Reforming Paternity Law to Eliminate Gender, Status and Class Inequality

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INTRODUCTION

One of the most fundamental issues about legal parentage is when it should be based on the purposeful conduct of adults taking on the responsibilities of parenthood, an idea sometimes called functional parenthood and, in some contexts, intended parenthood, and when it should be based on bio-
logical relationship alone. Traditional legal principles based parentage for children born to married women on marriage itself, through the presumption that the husband was the children’s father.\footnote{For further discussion of the marital presumption, see infra text accompanying notes 19-20.} Since most husbands were and are the fathers of their wives’ children, and since they intend to be and function as fathers, this rule avoided the potential tension between the principles.\footnote{The most comprehensive data analysis concluded that in the United States, typically 96.7% to 98.3% of the men raising children they believe to be their biological children are correct and that only 29.8% of the men who seek blood tests to confirm paternity are not the biological father. Kermyt G. Anderson, \textit{How Well Does Paternity Confidence Match Actual Paternity?: Evidence from Worldwide Nonpaternity Rates}, 47 CURRENT ANTHROPOLOGY 513, 516 (2006). Children born to same-sex couples who are married or in domestic partnerships or civil unions are also presumed in sixteen states to be the legal children of their biological parent’s spouse or partner. For discussion of these rules and the parentage rights of same-sex couples who are not married or in domestic partnerships or civil unions, see Leslie Joan Harris, \textit{Voluntary Acknowledgments of Parentage for Same-Sex Couples}, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 467-75, 488 (2012).} On the other hand, at least in principle, biology was traditionally the basis for legal paternity of nonmarital children.\footnote{For a discussion of bastardy proceedings brought under the Poor Laws to compel support from unmarried fathers during the nineteenth century and before, see Michael Grossberg, \textit{ Governing the Heart: Law and the Family in Nineteenth-Century America} 198-200, 207-11 (1985).}

Today in all states intent to assume the role of father is protected by rules regarding the establishment of legal paternity, since all states have a version of the marital presumption and, for nonmarital children, all states allow the mother and the intended father to establish paternity by signing and filing a voluntary acknowledgment of paternity (VAP).\footnote{See infra text accompanying notes 19-20, 142.} However, the law governing paternity disestablishment is much less protective of the legal paternity of men who may not be biological fathers, particularly where the father and mother are not married but instead have executed a VAP.\footnote{Federal child-support legislation requires all states to allow the mother and alleged father to sign a formal acknowledgment of his paternity and file it with the state. 42 U.S.C. § 666(a)(5)(C) (2006). Once filed, the acknowledgment must have the legal effect of a judgment of paternity. \textit{Id.} VAP forms must be offered to all parents at all birthing facilities and birth records offices in the state. \textit{Id.} Each party must be given oral and written notice of the alternatives to, legal consequences of, and rights and responsibilities arising from the signed VAP. \textit{Id.} Either party to the VAP may rescind it within sixty days or before a hearing regarding the child, whichever occurs sooner. \textit{Id.} § 666(a)(5)(D).}
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The disparate treatment of rights and duties in families based on the marital status of the parents is very old in Anglo-American culture and expressed a fundamental class divide. Marital parents were respectable, and parentage rules upheld their choices about family formation, both in the sense that they precluded outsiders from challenging those choices (the principle of family privacy) and in that they held the adults to the consequences of those choices if they later disagreed about who should be recognized as a child’s legal parent. On the other hand, childbearing outside marriage traditionally was disreputable, and parents in those cases were not accorded the same respect. Indeed, traditionally it was not even meaningful to consider respecting their choices, for unmarried parents did not live together and raise children openly, and paternity was established only for the sake of imposing a child-support obligation on the father.

However, as a number of scholars have observed, the link between marriage and traditional class distinctions is breaking down or at least shifting dramatically. Many more children are born outside marriage today than in the relatively recent past. In 2011, 40.7% of all births in the United States were to unmarried women. See supra note 5, at 612-14; Daniel L. Hatcher, Don’t Forget Dad: Addressing Women’s Poverty by Rethinking Forcible and Outdated Child Support Policies, 20 Am. U. J. Gender Soc. Pol’y & L. 775, 776 (2012); Daniel L. Hatcher, Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State, 42 Wake Forest L. Rev. 1029, 1043 (2007); Amy E. Hirsch, Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer, 16 N.Y.U. Rev. L. & Soc. Change 713, 719 (1988).

States were nonmarital, compared to 10.7% in 1970. Nonmarital childbearing, which used to be confined largely to the very poor, is becoming the norm for much of the middle class as well. In contrast, well-educated upper-middle- and middle-class women rarely bear children outside marriage. These class distinctions are also associated with racial and ethnic distinctions. In 2011, 17% of births to Asian/Pacific Islander mothers were nonmarital, compared to 29% to non-Hispanic white mothers, 53% to Hispanic mothers, 66% for American Indian/Alaska native mothers, and 72% for non-Hispanic black mothers. Unmarried parents on average are also younger and poorer than married parents. In the United States, nonmarital families are much less stable than marital families and so are more likely to experience the effects of biology-based paternity disestablishment rules than families with married parents.

14. See McLanahan, supra note 13, at fig.2; Cherlin, supra note at 13, 37-38.
15. Martin et al., supra note 11, at 12; see also Gretchen Livingston & Kim Parker, Pew Research Ctr., A Tale of Two Fathers: More Are Active, but More Are Absent 1, 8 (2011), available at http://www.pewsocialtrends.org/files/2011/06/fathers-FINAL-report.pdf (finding that 37% of white fathers have at least one nonmarital child, and 77% have at least one marital child; 72% of black men have a nonmarital child, and 48% have one in marriage; 59% of Hispanic men have a nonmarital child, and 58% have one in marriage).
18. Black fathers are more than twice as likely as white fathers to live apart from their children (44% versus 21%), and 35% of Latino fathers do not live with their children; 40% of fathers who have not completed high school live apart from their children, compared to 7% of fathers who graduated from college. Livingston & Parker, supra note 15, at 2. Fifteen percent of fathers with family incomes of $50,000 or more do not live with at least one child, compared to 39% of fathers with incomes below $30,000 and 38% of fathers with incomes between $30,000 and $49,999. Id. at 12.
The persistence of discrimination against nonmarital families in the law of parentage is inherently problematic, but the harm goes beyond the symbolic. Biology-based parentage rules make children’s legal paternity vulnerable, endangering children in two ways. First, in individual cases, caring, committed relationships between children and their legal fathers can be disrupted more easily. Second, to the extent that legal paternity is vulnerable to challenges, families in general are less stable, creating additional risks to children.

This Article first examines the extent to which current parentage law continues to vary with the parents’ marital status and how parentage law affects family stability. It examines current statutes and recent cases to show that discrimination in paternity law based on the parents’ marital status and, when paternity is challenged, on the gender of the parent, is still widespread in the United States. This review includes statutes about the marital presumption from sixteen states and case law from another ten states. More states are included in the section about paternity determinations outside marriage, which discusses statutes from thirty-one states and cases from thirteen more states. This analysis does not cover every state because some states have neither statutes nor current case law on these topics. The next section of the Article analyzes the impact of the marital status and gender-based differences on children, arguing that they systematically disadvantage nonmarital children. The Article concludes with recommended legislative changes to eliminate marital-status and gender-based rules in ways that will protect the relationships of individual children and their legal fathers and make legal paternity determinations more secure generally. By way of introduction, the next section describes how paternity law has evolved, emphasizing twentieth century constitutional and other developments intended to dismantle discrimination against nonmarital children and their parents and to equalize the parental status of mothers and fathers.

I. The Evolution of Paternity Law—A Brief Survey

From very early in English history, the law of paternity sharply distinguished between children born to married and unmarried women, strongly privileging father–child relationships within marriage. This pattern prevailed well into the twentieth century until the Supreme Court began using the Equal Protection Clause to dismantle the distinction. After these decisions, uniform parentage acts were promulgated that attempted to treat marital and nonmarital children and their fathers equally, as well as equalizing the legal structure of mothers’ and fathers’ relationships to their children. This Section discusses these developments.
A. Paternity at Common Law

The husband of a married woman has long been presumed to be the father of her children, a presumption that at common law could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months.19 This rule not only presumed the existence of a biological relationship between the legal father and child at a time when biological truth was often very uncertain, but it also excluded highly reliable evidence that no biological relationship existed (e.g., the mother’s testimony), protecting the social relationship between a child and the functional father, as well as the integrity of the marriage. The marital presumption continues to be the law in all states, although in all states it is rebuttable, at least in some circumstances.20

In contrast, at common law nonmarital children were bastards, the children of no one;21 although by the early nineteenth century, these children were recognized as legally related to their mothers in most American states.22 During the twentieth century, many states revised their laws, allowing nonmarital children to inherit from their fathers in some circumstances, but many states clung to the old rule that nonmarital children had no right to inherit from their fathers, to receive other financial benefits at the deaths of their fathers, or to be supported during their fathers’ lives.23 And in many states, unmarried fathers had no legal right to custody or visitation.24

This regime began to change in the late 1960s, at a time when about 10% of all children in the United States were born to unmarried women,25 as the Supreme Court started applying the Equal Protection Clause to state statutes that discriminated against nonmarital children and their parents. The first cases held that nonmarital children could not be denied the right to inherit from their parents and receive other death benefits in circumstances when marital children would inherit and receive benefits.26 Another early

20. See infra Section II.A.
21. 1 BLACKSTONE, supra note 19, at 454, 459.
22. GROSSBERG, supra note 3 at 207-15.
23. See id. at 228-33.
24. Id. at 207-10. For a discussion of the state of the law shortly before the Supreme Court entered this arena, see generally Harry D. Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 TEX. L. REV. 829 (1966).
26. The Constitution does not bar all distinctions, but it does prohibit distinctions if there is no means by which a nonmarital child can become entitled to the rights of a child born in marriage. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (finding a statute limiting inheritance rights to legitimate children unconstitutional because it posed an insurmountable
case held that if parents of a child born in marriage could sue for the wrongful death of their child, this right had to be extended to nonmarital parents too. In 1972, the Court first considered the custodial rights of nonmarital fathers, ruling in Stanley v. Illinois that a biological father who had lived with his children and their mother over a period of years and acted as a father was entitled to be recognized as the children’s legal father in a custody matter.

B. The 1973 UPA—Implementing Equal Protection

The 1973 Uniform Parentage Act (the 1973 UPA) was enacted against the backdrop of these constitutional decisions, and its innovative provisions complied with the holdings protecting the relationship of nonmarital children and their fathers in adoption/custody cases and in inheritance and related cases. In some circumstances the 1973 UPA based protections for the father–child relationship on men’s deliberate acts that demonstrated intent to take on the responsibilities of parenthood. Most importantly, the 1973 UPA provided that an unmarried man’s paternity would be presumed if he received a child into his home and held the child out as his.

The 1973 UPA borrowed this concept from older statutes that addressed how an unmarried father could “legitimate” his child, thereby making the child eligible to inherit, and covered cases like Stanley in which a man...
lived with his child and functioned as a father but did not establish paternity formally. The 1973 UPA also allowed an unmarried father to attempt to establish legal paternity by filing a written claim of paternity with the state bureau of vital statistics, which was to inform the mother of the claim. If she did not dispute the claim in writing, his paternity would be rebuttably presumed. This method, which is based on expressed intent to be a parent but not on function, seems to have been designed to ensure that a man could act unilaterally to establish a legal father–child relationship without the explicit cooperation of the mother, as the cases on discrimination based on illegitimacy seem to require.

In addition to these new provisions, the 1973 UPA included statutes that were updated versions of older statutes governing paternity of children born to married women and litigation to establish paternity in contested cases. They provided that if a child was born to a married woman or to a woman within 300 days of the end of her marriage, the child was presumed to be her husband’s. Paternity was also presumed if the parents married after the child was born and the husband acknowledged the child in writing filed with the state office of vital statistics, if he was named as the father on the birth certificate with his consent, or if he was obligated to pay child support by court order or written agreement. The 1973 UPA granted standing only to the child, the mother, and the presumed father to rebut presumptions based on marriage, and the challenge had to be brought within five years of the child’s birth. Any interested person, including an alleged father, could at any time challenge a presumption of paternity based on holding out or filing a claim of paternity with the office of vital statistics. If two men claimed legal paternity under different presumptions, the 1973

33. Id. § 4(b), 9B U.L.A. 393-94.
34. See cases discussed supra note 26. Under the 1973 UPA, nonmarital alleged fathers who fit into either of two categories described in the text was entitled to notice of proceedings affecting the custody of the child. Unif. Parentage Act § 24, 9B U.L.A. 497. In addition, if an adoption petition was filed and named no presumed father, the UPA required the court to determine whether a probable father could be identified by asking whether any man had acted as a father and, in particular, whether the mother was married at conception or thereafter, whether she was living with someone at conception or birth, whether she received support payments or promises of support from anyone, or whether any man has formally or informally declared possible paternity. Id. § 25(b), 9B U.L.A. 499-500. The commentary to the section indicates that the latter provisions were also regarded as necessary to comply with Stanley. Id. § 25 cmt., 9B U.L.A. 500.
35. These statutes date to the common law marital presumption and to bastardy actions at common law. See supra text accompanying notes 19-24.
37. Id.
38. Id. § 6(a)(2), 9B U.L.A. 410-11.
39. Id. § 6(b), 9B U.L.A. 410-11.
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UPA directed the court to prefer the one that was “founded on the weightier considerations of policy and logic.” A challenger had to prove the nonexistence of the relationship by clear and convincing evidence, which, given the state of genetic testing at the time, was and was intended to be a difficult burden to carry. An article published in 1968 said that the commonly used blood tests excluded a man inaccurately identified as the biological father only 55% of the time. In most states at the time, blood-test evidence was ordinarily admissible only to exclude the possibility that a man was the biological father, and in some states the evidence could not be admitted even for this purpose.

The 1973 UPA provisions on paternity litigation based legal paternity on biology. Unlike older laws, the 1973 UPA allowed a man who alleged himself to be the father of a child born outside marriage to bring an action, subject to the limitation on standing to challenge a husband’s presumption of paternity. In a paternity suit, the Act required the court to order the child, the mother, and the alleged father to submit to blood tests on the request of a party without exception. Again, these provisions must also be understood in light of the state of genetic testing at the time.

40. Id. § 4(b), 9B U.L.A. 393-94.
41. Id.
42. See id. § 4 cmt., 9B U.L.A. 393-94.
45. Id. at 104-06.
47. Id. § 11, 9B U.L.A. 445. Section 13 of the Act gave judges limited authority to consider children’s best interests in resolving cases by proposing a settlement after results of blood tests were available. Id. § 13, 9B U.L.A. 457-58. Again, this provision is premised on blood-testing technology that was quite primitive and could not conclusively resolve many cases. It required the judge to evaluate the probability of determining the existence or nonexistence of alleged paternity and whether a judicial determination of paternity would be in the child’s best interests. Id. § 13(a), 9B U.L.A. 457-58. The judge then recommended either (1) dismissal; or (2) that the case be settled by agreement that did not determine parentage but imposed an economic obligation on the man in favor of the child. Id. The court was also allowed to order that the alleged father’s identity be kept confidential if in the child’s best interests. Id. § 13(a)(2), 9B U.L.A. 457. Alternatively, the man could voluntarily acknowledge paternity, or the case could go to trial. Id. § 13(c), 9B U.L.A. 457-58.
C. Child-Support Enforcement and the 2002 UPA

In 1975 Congress established the federal–state child-support enforcement program in response to concerns about the growth in welfare rolls.48 Through the 1970s and 1980s the program concentrated “on enforcing existing support orders issued in divorce and separation cases.”49 As the rate of nonmarital births soared,50 an increasing number of children receiving assistance did not have legal paternity established. By 1989, fourteen years after federal–state child-support enforcement efforts began, paternity was established for only 31% of nonmarital children.51 The federal legislation was amended during the 1980s to increase paternity establishment requirements,52 and the number of paternity establishments more than trebled from 1992 to 2010.53 The rate of nonmarital childbearing also trebled; by 2000, about a third of all births were to unmarried women,54 and by 2011, the percentage had risen to almost 41%.55 Also during the same time period, the science of genetic testing improved dramatically. By the 1990s, in most cases a genetic test could not only exclude a man falsely identified as the biological father but could also positively identify a biological father to near certainty.56

50. See supra note 12 and accompanying text.
54. Ventura & Bachrach, supra note 12, at 5 figs.6 & 7, 28 tbl.4.
55. Martin et al., supra note 11, at 9 tbl.C.
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Based on these developments, it might be assumed that the improvement in genetic testing drove the increase in paternity establishments, but this is not so. Instead, almost all the growth in paternity establishment can be attributed to the success of VAPs. In 1997, 486,786 VAPs were reported to the federal Office of Child Support Enforcement, and in 1998, more than 614,000 were reported.\footnote{FY1998 Annual Report, supra note 53.} In 2010, 1.1 million of the 1.7 million cases in which paternity was established were done by VAP.\footnote{FY 2010 Preliminary Report, supra note 53.} Most of the VAPs are signed at the time of birth at the hospital or other birthing facility, and they can be and usually are signed without genetic testing having been done.\footnote{OFFICE OF CHILD SUPPORT, STATE OF MICHIGAN, FAMILY INDEPENDENCE AGENCY, 100% PATERNITY ESTABLISHMENT PROGRAM, ONE YEAR PILOT SUMMARY (on file with author). In a study of 1,660 unwed births at hospitals, paternity was voluntarily established in 78.5% of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed. Id.}

This emphasis on establishing paternity to facilitate child support collection is expressly noted as a driving force for the new 2002 Uniform Parentage Act (the 2002 UPA),\footnote{Notably, the 2002 UPA adopts the paternity registry, which was resoundingly rejected by the 1988 Uniform Putative and Unknown Fathers Act, as the means for protecting the parental rights of unmarried fathers whose paternity has not been established up to the point that their children are a year old. UNIF. PARENTAGE ACT §§ 401, 404 (amended 2002), 9B U.L.A. 321-24 (2001 & Supp. 2013). The 2002 UPA provides that the parental rights of a man who may be a father may be terminated without notice if the child is not yet one year old and the man has not registered and he is not exempt from registration because paternity has been established in some other way. Id. § 404, 9B U.L.A. 321-24. However, if the child is older than a year, notice of an adoption or termination of a parental rights proceeding must be given to every alleged father, regardless of whether he has registered. Id. § 405, 9B U.L.A. 324; cf. UNIF. PUTATIVE & UNKNOWN FATHERS ACT § 3 cmt., 9C U.L.A. 67-71 (2001) (rejecting the putative father registry, whose constitutionality was upheld in Lehr v. Robertson, 463 U.S. 248 (1983), as obscure and so unlikely to provide meaningful protection to unmarried fathers and creating the possibility that a bad actor would invade the privacy of unmarried mothers and interfere unjustifiably with adoptions). The Putative and Unknown Fathers Act is among the most unsuccessful of the uniform acts, apparently having been enacted in no state.} although the Act also includes important rules basing legal fatherhood on function and intent. Under the 2002 UPA, paternity establishment is largely based on function, intent, or both. 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.\footnote{UNIF. PARENTAGE ACT §§ 201(b)(1), 204(a), 9B U.L.A. 21, 23-24 (Supp. 2013).} If the alleged marriage is void or voidable, the presumption still applies.\footnote{Id. § 204(a)(3)-(4), 9B U.L.A. 311 (2001 & Supp. 2013).} 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...
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.63

The 2002 UPA carries forward from the 1973 UPA the concept of presuming fatherhood of a nonmarital child based on a man holding out a child as his own. The 2002 UPA is more limited than the 1973 version; the man must have lived with and held out the child as his own for at least two years, beginning at birth.64 However, this provision is relatively less important as a practical matter than it was in 1973 because the paternity of most nonmarital children is established by VAPs signed and filed by mothers and alleged fathers, as discussed above.65

In comparison to its provisions on paternity establishment, the approach of the 2002 UPA to paternity disestablishment is more complex. It grants standing to rebut a presumption of paternity to the child, the mother, a man whose paternity is to be adjudicated (including a legal father and an alleged father), the state child support enforcement agency, and adoption agencies.66 An action must be brought within two years of the child’s birth.67 The results of genetic testing are the only way to rebut the presumption,68 and courts have discretion to deny a motion for testing based on findings that the party is estopped to deny paternity and that allowing testing or disestablishing paternity would be contrary to the child’s best interests.69 Commentary to the UPA asserts that these provisions strike a fair balance by granting standing to challenge paternity to all interested parties while imposing a short statute of limitations and a possible estoppel/best interests limit on challenges.70

Unexceptionally, the 2002 UPA implements the federal requirement that a VAP can be set aside only on the basis of fraud, duress, or material mistake of fact, without defining those terms.71 Beyond that, the Act approaches challenges to the legal paternity of a nonmarital child consistently with how it resolves challenges to the marital presumption.72 It grants standing to the child, the mother, and the man whose paternity is to be adjudicated (the legal father or an alleged father), subject to a two-year statute of

63.  Id. § 204(a)(4), 9B U.L.A. 311.
64.  Id. §§ 201(b)(1), 204(a)(5), 9B U.L.A. 21, 24 (Supp. 2013).
65.  See supra text accompanying notes 58-59.
67.  Id. § 608(a), 9B U.L.A. 56 (Supp. 2013). If the presumed father and the mother did not cohabit or engage in sex at the probable time of conception and if the presumed father never held out the child as his, the action may be maintained at any time. Id. § 608(b), 9B U.L.A. 56.
70.  Id. § 607 cmt., 9B U.L.A. 52-53.
72.  See supra text accompanying notes 60-65.
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limitations running from the date of the judgment or VAP.73 Court-ordered genetic testing results are the only basis for setting aside a VAP,74 and, as is the case with children born to married women, courts have authority to deny requests for genetic testing based on findings that the challenger is estopped to deny paternity and that allowing testing or disestablishing paternity would be contrary to the child’s best interests.75 Thus, while biological paternity is the starting point for resolving a challenge to legal paternity under the 2002 UPA, both the statutes of limitation and the court’s discretion to invoke estoppel and best-interests principles give it substantial leeway to protect functional parent–child relationships.

II. PATERNITY LAW TODAY—THE CONTINUED PERSISTENCE OF GENDERED AND CLASS RULES

Abiding themes of both the 1973 and 2002 Uniform Parentage Acts were that marital and nonmarital children should be treated equally by law so far as possible76 and that the law should treat men and women equally in determining their parental status so far as possible.77 While a handful of states have enacted statutes, have case law, or both that implement these ideals, many states have statutes that preserve distinctions in how legal paternity is established or disestablished that protect parents’ choices within marriage far more than when a child is born to an unmarried woman. A number of states also have statutes that privilege men’s choices about whether to remain a legal father over women’s preferences. The development of highly reliable and readily available genetic testing78 is at the root of many of these statutes, which were enacted at the behest of men who learn that they are not the biological fathers of children born to their wives or

76. Indeed, both acts included provisions declaring that children have the same rights under the law, regardless of whether their parents are married or not. Id. § 2, 9B U.L.A. 390 (2001 & Supp. 2013); id. § 202, 9B U.L.A. 309-10.
77. See id. § 106, 9B U.L.A. 308 (“Provisions of this [Act] relating to determination of paternity apply to determinations of maternity.”). In contrast, the 1973 UPA provided simply that maternity was established by proof that the woman gave birth to the child. Id. § 3(1), 9B U.L.A. 391. Assisted reproductive technologies other than simple artificial insemination were still in the future. Nevertheless, mothers and fathers were granted equal roles in establishing and disestablishing paternity. See supra text accompanying notes 38, 46-47.
78. While legal paternity proceedings usually require that the test be court ordered and done by accredited labs, commercial paternity testing services are widely available to resolve suspicions about biological paternity.
girlfriends and who have banded together to fight “paternity fraud.” To demonstrate these developments, this Section first examines paternity statutes and case law that apply when a mother is married and then those that apply to nonmarital children.

A. Married Mothers

The method of establishing legal paternity associated with marriage—the marital presumption—is highly respectful of the choices of the mother and her husband regarding parentage. However, tension between protecting marriage-based paternity on one hand and biological parenthood on the other is immediately apparent when someone wants to challenge the presumption with genetic testing evidence. The most important issues are whether the spouses can introduce evidence to rebut the presumption; whether parties outside the marriage, especially men claiming biological fatherhood, have standing to challenge the presumption; and whether the interests of the affected children are considered in resolving these issues. Current statutes that address rebuttal of the marital presumption and recent cases on the issue are generally protective of the functional relationships and ties between husbands and their wives’ children, at least where the husbands want that protection. However, statutes and cases are less likely to protect mothers’ efforts to prevent the marital presumption from being rebutted by their husbands. This Section first examines current statutes that deal with rebuttal of the marital presumption and then analyzes recent cases from states without such statutes, where development of the law is left to the courts.

1. Statutes That Protect Marital Fatherhood

At least sixteen states have enacted statutes that address in detail who has standing to challenge the marital presumption, whether children’s interests must be considered in deciding whether to allow the presumption to be

79. The author’s recent Google search for the term “paternity fraud” produced more than 1.2 million hits. After a Wikipedia entry on the topic, the top site is PaternityFraud.com whose motto is “If the Genes Don’t Fit You Must Acquit.” PATERNITY FRAUD CENTER, http://www.paternityfraud.com (last visited Nov. 4, 2013).

80. For in-depth analyses of the marital presumption in operation, see Jana Singer, Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption, 65 Md. L. Rev. 246 (2006) (critiquing the recent changes to the marital presumption and arguing that the policy goals of the presumption continue to be valid); and Theresa Glennon, Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity, 102 W. Va. L. Rev. 547, 573-77 (2000). For a survey of recent cases about whether the presumption can be rebutted, see June Carbone & Naomi Cahn, Marriage, Parentage, and Child Support, 45 Fam. L.Q. 219 (2011).
rebutted, or both.\textsuperscript{81} Seven of these states have enacted the provisions of the 2002 UPA without substantial variation (although the duration of the statute of limitations on challenges to the presumption varies among these states). The seven states are Delaware,\textsuperscript{82} New Mexico,\textsuperscript{83} North Dakota,\textsuperscript{84} Oklahoma,\textsuperscript{85} Texas,\textsuperscript{86} Washington,\textsuperscript{87} and Wyoming.\textsuperscript{88} The 2002 UPA grants standing to rebut the presumption to the child, the mother, a man whose paternity is to be adjudicated (including a legal father and an alleged father), the state child-support enforcement agency, and adoption agencies.\textsuperscript{89} An action must be brought within two years of the child’s birth.\textsuperscript{90} The results of genetic testing are the only way to rebut the presumption,\textsuperscript{91} and courts have discre-

\textsuperscript{81} The statutes are discussed in detail in the rest of this Section. The states are Alabama, California, Colorado, Delaware, Iowa, Michigan, Missouri, Oklahoma, Oregon, New Mexico, North Dakota, South Dakota, Texas, Utah, Washington, and Wyoming.

\textsuperscript{82} Del. Code Ann. tit. 13, § 8-204 (2013) (marital presumptions); id. § 8-602 (standing to bring an action to establish parentage); id. § 8-607 (statute of limitations); id. § 8-608 (providing the court authority to deny a motion for genetic testing based on estoppel and the best interests of child).

\textsuperscript{83} N.M. Stat. Ann. § 40-11A-204 (2013) (marital presumptions); id. § 40-11A-602 (standing to bring action to establish parentage); id. § 40-11A-607 (changing the statute of limitations from the UPA to three years after child attains majority); id. § 40-11A-608 (providing the court authority to deny a motion for genetic testing based on estoppel and the best interests of child).

\textsuperscript{84} N.D. Cent. Code § 14-20-10 (2013) (marital presumptions); id. § 14-20-37 (standing to bring action to establish parentage); id. § 14-20-42 (statute of limitations); id. § 14-20-43 (court authority to deny motion for genetic testing based on estoppel and the best interests of child).

\textsuperscript{85} Okla. Stat. tit. 10, § 7700-204 (2013) (marital presumptions); id. § 7700-602 (standing to bring action to establish parentage); id. § 7700-607 (statute of limitations); id. § 7700-608 (providing the court authority to deny a motion for genetic testing based on estoppel and the best interests of child).

\textsuperscript{86} Tex. Fam. Code Ann. § 160.204 (West 2013) (marital presumptions); id. § 160.602 (standing to bring action to establish parentage); id. § 160.607 (statute of limitations); id. § 160.608 (providing the court authority to deny a motion for genetic testing based on estoppel and the best interests of child).


\textsuperscript{88} Wyo. Stat. Ann. § 14-2-504 (2013) (marital presumptions); id. § 14-2-802 (standing to bring action to establish parentage); id. § 14-2-807 (statute of limitations, changed from UPA to five years); id. § 14-2-808 (providing the court authority to deny a motion for genetic testing based on estoppel and the best interests of child).


\textsuperscript{90} Id. § 607(a), 9B U.L.A. 52 (Supp. 2013). If the presumed father and the mother did not cohabit or engage in sex at the probable time of conception and if the presumed father never held out the child as his, the action may be maintained at any time. Id. § 607(b), 9B U.L.A. 52.

tion to deny a motion for testing based on findings that a party is estopped to deny paternity and that allowing testing or disestablishing paternity would be contrary to the child’s best interests.92

In contrast to the UPA, at least six states deny standing to an alleged father to challenge the marital presumption. Four of the six (Alabama,93 California,94 Oregon,95 and Utah96) grant standing only to the husband and wife,97 and the other two (Colorado98 and Iowa99) grant standing to the husband, wife, and children.

Under the Alabama statute, a presumed father may bring an action to disprove paternity at any time.100 Further, he can prevent anyone else from challenging his paternity by “persist[ing] in his status as the legal father.”101 Utah limits the right to challenge the marital presumption to only the mother and her husband.102 However, if the mother and the husband disagree about rebutting the presumption, the mother always bears the burden to prove that her position protects the child’s best interests, regardless of whether she wants to rebut the presumption or prevent the husband from rebutting it. Specifically, if the mother seeks an order denying her husband’s motion for genetic testing, she must prove by a preponderance that his conduct estops him from denying parentage and that disrupting the father–child relationship would be contrary to the child’s best interests.103 On the other hand, if the mother seeks to rebut the presumption of paternity, she must prove by a

93. Ala. Code § 26-17-204 (martial presumptions); Ala. Code § 26-17-203 (standing to bring action to establish parenthood); Ala. Code § 26-17-608 (providing the court authority to deny a complaint seeking to disestablish paternity based on estoppel and equitable considerations); Utah Code Ann. § 78B-15-204 (marital presumptions); Utah Code Ann. § 78B-15-602 (standing to bring action to establish parenthood); Utah Code Ann. § 78B-15-607 (changing the statute of limitations from the UPA to four years if marital presumption applies); Utah Code Ann. § 78B-15-608 (court authority to deny motion for genetic testing based on estoppel and the best interests of child). The other two states, California and Oregon, do not base their statutes on the UPA.
97. Id.
98. Utah Code Ann. § 78B-15-607(1). This provision, which was enacted in 2008, is substantially the same as its predecessor. Pearson v. Pearson, 2008 UT 24, ¶ 10, 182 P.3d 353, 355 n.8. However, Pearson, which is discussed infra note 117, did not apply the statute. Id. ¶ 16.
99. Id. §§ 78B-15-607(1)(b); -608.
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preponderance that disestablishing the father–child relationship is in the child’s best interests.104

In California only a presumed father105 or a mother may seek genetic test evidence to rebut the presumption, and the challenge must be brought within two years of the child’s birth.106 However, the mother may file such a motion only if the child’s biological father has filed an affidavit acknowledging paternity,107 the rights of the presumed father are not so limited.108 An Oregon statute enacted in 2007 also allows either the husband or wife to challenge the marital presumption but denies standing to anyone else to bring a challenge “as long as the husband and wife are married and cohabiting, unless the husband and wife consent to the challenge.”109 Further, under Oregon law a court can admit evidence to challenge a marital presumption only if it finds “that it is just and equitable, giving consideration to the interests of the parties and the child” to do so.110

Two states, Colorado and Iowa, preclude alleged fathers from challenging the marital presumption and grant standing only to husbands, wives, and children.111 The Colorado statute has no additional limits, but Iowa law provides that if genetic tests exclude the husband as the child’s biological father, the court may still dismiss the action to overcome paternity if the husband asks that the relationship be preserved, the court finds that this is in best interests of child, and either the biological father does not object or the

104. Id. § 78B-15-607(1)(c).
105. The California statute applies to any “presumed father,” which is defined in CAL. FAM. CODE § 7611 (West 2013) to include not only mothers’ husbands but also unmarried men who receive children into their homes and openly hold them out as their own.
106. Id. § 7540 (providing that a husband is conclusively presumed to be father of his wife’s children if they were cohabiting and he is not sterile or impotent, subject to the provisions of § 7541); id. § 7541 (allowing the presumption to be rebutted by blood-test evidence). The Supreme Court famously upheld this statute against a due process challenge in Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989). For an in-depth analysis of California parentage law, see June Carbone, From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?, 7 WHITTIER J. CHILD. & FAM. ADVOC. 3 (2007).
107. CAL. FAM. CODE § 7541(c).
108. Id. § 7541(b).
110. Id. § 109.070(3).
111. COLO. REV. STAT. § 19-4-107(1) (2013); IOWA CODE § 600B.41A(3)(a) (2013). At least one other state, Illinois, has a statute that appears to limit standing to challenge the marital presumption to the mother, husband, and child, but it also allows an alleged father to bring an action to establish paternity, which would have the effect of rebutting the presumption. 750 ILL. COMP. STAT. 45/7(b) (2013); see In re G.M., 977 N.E.2d 791 (Ill. App. Ct. 2012) (rejecting the husband’s argument that another man’s suit to establish paternity could not be brought until the marital presumption had been rebutted).
Finally, Michigan grants standing to alleged fathers to challenge the marital presumption, but with limits. An alleged father must not have had reason to know the mother was married at the time of conception, the court must find that his paternity will be legally established, and either (1) the husband, the wife, and the biological father must have openly acknowledged the relationship between the child and the biological father, or (2) the husband must have lived separate and apart from the child or failed to support the child for two years or more. A wife’s ability to rebut the marital presumption is similarly limited. A mother must identify the biological father in the complaint, the court must find that his paternity will be legally established, and either (1) the husband, wife, and biological father all openly acknowledged the relationship between the child and the biological father, or (2) the husband lived separate and apart from the child or failed to support the child for two years or more. These limits on the ability of married women and alleged fathers to challenge the presumption seek to protect responsible husbands who wish to maintain legal paternity and to ensure that, at the end of the day, someone will be identified as a child’s legal father. In addition, in all cases the court may deny a petition to set aside paternity if it finds that this is contrary to the child’s best interests.

While the statutes regarding challenges to the marital presumption that are described above vary in their specifics, they generally protect father–child relationships formed within marriage against disruption by the spouses themselves, outsiders, or both. This legislative trend is not, how-

112. COLO. REV. STAT. § 19-4-107(1); IOWA CODE § 600B.41A(6).
113. MICH. COMP. LAWS § 722.1441(3) (2013). An alleged father may also rebut the marital presumption if he first proves that the woman was not married at the time of conception, even though she was married when the child was born. Id.
114. Id. § 722.1441(1).
115. Id. § 722.1443(4).
116. Id. § 722.1441(2).
117. Curiously, recent cases from two states with these statutes have not applied them when alleged fathers sought to rebut the marital presumption, although they used common law principles to advance the same interests that the statutes protect. In Pearson v. Pearson, 2008 UT 24, 182 P.3d 353, an alleged father sought to establish his paternity by rebutting the marital presumption while the husband and wife were divorcing. Under UTAH CODE ANN. § 78B-15-607(1) (West 2008), only the spouses would have had standing to rebut the presumption, but the court declined to apply the statute. Instead, it relied on In re J.W.F., 799 P.2d 710 (Utah 1990), which concerned whether an alleged father had standing to rebut the presumption and which did not apply the then-governing statute, which was similar to the current statute. Instead, the J.W.F. court determined as a matter of common law that whether a third party has standing to challenge the marital presumption depends on whether allowing
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However, universal. In 2013, South Dakota amended its statutes to grant standing to challenge the marital presumption to “a potential biological father of the child.”¹¹⁸ Before the amendment, only the husband, the wife, and their descendants could attempt to rebut the presumption.¹¹⁹ Nonetheless, even though state legislative decisions about when the marital presumption may be rebutted and by whom are not monolithic, most of the statutes that address rebuttal of the presumption provide special protection to husband–child relationships. Moreover, while many of these statutes are gender neutral in the sense that they provide the same authority to husbands and wives to invoke the protections of the marital presumption, a number protect only a husband’s desires about whether to remain the legal father or privilege his views over those of the mother. Courts generally exercise their common law powers to achieve similar outcomes, as the next Subsection discusses.

¹¹⁸ N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2001) also involved a suit brought by an alleged father to establish his paternity of a child born to a married woman. COLO. REV. STAT. § 19-4-107(1) (2001) says that only the spouses and the child have standing to rebut the presumption and that if the presumption is rebutted another man’s paternity can be established. However, the court did not address this statute. N.A.H., 9 P.3d at 360. Instead, it found that the alleged father also had a presumption in his favor under COLO. REV. STAT. § 19-4-105(1)(f) (2000), because genetic testing showed at least a 97% probability that he was the father. See 9 P.3d at 360. The court then invoked COLO. REV. STAT. § 19-4-105(2)(a), which provides, “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” The court interpreted this language to mean protecting the child’s best interests must be the controlling factor. Id. at 362-63. The case was remanded for a determination of the child’s best interests. Id. at 366.

2. Judicial Protection for Husbands Who Want to Be Legal Fathers

Recent cases about the marital presumption that are not governed by clear statutory rules also tend to protect the legal relationship between the husband and the child where the husband wants to maintain his legal paternity, and they are less likely to preserve the marital presumption where a mother seeks to prevent her husband from rebutting it. Often the cases describe the purpose of the presumption, at least in part, as protecting the child by protecting the caring relationship between the husband and the child. When the husband does not want to preserve the presumption, the reasoning goes, this goal cannot be served.120

Several recent cases rejecting efforts to rebut the marital presumption explicitly invoke the special protections for parenthood that marriage provides. In 2012, the Maryland Court of Appeals in Mulligan v. Corbett confirmed and applied a line of cases that hold that if a husband’s paternity is challenged, the parentage provisions of the state estates and trusts code govern, while if the child’s mother is unmarried, parentage challenges are governed by the family law code.121 The significance of the distinction is that a finding of legal paternity under the family law code must be set aside based on genetic tests unless the man acknowledged the child, knowing he was not the biological father.122 The child’s interests are irrelevant.123 In contrast, under the estates and trusts code, the court considers the child’s best interests in determining whether to allow the marital presumption to be rebut-

120. In most of these cases, the spouses have broken up and the ex-husband is seeking to avoid child-support obligations. Courts generally do not find that the best interests of the child justify requiring him to continue providing financial support for the child. See Harris, supra note 5, at 623 n.77, 629-31. Two recent Florida cases are more unusual, allowing the marital presumption to be challenged by an alleged father when the husband did not want to be involved with the child. L.J. v. A.S., 25 So. 3d 1284, 1285-86, 1289 (Fla. Dist. Ct. App. 2010) (holding that the biological father had standing to file a paternity suit despite the marital presumption where the husband did not oppose the suit but the mother did); J.T.J. v. N.H., 84 So. 3d 1176, 1177-78, 1180 (Fla. Dist. Ct. App. 2012) (allowing the biological father to establish paternity over the objection of the married mother where the mother and the husband had both relinquished the child for adoption, and the husband did not oppose the biological father’s suit). Depending on one’s point of view, the effect of these cases is either to benefit the child by giving him or her two parents or to thwart the mother’s wish to exclude the biological father from the child’s life without considering whether she might have a good reason to do so.

121. 45 A.3d 243, 252-61 (Md. 2012).


123. Id. § 5-1038(b). The statute was enacted to overrule Tandra S. v. Tyrone W., 648 A.2d 439, 449-50 (Md. 1994), which held that a man could not have a judgment of paternity set aside because of res judicata. See also Langston v. Riffe, 754 A.2d 389, 392 (Md. 2000) (interpreting the statute as absolute and not allowing consideration of the child’s best interests).
The leading Maryland cases explain that when a child is born to a married woman and two men claim paternity, it is “‘more satisfactory’ and ‘less traumatic’” to use the trusts and estates code than the family law code.125

Another example of a creative interpretation of statutes and common law doctrines to protect a husband is the 2012 decision by the Georgia Supreme Court in Brine v. Shipp.126 In that case the court held that the trial court lacked subject-matter jurisdiction over an alleged biological father’s action to establish his paternity.127 The court ruled that the alleged father’s suit amounted to an action to terminate the husband’s parental rights, which can be brought only in juvenile court under Georgia law.128 The court rejected the alleged father’s argument that the action was “primarily” a paternity establishment case, over which the court would have had jurisdiction.129

Courts in a number of other states have adopted more straightforward strategies that allow protection of husbands who want to retain their parental status, such as precluding rebuttal when contrary to the child’s best inter-

124. The leading case for this proposition is Turner v. Whisted, 607 A.2d 935, 938, 940 (Md. 1992). More recent cases are Evans v. Wilson, 856 A.2d 679 (Md. 2004); and Kamp v. Dep’t of Human Servs., 980 A.2d 448 (Md. 2009) (holding that a court should make the best interests determination before ordering genetic tests and that genetic tests are not in a child’s best interests when the husband acted as the father for the last thirteen years and alternatively holding that the husband was stopped to deny paternity).
125. Turner, 607 A.2d at 938 (quoting Thomas v. Solis, 283 A.2d 777, 781 (Md. 1971)).
126. 729 S.E.2d 393, 394 (Ga. 2012).
127. Id.
128. Id. at 395-96. In contrast, the court in In re G.M., 977 N.E.2d 791, 795-98 (Ill. App. Ct. 2012), held that a married woman’s suit to establish the paternity of a man other than her husband was a paternity action, to which a twenty-year statute of limitations applied, rather than an action to disestablish paternity, which had a two-year statute of limitations. The husband argued that the issue should be resolved so that a suit to establish paternity in another man could not be brought until the husband’s paternity had been disproven, but the court pointed to a statute allowing a mother to bring a paternity suit even though paternity was already presumed in another man. Id. at 794-95 (citing 750 Ill. Comp. Stat. 45/7(a) (2008)).
129. Brine, 729 S.E.2d at 396; see also N.J. Div. of Youth & Family Servs. v. D.S.H., 40 A.3d 734 (N.J. Super. Ct. App. Div. 2012) (reversing the juvenile court order terminating the mother’s parental rights so that the child could be adopted by the husband, who is not child’s biological father according to the mother; explaining that the husband was presumed to be the child’s legal father, the presumption was not rebutted, and, thus, there was no need for termination and adoption); Boone v. Ballinger, 228 S.W.3d 1, 3 (Ky. Ct. App. 2007) (reversing holdings that the biological father and mother were estopped to rebut the marital presumption over the husband’s objection and that the husband was a de facto parent when the facts did not fit these doctrines, but remanding for a determination of whether the biological father had waived his right to claim paternity by not stepping up to assume parental responsibilities more promptly).
In theory, estoppel could be invoked against any party, but it is most often successfully asserted against mothers who seek to terminate their husbands’ paternal status. In some cases, these tools are used in conjunction with other doctrines that protect husbands. A 2012 decision from the Pennsylvania Supreme Court is illustrative. The Pennsylvania courts have long held that where the marriage is intact, the marital presumption can be overcome only by “clear and convincing evidence . . . that the presumptive father had no access to the mother or . . . was physically incapable of procreation.”

However, the courts have also decided that the presumption does not apply if the marriage is not intact or if the parties know that the husband is not the child’s biological father, but stay together anyway. The rationale for the latter principle is that recognizing the presumption is not necessary to “protect [a] marriage from the effects of disputed paternity.” This does not necessarily mean, however, that a husband will lose legal paternity in such a situation. In K.E.M. v. P.C.S., the Pennsylvania Supreme Court applied these principles in a case where the husband knew that he was not the biological father, meaning that the presumption did not protect him. The court nevertheless ruled that the mother could not rebut the presumption over the husband’s objection if she was estopped to deny his paternity. It rejected her argument that the court should abolish the doctrine of paternity by estoppel, saying that it protects the child’s interests.

Another common example of a judicial strategy to protect husband–child relationships is the resolution of clashing presumptions of paternity. In all states, two different men may benefit from a presumption of paternity. Less often, the best interests criterion is used to prevent a husband from rebutting the marital presumption.

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134. B.S., 782 A.2d at 1036.


136. Id. at 800, 803.

137. Id. at 810.
presumption based on positive results of genetic testing. In most states, the presumption that prevails is the one that advances the child’s best interests, which often results in preserving the husband’s functional relationship with the child rather than establishing the legal paternity of the biological father.

As this discussion has shown, when courts are not limited by statutes dictating specific results, they are likely to craft rules for determining the parentage of children born in marriage that protect the legal relationship of husbands and children, just as some legislatures do. However, this outcome is much more likely when the husband desires to preserve the relationship than when he does not. The modern-day rationale for this rule is usually that only then is preserving the relationship in the child’s best interests. The result is that when the wishes of mothers and presumed fathers clash, men are more likely to win than women are. The next Section examines rules for determining paternity when a child is born to an unmarried woman and compares them to the rules for marital children.

B. Unmarried Mothers

Determining the extent to which the law protects functional and intended father–child relationships when children are born to unmarried mothers requires examining both the laws regarding formation of the legal father–child relationship and those regarding disestablishment of paternity. Current law and practice is quite protective of the wishes of unmarried mothers and alleged fathers who agree that they want to establish the man’s relationship. Federal child-support law requires state law to “create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.” 42 U.S.C. § 666(a)(5)(G) (2006). Some states also have statutes that presume paternity when a man lives with and holds out a child as his. See infra text accompanying note 143.

See, e.g., N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000), discussed supra note 117; In re Jesusa V., 85 P.3d 2, 22 (Cal. 2004); Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Doe v. Doe, 52 P.3d 255 (Haw. 2002); GDK v. State, Dep’t of Family Servs., 2004 WY 78, ¶¶ 15-16, 92 P.3d 834, 837-38 (Wyo. 2004); see also Dep’t of Revenue ex re l. Garcia v. Iglesias, 77 So. 3d 878 (Fla. Dist. Ct. App. 2012); In re Paternity of B.J.H., 573 N.W.2d 99, 100-02 (Minn. Ct. App. 1998) (holding that the best interests is a factor but is not controlling in choosing between competing presumptions of paternity). In contrast, the court in Courtney v. Roggy, 302 S.W.3d 141, 149 (Mo. Ct. App. 2009), interpreted the Missouri statutes on clashing presumptions as obviously favoring the presumption supported by biological paternity. The statutes typically provide that in resolving the clash, a court should prefer the presumption that on the facts is founded on the “‘weightier considerations of policy and logic.’” Id. at 146. This language is taken from the 1973 UPA, upon which a number of state statutes are based. Unif. PARENTAGE ACT § 4(b) (amended 2002), 9B U.L.A. 393-94 (2001 & Supp. 2013); see supra Section I.B. The 2002 UPA does not include this principle, relying instead on the court’s authority to use estoppel to protect a child’s relationship to a presumed father. Unif. PARENTAGE ACT § 204 cmt., 9B U.L.A. 24-25 (Supp. 2013).
legal paternity, since most nonmarital children’s paternity is established by a voluntary acknowledgment of paternity (VAP). The importance of this should not be underestimated, since in most cases legal paternity, once established, is not set aside. However, the law of paternity disestablishment for nonmarital children gives less weight to legal parents’ decisions to create father–child ties, at least when legal fathers who discover that they are not biological fathers want out. In contests between mothers and legal fathers, the law often protects the fathers’ positions, implicitly or explicitly endorsing the view that the men have a strong claim to relief because they have been duped or defrauded by the women. In many situations, children’s interests in maintaining legal ties with their legal fathers are ignored or deemed to have been irrevocably damaged when the legal father wants to leave. The law also tends to privilege biological paternity when third parties seek to set aside determinations of other men’s legal paternity on the basis of genetic testing, although functional father–child relationships are more likely to be protected here when the legal father wants to continue in his role.

This Section first examines the laws that governing establishment of paternity of nonmarital children and then looks at the more numerous and complex rules for disestablishing their paternity.

1. Establishing Paternity

All states allow unmarried parents to establish legal paternity without having to prove that the man is the biological father by executing a VAP. In addition, in at least nineteen states statutes provide that a man is presumed to be a child’s father if he has lived with and held out the child as his own. In theory, the holding-out statutes do not require that the child’s mother cooperate with the man in satisfying this criterion for presumed paternity, since the child could be living with the man over the mother’s objection. However, as a practical matter, cases that fit into this category generally involve mothers and alleged fathers living together with the child. The states with holding-out statutes are Alabama, California, Colorado, Delaware, Hawaii, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Mexico, Oklahoma, North Dakota, New Hampshire, New Jersey,

141. See supra text accompanying note 58.
142. The federal statutes establishing the state–federal system for providing assistance to needy children and their families require that states set up VAP regimes that satisfy federal rules. 42 U.S.C. § 666(a)(5)(C).
143. The 2002 UPA includes such a presumption and requires that the man have lived with the child during the first two years of the child’s life. UNIF. PARENTAGE ACT §§ 201(b)(1), 204(a)(5), 9B U.L.A. 21, 23-24 (Supp. 2013). The 1973 UPA did not include this time limitation. Id. § 4, 9B U.L.A. 393-94 (2001 & Supp. 2013).
Pennsylvania, Texas, Washington, and Wyoming. Seven of the states with holding-out statutes follow the 2002 UPA by requiring that the man live with the child during the first two years of the child’s life, and the other twelve impose no time limit. These “holding-out” statutes, like the VAP provisions, recognize legal paternity based on intention, function, or both. While they are less important today because VAPs are filed at or near birth for the majority of children born to unmarried women, it is symbolically and sometimes practically significant that in almost 40% of the states, paternity can be established in this alternate way.

Finally, all states allow both mothers and alleged fathers to bring paternity or filiation suits to establish legal paternity, as required by the federal child-support law. This form of paternity establishment is, in principle, not based on intent or function, but on biology, and the great majority of paternity suits today involve parents who have not agreed that the father should be recognized and have a role in the child’s life, since parents who have such agreements can use the much easier VAP process. Instead, paternity or filiation suits are usually brought as part of child-support enforcement proceedings, which are by definition adversarial in form and typically involve poor people (where the mother and child are receiving public assistance). In compliance with federal child-support requirements, state laws allow paternity suits to be resolved by a default judgment, and, even if both parties appear, cases can be settled without genetic testing. Alleged

146. See supra text accompanying note 58.
147. 42 U.S.C. § 666(a)(5)(L) (requiring that both mothers and alleged fathers have standing to initiate proceedings to establish paternity).
148. A Wisconsin study of nonmarital children born in 1997, 2000, and 2005 found that the means by which paternity was established was strongly related to whether formal child-support-enforcement measures were taken against a father. Patricia R. Brown & Steven T. Cook, A Decade of Voluntary Paternity Acknowledgment in Wisconsin: 1997-2007, at 1, 22 (2008), available at http://www.irp.wisc.edu/research/childsppolicy/pdfs/T12-VolPat97-07-Report.pdf. That study found that 99% of men whose paternity was established by adjudication were subject to formal child-support-enforcement efforts by the state; in comparison, only 73 to 79% of the men who had signed VAPs were in the child-support-enforcement database. Id. at 22, 23 tbl.5.
fathers who believe that they are in fact biological fathers can be motivated by finances to forego testing, since a state may recover the costs of testing from the man if paternity is established. One result of these rules is that men’s efforts to set judgments aside based on later tests showing that they are not biological fathers are not uncommon, and they are often regarded sympathetically by both courts and legislatures, as the next two sections show.

2. Setting Aside Judgments of Paternity and VAPs

Absent a statute creating a contrary rule, final paternity judgments are res judicata, and extraordinary circumstances must be shown to set them aside. Generally, to set aside a default judgment, a party must prove that the failure to appear resulted from excusable neglect. If a judgment is challenged based on fraud or material mistake, the challenger must have exercised due diligence in attempting to discover the true facts and made a reasonable effort at trial to ascertain the truth. If the challenge is based on material mistake, the mistake must have amounted to “denial of a fair hearing because of the plainly insufficient representation of a party or denial by the court of the opportunity to present a claim or a defense.”

150. If the state child-support agency orders the test, it must pay for it, but it can recover the cost from the father if paternity is established. Id. § 666(a)(5)(B)(ii)(I). The federal child-support provisions require states to be aggressive in establishing paternity to receive federal funds. As a condition of receiving federal funds for their child-support enforcement and Temporary Assistance to Needy Families (TANF) programs, all states must seek to attain a 90% paternity establishment rate. Id. § 652(g)(1)(A). States with rates below that level must show steady improvement. Id. § 652(g)(1)(B)-(F). If states do not meet these goals, they will lose TANF funds. Id. § 609(a)(5). States with paternity establishment rates above 50% receive incentive payments that increase as the rate increases. Id. § 658a(b)(6).

151. A national study conducted in the early 2000s found that for any man who was tested for paternity in a child-support office there was a 72% probability that the test would show that he was the father. David Bishai et al., A National Sample of US Paternity Tests: Do Demographics Predict Test Outcomes?, 46 TRANSFUSION 849, 850-52 (2006). The rate varied little across racial or ethnic lines. Id. at 852. The differences among racial and ethnic groups were not statistically significant. Id. This does not mean, of course, that in almost a quarter of all cases in which a man is believed to be the biological father of a child, he is not. Other 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 United States, 98% of the men raising children they believe to be their biological children are correct and that only about 30% of the men who seek blood tests to confirm paternity are not the biological father. Anderson, supra note 2, at 516.

152. RESTATEMENT (SECOND) OF JUDGMENTS § 67(1) cmt. b (1982) (“[W]hat must be shown is that the failure to respond was attributable to mishap and not indifference or deliberate disregard of the notice. In the case of ordinary individuals, the test is in essence one of good faith.”).

153. Id. §§ 70(2), 71(1).

154. Id. § 71(2)(c).
In theory, setting aside VAPs should be governed by legal rules similar to those that apply to setting aside judgments, since federal law requires that a VAP have the status of a legal finding of paternity once it is filed with the state office of vital statistics.\footnote{155} The federal rules for rescinding and challenging VAPs are consistent with this theory. They require that a VAP not “become final” until sixty days after it was signed; more specifically, they require that either party be allowed to rescind a VAP within sixty days of signing or the date of any judicial or administrative proceeding relating to the child, whichever occurs first.\footnote{156} After that, a VAP can be challenged only on the ground of fraud, duress, or material mistake of fact.\footnote{157}

When a paternity judgment or VAP is challenged after it becomes final, the most common issues are what constitutes fraud or material mistake; what is the significance of a party’s failure to ask for genetic testing before the judgment becomes final or the VAP is filed; and whether third parties, particularly alleged fathers, have standing to challenge the judgment or VAP.


At least five states have statutes that allow a man who claims to be a child’s biological father to challenge another man’s legal paternity, but do not address whether genetic evidence is sufficient to prevail on such a challenge.\footnote{158} Statutes that say genetic evidence alone may be sufficient to set aside a paternity determination are much more common; at least half the states have them,\footnote{159} and many, though not all of these statutes, also address whether an alleged father has standing to bring a challenge.\footnote{160} In general, statutes about setting aside paternity judgments and VAPs are less protective of nonmarital fatherhood than are statutes about rebuttal of the marital presumption. Moreover, many of these statutes are not gender neutral, as they allow a legal father, but not the mother, to disestablish paternity based solely on genetic evidence.

\begin{itemize}
\item \footnote{155} 42 U.S.C. § 666(a)(5)(D).
\item \footnote{156} Id. § 666(a)(5)(D)(ii).
\item \footnote{157} Id. § 666(a)(5)(D)(iii).
\item \footnote{158} HAW. REV. STAT. § 584-6(a) (2013); M N N. STAT. § 257.57(1)(b) (2013) (imposing a two-year statute of limitations); MONT. CODE ANN. § 40-6-107(1) (2013); NEV. REV. STAT. § 126.071(1) (2013); N.J. STAT. ANN. § 9:17-45(a) (West 2013); see also COLO. REV. STAT. § 19-4-107(3) (2013) (listing who may bring a paternity action if a child has no presumed father, which includes an alleged father). Some states appear to deny standing to alleged fathers by excluding them from the list of people and entities allowed to bring an action. See, e.g., CAL. FAM. CODE §§ 7575, 7646 (West 2013); OR. REV. STAT. § 109.070(2)(a), (5)(b) (2013).
\item \footnote{159} See infra notes 181-88.
\item \footnote{160} See infra notes 181-88.
\end{itemize}
Eight states have statutes with substantive rules identical or similar to those of the 2002 Uniform Parentage Act. Seven of these states have adopted the language of the 2002 UPA entirely or with minor variations; they are the same states that adopted the 2002 UPA sections regarding rebuttal of the marital presumption—Delaware, New Mexico, North Dakota, Oklahoma, Texas, Washington, and Wyoming. The eighth state, Michigan, has substantively similar rules.

The 2002 UPA (and the states that have enacted it) implement the federal requirement that a VAP can be set aside only on the basis of fraud, duress, or material mistake of fact. Beyond that, the 2002 UPA approaches challenges to the legal paternity of a nonmarital child consistently with how

161. Del. Code Ann., tit. 13, § 8-602 (2013) (standing); id. § 8-608 (providing the court authority to deny motion for genetic testing based on estoppel and the best interests of child); id. § 8-609 (statute of limitations); id. § 8-631 (providing that court-ordered genetic testing is required before paternity can be set aside). In addition, Delaware law provides that if a paternity finding was based on fraud, duress, or material mistake of fact and the court finds by clear and convincing evidence that disestablishing paternity would be in the child’s best interests, the court may set aside paternity outside the statute of limitations period. Id. § 8-606(e).

162. N.M. Stat. Ann. § 40-11A-602 (2013) (standing); id. § 40-11A-608 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child); id. § 40-11A-609 (changing the statute of limitations from the UPA to three years after child attains majority); id. § 40-11A-631 (providing that court-ordered genetic testing is required before paternity can be set aside).

163. N.D. Cent. Code § 14-20-37 (2013) (standing); id. § 14-20-43 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child); id. § 14-20-44 (statute of limitations); id. § 14-20-52 (providing that court-ordered genetic testing is required before paternity can be set aside).

164. Okla. Stat. tit. 10, § 7700-602 (2013) (standing); id. § 7700-608 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child if paternity is established by acknowledgment); id. § 7700-609 (statute of limitations); id. § 7700-631 (providing that court-ordered genetic testing is required before paternity can be set aside).

165. Tex. Fam. Code Ann. § 160.602 (West 2013) (standing); id. § 160.608 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child); id. § 160.609 (extending the statute of limitations to four years instead of two); id. § 160.631 (providing that court-ordered genetic testing is required before paternity can be set aside).

166. Wash. Rev. Code § 26.26.505 (2013) (standing); id. § 26.26.535 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child); id. § 26.26.540 (extending the statute of limitations to four years); id. § 26.26.600 (providing that court-ordered genetic testing is required before paternity can be set aside).

167. Wyo. Stat. Ann. § 14-2-802 (2013) (standing); id. § 14-2-808 (giving the court authority to deny a motion for genetic testing based on estoppel and the best interests of child); id. § 14-2-809 (statute of limitations); id. § 14-2-817 (providing that court-ordered genetic testing is required before paternity can be set aside).


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it resolves challenges to the marital presumption.\textsuperscript{170} It grants standing to the child, the mother, and the man whose paternity is to be adjudicated (the legal father or an alleged father), subject to a two-year statute of limitations running from the date of the judgment or VAP.\textsuperscript{171} Under the 2002 UPA, a judgment or a VAP can be set aside only if court-ordered genetic testing eliminates the established father as the biological father,\textsuperscript{172} and, as is the case with children born to married women, courts have authority to deny requests for genetic testing based on findings that the challenger is estopped to deny paternity and that allowing testing or disestablishing paternity would be contrary to the child’s best interests.\textsuperscript{173}

Michigan revised its statutes in 2012 to create a regime similar, but not identical, to the 2002 UPA. The mother, the established father, and an alleged father have standing to challenge a paternity judgment or a VAP, and the action must be brought within three years of the child’s birth or one year after the VAP was signed or the judgment was entered, whichever is later.\textsuperscript{174} A court may refuse to enter an order setting aside a paternity determination based on the finding that to do so would not be in the child’s best interests.\textsuperscript{175}

Two more states have parentage statutes based on the 2002 UPA,\textsuperscript{176} but they deviate from the Act in significant ways. Alabama has adopted the 2002 UPA sections that grant standing to an alleged father,\textsuperscript{177} but Utah allows only alleged fathers to challenge judgments and not VAPs.\textsuperscript{178}

\textsuperscript{170} See supra notes 62-64, 66-70 and accompanying text.
\textsuperscript{173} Id. §§ 608-609, 9B U.L.A. 56-58 (Supp. 2013).
\textsuperscript{174} MICH. COMP. LAWS § 722.1437(1) (2013) (providing for standing to challenge VAP and statute of limitations; “prosecuting attorney” also has standing); id. § 722.1437(2) (providing the following grounds: mistake of fact, newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed, fraud, misrepresentation or misconduct, and duress); id. § 722.1439(1) (providing for standing to set aside judicial finding of paternity and statute of limitations on grounds that order was based on affiliated father’s failure to appear).
\textsuperscript{175} Id. § 722.1443(4). Interpreting an earlier version of this statute, the court in Sinicropi v. Mazurek, 729 N.W.2d 256, 264 (Mich. Ct. App. 2006), held that an alleged father did not have standing to challenge a VAP, but the mother did, and the court seemed to assume that genetic testing was sufficient to show mistake. Nevertheless, the court held the VAP should not have been set aside because the mother did not prove that revocation was proper given the equities of the case, and ultimately affirmed an order of custody in favor of the man who had signed the VAP. Id. at 277.
\textsuperscript{176} Both states require genetic testing to disestablish the parentage of a legal father and give courts discretion to decline to order genetic testing for estoppel and best-interests reasons. ALA. CODE §§ 26-17-631, -608 (2013); UTAH CODE ANN. §§ 78B-15-617, -608 (West 2013).
\textsuperscript{177} ALA. CODE § 26-17-602.
\textsuperscript{178} UTAH CODE ANN. §§ 78B-15-602, -609.
longer statutes of limitations than does the 2002 UPA,\textsuperscript{179} and Alabama has no statute of limitations.\textsuperscript{180} Most significantly, both states provide that genetic testing alone is sufficient to require setting aside a paternity determination in some circumstances. The Utah statute is more modest; it says that genetic test results that exclude a man who signed a VAP constitute a material mistake of fact; the effect is to allow a VAP to be set aside at any time within the statute of limitations of four years because the man is not the biological father unless the court invokes the estoppel and best-interests principles.\textsuperscript{181} The Alabama statute says a man whose paternity was established by a VAP or a court order may reopen the case if he produces genetic-testing evidence showing he is not the biological father.\textsuperscript{182} Reconsideration of paternity under this statute is apparently not subject to the discretionary estoppel/best-interests limitation. The effect is to give a man adjudicated to be the father or who signed a VAP the absolute right to have his legal paternity disestablished based on genetic evidence.

In addition to Alabama and Utah, at least fifteen more states have statutes that effectively require determinations of legal paternity of nonmarital children to be set aside on the basis of genetic testing alone in some circumstances. The states are Alaska, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Nebraska, Ohio, Oregon, and Virginia.\textsuperscript{183} Like Alabama and Utah, nine or ten of these states only allow the man whose paternity had been established to raise the challenge,\textsuperscript{184} while the other five do not include this limitation.\textsuperscript{185} Two of the

\begin{itemize}
\item A challenge based on fraud or duress has no statute of limitations, while a claim of material mistake of fact must be brought within four years of the time the VAP was filed. Utah Code Ann. § 78B-15-307(1), (4); see also Unif. Parentage Act § 609 (amended 2002), 9B U.L.A. 58 (Supp. 2013).
\item Ala. Code § 30-3A-609.
\item Ala. Code § 26-17A-1(a); id. § 26-17A-308(a) (applying § 26-17A-1 to VAPs).
\item See infra notes 184-87 and accompanying text. The Virginia statute on its face gives the man an absolute right to set aside a paternity determination if genetic testing shows that he is not the biological father. Va. Code Ann. § 20-49.10 (2013). However, in Wooddell v. Lagerquist, No. 2121-11-3, 2012 WL 5866481, at *7 (Va. Ct. App. Nov. 20, 2012), the court held that if the Virginia statute is invoked in a case where paternity was established by a VAP, the challenger must first prove fraud, duress, or material mistake, thereby reconciling the statute with the usual rule about VAPs. In the same case, the court suggested that genetic evidence alone might be sufficient to prove mistake. Id. The statute can be applied literally in cases where paternity was established by adjudication.
\item Alaska Stat. § 25.27.166(a) (2013); Ark. Code Ann. § 9-10-115(e), (f)(1)(A) (2013) (entitling a man to one paternity test during the time he is obligated to pay child support if genetic testing was not done; if the test excludes him, the court must set aside paternity); Colo. Rev. Stat. § 19-4-107.3 (2013); Fla. Stat. § 742.18 (2013); Ga. Code Ann. § 19-7-54(a) (2013); 750 Ill. Comp. Stat. 45/7(b-5) (2013); Ind. Code § 16-37-2-2.1(k), (l), (n) (2013) (allowing a man, but not a woman, who signed a VAP to seek an order for genetic testing); Ind. Code § 16-37-2-2.1(h)(5) (providing that if the parties agree in a paternity
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states limit this privilege to cases in which the parties signed a VAP,\textsuperscript{186} five to adjudicated cases,\textsuperscript{187} and nine apply it to both.\textsuperscript{188} Many of the statutes also allow or require courts to set aside child support orders, sometimes including liability for unpaid arrearages,\textsuperscript{189} indicating that a primary motivation for these statutes is relieving men of financial obligations to children whom they did not sire.

affidavit to have joint legal custody, the parties must submit results of genetic testing showing that the man is the biological father within sixty days of child’s birth or the agreement is void; MO. REV. STAT. §§ 210.823(2), 854(1) (2013); OHIO REV. CODE ANN. §§ 3119.961-962 (West 2013); see also MISS. CODE ANN. § 93-9-9(4) (2013) (providing that the time for rescinding a VAP extends from sixty days to one year during which the father is entitled to genetic testing, and the time limit is tolled from the date the father asks for testing).

185. CAL. FAM. CODE § 7646(a) (West 2013) (declaring that a judgment of paternity may be set aside on a motion of the mother, established father, or child if genetic tests indicate the man is not the biological father); CAL. FAM. CODE § 7575(b) (discussing VAPs); MD. CODE ANN., FAM. LAW § 5-1038 (LexisNexis 2013); NEB. REV. STAT. § 43-1412.01 (2013); OR. REV. STAT. § 416.443 (2013); VA. CODE ANN. § 20-49.10. However, in Wooddell, 2012 WL 5866481, at *6, the court held that if the Virginia statute is invoked in a case where paternity was established by a VAP, the challenger must first prove fraud, duress, or material mistake, thereby reconciling the statute with the usual rule about VAPs. In the same case, the court suggested that genetic evidence alone might be sufficient to prove mistake. Id. at *7; see also CONN. GEN. STAT. § 46b-172(a)(2) (2013) (declaring that, for purposes of challenging a VAP on the basis of fraud, duress, or material mistake of fact, evidence that the man is not the biological father is relevant).

186. CONN. GEN. STAT. § 46b-172(a)(1)-(2) (providing that, for purposes of challenging a VAP on the basis of fraud, duress, or material mistake of fact, evidence that the man is not the biological father is relevant); MISS. CODE ANN. § 93-9-9(4) (extending the time limit for rescinding a VAP to one year and providing that a man has the right to genetic testing within that year); see also IND. CODE § 16-37-2-2.1(k), (l), (n) (providing that a man who signs a VAP may file for a genetic test within the sixty-day rescission period, and a VAP may be rescinded after the sixty-day period if a court finds fraud, duress, or material mistake and a genetic test indicates that the man is not the biological father).

187. COLO. REV. STAT. § 19-4-107.3; ALASKA STAT. § 25.27.166(a) (allowing paternity to be set aside if it was established other than by court order or VAP and if no genetic tests were done); FLA. STAT. § 742.18; GA. CODE ANN. § 19-7-54; NEB. REV. STAT. § 43-1412.01.

188. ARK. CODE ANN. § 9-10-115; CAL. FAM. CODE §§ 7646(a), 7575; 750 ILL. COMP. STAT. 45/7(b-5), 45/16 (allowing challenges to any adjudication based on the presumption that the man was the father where the presumption arises from marriage or a VAP); IOWA CODE § 600B.41A(3)(a)(1) (providing that if paternity is established by a VAP, the challenger must also show fraud, duress, or material mistake); MD. CODE ANN., FAM. LAW § 5-1038; MO. REV. STAT. §§ 210.823, 854; OHIO REV. CODE ANN. §§ 3119.961-962; OR. REV. STAT. § 416.443 (permitting challenges to administrative orders of paternity and VAPs, but not court orders); VA. CODE ANN. § 20-49.10; Wooddell, 2012 WL 5866481, at *6-7 (interpreting VA. CODE ANN. § 20-49.10 (2012) as requiring proof of fraud, duress, or material mistake if paternity is established by VAP, but suggesting that genetic evidence is sufficient to establish mistake).

189. COLO. REV. STAT. § 19-4-107.3(1)(b); ALASKA STAT. § 25.27.166(d); ARK. CODE ANN. § 9-10-115(f)(1)(B)-(C); FLA. STAT. § 742.18(5); GA. CODE ANN. § 19-7-54(d); NEB. REV. STAT. § 43-1412.01.
Five of the statutes, like Alabama’s, are absolute in their terms and do not set time limits on actions to set aside paternity. Six impose statutes of limitations, ranging from one to three years. Two give courts discretion to deny an action to set aside based on the child’s best interests, three allow a court to deny relief based on some variation of estoppel, and three allow vetoes based either on best interests or some kind of estoppel.

190. Ark. Code Ann. § 9-10-115(e) (providing that an action may be brought at any time while a man is ordered to pay child support); Fla. Stat. § 742.18; Ga. Code Ann. § 19-7-54(a), (d); Md. Code Ann., Fam. Law § 5-1038; Neb. Rev. Stat. § 43-1412.01.

191. Colo. Rev. Stat. § 19-4-107.3(2)(a) (providing for a statute of limitations of two years from entry of order of parentage); Alaska Stat. § 25.27.166 (“within three years after the child’s birth or three years after the petitioner knew or should have known of the father’s putative paternity of the child, whichever is later”); Cal. Fam. Code § 7646(a) (allowing an action within two years of when father knew or should have known of action establishing his paternity); Cal. Fam. Code § 7575(b)(3)(A) (allowing an action within two years of child’s birth); 750 ILL. Comp. Stat. 45/8(a)(4) (allowing an action within two years after the petitioner obtained actual knowledge of relevant facts); Miss. Code Ann. § 93-9-9(4) (allowing for a challenge effectively one year from date of VAP); Or. Rev. Stat. § 416.443(2)-(3) (allowing an action within one year from the administrative order of paternity or filing of a VAP).

192. Cal. Fam. Code § 7648 (providing that the action to set aside judgment may be denied based on the best interests of the child); Cal. Fam. Code § 7575(b) (providing that the action to set aside a VAP may be denied based on best interests of the child); Iowa Code § 600B.41A(6) (providing that the court may dismiss an action to overcome paternity if the legal father asks that the relationship be preserved, the court finds that this is in the best interests of the child, and the biological father does not object or the court terminates his parental rights).

193. See Fla. Stat. § 742.18(2)-(3); Ga. Code Ann. § 19-7-54(b); Va. Code Ann. § 20-49.10 (providing no relief if a man acknowledges a child knowing he is not the biological father). Fla. Stat. § 742.18, which is similar to the Georgia provision, provides in relevant part:

(2) The court shall grant relief on a petition filed in accordance with subsection (1) upon a finding by the court of all of the following:

   . . . .

   (c) The male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

   (d) The male ordered to pay child support has not adopted the child.

   (e) The child was not conceived by artificial insemination while the male ordered to pay child support and the child’s mother were in wedlock.

   (f) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

(3) Notwithstanding subsection (2), a court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:
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In total, more than half the states have enacted statutes that allow a legal determination of the paternity of a nonmarital child to be set aside based on evidence that the legal father is not the biological father without additional evidence of fraud, duress, mistake, or something equivalent. Counting the states that have adopted the provisions of the 2002 UPA, eighteen allow courts to refuse to set aside a judgment or a VAP based on estoppel or the child’s best interests, or both, but the remainder do not. Thirteen states have statutes of limitations on motions to disestablish paternity in some or all cases; in the other states, a legal determination of paternity is vulnerable to challenge at least throughout the child’s minority. And almost half of these statutes are not gender neutral but instead empower only the legal father to challenge paternity, at least in some situations.

b. Judicial Interpretations when Statutes Are Silent

Absent a statute governing paternity challenges like those described above, courts apply principles of res judicata and fraud when a party seeks to set aside a judgment of paternity, and they apply the statutory rule that a VAP can be set aside only for fraud, duress, or material mistake of fact.195

(a) Married the mother of the child while known as the reputed father in accordance with s. 742.091 and voluntarily assumed the parental obligation and duty to pay child support;
(b) Acknowledged his paternity of the child in a sworn statement;
(c) Consented to be named as the child’s biological father on the child’s birth certificate;
(d) Voluntarily promised in writing to support the child and was required to support the child based on that promise;
(e) Received written notice from any state agency or any court directing him to submit to scientific testing which he disregarded; or
(f) Signed a voluntary acknowledgment of paternity as provided in s. 742.10(4).

194. COLO. REV. STAT. § 19-4-107.3(1)(a) (best interests); id. § 19-4-107.3(3) (providing that a man who signed a VAP knowing he was not the father cannot have the order set aside); MO. REV. STAT. §§ 210.823, .854 (2013) (providing that an action must be filed within two years of entry of judgment or filing of the VAP; the court must set it aside unless it finds it is not in the best interests of parties to do so); OHIO REV. CODE ANN. § 3119.961 (2013) (providing for no statute of limitations); id. § 3119.962 (providing, however, that the court shall not grant relief if a man knew he was not the biological father and signed the VAP or otherwise acknowledged the child).

195. However, a few courts have evaded this requirement because of an anachronistic provision in their statutes. Before federal law required that states treat VAPs as conclusively determining paternity absent fraud, duress, or material mistake, some states had statutes that said a VAP created a rebuttable presumption of paternity. These statutes persist in at least six states, and recent cases from Kansas and Kentucky and an older case from Louisiana have used this language to set aside VAPs without requiring proof of fraud, duress or mistake and without reconciling the statutory provision requiring fraud, duress or mistake. State ex rel. Sec’y of Soc. & Rehab. Servs. v. Kimbrel, 231 P.3d 576 (Kan. Ct. App. 2010) (holding that a
Remarkably, in many recent cases, the person challenging a VAP did not allege and prove one of these three founds and therefore lost despite biological evidence that the man who signed the VAP was not the biological father.196 The most consistent feature of cases in which courts reach the merits

VAP creates a rebuttable presumption, genetic-test evidence is sufficient to rebut the presumption, and disestablishing paternity was in the child’s best interests); J.R.A. v. G.D.A., 314 S.W.3d 764 (Ky. Ct. App. 2010) (holding that a VAP creates a rebuttable presumption of paternity; since the parties agreed that man was not the biological father, the presumption was rebutted); Rousseve v. Jones, 97-1149, p. 7 (La. 12/2/97); 704 So. 2d 229, 232-33 (“[A]cknowledgment of an illegitimate child by authentic act effectively creates a presumption of biological parentage. . . . When the acknowledged fact is ultimately untrue, the acknowledgment may be null, absent some overriding concern of public policy.”). Courts in other states have rejected this argument, holding that even though a statute says that it was an error to order genetic testing when parties give contradictory and inconsistent testimony); In re Parentage of G.E.M., 890 N.E.2d 944 (Ill. App. Ct. 2008) (explaining that while the mother and the man who signed the VAP agreed he was not the biological father, the VAP could not be set aside absent fraud, duress, or material mistake, and the mother was not entitled to seek custody, even though she was the child’s legal father and was entitled to seek custody, even though blood tests showed he was not biological father, since the VAP was not rescinded or challenged); In re Westchester Cnty. Dep’t of Soc. Servs. ex rel. Melissa B. v. Robert W.R., 803 N.Y.S.2d 672 (App. Div. 2005) (providing that the court may not order genetic testing absent proof of fraud, duress, or material mistake and may decline an order based on the child’s best
of a petition to set aside a paternity judgment or a VAP is the emphasis on whether the man knew or had reason to suspect that he was not the biological father. This is especially true of cases involving challenges to a VAP by one of the signatories. Cases involving challenges to judgments are more mixed, as are cases where alleged biological fathers seek to set aside legal determinations of another man’s paternity.

i. Legal Fathers’ Challenges to Judgments of Paternity

Comparatively few recent cases concern challenges to judgments of paternity, and their results are mixed. Cases decided within the last ten years from Arkansas, Texas, and the District of Columbia refused to set aside judgments even though the issue of paternity was not actually litigated because it could have been, or they rejected arguments that a woman’s failure to disclose other lovers constituted fraud. However, during the same time

interest or estoppel); Wernke, 2010 SD 47 (holding that although the statute says a VAP creates a rebuttable presumption, after the sixty-day rescission period it may only be set aside on the basis of fraud, duress, or material mistake); DNW v. State, Dep’t of Family Servs., 2007 WY 54, 154 P.3d 990 (Wyo. 2007) (providing that it was an error for the court to set aside a VAP absent a finding of fraud, duress, or material mistake).

197. Hardy v. Hardy, 2011 Ark. 82, 380 S.W.3d 354 (holding that the former husband cannot challenge the divorce decree implicitly assuming that he was the father based on a claim that the mother misrepresented his paternity because the issue is res judicata); Martin v. Pierce, 257 S.W.3d 82 (Ark. 2007) (holding that the former husband cannot challenge the divorce decree implicitly assuming that he was the father based on a claim that the mother misrepresented his paternity because the issue is res judicata); M.M. v. T-M.M., 995 A.2d 164 (D.C. 2010) (per curiam) (holding that the paternity suit that was settled without genetic testing is res judicata and cannot be challenged after twelve years); In re J.M.C., No. 04-06-00431-CV, 2007 WL 460691 (Tex. Ct. App. Feb. 14, 2007) (holding that a judgment based on an admission of paternity without genetic testing cannot be set aside on the basis of fraud since the mother’s alleged lie is intrinsic, not extrinsic, fraud). Many older cases reach the same conclusions. See, e.g., State ex rel. I.Z., 668 So. 2d 566 ( Ala. 1995) (holding that a default judgment of paternity cannot be set aside based on the father’s incarceration on the date of the trial, since he could have participated); Robert J. v. Leslie M., 59 Cal. Rptr. 2d 905 ( Ct. App. 1997) (holding that a paternity judgment is res judicata where the man stipulated to being the father of the child, even though he thought he was not the biological father, to avoid publicity); Fla. Dep’t of Revenue ex rel. Sparks v. Edden, 761 So. 2d 436 (Fla. Dist. Ct. App. 2000) (holding that a paternity judgment entered without genetic testing was not to be set aside where the man knew the woman was also involved with other men and he had reason to know the truth and was able to defend the claim); Clay v. Clay, 397 N.W.2d 571 (Minn. Ct. App. 1986) (holding that a husband who stipulated to paternity in the dissolution proceeding could not later challenge the finding on the ground of fraud); McClain v. McClain, 958 P.2d 909 (Or. Ct. App. 1998) (per curiam) (holding that a husband who does not contest whether he is the father of a child during a divorce proceeding, who later learns that the mother lied to him, cannot set aside the judgment for fraud); Watson v. State, 694 P.2d 560 (Or. Ct. App. 1985) (en banc) (holding that if a man does not contest a paternity proceeding and later genetic tests show he is not the biological father, the paternity judgment will not be set aside even if the mother perjuriously testified that he was the father because
period, courts in Wisconsin, Wyoming, and Tennessee granted men relief upon proof that they were not biological fathers, even though the men had not asked for blood tests before the judgment was entered. In one such case, the Minnesota Court of Appeals explained why it ruled in favor of setting aside the paternity judgment when the mother had sworn that the man was the only possible father:

Given the nature of these sworn statements, to now penalize appellant for not seeking genetic tests before stipulating to paternity is to penalize him for not assuming Turner’s sworn statements were perjured or otherwise false. To hold that parties must preserve their rights by disbelieving sworn statements relating to the identity of the person with whom a woman conceived a child would result, we conclude, in a judicially mandated atmosphere of distrust and acrimony that is contrary to public policy strongly favoring stipulations in family cases.

ii. Signatories’ Challenges to VAPs

Many more recent cases involve challenges to VAPs based on genetic testing that shows that the man who signed the VAP is not the biological father. Courts are remarkably consistent in ruling that a VAP will not be set aside if the man knew or suspected that he was not the biological father, regardless of whether the challenge is brought by the man who signed the VAP or the mother. Even in states where a statute like those described

he had the opportunity to contest; Wachter v. Ascero, 550 A.2d 1019 (Pa. Super. Ct. 1988) (holding that a finding of paternity is res judicata and cannot be set aside based on blood-test evidence).

198. Coppage v. Green, No. W2006-00767-COA-R3-JV, 2007 WL 845909 (Tenn. Ct. App. Mar. 21, 2007) (holding that genetic testing ordered seven years after the paternity judgment entered based on privately done testing rendered the order no longer equitable); In re A.Y., 2004 WI App 58, 271 Wis.2d 242, 677 N.W.2d 684 (setting aside a paternity finding in the interests of justice where a default judgment was entered against a man who was in prison at the time of conception); MAM v. State, Dep’t of Family Servs., 2004 WY 127, 99 P.3d 982 (Wyo. 2004) (providing for a stipulated order without genetic testing on general equitable grounds). But see In re Kempton L.D., No. W2009-00906-COA-R3-JV, 2010 WL 1838058 (Tenn. Ct. App. May 7, 2010) (affirming an order denying the adjudicated father’s petition to disestablish paternity where the father continued to support the child, despite knowledge that the child was not his own, for more than two years).


200. A.E. v. J.E., No. 69A01-0901-CV-31, 2009 WL 1562993, at *2 (Ind. Ct. App. Oct. 22, 2009) (holding that Seger v. Seger, 780 N.E.2d 855 (Ind. App. 2002), misinterpreted the statute and that the man who signed the VAP knowing he was not biological father was estopped to challenge the VAP); In re Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001) (rejecting the legal father’s petition to set aside the VAP where he had reason to suspect he was not the biological father from the time of the birth and waited five and one-half years; finding that the mother’s failure to disclose to the court that he might not be father was not “fraud on the court”); Demetrius H. v. Mikhaila C.M., 827 N.Y.S.2d 810 (App. Div. 2006) (holding that fraud was not proven when the man knew he was not the biological father when he signed the VAP). But see J.M. v. M.A., 950 N.E.2d 1191 (Ind. 2011) (holding that a man’s belief that signing a VAP was necessary to allow guardianship to be established would
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above gives the man who signed a VAP the absolute right to set it aside based on genetic evidence, if the mother brings the challenge and she and the man knew or suspected that he was not the father, she loses. For the most part, courts explain this outcome by saying that the facts do not establish fraud or mistake or that they do establish that the challenger is estopped from denying the man’s paternity without further comment, but recent cases from Indiana describe the challengers as duplicitous. Rejecting a woman’s effort to set aside a VAP over the man’s objection, where both knew that he was not the biological father, the Indiana Court of Appeals wrote in In re Paternity of H.H.:

We do not believe the legislature intended this statute to be used to set aside paternity affidavits executed by a man and a woman who both knew the man was not the biological father of the child.

Rather, we believe the legislature intended to provide assistance to a man who signed a paternity affidavit due to “fraud, duress, or material mistake of fact.” A woman who gives birth knows she is the parent of the child, but men do not have the same certainty. Frequently, the woman is the only one who could know whether more than one man might be the father of her child. Accordingly, a woman always has the information necessary to question paternity prior to signing the affidavit. A man, however, could easily sign an affidavit without awareness of the questionable nature of his paternity; this is the situation we believe the legislature intended to address.

If mothers could manipulate the paternity statutes in this manner, men would have no incentive to execute paternity affidavits, and thereby voluntarily accept the responsibility to provide for children financially and emotionally, without genetic evidence proving their paternity. If a woman can assert fraud when she and the fa-

201. Madison v. Osburn, 2013 Ark. App. 212, at 1, 396 S.W.3d 264, overruled on other grounds by Furr v. James, 2013 Ark. App. 181, at 1 (finding no fraud or mistake when the parties suspected the man was not the father when the VAP was executed); Allison v. Medlock, 983 So. 2d 789 (Fla. Dist. Ct. App. 2008) (per curiam) (finding no fraud when the mother and the man knew he was not the biological father); Van Weelde v. Van Weelde, 110 So. 3d 918 (Fla. Dist. Ct. App. 2013) (finding no fraud when the mother and the man knew he was not the biological father); In re Paternity of H.H. v. Hughes, 879 N.E.2d 1175 (Ind. App. 2008) (holding that the legislature did not intend the statute governing challenges to VAPs to be used when a man and a woman knew the man was not the biological father).

202. See supra text accompanying notes 181-89.

203. Compare Madison, 2012 Ark. App. 212, at 7 (holding that a woman cannot claim fraud or mistake when she suspected the man was not the biological father when the VAP was signed), with Ark. Code Ann. § 9-10-115(e)-(f) (2013) (providing that a man is entitled to one paternity test during the time he is obligated to pay child support if genetic testing was not done; if test excludes him, the court must disestablish paternity). Compare Allison, 983 So. 2d at 790-91 (rejecting a mother’s claim to set aside a VAP based on fraud where she and the man knew he was not the biological father), with Fla. Stat. § 742.18 (2013) (providing that the court must grant the man’s petition to set aside a paternity determination based on genetic evidence unless the facts show he is estopped).
ther defrauded the State Department of Health, she presumably could assert fraud when she alone defrauded the Department and the man who signed the affidavit. Under the trial court’s holding, a man could maintain his legal relationship with a child in such a situation only if he had genetic proof of his paternity. If a woman may “use” a man to support her and her children until she tires of him, and then “dispose” of him as both partner and father, an unwed father would have no guarantee his relationship with a child could be maintained without proof of a genetic relationship. This could not be the intent of our legislature. Neither could it further the public policy of this State, where “protecting the welfare of children . . . is of the utmost importance.”

The next year the court said in A.E. v. J.E. that a man could not set aside a VAP when both he and the mother knew he was not the biological father, characterizing him as having “falsely attested” to a belief that he was the father.

On the other hand, if the man petitions to set aside the VAP when he did not know or have reason to suspect that he was not the biological father, courts usually grant his petition, notwithstanding that he could have sought genetic testing before signing the VAP. The mother’s failure to disclose that she had had another lover was sufficient to establish fraud or at least mistake in such cases. In language echoing that from similar cases where men did not seek genetic testing before being adjudicated a father, the Oklahoma Court of Appeals wrote:

[The state child support agency] has cited no authority imposing a legal duty on a putative father to insist on genetic testing before assuming responsibility for a child born out of wedlock, and we decline to impose such a duty, at least where there is

204. In re Paternity of H.H., 879 N.E.2d at 1177-78 (citations omitted) (quoting Straub v. B.M.T. ex rel. Todd, 645 N.E.2d 597, 599 (Ind. 1994)).


206. Brancher v. Peters, No. 294998, 2010 WL 1461623, at *2 (Mich. Ct. App. Apr. 13, 2010) (per curiam) (holding that when a man learns he is not the biological father but waits four-and-a-half years to sue to set aside the VAP, mistake is established and there is no estoppel or reliance because the man was trying to preserve the relationship); Dep’t of Human Servs. v. Chisum, 2004 OK CIV APP 20, ¶¶ 2, 4, 7, 85 P.3d 860, 861-62 (finding no mistake of fact and rejecting the argument that the man had a duty to seek blood testing before signing the VAP); Glover v. Severino, 946 A.2d 710, 716 (Pa. Super. Ct. 2008) (holding that the woman’s failure to disclose other lovers was sufficient to establish fraud); State ex rel. Dancy v. King, No. W2010-00934-COA-R3-JV, 2011 WL 1235597, at *5 (Tenn. Ct. App. Apr. 5, 2011) (holding that the woman’s assurance that the man was the father and her refusal to admit to relationships with other lovers established fraud); Jones v. State ex rel. Coleman, No. W2006-00540-COA-R3-JV, 2006 WL 3613612, at *4 (Tenn. Ct. App. Dec. 12, 2006) (holding that the woman’s assurance that the man was the father and her failure to disclose other lovers established fraud).

207. Glover, 946 A.2d at 716 (holding that the woman’s failure to disclose other lovers was sufficient to establish fraud); Jones, 2006 WL 3613612, at *4 (holding that the woman’s assurance that the man was the father and her failure to disclose other lovers established fraud); King, 2011 WL 1235597, at *5 (holding that the woman’s assurance that the man was the father and her refusal to admit to relationships with other lovers established fraud).
evidence that the mother has made positive assertions to the putative father concerning his paternity.

The [agency] approach is likely to inject an element of hostility into the oftentimes already volatile emotional relationships arising out of the birth of a child out of wedlock. Not only is such testing expensive, but the putative father’s request of such tests may be perceived as an attack on the mother’s veracity and an attempt to shirk responsibility for the child.208

In some of the cases involving challenges by the mother or the man who signed a VAP, the courts said that the child’s best interests must be taken into account in making the final determination of whether to set the VAP aside.209 However, as a practical matter, in the recent cases, the courts’ findings regarding the child’s best interests did not determine the outcomes.210

iii. Alleged Fathers’ Challenges to VAPs

Challenges to VAPs by alleged biological fathers are atypical, since in such cases two men, he who signed the VAP and he who claims to be the biological father, both want to be the child’s legal father, and the underlying dispute usually concerns custody and visitation, rather than child support. In most of the cases decided in the last eight years that I found, the court ulti-

208. Chisum, 2004 OK CIV APP ¶ 20, 7 & n.2.
209. Van Weelde v. Van Weelde, 110 So. 3d 918, 922 (Fla. Dist. Ct. App. 2013) (holding that a mother who seeks to set aside a VAP may have unclean hands precluding her from claiming fraud and, even if not, the child’s best interests may require leaving the VAP intact where the man wants to retain legal paternity); Allison v. Medlock, 983 So. 2d 789, 790-91 (Fla. Dist. Ct. App. 2008) (per curiam) (rejecting the mother’s challenge to the VAP for failure to prove mistake of fact and setting aside the VAP only if it is in the child’s best interest, which was also not established); In re Paternity of Cheryl, 746 N.E.2d 488, 495-98 (Mass. 2001) (holding that the mother did not commit fraud by failing to disclose other lovers and the child’s interests in preserving the relationship with someone she believes to be her father outweighed the man’s interest in not supporting the child); see also State ex rel. Sec’y of Soc. & Rehab. Servs. v. Kimbrel, 231 P.3d 576, 581-82 (Kan. Ct. App. 2010) (holding that a VAP creates a rebuttable presumption; if evidence is submitted in rebuttal, a court must also determine whether upholding the rebuttal is in the child’s best interests); Comm’r of Soc. Servs. ex rel. Edith S. v. Victor C., 936 N.Y.S.2d 149, 150-51 (App. Div. 2012) (refusing a man’s request for genetic testing because the child’s best interests would be disserved because the child considered him her father, had relationship with his relatives, was never dissuaded from thinking he was her father, believed the man’s mother was her grandmother, and would have been emotionally damaged had she been subjected to testing); Westchester Cnty. Dep’t of Soc. Servs. ex rel. Melissa B. v. Robert W.R., 803 N.Y.S.2d 672, 679 (App. Div. 2005) (holding that the court may not order genetic testing absent proof of fraud, duress, or material mistake and may decline an order based on the child’s best interest or estoppel).
210. See supra note 209.
mately ruled in favor of the biological father’s challenge without considering the child’s best interests or explaining why the child’s interests were irrelevant. However, where the court considered the child’s best interests, if the legal father had a significant relationship with the child, he prevailed.

In most of the cases where the alleged father won, the issue on appeal was whether the VAP was binding on the alleged father and, if so, whether the facts established fraud or mistake. Recent cases from Missouri, Illinois, and Indiana concluded that the VAPs simply did not bind the alleged biological fathers, as they were not parties to them. The court in a Pennsylvania case employed an alternative rationale, ruling that the alleged father had proven fraud by showing that the mother and the man who had signed the VAP knew there was a chance that he was not the biological father.

In another recent case, however, a biological father lost on the standing issue. The Michigan Court of Appeals held in Sinicropi v. Mazurek that a biological father should not have been allowed to file a paternity suit to establish his own paternity in the face of a VAP that had not been rescinded; that the biological father did not have standing to challenge the VAP; and that the mother’s effort to challenge the VAP should have been rejected as not consistent with the equities of the case, since the legal father had a longstanding relationship with the child.

In other recent cases, courts have applied the best-interests test to deny petitions to set aside VAPs when the effect was to preserve close relationships between children and the men who had signed VAPs and acted as their fathers. However, in a California case, the court ruled that a child’s

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211. Wilson v. Cramer, 317 S.W.3d 206, 210 (Mo. Ct. App. 2010) (holding that the VAP does not bind the alleged father because the statute does not say it does and because the VAP is in the nature of an agreement to which he was not a party and holding that an administrative order finding a VAP father to be the legal father was also not binding on the alleged biological father because he was not a party to the action); In re Paternity of an Unknown Minor, 951 N.E.2d 1220, 1223-24 (Ill. App. Ct. 2011) (applying 750 ILL. COMP. STAT. 45/7(a) (2011), which allows a man alleging himself to be the biological father to initiate an action to determine the existence of the father–child relationship regardless of whether such a relationship is already presumed to exist); In re Paternity of N.R.R.L., 846 N.E.2d 1094, 1096-97 & n.3 (Ind. App. 2006), a mother and a biological father file a paternity suit, stipulating to testing results; the mother then moved to set aside the order on the ground that she had signed a VAP with another man earlier, and that man intervened in litigation. The appellate court held that the VAP did not preclude another man from filing a paternity suit and suggested that the VAP should be set aside under a statute providing that a court “shall” set aside a VAP based on genetic testing. Id. The current version of the Indiana statute, discussed supra note 184, does not contain this language. IND. CODE § 16-37-2-2.1 (2013).


214. Koos v. Willson, 697 N.W.2d 127 (Iowa Ct. App. 2005) (holding that the biological father waived his constitutional right to establish paternity by delay in bringing suit);
best interests would be served by setting aside the VAP and allowing the biological father to establish an enduring relationship with the child.215 The child was very young, so that the man who had signed the VAP did not have a long relationship with him; the mother had lied about who the child’s biological father was; and the court regarded the biology-based relationship as more durable in the long run, since it questioned whether the mother’s relationship with the other man would last.216

These cases about alleged biological fathers’ challenges to paternity judgments and VAPs are consistent with important themes that run through the case law on judgments and VAPs generally. The first is that legal father–child relationships are vulnerable to being disrupted based on lack of a biological tie, at least where the party seeking to set aside the legal determination of paternity is judged to be relatively innocent. While children’s interests in maintaining ties with functional fathers are protected in some cases, even then decisions are affected by the equities among the affected adults. A second theme is that courts are quite reluctant to terminate a father–child relationship where the man knew that he was likely not the biological father or, after having learned that he was not, sat on his rights for a significant amount of time. Such men are not understood as being equally worthy of relief, and it is probably important that courts are concerned about leaving a child without a legal father, although they do not often say so. Finally, courts generally seem to regard mothers as least deserving of protection, explicitly or implicitly because they are seen as having full information about the biological facts and, therefore, as being less honest and trustworthy.

III. CONCLUSION: REFORMING DIESTABLISHMENT OF PATERNITY LAWS

The analysis of statutes and recent cases above demonstrates significant variation in state paternity law, especially regarding rebuttal of the marital presumption of paternity and setting aside VAPs and paternity judgments. In a majority of the states whose law is discussed here, legal

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216. Id.
rules provide greater protection to father–child relationships if the child’s parents were married than if the mother was unmarried, greater protection if legal fathers want to retain their status than if they want out, or both. Such rules perpetuate ancient rules favoring marital childbearing and protecting men from unfaithful women. The rules are not, however, tailored to protect the interests of children or to respect the diverse forms that families take in the early twenty-first century. Since so many of the discrepant rules are statutory, reforms will require legislative action.

The law of paternity for children born inside and outside of marriage could be equalized and made gender neutral by allowing mothers and legal fathers to challenge legal paternity on the basis of no biological connection in all contexts. Indeed, some commentators have even gone further, proposing that genetic testing be a mandatory prerequisite to a finding of legal paternity.217 For several reasons, though, neither of these solutions would promote the best interests of children and families. On the other hand, because genetic testing is so ubiquitous, a law that ignored the lack of a biological relationship between a child and a legal father in all circumstances would be disregarded as out of touch with reality. Instead, the general goals of the law should be to acknowledge the lack of a biological relationship when necessary, but to make legal paternity depend on determination of the child’s best interests. In other words, in principle, the 2002 UPA got the balance of values right. However, I believe that several of its specific provisions are inconsistent with this balance and should be changed and that new sections that preclude paternity challenges in some situations should be added. My proposals are based on an understanding of what children’s best interests means in this situation. This Section examines how best interests should be interpreted in this context and then proposes legislative reforms in light of that analysis.

Laws that allow alleged biological fathers to challenge paternity and legal fathers to disestablish their own paternity based on biology alone put all children at greater risk of familial instability. Moreover, since such rules more commonly apply to setting aside VAPs and paternity judgments than to rebutting the marital presumption, they affect nonmarital children more. Where current law distinguishes between marital and nonmarital children, again nonmarital children are relatively less protected against family disrup-

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In short, these laws also pose a risk of harming children by destabilizing their families. The laws are destabilizing in at least two ways: when applied, they may disrupt existing families, and their very existence means that families in which they might be invoked are more fragile.

Ordinarily, when courts consider whether allowing the marital presumption to be rebutted is in a child’s best interests, they focus on whether the child and the man have a psychological and emotional relationship that should be protected. Since the existence and importance of such a bond is fact specific, the recommendation of the 2002 UPA that the court have discretion under the “best interests” standard to decide in each case whether to rebuff an effort to disestablish paternity is sensible.

However, rules that require disestablishing paternity upon proof that the legal father is not the biological father cause additional systemic harm by destabilizing all families in which there is some question about whether the legal father is the biological father. The rules establish the pervasive possibility that at any time someone with standing to challenge the legal father’s biological paternity—mother, legal father, or alleged father—could decide to exercise that power. Arguably, this effect extends even more broadly, since the potential for a claim that the legal father is not the biological father can lurk in the background of any relationship.

This destabilizing effect is especially significant for children born outside of marriage, who are already much more likely to face the breakup of their parents at birth and the formation and dissolution of other residential romantic relationships between their mothers and new boyfriends, all of which increase children’s risk for educational, emotional, and behavioral problems. Evidence from the Fragile Families and Child Well-Being Study, a major longitudinal study of about 5,000 children and their parents that includes a disproportionate number of nonmarital children, shows that at the time of birth, the great majority of unmarried parents are strongly connected to each other and to their children. At the time of birth, 51% of unmarried


220. The study includes children born in sixty-one hospitals in sixteen cities in the United States with a population over 200,000. Sara McLanahan et al., The Fragile
couples are living together, and another 31% are dating. These relationships are fragile, however; a year after birth, 48% of the fathers in the Fragile Families Study were living away from their child, 56% were at three years, and 63% were at five years. Repartnering is the norm; by the time a child is five years old, more than half have seen their mother’s romantic partner move out or a new partner move in; 39% have experienced one or two of these changes, and 15% have experienced three or four. The average number of residential partner changes is three times higher among unmarried mothers than among married mothers. With repartnering comes new children; by the time children of unmarried mothers are five years old, 23% of their mothers have had a child by at least one man other than their father, 16% of the mothers have had a child by three men, and 8% have had a child by four or more men.

As Sara McLanahan, one of the lead researchers in the Fragile Families study, has written:

These findings are quite disturbing given what we know about the effects of instability. Instability causes stress, and chronic instability causes chronic stress, which taxes the immune system and increases the risk of physical and mental health problems. Instability also undermines the quality of the home environment by diverting mothers’ attention away from the child and creating uncertainty over parental authority.

_Families and Child Wellbeing Study: Baseline National Report_ 1-4, 18 n.4 (rev. 2003), available at http://www.fragilefamilies.princeton.edu/documents/nationalreport.pdf. The study uses baseline data collected between 1998 and 2000. Id. Mothers and fathers were interviewed at birth, and follow-up interviews were done when the children were one, three, and five years old. Id. Results of the study are generalizable to urban areas with a population of more than 200,000. Id.

221. Id. at 8 tbl.2; see also Larry Bumpass & Hsien-Hen Lu, _Trends in Cohabitation and Implications for Children’s Family Contexts in the United States_, 54 POPULATION STUD. 29 (2000). The great majority of these parents sign voluntary establishment of paternity forms soon after birth. The Fragile Families researchers found that in urban areas, the paternity establishment rate is 69% and that 81% of the paternity establishments are in the hospital or birthing center. Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, _In-Hospital Paternity Establishment and Father Involvement in Fragile Families_, 67 J. MARRIAGE & FAM. 611, 615 (2005). While the paternity establishment rate for couples not living together is lower, it is still 58%, although only 42% of these establishments occur in the hospital. Id.


223. McLanahan, supra note 13, at fig.4.


225. Id., supra note 13, at fig.5.

226. Id.; see also Cynthia Osborne & Sara McLanahan, _Partnership Instability and Child Well-Being_, 69 J. MARRIAGE & FAM. 1065, 1079-80 (2007); Laura Tach, Ronald Mincy & Kathryn Edin, _Parenting As a “Package Deal”: Relationships, Fertility, and Non-
The solutions to instability in the families of unmarried parents are complex and disputed, but at the very least, the law of parentage should not promote instability in the relationships of adults who are raising children together, as parentage law in many states does today. I propose the following legislative changes to correct the problem:

(1) Deny standing to alleged fathers and other third parties to challenge a legal father’s paternity so long as the relationship between the mother and the legal father is intact, i.e., so long as neither joins the challenge. This is an extension of rules that do not allow outsiders to the marriage to rebut the marital presumption. The essence of this protection should be restored not only to children born to married women but also to nonmarital children whose parents are together and raising the child.

(2) If an unmarried mother and a man sign a VAP, both knowing or suspecting that he is not the biological father, allow the VAP to be set aside at any time if both agree. If they do not agree, set aside the VAP only upon proof that continuing the relationship will substantially endanger the child, such as those that justify a nonconsensual adoption in the jurisdiction. These rules together respect and protect the decision of the man and woman to commit themselves to raising the child together but recognize that if they agree that this arrangement is no longer working, the interests of the child are unlikely to be advanced by maintaining the father–child relationship. On the other hand, if either legal parent wants to preserve the man’s legal fatherhood, the obligation, which the two undertook, should be upheld unless this would be harmful to the child.

(3) If neither or only one of the parties to a VAP knows or suspects that the man is not the biological father and one later learns that he is not

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227. Among the proposals are (1) programs to improve the relationships of couples, Marcia J. Carlson & Robin S. Högna, Coparenting in Fragile Families: Understanding How Parents Work Together After a Nonmarital Birth, in COPARENTING: A CONCEPTUAL AND CLINICAL EXAMINATION OF FAMILY SYSTEMS 98 (James P. McHale & Kristin M. Lindahl eds., 2011); (2) promoting “responsibility” among unmarried fathers, see generally U.S. Dep’t of Health & Human Servs., Responsible Fatherhood Grants, PROMOTING RESPONSIBLE FATHERHOOD, http://fatherhood.hhs.gov/ (last visited Nov. 4, 2013); (3) encouraging women to wait to have children until they find their permanent life partner, McLanahan & Beck, supra note 224, at 20; (4) promoting marriage and discouraging out-of-marriage childbearing, Marquardt et al., supra note 17, at 4; and (5) promoting the use of contraception, Isabel Sawhill, Adam Thomas & Emily Monea, An Ounce of Prevention: Policy Prescriptions to Reduce the Prevalence of Fragile Families, FUTURE OF CHILD., Fall 2010, at 139.

228. See supra text accompanying notes 117-19.

229. This proposal is similar to one that I made earlier in an article proposing that VAPs should be available to same-sex couples who are not married. Harris, supra note 1, at 487.
and wants to terminate the legal father relationship, treat the VAP as having been procured by mistake, but provide that the judge should not set it aside unless consistent with the child’s best interests.

(4) If paternity was established without genetic testing having been done by adjudication, either judicial or administrative, or by a VAP, allow both the legal father and the mother to petition for testing for up to one year after the judgment is entered or the VAP filed. If the test shows that the man is not the biological father, the court should find that the judgment or VAP was based on a material mistake and set it aside at the request of the petitioner. Many alleged fathers in paternity suits are naïve and unrepresented and unwisely do not seek genetic testing, and since state law allows and even encourages this, the law should provide a limited window in which they can correct this mistake. This opportunity should not be limited to men, though, since women, who are required to cooperate in paternity establishment if they seek public assistance, may not be in a much better position to protect themselves. The right should be extended to those who sign VAPs for two reasons. First, as a formal matter, federal law requires that VAPs be treated like judgments. Second, most people sign VAPs in the rosy glow immediately after birth without seeking paternity testing first, and they also may need an opportunity to reconsider once the glow has faded.

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230. As a condition of receiving assistance for herself and her child, the mother must cooperate with the child-support office in paternity establishment if the child has no legal father, unless she has good cause not to do so. 42 U.S.C. § 654(29)(A) (2006).

231. Id. § 666(a)(5)(D).

232. A Michigan study found that even when free genetic testing was offered to anyone who requested it before signing a VAP, only a tiny fraction asked for the test. Office of Child Support, supra note 59. Of the 1,660 nonmarital births examined, a VAP was signed in 78.5%, and only in 112 cases was a genetic test requested. Id.