Redefining Fatherhood: Approaching the Presumption of Legitimacy and Other Methods of Paternal Determination in the Age of DNA Testing

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INTRODUCTION

The traditional approach to determining paternity has increasingly fallen by the wayside over the past few decades. As a result the legal system has been forced to reevaluate and re-define “fatherhood” and what paternity means in both the legal and family context. A number of factors have played into the deterioration of the traditional presumption that a child born during a marriage is the issue of that marriage. An increasing disassociation between marriage and legal parenthood has helped to chip away at the presumption of legitimacy. Half a century ago, the divorce rate among the population was approximately 2.3 people of every 1,000 in 1956\(^1\) while 9.5 of every 1000 people were married in the same year.\(^2\) By 2005 the rate of divorce had gone up to 3.6 of every 1,000 people. However, the marriage rate had dropped to 7.5 of every 1,000 people that year.\(^3\) The Stepfamily Foundation reports that over 50% of U.S. families are re-married or re-coupled and 1300 new stepfamilies are forming every day.\(^4\) The 2000 U.S. census reported 601,209 gay and lesbian couples are living in the United States.\(^5\) Many of these couples have adopted artificial reproductive technology to produce their own children. The traditional presumption of paternity does not act to protect nontraditional families such as these and other methods of defining parenthood have grown to offer more protection to the legal rights of these parents.

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\(^1\) Centers for Disease Control and Prevention, Monthly Vital Statistics Report 9 (March 22, 1995 Vol. 43, No. 9).
\(^3\) National Vital Statistics Report, Births, Marriages, Divorces, and Death 1 (July 21, 2006, Vol. 54 No. 20).
Increased availability of genetic testing to determine biological paternity has also obviated the need for a strict legal presumption of legitimacy for children born during marriage. A simple kit can now be purchased over the Internet, guaranteeing quick results for a nominal fee. The Center for Law and Social Policy provided a list of alternate factors that combined with the increase usage of DNA paternity testing has caused the breakdown of the traditional presumption of paternity and changes in federal and state law. These include:

- The use of specific, numeric child support guidelines coupled with widespread use of income withholding to enforce support orders has made the inevitability of paying a significant amount of child support more real. This, in turn, has increased ex-husbands’ awareness of the magnitude of their child support responsibilities and made many desirous of avoiding those responsibilities when they believe the children are not “theirs.” As a result, paternity challenges during divorce proceedings and post-divorce are becoming more common.
- Women’s increased participation in the paid labor force has made them less financially dependent on their husbands. In addition, there has been increased awareness that domestic violence is not acceptable and more resources for women fleeing from abuse. This has lead women who wish to end all contact with their husbands/ex-husbands to be more willing to disestablish their husband’s paternity and go it alone. As a result, a substantial number of cases now exist in which ex-wives are seeking to disestablish paternity.
- Easing of divorce laws has meant that paramours who might once have disappeared from the scene are staying around, waiting for a divorce to come through and then marrying the mothers of their children. Frequently, these men wish to establish their paternity of a child born during the previous marriage.

These factors have upset the traditional presumption of legitimacy and forced the legal community to respond with new approaches to defining fatherhood.

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6 Congress has used its spending power to enact legislation requiring all states to enact procedures of establishing paternity and collecting child support from unmarried biological fathers and has implemented procedures for in-hospital paternity establishment programs, child support collections procedures (including wage-deduction program), and parent-locators services. 42 USC §§ 654-666 (§ 654 amended September 29, 2014).
This paper will examine five alternatives to the traditional presumption of paternity that have been developed in many states and will analyze how use of these five alternatives affect the interests of the married couple, the biological father, and the child. Across the fifty states, legal systems are employing these approaches and getting very different results, making it necessary for any family law attorney or Attorney for the Child to know and understand how the approach to paternity existing in their jurisdiction may affect the rights and interests of their client. As the state of paternity determination is still in flux, changes to state and federal legal systems continue to occur, necessitating a full understanding of the varying approaches that exist to defining legal fatherhood, especially when children are born to a marriage of which they are not the biological issue.

**The Traditional Presumption of Legitimacy Within a Marriage**

The presumption of paternity is a long held legal rule by which the offspring conceived and born during a marriage is presumed to be the issue of that marriage and the husband of the married woman was held to be the legal father of any child born during their marriage. This presumption was created in English common law and at that time was nearly irrefutable. Traditionally, the presumption could only be rebutted by proof that the husband was sterile or that he had no access to his wife during the time of conception. Non-access could be proved only “if the husband be out of the kingdom of England for above nine months: or extraquator maria,

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8 The terms “presumption of paternity” and “presumption of legitimacy” are used synonymously by the courts and may be interchanged throughout this paper. The policy against declaring children illegitimate was so intertwined ideologically with the presumption of paternity that these terms mean virtually the same thing in the legal community. See Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It is Actually in the Best Interests Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 359 (2006).
meaning “beyond the four seas.” Moreover, aside from these limited means of proving the non-legitimacy of a child born to the marriage, in both American and English common law, neither the husband nor the wife could be a witness to prove access or non-access. Initially at common law, the only evidence that could be introduced was the testimony of third parties, which rarely allowed the parties to rebut this common law presumption and likely resulted in many men caring for children who were not biologically theirs.

The presumption of paternity, though seemingly harsh on fathers forced to care for the products of their wives’ affairs, served a number of necessary functions within society. First, with biological paternity hard to establish, the marital presumption provided legal certainty for purposes such as inheritance and succession. In accordance with the common law presumption, there was no question at the time of a patriarch’s death whether the children were in fact his heirs. Accordingly, civil peace was maintained during the disposition of his assets, made in accordance with the doctrine of primogeniture, assuming that the oldest child born to the marriage was the one to inherit, without addressing whether that child was really biologically the issue of the marriage. A marriage helped the court to avoid evidentiary impasses. With third-party testimony as the only common law way of proving sterility or non-access, the testimony of contrary witnesses were likely to cancel each other out, making it nearly impossible for courts to

9 1 BLACKSTONE’S COMMENTARIES 456 (J. Chitty ed. 1826).
10 Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989). This case was one of the first to reach the Supreme Court regarding the role that DNA determinations of paternity play with regard to the presumption of paternity and substantive due process for biological fathers. The Supreme Court held that a California presumption of paternity did not infringe on any constitutional right of a child to maintain a relationship with her biological father. The Court determined that they could not find that the relationship existed between the child and her biological father should be afforded special protection, especially over that of the marital relationship between the child’s mother and her husband. Id at 124. Justice Scalia, writing for the majority, provides a very detailed history of the English and American common law presumptions.
determine biological paternity with any degree of certainty.\textsuperscript{11} Secondly, the presumption
preserved the integrity of marriage, assuming that “if husbands and wives were routinely
allowed, in open court, to assert that the wife had sex with another man during the marriage it
would have soiled the reputation of marriage and thus, would have deteriorated the sanctity of
marriage.”\textsuperscript{12} Lastly, perhaps the primary purpose of the presumption of legitimacy was that a
strong presumption promoted the welfare of children. If the presumption was easily rebutted, the
child would be declared an illegitimate or bastard child, both mother and child would be
humiliated and ridiculed, and the child would be deprived of their rights of inheritance and
succession. Many jurisdictions employed bastardy laws to discourage fornication, promiscuity,
and the procreation of illegitimate children. These laws acted in many jurisdictions to prohibit
illegitimate children from obtaining child support from their parents, receiving an inheritance,
and from obtaining compensations for the wrongful injury or death of a parent.\textsuperscript{13} Although
society has come to realize that bastardy laws act to punish the child for the actions of their
mother, and although bastardy have laws become increasingly less harsh, “judges in both
England and the United States gradually widened the acceptable range of evidence that could be
offered by spouses [to prove illegitimacy]… the law retained a strong bias against ruling the
children of married women illegitimate.”\textsuperscript{14}

A number of social, economic, and scientific developments have caused the erosion of
the strict marital presumption. There has been a dramatic increase in the number of children born
outside of traditional marriage, as traditional taboos surrounding divorce, extra-marital affairs,
single-parent households, and stepfamilies have diminished. As the percentage of children born

\textsuperscript{11} McRae, \textit{supra} note 8, at 361-62.
\textsuperscript{12} Id at 361.
\textsuperscript{13} Id at 364-65.
\textsuperscript{14} Michael H., 491 U.S. at 125.
outside of marriage increases, the federal government has made the establishment of paternity and child support enforcement a key component in the national welfare system.\textsuperscript{15} DNA testing has provided a quick, economically feasible way of proving biological paternity in cases of non-marital childbirths and has become an important tool for the federal government in ensuring that children born to single mothers are provided for by child support payments. With DNA testing available as an effective and accurate means of proving paternity with a high degree of accuracy, the presumption of paternity may no longer be effective or even necessary. Moreover, the traditional presumption of paternity cannot, by definition, address the concept of parentage in same-sex relationships, where a marriage may not be a legal option and where the child cannot biologically be that of both parents.

Some scholars continue to advocate for the continued use or revitalization, of the presumption of paternity in American Law. Jana Singer argues that although DNA was envisioned as a positive tool to establish paternity for otherwise fatherless children, it has been used as sword by which some fathers are seeking to disestablish their status as legal parents.\textsuperscript{16} Singer notes that paternity disestablishment cases raise difficult questions of “how best to balance concerns for finality, fairness, and child welfare.”\textsuperscript{17} These disestablishment petitions may run the risk of disrupting a significant number of marriages and later DNA testing could tear apart prior existing relationships between presumptive fathers and their children.\textsuperscript{18} Singer argues that the presumption ultimately continues to protect the role that marriage plays in determining

\textsuperscript{15} See 42 USC §§ 654, 666.
\textsuperscript{17} Id at 254.
\textsuperscript{18} Interestingly, Singer points to some empirical studies indicating that upwards of 10% of children born to married women may not be, in fact the biological offspring of the mother’s husband. Id at 266.
legal parenthood as well as the welfare of children. Parenthood, she asserts, is a “legal and social construct, not a biological fact,” though she sees “no inherent reason why it must be exclusive.”\(^{19}\) The presumption of paternity envisioned by Singer “recognizes that while there are multiple paths to legal parenthood, marriage in or of itself is one such path and that committing to marriage creates obligations and connections to children that cannot be undone.”\(^{20}\)

A majority of states continue to employ some form of the common law presumption of paternity, though the means by which the presumption may be rebutted can differ from state to state. New York, for example, maintains the presumption of legitimacy, though this presumption is statutorily rebutted upon the finding of a ninety-five percent probability of paternity through a DNA test and such tests create a new rebuttable presumption of paternity in the biological father.\(^{21}\) In Michigan, however, the common law presumption of paternity stands and access to court-ordered DNA testing contained in its Paternity Act\(^{22}\) doesn’t exist for children not born “out-of-wedlock.”\(^{23}\) The strength of the presumption depends on the evidence that must be produced to show that the child is not the biological issue of the marriage; in New York a simple DNA test will do, so long as it is in the best interests of the child\(^{24}\), while Michigan requires “clear and convincing evidence” to rebut the presumption.\(^{25}\) These two modern variations of the traditional presumption of legitimacy for children born during marriage vary greatly and the

\(^{19}\) Singer, *supra* note 16, at 266, 268.

\(^{20}\) *Id* at 270.

\(^{21}\) Family Court Act § 532(a).

\(^{22}\) § 722.14 provides for genetic paternity testing to prove paternity in a paternity proceeding

\(^{23}\) § 722.711

\(^{24}\) Family Court Act § 52(a)

interests of all parties may drastically differ depending on the statutory and common law of the state in which paternity is to be established or disestablished.

MODERN APPROACHES TO THE PRESUMPTION OF PATERNITY

As the traditional presumption of paternity has begun to erode in a number of states, judges and lawmakers have been forced to turn to alternate ways of establishing paternity in an attempt to re-define what fatherhood means in the DNA age. Five novel approaches have been crafted from these attempts, with each approach maintaining a different focus, and seeking to implement rules that are most equitable.

A. The Uniform Parentage Act

The Uniform Parentage Act (“UPA”) was developed first in 1973 as an attempt to “modernize [] the laws for determining the parents of children and [to] facilitate [] modern methods of testing parentage.”26 The Uniform Law Commissioners revised and revitalized the Act in 2000 and it was amended again in 2002.27 The UPA has been formally endorsed by the ABA Family Law Section, approved by the American Bar Association, and adopted in eight states.28 The current Act seeks to adapt to recent scientific developments, while including new provisions regarding federal mandates that states provide simplified non-judicial means to establish paternity, a comprehensive section on the adjudication of parentage, and a tightly integrated registry law to deal with the rights of men who are neither an acknowledged, presumed, or adjudicated father.

28 Id.
The UPA begins by addressing the definition of four different permutations of what a “father” might be legally. Specifically, the UPA defines a ‘father’ as:

(1) “Acknowledged father” means a man who has established a father-child relationship under [Article] 3.
(2) “Adjudicated father” means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.
(3) “Alleged father” means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term does not include:
   (A) a presumed father;
   (B) a man whose parental rights have been terminated or declared not to exist; or
   (C) a male donor.
(16) “Presumed father” means a man who, by operation of law under Section 204, is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding.29

A parent, according to the UPA, “means an individual who has established a parent-child relationship under Section 201.”30 These definitions immediately set the tone of the Act as they acknowledge that “fatherhood” can be defined both legally and biologically, and that a child can have more than one father and indicate that the Act will construe parentage with significant regard to the role that the “parent” plays in the life of a child.

The UPA sets forth its own presumption of paternity in § 204, which states that

(a) A man is presumed to be the father of a child if:
   (1) he and the mother of the child are married to each other and the child is born during the marriage;
   (2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
   (3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

29 UPA § 102
30 Id.
(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];
(B) he agreed to be and is named as the child’s father on the child’s birth certificate; or
(C) he promised in a record to support the child as his own; or

(5) for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.

(b) A presumption of paternity established under this section may be rebutted only by adjudication under [Article] 6.31

The National Conference of Commissioner’s comments to § 204 indicate the radical nature of this provision. They noted “originally the 2000 version of the new Act limited presumptions of paternity to those related to marriage.”32 However, in the 2002 amended version the Commission added subsection 5, which allows the creation of a presumption of paternity if a man “receives the child into his home and openly holds out the child as his natural child.”33 The Commission noted that

To more fully serve the goal of treating Nonmarital and marital children equally, the “holding out” presumption is restored, subject to an express durational requirement that the man reside with the child for the first two years of the child’s life. This mirrors the presumption applied to a married man established by § 607, infra. Once this presumption arises, it is subject to attack only under the limited circumstances set forth in § 607 for challenging a marital presumption, and is similarly subject to the estoppel principles of § 608.34

The comments to § 204 also noted the deletion of the requirement that a presumption of paternity “may be rebutted only by clear and convincing evidence” and state that “[i]f two or more presumptions arise which conflict with each other, the presumption which on the facts is founded

31 UPA § 204.
32 UPA, Comments to § 204.
33 UPS § 204.
34 UPA Comments to § 204.
on the weightier considerations of policy and logic controls.”35 The Commission noted that these provisions are no longer needed as, “[n]owadays, genetic testing makes it possible in most cases to resolve competing claims to paternity.”36

Section 6 of the UPA sets fourth the procedure for adjudications of paternity:

The court shall apply the following rules to adjudicate the paternity of a child:

1. The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.
2. Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man identified as the father of a child under Section 505 must be adjudicated the father of the child.
3. If the court finds that genetic testing under Section 505 neither identifies nor excludes a man as the father of a child, the court may not dismiss the proceeding. In that event, the results of genetic testing, and other evidence, are admissible to adjudicate the issue of paternity.
4. Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man excluded as the father of a child by genetic testing must be adjudicated not to be the father of the child.37

This section establishes the controlling supremacy of genetic testing as evidence to establish or disestablish paternity. However, the Commission notes, “other matters such as Statute of Limitations, equitable estoppel, and res judicata may preclude the matter from reaching trial or the court denying genetic testing.”38 The UPA allows courts to deny parties genetic testing when the child has a presumed father and “(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.”39 This provision sets forth the UPA’s statutory version of the equitable estoppel doctrine.

35 UPA Comments to § 204.
36 Id.
37 UPA § 631.
38 UPA Comments to § 631.
39 UPA § 608.
and instructs the court to look to the best interests of the child, paying mind to the following factors:

(1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
(2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
(3) the facts surrounding the presumed or acknowledged father’s discovery of his possible nonpaternity;
(4) the nature of the relationship between the child and the presumed or acknowledged father;
(5) the age of the child;
(6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
(7) the nature of the relationship between the child and any alleged father;
(8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
(9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.
(c) In a proceeding involving the application of this section, a minor or incapacitated child must be represented by a guardian ad litem.
(d) Denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence.40

The 2002 UPA further requires that a guardian ad litem be appointed for any child involved in a proceeding involving the use of genetic testing to determine parentage.41 The denial of a § 608 motion seeking an order for genetic testing must be based on clear and convincing evidence and if denied, the court is required to issue an order adjudicating the presumed or acknowledged father to be the father of the child.42 This section must be read in accordance with the UPA’s well-known two-year limitation on challenges to paternity when a child has a presumptive father. Section 607 limits the commencement of challenges to the paternity of a presumptive father to

40 UPA § 608.
41 Id.
42 Id.
two years after the birth of the child, except that if (1) the presumed father and the mother of the child neither cohabitated nor engaged in sexual intercourse with each other during the probable time of conception and (2) the presumed father never openly held out the child as his own.” UPA § 607 and § 608 indicate a compromise reached between protecting the presumption of legitimacy and recognizing its continued usefulness and providing avenues by which third parties could seek to challenge the presumption to establish their paternity while not disrupting the life of the child in question.43

B. Best Interests Marital Presumption of Paternity

The Best Interests Marital Presumption of Paternity (“BIMPP”) is a modified version of the marital presumption of paternity in which the court must address the role of presumption through the lenses of a “best interests of the child” analysis. The BIMPP shares similarities with the traditional presumption of paternity; for example, it provides that the husband is presumed to be the biological father of his wife’s children. The difference between the traditional marital presumption and the BIMPP lies in the fact that while the traditional presumption can always be rebutted by an interested party, the BIMPP allows the presumption to be rebutted only if it is in the children’s best interest to hold that someone other than the husband is the child’s biological father.44 In cases where the court applies a BIMPP approach, a determination of the best interests of the child must be made before the court will even determine to hear whether the interested party, e.g. the alleged biological father, can rebut the presumption of paternity through competent evidence. Under the BIMPP, a biological father could have every relevant piece of evidence that would point conclusively to his paternity of the child in question and the court

43 UPA, Comments to § 607.
44 McRae, supra note 8, at 349.
could still rule that it would not be in the child’s best interests to allow him to rebut the presumption and refuse to hear the evidence.

The BIMPP has been created by modern justifications out of the realization that “(1) there is no longer a need to harshly and routinely deny a party the right to challenge the children’s paternity and (2) the best interests of the children should always be the court’s paramount concern.” The BIMPP is, in this way, a semi-conclusive form of the traditional common law presumption of paternity. A number of jurisdictions have utilized the BIMPP in analyzing paternity cases. These jurisdictions, while recognizing the genetic testing nearly eliminates any question of who may be the biological father of the child in question, continue to focus on what is the best interests of the child as the primary concern with regard to the determinations of paternity.

Courts applying the BIMPP are likely to base their decisions with regard to what are the best interests of the child off a number of factors. The primary basis of the court’s decision should be with whom the child has a substantial relationship. For this reason, the courts are likely to consider

(1) the length of time the husband has had knowledge of the children’s existence, (2) the length of time the husband has assumed the role of the children’s father, (3) the circumstances surrounding the children’s questionable paternity, (4) the children’s age (5) the harm to the children if the children learned the truth about their paternity, and (6) the likelihood that someone else can be established as the children’s father.

In many ways, these questions are similar to the factors addressed in § 608 of the UPA, and seek to protect the interests of the child to maintain stability in that child’s life. Although financial stability can also play a role in what is in the best interests of the child, at least one court has

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45 McRae, supra note 8, at 352.
46 Id at 372.
found that it should not exclusively consider which father has the most money in making a
determination of whether the presumption of paternity should be allowed to be rebutted.47

Although the BIMPP was developed with the goal of furthering the best interests of the
child in paternity determinations, many scholars have criticized this approach for a number of
reasons. Jana Singer argues, “while the addition of the best interest inquiry represents a step in
the right direction in that it focuses on the child’s needs, the best-interests standard has
significant shortcoming as a rule of judicial decision [in that] the standard is cumbersome and
fact-specific.”48 Because a best interests analysis is so determinate of the facts at hand, the
standard may be open to judicial manipulation or may produce unpredictable or convoluted
results. Judicial discretion may also work in way that may undermine the overall interest of the
child, in that appellate review of these types of decisions is often difficult, with little basis in
prior decisions controlling the outcome of the case.49 Debi McRae argues that the BIMPP is no
longer effective in that it can never be in he best interests of the child not to know who their
biological parent is.50 McRae asserts that with so many medical disorders such as cancer, heart
disease, diabetes, hypertension, Alzheimer’s disease, etc., it will always be in the best interests of
the child to know their biological parent so that they may know what disorders they may be
prone to in an effort to detect them early. McRae also argues that it is not psychologically
scarring for a child now to know their biological parent, as children go through “a grieving
process” with regard to their missing birth parent. When the child never knows that parent, they
are unable to complete the grieving process, leaving them in a state of what McRae terms

48 Singer, supra note 16, at 264.
49 Id at 265
50 McRae, supra note 9.
“genealogical bewilderment.”51 Certainly, “while most courts invoke the best-interests standard to resolve custody disputes between legally recognized parents, there is considerably more dissent about whether the standard is an appropriate vehicle for assigning or terminating parental status.”52

C. Equitable Estoppel

Equitable Estoppel is the most well known method of adjudicating paternity in the DNA age. This doctrine has been applied to paternity cases in a number of jurisdictions and is codified in the UPA.53 The doctrine of equitable-estoppel in the paternity context arises from the traditional doctrine of estoppel, which was a doctrine to prevent one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.”54 Although the doctrine of equitable estoppel can be used by the courts in paternity determinations as a defensive doctrine prohibiting a father from disestablishing his child,55 it may also be used offensively to bar the child’s mother or her husband from asserting the presumption of legitimacy to deprive the child’s biological father of his paternal rights, where the mother has previously held the child out as his, or even preventing the child from later seeking DNA testing to prove a biological link with an alleged natural father.56 The traditional analysis of estoppel requires a finding that:

51 McRae, supra note 8 at 374, 378-79.
52 Singer, supra note 16 at 265.
53 UPA § 608.
54 BLACKS LAW DICTIONARY (9th ed.)
55 This is the most common usage of the doctrine of equitable estoppel. See Shondel J. v. Mark D., 820 N.Y.S2d 199 (2006) (landmark decision fortifying the doctrine of equitable estoppel in New York State).
(1) there was a false representation or concealment of material facts, (2) the representation was known to be false by the party making it, or the party was negligent in not knowing its falsity, (3) it was believed to be true by the person to whom it was made, (4) the party making the representation intended that it be acted on, or the person acting on it was justified in assuming this intent, and (5) the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds.  

Accordingly, courts applying equitable estoppel in the context of paternity determinations require a showing of both a false representation by the party sought to be estopped and detrimental reliance on the misrepresentation by another. “Where a marital father claims – often quite convincingly – that he was not aware during marriage of the real facts surrounding the child’s conception, most courts reason that he could not “knowingly” have misrepresented his parenthood to the child in question.” Where the father has reason to believe that the child is not biologically his and continues to hold himself out to the child that he was their parent, the child relied on that misrepresentation. Equitable estoppel, however is “gender neutral” and will also be applied in cases where a mother knowingly misrepresented to the father and child that the child was biologically that of the father and either child or father relied on the misrepresentation to estop the mother from attempting to disestablish the paternity of the child.

Opponents of the so-called “paternity fraud” often assert that application of the equitable estoppel doctrine to paternity determinations forces husbands to support children post-divorce that were not actually products of their marriage but were instead the result of their wives’ extra-marital affairs. While recognizing that many of these equitable approaches to paternity determination may result in a father supporting a child that my not be biologically his, opponents of paternity fraud assert that “the justifications refusing to grant post-judgment relief from a false

57 BLACKS LAW DICTIONARY (9th ed.)
58 Singer, supra note 16 at 262.
59 See e.g., Shondel, 820 N.Y.S.2d 199.
60 Id.
paternity establishment all circle back to the claim that is would be unfair to the child or to the
state to release the victim of false paternity establishment."61 They argue that in many cases,
though equitable estoppel is imposed to maintain family stability and relationships of the
children, fathers refuse to exercise visitation that is attached to the child support payments for the
child.62 Moreover, it is often asserted that the doctrine of equitable estoppel virtually requires a
father to obtain proof of the child’s biological relationship at the time of birth, before
establishing any form of relationship with that child so that he is not later asked to pay for that
relationship. 63

D. Res Judicata

The traditional doctrine of res judicata is also often applied to prevent parties from later re-
litigating issues of paternity, especially with regard to the challenging of prior ordered divorce
decrees. According to Black’s Law Dictionary “the three essential elements of [res judicata] are
(1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of
the same parties, or parties in privity with the original parties.”64

In the context of paternity determinations, res judicata is often used as a defense to a petition
for paternity establishment or disestablishment in order to protect an earlier determination of
parentage- typically contained in a divorce decree. Default divorce decrees acknowledging the

61 Ronald K. Henry, The Innocent Third Party: Victims of Paternity Fraud, 40 FAM. L.Q. 51, 65
62 Id at 67-68. Henry goes as far as to write "[i]f anyone actually cared about the best
interests of the child in maintaining a relationship, they would hasten to make amends to
the paternity fraud victim, compensate him from the abuses he suffered at the hands of
the government, and thank him as we thank Boy Scout leaders or volunteers at Big Brothers
who choose, as free men, to establish or continue a relationship with a child not their own.”
63 See Id at 74. "When the error in tagging the wrong man is discovered, the rush is on to
excuse or ignore the woman's behavior and to 'blame the victim': He didn't challenge her lie
soon enough; He didn't shun the baby when it was presented to him; HE was married to the
adulteress; It was her fault."
64 BLACKS LAW DICTIONARY (9th ed.)
existence of children produced from the marriage are often scrutinized when those decrees are later employed to prevent an ex-husband from later disestablishing paternity to a child he learned after the divorce was not biologically his.65 Father’s rights advocates, pointing to the availability of DNA testing, “have analogized their cause to the growing use of DNA evidence to exonerate defendants wrongfully convicted of rape or murder.”66 For these reasons, courts and legislatures have begun to carve out exceptions to the traditional rule of *res judicata*; including overriding *res judicata* to allow adjudicated fathers to disestablish paternity when there is conclusive DNA proof that the child isn’t biologically his, allowing a challenge to prior divorce decrees when there is evidence that the wife mislead her husband into believed that he was the father of her child, and questioning whether paternity was even “as issue” in a divorce where the matter was not specifically disputed.67 *Res judicata* principles may not be applicable to disestablishment actions brought by someone who was not a party to the original proceeding – for example, a putative father.68

E. Common Law Adjudications of Dual Fathers: The Louisiana Method

Louisiana provides an interesting and novel perspective towards the presumption of paternity in that it allows for common law determination of paternity with regard to two fathers.69 In Louisiana cases a biological father can establish a legal connection with a child born during the mother’s marriage to someone else, without erasing the rights and responsibilities of the marital

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65 See Henry, *supra* note 61 at 56.
66 Singer, *supra* note 16 at 260. One advocate argued that “just as DNA evidence has revolutionized criminal law, so should it, in roughly parallel ways, lead to revolution in family law.
67 *Id* at 260-61.
68 *Id* at 261.
69 See *e.g.*, *Smith v. Cole*, 553 So. 2d 847 (Sup. Ct. Lo. 1989).
The Louisiana Civil Code, article 185 sets forth a presumption that a child born during a marriage is the legitimate issue of that marriage. Article 187 of the Code provides for disavowal of paternity by a presumptive father and states “the husband may disavow paternity by clear and convincing evidence that he is not the father.” The opportunity for disavowal only lasts in a one-year window, which begins at the time that the presumptive father learns of, should have learned of the birth of the child. The Code further provides two methods by which other parties may seek to establish paternity. Article 198 allows a “man” to institute a proceeding to establish paternity with specific time limits. A child, on the other hand, “may institute an action to prove paternity even though he is presumed to be the child of another man. If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.” In essence, these provisions allow a child who has a presumptive father to compel an order of filiation with regard to a child who already has a presumptive father. “In most other states, once a child brings an action to filiate to his biological father, his link of filiation to his presumed father, the husband of his mother, is severed.” However, in Louisiana, common law allows for such dual paternity and an order of filiation with regard to the biological father does not act to sever the legal rights and responsibilities between the child and his presumptive father. The court continues to apply this doctrine, allowing “a child to receive

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70 Singer, supra note 16 at 269.
71 La. Civ. Code art. 185
73 La. Civ. Code art. 188.
74 La. Civ. Code art 197
support from two fathers, inherit from two fathers, and for both fathers to inherit from the child as well.”

California also recently enacted a dual parenthood statute. Initially authored to “address the changes in the family structure in California,” the statute came into effect January 1, 2014. Essentially, the statute provides that “a child may have a parent and child relationship with more than 2 parents, … any reference to 2 parents to be interpreted to apply to all of a child’s parents where a child is found to have more than 2 parents.”

THE EFFECTS OF NEW APPROACHES ON PARTIES TO PATERNITY ACTIONS

These new approaches to determining paternity when child was born during a marriage but may not be biologically the product of the marriage contain a number of similarities. For example, the UPA contains provisions relating to res judicata and equitable estoppel. Both the UPA and Louisiana’s doctrine of dual paternity contain timelines for establishing/disestablishing paternity. However, these doctrines also contain important distinctions, which could greatly impact upon the interest of a client. Attorneys for the children and guardian ad litems should be familiar with these approaches, as their nuances affect the rights of husband and wife, biological father and child.

A. Biological Fathers Seeking to Establish Paternity

It is becoming more frequent for biological fathers to attempt to establish paternity of children born while the mother was married to another man, in part because “easing of divorce

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76 Varnado, supra note 75 at 629; Smith v. Cole, 533 So.2d 847 (La. 1989).
77 Cal. Fam. Code § 3040 (West)
laws has meant that paramours who might once have disappeared from the scene are staying around, waiting for a divorce to come through, and then marrying the mothers of their children. 80 The Center for Law and Social Policy, recognizing the increased number of establishment petitions filed by biological fathers, has suggested that

Paramours rarely succeed in disestablishing a husband’s paternity and establishing their own if the couple is still married and resists the paramour’s attempts. Even claims of constitutionally protected due process and equal protection violations rarely succeed in these cases. However, once the marriage is over (or if the child was conceived during a period of marital separation) the paramour might succeed if he has some relationship with the child. 81

Certainly, it seems to be an uphill battle for a biological father to establish paternity, especially when the marriage has remained intact. Biological fathers may be afforded more protection under certain approaches to paternity determinations that’s others.

1. **Presumption of Paternity.** States that continue to support a strong version of the traditional presumption of paternity are less likely to be receptive to the claims of biological fathers who wish to establish paternity with regard to a child born during the mother’s marriage to another man. Michigan, for example, maintains an extremely strong version of the presumption of paternity to the point where Michigan courts have construed the language of their Paternity Act, which contains all methods by which fathers may establish paternity on the basis of genetic testing, to deny standing to such fathers. Paternity proceedings, which are allowed under § 722.714 of the Paternity Act, may only be maintained with regard to children that are statutorily defined as being born out of wedlock. 82 The Act defines a “child born out of wedlock” as “a child begotten and born to a woman who was not married from the conception to the date

80 Roberts, supra note 7 at 5.
81 Roberts supra note 7, at 7.
82 M.C.L. § 722.711
of birth of the child, or a child that the court has determined to be a child born or conceived
during a marriage but not the issue of that marriage.”83 Michigan courts have found that, in order
to prove standing as the father of a child “born out of wedlock” according to the second
provisions of § 722.711, that the child was not an issue of the marriage, the presumption of
legitimacy ordinarily attached must be rebutted by clear and convincing evidence.84 Accordingly,
a court determination is needed that the child is indeed not the biological issue of a marriage
before a putative father even has standing to seek establishment of paternity under the Paternity
Act.

Biological fathers in Michigan took another steep blow in 2006 with the Supreme Court’s
decision in Barnes v. Jeudevine.85 In Barnes, a putative father sought a determination of
paternity for a child conceived while the mother was in the process of divorcing her husband and
was born four months after the divorce was final. The child’s birth certificate listed Barnes as the
father and both parents signed an affidavit of parentage the day after the child’s birth. The
default divorce decree that existed between the parties stipulated that no children were born of
their union. Barnes and the mother lived together for nearly four years after the birth in harmony,
with the Barnes wholly partaking in his role as the child’s father. After four years, the
relationship abruptly ended and the mother attempted to deny Barnes access to the child.86
Michigan circuit courts dismissed Barnes’ petition, holding that he lacked standing to bring it
under Michigan’s Paternity Act. Barnes appealed the decision on the basis of the divorce decree,

83 Id.
84 Serafin v. Serafin, 258 N.W.2d 461 (1977); Girard v. Wagenmaker, 470 N.W.2d 372, 376
85 718 N.W.2d 311 (2006): see also Taylor v. Luna, No. 303421, 2011 WL 4469522, at *2
86 Id at 312
which he claims was a court determination according to Paternity Act § 722.711. The Court of Appeals determined that the divorce decree, which contained provisions specifically stating that the parties had no children, was sufficient to overcome the presumption of legitimacy and allow Barnes standing to seek establishment of paternity with regard to the child. The Supreme Court of Michigan reversed the Court of Appeals holding, finding that the divorce decree, though containing a provision explicitly addressing paternity, was not a sufficient to constitute a “court determination” according to the Paternity Act. With regards to Barnes’ claim that the birth certificate and affidavit of parentage indicated that he was the biological father, the court found that “it is acknowledged in the affidavit of parentage and in the birth certificate that plaintiff was the biological father of the child. Yet, despite these documents, the child is presumed to be a legitimate issue of the marriage.”

UPA. The UPA clearly provides an opportunity for an alleged biological father to bring a civil proceeding to adjudicate the parentage of his alleged biological child. However, with regard to a child having a presumed father,

(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.

(b) A proceeding seeking to disprove the father-child relationship between a child and the child’s presumed father may be maintained at any time if the court determines that:

(1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and

(2) the presumed father never openly held out the child as his own.

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87 Id.
88 Id at 2.
89 Barnes, 718 N.W.2d at 315.
90 UPA § 602(3).
91 UPA § 607
These time limits are to be taken very seriously. In the case In re Parentage of M.C., a putative father, Stanley Hodgkiss, sought a determination of paternity with regard to his alleged biological father, whereby David Clubb had already established presumptive paternity by signing an affidavit of paternity. Applying UPA, the court found that “a child’s interests are generally served by accurate, as opposed to inaccurate or stipulated, paternity determination.” Accordingly, Hodgkiss’ petition for paternity was denied. In Parentage of M.C., the court did undertake some “best interest” analysis specifically because Clubb was the child’s presumptive father not because of his marriage to the child’s mother, but instead because of the affidavit of paternity, however, much of the decision rested on the length that Clubb had lived with and raised the child and the time limitations set forth in the UPA. With regard to the biological father of a child who has a presumptive father through marriage, the plain language of the UPA would act to preclude any petition for parental determination made more than two years after the birth of the child.

2. **BIMPP.** Courts are not always willing to find that it is in the best interests of the child for a genetic test to be undertaken to determine the identity of the child’s biological father when that child was born to a marriage. In R.N. v. J.M. & B.M., the court addressed a putative father’s petition to establish paternity of a child born during the mother’s marriage. The putative father argued that under Arkansas law, the court was required to order DNA testing to prove a biological link between himself and the child that would rebut the presumption of paternity. Arkansas law creates a statutory form of the BIMPP, whereby the court maintains the discretion to deny the father genetic testing and an opportunity to rebut the presumption of paternity when

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93 *M.C.*, *supra* note 89
94 61 S.W.3d 149 (Ark. 2001); *see also Mulligan v. Corbett*, 426 Md. 670, 700, 45 A.3d 243, 261 (2012)
they believe that it is in the best interests of the child. The court found that although “opponents to our decision would argue that giving the trial judge discretion in such a case would erase a putative father’s ability to rebut the presumption of legitimacy where perhaps the only way to rebut that presumption is through DNA testing… it is this discretion in section 16-43-901 that allows the trial judge to provide the necessary level of objective reasoning to protect the best interest of the child who is presumed legitimate while still considering the interests of a putative father or other party who seeks to rebut the presumption.95

3. **Equitable Estoppel.** Equitable estoppel may be used by a biological father to bar either the child’s mother or the mother’s husband from asserting the presumption of legitimacy to deny that father his paternal rights when the mother has helped the child out as his and where the biological father and the child have relied on the mother’s statements. When equitable estoppel is used in this fashion, determinations rest heavily on the mother’s early urging or approval of a parent-child relationship between the biological father and the child and the existence of such relationship at an early age.96 These determinations are heavily fact-based and involve a weighing of the child’s relationship both to the biological father and to the presumptive father.97

Equitable estoppel can also be used against a biological father to bar him from asserting his parentage when the child has not maintained a relationship with him but has, instead, with

95 *Id.*

96 For example, in *Thomas S. v. Robin Y.*, 209 A.D.2d 298 (1st Dept. 1994), the court found there where the mother fostered a relationship between her child and the sperm donor that was used to produced the child via artificial insemination, equitable estoppel could be employed to preclude the mother from arguing against the entering of an order of filiation; see also *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 215, 856 N.Y.S.2d 258, 262 (App. Div. 2008)

97 The court will also determine not to apply equitable estoppel in certain circumstances. See *Swann v. Schoenfield*, 163 A.D.2d 850 (4th Dept. 1990),
their presumptive father. In the case of *Peter B.B. v. Robin C.C.*, the 3rd Department applied equitable estoppel against a biological father that had brought a paternity proceeding against the mother’s husband.98 The child in question was born during the time that the mother was married to her husband, whose name appeared on both her birth certificate and baptismal certificate. The mother and child resided with the husband for four years, until the couple separated and the mother and child moved to Florida, where they resided with the mother’s old paramour. The paramour believed the child resembled him and took an informal DNA test, which revealed that he was the biological father.99 As a result, the biological father moved there under the New York Family Court Act for an order demanding that all parties undergo blood genetic marker testing. The Court found itself “more inclined to impose equitable estoppel to protect the status of a child in an already recognized and operative parent-child relationship.” The court pointed to the fact that the child had lived with her presumptive father for four years in her childhood, and that even after the biological father suspected that the child was his, he still waited a year to bring a petition to adjudicate his paternity. The court further found that because the petition was filed when the child was already aged five, “[u]nder the particular circumstances presented herein, it would be unjust and inequitable to permit petitioner to take a parental role at this late juncture.”100

4. **Res Judicata.** The doctrine of *res judicata* acts to preclude later litigation of an issue previously examined by the court. However, if someone who is not a third party to the original proceeding brings a disestablishment action, a putative father for example, then *res judicata* will

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98 256 A.D2d 889 (3rd Dept. 1998).
99 Peter B.B., *supra* note 95
100 *Id; see also Dept of Soc. Servs. ex rel. J.Y. v. D.V.,* 15 Misc. 3d 1122(A), 839 N.Y.S.2d 432 (Fam Ct. 2007) (“Estoppel is therefore applied to prevent the destruction of an intact parent-child relationship.”)
not apply. In *State of West Virginia v. George K.*, a child was born to mother, Kimberly P. while she was married to Michael K. Neither Ms. P nor Mr. K believed the child was a product of the marriage, but instead, Ms. P believed that child to be that of Robert C.\(^\text{101}\) Two weeks after the birth of the child, Mr. C signed a notarized paternity acknowledgement pursuant to West Virginian law stating that he was the biological father of the child. Additionally, Mr. C’s name was added to the birth certificate. Two months after the birth of the child, Ms. P and Mr. K were divorced. Their divorce decree indicated there were no children of the marriage. Five months after Ms. P’s divorce, the West Virginia State Child Support Enforcement Division instituted a legal proceeding against Mr. C. for child support.\(^\text{102}\) During the hearing, the court ordered DNA testing to confirm paternity and it was discovered that the child was not Mr. C’s. The Division then filed a paternity/child support action against Mr. K and blood testing confirmed that he was the biological father. When the county ordered Mr. K to pay child support, he protested, stating that Mr. C had already acknowledged himself as the child’s biological father. On appeal, the Supreme Court of Appeals of West Virginia held that absent a showing of fraud or duress, a written notarized acknowledged of paternity is legally binding and irrevocable.\(^\text{103}\) In this instant case, however, a mistake of material fact existed, that is that the child was not biologically that of Mr. C., which allowed the court to rescind the acknowledge of paternity executed by Mr. C. Mr. K finally argued that the divorce decree existing between himself and his ex-wife stating that no children were born to the marriage should be used to preclude him from paying child support and that the decree supported the fact that Mr. C had accepted legal responsibility for the child. The court disagreed, finding that “our cases have consistently held that such decrees of

\(^\text{101}^\) 531 S.E.2d 669 (W. Va. 2000).
\(^\text{103}^\) *Id.*
determinations are not res judicata, and do not inure the benefit of a putative parent in an action brought on behalf of the child to obtain support. “ Accordingly, Mr. C as that putative parent could not be held by the doctrine of res judicata to the determination made by the court that the marriage of Mr. K and Ms. P had no children during the time of their marriage.104

5. Dual Fatherhood. The common law doctrine of dual fatherhood espoused in Louisiana creates novel issues with regard to the role of the biological father. In Louisiana’s seminal case, Smith v. Cole, a mother brought suit against a biological father, arguing that he was obligated to provide support for the child notwithstanding that he child was conceived during the mother’s marriage to a man presumed to be the child’s father.105 The mother’s husband, though averring that he was not the biological father of the child, never petitioned to disavow the child’s paternity under Louisiana law. Cole, the alleged biological father, asserted that he could not be the child’s legal father, as the mother’s husband had remained the presumptive father. He claimed, “because Donel [the child] had a legitimate father, her mother should not be allowed to bastardize her just to obtain money.”106 Turning to Louisiana statutory law and a judicial trend allowing common law dual paternity, the court found that “the legal fiction, that a mother’s husband was the only father the law would recognize, was … whittled down.” Because it was possible under Louisiana law for a child to establish paternity with an alleged biological father, the court found that “the result here is that the biological father and the mother share the support for the child” and held that as long as petitioner mother could prove a genetic connection between Cole and the child,

104 Id.
105 553 So.2d 847 (Sup. Ct. La. 1989); see also J.M.Y. v. R.R., 2008-805 (La. App. 3 Cir. 12/11/08), 1 So. 3d 725, 728 (noting that Louisiana continues to accept dual fatherhood).
106 Id.
her ex-husband’s presumed paternity would not act to prevent her from receiving support from Cole, as the child’s biological father.\(^{107}\)

B. Non-biological Husbands Seeking to Disestablish Paternity

Opponents to so-called paternity fraud and fathers’ rights groups often point to problems that exist in judicial methods of disestablishing paternity for husbands that later discover that the children they raised are not biologically theirs, but instead are the product of their wives’ affairs.\(^{108}\) The Center for Law and Social Policy sets forth the following for fathers who wish to disestablish paternity of children born during their marriage:

- **Conduct counts.** A man who has held a child out as his own, knowing that he is not the biological father of that child will rarely be allowed by a court to disestablish paternity. If he has promised the mother that he will take care of the child and raise him/her as a family member and/or has discouraged the mother from establishing the paternity of the genetic father, the court is especially unlikely to allow him to renege.
- **Timing matters.** A man who suspects he is not the biological father of his wife’s child and fails to act on his suspicions, faces an uphill battle in disestablishing paternity. A man who waits for years before seeking genetic tests to confirm or rebut his suspicions is likely to be stopped from denying his paternity.
- **What the divorce decree says is very important.** If the divorce decree declares that the child in question is a child of the marriage (or words to that effect), courts usually consider that finding is binding at least between the ex-husband and ex-wife.\(^{109}\)

Certainly, a husband that has any reason to believe that the child produced in his marriage is not his should immediately seek DNA testing and sever his relationship with the child, if he determines that he doesn’t want to maintain his status as that child’s legal father.

I. **Presumption of Paternity.** As we’ve previously seen, the presumption of paternity can be used to protect the relationship between the child and the husband when an alleged biological father seeks access to the child on the basis of that biological connection. However, a strong presumption of paternity works both ways. So long as the presumption attaches to the

\(^{107}\) Id.

\(^{108}\) For a good article relying on this position, see Henry, *supra* note 61.

\(^{109}\) Roberts, *supra* note 7 at 5-6.
relationship between the child and the husband, the presumptive father is required to care for and support the child.\footnote{110} In Michigan, where a strong presumption of paternity exists, the presumption must be rebutted by “clear and convincing evidence.”\footnote{111} However, even Michigan has discarded the common law rule whereby husbands and wives could not testify as to non-access. Accordingly, a husband may testify that he had no access to his wife during her period of conception and gestation and the court may admit such evidence which, if amounting to clear and convincing evidence, will serve to disestablish the paternity of the child in question.\footnote{112}

2. \textit{UPA}. The same provision of the UPA that governs paternity actions by putative fathers when the child in question has a presumed father applied in instances where the presumed father wishes to adjudicate the parentage of a child.\footnote{113} This provision reads:

\begin{quote}
(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.

(b) A proceeding seeking to disprove the father-child relationship between a child and the child’s presumed father may be maintained at any time if the court determines that:

(1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and

(2) the presumed father never openly held out the child as his own.\footnote{114}
\end{quote}

Accordingly, a husband wishing to disestablish a child born during his marriage to his wife on the basis that he is not the child’s biological father has a mere two years to do so after the birth of

\footnote{110}{“In cases where the husband does successfully rebut the presumption, he would not be required to support the child... [s]upport would then be sought from another source.” \textit{Pruitt v. Pruitt}, 90 Mich. App. 230 (Ct. App. 1979).}
\footnote{111}{\textit{Serafin}, 258 N.W.2d at 463.}
\footnote{112}{\textit{See Serafin}, 258 N.W.2d at 463. This case involved a husband who, during the process of his divorce, sought to disestablish the child born during his marriage to his wife. The lower court determined, on the basis of the common law rule of Lord Mansfield, that evidence given by the husband with regard to non-access was inadmissible. The husband appealed the decision and it was reversed.}
\footnote{113}{UPA § 607.}
\footnote{114}{\textit{Id.}}
said child. If the marriage lasts more than two years after the birth of the child, it is unlikely a husband may ever suspect that the child may not be biologically his. For this reason, the UPS sets forth second provisions for proceedings seeking to disprove the father-child relationship, where no time limit is put in place. However, the provision is application only when “the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probably time of conception; and the presumed father never openly held out the child as his own.” Note that both prongs of this provisions must be met if a presumptive father wishes to disestablish children born during his marriage after the tolling of the two year limitations set forth in UPA § 607(a). Section 607 (b) is difficult to satisfy in that, if the wedded couple neither cohabitated nor engaged in intercourse during the time that the child was conceived and the husband never openly held the child out as his own, it would be more likely for the husband to petition for disestablishment soon after the birth of the child under § 607 (a). UPA § 607(b) leaves no relief for husbands who, deceived by their spouses, years later discovers that the children produced during their marriages are really the products of their wives’ extra-marital affairs.

3. **Equitable Estoppel.** Where a presumptive father wishes to disestablish a child he now believes to be not biologically his, the doctrine of equitable estoppel has traditionally been used to prevent the disestablishment. In 2006, the Court of Appeals handed down the *Shondel J v. Mark D.* decision, which recognized the doctrine of equitable estoppel secured by statue in New York under the Family Court Act § 418(a) and § 532(a). In *Shondel J.*, mother and father

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115 UPA § 607 (emphasis added).
117 Both § 418 and § 532 state that no genetic marker test “shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of
of the child were dating and having sexual intercourse during the time of the child’s conception, and the father had recognized that he was convinced that he was the child’s father in a sworn statement recorded in a registry in the county of Guyana, where the parties resided. The father supported the child and named the child as the primary beneficiary of his life insurance plan, and the mother alleged that he visit the child, sent the child gifts, took the child to meet his parents, regularly spoke with the child by telephone, referred to the child as his daughter and that the child referred to him as “daddy.” After the mother sought an order of filiation in New York naming the father, he requested court ordered DNA testing, which showed that he was not the father of the child.118 The court found that the interests of the child in maintaining her relationship with a man who had led her to believe that he was her father overrode the inequities that may exist in compelling the father to support a child that is not biologically his. Moreover, the court rejected the father’s assertion that his misrepresentation to the child stemmed from the misrepresentation of the mother who asserted that the child was biologically his. The court found that the Legislature did not create an exception for men who take on the role of fatherhood based on the mother’s misrepresentation.119

Although Shondel J. factually dealt with a case where the parties were never married but where the father had acknowledged the child by legal document, courts do bar presumptive fathers from denying paternity where they have developed a parent-child relationship with the child.120 Because the court in Shondel J. has recognized that men who take on the role of fatherhood based on the misrepresentations of the mother can later be estopped from denying

res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.”

118 Shondel J., 820 N.Y.S.2d at 200.
119 Shondel J., 820 N.Y.S.2d.
paternity according to the Court of Appeal’s reading of the Family Court Act, presumptive fathers who are opposed to paying support for children not biologically theirs must act quickly at the time of the child’s birth to determine that they are in fact their biological children before developing a relationship with them. If a husband is suspicious that his wife is having an affair and does not want to later support a child that may be produced from that affair, he should have informal DNA testing done shortly after the child’s birth before he develops a relationship with that child.121

4. *Res Judicata.* The doctrine of *res judicata* may be employed to uphold a divorce decree establishing a husband’s paternity of children born to that marriage, even when the mother may have committed fraud upon the court in representing that the child was biologically that of her husband. In *Godin v. Godin*, a Vermont court was charged with determining whether a father who had presumed for fourteen years that the child produced during his marriage was biologically his child, could later disavow the child contrary to a divorce decree executed six years prior to the disavowal petition.122 In *Godin*, mother and the presumptive father shared a sexually intimate relationship before the presumptive father returned to military service. Subsequently, mother told the presumptive father that she was pregnant, he returned from services and they were married shortly before mother gave birth to the child in question. Mrs. Godin filed for divorce seven years after the birth of the child, which was resolved by awarding custody of the couple’s daughter to the mother and requiring Mr. Godin to pay child support. Six years after the divorce, Mr. Godin got wind of rumors that were circulating throughout his family

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121 For the most part however, husbands are not likely to be cautious or suspicious to this degree. A majority of fathers affected by this reading of the Family Court Act will have already developed a relationship with the child, believing it to be biologically theirs, and will later be estopped from denying paternity of that child.

that the child wasn’t his, and in reconsidering the time frame of his relationship with the mother, realized that ten months had elapsed between his return to military service and the child’s birth.\textsuperscript{123} As a result, Mr. Godin requested that the court order a genetic marker testing to determine whether he was the biological father of the child, and the court denied such request, ruling that the test should have been requested before the divorce was finalized. Mr. Godin argued that the divorce decree should not preclude testing, as Mrs. Godin had effectively perpetrated a fraud on the court during the divorce proceedings by representing that the child was biologically his when she should have known that it wasn’t.\textsuperscript{124} Under Vermont law, a court could only grant relief from a final judgment for newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial or for fraud … misrepresentation, or other misconduct of an adverse party.”\textsuperscript{125} The court found that since a presumption of legitimacy existed which, until rebutted, rendered the child legitimate, that the mother could not have possibly misrepresented to the court that the child was born of the marriage. Neither did the court find any “special circumstances” that would equitably entail overlooking the prior divorce decree. Instead, the court found that “even more compelling, in or view, are the fundamental policy concerns that require finality of paternity adjudications.” Accordingly, the court affirmed the lower court’s denial of genetic marker testing with regard to Mr. Godin and his child, finding that although the court “cannot perpetuate a parent-child relationship against the parent’s will”

\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} V.R.C.P. 60(b), which mirrors Fed.R.Civ.P. 60. This provisions contains an exception under 60(b)(6) for instances in which the fraud was “upon the court.” The Court in \textit{Godin} determined that this exception did not apply since the fraud was essentially upon Mr. Godin and not upon the court.
the divorce decree should be upheld so that the child may retain both the legal rights and the financial benefits of the parent-child relationship.126

5. **Dual Fatherhood.** As with the UPA, disavowal under Louisiana law is extremely particular with regard to time limits. Article 187 of the Louisiana Civil Code provides that “the husband may disavow paternity by clear and convincing evidence that he is not the father.”127 However, the opportunity for disavowal only lasts in a one-year window from the birth of the child.128 The Louisiana Civil Code does provide an extended time limit “if a mother in bad faith deceived the father of the child regarding paternity,” but only allows that “the action shall be instituted within one year from the day the father knew or should have know of his paternity, or within ten years of the day of the birth of the child, whichever first occurs.”129 Should a husband seek to disavow a child born during his marriage, which he had previously believed to be his child through the “bad faith” of the mother, he has one year from the time that he learns that the child is not biologically his to institute an action for disavowal, unless ten years have elapsed since the birth of the child. After ten years from the birth of the child, the presumptive father is no longer allowed under Louisiana law to disavow that child under any circumstances. Note that under *Smith v. Cole*, the legal rights and responsibilities of a presumptive father who has not disavowed his child are not severed by a legal determination that the child is biologically that of another man.130

**C. Mothers Seeking to Bar Access to Husband or Biological Father**


128 La. Civ. Code, article 188.
129 *Id.*
130 553 So.2d 847 (La. 1989).
In an age where more women participate in the paid labor force and where more resources are available to victims of domestic violence, more women are leaving disharmonious relationships and attempting to take care of their child entirely on their own. In these cases, mothers are seeking to bar access to their children from ex-husbands in an attempt, for whatever reason, to remove the putative of presumptive father from the life of that child. The Center for Law and Social Policy offers these tips for wives and ex-wives that wish to disestablish paternity:

- Courts also consider the wishes of the husband or ex-husband. If he does not want paternity to be disestablished, courts are reluctant to allow it. They are particularly likely to apply *res judicata* principles in these cases, refusing to let the ex-wife disestablish paternity. Alternatively, they may weigh the competing presumptions (the marital presumption vs. the genetic test presumption) and find, that for public policy reasons, paternity disestablishment is not allowable.
- Another factor that comes into play is the availability of the biological father. It is more likely that a court will allow disestablishment when another man is ready, willing and able (or at least available) to take on that role than when the child would be rendered fatherless by disestablishment.

2. **UPA.** Mothers seeking to bar access to their child from a husband or that child’s allegedly biological father are bound by the UPA’s 2 year time limit for parentage adjudications when the child is born during a marriage and has a presumed father. This time limit may essentially bar an action by the mother to disestablish the paternity of an ex-husband with regard to children born during their marriage, especially if the divorce happened more than two years after the birth of those children. In states adopting the UPA, if a mother anticipates a successful divorce and wishes to later deny her ex-husband access to the child or if she wishes to establish the paternity

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131 Roberts, *supra* note 8 at 5.
133 UPA § 607.
of her paramour with regard to the child, she must act quickly after the birth of the child to commence the action within two years.

3. **BIMPP.** The BIMPP may be employed against a mother attempting to disestablish her former husband as the legal father of her child. For example, in *Matter of Marriage of Ross,* a wife, Sylvia, sued for divorce against her husband, Robert, alleging him to be the father of the child produced during their marriage.\(^{134}\) That mother later filed a petition, alleging that the child was not biologically Roberts’, but was the child of Charles. Both Robert and Charles opposed the petition, and, when the court ordered to compel both men to submit to genetic marking testing, appealed the determination, arguing that the court had failed to hold a “best interests” hearing before ordering the testing.\(^{135}\) The court, turning to Kansas law which stated that “[t]he court shall enter such orders regarding custody and visitation as the court considers to be in the best interest of the child,” held that the best interests of the child must be determined before DNA testing is ordered, which may effectively bastardize the child. The court based its decision off of the concept that “[o]nce the judge, in the interest of judicial economy, ruptures the father/child relationship, the judge cannot return the parties to the position they were in prior to the blood test, no matter how wise or great his or her judicial power. That is a fact of life.”\(^{136}\) For this reason, the court found that:

\(^{134}\) 783 P.2d 331 (Kan. 1989).

\(^{135}\) *Id.* The court had instead determined that is would always be in the best interests of the child to know who their biological father is.

\(^{136}\) *Marriage of Ross,* 783 P.2d at 338; see also *Greer ex rel. Farbo v. Greer,* 50 Kan. App. 2d 180, 190-91, 324 P.3d 310, 318 (2014) (distinguishes *Ross* by noting that “a *Ross* hearing is only required in two very specific situations: when (1) there is not a genetic test resulting in a presumption of paternity performed prior to the filing of the paternity action, or (2) a genetic test was completed prior to the filing of the paternity action but the result is inadmissible due to a proper statutory objection being lodged... *Ross* would only apply when one man’s presumption is at risk of rebuttal... a *Ross* hearing in advance of admitting a genetic test results is not required.”)
[w]hen a marital relationship has been terminated, children of the marriage need for the court to provide stability in their lives, to acknowledge that their perception of time is different from that of an adult, and to take into consideration their past relationship with their parents. Prior to ordering a blood test to determine whether the presumed parent is the biological parent, the district court must consider the best interests of the child, including physical, mental, and emotional needs. The shifting of paternity from the presumed father to the biological father could easily be detrimental to the emotional and physical well-being of any child. Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed.\[137\]

The court held that the lower court had abused its discretion in not holding a hearing on whether the best interests of the child precluded the mother from seeking genetic marker testing of her child, ex-husband, and the child’s alleged biological father and remanded for such hearing.

4. \textit{Equitable Estoppel}. A mother seeking to disavow either her husband or the child’s biological father can be estopped from challenging the paternity determination. The Center for Law and Social Policy notes “[w]omen’s increased participation in the paid labor force has made them less financially dependent on their husbands. In addition, there has been increased awareness that domestic violence is not acceptable and more resources for women fleeing from abuse. This has lead women who wish to end all contact with their husbands/ex-husbands to be more willing to disestablish their husband’s paternity and go it alone.”\[138\] However, courts are hesitant to allow a mother to seek disestablishment of her child’s paternity where it would render them illegitimate. “Common sense, public policy, reason and the overriding consideration for the welfare of the child will bar a wife from bastardizing her child where, as here, she lived with her husband as his wife during the period of conception and birth of the child and for ... years thereafter and where the husband has supported and nurtured the child for all of the child’s

\footnote{137 Id at 338-39.}
\footnote{138 Roberts, supra note 7 at 15.}
life.” In *Kim Marie V. v. Michael S.*, a mother sought to disestablish the paternity of her child with regard to her ex-husband, stating that another man was the biological father of the child. The alleged biological father denied his paternity, while the ex-husband expressed a desire to continue his relationship with the child and continue to support the child. The Fourth Department estopped the mother from challenging the paternity of her ex-husband, finding that a relationship existed between the child and father and asserting that the mother improperly waited nearly six years until even bringing the petition for disestablishment. Courts applying the equitable estoppel doctrine have not been more lenient in allowing mothers to disestablish their husbands if the alleged biological father is willing and able to take care of the child if a parent-child relationship already exists between the child and presumptive father. In *State ex rel. H v. P.*, the court found that a mother was estopped from challenging the paternity of her daughter, born potentially by artificial insemination while the mother was married to her ex-husband. In this case, the mother had actively encouraged her ex-husband in maintaining a relationship with his child even after their marital separation, including sending letters and gifts from the child to her ex-husband, addressed to “Daddy” and inviting him to her place of employment, where she indicated to co-workers that he was the child’s father. Even though the mother asserted that her current boyfriend was ready to adopt the child as his own, the court found that allowing the mother to claim that the child was illegitimate after encouraging the development of a parent-

139 *Id.*

142 90 A.D.2d 434 (N.Y. 1st Dept. 1982).
143 *Id.*
child relationship between the child and her ex-husband “would be cruel and unseemly affront to decency and morality to which the law should not give its imprimatur.”\textsuperscript{144}

\textbf{D. Same-sex Couples}

In 2011, the Marriage Equality Act was signed into effect in New York Start, legalizing marriage for same-sex couples. Presently, as same-sex marriage is now legal and valid in New York State, the presumption of paternity standard that currently stands in New York State also stands for same-sex couples in New York State. In, \textit{Wendy G.M. v. Erin G.M.}, a matter involving two women divorcing from a same-sex marriage, the Supreme Court noted that “New York's public policy strongly favors the legitimacy of children, and that the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law.”\textsuperscript{145} The Court further notes that both New York’s Domestic Relations Law and Family Court Act both provide statutes declaring that: “a child born to married parents is the legitimate child of both parents.”\textsuperscript{146} In this matter, the court ultimately held that the “female spouse was the presumed parent of child conceived from artificial insemination and born during the marriage of same-sex couple.”

While this presumption may present difficulties where there is an established, known opposite-sex parent (instead of through artificial insemination or surrogacy), overall it is known and accepted that Domestic Relations Law § 10–a requires same-sex married couples to be

\textsuperscript{144} \textit{Id}; see also \textit{Laura G. v. Peter G.}, 15 Misc. 3d 164, 169, 830 N.Y.S.2d 496, 500 (Sup. Ct. 2007) (holding that the father was equitably estopped from denying paternity of child born via artificial insemination during the marriage).

\textsuperscript{145} 45 Misc. 3d 574, 985 N.Y.S.2d 845, 848 (Sup. Ct. 2014)

\textsuperscript{146} \textit{Id.} (Citing DRL §21(1) and Section 417 of the Family Court Act.)
treated the same as all other married couples,” allowing the presumption of paternity to stand in same-sex marriages.\textsuperscript{147}

CONCLUSION

The cases addressed throughout this Paper are merely a sampling of common law and statutory jurisprudence regarding these approaches to the traditional presumption of legitimacy. The legislation of each state will vary and court determinations rely heavily on that state’s statutory law. However, it is easy to see common trends, patterns, and policy reasons that have been adopted across the states and even across these various approaches. When an Attorney for the Child receives a file that has to do with a paternity determination, they should become familiar with the way that the approach adopted in their jurisdiction affects the interests of the parents and alleged biological parents. The cases addressed throughout this Paper represent a sample of such decisions; even within state, determinations of paternity rely heavily on the factual background of the case. By examining these different approaches, the Attorney for the Child will be able to get a feel for the problems and solutions that may exist in different jurisdictions, the arguments that have succeeded or failed, and the way the various approaches seek to vindicate the interests of all parties so as to reach the most fair and equitable result.