*, the trial court erred in holding that the state could not challenge the validity of a man’s acknowledgment (in a paternity affidavit) of his paternity of a child of whom he was not the father. The court observed that the affidavit statute contemplates challenges to paternity on the basis of fraud, duress or material mistake of fact. *Id.* at 529. Pointing out that the man has acknowledged that he is not the child’s father, the court found that fraud was involved in the execution of the paternity acknowledgment. *Id.* Even if the man believed he was the father, genetic tests show that such belief was a mistake of fact. *But see In re Paternity of J.A.C.*, 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000) (Robb, J., concurring) (Execution of a paternity affidavit establishes paternity, and thus it was “completely unnecessary” for the father to have to prove his paternity in a later paternity action.).

73. See *Seeger v. Seeger*, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002) (Where the acknowledging man knew he was not the biological father but nevertheless executed the legally binding affidavit, the court found that the execution of the paternity affidavit was “fraudulent” because both affiants knew the man was not the biological father.).

74. See *supra* notes 71-73; see also *In re Paternity of B.N.C.*, 822 N.E.2d 616, 619-20 (Ind. Ct. App. 2005) (Where acknowledging man was “certain” that he was child’s biological father at the time he executed the paternity affidavit, and the mother was “pretty sure” that he was the child’s biological father, although she “did have a doubt,” the court held that the putative father failed to establish that they engaged in a “deliberately planned and carefully executed scheme” to improperly influence the trial court to issue the paternity judgment.).

75. UNIF. PARENTAGE ACT § 301 (amended 2002).

76. *Id.* §§ 301-302.

sexual relations.”⁷⁷ The rationale of this section is to deter men from lying and to avoid the added formalities of witnesses and notaries which would be at odds with the goal of making this a simple, informal process.⁷⁸

V. DISESTABLISHMENT OF PATERNITY

Both Title IV-D and the UPA 2002 have the potential to eliminate the number of actions brought to disestablish paternity (to release the once legal father from all duties and responsibilities that came with such status). This would not only serve the best interests of the child but also the economy of the court. It is plausible that the government intended this result when it enacted the informal procedure whereby a voluntary acknowledgment of paternity creates a legal finding of paternity. In 1973 the drafters of the UPA had the foresight to expect that “the pre-trial procedure envisaged by the [UPA 1973] . . . will greatly reduce the current high cost and inefficiency of paternity litigation.”⁷⁹ Thus one of the goals of the original UPA was to create a means to establish paternity that would not be subject to future litigation.⁸⁰

Under the UPA 2002 a challenge to a valid acknowledgment of paternity must be brought within the sixty day rescission period. An action brought after the sixty day period can only be brought on the grounds of “fraud, duress, or mistake of fact.”⁸¹ Under Title IV-D, although there is no prescribed time limit within which the challenge must be brought, the terms are the same, and they specify that the action must be brought “in court.”⁸²

A. State Compliance with Title IV-D

Although states are required to enact Title IV-D legislation, there is no requirement for the adoption of the UPA 2002. Therefore, where IV-D language may be ambiguous or unclear, the states are left to individual interpretation.⁸³ Given that only four states have enacted the UPA 2002 in its entirety, there is little consistency among the states in the execution of Title IV-D mandates.⁸⁴

77. *Id.* § 301 cmt.

78. *Id.* § 302 cmt.

79. UNIF. PARENTAGE ACT prefatory cmt. (1973).

80. *Id.*

81. UNIF. PARENTAGE ACT § 308(a)(1) (amended 2002).

82. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

83. For example, under Maryland Family Statute section 5-1028, the required elements for a voluntary acknowledgment of parentage are stricter than those called for by Title IV-D. Maryland requires that parents swear under penalty of perjury that the information on the affidavit is truthful, including the mother’s consent to the assertion that the man is the only possible father, and the father’s acknowledgment that he is the natural father. MD. CODE ANN. FAM. LAW § 5-1028(v)-(vii) (2004). Although Maryland has not adopted the entire UPA 2002, it subscribes to the genetic requirements specified under UPA 2002 sections 301 and 302.

84. Uniform Law Commissioners, *A Few Facts About the Uniform Parentage Act*, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Feb.27, 2005).

Challenges to paternity acknowledgments have essentially been left to state discretion. Although most states provide some statutory guidance as to how these challenges should be handled, there are no set definitions for fraud, duress, or mistake of fact, nor are these rules as to how these standards should be applied to the facts.⁸⁵ Most states do not set a time limit on a parent's right to challenge a paternity acknowledgment based on these grounds.⁸⁶ However, some state legislatures impose time limitations from the date of the child's birth or execution or filing of the acknowledgment.⁸⁷ Other states focus on when the father discovered or should have discovered that he was not the biological father.⁸⁸ "Still others specifically reference Rule 60 of the Federal Rules of Civil Procedure (or the state equivalent), which depending on the section invoked, requires action within a specific time frame or a 'reasonable time.'"⁸⁹ Certain state legislatures have enacted laws that authorize a man to bring a challenge based on genetic testing which excludes him as the biological father.⁹⁰ Those states without statutory guidance have used judicial discretion to disestablish paternity.⁹¹

As the number of actions to disestablish paternity rise, there is fear among states that these individual practices may conflict with Title IV-D, rendering states ineligible for the federal funds provided by the statute. In response, the Office of Child Support Enforcement sent a memo to State IV-D Directors in 2003 addressing their concerns and providing federal guidance.⁹² The memo stated that Title IV-D does not require a state to provide services to disestablish paternity, but that "federal IV-D funding would be available at 90 percent for genetic testing and at 66 percent for reasonable and necessary expenditures incurred" by a IV-D agency in dealing with an action brought to challenge a voluntary acknowledgment of paternity based on fraud, duress or mistake of fact.⁹³

85. See Roberts, *supra* note 9, at 44 n.51.

86. *Id.* at 44. Title IV-D does not advocate a time limit within which a challenge must be brought on the grounds of fraud, duress or mistake of fact.

87. *Id.* (citing IOWA CODE ANN. § 600B.41A(3)(a) (West 2002) (requiring the action be filed before the child attains the age of majority); N.D. CENT. CODE § 14-19-10(2) (2003) (requiring the action be filed within one year of execution of acknowledgment); TEX. FAM. CODE ANN. § 160.308(a) (2002) (requiring the action be filed within four years of filing); WASH. REV. CODE ANN. § 26.26.335(b) (2002) (requiring the action be filed within two years of filing)).

88. Roberts, *supra* note 9, at 44 (citing MINN. STAT. ANN. § 257.75(4) (2002) (providing that a man has one year from the time of filing the acknowledgment or six months from the time he discovers that he is not the genetic father, to file)).

89. *Id.* at 45 (citing VT. STAT. ANN. tit. 15, § 307(f) (2002)).

90. *Id.* (citing MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(ii) (2003)).

91. See State *ex rel.* W. Va. Dep't of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669 (W. Va. 2000).

92. Memorandum from the Office of Child Support Enforcement to the State IVD Directors (Apr. 28, 2003), available at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/piq-03-01.htm>.

93. *Id.*

B. The Competing Social Policies that Underlie the Paternity Debate

The voluntary paternity affidavit presents complex questions concerning the notion of fatherhood—namely, whether biological fathers should be the only fathers, aside from adoptive fathers, to have rights and responsibilities in a child's life. At the heart of this issue is the tension between two competing social policies. Both sides argue that the child's best interest is the driving force behind the policy. On one side there is the argument that only biological fathers should be allowed to assume the role of the father. Proponents of this biological certainty policy represent the notion that people have a primal affinity for their natural offspring and that the biological father will naturally serve his child's best interests.

Opponents argue that paternity determinations should be left alone, not disturbing the child's established relationship with the only father he has ever known. Proponents of this position argue that stability, enforcement of agreements, executed paternity declarations, finality of judgments, and clarity and consistency in the law ultimately serve a child's best interests.

Although state legislatures generally focus on biological ties as the sole basis for establishing and maintaining a legal father-child relationship, the courts have been less willing to disestablish paternity in a non-biological father where the child's best interests will not be served by such a determination.⁹⁴ However, Indiana courts are an example of the exception, in that they tend to grant and protect the rights of parenthood only for the natural father.⁹⁵ "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."⁹⁶

On the other hand, "Strong paternity presumptions are grounded in the belief that important social policies may sometimes require a distinction between *legal* paternity and *biological* paternity."⁹⁷ There are instances under state law where the social relationship between a man and child would preclude a challenge based on biology.⁹⁸ Other states use legal theories such as equitable estoppel to achieve the same outcome by precluding genetic evidence that could effectively rebut the presumption of paternity as it is defined by state law.⁹⁹ In *Watts v. Watts*, for example, the Supreme Court of New Hampshire denied the admission of blood tests to show that a man was not the father of two children born during his

94. Glennon, *supra* note 59, at 550-51.

95. *In re Paternity of S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992) (finding that while "stability and finality are significant objectives to be served when deciding status of children of divorce . . . there is substantial public policy in correctly identifying parents and their offspring").

96. *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983).

97. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 cmt. d (May 16, 2000) (emphasis in original).

98. *Id.* For example, California has implemented a two-year time limit on genetic challenges to a husband's paternity based on the maintenance of the "social parent-child relationship" which trumps biology. *Id.*

99. *Id.*

twenty-one year marriage.¹⁰⁰ Although state law allowed for genetic tests to rebut the presumption of paternity, the court held that

those rules do not apply in a situation such as this one where defendant has acknowledged the children as his own without challenge for over fifteen years. To allow defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities.¹⁰¹

C. *The Implications of State Discretion*

Voluntary paternity acknowledgments can be challenged on the basis of fraud, duress or mistake of fact.¹⁰² As noted above, there is no clear explanation of what this means in the law and it is not clear whether Title IV-D extends the ability to execute paternity acknowledgments to non-biological fathers. Individual state interpretations and judicial decisions illuminate the inconsistencies created by this Title IV-D procedure and mandate reform.

1. *Indiana*.—The Indiana legislature clearly intended the voluntary acknowledgment process to apply exclusively to biological fathers. The Indiana statute prescribes a procedure whereby a mother and “a man who reasonably appears to be the child’s biological father,” can execute an affidavit shortly after the birth of a child born out of wedlock, which acknowledges the man’s paternity.¹⁰³ In addition to the grounds prescribed by Title IV-D as the basis for challenging a paternity affidavit, Indiana allows courts to set aside a voluntary acknowledgment of paternity based on genetic tests that exclude the signatory as the father.¹⁰⁴ It can be inferred from the Indiana statutes that a paternity affidavit by law not only establishes legal paternity but biological paternity as well. In 2001, the legislature amended the statute governing presumptions of biological paternity, to delete the portion that created such presumption in a man who executes a paternity affidavit.¹⁰⁵ Indiana’s policies and judicial decisions have

100. *Watts v. Watts*, 337 A.2d 350, 352 (N.H. 1975) (citations omitted).

101. *Id.* See *Commonwealth ex rel. Hall v. Hall*, 257 A.2d 269, 271 (Pa. Super. Ct. 1969); *Commonwealth v. Weston*, 193 A.2d 782, 783 (Pa. Super. Ct. 1963).

102. That is, once the sixty-day rescission period has expired. See *supra* notes 43-44 and accompanying text.

103. IND. CODE § 16-37-2-2.1(b)(1)(B) (2004). Required data elements under the Indiana statute include a sworn statement by the mother attesting that the man is the child’s biological father and a statement by the father that he believes to be the child’s biological father. *Id.* § 16-37-2-2.1(e)(1)-(2). Indiana has made it a Class A misdemeanor for a woman to “knowingly or intentionally falsely [name] a man as the child’s biological father.” *Id.* § 16-37-2-2.1. Once it finds that *a man is a child’s biological father*, the trial court must “conduct a hearing to determine the issues of support, custody, and visitation.” *Id.* § 31-14-10-1.

104. *Id.* § 16-37-2-2.1(k).

105. IND. CODE § 31-14-7-1(3) (1998) was amended by P.L. 138-2001. Subsection (3) now provides that there is a presumption that a man is a child’s biological father if he undergoes a

seemingly nullified the goals of Title IV-D, by imposing heightened criteria on the maintenance of the status of legal father.

In *Seger v. Seger*, the Indiana Court of Appeals disestablished paternity on the basis of biology alone.¹⁰⁶ In *Seger*, Rusty and Angela, an out-of-wedlock couple, executed a voluntary affidavit of paternity for Angela's minor son, C.S., despite both knowing that Rusty was not the biological father. The couple subsequently married for a short time and upon dissolution, Rusty sought to disestablish paternity based on biological exclusion.¹⁰⁷ The court found that the execution of the paternity affidavit was "fraudulent" because both affiants knew Rusty was not the biological father.¹⁰⁸ Angela challenged the judgment based on the fact that both she and Rusty signed the paternity affidavit with the intent to make Rusty "the minor child's legal father."¹⁰⁹ Angela asserted that "Rusty voluntarily and knowingly accepted all the rewards and responsibilities relating to C.S. and, therefore, the paternity affidavit [was] valid."¹¹⁰ Although recognizing that the execution of a paternity affidavit creates a legal presumption that the affiant is the biological father,¹¹¹ the appellate court affirmed because neither party reasonably believed that Rusty was the biological father.¹¹²

Similarly, in *Farrow v. Farrow*, the Indiana Supreme Court ignored the policy of supporting stability in legally established relationships between parents and children, stating instead that, "there is a substantial public policy, namely justice, which disfavors a support order against a husband who is not the child's father."¹¹³

Indiana's strict adherence to biological paternity seems in conflict with Title IV-D, which makes no distinction and seeks primarily to ensure child support.¹¹⁴ However, on closer look, it is apparent that judicial decisions are not only

"genetic test that indicates with at least ninety-nine percent (99%) probability that the man is the child's father." IND. CODE § 31-14-7-1(3) (2004).

106. *Seger v. Seger*, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; IND. CODE § 31-14-7-1(3) (1998). The statute was amended in 2001, deleting the subsection that said a man is presumed to be a child's biological father if "(3) the man executed a paternity affidavit in accordance with IC 16-37-2-2.1." *See supra* note 108.

112. *Seger*, 780 N.E.2d at 857. Citing Indiana's paternity affidavit statute, IND. CODE § 16-37-2-2.1, the court held that "a man who 'reasonably appears to be the child's biological father'" may execute a paternity affidavit following the birth of a child born out of wedlock. *Id.* The court interpreted Angela's challenge as amounting to Rusty's adoption of C.S., such that he should be bound by the rights and responsibilities of parenthood. However, Indiana does not allow equitable adoption. *Id.* at 858.

113. *Farrow v. Farrow*, 559 N.E.2d 597, 600 (Ind. 1990). Although *Farrow* never executed a paternity affidavit, this case is an example of an extraordinary circumstance that would warrant the court's determination of whether paternity should be maintained.

114. 42 U.S.C. § 666(a)(5)(C)(i) (2000).

inconsistent from state to state, but there may be deviations within one state. *Ohning v. Driskill* illustrates this with respect to Indiana.¹¹⁵

Ohning supports the establishment of paternity, despite the biological disposition of the father, and in the absence of extraordinary circumstances, advocates the maintenance of paternity.¹¹⁶ In *Ohning* the child was born while the mother lived with her boyfriend. His name was put on the birth certificate and a paternity affidavit was executed in which both swore under oath that the boyfriend was the child's father, despite the fact that he met the mother after she was already pregnant. The couple subsequently married, but separated four months later. In the marriage dissolution, the mother wanted to disestablish the paternity of the husband while he wanted visitation with the child. The dissolution decree granted the parties joint custody of the child of the marriage.¹¹⁷ Although the wife asserted that the husband was not the biological father of the child, she never rejected child support from him and continued to represent that the child was in fact a child of the marriage.¹¹⁸ The court held that:

In many cases, the parties to the dissolution will stipulate or otherwise explicitly agree that the child is a child of the marriage. In such cases, although the dissolution court does not identify the child's biological father, the determination is the legal equivalent of a paternity determination in the sense that the parties to the dissolution—the divorcing husband and wife—will be precluded from later challenging that determination, except in extraordinary circumstances.¹¹⁹

The court found that there were no extraordinary circumstances that would justify the bastardization of the child, thus estopping the wife from attacking the paternity of the child.¹²⁰

2. *Massachusetts*.—The Supreme Court of Massachusetts has refused to relieve a father of parental responsibility simply because he can prove that he is not a child's biological father.¹²¹ An action to disestablish paternity must be brought within a reasonable time period, and even then such action can only be brought on the basis of fraud, duress or material misrepresentation.¹²² The court

115. *Ohning v. Driskill*, 739 N.E.2d 161 (Ind. Ct. App. 2000).

116. *Id.* at 163.

117. *Id.*

118. *Id.* at 164.

119. *Id.* (citing *Russell v. Russell*, 682 N.E.2d 513, 518 (Ind. 1997)).

120. *Id.* See *Fairrow v. Fairrow*, 559 N.E.2d 597 (Ind. 1990) (finding an extraordinary circumstance to warrant the disestablishment of paternity where the husband learned through externally obtained medical proof eleven years after the child was born, that he could not be the child's biological father). *Fairrow* creates a slippery slope that would allow any man who "happens upon" evidence that excludes him as the child's biological father to have his paternity set aside.

121. *In re Paternity of Cheryl*, 746 N.E.2d 488, 490 (Mass. 2001).

122. *Id.* at 494-97. The UPA 2000 supports this policy—that there is a compelling public interest in finality of paternity judgments, and that a signatory may only bring an action to challenge the voluntary paternity acknowledgment within two years of its execution, and only on the basis of

held that a five and one-half year time period between the father's voluntary acknowledgment of paternity and his action to disestablish paternity was not a "reasonable time" within the meaning of Rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure.¹²³ The father not only had ample opportunity to seek genetic testing prior to executing the voluntary paternity acknowledgment, but also failed to challenge the judgment at the earliest reasonable opportunity. The court noted that the father knew from numerous sources over the years that he was not the child's biological father, and did nothing in response.¹²⁴ In refusing to vacate the paternity judgment, the court also took into account the "substantial relationship" that had developed between Cheryl and the father.¹²⁵ In defending its decision, the court stated that "[t]here is a compelling public interest in the finality of paternity judgments."¹²⁶ "Social science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships," regardless of whether the parental relationship is with a non-biological or non-custodial parent.¹²⁷ The court looked to the best interests of the child, holding that Cheryl's interests outweighed any interest of the father.¹²⁸

Unlike the Indiana Court of Appeals in *Seeger*, the Massachusetts Supreme Court held that even if the mother knew at the time the father signed the paternity acknowledgment that he was not the biological father, her failure to disclose that information to the court would not amount to fraud on the court.¹²⁹ The court defined fraud on the court as a conscious, calculated decision to "interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."¹³⁰ The law places on men the burden to consider carefully the permanent consequences that flow from an acknowledgment of paternity.

3. *Louisiana*.—In *Faucheux v. Faucheux*, the Louisiana Court of Appeals addressed the question of whether a non-biological parent has a right of action to annul an acknowledgment of paternity that he signed with the full knowledge that he was not the biological father.¹³¹ The mother's husband filed a petition to

fraud, duress, or material misrepresentation. *Id.* at 495 n.14; UNIF. PARENTAGE ACT § 308(a) (2000).

123. *In re Paternity of Cheryl*, 746 N.E.2d at 496.

124. *Id.*

125. *Id.* at 492.

126. *Id.* at 495.

127. *Id.* at 495 n.15.

128. *Id.* at 497.

129. *Id.* at 498.

130. *Id.* (citing *Rockdale Mgt. Co. v. Shawmut Bank, N.A.*, 638 N.E.2d 29 (Mass. 1994) (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989)).

131. *Faucheux v. Faucheux*, 772 So. 2d 237, 238 (La. Ct. App. 2000).

disavow paternity or alternatively to void the acknowledgment of paternity, alleging that it was impossible for him to be the child's biological father because he did not meet the mother until after child was born.¹³² The court held that in the absence of a biological relationship between the child and the mother's husband, any acknowledgment of paternity is null.¹³³

In nullifying the acknowledgment of paternity, the court essentially voided the legal significance of the voluntary paternity acknowledgment and contravened the mandate in Title IV-D. This decision would seemingly carve an exception for every non-biological father who executed a paternity acknowledgment. Unless a biological relationship existed between the child and the man, there would be no basis to uphold the rights and responsibilities undertaken through the acknowledgment.

4. *Tennessee: Pre-Trial Evidentiary Hearing.*—Under Tennessee law, a party may challenge a voluntary acknowledgment of paternity only if based on “fraud, whether extrinsic or intrinsic, duress, or mistake of fact.”¹³⁴ The party bringing the challenge must, within five years from the execution of the document, give notice to the other parties, including the Title IV-D agency. Under Tennessee law, a court must hold an evidentiary hearing to determine whether there is “a substantial likelihood that fraud, duress, or mistake of fact existed in the execution of the acknowledgment of paternity,”¹³⁵ and if so, the court shall order the genetic testing. Such action is not barred by the five-year statute of limitations “where fraud in the procurement of the acknowledgment by the mother of the child is alleged and where the requested relief will not affect the interest of the child, the state, or any Title IV-D agency.”¹³⁶

In *Granderson v. Hicks*, the putative father appealed from a denial of his motion to request genetic testing to determine paternity of the minor child.¹³⁷ He alleged that he signed a voluntary consent order in conjunction with the mother of the child, based on her fraudulent representation to him that he was the biological father. He later learned from the mother that he was not the biological father and he responded by filing a motion to set aside paternity and child support, or in the alternative, for DNA testing to determine genetic paternity. His motion was denied without an evidentiary hearing on the allegations of fraud.¹³⁸

The Court of Appeals of Tennessee touched on the policy considerations underlying the paternity statutes but held that “[t]he interest in determining true

132. *Id.*

133. *Id.* at 239 (explaining that “if a biological relationship does not exist . . . the acknowledgment was made in contravention of the law, is null and can produce no effects” and finding a right of action for the alleged father to seek to and his acknowledgment of paternity).

134. TENN. CODE ANN. § 24-7-113(e)(1) (West 2004).

135. *Id.* § 24-7-113(e)(2).

136. *Id.*

137. *Granderson v. Hicks*, No. 02A01-9801-JV-00007, 1998 WL 886559 (Tenn. Ct. App. 1998).

138. *Id.* at *1.

parentage must, of course, be weighed against the need for stability for the child, particularly in situations in which the child has long believed that the party requesting the blood test was his father.”¹³⁹ The Court of Appeals of Tennessee reversed the lower court ruling, and held that, pursuant to state law, which reflects the requirements under Title IV-D, parentage testing is mandatory in a contested paternity case, upon the sworn request of a party.¹⁴⁰

VI. THE BEST INTERESTS OF THE CHILD

Within this mix of policy, state discretion, and law, is one overwhelmingly crucial, yet largely ignored consideration—the child’s best interest. As seen above, the competing social policies that underlie the paternity debate both defend their position as promoting the best interests of the child. Yet, this factor contributes to judicial decision-making in paternity cases, even where the end result is to render a child fatherless.

Some courts appoint legal guardians to protect the best interests of a child in a paternity action where the parents’ own individual goals may prevent them from identifying the best path for the child.¹⁴¹ The UPA 1973 mentions “the best interest of the child” as a factor to consider in a pre-trial hearing to a paternity action.¹⁴² The UPA 2002 is, however, silent as to the child’s best interest in terms of the voluntary paternity acknowledgment. Similarly, Title IV-D never mentions “the child’s best interest” as a factor to consider in determining whether paternity should be disestablished.

In most paternity disestablishment cases, the courts do perform a best interest analysis at some point in the discussion; however, as a multitude of law review articles have repeatedly pointed out, there is no rhyme or reason to such considerations.¹⁴³ The best interests of the child should be a factor in a case to disestablish a voluntary paternity acknowledgment, or in other words, a legal finding of paternity.

Returning to the question posed in the beginning of this discussion, what did the federal government intend, and did their lack of clarity as to *who* could execute a voluntary paternity acknowledgment mean that an “acknowledged” father should be accorded the same status as a genetic father? The purpose of

139. *Id.* at *3. The Court in *Granderson* relied on *Bass v. Norman*, which held that “[T]he purpose of the paternity statute is to require a biological father to support his child.” *Id.* at *3 (quoting *Bass v. Norman*, 535 N.E.2d 587 (Tenn. Ct. App. 1989), which held that “a mother could bring a petition to establish paternity and support against the alleged father even though she was married to another at the time the child was born”) (citing *Frazier v. McFerrin*, 402 S.W.2d 467 (Tenn. Ct. App. 1964)). The common law presumptions of paternity are rebuttable and the goal of the courts in paternity actions should be to identify the biological father. *Id.*

140. *Id.* at *4 (citing TENN. CODE ANN. § 24-7-112(a)(1)(A)-(a)(2)).

141. Glennon, *supra* note 59, at 569 n.167.

142. UNIF. PARENTAGE ACT § 13(a) (1973).

143. *See e.g.*, Roberts, *supra* note 9, at 53. “The concept of ‘the best interests of the child’ has also been used to argue both for and against paternity disestablishment.” *Id.*

this "simple civil process," whereby paternity can be established, child support can be enforced, and children can have legal fathers, should ultimately be to protect the best interests of the child. Thus, perhaps the reason there is no mention of the child's best interests is because the pretense of this procedure is designed to serve this very goal. By cutting down the number of paternity disputes brought in court and by making certain that a man who consents to a voluntary acknowledgment is aware of the legal consequences and responsibilities, the federal government is looking out for the child's best interest from the point the affidavit is signed.

VII. PROPOSED REFORMATIONS TO THE VOLUNTARY PATERNITY ACKNOWLEDGMENT PROCESS AND PATERNITY DISESTABLISHMENT PROCESS

The U.S. government favors the policy of establishing paternity and of securing child support for children born out of wedlock.¹⁴⁴ Title IV-D established the paternity acknowledgment program which ostensibly reduces the number of illegitimate children and the supposed ill effects suffered by the child and society as a result of illegitimacy. This congressional innovation allows men to become *legal fathers* without having to declare that they are in fact the genetic father. The UPA 2002, however, assigns paternity to biological fathers and requires the affiant to swear under penalty of perjury that he is the genetic father.¹⁴⁵ This obvious conflict has led to inconsistencies in state court decision-making, and has allowed individual states to disregard the federal mandate. Unfortunately, the most significant result of the UPA 2002's biological-minded notion of parenthood is to nullify the effect of a legal paternity acknowledgment. As seen in *Faucheux*, the Louisiana court held that any paternity affidavit made by a non-biological father was void.¹⁴⁶ Title IV-D's informal civil process (whereby a child is guaranteed child support and the legal status of legitimacy) is eradicated by these court decisions, voiding the intent of the federal mandate.

In weighing possible solutions to the issue of the voluntary paternity acknowledgment, and what it *should* mean in the eyes of the law, it is important to consider both the government's interest in establishing and in not establishing paternity. First, as previously discussed, the establishment of paternity for a child born out of wedlock not only secures support for the child, but fosters a relationship between the father and child. Paternity creates rights of inheritance and the right to sue for wrongful death. By settling birth records, the bureaucrats are pleased and the child is allowed to receive government benefits such as social security death benefits. Moreover, the government seeks to reduce the social

144. See Parness, *supra* note 7, at 59-60.

145. UNIF. PARENTAGE ACT §§ 301, 302 (2002).

146. *Faucheux v. Faucheux*, 772 So. 2d 237, 239 (La. Ct. App. 2000).

stigma attached to illegitimacy and to eliminate the associated social problems such as poverty, crime and despair.¹⁴⁷

However, it can be argued that the government has an equal interest in not establishing paternity. The cost associated with paternity establishment is too high, especially taking into account the number of actions to disestablish paternity that result from cases where the man established paternity pursuant to Title IV-D procedures. Additionally, critics would argue that the paternity establishment procedure does not have the desired effect, and that this informal process should be eliminated.¹⁴⁸ Single mothers may argue that having a child out of wedlock is neither a problem nor a social stigma, but instead a sign of self-determination and autonomy in the increasingly modern world.

There is no easy answer to this debate. This issue is tempered by the fact that the federal government, which has an interest in establishing paternity, has created a procedure in the absence of more specific rules or standards. States, adhering to the measures created by Title IV-D, are still free to decide the subsequent paternity actions in an autonomous fashion. It is crucial to remember that the usual post-paternity acknowledgment case is not about who gets to be the legal father, but who gets out of being the legal father. What are the possible solutions and who should ultimately decide the fate of the father who seeks to sever all rights and responsibilities?

A. *Eliminate Voluntary Paternity Acknowledgments*

One option is to eliminate the voluntary paternity acknowledgment process which allows a man to become the legal father by providing little more than his name and social security number. This argument focuses on the rationale that the associated cost of paternity affidavits is too high and the benefits do not outweigh the burdens. Proponents would argue that voluntary paternity acknowledgments are ineffective because bad parents are inherently bad parents. Merely signing what the government has labeled a legal finding of paternity does not mean that a man will automatically begin to act like a legal father.

However, even if the procedure is nullified, the problem remains. This would mean paternity could only be established by judicial means, and with this shift would come an even greater cost. In creating a non-judicial means to establish paternity the government recognized that the acknowledgments could settle legal relationships, determine inheritance rights, clarify birth records and make more certain the appropriate target for the payment of child support. In the absence of this simple civil process, these results would be diminished as fewer men would go to the trouble of appearing before a court to establish paternity. In addition, the court system itself would be prevented from focusing on the critical issues that require judicial determination.

147. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

148. Those in favor of the social policy of establishing paternity *only* in biological fathers would find the current practice to be a failure in that non-biological fathers seemingly have the same access to paternity acknowledgments.

B. Finality of Judgment

The most stringent argument is to rigidly enforce voluntary paternity acknowledgments, even in cases of fraud, duress, or material misrepresentation. This would eliminate any conflicting state judicial interpretations and the need for post-acknowledgment actions to disestablish paternity. One could argue that prior to executing a voluntary paternity acknowledgment the man is apprised of the legal consequences such that he essentially disclaims any right to challenge the affidavit in the future. Proponents of this proposition would argue that stability, enforcement of agreements, executed paternity declarations, finality of judgments and clarity and consistency in the law ultimately serve a child's best interests.

In practice, however, this proposal could lead to harsh and unjust outcomes. As discussed above, the notice requirement associated with the Title IV-D voluntary paternity acknowledgment is minimal and would not be sufficient to uphold a paternity determination where the man was truly "duped" into believing he was the biological father. Additionally, a child's best interest should be considered in a case for paternity disestablishment, and although hard to define, there are situations in which the child's best interest is not best served by strictly enforcing a paternity acknowledgment.

C. Strict Notice Requirements

There must be greater detail in the notice requirement associated with paternity acknowledgments. A man must be sufficiently apprised of the rights and responsibilities associated with this legal finding of paternity.

This solution may alleviate some of the harshness with the above proposition but it is not a viable solution. First, it would be virtually impossible to agree on what elements of notice must exist in order for there to be no legal recourse for the acknowledging man. Second, by instituting these more rigid notice requirements, the process would lose its informal nature. Finally, the heightened formality of the process would be a deterrent to an otherwise willing man.

D. Hearing Officers

Under Florida law, there are provisions to provide for child support hearing officers, to be used in Title IV-D cases, who have the authority to enter child support orders pursuant to a voluntary acknowledgment of paternity.¹⁴⁹ Expanding the role of a hearing officer to not only handle the issue of child support arising from a voluntary acknowledgment of paternity, but also to handle any paternity disputes arising out of such acknowledgment could greatly reduce the amount of paternity actions that go to trial.

149. FLA. FAMILY L.R.P. ANN. 12.491(e) (West 2004). "A support enforcement hearing officer does not have the authority to hear contested paternity cases," but shall "accept voluntary acknowledgment of paternity and support liability and stipulated agreements setting the amount of support to be paid." *Id.* 12.491(e) & 12.491(c)(3).

Upon agreement as to the amount of child support, the hearing officer submits the recommendation to the court for its final order or a request for further proceedings.¹⁵⁰ Additionally, “[f]indings of fact are included in the recommended order to provide the judge to whom the order is referred basic information relating to the subject matter.”¹⁵¹ Here is a situation where the hearing officer has already met with the parties, has made findings of fact, and has made recommendations to a judge with respect to child support. The hearing officer is in the ideal position to handle any subsequent paternity dispute through the same channels.

Assume a couple executed an acknowledgment of paternity in 2002, and in 2004, long after the sixty day rescission period is over, the mother seeks to disestablish paternity in the now legal father. She is limited by Title IV-D to claims arising out of duress, fraud, or material misrepresentation. A hearing officer could hear the mother’s claims, the father’s response and even sit with the child to weigh the child’s best interests, before making additional findings of fact and an ultimate recommendation to the presiding judge. The hearing officer could handle all preliminary matters in determining whether there were adequate grounds for the case to go before the judge.

This proposal adds another administrative layer between the social worker or nurse who proffers the affidavits and the judge, who still makes the final determination. However, this proposal would amount to additional expense and critics would contend that it merely sidesteps the pressing question of whether to maintain the legal rights and responsibilities of parenthood in a man who may not be the child’s father.

E. Mandatory Genetic Testing

The requirement that every man undergo genetic testing prior to executing a paternity affidavit is one idea proposed by those in favor of the social policy favoring biology. However, mandatory genetic testing is not required under either Title IV-D or the UPA 2002 as a condition to voluntarily acknowledging paternity. Testing every man before he is allowed to execute an acknowledgment would remove the threat of future actions to disestablish paternity based on biology. This solution would surely decrease the number of paternity disputes brought on the basis of duress, fraud, or material misrepresentation. The answer seems like an easy one, yet Congress purposely ignored this simple addition to its Title IV-D paternity acknowledgment procedure.

The Office of Child Support Enforcement has declared publicly that this practice is prohibited by Title IV-D, in which the procedures concerning voluntary acknowledgments of paternity are specified and do not include

150. *Id.* 12.491e(4) & 12.491(f).

151. *Id.* 12.491 Commentary, 1988 Adoption.

mandatory genetic testing.¹⁵² The law was enacted so that paternity could be established by a simple civil process in which judicial or administrative procedures are neither permitted nor required to approve a voluntary acknowledgment.¹⁵³ The idea is to ensure that an acknowledgment, standing alone, is sufficient grounds for seeking a support order.¹⁵⁴

The government created an informal procedure to establish paternity, and by adding a mandatory genetic test to this procedure, it would become inherently formal. One of the benefits of creating a non-judicial means to establish paternity was to save time and money required to establish paternity. By requiring a genetic test for each and every man who seeks to acknowledge his paternity, this savings would be void.

Moreover, in following the evolution of paternity laws it becomes apparent that establishing paternity is a fundamental governmental interest and one that warrants a procedure that encourages the establishment of paternity, not one that discourages it. The goal of these government procedures should be to look out for the children and to ensure that their needs are being met. The requirement of

152. Office of Child Support Enforcement, Department of Health & Human Services, Policy Interpretations, PIQ-03-01 (Apr. 28, 2003), available at <http://www.acf.dhhs.gov/programs/cse/pol/PIQ/piq-03-01.htm>.

3. Question: Is federal IV-D funding available for genetic testing offered and provided as part of the voluntary acknowledgment process? If a state requires genetic testing in every out-of-wedlock case, would federal IV-D funding be available for those costs?

Response: Federal IV-D funding is only available for genetic testing in IV-D cases. In addition, under section 45 CFR 304.20(b)(2)(vi), Federal Financial Participation at 66 percent is available for payments up to \$20 to hospitals, state birth record agencies, and other entities designated by the state and participating in the state's voluntary paternity establishment program, under 45 CFR 303.5(g), for each voluntary acknowledgment obtained pursuant to an agreement with the IV-D agency. Federal IV-D funding is not otherwise available in non-IV-D cases as part of the voluntary acknowledgment process or in every out-of-wedlock case.

4. Question: May a court require genetic testing before accepting a voluntary acknowledgment in a IV-D case?

Response: No. Section 466(a)(5)(D)(ii) and (E) of the Act requires states to enact laws requiring the use of procedures under which: (1) a signed voluntary acknowledgment of paternity is considered a legal finding of paternity; and (2) judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity. In addition, 45 CFR 302.70(a)(5)(vii) requires procedures under which a voluntary acknowledgment must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.

Id.

153. 42 U.S.C. § 666(a)(5)(E) (2000).

154. 45 C.F.R. § 302.70(a)(5)(vii) (2005).

genetic testing will not only deter men from executing the acknowledgment, but would leave many children illegitimate in the eyes of the law. The man who knows he is not the biological father, but wants to become the legal father despite this fact, is no longer permitted to establish his paternity. Some would argue adoption would be the answer, but if the couple is not married, there is no such alternative. In this hypothetical, the mother is not willing to give up her rights to the child; instead she wants a *legal father* who will support the child both financially, and, in some cases, emotionally. Thus, the genetic test requirement would prevent many children from ever having a legal father to provide for them. This result seems at odds with the goals of Title IV-D as well as the history of illegitimacy in this country.

This proposition creates more problems than it solves. There are instances where it would be best to never disclose that the “father” is not biologically related to the child. The best interests of the child must be considered in each and every potential solution and in this case the “best interests of the child” dictates that there not be mandatory genetic testing.

CONCLUSION

At the heart of the paternity acknowledgment debate is whether a non-biological, but legally “acknowledged father,” should be held to have the legal rights and responsibilities of parenthood in the absence of fraud, duress, or material misrepresentation. The answer to this pressing question should be yes. Although there is no one solution that will eliminate the problems associated with paternity establishment, mandating that paternity acknowledgments sustain the weight assigned to them by Congress has the promise of eliminating the injustices currently being handed down from state to state. The government’s interest in establishing paternity is well-settled and goes beyond the notion of finding one’s biological father.

A man who signs a voluntary acknowledgment of paternity may be “unknowingly, but legally, binding himself to supporting and parenting a child of whom he is not the biological father.”¹⁵⁵ In some cases, this non-biological father may have been purposely misled by the mother to believe that he fathered the child. “The probability of this scenario is particularly disturbing considering that recent statistics . . . show that nearly thirty percent of . . . alleged . . . fathers . . . who undergo genetic testing are determined not to be the biological fathers of the children involved.”¹⁵⁶ In this instance, Title IV-D provides a remedy allowing the man to contest his paternity on the grounds of fraud.¹⁵⁷ To find otherwise would not only be unconscionable, but would be the ultimate

155. Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 ST. MARY’S L.J. 421, 425 (2004).

156. *Id.* (citing AMERICAN ASSOCIATION OF BLOOD BANKS, ANNUAL REPORT SUMMARY 4 (2000) (“reporting that 300,626 parentage cases were evaluated by laboratories in 2000, and the overall exclusion rate was 27.9%”)).

157. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

deterrence to a potential father signing voluntary acknowledgment of paternity.

If you change the above scenario slightly so that a man who knows he is not the biological father signs the acknowledgment, then he knowingly and legally binds himself to supporting and parenting a child of whom he is not the biological father. There was no fraud, no duress, and no material misrepresentation. This man has no remedy under Title IV-D, and he is bound by his signature. In this case, the only factor that should weigh in favor of disestablishing his paternity would be if the best interests of the child dictated that he should be removed from his legal responsibilities.

Although the above solution seems simple, who should decide whether there was fraud, duress, or material misrepresentation? In order to reduce the number of adjudicated paternity actions, it would be inconsistent to require every such case to go before a judge. However, Title IV-D states specifically that a contested finding of paternity "may be challenged in court only."¹⁵⁸ In adhering to this mandate, the best solution would be to employ a layer similar in nature to the proposed hearing officer position. The specifics of the position would have to be left to state discretion as personnel and court structure differ by jurisdiction.

In theory this process would be controlled by a "screener." The screener's sole responsibility would be to make factual findings as to whether the complainant had grounds to contest the legal finding of paternity. The findings would be presented to the trial court judge in a recommendation regarding whether there was sufficient evidence to support a paternity action. Similar to the Tennessee law that requires a pre-trial evidentiary hearing to make such a determination,¹⁵⁹ this process would be required before an action to disestablish a voluntary paternity acknowledgment could be officially brought. Included in this factual finding would be an analysis of the best interests of the child. Although a subjective standard, at least this factor would be weighed in the decision-making process.

The most important aspect of this change would be to recognize that certain fundamental principles must guide this new process: 1) after the sixty day rescission period has expired, a man may only bring an action to disestablish his paternity on the basis of fraud, duress, or material misrepresentation; 2) a finding that the acknowledging man is not the biological father is not enough to disestablish paternity; and 3) there are instances in which a child's best interests would be preeminently served by maintaining the paternity of a non-biological father.

The value of this tool could be revolutionary if the federal government was willing to make some adjustments to the current policy. This could mean less paternity challenges and, in turn, less courtroom traffic and expense. Ultimately though, this tool will have the ability to protect the best interests of a child, by implementing a procedure whereby a man knows that once he signs the affidavit, he is bound to his duty. Consistency in the disestablishment procedures will lead to increased finality of judgments and stability in father-child relationships.

158. *Id.*

159. *See* discussion *supra* Part V.C.4.