BIOLOGY AND BEYOND:
THE CASE FOR PASSAGE
OF THE
NEW UNIFORM PARENTAGE ACT

by

Paula Roberts
With assistance from
Nicole Williams

October 2000

CLASP

BIOLOGY AND BEYOND:
THE CASE FOR PASSAGE
OF THE
NEW UNIFORM PARENTAGE ACT

by

Paula Roberts
With assistance from
Nicole Williams

October 2000

CLASP's child support policy work is supported by the Ford Foundation, the Charles Stewart Mott Foundation, the Public Welfare Foundation, the Moriah Fund, the Open Society Institute and the Nathan Cummings Foundation

Center for Law and Social Policy
1616 P Street, NW
Suite 150
Washington, DC 20036
Phone: (202) 328-5140 ♦ fax: (202) 328-5195
info@clasp.org ♦ www.clasp.org

Table of Contents

Introduction

There are many advantages to children in having their parentage established. Knowing who their biological mother and father are can bring financial and emotional support as well as valuable information about family medical history. Until recently, identifying a child's biological mother was a routine matter: she was the person who gave birth to the child. If the child was born to a married couple, fatherhood was also generally a routine matter. The child's father was presumed to be the mother's husband. Thus, the major focus of the law was on establishing *paternity* for *non-marital* children.

Recent scientific developments have changed this picture. Through artificial insemination and assisted reproduction, it is now possible that the woman who gives birth is not the child's biological mother. Through genetic testing, it has become possible to show—to a near certainty—that a husband is not the biological father of his wife's child. These scientific advances have created the need for a more sophisticated view of both maternity and paternity, one that goes beyond biology and presents a more nuanced view of what is at stake for mothers, fathers and children.

These are matters of concern to the individuals involved. They also pose significant public policy questions. Should the law allow individuals to enter agreements in which they are biological parents but not responsible for the resulting child? Should the law sanction a couple's agreement to be responsible for a child to whom they are not biologically related? Should an outsider to a marriage be allowed to question the paternity of a marital child? Should the child be allowed to raise this issue? Should all children be genetically tested at birth to determine their biological parentage?

In addition to these questions, resolving parentage issues has implications for the public fisc. Many of the benefits of establishing parentage—whether for marital or non-marital children-- are monetary. In the absence of financial support, a child may need public assistance. The cost of financing programs like Temporary Assistance to Needy Families (TANF), Food Stamps, and Medicaid or SCHIP requires a significant expenditure of public resources and this is of concern to both federal and state legislatures.

Finally, as the non-marital birth rate has soared, federal law has placed increasing emphasis on the importance of the state's establishing paternity for children born to unmarried parents. From 1984 to 1998, Congress passed a number of laws that have resulted in states' streamlining the paternity process for non-marital children.[1] By-and-large, the federal provisions

[1] Under Title IV-D of the Social Security Act, the federal government provides states with 66% of the basic cost of running a child support program. 42 USC Section 655. In order to qualify for this money, however, states have to enact certain laws. 42 USC Section 666. A series of such laws relating to paternity establishment are found at 42 USC Section 666(a)(5). While a state could decline to take federal money and thereby be under no obligation to enact these laws, every state has taken federal funds and enacted the required state statutes.

simplified the voluntary establishment process and expedited the process for handling disputed cases. Federal law also provides financial rewards to states that do a good job in establishing paternity and penalizes those who have not increased the percentage of children whose paternity has been established.[2] Obtaining the rewards and avoiding the penalties is of concern to state legislators, as the penalties can be quite severe.[3]

Recognizing the need to help states develop a statutory framework to address the difficult public policy issues and meet the federal standards, in 1997, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a drafting committee to revise the existing model Uniform Parentage Act (UPA).[4] In addition to addressing the establishment of paternity for marital and non-marital children, the drafting committee decided to look at the provisions of two other model acts relating to aspects of paternity determination and incorporate them into the new UPA. They are the Uniform Putative and Unknown Fathers Act (UPUFA 1988),[5] which provides a model for the creation of state paternity registries, and the Uniform Status of Children of Assisted Conception Act (USCACA 1988), which deals with parentage of children who are born pursuant to surrogacy agreements.[6]

The new UPA contains all of the provisions regarding paternity of non-marital children that states need to have in order to be eligible for federal funding for their child support and TANF programs. In addition, it provides guidance in areas—like rescission of acknowledgments, and the establishment of paternity registries -- where the federal law is silent. It also goes beyond the federal requirements and deals with parentage of marital children and children conceived through means other than sexual intercourse.

The new UPA has been endorsed by the American Academy of Matrimonial Lawyers, the National Child Support Enforcement Association, the Eastern Regional Interstate Child Support Association, the Academy of American Adoption Attorneys, and the Organization of Parents Through Surrogacy. It was approved by NCCUSL on August 1, 2000 and will be reviewed by the American Bar Association in January 2001. Thereafter, many NCCUSL members will be urging their state to adopt this Model Act.

This monograph is designed for state officials, advocates and citizens who are involved in the state legislative process. It explains the new UPA in detail and provides the rationale behind its provisions. It explains which provisions are required by federal law and which represent

[2] See, e.g., 42 USC Section s 652(g) and 658(b)(6)(A).
[3] For example, a state that fails to pass a required law cannot obtain approval of its state child support plan. 42 USC Section 654. This means it is ineligible for federal child support funds. 42 USC Section 655. In addition, in order to draw down federal TANF funds, a state must be able to certify that it has an approved child support plan. Thus, without an approvable plan, the state is also ineligible for federal TANF funds. 42 USC Section 602(a)(2).
[4] The existing version of the UPA was written in 1973. Nineteen states had adopted this version and several others had adopted large sections of it. However, much has changed in the intervening 25 years and there was a need to revise the document in light of these changes.
[5] This model act was never adopted by a single state. However, at least 28 states have created some form of a paternity registry.
[6] This act offers two different approaches to the subject. One regulates such agreements through a judicial review process and the other makes all such agreements void. Only two states have adopted this Act, with Virginia taking the regulatory option and North Dakota choosing to make all such agreements void.

policy choices. Where policy choices are involved, it explains the choice in light of current law and social science research as well as best state practices.

As background, the modern history of the paternity establishment system is examined. Then the federal statutes and their implications are explored. A chapter describing how the new UPA addresses the paternity of marital children follows these explanations. Next the paternity of non-marital children is addressed. This is followed by an explanation of the need for paternity registries. Finally, parentage in the context of assisted reproduction and surrogacy is considered. This is followed by a conclusion and a section-by-section description of the new UPA. It is hoped that this format will provide the detail needed for advocates and legislators to assess the new UPA and work for its passage in their states.

A Brief History of Paternity Establishment

The Paternity of Marital Children

For centuries, a child born during a marriage was conclusively presumed to be the child of that marriage. The child's paternity could not be attacked. Over time, a slight change in this rule evolved: paternity could be questioned where it could be shown that the husband and wife could not possibly have had intercourse at the probable time of conception.[7] Later, challenges were allowed when the husband was imprisoned at the time of conception and in situations where the husband was impotent or sterile. The exceptions all hinged on the fact that a husband could **prove** that he was not the biological father of his wife's child.

The advent of genetic testing made it possible to greatly expand the number of situations in which a husband could prove his non-paternity. Such testing has also made it possible for outsiders to the marriage to assert their paternity-- even when the husband has fully accepted parental responsibility. Courts and legislatures have had to consider whether such a further expansion of attacks on the paternity of marital children is desirable.[8]

Today, trial courts often face the issue in divorce or post-divorce proceedings. In the divorce context, a husband might question the paternity of children born during the marriage and request that the court order genetic testing. In the post-divorce context, the issue frequently arises when the father has defaulted on this support obligation. He may then raise non-paternity as a defense and ask the court to order tests. Courts then have to weigh whether biological paternity is more important than preserving a stable relationship for the child.

The Paternity of Non-Marital Children

Until recently, paternity proceedings were quasi-criminal in nature. The alleged father was arrested, a jury trial was held, and the mother had to prove paternity beyond a reasonable doubt. Such a proceeding was not brought for the emotional, psychological or familial good of the child: it was brought to relieve the public from the burden of the child's support.[9] The idea that a father might want to establish his paternity and have a relationship with his child was not even considered.

[7] This doctrine came to be known as "beyond the four seas" meaning the husband was out of the country. See, 1 Blackstone Commentaries 456 (J.Chitty ed. 1826).
[8] For a discussion of the policy considerations in this regard see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).
[9] For a detailed history of paternity law in America, see H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

As late as 1922, when the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed the Uniform Illegitimacy Act, the model was still a quasi-criminal proceeding. Moreover, the decision as to whether to bring a paternity action was still largely left to the mother. Unless the child became dependent on public aid, in which case the state might bring an action, neither the child nor the father could initiate a paternity action.[10]

In the 1970's, things began to change. A few states set up administrative processes under which parents who wished to voluntarily establish paternity for their children could participate in a relatively informal hearing, sign papers, and obtain a paternity order for their child. The administrative agency then docketed the order with a court that affirmed it and made the finding a judicial order binding on the parties and entitled to full faith and credit in other states.[11] Then, a handful of states began allowing parents to establish paternity by simply signing and filing an acknowledgment. Virginia went so far as to make an acknowledgement, once signed, the equivalent of a judicial finding of paternity without the need for any court action.[12]

One important factor in these changes was the emergence of the science of parentage testing. By 1930, rudimentary blood tests that *exclude* a man's paternity had been developed. Over the next fifty years, nearly every state had accepted such tests into evidence to exclude a putative father from paternity. In the 1970's, modern genetic testing emerged, providing tests that go beyond negating paternity. These tests can now provide a probability in excess of 99 percent that a given man *is* the father of the child in question. This scientific development makes it possible for fathers to have tests done which confirm or deny their paternity with near certainty. With this information in hand, fathers are comfortable with administrative processes and voluntary acknowledgments.

Changes in state law also occurred as a result of a series of actions taken by the Supreme Court. During the 1970's, the Court struck down a number of state statutes which required that paternity actions be brought shortly after a child's birth.[13] This lead some states to greatly expand or eliminate their statutes of limitations in paternity cases so that more children were able to have their paternity established. The Supreme Court also held that it was constitutionally permissible to use the non-criminal "preponderance of the evidence" standard rather than the criminal standard of "proof beyond a reasonable doubt" in paternity cases.[14] Again, some states responded by using the lower standard.

Congress and the President--through establishment and periodic revision of Title IV-D of the Social Security Act--have also advanced dramatic change. Through a combination of substantive requirements and financial penalties/incentives, they have moved all states toward a common set of paternity establishment protocols. Properly implementing these changes is important to the well being of children. It is also important to states because Congress developed

[10] It was not until 1973, with the promulgation of the Uniform Parentage Act, that there was widespread recognition that fathers, as well as mothers, might wish to establish paternity.
[11] For more on these early systems see Roberts, *Expedited Processes and Child Support Enforcement: A Delicate Balance: Part II,* 19 CLEARINGHOUSE REV. 620 (Oct. 1985).
[12] For more on these systems, see Roberts, *Paternity Establishment: An Issue for the 1990's*, 26 CLEARINGHOUSE REV. 1019 (January 1993).
[13] See e.g., *Pickett v. Brown*, 103 S. Ct. 2199 (1983) and *Mills v. Habluetzel*, 456 U.S. 91 (1982).
[14] *Rivera v. Minnich*, 107 S. Ct. 3001 (1987).

paternity establishment standards for states to meet. Failure to meet these standards can result in a substantial fiscal penalty that escalates every year the state continues to be unable to meet its paternity establishment standard. Congress has also provided incentive payments to states to encourage aggressive implementation of streamlined paternity procedures. Because of the importance of this issue, it is the subject of the next chapter.

The Parentage of Children Born through Assisted Reproduction or Pursuant to Surrogacy Agreements

During the last thirty years, there have been enormous changes in reproductive technology. Married couples that once would have been childless are now able to conceive a child through assisted reproduction. Almost every state now has some law governing the process.[15]

In assisted reproduction, when genetic material from both the husband and the wife is used and the wife bears the child, the traditional rules of parentage generally work. The wife is both the biological and the legal mother and the husband is both the biological and the legal father. However, there are sometimes reasons why the sperm of the husband or egg of the wife (or both) cannot be used. Then assisted reproduction involving donated sperm or eggs may be involved. In these cases, the legal parents of a child are distinct from the biological parents of that child.

If the wife bears the resulting child, she is the child's legal mother (by virtue of having given birth) and her husband is the child's legal father (by virtue of the presumption that a husband is the father of a child born during the marriage). However, when donor sperm has been used, the husband is not the biological father of the child. The sperm donor is. Some husbands in this situation have attempted to challenge their paternity. Generally, this happens when the marriage breaks up and the husband wishes to avoid paying child support. Courts have consistently held that—if he consented to the assisted reproduction—the husband is the father of the resulting child and is required to pay support even if he is not the biological father.[16] A substantial number of states have also enacted statutes saying that the sperm donor is not the legal father.[17] This both protects the sperm donor from a paternity suit and prevents him from filing a paternity action.

---

[15] Only the District of Columbia, Hawaii, Maine, Pennsylvania, South Dakota, Utah, and Vermont do not have laws governing artificial insemination. *Chart 7. Assisted Reproductive Technologies,* 33 FAMILY LAW QUARTERLY 916 (Winter 2000).

[16] See, e.g., *Levin v. Levin,* 645 N.E.2d 601 (Ind. 1994*); K.B. v. N.B.*, 811 S.W. 2d 634 (Tex. App. 1991); *In re Marriage of Adams,* 528 N.E.2d 1075 (Ill. App. 1988), rev'd on other grounds 551 N.E.2d 635 (Ill. 1990); I*n Re Baby Doe , 353 S.E.2d 877 (S.C.1987);*); *K.S. v. G.S,* 440 A.2d 64 (N.J. Super. 1981); *People v. Sorensen*, 68 Cal.2d 80 (Cal. 1968); *Gursky v. Gursky,* 242 N.Y.S.2d 406 (N.Y. 1963). These cases generally rely on the principle of estoppel by consent. However, if the husband can establish that he did not consent to the artificial insemination of his wife, then he may be found not to be the father and thereby not have a support obligation toward the child. See, e.g., *In re marriage of Witbeck-Wildhagen*, 667 N.E.2d 122 (Ill. App. 1996).

[17] Alabama, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Texas, Virginia, Washington, Wisconsin and Wyoming have laws to this effect. *Chart 9. Artificial Insemination,* 33 FAMILY LAW QUARTERLY 918 (Winter 2000).

Unmarried heterosexual couples and lesbian couples also use assisted reproduction. There, the person giving birth is the mother. If the partner is male, he and the mother can establish paternity through acknowledgment. If the mother's partner is female, she cannot use the voluntary acknowledgment process and her legal status is quite precarious in most states.[18] One possible route to parentage is through adoption of the child, but this is not always allowed.[19]

More recently, the technology has expanded to allow a surrogate to carry and bear a child for another couple. Generally, these arrangements involve a contract between a husband and wife and the surrogate (and her husband if she is married). A number of states have enacted statutes making such surrogacy agreements void.[20] Others allow such agreements, but require either medical and psychological testing or judicial pre-authorization or both.[21]

In such arrangements there are at least three, and possibly as many as six, persons who could be a parent to the resulting child. In the simplest case, the sperm and egg of a married couple are used to impregnate an unmarried surrogate. In that case, the father may establish his paternity through acknowledgment (by agreement of the surrogate) or through a lawsuit (if the surrogate has changed her mind). As he is the biological father and there is no husband to deal with, this is relatively straightforward. The child has two potential mothers: the surrogate who gives birth and the wife who is the biological parent. Which one is the legal mother has to be resolved. At least some states declare the surrogate to be the mother and require her parental rights to be terminated so that the wife can adopt the child. This is a cumbersome process but does lead to resolving the issues. One state has enacted legislation allowing the biological mother (rather than the surrogate) to be named on the birth certificate.[22]

In the more complicated scenario, a married couple contracts with a surrogate who is also married to give birth through the use of donated sperm and/or eggs. Then there are three potential mothers (the wife, the surrogate and the egg donor) and three potential fathers (the husband, the surrogate's husband, and the sperm donor). A handful of states do have some law on paternity presumptions in these cases, but most do not. In the absence of legislation, courts are in unknown territory when they try to sort this out. As one court, calling for legislative action in this area noted:

> Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect

[18] It appears that, for purposes of custody or visitation, courts are reluctant to grant parental status to lesbian partners. See, e.g., *Nancy S. v. Michele G.*, 228 Cal. App. 831 (Cal. App. 1991) and *West v. Superior Ct.*, 59 Cal. App. 4th 302 (Cal. 1997). However, such partners have been held to be "parents" for purposes of child support obligations. See, e.g., *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (N.Y. 1985).

[19] See, e.g., *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

[20] These states are Arizona, the District of Columbia, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New York, North Dakota, Utah, Virginia, and Washington. *Chart 8.Surrogacy and Gestational Agreements*, 33 FAMILY LAW QUARTERLY 917 (Winter 2000).

[21] Id. Florida requires medical or psychological screening, Illinois and Tennessee require judicial pre-authorization, and New Hampshire and Virginia require both.

[22] 410 Il. Comp. Stat. Sec. 535/12-9 (2000).

> on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e. judge-formulated) law in applying old legal principles to new technology….[citations omitted] However, we still believe that it is the legislature, with its ability to formulate general rules based on input from all its constituencies, which is the most desirable form of lawmaking.[23]

[23] *In Re Marriage of Buzzanca* ,61 Cal. App. 4th 1410 (Cal. App. 1998).

The Federal Law Framework

Federal law does not address the issues involved in determining the paternity of marital children. It is also silent on issues relating to children born as the result of assisted reproduction and surrogacy agreements. However, there is substantial federal law on the subject of paternity establishment for non-marital children.

Voluntary Acknowledgment of Paternity

In 1988, Congress encouraged every state to establish and implement a simple *civil* process for the voluntary acknowledgment of paternity. Five years later, Congress required that states offer a hospital-based procedure for the voluntary acknowledgment of paternity during the periods immediately before and after a child's birth as well as a simple process for parents who wish to voluntarily establish paternity outside the hospital. In 1996, Congress again amended the law adding even more detail. Federal law now provides that (as a condition of continued receipt of child support funds under Title IV-D of the Social Security Act and welfare funding under Title IV-A of the Social Security Act) states must have laws and procedures *for the voluntary acknowledgement of paternity* under which:

- All birthing facilities and birth records offices in the state offer unmarried parents the opportunity to sign an acknowledgment of paternity. 42 USC Section 666(a)(5)(C)(ii).

- Before either party signs a paternity acknowledgment, he/she is given notice (both orally and in writing) of the alternatives to, legal consequences of and rights and responsibilities arising from the signed acknowledgment. If state law affords any special rights to minors, the notice must include a discussion of these rights. 42 USC Section 666(a)(5)(C)(i).

- If he is not married to the mother, a man's name cannot appear on a child's birth certificate unless he has signed a voluntary acknowledgment of paternity or there has been a judicial or administrative determination of paternity. 42 USC Section 666(a)(5)(D)

- A form that meets the minimum federal requirements established in Action Transmittal 98-02 (January 23, 1998) is used. The form must include the current full name, address, social security number and date of birth of the mother and the father; current name, date of birth, and birthplace of the child; a brief explanation of the legal consequences of signing the form; a statement that the parents are voluntarily signing the form and understand the nature and consequences of what they are doing; and signature lines for both parents. 42 USC Section

666(a)(5)(C)(iv).

- The state designates an entity where acknowledgments can be filed. This entity must make the acknowledgments available to the state child support enforcement (IV-D) agency. 42 USC Section 666(a)(5)(M).

- Either parent is able to rescind the acknowledgment within the *earlier* of 1) 60 days of signing; or 2) the date of any judicial or administrative proceeding relating to the child to which the signatory is a party. Thereafter, the acknowledgment is the equivalent of a judicial determination of paternity. 42 USC Section 666(a)(5)(D)(ii)

- No proceeding of any kind is required or allowed to ratify an unchallenged acknowledgment of paternity once the rescission period has expired. 42 USC Section 666(a)(5)(E).

- The grounds on which an acknowledgment can be challenged after the rescission period are limited to fraud, duress or material mistake of fact. If such a challenge is filed, the burden of proof rests on the challenger. Further, any legal obligations arising from the acknowledgment (e.g., child support) must continue during the challenge period unless good cause for suspending them is shown. 42 USC Section 666(a)(5)(D)(iii).

- A state may make similar procedures available at places other than birthing facilities and birth records agencies for parents who wish to sign a paternity acknowledgment. If a state chooses this option, the entities administering the program at those sites must use the same forms and materials as those used in the hospital/birth records agency. 42 USC Section 666(a)(5)(C)(iii)(II)(bb).

- The State gives full faith and credit to acknowledgments signed in other states if they contain the information required by the minimum federal standards and have been entered in compliance with the procedures required by the state in which they were signed. 42 USC Section 666(a)(5)(C)(iv).

Contested Paternity Cases

The availability of the voluntary acknowledgment process has decreased the number of cases in which paternity needs to be established. However, there are still a significant number of contested paternity cases. Some of these are situations where the mother does not wish to establish paternity and the father has to bring suit to assert his rights. Others involve biological fathers who adamantly deny paternity and take every possible step to avoid the entry of an order. Others are cases where the alleged father has genuine doubts about his paternity because 1) there is more than one possible father; 2) genetic test results are inconclusive; or 3) there is conflicting testimony about whether the alleged father had access to the mother during the probable time of conception. Some of the issues may be resolved at an informal conference or after genetic tests. Others will require a full- blown hearing.

In recognition of the need to streamline the contested paternity process and deal with these issues, Congress has required states—again as a condition of receipt of federal TANF and child support funding -- to enact laws and procedures for contested cases so that:

- Fathers as well as mothers are be able to initiate a paternity action. 42 USC Section 666(a)(5)(L).

- Expedited processes are available to handle contested paternity cases. 42 USC Section 666(a)(2). Whether the hearing entity is judicial or administrative, it must have: 1) statewide jurisdiction; and 2) the capacity to transfer cases between local jurisdictions without the necessity for the parties to re-file. 42 USC Section 666(c)(2)(B).

- The child and all other parties are required to submit to genetic tests whenever a party requests such tests.[24] The request must be accompanied by an affidavit alleging paternity and setting forth facts indicating the requisite sexual contact between the parties at the probable time of conception or denying paternity and setting forth facts raising a reasonable doubt of the requisite sexual contact between the parties at the probable time of conception. 42 USC Section 666(a)(5)(B).

- Child support agencies have the power (without the need for permission from a court or administrative tribunal) to order genetic tests in appropriate cases in their system. These agencies must also recognize and enforce the ability of other state IV-D agencies to take such actions. 42 USC Section 666(c)(1)(A).

- In any case in which the child support agency orders the test, the state pays for the initial tests. The state is allowed (but not required) to recoup the cost from the father if paternity is established. 42 USC Section 666(a)(5)(B)(ii)(I). If the original test result is contested, further testing can be ordered by the IV-D agency if the contestant pays the cost in advance. Id. Section 666(a)(5)(B)(ii)(II).

- Genetic test results are admissible as evidence so long as they are of a type generally acknowledged as reliable by accreditation bodies recognized by HHS and performed by an entity approved by such an accredited body. 42 USC Section 666(a)(5)(F)(I).

- Genetic test results are admissible without the need for foundation testimony or other evidence of authenticity or accuracy unless objection is made within a specified number of days before the evidentiary hearing. 42 USC Section 666(a)(5)(F).

- A party wishing to challenge genetic test results must file a written objection either a specified number of days before the hearing or (at state option) a specified

[24] Parents receiving TANF or Medicaid who have been found to have "good cause" for not pursuing paternity are exempt from this rule. 42 USC Section 654(29).

number of days after receipt of the test results. Unless timely objection is made, the test results must be admitted into evidence without the need for foundation testimony or other proof of authenticity or accuracy. 42 USC Section 666(a)(5)(F)(ii) and (iii).

- Genetic test results that demonstrate a high probability that the named father is the father if the child in question create either a rebuttable or a conclusive presumption of paternity. 42 USC Section 666(a)(5)(G).

- In a case where the alleged father fails to appear at the hearing, the judge, master and/or hearing officer has the authority to enter a default order on a showing that the defendant was served and any other showing required by state law. 42 USC Section 666(a)(5)(H).

- Judges, masters and hearing officers have the authority to issue temporary support orders if requested to do so by either party when there is clear and convincing evidence of paternity. 42 USC Section 666(a)(5)(J).

- A paternity order entered by a judge, master or administrative tribunal contains the social security number of both parents. 42 USC Section 666(a)(13(B).

- There is no right to a jury trial. 42 USC Section 666(a)(5)(I).

Fiscal Implications

Simply having good laws in place does not guarantee results. In order to encourage states to focus on results, Congress also enacted a series of penalties for failure to achieve a high level of performance in establishing paternity. More recently, Congress has also provided incentives for good performance in this area.

Current law establishes the goal of a *90* percent paternity establishment rate. States that do not meet this standard must perform as follows:

- a state with a paternity establishment percentage between 75 and 90 percent must improve its IV-D paternity establishment percentage for the next fiscal year by 2 percentage points;

- a state with a paternity establishment percentage between 50 and 75 percent must improve its IV-D paternity establishment percentage for the next fiscal year by 3 percentage points;

- a state with a paternity establishment percentage between 45 and 50 percent must increase its IV-D paternity establishment percentage for the next fiscal year by 4 percentage points;

- a state with a paternity establishment percentage between 40 and 45 percent must improve its IV-D paternity establishment percentage for the next fiscal year by 5 percentage points; and

- a state with a IV-D paternity establishment percentage of less than 40 percent must improve its IV-D paternity establishment percentage for the next fiscal year by 6 percentage points. 42 USC Section 652(g).

Failure to meet these standards will result in a loss of TANF funds. 42 USC Section 608(a)(9).

In 1998, Congress also provided states with incentive payments for good performance. The new system is being phased in and will be fully operational in FY 2002. At that time, a state with a paternity establishment rate below 50% will receive no incentive payment unless its rate is at least 10% higher than in the previous year. States with rates above 50% will receive incentive payments that grow proportionately to the state's success rate. 42 USC Section 658a(b)(6).

The Paternity of Marital Children Under the New UPA

The Issues

As noted above, until recently, a child born to a married woman was conclusively presumed to be the biological child of her husband. There are three independent reasons for this rule:

- the best interests of the child. If a child is born into a marriage and establishes a father-child relationship with the husband, it is generally in the child's interest to maintain that relationship as it provides him/her both financial and psychological benefits.

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

- the public fisc. If a husband successfully challenges the paternity of a child thought to be his, the child might well need public assistance to replace the lost financial support the husband had provided.

However, there is a fourth concern that runs in the opposite direction: a sense that it is unfair to require a man to support a child with whom he has no biological connection.

Until recently, the first three considerations dominated the statutory and case law. The fourth concern was recognized only when it was physically impossible for the husband to be the biological father. However, the advent of sophisticated genetic testing has greatly increased the number of situations in which it can be shown that it is not physically possible for a husband to be the father of his wife's child either because his paternity is excluded by such tests or because the test results show that another man is the biological father. This has led to a number of difficult and contradictory laws and decisions in six different areas.

1. *Paternity challenges by mothers at the time of divorce*. These cases generally arise when a husband and wife have cohabited during the marriage, a child is born, and either the wife has affirmatively told the husband that he is the father or he has simply assumed that he is. The husband then develops a father-child relationship with the child. At divorce, the wife asserts (and often offers or seeks genetic tests to prove) that the husband is not the father. If the father wishes to maintain a parent-child relationship and offers to assume the emotional and financial responsibilities of fatherhood, courts try to maintain that relationship. Looking at the consent of

the husband, the best interests of the child, and the public fisc, they conclude that there is more to fatherhood than biology.[25] Some have even gone so far as to develop the concept of "equitable parenthood".[26] However, there is growing discomfort with the "equitable parent" doctrine.

2. *Paternity challenges by fathers at the time of divorce*. These cases arise under similar circumstances as the challenges by mothers discussed above. The difference is that the husband—confronted with the possibility that he is not the child's biological father—wishes to end his relationship to the child. In this situation, courts often allow the challenge, weighing in on the side of not forcing a man to assume responsibility for a child to whom he has no biological connection.[27] This is often not in the best interests of the child as it leaves him/her without the man who has provided emotional and financial support. It also has public implications if the child then needs some form of public assistance. For this reason, other courts have estopped husbands from raising the paternity issue at divorce. This is especially true when the husband knew there was some question, but failed to act, established a relationship with the child, and/or precluded the mother from pursuing the biological father.[28]

3. *Post-divorce paternity challenges by mothers*. In some states, divorce decrees contain affirmative language stating that the children are "the children of the marriage." Other states do not use this specific language, but, when there are children, the order does allocate parental rights and responsibilities (child support, custody, visitation) that are dependent on a determination that the divorcing couple are the parents of children born during the marriage. Sometimes, a divorce is issued and the mother subsequently challenges the ex-husbands paternity. This can happen when she rekindles a relationship with the biological father and hopes to have him assume parental responsibility for the child. Usually, courts find that the ex-husband's paternity is *res judicata* under the divorce decree and do not allow the mother's challenge.[29] This protects the children and the ex-husband as well as the public fisc. However, when the biological father wishes to assert his paternity and offers tests to prove it, the court is faced with competing paternity presumptions: the marital presumption (non-biological) vs. the genetic test presumption (biological) and courts must carefully sort out the competing concerns.[30]

4. *Post-divorce paternity challenges by fathers*. Here too, the divorce decree contains language either explicitly or implicitly determining parentage. Generally, the mother has custody and the father is ordered to pay support. He gets behind in payment and she brings an enforcement action. He counters with a challenge to paternity, asserting that he should not be required to pay support since the children are not his. Courts tend to use principles of *res judicata* and collateral estoppel here as well.[31] The rationale is that this protects the best interests

[25] See, e.g., *L.D.H. v. K.A.H.*, 665 N.E.2d 43 (Ind. App. 1996); *In re Worcester*, 960 P. 2d 624 (Ariz. 1998).
[26] See, e.g., *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. App. 1987); *Monroe v. Monroe*, 621 A.2d 898 (Md. 1993); *In re Marriage of Slayton*, 685 N.E.2d 1038 (Ill. App. 1997).
[27] See, e.g., *Serafin v. Serafin*, 258 N.W.2d 461 (Mich. 1977); *Gantt v. Gantt*, 716 So. 2d 846 (Fla. App. 1998).
[28] See, e.g., *Johnson v. Johnson*, 286 N.W.2d 886 (Mich. App. 1979); *White v. White*, 710 So. 2d 208 (Fla. App. 1998). *W. v. W.*,728 A.2d 1076 (Conn. 1999).
[29] See, e.g., *Ex parte Presse*, 554 So. 2d 406 (Ala. 1989); *Klebs v. Trzoski*, 554 N.E. 2d 298 (1st Dist. 1990); *Patterson v. Whitehead*, 481 S.E. 2d 621 (Ga. App. 1997); *Moore v. Commonwealth*, 954 S.W.2d 317 (Ky. 1997).
[30] See, e.g. *Miller v. Miller*, 74 Cal. App. 4th 111 (Cal. App. 1998).
[31] See, e.g., *Jeffries v. Jeffries*, 840 S.W. 2d 291 (Mo. App. 1992); *In re Paternity of Rogers*, 697 N.E. 2d 1193 (Ill. App. 1998); *Godin v. Godin*, 725 A.2d 904 (Vt. 1998).

of the child as well as the public fisc. Since the husband had a chance to raise the issue at divorce but failed to do so, courts are less troubled by holding him responsible even if he is not the biological father. However, there is growing concern that these holdings prevent a child from learning about his/her biological heritage. At least one court has determined that a guardian ad litem must be appointed in these cases to investigate, analyze and report on the child's best interest.[32] Other courts have gone so far as to allow a post-divorce challenge, finding *res judicata* was not applicable because the mother had committed fraud.[33]

5. *During marriage paternity challenges by men alleging to be the biological father of a marital child.* A married woman may conceive a child during an extra-marital affair. Her husband may know/suspect that he is not the father but nonetheless establish a parent-child relationship with the youngster. If the biological father then comes forward and files a paternity action, the court must decide whether to allow the action to proceed or dismiss it. Here case law is quite mixed with some courts finding that it is in the best interest of the child as well as necessary to preserve family stability to refuse to allow such actions.[34] Others, emphasizing the importance of biology, allow the case to proceed.[35]

6. *Post-divorce challenges by men alleging to be the biological father of a child born during a marriage*. In these situations, the marriage has already broken down so consideration of maintaining marital harmony is irrelevant. However, there may already be a court order establishing the ex-husband to be the father of the child. In that situation, the court is likely to apply *res judicata* principles if the husband wishes to remain the legal father of the child. If he does not, then a court may well allow the biological father to assert his claim. Courts may then consider the nature of the relationship between the child and the husband to see if it should be preserved as well as any relationship the child may have with the biological father.[36]

How the New UPA Addresses These Issues

The new UPA codifies the presumption of paternity in the context of marriage. **Section 204.** The presumption arises when a man and the child's mother:

- are married to each other at the time of the child's birth.
- were married to each other and the child was born within 300 days of the termination of the marriage whether by death, annulment, decree of separation, or divorce.

[32] *Marriage of Swanson,* 944 P.2d 6 (Wash. App. 1997).
[33] See, e.g., *DeRico v. Wilson,* 714 So.2d 623 (Fla. App. 1998); *Love v. Love,* 959 P. 2d 523 (Nev. 1998). *Miller v. Miller,* 956 P.2d 887 (Okla. 1998).
[34] See, e.g., *Grice v. Detwiler,* 488 S.E. 2d 755 (Ga. App. 1997); *I.A. v. H.H.,* 710 So.2d 162 (Fla. App. 1998); *Callendar v. Skiles* 591 N.W. 2d 182 (Iowa 1999); *Strauser v. Stahr,* 726 A. 2d 1052 (Pa. 1999). See, also *State ex rel. Roy Allen S. v. Stone,* 474 S.E. 2d 554 (W.Va. 1996).
[35] See, e.g., *In re S.R.H.,* 981 P.2d 199 (Col. App. 1998); *T.D. v M.M.M.,* 730 So. 2d 873 (La. 1999).
[36] See, e.g., *In re Paternity of S.R.I.,* 602 N.E.2d 1014 (Ind. 1992); *McDaniels v. Carlson,* 738 P.2d 254(Wash. 1987).

- attempted to marry each other-- even if the marriage could be or has been invalidated-- if the child was born during the invalid marriage or within 300 days of its termination.

- married *after* the child's birth (even if the marriage is or could be declared invalid) if the man took some voluntary step to establish his paternity. Such steps include asserting paternity in a filing with the state birth records agency, allowing his name to appear on the child's birth certificate, and promising in writing to support the child.

If paternity is established by one of these marital presumptions, there are only **two** ways to challenge the husband's paternity—through the voluntary acknowledgment process or through a court proceeding. Moreover, the new UPA establishes rules governing the effect of paternity declarations in divorce decrees, which should help settle the law in that area.

Through the voluntary acknowledgment process. The marital presumption of paternity may be overcome under Article 3, which governs the voluntary acknowledgement of paternity.[37] Under this article, if a married woman gives birth to a child who is not the biological child of her husband and 1) the biological father is ready and willing to acknowledge his paternity; and 2) the husband is willing to relinquish his parental rights and responsibilities, the parties can enter a three-way process. Note that in this situation all four policy concerns can be satisfactorily addressed. Since the husband and wife agree on the proper resolution, there is no threat to the marriage. The child ends up with a father who willingly assumes the role of provider of emotional and financial support. Thus, the child has a father and the likelihood that the child will need public assistance is diminished. Finally, a man with no biological tie to the child (the husband) is not held responsible for the child.

To engage in this process, the wife and biological father execute a voluntary acknowledgment of paternity. (For more details on the voluntary acknowledgment process, see the next chapter.) The acknowledgment states that the child has a presumed father and provides his name. **Section 302(a)(3)(A).** Incorporated in or attached to that acknowledgment is the husband's denial of paternity. **Section 304(a).** He must sign the denial under penalty of perjury. **Section 303.**

The acknowledgment and denial may be executed before the child's birth, **Section 304(b),** in which case they become effective only on birth of the child or filing (whichever comes last). **Sections 304(b) and (c).** Once the biological father's acknowledgment of paternity and the husband's denial are filed, the denial becomes the equivalent of an adjudication of non-paternity and serves to terminate the husband's parental rights and responsibilities. **Section 305(b).** Unless he changes his mind within 60 days or brings suit within two years (alleging fraud, duress or material mistake of fact), the husband is bound by the denial. **Sections 307 and 308.** The denial is also entitled to full faith and credit in other states. **Section 311.** In this way, the parties to this awkward situation can resolve the problem and the child ends up with a legal

[37] Most of the rules in this section of the UPA apply to non-marital children. However, there are a number of provisions that can be used to establish the paternity of a marital child in a man other than the mother's husband.

father who is also his/her biological father. Note also that there is *no time limit* on this process: it can be used at any time when all three adults are in accord.

Through a contested case proceeding. The *second* way to challenge the marital presumption of paternity is to bring a proceeding under Article 6 of the new UPA. This process can be used when the wife, husband and possible biological father do not all agree on the proper resolution of parentage. Because this process can both disrupt an established father-child relationship between the husband and the child and can lead to a child having no legal father, it raises serious moral, ethical and legal issues. Thus, there is a need for careful consideration of both the timing of and the process for such a challenge.

Timing. Under the new UPA, a husband, wife or possible biological father who wishes to challenge the paternity of a marital child must bring the action within *two years of the child's birth.* **Section 607(a).** The only exception to this rule is when the husband and wife neither cohabited nor engaged in sexual intercourse with each other during the probably period of conception **and** the husband never openly treated the child as his own. **Section 607(b).**

In essence, the new UPA allows both partners to the marriage and the biological father to challenge the marital presumption of paternity, but only if they do so around the time of the child's birth. If they wait longer than two years, they will be precluded from raising the issue. In this way, the interest of the child in maintaining an on-going father-child relationship with the husband is recognized. Once two years have passed, that relationship is likely to be solid and it disruption potentially harmful to the child.

At the same time, the new UPA retains the ancient rule that if a husband cannot possibly be the biological father (he neither cohabited nor engaged in sexual relations with the mother) a challenge may be brought at any time --unless he has held the child out as his own. In this case, there is neither a marriage nor a father-child relationship to protect. While the child might need public assistance, this concern is outweighed by the need for fairness to the husband who should not be required to support a child with whom he has neither a biological nor an emotional bond. On the other hand, if he has treated the child as his own, he has created a father-child relationship and he, the mother and the possible biological father should be estopped from claiming non-paternity once two years have passed.

Process. Even if an action is timely filed, under the new UPA it will not necessarily be successful. Remember, the marital presumption of paternity created in **Section 204** continues to exist. The only allowable way to rebut this presumption is through the use of admissible genetic test results. **Section 631(a)**. Such testing may be ordered. **Section 502(a).** However, because of the seriousness of the consequences and the complexity of the legal issues only a court may order genetic testing in a case where the child has a presumed father. The child support agency may not order testing. **Section 502(b).** Thus, if the issue arises in a IV-D case, the agency must begin a formal legal proceeding**.**

The court may order testing. It may also decline to do so if:

- the wife's conduct estops her from denying her husbands paternity (e.g., she told him he was the father and based on that knowledge he has bonded with the child) or

- the husband's conduct estops him from denying his paternity (e.g., the wife told him he was not the father but he told her not to worry about it that he would treat the child as his) and

- it would be inequitable to disprove the father-child relationship. **Section 608(a)**.

Whether the request for genetic tests comes from the wife, the husband or the man alleging to be the biological father, the court must also consider the best interests of the child. In doing so, it must look at a variety of factors including the child's age, the relationship between the child and the husband, the relationship between the child and the man alleged to be the biological father, and the facts surrounding the husband's discovery of his possible non-paternity. **Section 608(b).** Moreover, to make sure that the child's interests are adequately considered, a guardian ad litem must be appointed for the child. **Section 608(c).**[38]

After considering all the factors, if there is clear and convincing evidence that it should do so, the court can deny genetic testing. **Section 608(d).** At that point, it must enter an order declaring the husband to be the child's father. **Section 608(e).** This will preclude any future issue. If the court does allow genetic testing to proceed, the results are admissible so long as they meet the other statutory standards. **Section 621.** If the results indicate that the husband is not the biological father, then a finding of non-paternity must be entered**. Section 631(4).**

The effect of a divorce decree. As noted above, a divorce decree usually contains language in some way declaring or implying that children born during the marriage are the children of the husband and wife. Courts sometimes give such language *res judicata* effect and sometimes they do not. The new UPA provides that, if the dissolution decree:

- expressly identifies a child as "child of the marriage", "issue of the marriage" or uses similar words, or

- requires the husband to support of the child and does not specifically state he is not the father

the order is deemed to be an adjudication of parentage. **Section 637(c).** As such, it is binding on both the wife and the husband. Moreover, if a later proceeding is brought and another man is alleged to be the biological father, that man may use the divorce decree as a defense. **Section 637(d).**

By applying these rules, many of the issues that have troubled courts can be resolved. In the context of a divorce, parties must raise the issue or be bound by the order. Post-divorce

[38] The appointment of a guardian ad litem also prevents the child from later challenging his/her paternity. **Section 637(b)(2).**

parental attacks on a child's paternity will not be allowed if the order contains any language that can be construed as establishing paternity of the children born during the marriage.

Outside the context of divorce, wives, husbands and possible biological fathers will all be able to either voluntarily resolve the issue through the acknowledgment process or ask for a timely adjudication. If they wish adjudication, the action must be commenced within two years of the child's birth. The court will then assess the conduct of the parties and the nature of any parent-child relationships that have developed between the child and the husband or the child and the possible biological father. If it appears that genetic tests are appropriate, they may be ordered. However, if it appears that this is not in the best interests of the child they can be denied and the husband's paternity is then officially established.

The Paternity of Non-Marital Children Under the New UPA

The Issues

There are two primary ways in which the paternity of non-marital children can be established: through the voluntary agreement of their parents, and through a contested proceeding. As the issues for each are different, they are described separately below.

Voluntary Acknowledgments

As noted above, all states now have laws that allow parents to establish their child's paternity by simply signing a sworn statement. When this acknowledgment is signed, the father's name can appear on the child's birth certificate. If the statement contains all of the elements required by federal law and is signed by both parents, once 60 days pass, the acknowledgment becomes the equivalent of a judicial order. Thereafter, the parents may only challenge the voluntary paternity acknowledgment on grounds of fraud, duress or material mistake of fact. Moreover, the acknowledgment is entitled to full faith and credit in other states. By-and large, this process has been highly successful, allowing parents to "do the right thing" for their children. However, on the process level, there is an identified need to do better parent education; improve coordination between birthing facilities, child support agencies and vital records; and to think carefully about the pros and cons of allowing community-based agencies to be involved in the voluntary acknowledgment process.[39] There are also some legal issues that need to be addressed. These are described below.

The Ability of Minors to Use the Voluntary Process. A small but significant number of unmarried mothers and fathers are minors, i.e., under the age of 18. State laws usually preclude minors from entering legally binding contracts without the consent of their parents or the appointment of a guardian ad litem. Paternity acknowledgments are the type of contract where this rule applies. Some states have enacted legislation abrogating the rule: they specifically allow minor parents to sign a binding paternity acknowledgment without the consent of their parents or the appointment of a guardian ad litem.[40] Other states explicitly forbid minors from signing without the consent of their guardian.[41] Still others allow minors to sign but make the document

[39] DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, PATERNITY ESTABLISHMENT: USE OF ALTERNATIVE SITES FOR VOLUNTARY PATERNITY ACKJNOWLEDGMENT (July 1999). See, also, ID. PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS (April 2000).
[40] See, e.g., MASS. GEN. LAWS ANN. Ch.209C, Section 11; MONT. CODE ANN. Section 40-5-232(3).
[41] See, e.g., W.VA. CODE Section 48A-6-(b); WY.STAT. ANN. 14-2-102(c).

a rebutable, rather than a conclusive, presumption of paternity.[42] Federal law takes a neutral position: no specific protections are required, but if a state chooses to establish such protections, it must inform the minor about them.[43]

The Rescission Process: Some states have no rescission process. Some have an administrative or quasi-administrative process. Still others use judicial processes.[44] The goal of the administrative method is to offer parents a fast, simple way to withdraw the acknowledgment before it becomes legally binding. The goal of the judicial method is to bring the parties into a formal proceeding to resolve the issue. When the judicial process is used, genetic testing can be ordered and the paternity or non-paternity of the man who signed the acknowledgment can be determined. Moreover, at the end of a judicial proceeding, the court can issue an order correcting the child's birth certificate if this is necessary.

A major problem with the less formal administrative or quasi-administrative processes is that child support offices, vital records offices and sometimes parents are not informed when a voluntary acknowledgment is rescinded. This failure to communicate results in inaccurate birth records, misinformed parties, and further delay in the effort to ultimately collect support.[45]

Challenges Beyond the Rescission Period: The only legal grounds on which an acknowledgment can be challenged after the rescission period are fraud, duress and material mistake of fact. Nonetheless, some acknowledging fathers have attempted to have the acknowledgment declared void simply because genetic testing shows that they are not the biological father. Courts have sometimes allowed this[46] and at other times have refused to throw out the acknowledgment.[47] The latter is particularly true when the man has established a close relationship with the child.[48]

Courts have also faced this issue when a mother wishes to challenge a voluntary acknowledgment in order to pursue someone else. Like the father, she must show fraud, duress or material mistake of fact.[49]

Contested Cases

A putative father may have doubts about or outright deny paternity. Genetic test results may be questionable or inconclusive. There may be conflicting testimony about whether the

[42] See, e.g., MINN.STAT. ANN. Section 257.75(9).
[43] 42 U.S.C. Ann. Section 666(a)(5)(C)(i).
[44] According to the Appendix to Section 309 of the UPA, 2 states have no process at the present time, 24 states have an administrative or quasi-administrative process and 16 have a judicial process. The other states either provided no answer or said rescission was "not applicable".
[45] Department of Health and Human Services-Office of Inspector General. "Paternity Establishment: Role of Vital Records Agencies." September 1999. See also "Use of Voluntary Acknowledgments." April 2000.
[46] See, e.g., *Alabama ex.rel. A.T. v. E.W.*, 695 So. 2d 624 (Ala. 1997); *Smith v. Georgia,* 487 S.E.2d 94 (Ga. App. 1997); *Rousseve v. Jones*, 704 So. 2d 229 (La. 1997).
[47] See, e.g., *Robert J. v. Leslie M.*, 59 Cal. Rptr. 2d 905 (Cal. App. 1997).
[48] See, e.g., *Dye v. Geiger*, 554 N.W. 2d 538 (Iowa 1996); *Guise v. Robinson*, 555 N.W. 2d 887 (Mich. App. 1996).
[49] See, e.g., *Stephenson v. Nastro*, 967 P. 2d 616 (Ariz. App. 1998).

man had access to the mother during the probable period of conception. When any of these things happen, the case is likely to be contested.

There are three central stages in a paternity case. In the first stage, one of the parents initiates an action. Whether it is the mother or the father, the parent must allege the requisite sexual contact during the probable period of conception. If there is other evidence (e.g., a written acknowledgment, an agreement to support, a pattern of conduct holding out the man as the child's father), that evidence may be offered. Next, the other parent must be located and served with notice of the action. Some states serve formal notice while others may simply send a letter, requesting the parent to come in for a conference. At that point, genetic testing may be required. Typically, testing resolves the issue and—if the results demonstrate a high probability of paternity—an acknowledgment is entered into. However, if either party wishes, the case may have to go to court. Then, formal service of process is required. The major legal issues here are:

The Role of the Child in the Proceeding. Some states require that the child be joined in any proceeding to determine paternity. Other states do not have this requirement. If the child is a party and represented by a *guardian ad litem*, *res judicata* principles usually apply and the child is bound by the outcome.[50] If the child is not a party, he/she may nonetheless be bound on the theory that he/she is in privity with a party (usually the mother).[51] However, there has been a recent tendency to allow the child to proceed with a paternity action on his/her own behalf even when there has been a prior proceeding.[52]

Default orders. If a putative father is properly served and does not appear, the court may enter a default order. The child then has a legal father and the mother can proceed with a support action. If this were not so, men would have no reason to respond to paternity suits. They could simply fail to appear and avoid responsibility. However, some courts have been troubled when the putative father later shows up with genetic tests showing non-paternity. These courts may vacate the default judgment, leaving the child without a father. The rationale is that the child is better off with no father than with the wrong father.[53]

Consent Orders. Prior to the advent of the voluntary acknowledgment process, paternity was often acknowledged through the entry of a consent order. Legally, such an order has the same standing as an order issued after a fully contested case and should be binding on the parties. Nonetheless, some courts have allowed challenges to consent orders based on later genetic testing.[54]

Genetic Testing. There are a number of legal issues which have come up in this area. They include:

[50] See, e.g., *In re Parentage of Griesmeyer*, 707 N.E. 2d 72 (Ill. App. 1998).
[51] See, e.g., *In re Estate of Quintero*, 569 N.W. 2d 889 (Mich. 1997).
[52] See, e.g., *In re Paternity of Amber J.F.*, 557 N.W.2d 84 (Wisc. App. 1996); *B.M.L. through Jones v. Cooper*, 919 S.W. 2d 855 (Tex. App. 1996); *Phinisee v. Rogers*, 582 N.W. 2d 852 (Mich. App. 1998); *Hall v. Lalli*, 977 P.2d 776 (Ariz. 1999).
[53] See, e.g., *Losoya v. Richardson*, 584 N.W. 2d 425 (Minn. App. 1998).
[54] See, e.g., *Smith v. Georgia DHR*, 487 S.E. 2d 94 (Ga. App. 1997).

1. Genetic testing when not all parties are available. Not infrequently, a mother desires to bring a paternity action after the putative father has died. This might happen when the mother and father have cohabited and held the child out as their own, feeling no need to go through the formal establishment process. Then the father suddenly falls ill or is in an accident and dies. To protect inheritance rights or receive Social Security survivors benefits, the child needs to formally establish parentage. A genetic sample may be available for testing but, if it is not, the father's body will need to be exhumed for purposes of testing.[55] In states where these maters are handled in a family court or other court of limited jurisdiction, the court may not have the authority to order exhumation. This can stymie the proceedings. The other alternative is to order testing of the man's relatives. Again, a court needs specific authority to order these non-parties to provide genetic samples. In the absence of such authority, there may be no possibility of genetic testing.

2. Different standards for deciding that a genetic test result creates a rebutable presumption of paternity. Every state now has a law pursuant to which genetic test results that establish a high probability that a man is the biological father of the child in question create a rebutable presumption that the man is the father. However, there is great variation in state standards.[56] This is largely because some of the standards were adopted before the most recent advances in genetic testing. They reflect the probabilities that could be achieved years ago. Today, routine test results establish a 99% probability of paternity. Thus, some of the old standards may be unfair to putative fathers: results at a 94% probability standard should not create a rebutable presumption in today's world. If results come in at this level, additional testing should be done as such testing might lead to a determination of non-paternity. At the very least, it would provide both the child and the man more certainty that the paternity judgment is correct.

3. Inconclusive genetic test results Genetic testing results are capable of yielding a probability of 99.9%. However, when siblings are involved it may require several tests to achieve this level of certainty. If identical siblings are involved, certainty may never be achieved based on test results alone. Some standard is needed to determine how to proceed in these cases.

4. Use of genetic tests when paternity has already been established**.** As noted above, genetic test results are sometimes offered to rebut the presumption of paternity of a marital child. Such test results may also be offered to challenge the paternity of a child whose paternity has been established through an un-rescinded acknowledgment or through an adjudication that did not involve genetic testing. This can be problematic, undermining the validity of the voluntary paternity acknowledgment or adjudicatory process. Nonetheless, such challenges have been allowed.[57]

[55] See, e.g., *Alexander v. Alexander*, 537 N.E.2d 1310 (199).
[56] The Appendix to Section 605 of the new UPA lists each state's law in this regard. It indicates that in some states a probability as low as 92% creates a rebutable presumption while in others a 99.9% standard is used. There are also some states that use a combined paternity index standard rather than (or in addition to) the probability standard.
[57] See, *Langston v. Riffe*, 200 Md. Lexis 387 (June 28, 2000).

How the New UPA Addresses These Issues

Voluntary Establishment

Article 3 of the new UPA includes all of the provisions necessary to meet federal law requirements. It creates a voluntary acknowledgment process through which a mother and a man who have conceived a child through sexual intercourse may voluntarily establish the paternity of that child. **Section 301.**[58] The acknowledgment must be in a record and be signed by both parties. As noted above, if the mother is married to someone other than the biological father, there are provision for allowing the mother, her husband and the biological father to execute a voluntary paternity acknowledgment. If the rules are properly followed, the biological father's paternity can be established and the husband's paternity dis-established. **Sections 303 to 305.**

However, if the child has a previously acknowledged or adjudicated father, the voluntary establishment process cannot be used. **Section 302(a)(3)(B).** If a couple tries to use the voluntary process to override a prior acknowledgment or adjudication, their acknowledgment is void. **Section 302(b)(2) and (3).** Parents in this situation must go to court for a determination of whether the prior acknowledgment or adjudication can be overturned. (See discussion of Article 6 below). This is important for two reasons.

- A child's paternity would be subject to question if his/her mother and a man could undo a prior acknowledgment/adjudication on their own. The new voluntary acknowledgement would declare one man to be the father while the prior acknowledgment/adjudication would declare another man to be the father.

- The integrity of the birth records process would be undermined. The official birth records would declare one man to be the father. In the absence of a court order to make a change, the birth records agency would be without authority to change the record to reflect the new acknowledgment.

The new UPA does allow minor parents to sign an acknowledgment of paternity without the need for a guardian. **Section 304(d**). This reflects a judgment that those who have brought a child into the world and wish to take responsibility for that action should be allowed to do so.

If there is no presumed, previously acknowledged or adjudicated father, the process is fairly straightforward. A valid acknowledgment is filled out and filed with the birth records agency. Once filed, it is the equivalent of an adjudication of paternity and confers upon the acknowledging father all the rights and duties of a parent**. Section 305.** No ratification is needed or permitted. **Section 310.** Moreover, the acknowledgment is entitled to full faith and credit by other states. **Section 311**.

Either parent may rescind the acknowledgment for any reason within 60 days of its filing. **Section 307(1).** (If there is a hearing regarding the child and that hearing is held before the 60

[58] Note that this means the voluntary process is not to be used by those conceiving a child through assisted reproduction or surrogacy. In those cases, the provisions of **Articles 7 and 8** are to be used.

days expire, a signatory who is a party to that proceeding must challenge the acknowledgment in the proceeding. Failure to do so makes the acknowledgment binding even if 60 days have not expired. **Section 307(2)**.

The new UPA weighs in on the side of a formal rescission process. A signatory[59] may commence this process by timely filing a proceeding to establish non-paternity. **Section 307.** The other signatory must be made a party to the proceeding, **Section 309(a)**, and will thereby be on notice that paternity is now an issue. The proceeding will be handled like a contested case (described in more detail below). **Section 309(d).** Genetic tests will be ordered and the court will enter an order determining parentage. **Section 636.** If the order requires a change in the information recorded on the child's birth certificate, the court will issue an order to the birth records agency to make the necessary changes. **Section 309(e).**

The rationale for this approach is protection of the child. If, after the acknowledgment is filed, one of the parents changes his/her mind, the other parent needs to know this. If a formal action is required, the other parent will receive such notice. At that point, consideration must also be given to establishing the identity of the child's father. The acknowledging male might be the father, and it makes sense to bring him in and have genetic tests performed. In that way there will be a timely resolution of his paternity. The tests may demonstrate that he is the father and the issue can be put to rest by court order. If tests establish that he is not the biological father, then the birth record (which is based on information in the acknowledgment) will need to be changed. The court can order that this be done, thereby assuring a timely and accurate record.

Once the rescission period expires, either party can challenge the acknowledgment based on fraud, duress or material mistake of fact. **Section 308(a)(1).** However, the challenge must be filed in court and within two years of the date of filing the acknowledgment in the birth records agency. **Section 308(a)(2).** This places the non-marital child in the same situation as a marital child; any contest must be commenced within two years of the event that establishes paternity. Again, this will involve a contested case procedure under Article 6 with the attendant rules on genetic testing, standard of proof, issuance of orders and correction of birth records (if necessary).

Contested Cases

1. Child with No Presumed, Acknowledged or Adjudicated Father.

If the mother and possible father of a non-marital child do not sign an acknowledgment of paternity, the parent wanting to establish paternity will have to bring a parentage action. **Section**

[59] It is also possible for a non-signatory to challenge an acknowledgment by commencing a proceeding within two years of the filing of the acknowledgment. **Section 609(b).** The court will then order genetic testing. **Section 502(a),** and proceed to determine parentage based on that testing. No evidence other than genetic testing can be used to disprove the paternity of the acknowledging father. **Section 631(a).** l In this way, a non-marital child whose paternity is established by acknowledgment is in the same position as a marital child whose paternity is established by presumption. A biological father may seek to rebut these presumptions and establish his paternity, but only if he acts quickly.

601.[60] Under the new UPA, such an action may be commenced before the birth of the child, **Section 611,** and at any time thereafter, **Section 606**. Essentially, this means there is no statute of limitations on establishing the paternity of a person whose parentage has not yet been determined.

In many states, the paternity process begins at the state child support agency. That agency can call the parents in and attempt to negotiate an agreement. If negotiation does not work, genetic tests can be ordered. **Section 502(b)**. The initial cost of these tests will be born by the state. **Section 506(a)(1).** The testing must be of a type generally recognized as valid and done by an accredited laboratory. **Section 503.** The lab will issue a report accompanied by documentation that establishes the chain of custody of the specimens. **Section 504.** If the results establish at least a 99% probability of paternity and a combined paternity index of at least 100 to 1, they create a rebutable presumption that the tested man is the father of the child. **Section 505(a).** When such results are achieved, the parents will usually sign a voluntary acknowledgment or consent order. If agreement cannot be reached, a formal action is filed.[61]

The mother and the man whose paternity is to be adjudicated must be made parties to the action. **Section 603.** The child is not a necessary party. **Section 612.** For this reason, the child is not bound by the judgment unless he/she 1) was represented in the action by a guardian ad litem; or 2) the determination of parentage was consistent with genetic test results and this is stated in the determination or otherwise shown. **Section 637(b).**

When an action is brought, the court will order genetic tests if they have not yet been done. If testing has been done but is inconclusive, the court or IV-D agency may order additional tests. **Section 507.** The court will determine how the cost of such tests is to be paid. However, if the previous tests rebuttably identified the man as the father, the contesting party must pre-pay the costs of any additional testing. **Section 507.**

If a testing specimen is not available from a man alleged to be the father, the court may order one or more of his relatives to participate in the testing. **Section 508(a)**. If a sample from the mother is not available, the testing can proceed without her, as a sample from her is not essential. **Sections 508(b) and 622(d).** If either parent is deceased, the court may also order the body exhumed so that a sample may be obtained. **Section 509.**

If the case involves identical brothers, all may be tested. If none are excluded and each provides results consistent with paternity, the court may rely on non-genetic evidence. **Section 510.**

In any other case, genetic tests results will usually be determinative.

- If they indicate that a man is not the father, an order declaring his non-paternity must be issued. **Section 631(4).**

[60] Under the new UPA, an action might also be brought by the child, a support enforcement agency, or an authorized adoption or child placement agency. **Section 602.**

[61] This same basic pattern is followed in states that do not start with an informal IV-D conference and in cases not handled by the IV-D system. In these instances, the court will order testing. If the IV-D agency is involved, the agency will pay the initial costs. If the case involves private parties, the court will determine who will pay for the costs. **Section 506(a)(2)-(4).**

- If the initial results create a rebutable presumption of paternity, the burden shifts to the alleged father. The only means by which he can rebut the presumption is to offer other genetic tests that either exclude his paternity or establish that another man is the father. **Section 505(b). See, also Section 631(b).**

- If there are multiple alleged fathers, and none are excluded by initial testing, then the court must order additional testing until the issue is resolved. **Section 505(c).**

- If the test results neither exclude the man as the father nor create a rebutable presumption of paternity, the court must proceed. The genetic test results as well as other evidence must be considered and a determination made. **Section 631(3).**

- If a man refuses to submit to genetic testing, that denial is admissible into evidence.[62] Moreover, the court may then adjudicate parentage contrary to his position. **Sections 622(b) and (c).**[63]

In any event, the issue must be resolved by the judge without the assistance of a jury. **Section 632.**

If a man is served in a paternity case but fails to appear, the court may issue a default order based on the available evidence. **Section 634.** If there are genetic tests available and they meet the UPA standards, they may be considered. See, **Sections 503,504 and 621**. If tests are not available, the court can consider other evidence such as testimony from the mother, evidence of access at the probable time of conception, statements against interest, documents indicating the man's acknowledgment that he is the father. In that way, paternity can be adjudicated and there will be an evidentiary record showing the basis for the finding.

If, after the action is commenced, neither party pursues it, the court may dismiss the action. However, the dismissal must be *without prejudice*. **Section 635.** In that way, one of the parties, the child support agency, or the child may bring an action in the future so that paternity can be resolved. This is particularly important in preserving the child's right to know who his/her parents are. It is also important to the state: if the child needs public assistance, the state may want to establish paternity and pursue the father to help support the child. If a prior action was dismissed with prejudice, the state may not be able to go forward with the action. Indeed, this is so important that the new UPA makes void any dismissal with prejudice and allows such a dismissal to be challenged in a judicial or administrative proceeding. **Section 635.**

2. Child With a Presumed Father.

See Chapter on the Paternity of Marital Children under the New UPA, *supra*.

3. Child With an Acknowledged Father.

[62] He may also be held in contempt. **Section 622(a).**
[63] A mother who refuses to be tested may also be held in contempt and have her refusal admitted into evidence. However, genetic testing may proceed without her so the evidence can be obtained even if she fails to cooperate. **Section 622(d).**

See Section on Voluntary Acknowledgments, *supra*.

4. Child With An Adjudicated Father.

Once paternity has been adjudicated by a court of competent jurisdiction, as between the parties to the action, the issue is resolved. **Section 637(a)(2).** If one or more of them is unhappy with the result, he/she may appeal. **Section 637(e)**. If a timely appeal is not filed, the parties are bound.

However, a non-party might wish to challenge an adjudication. For example, a child is allowed to bring a paternity action under the new UPA. **Section 602(1).** If the child was not a party to the original action, he/she might wish to proceed to establish his/her paternity against a man who has been adjudicated not to be the father. The new UPA allows this, but only if 1) the child was not represented by a guardian ad litem in the original action; or 2) the determination was not consistent with genetic test results. **Section 637(b).** This balances the rights of the parties to have a final order with the rights of the child to know who his/her father is. If the child was represented in the original proceeding, he/she should be bound. If the child was not represented, but the results are based on genetic test results, the child should also be bound since it is unlikely that a new proceeding would bring a different result. However, if the child was not represented or the result was not consistent with genetic testing, then the child should be able to proceed.

It is also possible that a man who was not a party to the adjudication might want to contest the result. For example, a man who discovers that his ex-girlfriend has given birth to a child might believe that he is the biological father even though another man has been so adjudicated. (This might happen in a case where the decision was not based on genetic test results or where there was a default order.) In this situation, the new UPA allows the non-party to bring an action. **Section 602(c).** However, he must do so within two years of the adjudication. **Section 609.** If he files within this time frame, the case will proceed like any other contested paternity case as described above. This means the man must offer admissible genetic test evidence of his paternity. **Section 631(a)**.

Protecting Fathers, Children and Adoptive Parents Through the Use of Paternity Registries

The Issues

The last 30 years have brought a growing recognition of the rights of non-marital fathers to have a legal relationship with their children. The voluntary acknowledgment process described above allows willing mothers and biological fathers to easily establish such a relationship. If the mother is unwilling, the biological father can file suit and use the streamlined procedures also described above. Most of the time, one of these procedures is available and will resolve the issue.

However, there are a small—but not insignificant—number of situations where the biological father cannot use one of these procedures. This can happen when the biological father is unaware of the pregnancy and so does not know he has rights to assert. It can also happen when he is aware of the pregnancy, but looses contact with the mother. In this situation, he can neither enter a voluntary agreement nor file suit.

In the absence of some way to deal with these situations, if the mother places their child for adoption, the biological father's parental rights will be terminated without notice to him. If he later learns of the birth of the child or the child's whereabouts, he may sue to assert his rights--arguing that he was entitled to notice before his parental rights were terminated. If he is successful, he may overturn the adoption and claim custody of the child. Since this can happen several years after the adoption, it can be very disruptive to the child and devastating to the adoptive parents. The recent cases of Baby Richard (a four year old) and Baby Jessica (a three year old) who were taken from the only parents they had ever known and given to their biological father who was a complete stranger to them are graphic examples of how heart wrenching this can be.[64] Moreover, the mere fact that this can happen has a chilling effect on the willingness of potential adoptive parents to actually adopt a child.

To limit the potential disruption to children and adoptive parents, yet protect the rights of biological fathers who wish to assume parental rights and responsibilities, some states enacted legislation creating paternity registries. Under these laws, a biological father must register his claim to paternity. If he does so, he will be notified of any proceeding to terminate his parental rights or for adoption of the child. If he fails to register, however, his rights may be legally terminated without such notice and he will be unable to undermine the adoption of the child. The Supreme Court has upheld the constitutionality of such statutes. *Lehr v. Robertson*, 463 U.S. 248

[64] See, *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) and *In re Baby Girl Clausen*, 501 N.W. 2d 193 (Mich. App. 1993) aff'd *In re Clausen*, 502 N.W. 2d 649 (Mich. 1993) and *In re Doe*, 638 N.E.2d 181 (Ill. 1994).

(1983). Today, twenty- eight states have enacted such laws.[65] However, that leaves twenty-three jurisdictions in which there is still a potential for serious problems.

How the New UPA Addresses the Issues

Article 4 of the new UPA adopts the paternity registry concept. **Section 401.** However, only a narrow class of men need to register. If a man already has a father-child relationship under the UPA by virtue of an acknowledgment, an adjudication, or one of the presumptions of paternity, he need not register. That relationship, in and of itself, gives him the right to be notified of any proceeding to terminate his parental rights or for adoption of the child. **Section 402(b).**

Any other man who 1) believes he has fathered a child; and 2) wishes to be notified of any proceeding in which his parental rights might be terminated or the child might be adopted, must register in the state paternity registry before the birth of the child or within thirty days thereafter. **Section 402(a).** The state cannot charge a fee for filing the registration. **Section 416(a).** The registrant will be given a form to sign that will tell him that:

- ❖ timely registration entitles him to notice of any proceeding to terminate his parental rights or for adoption of the registered child.
- ❖ timely registration is not the equivalent of filing a paternity action.
- ❖ the services of the state child support enforcement agency are available to him if he does wish to file a paternity suit.
- ❖ information on the form may be used if an action to establish his paternity is brought.
- ❖ if the child was conceived or born in another state, he should also register in that state or those states. The form should also explain how to obtain information about those other state registries.
- ❖ there are procedures to revoke the registration and what those procedures are.
- ❖ the form must be signed under penalty of perjury. **Section 411.**

Thereafter, he must notify the registry if there is any change in the information. **Section 402(c).** In addition, a registrant can revoke his registration at any time by sending a written, witnessed or notarized revocation to the registry. **Section 414.** Finally, if the registration is not timely, the registry will notify the registrant so that he will know that his right to notice is not protected. **Section 415.**

[65] According to the Appendix to Section 401 of the new UPA, these states are Alabama, Arizona, Arkansas, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming.

Information filed in the paternity registry is confidential and can only be released to a limited number of specified courts, agencies or parties. **Section 412(b).** Release of the information to an unauthorized person or entity is a misdemeanor. **Section 413.** One party who can request information is the mother. **Section 412(b)(2).** Moreover, if the biological father provides her address on the form, the registry will actually notify her of the registration. **Section 412(a).**

A biological father who timely files is entitled to be served (in the same manner for service of process in a civil action) of any proceeding to terminate his parental rights or for the adoption of the child. **Section 403.** However, if the child is an infant (i.e., less than one year old) and he fails to file or he files more than thirty days after the birth of the child, his parental rights may be terminated without notice to him. **Section 404.** Thereafter, he is entitled to formal notice of any proceeding to terminate his parental rights or for adoption of the child even if he has not filed in the paternity registry. **Section 405.**

To make sure that this system is honored, the new UPA provides that, in any proceeding for adoption of or termination of parental rights to a child under the age of one whose paternity is not known, the petitioner must obtain a certificate of search of the appropriate paternity registry or registries. These include the registries of the forum state and any states where the child may have been conceived or born. **Section 421.** A certificate of search must be signed on behalf of the appropriate state registry, indicate that a search has been made, and either 1) no registration has been found: or 2) a registration has been found and is attached. **Section 422(b).**

The certificate or certificates of search are admissible as evidence (**Section 423**) and must be filed before the adoption or termination proceeding can be concluded. **Section 422(c)**. If the search reveals the existence of a registrant, he is then entitled to notice and an opportunity to appear. **Section 403.**

In this way, the new UPA both acknowledges the rights of biological fathers and facilitates the process for infant adoption. The father is given an opportunity to timely register his claim and thereby have a voice in the future of his child. However, if he does not exercise this right, while the child is still an infant, his rights can be terminated and the child released for adoption. Adoptive parents and their children need not fear that a stranger claiming to be the biological parent will someday appear and interfere with their legal status. Once infancy has passed, however, the biological father regains his right to notice of adoption/termination of parental rights even if he has not registered. Thus, a father who learns of the existence of his child only after that first year will be notified and given an opportunity to argue why he—rather than the potential adoptive parent—should be recognized as the child's father.

Parentage of Children of Assisted Reproduction Under the New UPA

The Issues

As the result of new reproductive technologies, an increasing number of couples who would once have been childless are now becoming parents. Indeed, several thousand children are born each year as the result of assisted reproduction. As to married couples using their own eggs and sperm to conceive a child born by the wife, the law in most states is settled: the husband is the father of the child by both biology and the marital presumption of paternity. The wife is the mother by virtue of both biology and having given birth to the child.

If, using assisted reproduction, a wife gives birth to a child conceived using sperm from a man other than her husband, she is the mother and her husband is the presumed father. However, there is always a chance that the sperm donor could assert his biological paternity. There is also a chance that the husband could try to rebut the martial presumption of paternity and assert that he is not the biological father. There is a need for legal standards in this area.

Similarly, if the assisted reproduction involves the use of eggs from a woman other than the wife, there is always a possibility that the egg donor could assert her maternity. Moreover, the wife could attempt to deny maternity based on the lack of genetic connection to the child. Again there is a need for legal standards to resolve these issues.

In addition, the current technology often involves the mixing of sperm and eggs to form a pre-zygote that is then frozen for future use. If the couple later divorce, the disposition of these pre-zygotes can be a potential problem on which courts need guidance.[66]

Finally, there is the issue of post-death conception. This can arise when there are frozen pre-zygotes which the widow or widower wishes to use to create a posthumous child. It can also arise when a partner wishes to obtain sperm or eggs from the body of a newly deceased spouse for future use.

How the New UPA Addresses These Issues

Section 102(4) of the new UPA defines "assisted reproduction" to be a method of causing pregnancy other then sexual intercourse. The term includes intrauterine insemination, donation

[66] See, e.g., *Kass v. Kass*, 673 N.Y.S.2d 350 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nomine Stowe v. Davis*, 507 U.S. 911 (1993).

of embryos, in-vitro fertilization and transfer of embryos; and intracytoplasmic sperm injection.[67] **Section 701** of the new UPA makes clear that Article 7 applies only to children born as the result of assisted reproduction. If a child is conceived through sexual intercourse or is the result of a gestational agreement, then this section of the UPA does not apply.

If a child is conceived as the result of assisted reproduction, **Section 702,** clarifies that a donor (whether of sperm or egg) is *not* a parent of the resulting child. The donor can neither sue to establish parental rights nor be sued and required to support the resulting child. In other words, donors are eliminated from the parental equation.

It should be noted, however, that a wife who provides eggs for her own conception and a husband who provides sperm for use by his wife in assisted reproduction are not "donors" within the definition found in Article 1, Section 102(8). They do have parental obligations toward any child born as the result of assisted conception. The wife is the child's mother under **Section 201(a)(1)** by virtue of giving birth to the child. If he has consented to the assisted reproduction, the man is the child's father under **Section 201(b)(5).**

This point is underscored in **Section 703,** which states that a husband who provides sperm for use by his wife in assisted reproduction is the father of any resulting child born to the wife. Moreover, even if his sperm is not used, if a husband *consents* to assisted reproduction by his wife, he is the father of a child born to the wife by this means. To be effective, this consent must be in writing and signed by both the husband and the wife. **Section 704(a).** It may be signed either before or after the birth of the child. **Section 705(a)(2).**

If a husband did not consent to assisted reproduction, he may nonetheless be found to be the father of a child born through those means if he and his wife openly treat the child as their own. **Section 704(b)**.

If his sperm was not used and he did not consent to assisted reproduction either before or after the birth, and he wishes to challenge the paternity of a child born to his wife through these means, then he must commence the proceeding within two years of learning of the birth of the child. **Section 705(a).** Exception to this time limit is made only if the couple has not cohabited since the probable time of the use of assisted reproduction and the husband has never openly treated the child as his own. **Section 705(b).**

The new UPA also addresses what happens when a husband and wife have entered into an agreement for the use of assisted reproduction and, before implantation, the marriage is dissolved. In this case, if the wife proceeds with assisted reproduction, the former husband is *not the legal parent* of the resulting child unless the agreement (or another record) contains his consent to the post-divorce use of assisted reproduction.[68] **Section 706.** Similarly, if a husband

[67] This definition establishes a broad base (a method of causing pregnancy other than sexual intercourse) and names all present forms of assisted reproduction. This covers the present and allows for the development of future techniques as well.

[68] Note that the UPA does not deal with the question of the ownership of pre-zygotes post-divorce. This difficult issue is left to other law. See, e.g., *Kass v. Kass*, 673 N.Y.S.2d 350(N.Y. 1988); *Davis v. Davis*, *supra*. As a parentage act, the UPA addresses only the question of the parentage of a child who is the product of post-divorce use of assisted conception.

dies before placement and his wife proceeds with assisted reproduction, he is *not the legal father* of any child born as the result unless there is a record of his consent to be the father of a child born as the result of posthumous assisted reproduction. **Section 707.**

In these cases, the child would have a legal mother under **Section 201(a)(1).** The child would have a biological father but not a legal father. Intention, rather than biology, is the controlling factor. Hopefully, this would lead to careful crafting of assisted reproduction agreements so that the parties will have thought about and discussed these issues and clarified their intent before a problem arises.

Parentage of Children Born Pursuant to a Gestational Agreement Under the New UPA

The Issues

Assisted reproduction involves two people who wish to become parents. In contrast, gestational agreements involve three parties: the couple who wish to become parents (the intended mother and father) and a woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother).[69] Thus, by definition, children born pursuant to such agreements need to have their *maternity* as well as *paternity* clarified.

The use of gestational (sometimes called surrogacy) agreements is highly controversial. Some believe that such agreements should be outlawed entirely. Others believe that such agreements should be allowed, but regulated. In recognition of this, when the Uniform Status of Children of Assisted Conception Act (USCACA) was approved in 1988, it presented two opposing models for states to choose from: one regulated such agreements (subjecting them to judicial scrutiny) while the other made such agreements void as against public policy.

In the twelve years since the drafting of USCACA, a little less than half the states have developed statutory or case law on the issue. Of those, about half have recognized such agreements[70] and half have rejected them.[71] In states rejecting such agreements, the legal status of children born pursuant to a gestational agreement is cloudy. Also troubling is the question of whether full faith and credit applies if an agreement was entered into in a state that does recognize such to be valid.

Despite these legal issues, thousands of children are born each year pursuant to gestational agreements. These children need to have their parentage clarified. In addition, courts have issued a call for legislative action in this area. As one California court put it:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and –as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be

[69] The term "gestational mother" is defined in Article 1, Section 102(11) while the term "intended parents" is defined in Article 1, Section 102(12).

[70] Arkansas, Florida, Illinois, Iowa, Nevada, New Hampshire, Tennessee, Virginia, West Virginia and Wisconsin allow gestational agreements by statute while California and Ohio have case law allowing such agreements. See Appendix 8 to the UPA.

[71] Arizona, District of Columbia, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, New York, North Dakota, Utah and Washington prohibit such agreements by statute and Massachusetts and New Jersey have case law finding such agreements to be invalid. See Appendix 8 to UPA.

> ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who – other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.[72]

Nonetheless, in some states, the legislature may feel that it is not yet ready to tackle the issue. For that reason, this Article of the new UPA is bracketed: that is, it is optional. For states ready to deal with the issue and in need of a roadmap, it provides a model. Those feeling that the issue is still too unsettling may omit this part of the new UPA without doing damage to the other provisions.

How the UPA Addresses These Issues

The new UPA takes a cautious, middle ground approach to gestational agreements. It allows them, but only in very particular circumstances:

- only a *married couple* can be the intended parents and both must be parties to the gestational agreement. **Section 801(b).** The UPA does not sanction a gestational agreement if the intended parents are not married to each other.

- there must be medical evidence that the wife is unable to bear a child or is unable to so without unreasonable risk to her or the child. **Section 803(b)(2).** A couple who are capable of having a child through assisted reproduction or sexual intercourse would not be able to use a gestational agreement simply to avoid the inconvenience of a pregnancy.

- the proposed gestational mother must have had at least one prior live birth. **Section 803(b)(5).** This requirement insures that the gestational mother fully understands what pregnancy and child birth entail. Her consent to be the gestational mother is thus with full knowledge of what she has agreed to.

- there must be evidence that bearing a child will not pose an undue physical or mental health risk to the gestational mother. There must also be evidence that the gestational mother is in good health so that her being the gestational mother poses no undue health risk to the potential child. **Section 803(b)(5).**

- the agreement cannot limit the right of the gestational mother to safeguard her health or that of the embryo or fetus**. Section 808(b).** In other words, the intended parents cannot insist that the gestational mother expose herself to undue medical risk.

[72] *Buzzanca, supra.*

- if the gestational mother is married, her husband must consent to the agreement as well.[73] Since he would otherwise be the presumed father of the child, his agreement entails a waiver of his parental rights so that the intended father can assert his parentage. **Section 801(a)(1).**

If all of these conditions are met, the parties can enter into a gestational agreement that is *approvable.* The agreement must be in writing and be signed by the intended mother and the intended father, the gestational mother and her husband (if she is married). In addition, if there are donors involved, they must also sign the agreement. The agreement must provide that the intended parents will be the parents of any child born pursuant to the agreement while all of the others (gestational mother, husband, donors as appropriate) relinquish all rights and duties of parenthood. **Section 801(a).** The agreement may provide for the payment of consideration by the intended parents. **Section 808(a).**

Once the agreement is signed, a court must validate it. **Section 801(c).** A signatory must file the agreement along with a petition to validate. **Sections 802(a) and (d).** The petition must be signed by the intended parents, the gestational mother and her husband (if any). **Sections 802(a) and (c).** To discourage forum shopping, the new UPA limits where the petition can be filed to a state in which the intended parents or the gestational mother have been resident for at least 90 days. **Section 802(b).** After filing, the court is allowed (but not required) to validate the agreement. **Section 803(a)** The decision is subject to review only for abuse of discretion. **Section 803(c).**

In making the decision, the court must be sure that all the conditions mentioned above are met and that the 90-day residency requirement has been satisfied. The court must also determine that adequate provision has been made for all reasonable health-care expenses associated with the agreement. Finally, unless waived, there must have been a home study and the intended parents must have been found to meet the standards of fitness applicable to adoptive parents. **Section 803(b).**

In validating the gestational agreement, the court will declare that the intended parents will be the parents of any child born pursuant to the agreement. **Section 803(a).** Thereafter, the court will also have continuing exclusive jurisdiction over the matter until a child born under the agreement to the gestational mother is 180 days old. **Section 805.**

After validation but before the gestational mother becomes pregnant, the court (for good cause) or any of the parties to the petition may terminate the agreement. The person who wishes to terminate the agreement must inform the others in writing and file notice with the court. The court will then vacate the order approving the agreement. A gestational mother who terminates the agreement is not liable to the intended parents. **Section 806.**

Once the child is born, the intended parents must file a notice with the court. The court will then issue an order confirming that the intended parents are the parents of the child and directing the birth records agency to issue a birth certificate naming the intended parents as the

[73] If the gestational mother is not married at the time the agreement is validated, but subsequently marries, the gestational agreement remains valid. Her husband's consent is not required and he is not the presumed father of the child. Section 808(c).

parents. If necessary, the court may also order the gestational mother to surrender the child to the intended parents. **Section 807.**

The new UPA also addresses the problem of gestational agreements that have not been validated. Such agreements are unenforceable. **Section 809(a).** If a child is born pursuant to an unvalidated agreement, parentage of the child is to be determined under Article 2. **Section 809(b).** That means that the gestational mother is the mother (see **Section 201(a)(1)**) and her husband (if she has one) is the father (see **Section 204**). Nonetheless, the intended parents may be liable for the financial support of the child (as well as fees and costs associated with any proceeding to enforce this obligation). **Section 809(c).**

Conclusion

Pursuant to Title IV-D of the Social Security Act, a great deal of standardization of the paternity process for non-marital children has been achieved. Every state now has a simple voluntary process for the establishment of paternity, a civil process for contested paternity cases, and statutes that allow extensive use of genetic tests to determine paternity. Even within this world, however, there is still substantial variation between states in such critical areas as the rights of minors to employ the voluntary process, the type of rescission process to be used when the signers of a voluntary acknowledgment change their mind, and the relationship between the voluntary process and the marital presumption of paternity when a wife gives birth to a child who is not her husband's. These differences can cause serious problems in interstate situations as states are required to give full faith and credit to voluntary acknowledgments entered into in other states.

Lack of standardized is also apparent when dealing with the paternity of marital children and those born as the result of assisted conception or through surrogacy arrangements. In some instances the problem is state policy. In others, it is the absence of state policy that creates problems. The result is that vulnerable children are harmed.

The new UPA provides a comprehensive framework for addressing all of these issues. Its adoption by states would be a boon to children, their parents, and the tax payers, who often end up supporting children when the law does not hold their parents accountable for their support.

APPENDIX A

Reasons for Establishing the Paternity of a Non-Marital Child

There are many advantages to children in having their paternity established. They include**:**

- Financial Support. If a child is born outside marriage, then paternity must be established before the father has a legal obligation to financially support the child.
- Emotional Support and Family Ties. Children whose paternity has been established are more likely to have an on going relationship with their father and his extended family than are children whose father does not acknowledge them.
- Social Security Benefits. When a father has been employed and has contributed to the Social Security system, if he dies or becomes disabled, his legally acknowledged children are entitled to receive monthly cash benefits until they reach the age of 18.
- Military Allotments. A father in the armed services may draw an extra allotment to provide a household for his dependents. His child is also eligible for commissary privileges as well as military health care and insurance.
- Worker's Compensation. Children whose paternity has been established may receive benefits from such a program if their father is injured or killed on the job.
- Health Insurance. If a father's employer provides dependent's health care coverage, the child should be eligible for coverage under the plan.
- Genetic Information. A child who knows who his/her biological parents are, can ascertain family medical history and obtain information about any genetically-linked family diseases. Such information can also be useful in identifying a potential organ donor, if one is ever needed.
- Inheritance Rights. Children whose paternity has been established have inheritance rights if their father dies.

APPENDIX B

Section-By Section Analysis of the Provisions of the Uniform Parentage Act (UPA) as Approved by the National Conference of Commissioners on Uniform State Laws July 2000

ARTICLE 1. GENERAL PROVISIONS

Section 101 provides the name of the Act.

Section 102 contains key ***definitions*** used throughout the ACT. Of particular note is the definition of "man" (a male individual of any age). Using this definition, the rules of paternity establishment apply to minor fathers as well as those who have reached the age of majority. In addition, the word "record' includes paper records (information that is inscribed on a tangible medium) and electronic records. This allows information to flow more quickly than confining records to documents that must be mailed or hand-carried.

Section 103 provides rules on ***scope and choice of law.*** The Act is to govern every determination of parentage in the state. Thus it covers establishment of the mother-child relationship as well as the father-child relationship. It also governs whether the dispute involves a nonmarital child or one born to married parents.

In any action to determine the parent-child relationship, the court is to apply the law of the state regardless of the place of birth of the child or the child's past or present residence. If the state is an inappropriate forum, the court can dismiss the action on forum non- conviens grounds. But if it proceeds with the case, the court must apply local law.

Section 104 designates which ***courts in the state are empowered to adjudicate parentage***.

Section 105 makes it clear that other state laws regarding ***privacy and confidentiality*** apply in parentage actions. Particular note is made of laws that may protect domestic violence victims from disclosure of identifying information including address, telephone number, place of employment, social security number, and a child's day care facility or school.

Section 106 applies the same provisions relating to determination of paternity to the ***determination of maternity***.

ARTICLE 2. PARENT-CHILD RELATIONSHIP

Section 201 describes the ***basic rules for establishment of the parent-child relationship***. It covers both the mother-child and the father-child relationship. The mother-child relationship can be established by giving birth, an adjudication of maternity, adoption, or an adjudication confirming that a woman is the parent of a child born pursuant to a gestational agreement. The father-child relationship can be established by an unrebutted presumption of paternity, an acknowledgment or adjudication of paternity, adoption, consent to the use of assisted

reproduction which results in the birth of a child, or an adjudication confirming a man to be the parent of a child born pursuant to a gestational agreement.

Section 202 clarifies that a child born to unmarried parents has the same ***legal rights*** as a child born to married parents.

Section 203 describes the ***consequences of the establishment of parentage.*** Unless and until parental rights are terminated, the parent-child relationship applies for all purposes. the relationship

Section 204 establishes the ***presumption of paternity in the context of marriage.*** A man is presumed to be the farther of a child if 1) he and the child's mother *are married* to each other and the child is born during the marriage; or 2) he and the mother *were married* to one another and the child is born within 300 days of termination of the marriage; or 3) he and the child's mother *attempted to marry* in compliance with the law even if the marriage is or could be declared invalid and the child is born during the invalid marriage or within 300 days after its termination. A man is also presumed to be the father of a child if he and the mother *marry after the birth of the child (even if the marriage is or could be declared invalid)* and he asserted his paternity in a record filed with the state birth records agency, agreed to be and is named as the child's father on the birth certificate, or promised in a record to support the child. If paternity is established by one of these presumptions, it can be *rebutted* only in an adjudication brought under Article 6. (Note that the presumption can be denied if the provisions of Article 3 are followed.)

ARTICLE 3. VOLUNTARY ESTABLISHMENT OF PATERNITY

Section 301 describes two basic ***requirements for a valid paternity acknowledgment.*** Both the mother and the man claiming to be the father must sign the acknowledgment for it to be valid. The man must also state that the child was conceived as the result of sexual relations between him and the mother. (This is to prevent the acknowledgment process being used to circumvent adoption laws.)

Section 302 describes the ***process for execution*** of an acknowledgment of paternity. The acknowledgment must be in a record, signed under penalty of perjury, state whether there has been genetic testing, and, if so, that the acknowledgment is consistent with the results of that testing. The acknowledgment must also indicate whether or not there is another man who is the presumed, acknowledged or adjudicated father of the child. A false denial of the existence of a presumed, acknowledged or adjudicated father renders the acknowledgment invalid. Moreover, if the acknowledgment indicates that the child does have a previously acknowledged or adjudicated father, the acknowledgment is also invalid. However, if the acknowledgment indicates that the child has a presumed father, the acknowledgment can be valid if the presumed father has signed a denial of paternity and that denial is filed with the birth records agency either with the acknowledgment or separately from it.

Section 303 provides a process under which a ***presumed father may deny paternity when another man has acknowledged paternity***. (Note that a presumed father cannot deny paternity

using this method in the absence of another man who is willing to come forward and acknowledge his paternity.) The presumed father must make the denial in a record signed under penalty of perjury. One further restriction is that a presumed father may not file a denial of paternity if the issue has already been litigated and he has been adjudicated to be the father or he has filed a paternity acknowledgment that has not been rescinded or challenged.

Section 304 contains ***special rules for an acknowledgment or denial of paternity.*** This section addresses a number of common issues relating to acknowledgments and denials. *First*, the acknowledgment and denial can be contained in the same form or separate forms may be used. All the forms may be filed together or they may be filed separately. This should make it easier to use the process when the mother, acknowledging father and presumed father live in different states and those states have adopted different forms. S*econd*, acknowledgments and denials of paternity signed by minors are valid so long as they are otherwise in compliance with the law. *Third*, acknowledgments and denials can be signed before the birth of the child. They take effect upon birth (if already filed) or filing (if filed after the birth).

Section 305 describes the ***legal effect of filing an acknowledgment or denial*** of paternity. Unless properly rescinded or challenged, a valid acknowledgment of paternity, once filed with the birth records agency is equivalent to an adjudication of paternity and confers on the acknowledging father all the rights and duties of a parent. Likewise, a valid denial of paternity filed in conjunction with an acknowledgment is equivalent to an adjudication of non-paternity and discharges the presumed father from all the rights and duties of a parent.

Section 306 ***prohibits*** the birth records agency from charging ***a fee*** for the filing of an acknowledgment or denial of paternity.

Section 307 describes the procedure for ***rescinding an acknowledgment or denial*** of paternity once it has been filed. Federal law requires states to give both the mother and the acknowledging father the right to timely rescind a paternity acknowledgment. To be timely, the rescission must occur within 60 days, or, if held sooner, the date of the first hearing in a proceeding regarding the child to which the signatory is a party. Federal law does not specify 1) how to measure the 60 day period; 2) what process (if any) is available to rescind a denial of paternity filed by the presumed father; or 3) any particular form or process for rescission. The UPA fills in these gaps by providing: 1) that the 60 day period in which a rescission may be requested commences on the effective date of the filing of the acknowledgement (or denial); 2) that a presumed father has the same timely rescission rights in his denial of paternity as the mother and acknowledged father have to timely rescind their acknowledgment of paternity; and 3) the party desiring to timely rescind an acknowledgement or denial must commence a legal action.

Sections 308 explain the conditions under which an ***acknowledgment or denial*** can be ***challenged*** once the rescission period has passed. Federal law requires states to allow the mother or acknowledged father to challenge an acknowledgment after the rescission period has passed, but only for fraud, mistake or material change of circumstances. Federal law makes no provision for a presumed father to challenge his denial of paternity. The UPA allows the mother, acknowledged father or presumed father to challenge an acknowledgment or denial of paternity for fraud, duress, or material mistake of fact. However, the challenge must be done in a legal

proceeding and that proceeding must be commenced within two years after the acknowledgment or denial at issue is filed with the birth records agency. The challenging party bears the burden of proof.

Section 309 describes the ***procedure*** to be followed when a ***rescission or challenge*** is filed. Every signatory to the acknowledgment any accompanying denial must be made a party to the proceeding. (Once the document has been filed with the state birth records agency, each signatory to an acknowledgment or denial is deemed to have submitted to the personal jurisdiction of the state for the purpose of any proceeding to rescind or challenge that document.) The proceeding will be conducted as if it were a contested paternity case. During the pendency of the proceeding the court may not suspend the legal responsibilities (including payment of child support) of any signatory. If appropriate, at the end of the proceeding the court must order the birth records agency to amend the child's birth certificate.

Under Section 310, courts and administrative agencies are neither required nor permitted to ***ratify*** an unchallenged paternity acknowledgment.

Section 311 requires the courts to give ***full faith and credit*** to paternity acknowledgments and denials effective in another state if the acknowledgment/denial has been signed and complies with the law of the state in which it was signed.

Section 312 requires the state birth records agency to promulgate ***standardized forms*** for acknowledging and denying paternity. A valid acknowledgment is not affected by a later modification in the prescribed forms.

Section 313 ***limits the information*** a birth records agency can provide about an acknowledgment or denial of paternity. Only the signatories, courts, and appropriate state or federal agencies may obtain this information.

Section 314 allows the birth records agency to adopt ***rules to implement*** the procedures for voluntary acknowledgment of paternity.

ARTICLE 4. REGISTRY OF PATERNITY

Part 1. General Provisions

Section 401 establishes a state ***registry of paternity***.

Section 402 describes those men who do and do not need to ***register their claim of paternity***. A man is exempt from the need to register if he has a legal father-child relationship with a child (i.e., he is a presumed, acknowledged or adjudicated father) or has commenced a proceeding to adjudicate his paternity. However, any other man who believes he has fathered a child with whom he wishes to have a relationship must register before the child's birth or within 30 days thereafter. He should also promptly notify the registry if there is any change of circumstances (e.g., a change in his address).

Section 403 gives a timely registrant the right to notice (in the manner prescribed for service of process in a civil action) about proceedings to terminate his parental rights and/or proceedings for adoption of the child whose father he claims to be.

Section 404 establishes that, if a non-exempt man ***fails to register***, his parental rights may be terminated without notice at any tim***e before the child's first birthday***. After that, under Section 405, notice (in the manner prescribed for service of process in a civil case) of termination of parental rights/adoption must be given to a man who may be the child's father, whether or not he has registered.

Part 2. Operation of the Registry

Under Section 411, the agency responsible for the registry must prepare and use a ***standardized registration form***. The form must be signed and sworn under penalty of perjury. It must inform the registrant that 1) the information disclosed in the form can be used against him in a paternity action; 2) timely filing in the paternity registry gives him the right to notice of any proceeding for adoption or termination of his parental rights but is not the same thing as commencing a paternity proceeding; 3) services to assist him in establishing paternity are available through the local child support office; 4) that, if conception and/or birth occurred in another state, he should also register in that state or states; 5) how to obtain information about paternity registries in other states; and 6) the procedures to revoke registration of a claim of paternity should he wish to do so at a later date.

Section 412 provides that the registry has no obligation to locate the registered child's mother. However, if the registrant provides her address, then the registry must send a copy of the registration to her at that address.

Sections 412 and 413 establish that ***information*** contained in the paternity registry is ***confidential***. Release is authorized only to a court, another state's paternity registry, specified agencies, the child's mother, and a party (or his/her attorney of record) in a paternity, termination of parental rights or adoption proceeding involving the registered child. It is a ***misdemeanor*** to intentionally disclose information to an unauthorized individual or agency.

Section 414 lays out the procedure for ***revoking a registration***. A registrant may do this at any time by sending a written revocation that is signed by him and witnessed or notarized.

Section 415 describes what happens when an ***untimely registration*** is filed. If a man registers more than 30 days after the child's birth, the registry will notify the registrant that his filing was untimely. Even if the registration is untimely, if the registry receives a notice of an order terminating the man's parental rights, the registry will notify the untimely registrant.

Section 416 establishes a policy that there should be ***no fee for filing*** in the registry. However, the registry can charge a ***reasonable fee*** to any authorized court, person, registry or agency (other than a support enforcement agency) for making a ***search*** of the registry and furnishing a certificate of such search.

Part 3. Search of Registries

Section 421 provides that, in any proceeding for adoption of or termination of parental rights to a fatherless child under the age of one, the petitioner must ***provide a certificate of search*** in the state's registry of paternity. If the petitioner has reason to believe that the child was conceived or born in another state, the petitioner must provide a certificate of search in the registry of that state or states as well. According to Section 422, the certificate or certificates must be filed ***before the adoption/termination of parental rights proceeding can be concluded.***

Section 422 requires the registry to provide a certificate of search to any authorized person who requests one. The ***certificate*** must be signed on behalf of the agency and state that a search has been made and that a registrant has/has not been found. If a registrant has been found, a copy of the registration is to be attached to the certificate of search.

Section 423 provides that a ***certificate of search*** from any state (including the one conducting the proceedings) is ***admissible*** in adoption/termination of parental rights and, if relevant, any other legal proceedings.

ARTICLE 5. GENETIC TESTING

Section 501 establishes the ***scope*** of this article. Its provisions apply in situations in which individuals voluntarily submit to genetic testing as well as those where testing is ordered by a court or support-enforcement agency.

Section 502 describes the ***conditions under which an order for genetic testing is to be issued.*** A *support-enforcement agency* may order genetic testing, but only in cases in which the child has no presumed, acknowledged or adjudicated father.

A *court* can order genetic testing in any case if requested to do so. However, there are some limits on the power to order genetic tests if a child has a presumed, adjudicated or acknowledged father. These limits are described in Sections 607-609 below. In a court case, the request must be supported by the sworn statement of a party to the proceedings 1) alleging paternity and stating facts establishing a reasonable probability of the requisite sexual contact between the individuals; or 2) denying paternity and stating facts establishing the possibility that the child was not the result of sexual contact between the individuals. The resulting order will name the child and the individuals to be tested. If two or more men are subject to court-ordered genetic testing, the testing may be done concurrently or sequentially.

If the request for genetic testing is filed before the birth of the child, neither a court nor a support-enforcement agency may order in utero testing. (The mother may submit to such testing voluntarily if she desires.)

Section 503 specifies the ***requirements of an admissible genetic test.*** Genetic tests must be of the type reasonably relied on by experts in the field and performed by an accredited testing laboratory. The specimens used may consist of one or more samples of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen need not be of the same kind for every tested individual. Based on the ethnic or racial group, the lab shall determine the databases from which

to select frequencies for use in calculating the probability of paternity. If there is disagreement about the proper racial or ethnic group, a series of steps are provided to resolve the issue.

Section 504 provides the acceptable ***form for a report*** of genetic test results. The report must be in a record and signed under penalty of perjury by a designee of the lab. Accompanying documentation must include the names and photographs of the tested individuals, the names of the individuals who collected the specimens, the place and date the specimens were collected, the name of the individual who received the specimens at the laboratory, and the dates the specimens were received.

This section also makes it a misdemeanor for an individual to release an identifiable specimen collected for genetic testing purposes to any other individual for any purpose other than the parentage proceeding without a court order or the permission of the person submitting the specimen.

Section 505 discusses the ***evidentiary value of genetic test results***. If the genetic test results indicate at least a 99% probability of paternity and a combined paternity index of at least 100 to 1, then the man is rebuttably presumed to be the father. This presumption may be rebutted only through the use of additional genetic tests that either exclude him as the genetic father or identify another man as the father.

If more than one man has test results that create a rebuttable presumption, the court is to order additional testing to resolve the issue.

Sections 506 and 507 set forth the rules for ***paying for genetic tests***. In cases in which a state support-enforcement agency is providing services, the cost for *initial* genetic testing is to be advanced by the state. The agency may later seek reimbursement of these costs but only from a man who is rebuttably identified as the father.

In all other cases, depending on the circumstances, the *initial* cost of genetic testing may be born by the individual requesting the test, as agreed to by the parties, or as ordered by the court. The money may be reimbursed to the paying individual as costs at the conclusion of the proceeding.

A party who disputes the result of the initial test may request *further testing*. The court or support-enforcement agency must order such tests when they are requested. However, if the initial test establishes a rebuttable presumption of paternity, and the requesting party seeks additional tests in order to rebut that presumption, then the requesting party must pay for the tests in advance.

Section 508 provides rules applicable when ***all the relevant individuals are not available***. If a specimen is not available from the alleged *father* (e.g., he has died or disappeared), the court may order one or more of his relatives to submit a specimen. These relatives include parents, brothers and sisters, other children of the man and their mothers, and any other individuals necessary to complete the testing.

If, for similar reasons, a specimen from the mother is not available, the court may order the testing to proceed without a specimen from her. NOTE COMMENT IS NOT CONSISTENT WITH THE LANGUAGE. See also related section 622.

Section 509 gives a court authority, when good cause is shown, to order genetic testing of a ***deceased*** individual. This section provides authority to order disinterment if necessary.

Section 510 provides rules when genetic testing of ***identical brothers*** is called for. If twins, triplets, etc. are tested and the results for each (independent of one another) create a rebuttable presumption of paternity, then the court may use non-genetic evidence to adjudicate which is the father of the child.

Section 511 provides rules regarding the ***confidentiality of genetic testing***. The release of the report of genetic testing is controlled by the laws of the state in which the testing is done. It is a crime when an individual submits a specimen of another individual for any reason other than that relevant to the paternity establishment proceeding without a court order or written consent of the individual who provides the specimen.

ARTICLE 6. PROCEEDING TO ADJUDICATE PARENTAGE

Part 1. Nature of Proceeding

Section 601 establishes that a parentage action is a ***civil proceeding*** governed by the rules of civil procedure.

Section 602 lists those with ***standing*** to maintain a parentage action. They include the child, the mother, a man whose paternity is to be adjudicated, an intended parent,[74] and a representative authorized to act for one of these persons if that person is deceased, incapacitated, or a minor. Support enforcement agencies, authorized adoption agencies and licensed child-placing agencies are also authorized to bring a parentage action.

Section 603 names the individuals who ***must be*** joined as ***parties*** to a parentage action. They are the mother and the man whose paternity is to be adjudicated. (Note that Section 612 (a) specifies that the child is not a necessary party to the proceedings.)

Section 604 requires that the court have personal ***jurisdiction*** in order to adjudicate parentage. The court is given personal jurisdiction over non-residents (and their guardians and conservators) if any of the tests for exercising long-arm jurisdiction under the Uniform Interstate Family Support Act are met. This section also clarifies that lack of jurisdiction over one individual does not preclude the court from making a determination of parentage which is binding on another individual over whom the court does have personal jurisdiction.

Section 605 governs ***venue***. Venue is proper where the child resides or is found. If the child does not reside in the state, venue is also proper where the respondent resides or is found. If a probate proceeding involving the presumed or alleged father's estate has been commenced, venue also lies in the county of that proceeding.

Sections 606, 607 and 609 provide the ***statutes of limitations*** for parentage actions.

[74] Intended parent are those whose child is born to a surrogate by means of assisted conception. See Section 101 and Article 8 for more on this issue.

- ❖ if a child has no presumed, acknowledged or adjudicated father, there is no statute of limitations. A parentage proceeding can be brought at any time even after the child reaches adulthood and even if an earlier action has been dismissed based on a shorter statute of limitations that was then in effect.

- ❖ if a child has a presumed father, and the action is brought by the presumed father, the mother, or another individual (e.g., a biological father wishing to contest the presumed father's paternity), the action must be brought within two years of the child's birth. An exception to this rule is made only if 1) the action seeks to disprove the parent-child relationship between a child and a presumed father; and 2) the court finds that the presumed father and the mother neither cohabited nor engaged in sexual relations at the probable time of the child's conception and the presumed father has never openly treated the child as his own.

- ❖ if a child has an acknowledged father, a *signatory* to the acknowledgment (and accompanying denial, if there is one) must commence proceedings within the 60-day rescission period or the two year challenge period as described in Article 3. A *non-signatory* who wishes to challenge the acknowledgment must do so not later then two years after the effective date of the acknowledgment.

- ❖ if a child has an adjudicated father, an individual who is *party* to the proceeding is bound thereby (or can follow the normal appeal route). A *non-party* to the adjudication who wishes to seek an adjudication of paternity must commence a proceeding not later than two years after the effective date of the adjudication.

Section 608 gives courts the ***authority to deny a request for genetic testing if the child has a presumed father.*** Even when a parentage action regarding a child with a presumed father is brought within the appropriate statute of limitations, a court may deny genetic testing if 1) the conduct of the mother and presumed father estops that party from denying parentage; or 2) it would be inequitable to disprove the father-child relationship between the child and the presumed father. In assessing these issues, the court is to start with the best interests of the child and consider: 1) the length of time that has elapsed from the time the presumed father first learned of his possible non-paternity and the time the action was commenced; 2) the length of time during which the presumed father has assumed the role of father of the child; 3) the facts surrounding the presumed father's discovery of his possible non-paternity; 4) the nature of the father-child relationship; 6) the age of the child; 7) the relationship of the child to any alleged father; 8) the extent to which the passage of time has reduced the chances of establishing the paternity of the biological father and obtaining child support for the child; and 9) any other factors that affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child. If a court decides to deny genetic testing, it must do so on the basis of clear and convincing evidence. Moreover, if a court denies genetic testing, it must issue an order adjudicating the presumed father to be the father of the child in question.

In a proceeding involving a request for genetic testing of a child with a presumed father, the child must be represented by a guardian ad litem.

Section 610 deals with ***joinder*** issues. A proceeding to adjudicate parentage may be joined with an original proceeding for adoption, termination of parental rights, child custody or visitation, child support, divorce or annulment, legal separation, separate maintenance, probate or administration of an estate, or any other appropriate proceeding *except* a parentage action brought under the Uniform Interstate Family Support Act.

Section 611 establishes a process for commencing a ***paternity action before the birth of a child.*** An action may be commenced and the parties served before the child's birth. Discovery may be undertaken and specimens for genetic testing may be taken except that a mother may not be required to undergo *in utero* testing. However, the proceeding may not be concluded until after the birth of the child.

Section 612 allows the court to ***appoint an attorney ad litem to represent any child*** whose interests are not adequately represented in the proceeding.

Part 2. Special Rules for Proceeding to Adjudicate Parentage

Section 621 provides special rules regarding the ***admissibility of genetic tests*** in a parentage proceeding.

- the general rule is that a record of a genetic testing expert is admissible as evidence of the truth unless, a party objects to its admission within 14 days after its receipt. Any objection must state specific grounds for the reports exclusion. The objecting party can call one or more experts to challenge the report. The expert may testify in person, by telephone or videoconference, by deposition or in any other manner approved by the court. Unless otherwise ordered by the court, the objecting party must pay for the expert testimony.

- if a child has a presumed, acknowledged or adjudicated father, however, the genetic test results are admissible *only if* 1) the testing was done with the consent of both the mother and the presumed, acknowledged or adjudicated father; or 2) pursuant to a court order.

Section 621 also deals with the ***admissibility of bills for genetic testing and birthing costs.*** Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and the child that are furnished to the other party at least 10 days prior to the hearing are admissible to prove the amount of the charges and that the charges were reasonable, necessary and customary.

Section 622 describes the ***consequences of refusal to submit*** to genetic testing. An order for genetic testing is enforceable by contempt. Moreover, if an individual refuses to submit to ordered genetic testing, that denial may be admitted into evidence and the court may adjudicate parentage contrary to the position of that individual based on the other evidence in the case. This section also notes that, since genetic testing can proceed without the mother (see Section 508), if the mother refuses to submit to genetic testing, then the court may order testing of the child and any man whose paternity is being adjudicated.

Section 623 sets forth the rules for an ***admission*** of paternity. A respondent in a parentage proceeding may admit paternity by filing a pleading to that effect or by making an admission under penalty of perjury when making an appearance or during a hearing. If the court finds that there is no reason to question the admission, it must issue an order adjudicating the man to be the father of the child in question.

Section 624 authorizes the issuance of ***temporary support orders***. When parentage under the law is fairly clear, a court *must* issue an order of temporary support and *may* make provisions for custody and visitation. This occurs in cases where the support order is issued against a presumed father or the child's mother. It also occurs when the case involves a man who 1) is petitioning to have his paternity established; 2) has admitted paternity in pleadings filed with the court; 3) is identified as the father through genetic testing; or 4) is shown to be the father by clear and convincing evidence.

Part 3. Hearings and Adjudication

Section 631 sets forth the basic ***rules of adjudication***. They are as follows:

- ❖ the paternity of a child having a presumed, acknowledged or adjudicated father can be *disproved* only by *admissible genetic tests* which either exclude a man as father of the child or identify another man to be the father.

- ❖ a man rebuttably presumed to be the father of a child under Section 505, *must* be adjudicated to be the father unless the presumption is rebutted by further genetic tests.

- ❖ if genetic testing neither excludes a man as the father of a child nor yields a rebuttable presumption of paternity, the court may not dismiss the proceeding. The court must adjudicate the issue based on the *genetic test results and other evidence.*

- ❖ if genetic test results exclude a man as the father, he must be adjudicated not to be the father of the child.

Section 632 ***prohibits jury trials*** in parentage actions.

Section 633 governs ***confidentiality of hearings and records*** in parentage cases. Parentage proceedings may be closed only upon the request of a party and for good cause shown. The final order is a public record. However, other papers and records in the proceeding are publicly available only with the consent of the parties or upon order of the court for good cause shown.

Section 634 describes when a ***default order*** may be entered. The court must issue a default order adjudicating paternity of a man who, after service of process, defaults and is found by the court (based on the evidence presented) to be the father of the child.

Section 635 allows the court to ***dismiss a case for want of prosecution*** but only if the order is ***without prejudice***. An order of dismissal for want of prosecution with prejudice is void and may be challenged in another judicial or administrative proceeding.

Section 636 governs ***final orders***. The court must issue an order adjudicating whether a man alleged to be or alleging to be the father is the parent of the child. The order must identify the child by name and date of birth. On request, and for good cause shown, the court may order the name of the child to be changed. If the resulting order is at variance with information contained on the child's birth certificate, the court must order the birth records agency to amend the birth certificate accordingly.

At the end of the proceedings, the court may assess fees, costs and expenses. The court may award attorneys fees, which may be paid directly to the attorney, who may enforce the fee order in his own name. However, fees, costs or expenses may not be assessed against a support-enforcement agency of the state or any other state.

Section 637 establishes which individuals are ***bound*** by a determination of parentage. A determination of parentage is binding on 1) all signatories to an acknowledgment (and any accompanying denial); and 2) all parties to an adjudication. A child is not bound unless the determination of parentage 1) was based on genetic test results and consistency with those results is declared in the determination or otherwise shown; or 2) the child was represented in the prior proceeding by an attorney.

In the case of marital children, if the dissolution decree expressly identifies the children as "children of the marriage" or uses similar words, or provides for the support of the children by the husband, that is a binding determination of paternity of the children.

If a party wishes to challenge a determination of paternity, he/she must do so under the law relating to appeal and vacation of judgments.

ARTICLE 7. CHILD OF ASSISTED REPRODUCTION

Section 701 limits the ***scope*** of this article. Its provisions do not apply to children conceived through sexual intercourse or those born as the result of a gestational agreement. It does apply to children born as the result of assisted reproduction which is defined in Article 1 to include intrauterine insemination, donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos and intracytoplasmic sperm injection.

Section 702 states that a ***donor[75] is not a parent*** of a child conceived as the result of assisted reproduction.

Section 703 states that a ***husband who provides sperm for or consents to assisted reproduction by his wife is the father*** of any resulting child born to the wife.

Section 704 sets forth the rules for a valid ***consent to assisted reproduction***. To be valid, a consent to the use of assisted reproduction by a married woman must be in a record and signed by both the woman and her husband.

[75] "Donor" is defined in Article 1 to be an individual who produces eggs or sperm used for assisted reproduction. The term does ***not include*** a husband who produces sperm or a wife who provides eggs for assisted reproduction by the wife. A woman who gives birth to a child through assisted reproduction is also not a "donor", unless the birth is the result of a gestational agreement. See Article 8.

Section 705 ***limits the ability of a husband to dispute paternity*** of a child born through assisted reproduction. A husband may not dispute the paternity of a child born to his wife (even if the marriage is later declared invalid) unless 1) he commences the proceeding within two years of learning of the birth of the child; *and* 2) the court finds he did not consent to the assisted reproduction prior to the birth of the child.

The only exception to this rule is that a proceeding may be maintained at any time if 1) the husband did not provide sperm for, or consent to, the assisted reproduction; 2) the parties have not cohabited since the probable time of the use of assisted reproduction; *and* 3) the husband never openly treated the child as his own.

Section 706 describes the ***parental status of a former spouse***. When there is a valid agreement to assisted conception, and a pregnancy occurs before the marriage is dissolved, the husband and wife are the parents of the resulting child. If, however, the marriage is dissolved before placement of the eggs, sperm or embryo, unless there is a record showing his/her consent to post-divorce use of assisted reproduction, a non-consenting former spouse is not the parent of the resulting child.

Section 707 provides a rule for determining the parental status of a ***deceased spouse***. When there is a valid agreement to assisted conception, a pregnancy occurs, and a spouse then dies, the husband and wife are the parents of the resulting child. If, however, a spouse dies before placement of the eggs, sperm or embryo, unless there is a record showing his/her consent to parentage of any child born as the result of post-mortem use of assisted reproduction, the dead spouse is not the parent of the resulting child.

ARTICLE 8. GESTATIONAL AGREEMENT

Section 801 ***allows gestational agreements*** under certain circumstances. Such agreements must be in writing, the intended parents[76] of the child born pursuant to the agreement must be married, and both must be parties to the agreement. Necessary parties to the agreement are the intended parents, the gestational mother[77] (and her husband if she is married) and any donor or donors.[78] The agreement must provide that the intended parents will become the parents of the child born pursuant to the agreement while the others relinquish all rights and duties as parents to the child. Once signed, the agreement must be validated by a court.

Section 802 provides that the intended parents and the gestational mother (and her husband if she is married) must file a ***petition to validate*** the gestational agreement. A copy of the gestational agreement must be attached to the petition. A petition may not be maintained unless *either* the intended parents *or* the gestational mother have been state residents for at least 90 days.

Section 803 allows the court to ***validate*** the gestational agreement and declare that the intended parents will be the parents of a child born during the term of the agreement. Before doing so, the

[76] Article 1 defines "intended parents' to be individuals who enter into an agreement providing that they will be the parents of a child born to a gestational mother by means of assisted reproduction, whether or not they have a genetic relationship to the child."
[77] Defined in Article 1 to be " the woman who gives birth to the child."
[78] See note 1. *supra*.

court must find that 1) the residency requirements of Section 802 have been satisfied and that it has jurisdiction over the parties; 2) medical evidence establishes that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her/the child's physical or mental health; 3) unless waived, there has been a home study and the intended parents have been found to meet the standards of fitness applicable to adoptive parents; 4) all necessary parties have entered into the agreement and understand its terms; 5) the gestational mother has had at least one pregnancy and delivery and her bearing another child will not pose an undue health risk to the unborn child or to the physical/mental health of the gestational mother herself; 6) adequate provision has been made for all reasonable health-care expenses associated with the agreement until the birth of the child.

Whether or not to validate the agreement is within the discretion of the court and is subject to review only for abuse of discretion.

Section 804 makes the standards applicable to the ***confidentiality*** of adoption proceedings and records applicable to gestational agreements.

Section 805 gives the court hearing the petition for validation ***continuing, exclusive jurisdiction*** over all matters arising out of the gestational agreement until a child born to the gestational mother during the period governed by the agreement is 180 days old.

Section 806 allows the court (for good cause shown), the intended mother, the intended father, or the gestational mother (or her husband if she is married) ***terminate the agreement*** at any time before the gestational mother becomes pregnant by means of assisted reproduction. An individual who wishes to terminate the agreement must inform the other parties in writing. That individual must also file notice with the court. The court must then vacate the order validating the agreement. An individual who does not notify the court of his/her termination of the agreement is subject to sanction.

A gestational mother is not liable to the intended parents for terminating the agreement.

Section 807 sets forth the ***process*** to follow ***once the child is born***. The intended parents must file a notice with the court that a child has been born to the gestational mother within 300 days of the use of assisted reproduction. The court will then issue an order 1) confirming that the intended parents are the parents of the child; 2) if, necessary ordering that the child be surrendered to the intended parents; and 3) directing the birth records agency to issue a birth certificate naming the intended parents as the parents of the child.

Section 808 contains some ***miscellaneous provisions*** in regard to gestational agreements. They may provide for payment of consideration. They may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus. If, after issuance of the original court order validating the gestational agreement, the gestational mother marries, the gestational agreement is still valid and the consent of her new husband is not required. In addition, her new husband is not the presumed father of the child born pursuant to the gestational agreement.

Section 809 addresses the ***legal status of a non-validated gestational agreement***. An unvalidated gestational agreement is not legally enforceable. If a child is born pursuant to an unvalidated

agreement, the parent-child relationship is to be determined under Article 2. However, the intended parents may be liable for the support of any resulting child even if the agreement itself is unenforceable.

ARTICLE 9. MISCELLANEOUS PROVISIONS

Section 901 reminds courts and support-enforcement agencies that in applying and construing the Act the goal is to ***promote uniformity*** of parentage laws.

Section 902 makes the provisions of the Act ***severable.*** Thus, if any provision is held invalid, the rest of the Act is not affected.

Section 903 provides for an ***effective date***.

Section 904 provides a place to ***repeal prior law***.

Section 905 provides a ***transition*** from the old law to the new. A parentage proceeding commenced under prior law is governed by the law in effect at the time the proceeding was commenced.