A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests and Betrayal

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A NEW PATERNITY LAW FOR THE TWENTY-FIRST CENTURY: OF BIOLOGY, SOCIAL FUNCTION, CHILDREN’S INTERESTS, AND BETRAYAL

LESLIE JOAN HARRIS*

In the 1970s, about 90 percent of all children were born to married women, and their paternity was resolved by the legal presumption that a married woman’s husband is the father of her children.1 In some states, including Oregon, legal rules prohibited the admission of evidence to rebut the presumption2 or precluded parents from testifying so as to “bastardize” their child.3 Even in states where the presumption could be rebutted, blood tests then available were so primitive that they were unlikely to exclude a man as the biological father even if he were not.4 As a result of these conditions, the legal father of most children was also the social father, the man who functioned as their father—their mother’s husband. This man was usually also their biological father, but even when he was not, few people were likely to know for sure. Children born to unmarried mothers usually did not have a social father, but they also did not have legal fathers because paternity was often not legally established. In these circumstances, the law simply did not need to choose between children’s biological and social fathers for purposes of determining their legal fathers. For all

* Dorothy Kliks Fones Professor, University of Oregon School of Law. This article draws on and reflects on the many hours of work of the members of the Oregon Law Commission’s Uniform Parentage Act Work Group, with whom I greatly enjoyed working and from whom I learned much. The group’s chair, Sandy Hansberger, and its staff attorney, Sam Sears, contributed a great deal to the group’s report, from which portions of this article are drawn. I also thank Ty Manieri, University of Oregon Law School class of 2008, for excellent research assistance.


2. See infra text accompanying notes 32-33.


practical purposes, social fathers were legal fathers.

Laws and social practices affected by the law of paternity have changed significantly since the 1970s. Among the most important changes are the availability of genetic testing that can identify a child’s parents with certainty and the development of a sophisticated and complex federal-state program for establishing paternity and collecting child support. Perhaps of greatest significance in the long-run are major changes in family forms and mores. Compared to 30 years ago, many more parents with children divorce, many more children are born to unmarried women, and many more children spend portions of their lives living in households with a parent and the parent’s partner, who is not the child’s biological parent but who may function as a parent and to whom the biological parent may or may not be married.

These changes have brought sharp challenges to the paternity laws, which were last extensively revised in many states, including Oregon, during the 1970s after the Supreme Court first held that unmarried fathers may have constitutionally protected interests in custody of their children and that the law may not routinely and automatically discriminate between children born inside and outside marriage. The most important issue underlying the current challenges is the relative importance of social and biological paternity in determining legal paternity when a child’s legal father and biological father are not the same. This issue arises both for legal fathers who are not and have never been married to the children’s mothers and for husbands who are presumed to be the legal fathers of their wives’ children.

During the late 1990s and the early part of the twenty-first century, courts in many states began facing cases that challenged traditional laws regarding parental status, and two major law reform

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7. This issue, including the major arguments pertaining to it, is discussed in Leslie Joan Harris, Reconsidering the Criteria for Legal Fatherhood, 1996 UTAH L. REV. 461 (1996).
groups—the American Law Institute and the National Conference of Commissioners on Uniform State Laws—developed proposals for new legal regimes that address these changes. Seven states have revised their parentage statutes based on the National Conference’s proposal, the 2002 Uniform Parentage Act (UPA). In 2006 the Oregon Law Commission, at the request of the Oregon Child Support Program, convened a work group to examine the law of parentage, identifying as a possible model for reform the 2002 UPA. Because paternity law potentially affects so many areas of the law, the work group was very large and included state trial court judges, juvenile court attorneys, family law attorneys, adoption attorneys, representatives from the state child support enforcement office and from the state child welfare office, and a self-identified fathers’ rights lobbyist.

The major issue with which the Oregon UPA Work Group struggled was the same as that which has dominated the national discussion—whether biological paternity should always trump other criteria for determining legal parentage, especially marriage to the mother and functioning as the child’s father, and, if not, under what circumstances it should give way to one or the other of these alternative criteria. A second major point of disagreement, more surprising than the first, was whether the rules for resolution of disputes about paternity legitimately considered the interests of the children affected, or whether the disputes were to be understood as disputes only between the affected adults.


10. The list of states that have adopted the act is provided by the National Conference of Commissioners on Uniform State Laws at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp.

11. The Commission agreed to the Child Support Program’s proposal and appointed a work group charged with examining all provisions of the UPA except Articles 7 and 8 (related to assisted reproduction and gestational agreements) in relation to current Oregon law and determining whether the UPA should be adopted in whole or in part. The group was not limited to making recommendations about the UPA, but was instructed to propose law reforms in this area. Oregon Law Commission Uniform Parentage Act Work Group, Establishing, Disestablishing and Challenging Legal Paternity 2 (2007), available at http://www.willamette.edu/wucl/pdf/hb2382report.pdf [hereinafter OLC Work Group].

12. For a list of the members, see id. at 2-3.

13. A third issue, much less important than the other two, was the extent to which the statutes should spell out procedures in great detail. Those who argued in favor of specifics argued that this would help the many people who negotiate the paternity system without the as-
This article describes the new Oregon law and then comments on the issues that judges applying it may face. It argues that, given the wide variety of circumstances in which paternity is at issue, judges must have discretion to decide whether legal paternity should be based on biological paternity. It further argues that disputes over paternity should not be understood first and foremost as contests between the adults claiming (or disclaiming) parenthood that turn on issues of their relationships. Instead, judges should focus on the wellbeing and interests of children as they exercise this discretion.

The first section of the article elaborates on the reasons for pressure to change the law of paternity; the second part describes Oregon law before the 2007 changes in light of these pressures. The third part sets the stage for the revisions by describing the requirements imposed by the state-federal child support program, as well as explaining in detail the Uniform Parentage Act, which served as the starting point for the Oregon revisions. The fourth part discusses the UPA Work Group’s decisionmaking process, the draft that it proposed, and the final version of the law as enacted by the 2007 legislature. The conclusion argues that judicial discretion is essential in today’s world to an acceptable law of paternity because of the wide variety of circumstances in which courts must decide who the legal father of a child is.

I. CHALLENGES TO THE TRADITIONAL LAW OF PATERNITY

Today, marriage is still the most common way that a child’s legal father is determined, since about two-thirds of children are born to married women, whose husbands are presumed to be the fathers. However, as the number of divorces has increased, the occasions for one former spouse or the other to challenge the husband’s paternity have become more common.

In addition, changes in the number of children born to unmarried women and efforts to collect child support from their fathers make it much more likely that questions about the paternity of these children will arise. Today about one-third of all children are born to unmarried women, about one-quarter to one-half of whom live with the child’s

sistance of an attorney, while the objectors disagreed that the detail would not necessarily help and feared that it would hamstring the courts.

14. On the presumptions of paternity based on marriage, see infra text accompanying notes 32-49.
father at birth. About 40 percent of births to Latinas occur outside marriage, and among African Americans the figure is 70 percent. Moreover, it is far more likely that paternity of a nonmarital child will be established today than it was 30 years ago and that the man identified as the biological father will be ordered to pay child support. Between 1992 and 2000, paternity establishment increased from 500,000 to 1.5 million children per year. In fiscal year 2005 paternity was established or acknowledged for more than 1.6 million children, a 1.5 percent increase from fiscal year 2004. One result is that many men today are identified as legal fathers and are required to support children with whom they may never have lived or developed a parent-child relationship.

Further, the ways that paternity establishment processes are implemented create risks that the men identified as fathers may not actually be biological fathers. As a condition of receiving federal funds for their child support enforcement and Temporary Assistance to Needy Families (TANF) programs, all states must aggressively seek to establish the paternity of children born to unmarried mothers for purposes of imposing child support obligations on these men. Federal law requires states to achieve high rates of paternity establishment. If states do not meet these goals, they will lose TANF funds, and states with paternity establishment rates above 50 percent receive


17. PAUL LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 6 (2003), available at http://www.aecf.org/upload/PublicationFiles/starthing%20off.pdf. See also Virginia Ellis, Fathers’ Legal Ties that Bind, L.A. TIMES, Mar. 8, 1998, at A1 (highlighting the increase in paternity filings since the January 1997 enactment of a state law and finding there was a 600 percent increase in the number of fathers signing paternity declarations in 1997).


20. See id. States must seek to attain a 90 percent paternity establishment rate. States with rates below that level must show steady improvement. See id. § 652(g)(1).
incentive payments that increase as the rate increases. To the end of achieving these goals, federal law also requires states to enact specific laws regarding the operation of their systems for establishing paternity.

The federal-state child support enforcement program encourages unmarried mothers and men believed to be fathers to establish legal paternity voluntarily; all states allow mothers and alleged fathers to do this by signing a voluntary acknowledgment identifying the man as the legal father and filing it with the state. This has become the most common way that legal paternity of children born to unmarried mothers is established. Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility, and they can be and often are signed without genetic testing having been done. The other way that paternity of children born to unmarried mothers is commonly established is through an administrative or judicial process that establishes legal judgments of paternity. Blood testing is available, but orders are frequently entered when testing has not been done. This generally happens because the man alleged to be the father does not contest the action, believing that he is the father, or because he does not respond and a default order is entered.

Today when someone becomes suspicious that a child’s legal father may not be the biological father, whether that man is the mother’s husband or a man to whom she was never married, genetic testing can readily resolve the question. By the 1990s, the science of genetic testing had advanced to the point that in most cases a test can not only exclude a man falsely identified as the biological father but

21. Id. § 658a(b)(6).
22. Id. § 652.
23. The federal requirements are set out in 42 U.S.C. § 666(a)(5) and are discussed at greater length below. See infra text accompanying notes 79-98.
24. According to data from the Oregon Vital Records Office and Child Support Program, in fiscal years 2004, 2005, and through March of 2006, paternity was established for 31,866 children in the state; of these, 27,536, or more than 86 percent of the total, were by voluntary acknowledgment. Representatives from the Oregon Vital Records Office and Child Support Program provided these figures to the UPA Work Group. OLC WORK GROUP, supra note 11, at 5.
25. Office of Child Support, State of Michigan, Family Independence Agency, 100% Paternity Establishment Program, One Year Pilot Summary, available at http://michigan.gov/documents/FIA-Pub-45-Paternity-Establishment-Project_33917_7.pdf. In study of 1,660 unwed births at hospitals, paternity was voluntarily established in 78.5 percent of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed.
can also positively identify a biological father to near-certainty.\textsuperscript{26} These tests are not prohibitively expensive and are easy to administer, and therefore, they are used frequently.

Studies show that almost always the man identified as a child’s legal father is the biological father. The most comprehensive data analysis concluded that in the U.S., 98 percent of the men raising children they believe to be their biological children are correct and that only 30 percent of the men who seek blood tests to confirm paternity are not the biological father.\textsuperscript{27} Data from the Vital Records section of the Oregon Health Division and the Child Support Program show that in less than one percent of all cases in which paternity was established by voluntary acknowledgment were judicial orders later entered finding that the man was not the biological father.\textsuperscript{28} In fiscal years 2004, 2005, and through March of 2006, of the 27,536 cases in which paternity was established by voluntary acknowledgment, a party filed a request with the state to reopen the paternity findings in 79 cases. In 22 percent of these 79 cases, the man identified as the legal father was found not to be the biological father.\textsuperscript{29}

Nevertheless, when genetic testing does show that a child’s legal father is not the biological father, someone—most often the mother or the legal father—may want to obtain a legal order that the man is not the legal father. Oregon law before 2007 addressed the possibility of such challenges, but the results it provided were sometimes controversial.

\section*{II. Determining Paternity in Oregon Before 2007}

ORS 109.070 is the fundamental Oregon statute on determining paternity.\textsuperscript{30} Subsection one provides three principal means by which a man’s status as a child’s legal father can be established: 1) marriage to the child’s mother, 2) judicial filiation proceedings, and 3) voluntary acknowledgments by the mother and alleged father.ORS 109.070(1) also includes a catchall provision allowing paternity to be resolved by judicial order.

\begin{itemize}
\item \textsuperscript{28} OLC WORK GROUP, supra note 11, at 5.
\item \textsuperscript{29} See supra note 24.
\item \textsuperscript{30} OR. REV. STAT. § 109.070 (2005).
\end{itemize}
established by “other provision of law.” Before the 2007 amendments to the statute, the remaining sections of section 109.070 elaborated on the voluntary acknowledgment process.

A. Marriage as the Basis for Paternity

Until 2005, ORS 109.070(1)(a) provided that if a married woman and her husband were cohabiting when a child was conceived and the husband was not infertile, he was conclusively presumed to be the father of children born to her. Subsection (1)(b) of the statute provided that a married woman’s husband was rebuttably presumed to be the father of her children born during the marriage. The 2005 legislature temporarily repealed the conclusive presumption and designated the provision establishing the rebuttable presumption as subsection (1)(a). Had the legislature not further amended ORS 109.070 in 2007, the conclusive presumption would have come back into effect on January 2, 2008.

The conclusive presumption defined the husband as the legal father of his wife’s children, regardless of biological reality, if the facts of cohabitation and fertility were proven. The conclusive presumption, which has very old common law roots and which was developed when scientific determination of paternity was impossible, protected children from the substantial legal and social disadvantages of illegitimacy, except when the facts showed that the husband could not possibly have been the father. While the conclusive presumption is no longer justified by lack of reliable evidence about

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31. OR. REV. STAT. § 109.070(1)(g). This section has been invoked, for instance, to permit determination of paternity during the probate of the estate of an alleged father. See Thom v. Bailey, 481 P.2d 355, 356-58 (Or. 1971) (en banc). The statute can also be invoked to authorize a declaratory judgment action to determine paternity.

32. 2005 Or. Laws 569.

33. Id.

34. See In re Marriage of Hodge, 722 P.2d 1235 (Or. 1986). The only other state with a conclusive presumption, California, allows husbands and wives to challenge it under some circumstances. CAL. FAM. CODE §§ 7540, 7541 (West 2004).


36. 1 BLACKSTONE, supra note 35, at 457. The presumption could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months or by proving the non-access of the husband beyond a reasonable doubt.
biological parentage, it does protect married couples raising children who are not the husband’s biological offspring from outsiders to the marriage who want to establish the husband’s nonpaternity. The U.S. Supreme Court recognized this rationale in 1989 when it upheld a similar provision of California law against a constitutional challenge from a biological father who wanted to establish his own paternity.37 The Oregon conclusive presumption also precluded divorcing couples from disproving the husband’s paternity if they had been living together when the child was conceived.38

While the second presumption of paternity, which applied when the parties were not living together at conception, could be rebutted, the Oregon Court of Appeals has held that a trial court may refuse to allow the presumption of paternity to be rebutted because the petitioner is equitably estopped from denying paternity. In the first of these cases, In re Marriage of Johns,39 a mother alleged in court documents, in order to obtain child support payments from the husband, that he was the father of the child.40 The trial court found that the child and the husband relied on that representation to establish a parent-child relationship in the two-and-a-half years before the hearing.41 The Court of Appeals upheld the trial court’s conclusion that “Mother cannot be allowed to assert or deny the heritage of her child as one or the other may appear to temporarily be to her advantage.”42 Similarly, in In re Marriage of Hodge,43 the court held that the wife was estopped from raising the question of whether the husband was the biological father as a consideration in determining custody.44 The

37. Michael H. v. Gerald D., 491 U.S. 110, 118-30 (1988). This case rejected the biological father’s argument, based on earlier decisions on the rights of unmarried biological fathers, that he had a right to establish a legal relationship with his child. The cases upon which he relied hold that unwed biological fathers who have demonstrated a commitment to the responsibilities of parenthood are entitled to notice of proceedings involving the custody of their children and to the same protections for their substantive parental rights that other parents enjoy. See Lehr v. Robertson, 463 U.S. 248, 258 (1983); Caban v. Mohammed, 441 U.S. 380, 389 (1979); Quillen v. Walcott, 434 U.S. 246, 256 (1978); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). OR. REV. STAT. § 109.094 (2005), a statute of general applicability, provides that once a man’s paternity has been established, he has full parental rights—that is, the same procedural and substantive rights as a married father.
40. Id. at 1231.
41. Id. at 1232.
42. Id. at 1233.
43. 733 P.2d 458.
44. Id.
court concluded that “[h]aving allowed husband to establish the emotional ties of a child-parent relationship, wife cannot at this late date deny him and the child the benefits of the relationship.”

Most recently, the court held in In re Marriage of Sleeper that the wife was estopped from denying the husband’s paternity, even though they both knew that he was not the biological father; because she represented to everyone that he was the biological father; because the husband relied on the wife’s representation that, even if the children were not his biological children, he was their “father”; and because the children relied on this representation to develop a father-child relationship with husband.

The two presumptions regarding the paternity of children born to a married woman date to provisions of Deady’s 1862 Oregon Civil Code. The third part of ORS 109.070(1), which also derives from the Deady Code, provided that a child’s paternity was established “[b]y the marriage of the parents of a child after birth of the child.”

While the statute did not say so, the implicit requirement for application of this statute was that the husband be or at least be believed to be the child’s biological father; it did not operate to make stepfathers legal fathers.

**B. Judicial and Administrative Proceedings to Establish Paternity**

In 2005, ORS 109.070(1)(c) provided that paternity could be established through filiation proceedings in circuit court. Details of the filiation process are set out in ORS 109.124–109.237. In addition, the provisions of ORS 416.400–416.465 allow the state child support enforcement agency to establish paternity through an administrative...
proceeding, which results in a judicial order of paternity.

Under existing Oregon law, a judgment of paternity is res judicata as to parties to the proceeding. ORCP 71(B) provides that a judgment procured by mistake, fraud, misrepresentation or other misconduct of an adverse party is an exception to general principles of res judicata. 51 However, the Oregon Court of Appeals has held that if a man does not contest a paternity proceeding and later genetic tests show that he is not the biological father, he cannot successfully claim relief under this section, even if the mother perjuriously testified that he was the father, because he had the opportunity to contest. 52 The Court of Appeals has also held that if a husband does not contest whether he is the father of a child during a divorce proceeding, and he later learns that the mother lied to him about this, he cannot set aside the judgment on the basis of fraud under ORCP 71. 53

In contrast, ORS 416.443 provided that if paternity was established administratively through the Child Support Program, a party could petition to reopen the matter for up to one year if no genetic tests had been done before the finding of paternity was made.

C. Voluntary Acknowledgments of Paternity

Oregon enacted a law allowing an unmarried mother and alleged father to establish the man’s legal paternity by voluntary acknowledgment in 1975, well before most other states. This legislation provided that if the mother and alleged father swore in writing that the man was the biological father, paternity was established. 54 The law was enacted in response to two decisions on the rights of putative fathers: Stanley v. Illinois, 55 the 1972 United States Supreme Court case that first held that unmarried fathers may have custodial rights, and Miller v. Miller, 56 a 1974 Ninth Circuit decision that struck down as unconstitutional an Oregon statute that allowed a child born to an unmarried mother to be adopted on the basis of her consent alone.

The voluntary acknowledgment legislation was amended in 1995 to conform to the specific requirements of a federal law enacted in

55. 405 U.S. 645 (1972).
56. 504 F.2d 1067 (9th Cir. 1974).
1993.\textsuperscript{57} The statute was further amended in 1999 to comply with addition federal requirements enacted in 1996\textsuperscript{58} and in 2005 in conjunction with revisions to the statutes governing treatment of unmarried fathers in child dependency cases in juvenile court.\textsuperscript{59} Signing a voluntary acknowledgment has become the most common way that legal paternity of children born to unmarried mothers is established. Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility.\textsuperscript{60}

Under the voluntary acknowledgment law as it existed before and after 2005, the unmarried parents of a child could acknowledge paternity at the hospital voluntarily and file the acknowledgement with the state office of vital statistics, thereby establishing legal paternity.\textsuperscript{61} ORS 109.070(1)(e) required Oregon to recognize voluntary acknowledgements of paternity filed in other states.\textsuperscript{62} ORS 109.070(2), added in 1999, allowed either party to rescind a voluntary acknowledgment within 60 days of its signing. If the party wishing to rescind was a party to a “proceeding relating to the child” which occurred within that 60-day period, he or she had to rescind before an order was entered in the proceeding.\textsuperscript{63} Under subsection (3), a party could challenge a voluntary acknowledgment after the rescission period had passed on the basis of fraud or duress.\textsuperscript{64} The statutes did not define these terms.

The statutes also provided that within a year after an acknowledgment was signed, it could be challenged on the basis that the man was not actually the child’s biological father by a party, the child, or


\textsuperscript{59} Act of June 7, 2005, ch. 160, 2005 Or. Laws, ch. 160 (an act relating to paternity). Part of this legislation was also proposed by an Oregon Law Commission Work Group, and part was added by the legislature at the urging of fathers’ rights lobbyists. The work group process and final legislation are described at OREGON LAW COMMISSION JUVENILE CODE REVISION WORK GROUP, RIGHTS OF PUTATIVE FATHERS IN JUVENILE COURT (2005), available at http://www.willamette.edu/wucl/pdf/sb234report.pdf (describing the work group process and final legislation).

\textsuperscript{60} See supra note 25 and accompanying text.


\textsuperscript{62} OR. REV. STAT. § 109.070(1)(f).

\textsuperscript{63} OR. REV. STAT. § 109.070(2) (corresponds to the Act of Apr, 20, 1999, ch. 80, § 20).

\textsuperscript{64} OR. REV. STAT. § 109.070(3)(a)(C).
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the state if the state was providing child support enforcement services.65 Anyone who could raise a challenge could also seek an order requiring that the mother, the child, and the male party submit to blood tests as provided for in chapter 109.66 If the test excluded the man as the child’s biological father, a party could apply to the court for a judgment of nonpaternity.67

A party who obtained a judgment of nonpaternity under either of these provisions had to send a certified true copy to the Center for Health Statistics, which corrected the official state records regarding the child’s parentage.68

In addition, as discussed above, the Oregon statutes governing administrative processes for establishing paternity through the Oregon Child Support Program allowed a party one year in which to petition to reopen the matter if genetic tests had not been done before the finding of paternity was made, as discussed above. This provision applied to cases in which paternity was established by voluntary acknowledgment as well as by administrative adjudication.

In 2005, the legislature amended these statutes to allow a larger group to bring challenges in more circumstances than federal law requires. Some of the changes were ancillary to legislation that revised and clarified the rights and duties of unmarried fathers in juvenile court dependency proceedings involving their children.69 The legislation amended the statute on challenges to voluntary acknowledgments of paternity to expand the group of persons entitled to make challenges to include the child (or, practically speaking, the child’s attorney) and DHS if the child was in the custody of DHS as an abused or neglected child. The legislation also amended the provisions regarding challenges within a year after a voluntary acknowledgement was filed by extending the right to make a challenge to the child. The party receiving such a judgment was required to send it to the state office of vital records so that the child’s birth records could be corrected.70

65. OR. REV. STAT. § 109.070(2)(c).
67. OR. REV. STAT. § 109.070(4)(b)
68. Id.
Other sections of the 2005 legislation, which sunset on Jan. 2, 2008, were promoted by fathers’ rights advocates who objected to the existing law’s limitations on challenges to paternity when genetic testing showed that the legal father was not the biological father. Many of the principles inherent in this section were carried forward into the 2007 legislation and are, therefore, important to understand.

First, these provisions allowed a child’s mother or a man whose legal paternity had been established by any means authorized by ORS 109.070(1) or by the administrative process under chapter 416 to petition to reopen paternity. If paternity was based on the marital presumption, the challenge could be brought at any time during the marriage. Paternity could also be challenged after a divorce if paternity had been established by the conclusive presumption discussed above because a challenge could not have been brought at the time of divorce. On the other hand, if paternity was based on a voluntary acknowledgment or a default order or judgment of paternity, the petition to reopen had to be filed within two years of the filing of the acknowledgment or the entry of the order or judgment. The petition had to allege either that paternity could not have been challenged earlier because it was based on the conclusive presumption or that new evidence had been discovered. It also had to be accompanied by the results of blood tests, administered within 90 days of the petition’s filing, showing “a zero probability that the legal father is the biological father.”

If the evidence from properly conducted blood tests excluded the man as the child’s biological father, the court was required to enter a finding of nonpaternity if it found that fraud had been committed. If the court found no fraud, it was required to enter a finding of nonpaternity if the petitioner proved that the finding would not cause “undue harm to the child” and that 1) the legal father had not adopted the child, 2) the child was not conceived by artificial insemination while the legal father and the mother were married, 3) the petitioner

STAT. § 109.070(4)(a).
72. Id. § 9(2).
73. Id.
74. Id. § 9(3). A court may order the parties to submit to blood tests “if the blood test results submitted with the petition were not properly conducted or documented,” and the court must order blood tests “upon the motion of a party.” The petitioner must pay for the blood tests. Id. §§ 9(4)-(5).
had not acted to prevent the biological father from asserting his parental rights, and 4) the petitioner, with knowledge that the legal father was not the biological father, had not taken any action to affirm the legal father’s parentage of the child or failed to respond to a judicial or administrative proceeding to establish paternity after having received notice and been given an opportunity to be heard.\textsuperscript{76} If the court found that the petitioner knew that the legal father was not the biological father and nevertheless affirmed his legal fatherhood or failed to respond to notice of a proceeding to establish paternity, the court could still disestablish paternity if it found that to do so would not cause undue harm to the child, unless legal paternity was established by a voluntary acknowledgment.\textsuperscript{77} If the petitioner signed a voluntary acknowledgment of paternity without knowledge that the man was not the biological father, the court could grant the petition for a finding of nonpaternity if it found that to do so would not cause undue harm to the child.\textsuperscript{78}

The 2005 changes to the statutes dramatically expressed dissatisfaction with Oregon’s paternity laws as they had existed for decades, particularly of men who had been identified as legal fathers and ordered to pay child support who learned they were not the children’s biological fathers. However, the 2005 amendments were unclear in important respects and were enacted hastily without input from important constituencies. As the legislative session ended, the Oregon Law Commission had already agreed to take on a more inclusive and thorough examination of the paternity issue for the 2007 legislative session.

\textbf{III. THE CONTEXT OF THE OLC REFORM PROPOSAL}

As a practical matter, any changes to Oregon’s paternity law had to conform to the requirements of the federal child support enforcement system, which provides essential financial support to the state’s public assistance and child support programs. The 2002 Uniform Parentage Act was carefully drafted with these requirements in mind and was, therefore, proposed as a model for change to the state’s laws.

\textsuperscript{76} Id. § 9(7)(A)-(F).
\textsuperscript{77} Id. § 9(8)(A).
\textsuperscript{78} Id. § 9(8)(B).
A. The Federal Child Support Requirements

The federal-state child support enforcement program turns on states’ compliance with federal requirements regarding how they run their programs. As described above, some of these requirements focus on outcomes; states that do not achieve certain benchmarks, including ones related to paternity establishment, suffer loss of federal support.79 In addition, federal law mandates that states enact very specific laws, as this part describes. Oregon law, both before and after the 2007 legislative session, complies with these requirements.

1. Statute of Limitations

Traditionally, states imposed short statutes of limitations on paternity suits, often requiring the suit to be brought within a year of the child’s birth. Federal rules require states to allow proceedings establishing paternity to be brought at any time until a child’s eighteenth birthday.80

2. Paternity Suits

A paternity suit or filiation proceeding is a judicial or administrative procedure for establishing the identity of the biological father of a child born outside marriage. Federal law requires that both mothers and alleged fathers have standing to initiate proceedings to establish paternity.81 The state child welfare agency must be able to order genetic tests in certain situations without a court or administrative order.82 If the agency orders the test, the state must pay for the initial test, though it may recover the cost from the father if paternity is established.83 Whenever a party requests genetic tests, the child and all the parties must submit, with one exception: a parent receiving public assistance who has “good cause” for not pursuing paternity is exempt.84 State law must require that courts consider the results of genetic tests to establish paternity if the test is “of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary [of HHS]” and performed by an accredited laboratory.85

80. Id. § 666(a)(5)(A); 45 C.F.R. § 302.70(a)(5)(i) (2006).
82. Id. § 666(c)(1)(A).
83. Id. § 666(a)(5)(B)(ii)(I).
84. Id. §§ 654(29), 666(a)(5)(B).
85. Id. § 666(a)(5)(F).
Further, state law must create a rebuttable presumption, or at the option of the state, a conclusive presumption of paternity when genetic test results indicate a threshold probability that the alleged father is the father of the child. 86 If a party fails to appear at a hearing on a paternity action, the judge or hearing officer must have the authority to enter a default judgment. 87 Jury trials in paternity actions are not allowed. 88

3. Voluntary Acknowledgments of Paternity

A mother and alleged father must be able to sign a form voluntarily acknowledging paternity which, when filed with the state office of vital statistics, has the legal effect of a judicial determination of paternity. 89 The name of a man who is not married to the mother can appear on a child’s birth certificate only if a voluntary acknowledgment has been filed or a court or administrative agency has determined that he is the father. 90 Voluntary acknowledgment forms must be offered to all parents at all birthing facilities and birth records offices in the state. 91 Each party must be given oral and written notice of the alternatives to, legal consequences of, and rights and responsibilities arising from the signed acknowledgment. 92 The state cannot condition the validity of the acknowledgment on any kind of proceeding, 93 and a voluntary acknowledgment can be signed without genetic testing having been done; indeed, federal law provides that states may not require blood testing as a precondition to signing a voluntary acknowledgment of paternity. 94 Either party must be able to rescind the acknowledgment within 60 days of the child’s birth or the date of any judicial or administrative proceeding relating to the child, whichever occurs first. 95 After that, an acknowledgment can be challenged only on the ground of fraud, duress, or material mistake of fact. 96 Federal law does not define these terms. States must give full faith and credit

86. 42 U.S.C. at § 666(a)(5)(G).
87. Id. § 666(a)(5)(H).
88. Id. § 666(a)(5)(I).
89. Id. §666(a)(5)(C).
90. Id. § 666(a)(5)(D).
91. Id. § 666(a)(5)(C)(ii).
92. Id. § 666(a)(5)(C)(i).
93. Id. § 666(a)(5)(E).
96. Id. § 666(a)(5)(D)(iii).
to acknowledgments signed in other states if they contain the information required by federal standards and have been executed in compliance with the procedures required by the state in which they were signed.  

B. A National Model—The Uniform Parentage Act

The Uniform Parentage Act, which was originally promulgated in 1973, was revised in 2000 and amended in 2002. It complies with the federal requirements described above and also attempts to provide equitable solutions to the problems in determining legal parentage that arise in an era when married couples often divorce and contest paternity, many children are born to unmarried parents, and many children are raised by adults who know they are not the children’s biological parents but intend to and do accept the responsibilities of parenthood. The UPA adheres to tradition in the sense that it makes biology the determinant of legal paternity in most contested situations. However, following legal principles developed by courts and state legislatures, it uses several devices to mitigate the significance of biology. These include presumptions of paternity based on marriage and social function, time limits within which challenges to paternity must be brought, and grants of discretion to judges to refuse to determine paternity on the basis of biology under some circumstances.

Under the UPA, a parent-child relationship may exist between a man and a child in any of six circumstances. For purposes of this article, three are important: the man may be presumed to be the father because of his marriage to the child’s mother or because he has lived with and held out the child as his for at least two years; he and the mother may have signed and filed a formal acknowledgment of his

97. Id. § 666(a)(5)(C)(iv).

98. The 2002 version of the UPA makes biology more determinative of parentage than the 1973 version did in at least two significant ways. First, the 2002 UPA provides that if two presumptions of parentage apply to the facts of a case, the conflict is usually to be resolved by genetic testing. UNIF. PARENTAGE ACT § 204 cmt. (2002). In contrast, the 1973 version of the act provided, “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” UNIF. PARENTAGE ACT § 4(b) (1973). Second, the 2002 version provides that a man not married to the child’s mother is presumed to be a child’s father if he lived with and openly held out the child as his for at least two years, beginning at birth. UNIF. PARENTAGE ACT § 204(5) (2002). The corresponding section of the 1973 UPA, section 4(4), provided that the presumption arose upon proof that the man received the child into his home and openly held the child out as his, without time limits.
paternity; or, he may have been adjudicated to be the father.99

1. Marital Presumptions Under the UPA

Under the 2002 UPA, a man married to the child’s mother is presumed to be the father if the child was born while the couple was married or within 300 days of the termination of the marriage.100 If the couple marries after the child is born, the man is presumed to be the father only if he voluntarily took steps to establish paternity, such as filing a voluntary acknowledgment with the state, allowing his name to be on the birth certificate, or promising in writing to support the child.101

The UPA provides that if a married woman has a child by a man other than her husband, she, her husband, and the biological father can execute a voluntary acknowledgment that establishes the biological father’s legal paternity and effectively rebuts the marital presumption of paternity.102

If the husband and wife divorce and the divorce decree identifies a child as a child of the marriage or requires the husband to pay child support, the UPA provides that the decree is a determination of paternity entitled to res judicata effect.103

The presumption of paternity may be challenged in court by the mother, her husband, or by a man alleging himself to be the child’s biological father. The challenge must be brought within two years of the child’s birth.104 The two-year statute of limitations does not apply if the husband and wife did not cohabit or engage in sexual intercourse during the time that the child was probably conceived and if the husband never openly acknowledged the child as his.105 The presumption may be rebutted only by genetic test evidence, and only a court may order the tests; the state child support enforcement agency

99. Id. § 201(b). This section also provides that a man is the legal father if he has adopted the child or if he satisfies the UPA requirements for determining paternity in cases of assisted reproduction. The Oregon UPA Work Group was not charged with considering the UPA’s provisions on assisted reproduction. The UPA complies with federal law in imposing no time limit on establishment of the paternity of a child born outside marriage. Id. § 606.
100. Id. § 204(a). If the alleged marriage is void or voidable, the presumption still applies. Id. §§ 204(a)(3)-(4).
101. Id. § 204(a)(4).
102. Id. §§ 302(a)(3-A), 304, 305.
103. Id. § 637.
104. Id. § 607(a).
105. Id. § 607(b).
is specifically precluded from ordering testing.106

Under the UPA, the decision to order genetic testing is the most crucial step in the process because of the conclusive effect of the test results.107 Therefore, section 608(a) allows a court to deny the order for testing if the wife or the husband is estopped from denying the husband’s paternity and the court finds by clear and convincing evidence that it would be inequitable to disprove the father-child relationship. When deciding whether to order the tests, the court must also consider the child’s best interests.108 The child must be represented by a guardian ad litem, and the court’s analysis must take into account the child’s age, the child’s relationships to the husband and the man alleged to be the genetic father, and the facts surrounding the husband’s discovery of his possible nonpaternity.109

2. Voluntary Acknowledgments Under the UPA

Article 3 of the UPA governs acknowledgments of paternity and is designed to implement the requirements of federal law described above.110 Under Section 301, a mother and the man alleged to be the father may sign a document acknowledging his paternity; if the document is filed with the state bureau of vital statistics, it has the legal effect of a judgment of paternity.111 The UPA resolves the problem of conflicting claims to paternity that can arise if another man is presumed to be, or has previously been adjudicated to be, the father by providing that an acknowledgment of paternity is void unless the other claim has been resolved by a court or the mother, husband, and alleged father have signed a three-way acknowledgment as described above.112 Either party to the acknowledgment may rescind it within 60 days or before a hearing regarding the child, whichever occurs sooner.113 After the rescission period expires, a party may challenge the acknowledgment only on the ground of fraud, duress, or material mistake of fact, and then for only two years after the acknowledgment

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106. Id. §§ 502(b), 621(c)(2).
107. If the test results indicate that the husband is not the biological father, the court must enter a finding of nonpaternity. Id. § 631(d)(4).
108. Id. § 608(b).
109. Id. §§ 608(b),(c)
110. For a thorough discussion of the UPA, see generally Paula Roberts, Biology and Beyond: The Case for Passage of the New Uniform Parentage Act, 35 FAM. L.Q. 41 (2001).
111. UNIF. PARENTAGE ACT § 305.
112. Id. §§ 302(b), 305.
113. Id. § 307.
was filed. The process for and rules governing a proceeding to rescind a challenge to a voluntary acknowledgment are the same as those for challenging a judgment of paternity, which are discussed in the next subsection.

3. Paternity Suits Under the UPA

As is typical of most state statutes today, the outcome of a contested paternity proceeding under the UPA ordinarily turns on the results of genetic testing. If a party refuses to submit to genetic testing, the court may resolve the case against him or her, and it may enter a default order against a party who fails to appear.

An individual who is not a party to the adjudication may file a proceeding to contest it within two years of its effective date. The rules regarding judicial discretion to deny a challenge to the marital presumption on the ground of estoppel or the child’s best interests discussed above also apply to challenges to adjudications.

Whether paternity is established by the marital presumption, voluntary acknowledgment, or adjudication, the UPA adopts the same strategy for mediating the tension between biological and social paternity. The effect of the rules described above is that biological paternity is the starting point for determining legal paternity. However, challenges to prior determinations of legal paternity are subject to two-year statutes of limitation, and judges retain authority to reject challenges within this time limit on the basis of estoppel or the child’s best interests. This, then, was the structure recommended to the Oregon UPA Work Group as it began its study of Oregon paternity law.

IV. THE OREGON RESOLUTIONS

The UPA Work Group quickly agreed not to recommend that the UPA be enacted without changes because a substantial number of its members disagreed with one or more of the ways that the UPA re-

114. Id. § 308(a).
115. Id. §§ 505(b), 631(2).
116. Id. § 622(b), (c).
117. Id. § 634.
118. Id. § 609(b).
119. Id. § 609(c).
120. This section does not provide a section-by-section analysis of the bill nor does it even describe every section. For this information, see OLC WORK GROUP, supra note 11, at 14-28.
solved policy issues regarding paternity. The group then considered whether to propose that the UPA be enacted with amendments to reflect these differences. However, the UPA is structured differently from the sections of ORS chapter 109 that govern paternity and does not address several issues covered in chapter 109, making it difficult to fit the UPA and existing statutes together. Therefore, the group decided to consider the issues and policy choices expressed in the UPA but not to use it directly as the basis for proposed amendments.

A. The Elephant in the Room\textsuperscript{121}—When Should Biology Determine Legal Paternity?\textsuperscript{122}

From the outset, a minority of the UPA Work Group argued that the biological fact of paternity should always or almost always determine legal paternity and objected to giving judges any discretion that could result in a finding that a husband, former husband, or other man identified as a legal father was still the legal father when genetic evidence showed him not to be a child’s biological father.\textsuperscript{123} Some proponents of this view framed the issue as one of fairness between the mother and the man, and particularly focused on child support obligations.\textsuperscript{124} They argued that a man who can establish his biological nonpaternity has been betrayed by the mother and that her unfaithfulness inherently constitutes fraud.\textsuperscript{125} They argued that such a man simply should not be obliged to pay support under any circumstances.\textsuperscript{126} Some of this group supported allowing the judge to deny a challenge to paternity, based upon a showing that the party making the challenge should be estopped from denying paternity because he knew the child was not his and still assumed the paternal role (or because she had represented that the child was the husband’s) and the other party

\textsuperscript{121} This was the title that the chair of the work group gave to a document intended to help focus the group’s discussions in one of its early meetings. See UPA WORK GROUP, SUMMARY MEETING REPORT 1-3 (June 13, 2006) (on file with author).

\textsuperscript{122} This section has been previously published in substantially the same form in OLC WORK GROUP, supra note 11, at 12.

\textsuperscript{123} Some of these discussions are memorialized in the minutes of the work group’s meetings. See, e.g., UPA WORK GROUP, SUMMARY MEETING REPORT 2-3 (June 13, 2006) (on file with author); UPA WORK GROUP, SUMMARY MEETING REPORT 2-3 (Aug. 22, 2006) (on file with author); UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Oct. 17, 2006) (on file with author).

\textsuperscript{124} UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Aug. 22, 2006) (on file with author).

\textsuperscript{125} OLC WORK GROUP, supra note 11, at 12.

\textsuperscript{126} Id.
had relied on this representation. However, these members of the group opposed allowing the judge to consider the child’s best interests in making the decision, believing that the matter should simply be an issue of equity between the adults. That this view was openly expressed and taken seriously was remarkable, considering that determining legal parentage is so fundamental to a child’s future. The assumption underlying this position was that the only or principal importance of an order of legal paternity is in establishing financial responsibility for a child.

In contrast, a majority of the work group argued that the circumstances in which a presumption or finding of legal paternity might be challenged are so variable that judges should have discretion to determine whether the facts of a particular case are sufficiently unusual that justice to the parties and the child require that the legal relationship between the man and the child not be severed. The usual examples involve disputes over the custody of or access to a child, as when a divorcing mother challenges her husband’s paternity in an effort to cut off his relationship with a child. This view prevailed. As the work group’s report to the Oregon Law Commission and the legislature explained, the majority of the work group concluded,

[S]ociety has a legitimate interest in protecting children from harm, especially in situations where the legal father has also had a social relationship with the child. Although we cannot legislate that fathers have continuing social relationships with their children, social policy does not and law should not condone severing these relationships. The work group decided that it would not be feasible to draft a statute that would be flexible enough to appropriately respond to the variety of fact scenarios that are likely to arise and that judicial discretion is an appropriate solution.

Some of the work group members who wanted biology to control legal paternity argued that a judge could protect a man and child with a developed parent-child relationship under ORS 109.119. How-

127. Id.
131. OLC WORK GROUP, supra note 11, at 12.
132. Id.
ever, the conditions under which a nonparent can be awarded custody or visitation under ORS 109.119 are very limited, and the position of a nonparent with rights under ORS 109.119 is far more tenuous than that of a legal parent.

ORS 109.119 only authorizes a court to consider granting custody to a person who is not a child’s legal parent if that person has established emotional ties creating a parent-child relationship and has rebutted the presumption that the parent acts in the child’s best interests. In making this determination, the court is to consider whether:

(A) The legal parent is unwilling or unable to care adequately for the child;
(B) The petitioner or intervenor is or recently has been the child’s primary caretaker;
(C) Circumstances detrimental to the child exist if relief is denied;
(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or
(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

While an earlier version of ORS 109.119 allowed a court to grant custody to a nonparent upon a finding that this was in a child’s best interests, in 2004, in In re Marriage of O’Donnell-Lamont, the Oregon Supreme Court interpreted the current version of the statute as requiring the nonparent to prove by a preponderance of the evidence that the parent’s decisions are not consistent with the child’s best interests.

Federal constitutional law also requires that states defer to parents’ rights to custody and decisions regarding visitation in the face of challenges from third parties. In 2002, the United States Supreme Court in Troxel v. Granville considered whether a state may place parents and nonparents on an equal footing in disputes over visitation as a matter of course. While the exact limits on state law imposed by Troxel are much disputed, since the case has no majority opinion and the plurality opinion is ambiguous, it is clear that states must

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135. See In re Marriage of Sleeper, 982 P.2d 1126, 1131 (Or. 1999).
136. 91 P.3d 721 (Or. 2004).
137. Id. at 733-34.
139. See id. at 64-67.
140. See id. at 73-75.
“accord at least some special weight” to the parent’s view of the child’s interests.\textsuperscript{141}

Because the rights of claimants under ORS 109.119 are not equivalent to parental rights, the UPA Work Group decided to reject the principle that biological paternity should always determine legal paternity.\textsuperscript{142} However, the group agreed that biological paternity should be the starting point for determining legal paternity most of the time, subject to the need to protect the interests of other parties or the child in specific situations. The issue repeatedly surfaced in discussions about all three ways of determining paternity—marital presumptions, adjudications, and voluntary acknowledgments.\textsuperscript{143} The specific recurring issues included whether to place a statute of limitations on challenges to legal paternity, who should have standing to bring a challenge, the grounds for a challenge, and whether judges should have discretion to reject a challenge in some situations, as the following sections explain.

\textit{B. Paternity Based on Marriage}\textsuperscript{144}

The work group unanimously concluded that, given the availability of relatively inexpensive, reliable genetic testing and changes in social mores, the absolute rule that a husband is the legal father of his wife’s children regardless of the circumstances does not express sound public policy.\textsuperscript{145} In contrast, the rebuttable presumption that the husband is the father was retained because it is consistent with the expectations of most people, reflects biological reality most of the time, and is the law in virtually all states. Over some dissent, the work group also decided to follow the UPA\textsuperscript{146} and recommend enactment of a new rebuttable presumption—that a child born within 300 days

\textsuperscript{141} \textit{Id.} at 70.

\textsuperscript{142} OLC WORK GROUP, supra note 11, at 13.

\textsuperscript{143} See, e.g., UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Aug. 22, 2006) (on file with author); UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Oct. 17, 2006) (on file with author); UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Dec. 18, 2006) (on file with author).

\textsuperscript{144} This section has been previously published in substantially the same form in OLC WORK GROUP, supra note 11, at 8.


\textsuperscript{146} UNIF. PARENTAGE ACT § 204(a)(2) (2002).

Without this provision, a child born to a woman after her husband dies, they divorce, or the marriage is otherwise terminated has no presumptive father, even though it may be very likely that the former husband is the father. Attorneys who were members of the work group said that when a child is born under these circumstances and the parties have no reason to doubt the husband’s paternity, the usual practice is to proceed as if this presumption existed.\footnote{Id.} The dissenter argued that the question about the paternity of the presumed father could not be resolved by a simple genetic test if he were dead.\footnote{Id.} The group acknowledged this difficulty but concluded that a challenger could present other evidence to rebut the presumption and that the burden on such a challenger did not justifiy rejecting the proposal.\footnote{Id.}

After much discussion, the work group recommended limits on standing to present evidence to rebut the marital presumption.\footnote{Id.} This was done for the sake of protecting married couples raising children from challenges to paternity by outsiders to the family. The protection lasts as long as the couple remains together with the children. The legislature accepted this recommendation, amending ORS 109.070(2) to read:

The paternity of a child established [by one of the presumptions based on marriage] may be challenged in an action or proceeding by the husband or wife. The paternity may not be challenged by a person other than the husband or wife as long as the husband and wife are married and cohabiting, unless the husband and wife consent to the challenge.\footnote{Id.}

Allowing a third party to raise a paternity challenge would violate the parents’ right to family and marital privacy and would not serve the interests of the children.\footnote{Id.} However, if the parents are no
longer married nor living together, their claim to privacy and the assumption that the interests of the children are served by allowing the parents to raise them without interference is not as strong, and third parties then have standing to raise a challenge. The statute uses the term “married and cohabiting” to describe the families that are protected from outside challenges, with the understanding that the term covers all intact families. Thus, a family in which one spouse was away for an extended period, but the husband and wife were still together as a couple would be protected by the provision.\textsuperscript{154}

The work group considered and rejected imposing a statute of limitations on challenges to the marital presumption of paternity.\textsuperscript{155} Ultimately, those who favored a time limit agreed not to impose one, deferring to the view of those who believed that a “wronged” husband should always be able to disestablish paternity. However, the majority of the group supported giving judges discretion to reject evidence offered to rebut the presumption. As enacted, the bill authorizes this action upon a finding that “it is just and equitable, giving consideration to the interests of the parties and the child.”\textsuperscript{156} This language, along with other language regarding judicial discretion that is used in the enacted bill, is discussed below.\textsuperscript{157}

The group also did what amounts to a repeal of the statutory provision establishing a man’s paternity if he marries the mother after the child is born, which, as discussed above, presupposes that he is the biological father. The 2007 legislation requires that the parents also file a voluntary acknowledgment of paternity form with the state of-

tive discussed infra at text accompanying notes 171-180. See UPA WORK GROUP, SUMMARY MEETING REPORT 3 (June 13, 2006) (on file with author). The group also affirmed that it intended to require the consent of both parents before a third party could challenge paternity if the family were intact. UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Jan. 5, 2007) (on file with author). Representatives of the Department of Human Services argued unsuccessfully that DHS should have standing to challenge the presumption if the child were in the custody of the state as an abused or neglected child. UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Sept. 29, 2006) (on file with author). The group refused to revisit this issue at its final meeting before the legislation was proposed. UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Jan. 5, 2007) (on file with author).

\textsuperscript{154} OLC WORK GROUP, supra note 11, at 9.

\textsuperscript{155} UPA WORK GROUP, SUMMARY MEETING REPORT 2-3 (July 12, 2006) (on file with author). The vote was five in favor of the two-year limit, three opposed and three unsure or abstaining.

\textsuperscript{156} H.B. 2382, 74th Leg. Assem., Reg. Sess. § 1, 2007 Or. Laws ch. 454 (amending Or. REV. STAT. § 109.070(3) (2005)).

\textsuperscript{157} See infra text accompanying notes 200-16.
fi ce of health statistics. As discussed below, filing such a form is in itself sufficient to determine paternity; the marriage is, therefore, irrelevant to the paternity determination.

C. Judicial Proceedings to Establish and Challenge Paternity

The UPA Work Group recommended some small but significant changes to the statutes governing judicial proceedings to establish paternity, designed to prevent a court from declaring a man to be a child’s legal father when another man is presumed to be or has already been found to be the legal father. After some discussion the group also recommended enactment of a specific procedure for bringing challenges to previously-entered judicial or administrative findings of paternity. Several attorney-members of the group argued that such statutes are unnecessary because ORCP 71, governing motions to set aside judgments, is sufficient for the purpose. However, representatives from the Child Support Program successfully argued that a statutory process is needed because many challengers proceed pro se and do not understand how the rules of civil procedure relate to their problem.

1. Avoiding Inconsistent Findings of Paternity

Several of the existing statutes that together govern judicial proceedings to establish paternity were amended to prevent courts from entering paternity findings when another man is already presumed to be the father or has been established as the father by a voluntary acknowledgment. These provisions 1) require that a petition to establish paternity name the mother’s husband if another man is alleged to be the child’s father; 2) define a man whose paternity has been established under ORS 109.070 as a necessary party to the proceedings unless his paternity has previously been disestablished; and 3) preclude a court from entering a judgment establishing paternity in a

159. See infra text accompanying note 168.
160. See OLC WORK GROUP, supra note 11, at 10.
161. Id.
162. Id.
163. Id.
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filial proceeding if another man’s paternity has previously been established unless the judgment also disestablishes that paternity. While these provisions help to solve the problem of conflicting determinations of legal paternity, they do not completely solve the problem. No statute prevents a mother and alleged father from signing a voluntary acknowledgment of paternity when another man is presumed to be or has been established as the child’s father, nor do the statutes allowing the child support enforcement agency to establish paternity administratively contain such requirements. Thus, it continues to be possible for more than one man to be designated as a child’s legal parent as, for example, when a married woman files a voluntary acknowledgment of paternity with a man who is not her husband or when another man is designated as the legal father through a child support enforcement administrative proceeding.

166. H.B. 2382 § 5 (enacting OR. REV. STAT. § 109.155(7) (effective Jan. 2, 2008)).

167. OR. REV. STAT. § 109.070(1)(d) (2005) simply provides that paternity is determined by the parents’ filing a voluntary acknowledgment form as provided for in OR. REV. STAT. § 432.287. That section, in turn says in relevant part, “[w]hen the form is signed by both biological parents and witnessed by a third party, the form establishes paternity for all purposes when filed with the State Registrar of the Center for Health Statistics, provided there is no male parent already named on the birth certificate.” Id. § 432.287(1). The statute further provides:

(2) The voluntary acknowledgment of paternity form must contain:

(a) A statement of rights and responsibilities including any rights afforded to a minor parent;

(b) A statement of the alternatives to and consequences of signing the acknowledgment;

(c) Instructions on how to file the form with the state registrar and information about any fee required;

(d) Lines for the Social Security numbers and addresses of the parents; and

(e) A statement that the rights, responsibilities, alternatives and consequences listed on the acknowledgment were read to the parties prior to signing the acknowledgment.

Id. § 432.287(2). Voluntary acknowledgments are discussed further infra in text accompanying notes 181-199.


169. This scenario assumes that the mother did not put her husband’s name on the birth certificate.
2. Setting Aside a Judicial Order Establishing Paternity170

The new legislation creates a procedure for setting aside an order establishing paternity that is as parallel as possible to ORCP 71. The substantive rules should be the same as the substantive rules applicable to challenges to voluntary acknowledgments unless there is a clear reason for treating the two kinds of paternity findings differently.171

The same people and agencies may file a petition to set aside an order of paternity and to challenge a voluntary acknowledgment: the parties to the paternity in question, DHS (if the child is in the custody of DHS as a dependent child under ORS Chapter 419B), and the Division of Child Support (if support rights have been assigned to the state).172 Time limits on challenges to judicial orders are the same as for challenges to orders brought under ORCP 71. A challenge based on mistake, inadvertence, surprise or excusable neglect must be filed within one year.173 A challenge based on fraud, misrepresentation, or other misconduct must be brought within one year of the date of dis-

170. The work group discussed whether a divorce decree identifying children as children of the marriage (or using equivalent language) constitutes a judgment of paternity if the issue of paternity was not actually contested. UPA WORK GROUP, SUMMARY MEETING REPORT 4 (Oct. 30, 2006) (on file with author). Some attorney-members said that under the law as it existed before the enactment of HB 2382, family law practitioners may not have considered such a divorce decree as a judicial order establishing paternity because the conclusive presumption of paternity did not allow this issue to be contested. Id. Because the bill abolishes the conclusive presumption, see supra text accompanying note 146, the issue is now contestable in every divorce, and even if it is not contested, a party may not be able to raise a challenge later because it will be res judicata. See OLC WORK GROUP, supra note 11 at 11-12. The OLC report observes that “[p]ractitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law.” Id. at 12.

171. This section discusses only the most important or most contested aspects of the procedure. Details are discussed in the OLC report on the paternity legislation OLC WORK GROUP, supra note 11, at 10-11, 20-25.

172. H.B. 2382, 74th Legis. Assem., Reg. Sess. § 9(2) (Or. 2007) (standing to file a petition to vacate or set aside a judgment of paternity); H.B. 2382 § 1(5)(b) (standing to challenge a voluntary acknowledgment on the basis of fraud, duress, or material mistake of fact). The latter provision reenacts the substance of S.B. 234 § 11(3)(a)(B), enacted by the 2005 legislature, which is only effective until January 2, 2008. S.B. 234, 73d Legis. Assem., Reg. Sess. §§ 17, 23 (Or. 2005). As the OLC report to HB 2382 explains,

The work group intentionally decided to limit access to this procedure to those most likely to raise challenges, while recognizing that it is possible that others may have interests that are affected by a finding of legal paternity and wish to challenge it. Such actions would be governed by the rules of civil procedure and generally applicable Oregon statutes.

OLC WORK GROUP, supra note 11, at 10-11.

covery. In contrast, the statute imposes no time limits on challenges to voluntary acknowledgments brought on these grounds.

Another hotly contested issue parallels one that arose regarding the marital presumption: whether a judge should have discretion to reject a petition to set aside a judgment when genetic evidence shows that the legal father is not the biological father. As with the marital presumption, the legislation gives judges discretion. Of equal or perhaps even greater importance, the legislation also gives judges discretion to deny requests for mandatory genetic testing. This provision recognizes that, in many situations, whether to order blood tests (which will resolve uncertainty about biological paternity) may, as a practical matter, be a more important decision than whether to set aside a paternity judgment after the biological question has been resolved. However, the specific language that the legislature adopted in granting discretion in these sections differs, as discussed below.

D. Challenges to Voluntary Acknowledgments

Just as the new legislation creates a detailed procedure for petitioning to set aside judgments of paternity, it establishes a process for challenging voluntary acknowledgments, and for the same reason—the Child Support Program reported that a significant number of people who want to rescind or challenge voluntary acknowledgments are proceeding pro se and need statutory guidance. The work group decided that the substantive rules for challenging a voluntary acknowledgment should parallel those for challenging a judgment of paternity unless there was a specific reason for varying.

174. Id. § 9(2)(d).
175. See infra text accompanying note 187.
176. OLC WORK GROUP, supra note 11, at 12-13.
177. Id. at 13.
178. HB 2382 § (9)(6).
179. See infra text accompanying notes 200-16.
180. The work group also recommended without controversy that parents who have signed a consent to adoption or a document relinquishing a child to a public or private child-caring agency, whose parental rights have been terminated, or who have been adjudicated not to be the biological parents of a child, may not sign a voluntary acknowledgment; if they purport to do so, the acknowledgment is void. H.B. 2382 § 1(7) (enacting OR. REV. STAT. § 109.070(7) (effective Jan. 2, 2008)).
181. OLC WORK GROUP, supra note 11, at 9.
182. UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Nov. 20, 2006) (on file with author).
1. Grounds for Rescinding and Challenging Voluntary Acknowledgments

The new legislation does not change existing law regarding when parties may rescind a voluntary acknowledgment, who may challenge it, and on what grounds it may be challenged after the rescission period. As required by federal law, either the mother or the man signing the acknowledgment may rescind it within 60 days of filing. 183 A party, the child, or DHS or the state child support program (if the child is an abused or neglected child in the custody of the state) may challenge an acknowledgment after the rescission period based on fraud, duress, or material mistake of fact. 184 The new legislation specifies that the challenge is to be brought in circuit court and is to be conducted according to the Rules of Civil Procedures and that the challenger bears the burden of proof. 185 Consistently with its decisions regarding rebuttal of the marital presumption and challenges to paternity judgments, the work group did not recommend a statute of limitations on challenges to voluntary acknowledgments, as the UPA does. 186

The group debated at length whether a man who knows that he is not or is uncertain about whether he is the biological parent should be prohibited from signing a voluntary acknowledgment and whether a purported acknowledgment from such a person should be per se invalid. 187 The group decided that the statutes should not require the parties to affirm the man’s biological paternity, as they do not so require now. 188 The federal legislation on voluntary acknowledgments does not require that the man who signed the voluntary acknowledgment be the biological father. 189 Moreover, federal law and state law that

185. Id.
186. UNIF. PARENTAGE ACT § 308(2) (2002).
187. OLC WORK GROUP, supra note 11, at 9; UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Dec. 4, 2006) (on file with author).
188. Id.
189. 42 U.S.C. § 666(a)(5)(C) (2006). The group was informed that the standard acknowledgment form used in Oregon includes an affirmation that the man is the biological father, and from this some argued that if he is not, the form was necessarily the product of mistake or fraud.
implement the federal requirements allow an acknowledgment to be challenged after 60 days for fraud, duress, or material mistake of fact;\(^{190}\) if proof that the man was not the biological father automatically constituted a basis for setting aside the acknowledgment, this language would be irrelevant.

Nevertheless, parties to a voluntary acknowledgment who wish to challenge it after the 60-day rescission period because the man is not the biological father may have another avenue to seek relief. Under the law as it existed before the 2007 legislation, if blood tests were not performed before an administrative order of paternity was entered, a party could file an administrative petition to reopen the issue for up to one year.\(^{191}\) A party to a voluntary acknowledgment or the state (if child support enforcement services were being provided) could seek an order (from the court or from the administrator) for blood testing.\(^{192}\) The order could be sought for up to one year after the acknowledgment was signed if blood tests were not done.\(^{193}\) While these provisions seem to conflict with the federal statute which says that after the 60-day rescission period, the parties may only challenge a voluntary acknowledgment on the basis of fraud, duress, or material mistake, representatives from the Child Support Program assured the work group that the language has been in the statutes for some years without objection from the federal authorities. The new legislation, therefore, retains the language authorizing the administrative petitions\(^{194}\) and extends the authority to file a petition to DHS if the child is in state custody because of abuse or neglect.\(^{195}\) The Child Support Program must pay for the testing, subject to the right to seek recovery from the party who requests the test.\(^{196}\)

The child support enforcement administrator has no discretion to deny the request for blood tests, and if the test excludes the man as the biological father, the agency may seek an order from the court


\(^{193}\) Id.

\(^{194}\) H.B. 2382 § 1 (enacting Or. Rev. Stat. § 109.070(6) (effective Jan. 2, 2008)). See also UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Dec. 18, 2006) (on file with author). However, the section of ORS 109.070 allowing judicial petitions was repealed because it was little used.

\(^{195}\) Id.; H.B. 2382 § 7 (amending Or. Rev. Stat. § 416.443(3) (2005)).

\(^{196}\) H.B. 2382 § 7 (enacting Or. Rev. Stat. § 416.443(9) (effective Jan. 2, 2008)).
setting aside the voluntary acknowledgment.\footnote{Id. § 7 (amending OR. REV. STAT. § 416.443 (2005)).} In contrast, the group decided, again after extended discussion and over some dissent, to give judges discretion to deny a petition to set aside a voluntary acknowledgment on the ground of fraud, duress, or material mistake of fact.\footnote{Id. § 1 (amending OR. REV. STAT. § 109.070(5)(f) (effective Jan. 2, 2008)).} The specific language is discussed in the next section.

E. Judicial Discretion to Deny Petitions to Set Aside Paternity

As the discussion above explains, the new legislation takes the same approach to resolving the dispute about whether biological paternity should give way to other factors in determining legal paternity, regardless of how legal paternity is established. Ordinarily, evidence about biological paternity is admissible, and biology is the starting point for determining legal paternity. However, at every critical point, the judge has discretion to enter an order that will preclude biological evidence from being determinative:

— The judge may reject evidence to rebut the marital presumption upon a finding that rejection is “just and equitable, giving consideration to the interests of the parties and the child."\footnote{Id. § 1 (enacting OR. REV. STAT. § 109.070(3) (effective Jan. 2, 2008)).}

— If the court finds that the legal father is not the biological father and a paternity judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct of a party, it must vacate or set aside the judgment unless it finds, “giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable."\footnote{Id. § 9(7).}

— In a suit to set aside a judgment of paternity, the judge must “consider the interests of the parties and the child and, if it is just and equitable to do so,” may deny a request for blood tests.\footnote{Id. § 9(6).}

— If a court finds that a voluntary acknowledgment names a man who is not the biological father and was procured by fraud, duress, or material mistake of fact, the court “shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable.”\footnote{Id. § 1(5)(f).}

The unifying theme of these statutory provisions is that the judge
must make an individualized determination about whether, on the facts of a particular case, a legal determination of paternity should stand even though the man is or may not be the biological father. Whether to grant judges this discretion and, if so, on what terms, was the mostly hotly contested issue in the UPA Work Group’s deliberations, along with whether to impose statutes of limitations on challenges. The compromise that the group reached was to grant judges discretion but not to impose time limits on challenges.

A majority of the work group consistently supported giving judges this authority to make individualized decisions. The voting members split 9-1 (with one abstention) in favor of allowing judges to reject evidence rebutting the marital presumption of paternity based on evidence supporting that a party was estopped to present the evidence or that rebuttal was inconsistent with the child’s best interests. By a vote of 10-2 (with one abstention), the group voted to allow a judge to deny a motion to set aside a judgment of paternity when the evidence shows that the man is not the child’s biological father. The vote on whether to extend judicial discretion to paternity established by voluntary acknowledgment was 4-3 in favor of granting discretion, with a number of members absent. Some of those voting against judicial discretion believed the federal law that allows challenges to voluntary acknowledgments only on the basis of fraud, duress, or material mistake of fact does not allow judicial discretion. The majority believed that judicial discretion was allowed, pointing out that the UPA, which was drafted by a team of experts from around the country, including representatives of the federal child support program, allows courts to disallow a challenge to a voluntary acknowledgment based on estoppel and the best interests of the child.

204. Id.
205. UPA WORK GROUP, SUMMARY MEETING REPORT 3 (July 12, 2006) (on file with author). See also UPA WORK GROUP, SUMMARY MEETING REPORT 2 (July 27, 2006) (on file with author).
207. UPA WORK GROUP, SUMMARY MEETING REPORT 2 (Dec. 18, 2006) (on file with author).
208. UNIF. PARENTAGE ACT § 609(c) (2002). See also In Re Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001) (where father voluntarily acknowledged child and judgment was entered accordingly and he moved to set aside five and a half years later, motion to vacate was
Some of the work group wanted the statute to explicitly state that the judge could consider the child’s best interests in making the determination because they feared that if the “best interests” language was omitted, judges would believe they may consider only the interests of the parties and not the interests of the child.\textsuperscript{209} One representative reported that she asked judges attending a recent conference whether they would interpret the statutes as allowing them to consider children’s best interests if the statutes did not explicitly include this language; the judges unanimously said they would not.\textsuperscript{210} Those who opposed including the “best interests” language argued that some judges would take it as a signal to deny most petitions on the theory that the best interests of the child are not usually served by disestablishing paternity.\textsuperscript{211} The work group settled on the language “just and equitable to the parties and the child” as best expressing that judges should consider both the conduct of the parties and the interest of the child in exercising discretion.\textsuperscript{212} The work group also believed that the same standard of judicial discretion should apply to disestablishing paternity regardless of how paternity was established because legal rules should not vary simply because the forum differs.\textsuperscript{213}

However, as the language quoted above shows, the same standard does not govern judicial discretion in the legislation as enacted. After the OLC work group reached its compromise and its bill was introduced in the legislature, the fathers’ rights lobbyist who participated in the work group continued to press his case against judicial discretion, resulting in changes from the original bill. The language

\textsuperscript{209} UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Oct. 17, 2006) (on file with author).

\textsuperscript{210} UPA WORK GROUP, SUMMARY MEETING REPORT 3-4 (Oct. 30, 2006) (on file with author).

\textsuperscript{211} UPA WORK GROUP, SUMMARY MEETING REPORT 4 (Oct. 30, 2006) (on file with author); UPA WORK GROUP, SUMMARY MEETING REPORT 3 (Oct. 17, 2006) (on file with author).

\textsuperscript{212} OLC WORK GROUP, supra note 11, at 13.

\textsuperscript{213} Id. at n.14.
governing motions to set aside judgments and voluntary acknowledgments clearly expresses a preference for granting the motion and requires that, before a court denies such a motion, it must find that to do so is necessary to avoid “substantial inequity.” On the other hand, a judge may refuse to admit evidence to rebut the marital presumption or deny a request for genetic tests if it is “just and equitable, giving consideration to the interests of the parties and the child.”

V. Final Thoughts—Can a Single Law Define Paternity for All Purposes?

According to Oregon Law Commission staff, the UPA Work Group was the largest ever assembled, with 17 voting members, 12 advisors who participated in meetings, and 14 “interested persons” who were kept informed of the group’s progress and could participate in meetings when they chose. The group had to be so large because paternity law touches so many other legal areas, and few, if any, lawyers and other professionals fully understand the significance and consequences of different paternity rules in all these areas.

For example, in juvenile court dependency proceedings, legal paternity findings determine who must be given notice of and opportunity to participate in the proceedings, who is entitled to state-provided services, and whose relatives may be considered as alternate placements for a child. In adoption cases, the law of paternity determines who is entitled to notice of a proposed adoption, who may block an adoption by refusing to give consent, and who may try to negotiate an open adoption agreement with the would-be adoptive parents. In private custody disputes, designation of a child’s legal father determines who is entitled to seek custody or access to a child and who must pay child support when the child’s parents are not living together. And the context of these disputes varies dramatically as well. For example, a private custody dispute may be part of a divorce or the break-up of a long-standing nonmarital relationship in which

216. OLC Work Group, supra note 11, at 1-2.
the parties and the child lived together as a family. Conversely, it may be the only matter at issue when a more loosely structured arrangement breaks down or when the consequences of a casual liaison between adults who do not know each other well must be sorted out.

The values and goals that come to the forefront when legal paternity must be decided in one setting may be quite different from those that are most important in another context. For example, when a longstanding familial unit is breaking up, the most important consideration may be protecting the child’s relationships with loving adults who are and should remain an integral part of the child’s life, while in the one-night-stand situation the main issue is likely to be how to determine who must provide financial support for a child.

Given the diversity of circumstances in which we must decide who a child’s legal father is, the legal consequences of a paternity determination might vary as well. A man’s relationship with a child might be protected by a visitation order, but he might not be obliged to pay child support, or vice versa. Or, a man who was willing to take on parental responsibilities and work at learning to be a good parent might be accepted as a father of an infant in a dependency proceeding, even though he had formed no relationship with the child, while he might not be permitted to stop the child’s adoption if the mother wanted to relinquish her parental rights.

Yet, under the law of most American jurisdictions, including Oregon, once a man is determined to be the legal father of a child, he has all the rights and duties of a father, regardless of how inapt this may sometimes seem. This result flows from the principle, commonly expressed by statute and intended to eliminate discrimination against “illegitimate” children, that the rights and duties of a parent and child are not different just because the child’s parents are or were not married.218 And those rights and duties are those of the married or divorced father—to seek custody, to have access to the child if he does not have custody, to pay child support, to prohibit adoption of his child unless he is proven unfit, and so on.

For more than two decades, legal scholars have argued that, given the complexity and variety of modern family life, the law should allow the possibility that a child will have more than two parents and that parenthood should not necessarily be an all-or-nothing status.219 Courts in Louisiana have taken modest steps toward recog-

219. An early, much-cited exploration of this idea is Katharine T. Bartlett, Rethinking
nizing multiple parenthood, but other states are not likely to follow in the near future. The multiple father possibility was raised in an early meeting of the OLC UPA Work Group, but the suggestion was not seriously discussed and was never mentioned again. Instead, like the 2002 UPA, Oregon recognizes at most two legal parents and so must struggle with problem of making one paternity law apply to widely varying situations. In this context, the solution that offers


221. In contrast, the American Law Institute’s Principles of the Law of Family Dissolution recommend that state law recognize for purposes of both child support and child custody statuses other than “legal parent” that give rise to limited parental rights and duties. The ALI Principles apply only at dissolution of adults’ marital or cohabiting relationships and therefore do not address all the incidents of the parent-child relationship. They do not define “legal parent,” leaving that to background state law. ALI PRINCIPLES 2000 § 2.03(1)(a) (2000). The Principles provide that in “exceptional cases” an adult who is not a child’s legal parent may be estopped to deny a child support duty. Id. § 3.02A. This duty may be imposed if

(a) there was an explicit or implicit agreement or undertaking by the person to assume a parental-support obligation to the child; (b) the child was born during the marriage or cohabitation of the person and the child’s parent; or (c) the child was conceived pursuant to an agreement between the person and the child’s parent that they would share responsibility for raising the child and each would be a parent to the child.

Id. A person who formerly lived with or was married to a child’s parents does not automatically acquire support obligations under this section. Id. § 3.02A(b). The Principles indicate that a support duty should be imposed only when the would-be obligor’s actions have eliminated or greatly reduced the chance that support can be obtained from the child’s absent parent. Id. § 3.02A.

For purposes of custodial and access rights, the Principles are much more generous to nonparents, defining two statuses that give rise to some or all parental rights. A “parent by estoppel” has full parental rights. Id at § 2.03(1)(b) cmt. b. Even though the term “parent by estoppel” may suggest that the critical issue is whether the individual relied on a legal parent’s representations, the requirements focus on whether the person has assumed the function of parent because the ALI Principles emphasize protection of the parent-child relationship, rather than relationships between the contesting adults. Id. A person may become a parent by estoppel by (i) being obliged to pay child support under the provisions described above, (ii) living with the child for at least two years while having a good faith belief that he is the child’s biological father, based on marriage to the mother or the mother’s representations if he has ac-
the best promise is giving judges discretion to determine the basis for legal paternity in specific cases, as the new Oregon law and the UPA do. However, the new Oregon law, unlike the UPA, does not include a list of factors for judges to consider in exercising discretion. The majority of the group rejected such a listing; while the reason was never made explicit, the apparent concern was that having to choose these factors could be a deal-breaker. As trial judges work with the new statutes and the appellate courts interpret them, principles to guide discretion may emerge, resulting in more consistent decisions on similar facts and, eventually perhaps, consensus about how specific fact patterns should be treated that may some day form the foundations for a new and varying law of paternity.

The ALI Principles also recognize the status of “de facto parent,” which is similar to the “psychological parent” relationship recognized under OR. REV. STAT. § 109.119 (2005). To be a “de facto parent,” an adult must have lived with the child for at least two years and, for reasons other than financial compensation, regularly performed as much of the caretaking functions for the child as the child’s parent(s), either with the agreement of the child’s legal parent(s) or because of the parent’s inability to act as parents. Id. § 2.03(1)(c). Unlike a parent by estoppel, a de facto parent does not have full parental rights. The custodial, access, and decisionmaking rights of a parent by estoppel are determined in the same way as a legal parent’s, id. §§ 2.08(1)(a), 2.09, while those of a de facto parent are subordinated to the rights of legal parents and parents by estoppel. Id. § 2.18(1). In addition, the de facto parent has standing to bring an action for custody or access only if he or she has lived with the child within six months of filing or has “consistently maintained or attempted to maintain the parental relationship” since ceasing to live with the child, id. § 2.04(1)(c), while a parent by estoppel’s standing is not so limited. Id. § 2.04(1)(b). This proposal was drafted before the Supreme Court decided Troxel v. Granville, 530 U.S. 57 (2000), and so does not take account of that case, which held that legal parents are constitutionally entitled to determine whether a child will visit an outsider to the residential family and that courts must give substantial weight to this decision. For a discussion of whether the ALI proposals, particularly those concerning de facto parents, would survive constitutional scrutiny after Troxel, see David D. Meyer, What Constitutional Law Can Learn from the ALI Principles of Family Dissolution, 2001 B.Y.U. L. REV. 1075 (2001). Compare the discussion of OR. REV. STAT. § 109.119 and the constraints imposed by Troxel at supra text accompanying notes 133-44.

222. UNIF. PARENTAGE ACT § 608 (2002).