

# CLASP

CENTER FOR LAW AND SOCIAL POLICY

## TRUTH AND CONSEQUENCES: PART II. Questioning the Paternity of Marital Children

BY  
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One of the fundamental reasons that couples marry is to secure the legal and financial status of their children. Unlike children born outside marriage, marital children are entitled to financial support from their fathers as well as their mothers. They also have the right to inherit from paternal as well as maternal relatives. In addition, marital children are usually part of their father’s extended family, acquiring grandparents, aunts, uncles, and cousins. Because of the importance of these familial and legal relationships, there is a long-standing legal presumption that a child born in the context of marriage is the child of the couple.<sup>2</sup> A child born to a married woman is entitled to call his or her mother’s husband “daddy” and the husband is entitled to treat the child as his own. The presumption applies even if the marriage was defective in some way.

A typical state statute in this regard reads:

“A man shall be presumed to be the natural father of a child if:

- (1) He and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or dissolution, or after a decree of separation is entered by a court; or
  - (2) Before the child’s birth he and the child’s natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or may be declared invalid, and:
    - (a) If the attempted marriage may be declared invalid only by a court, the child is born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity or dissolution;
- or

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<sup>2</sup> The presumption originates in English common law and is sometimes referred to as Lord Mansfield’s Rule. *Commonwealth v. Sheperd*, 6 Binney 283 (Pa. 1814)(The child of a married woman is conclusively presumed to be legitimate unless her husband was not within the four seas which bound the kingdom [England] at the time of conception.). It has been referred to as one of the strongest and most persuasive presumptions known to the law. *Richard B. v. Sandra B.B.*, 625 N.Y.S. 2d 127,129 (N.Y. App. Div. 1995); *A.G. v. S.G.*, 609 P. 2d 121,124 (Co. 1990).

- (b) If the marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation; or
- (2) After the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with the law, although the marriage is or may be declared invalid, and:
- (a) He has acknowledged his paternity of the child in writing and filed with the bureau [of vital statistics]; or
- (b) With his consent he is named as the child's father on the child's birth certificate; or
- (c) He is obligated to support the child pursuant to a written voluntary promise or court order.<sup>3</sup>

Of course, using these criteria, there could be competing presumptions of paternity. For example, a child could be born within the 300 days after a divorce was granted and thus be presumed to be the child of the mother's ex-husband. If the mother married someone else during that 300-day period—but before the child's birth—then the child is also presumed to be the child of her new husband. Where two presumptions compete like this, the statutes usually instruct the courts to follow the one based on weightier considerations of policy and logic.<sup>4</sup>

This marital presumption protects parents and children. It also protects the sanctity of marriages by assuming the husband and wife have both remained true to their marriage vows. Until recently, it was also the only practical way to deal with the issue. In the absence of a method to prove that the husband was not the child's biological parent, raising the issue could harm the child (and the reputation of the child's mother), but would not resolve the question. Unless the husband was impotent, sterile, or not around during the time of conception, there simply was no way to disprove his paternity.

The advent of genetic testing has changed this; user-friendly, relatively inexpensive tests are now available.<sup>5</sup> These tests will exclude men who could not possibly be a child's genetic parent and establish with great certainty whether a particular man is a child's biological father.<sup>6</sup> These tests are widely used in establishing the paternity of non-marital children. Questions are now being raised about whether they should also be used in establishing the paternity of marital children.

The issue arises in several different contexts:

- **Medical reasons.** The child is ill and tests are done to determine whether he or she has inherited a genetically linked disease. Alternatively, the child is in

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<sup>3</sup> MONT. REV. STAT. §40-6-105 (2002). See, also, COL. REV. STAT. §19-4-105(1) (2002).

<sup>4</sup> Id. §19-4-105 (2)(a). See, also, WY. STAT. ANN. § 14-2-102 (b).

<sup>5</sup> Inquisitive parents can actually order paternity testing kits online. Dozens of sites advertise home testing kits free or at low cost. See, e.g., [www.genetree.com](http://www.genetree.com), which offers to ship free kits (payment is made if you send the samples back for testing) and [www.prophase-genetics.com](http://www.prophase-genetics.com), which offers kits and results for \$160.

<sup>6</sup> Today, the typical genetic test can yield a 99-percent probability that a given man is the child's father.

need of a transplant and tests are done to determine whether a family member is a genetically suitable donor. The genetic test results reveal that the father is not biologically related to the child. This may lead to a family breakup or the family may remain together and continue to raise the child as if he or she was a marital child.

- **Divorce.** The child's parents divorce and one of them questions whether the father is biologically related to one or more of the children born during the marriage. Uncertainty about the child's parentage may have led to the divorce. Alternatively, there may have been no question about parentage until the divorce. The father might raise the issue then because he wants to avoid paying child support. The mother might raise the issue because she wants to end all contact with her husband and marry the biological father of the child.
- **Post-divorce.** There is conflict over the child's needs. The father might be in arrears and raises the issue as a defense to his non-payment of support. The mother may wish to avoid having to consult the father about the child's upbringing and raises non-paternity as a way to remove him from the child's life.
- **The biological father appears on the scene.** The man with whom the mother was having an affair might decide he wishes to assume parental responsibility and files suit to establish his paternity of the child even when neither the wife nor the husband wishes this to happen.

In many of these situations, the child's paternity is disestablished. The child might then begin a relationship with his or her biological father. Alternatively, the child is left fatherless. In the latter case, both financial and emotional support end, and ties to the extended family are likely to be severed. Because of the conduct of adults, children are irreparably harmed.

This leaves many courts troubled. For example, in *Pietros v. Pietros*,<sup>7</sup> the Rhode Island Supreme Court was faced with a situation in which a man had known all along that he was not the biological father of his wife's child. Nonetheless, he had raised the child as his own, assuring the mother that he would always care for the child. However, when the couple divorced, the husband tried to disestablish his paternity. In resisting his effort to do so, the court noted:

As deep as our concerns are for [the husband], we cannot sanction the proposition that children can be embraced and raised by a person as a parent and then discarded when the parents no longer get along....Children are not mere personal property to be assigned or distributed upon divorce. The relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted.<sup>8</sup>

Retaining a system in which marital offspring are irrevocably presumed to be the children of the husband, however, has also troubled the courts. For example, in *Russell v.*

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<sup>7</sup> 638 A.2d 545 (R.I. 1994) citing *Clevenger v. Clevenger*, 11 Cal. Rptr. 707, 716 (Cal App. 1961).

<sup>8</sup> *Id.* at 548.

*Russell*,<sup>9</sup> the Indiana Supreme Court was faced with a similar situation to that faced by the *Pietros* court and allowed paternity disestablishment to proceed. The court wrote:

Proper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons. It also plays a role in the just determination of child support; we have already declared that public policy disfavors a support order against a man who is not the child's father.<sup>10</sup>

As is evidenced in Appendices A, B, and C, and the discussion below, one can find similar tensions in court decisions from many other states.

State legislatures are now wading into this difficult area as well, trying to provide some guidance to the courts. The state legislatures too are struggling to balance competing public policy and human concerns.<sup>11</sup> Their approaches vary from proposals limiting the ability to disestablish paternity<sup>12</sup> to allowing disestablishment at any time<sup>13</sup> to requiring genetic testing of all newborns.<sup>14</sup>

This monograph explores the approaches that courts and legislatures are now taking on the issue of paternity disestablishment when marital children are involved. It explores the pros and cons of different approaches and suggests a path that balances some of the legitimate concerns of all parties in this difficult area.

## JUDICIAL APPROACHES

Courts have been dealing with the thorny issue of disestablishing the paternity of marital children for hundreds of years. However, the presumption of legitimacy of marital children was a difficult one to overcome. Most of the older cases involved situations in which the husband was impotent or sterile or was not around when the child was conceived. Evidence supporting the impossibility of the husband's paternity was introduced, weighed, and a decision was rendered. Rarely were paternity challenges successful in any other circumstances. Moreover, rarely did any one other than the husband raise the issue. Neither the mother nor her paramour was likely to try to disestablish the husband's paternity.<sup>15</sup>

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<sup>9</sup> 682 N.E.2d 513 (Ind. 1997).

<sup>10</sup> Id. at 517 n.7.

<sup>11</sup> At least three states enacted paternity disestablishment legislation in the 1990s. Five states have enacted such legislation since 2000 and legislation is pending in three other states. Eighteen bills (filed in 13 states) have been introduced, but most have died in committee. Christi Goodman, *State Legislation Regarding Disestablishment of Paternity*, National Conference of State Legislatures (Nov. 2002).

<sup>12</sup> See, e.g., H.B. 702, 2002 Leg., 416<sup>th</sup> Sess. (Md. 2002).

<sup>13</sup> See, e.g., Ohio Rev. Code Ann. §3119.962 (West 2002).

<sup>14</sup> See, e.g., H.B. 379P, 2002 Leg., Sess. (Fl. 2002). While this would be costly and (in most cases) unnecessary, it does ensure that everyone knows "the facts" from the outset. However, many also find it an invasion of their privacy and another example of government intrusion.

<sup>15</sup> For a detailed history of American paternity law, see H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

In the last 25 years, there have been dramatic changes, however.

- The advent of sophisticated genetic testing has made it possible clearly and easily to establish biological parentage, giving husbands, wives, and paramours access to “the truth.”
- 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.<sup>16</sup>
- 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.<sup>17</sup>
- 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.<sup>18</sup> Paramours have also been asserting their constitutional right to a relationship with their children even when they have ended the relationship with their children’s mothers.<sup>19</sup>

As a result, there are now a substantial number of cases in which husbands, wives, and paramours seek to disestablish the paternity of a child. What can we learn from these cases? Some patterns are obvious.

### ***Husbands and Soon-to-be Ex-Husbands Who Wish to Disestablish Paternity***

For husbands or soon-to-be ex-husbands who wish to disestablish their paternity of a child born during the 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

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<sup>16</sup> See cases cited in Appendices A and B. Note that the author looked at recent case law (1997-2003). Many states have controlling cases that were issued before 1997. Moreover, the listing is not dispositive. It merely provides a sampling of recent, reported cases that demonstrate the types of issues that are now being litigated in this area.

<sup>17</sup> See cases cited in Appendix B.

<sup>18</sup> See, e.g., *Stitham v. Henderson*, 768 A. 2d 598 (Me. 2001).

<sup>19</sup> See, e.g., *Calendar v. Skiles*, 591 N.W.2d 182 (Iowa 1999) and cases cited in Appendix C.

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.<sup>20</sup>

- *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.<sup>21</sup>
- *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.<sup>22</sup> When a court does not apply res judicata and lets the case proceed, it is usually because the father has filed a timely motion under the state's equivalent of Federal Rule 60(b). That rule allows litigants to reopen a judgment for fraud, duress, material mistake of fact, excusable neglect, and the like, typically within one year of entry of the judgment. The rule also allows judgments to be set aside prospectively "in the interests of justice" if the litigant acts within a "reasonable time" to rectify the error.<sup>23</sup>

### ***Wives and Ex-Wives Who Wish to Disestablish Paternity***

Wives and ex-wives who wish to disestablish paternity face a similar set of restrictions.<sup>24</sup>

- *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.<sup>25</sup> Alternatively, they may weigh the competing

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<sup>20</sup> See, e.g., *W. v. W.*, 728 A.2d 1076 (Conn. 1999); *Michael K.T. v. Tina L.T.*, 387 S.E.2d 264 (W.Va. 1989). In Alaska, however, the case law seems to be going in a different direction, based on state legislation discussed below. See, e.g., *B.E.B. v. R.L.B.*, 970 P.2d 514 (Alaska 1999).

<sup>21</sup> See, e.g., *Culhane v. Michels*, 615 N.W. 2d 580 (S.D. 2000) (belated efforts to declare a child illegitimate, for whatever reasons, should seldom prevail.); *Dixon v. Pouncy*, 979 P.2d 520 (Alaska 1999) (husband must act within a reasonable time); *William L. v. Cindy E.L.*, 495 S.E. 2d 836 (W.Va. 1997)(a husband has a relatively brief period to disestablish his paternity).

<sup>22</sup> See, e.g., *Godin v. Godin*, 725 A. 2d 904 (Vt. 1998); *Betty L.W. v. William E.W.*, 569 S.E. 2d 77(W. Va. App. 2002). See, also 24 Am. Jur. 2d Divorce and Separation §1099, at 1084 for a long line of cases supporting the proposition that if the paternity of a child is placed at issue in an action for a divorce and is adjudicated the matter is res judicata between the husband and wife in any subsequent action or proceeding. Some courts, however, are now disputing whether paternity was "at issue" in a divorce in which the question was not raised and the children were simply assumed to be the husbands. See, e.g., *Rafferty v. Perkins*, 757 So. 2d 992 (Miss. 2000); *Cornelius v. Cornelius*, 15 P. 3d 528 (Okla. App. 2000).

<sup>23</sup> See, e.g., *C.T.G. v. M.A.B.*, 723 So. 2d 644 (Ala. App. 1997); *Dixon v. Pouncy*, 979 P.2d 520 (Alaska 1999).

<sup>24</sup> See, e.g., *Doe v. Doe* 52 P. 3d 255 (Haw. 2002) (mother estopped from pursuing paternity in someone other than her former husband); *Driskill v. Driskill*, 739 N.E. 2d 161 (in. App. 2000) (same); *Worcester v. Worcester*, 960 P. 2d 624 (Ariz. 1998)(mother not entitled to move under Rule 60 because such relief is available only when the mistake occurs despite parties diligent efforts, and here she had lied to the court).

<sup>25</sup> See, e.g., *Driskill, supra*.

- presumptions (the marital presumption vs. the genetic test presumption) and find, that for public policy reasons, paternity disestablishment is not allowable.<sup>26</sup>
- *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.<sup>27</sup>

### ***Paramours Who Wish to Disestablish a Husbands Paternity***

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.<sup>28</sup> 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.<sup>29</sup>

### ***Other Factors in Disestablishment***

While one can find an exception in the case law to each one of these observations,<sup>30</sup> they generally hold true. Two other areas, however, are not so clear cut. One involves the question of whether the court has to consider the best interests of the child in deciding how to proceed; the other is the treatment of "self-help" genetic tests. Some courts insist that the best interests of the child be considered as part of the disestablishment process.<sup>31</sup> Others seem more concerned about fairness to the husband who wishes to end his relationship with the child.<sup>32</sup> In either case, however, there seems

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<sup>26</sup> See, e.g., *Sleeper v. Sleeper*, 929 P. 2d 1028 (Ore. App. 1997); *Worcester*, *supra*.

<sup>27</sup> See, e.g. *Rubright v. Arnold*, 973 P. 2d 580 (Ark. 1999); *P.E. v. W.C.*, 552 N.W. 2d 375 (N. Dak. 1996); *Worcester v. Worcester*, 960 P. 2d 624 (Ariz. 1998); *Stitham v. Henderson*, 768 A. 2d 598 (Maine 2001); *Opland v. Kiesgan*, 594 N.W. 2d 505 (Mich. App. 1999). But, see *W.B. v. M.G.R.*, 955 S.W. 2d 935 (Mo. Banc 1997).

<sup>28</sup> See, e.g., *Dawn D. v. Superior Court of Riverside Cty.* 72 Cal. Rptr. 2d 871 Cal. 1998); *McHone v. Sosnowski*, 609 N.W.2d 844 (Mich. App. 2000); *Strauser v. Starr*, 726 A. 2d 1052 (Pa. 1999). See, also *N.A.H. & A.H. v. S.L.S.*, 9 P.3d 354 (Col. 2000). (While the statute required ordering of genetic tests, results were not dispositive. Court must use "best interests" standard to determine whether husband or paramour should be declared the father.)

<sup>29</sup> See, e.g., *B.S. & R.S. v. T.M.*, 782 A. 2d 1031 (Pa. Super. 2001); *Calendar v. Skiles*, 591 N.W. 2d 182 (Iowa 1999).

<sup>30</sup> See case summaries at the end of this article.

<sup>31</sup> See, e.g., *In re Marriage of Ross*, 783 P. 2d 331 (Kansas 1989).

<sup>32</sup> Compare *Ferguson v. Winston*, 996 P. 2d 841 (Kansas App. 2000) with *B.E.B. v. R.L.B.*, 970 P. 2d 514 (Alaska 1999). Oregon has two rather curious cases in this area. In both cases, in order to oust a husband who wanted custody of children born during the marriage, a wife sought to disestablish his paternity in the divorce. The court acknowledged that the doctrine of estoppel would prevent the wife from disestablishing paternity. However, the court swept over this and instead relied on a state statute governing custody disputes between a biological parent and a non-parent who has a parent-child relationship with the child. This statute requires custody to be determined based on the best interests of the child, giving the husband an opportunity to obtain custody even though he was not the biological father. *Moore v. Moore*, 934 P.2d. 572 (Ore. App. 1997) and *Sleeper v. Sleeper*, 929 P. 2d 1028 (Ore. App. 1997).

to be a consensus that a guardian should be appointed to make sure that the child is at least considered in the process.<sup>33</sup>

As to “self-help” genetic tests, consensus has clearly not yet emerged. Some courts welcome and use such tests, others accept them but order a second set of tests,<sup>34</sup> while others reject them and require a best interests hearing to be held before test results can be introduced.<sup>35</sup>

## STATUTORY APPROACHES

### *Addressing the Problem When Paternity Is Based on Presumption*

A number of states have enacted legislation to deal with paternity establishment when the mother is married to a man who is not the child’s biological father and the actual biological father wishes to establish his paternity of the child. In those states, the wife, the husband, and the paramour sign a document (or documents) in which the wife and biological father acknowledge his paternity and the wife’s husband acknowledges that he is not the child’s biological father. Any of the three parties can rescind within 60 days. Thereafter, the acknowledgement is the equivalent of a court order and binds all three parties.<sup>36</sup> These statutes are very helpful in states that otherwise would presume the husband’s paternity and require his name to be placed on the child’s birth certificate.<sup>37</sup>

Alternatively, some states allow the husband to go to court and disestablish his paternity based on verified evidence, such as genetic tests, that he is not the father. For example, Louisiana allows a husband to sue within one year of the time he learns (or should have learned) of the birth of a child to his wife that he believes is not his child.<sup>38</sup> Missouri allows a mother, a husband, a paramour, the child, anyone who has had custody of the child for more than 60 days, and the child support agency to bring at any time an action to disestablish paternity that was based on the marital presumption. The presumption must be rebutted by clear and convincing evidence. However, the court need

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<sup>33</sup> Danny Veilleux, Annotation, *Necessity or Propriety of Appointment of Independent Guardian of Child Who is Subject of Paternity Proceedings*, 70 A.L.R. 4<sup>th</sup> 1033 (1989). See, also *Michael K.T. v. Tina L.T.*, 387 S.E.2d 866 (1989).

<sup>34</sup> See, e.g. *RWR v. EKB*, 35 P. 3d 1224 (Wyo. 2001).

<sup>35</sup> See, e.g., *Worcester*, *supra*; *Betty L.W.*, *supra*.

<sup>36</sup> See, e.g., KY.REV. STAT. ANN. § 213.046 (9)(2002); MASS. GEN. LAWS ch. 209C § 5(b)(2002); MINN. STAT. ANN. §257.75(1A) (2002); MONT. CODE ANN. §40-6-105(e)(2001); N.H. REV.STAT. ANN. § 126: 6-a (2002); N.M. STAT. ANN. §24-14-13 (G)(2002); N.D. CENT. CODE §14-19-09 (2002).

<sup>37</sup> A number of the cases cited in Appendices A, B, and C could have been avoided if there was a process under which the husband, wife, and paramour could have resolved the issue at the time of the child’s birth through the voluntary process. See, e.g., *CSED v. Maxwell*, 6 P. 2d 733 (Alaska 2000); *W. v. W.*, 728 A.2d 1076 (Conn. 1999); *P.E. v. W.C.*, 522 N.W. 2d 375 (N.D. 1996).

<sup>38</sup> LA. CIV. CODE ARTS. 187-189 (2001 SUPP.). A man who has consented to artificial insemination of his wife cannot avail himself of this statute, and a man who knowingly marries a pregnant woman cannot disavow paternity unless he can both prove bad faith on the part of the mother and that the child is not his biological child. Montana also allows a husband to challenge the paternity of his presumed children based on genetic tests. MONT. CODE ANN. § 40-6-105(3)(2002).



not base its decision on genetic tests. If there are two presumptions operating in the case (i.e., the marital presumption and a presumption based on genetic tests), the court is to follow the one based on weightier considerations of policy and logic.<sup>39</sup>

### ***Addressing the Problem When Paternity Has Been Adjudicated***

A few states have legislatively altered the concept of *res judicata*, allowing a husband who has been adjudicated the father of a child born during the marriage to go back to court and disestablish his paternity.<sup>40</sup> For example, Ohio allows men and minor males who have been adjudicated fathers or ordered to pay child support to disestablish paternity. In Ohio, the court *must* disestablish if genetic tests indicate a zero probability of paternity.<sup>41</sup> Georgia has a similar statute but makes the granting of the motion discretionary in some cases.<sup>42</sup> Both states provide exceptions in circumstances where the individual named as the father acknowledged paternity knowing he was not the father, adopted the child, or knew that the child was conceived through artificial insemination.<sup>43</sup> Alabama allows a man who has been declared a child's legal father in a paternity proceeding to reopen the case based on genetic test results. The court must admit genetic test results provided by the father into evidence or order additional tests. The only exception is for fathers through adoption.<sup>44</sup> Arkansas also allows men who have been adjudicated fathers to move to disestablish paternity but only if the proceeding in which the paternity determination or support order was issued did not include genetic tests.<sup>45</sup> In Virginia, either the mother or the father may file a petition for relief from any judgment, court order, administrative order, obligation to pay support, or legal determination of paternity. The court *may* grant the petition if genetic tests exclude the man named as the father in the legal determination. If it does so, it must order completion of a new birth certificate.<sup>46</sup> Iowa provides procedures by which mothers, established fathers, children,

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<sup>39</sup> MO. REV. STAT. §210.826.1 (2002). Iowa also allows a challenge to paternity established by marital presumption. IOWA CODE §600B.41A (2001).

<sup>40</sup> See Appendix D. Note that many of these statutes grant fathers—but not mothers—the right to bypass *res judicata*. Whether these statutes will hold up under due process or gender bias challenges is an open question.

<sup>41</sup> OHIO REV. CODE §§ 3119.961 & 3119.962 (2002).

<sup>42</sup> GA. CODE §19-7-54 (2003).

<sup>43</sup> See Appendix D for details.

<sup>44</sup> ALA. CODE §26-17A-1 (2001). In *Ex Parte Jenkins*, So. 2d (Ala. 1998). The Alabama Supreme Court considered the applicability of this statute in a case where a child was born shortly after the divorce but the husband had nonetheless acknowledged the child as his and agreed to pay support. When, nine years later, the mother sought an increase in support, the ex-husband challenged his paternity. At the time paternity was established, there was a five-year period under which either parent could challenge paternity. The husband invoked the new statute, however, and the court was confronted with its applicability to cases that could not have been reopened under prior law. The Court determined that retroactive application of this statute would violate the separation of powers doctrine. Only paternity judgments entered after the date of enactment may be reopened under this statute.

<sup>45</sup> ARK. CODE ANN. § 9-10-115(e) (2002).

<sup>46</sup> VA. CODE §20-49.10(2002).

and their legal representatives can move to disestablish paternity.<sup>47</sup> Missouri allows all these parties plus men alleging themselves to be biological fathers to file suit.<sup>48</sup>

### **A COMPREHENSIVE APPROACH: THE UNIFORM PARENTAGE ACT (UPA 2002)**

Many of the concepts found in judicial decisions and state statutes have been incorporated into the new Uniform Parentage Act (UPA 2002).<sup>49</sup> This model act allows paternity disestablishment but requires the parties to act quickly if they wish to do so. It codifies the use of estoppel in preventing disestablishment in certain circumstances. It emphasizes the best interests of the child in determining whether genetic testing is appropriate, and refuses to accept unilateral, parent-generated genetic tests into evidence. UPA (2002) also allows parties to obtain relief from paternity established through a divorce decree under some circumstances. To date, Texas, Washington, and Wyoming have adopted this model act.<sup>50</sup>

#### ***Addressing the Problem When Paternity Is Based on Presumption***

UPA (2002) retains the traditional marital presumptions.<sup>51</sup> When a child's paternity is established by one of these presumptions, there are only two ways to disestablish the husband's paternity: through the voluntary acknowledgment process or through a judicial proceeding.

The Voluntary Acknowledgment Process: When a child is born to a married couple and the child is the biological child of another man, the child's true paternity may be established through the voluntary acknowledgment process if all parties wish to do this. The wife, husband, and paramour sign the voluntary acknowledgment form—the wife and biological father to acknowledge paternity and the husband to deny his paternity.<sup>52</sup> The acknowledgment and accompanying denial are binding on all three parties once 60 days have passed.<sup>53</sup>

The Judicial Process: A husband can challenge the paternity of a child born to his wife by filing suit if he does so within two years of the child's birth.<sup>54</sup> Thereafter, the husband cannot bring suit unless he can prove that he and his wife neither cohabited nor had sexual relations with each other during the probable period of conception, and he

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<sup>47</sup> IOWA CODE §600B.41A (2001).

<sup>48</sup> MO. REV. STAT. §210.826.1 (2002). See *W.B. v. M.G.R.*, 955 S.W.2d 935 (Mo. Banc 1997), which found retroactive application of statutes that reopen settled paternity determinations to be unconstitutional.

<sup>49</sup> The text of the current act can be found on-line at [www.nccusl.org](http://www.nccusl.org) under Parentage Act.

<sup>50</sup> TEX. FAM. CODE ANN. Ch. 160 (2003); WASH. REV. CODE ch. 26.26 (2003).

<sup>51</sup> UPA (2002) § 204(a)(1)-(4).

<sup>52</sup> *Id.* §§ 302 to 304.

<sup>53</sup> *Id.* § 305.

<sup>54</sup> *Id.* §607(a). The presumed father can also raise his claim in a divorce, annulment, or child support proceeding so long as he does so within the prescribed time. *Id.* § 610(a).

never held the child out as his own.<sup>55</sup> A wife and/or the biological father can also bring an action to disestablish the presumptive paternity of a husband, but they must do so within two years of the child's birth.<sup>56</sup>

No matter who brings the suit, the presumption of the husband's paternity can only be rebutted by genetic testing. No other evidence can be offered.<sup>57</sup> For that reason, genetic tests will generally be ordered.<sup>58</sup> Secret tests conducted during visitation are not admissible. Only court-ordered tests or those conducted with the consent of all the parties can be entered into evidence.<sup>59</sup> In addition, the court has the authority to deny a motion for genetic testing if it finds that the conduct of the husband or wife estops that party from denying paternity and it would be inequitable to disprove the father-child relationship.<sup>60</sup> In making this determination, the court is required to consider the best interests of the child.<sup>61</sup> It must also consider how long a time has passed since the facts became known, the length and nature of the relationship between the presumed father and the child, and the nature of the relationship (if any) between the child and the biological father.<sup>62</sup> If the court denies genetic testing, it must issue an order finding the presumed father to be the father of the child.<sup>63</sup> If genetic testing is ordered, then the results are dispositive.<sup>64</sup> If paternity is disestablished, then the court will also order the birth records agency to issue a new birth certificate.<sup>65</sup>

### ***Addressing the Problem When Paternity Has Been Adjudicated***

UPA (2002) specifically states that if there has been a proper proceeding to dissolve a marriage, and the final order identifies a child as a "child of the marriage" or uses similar words, paternity has been adjudicated. Likewise, if the divorce decree orders the husband to pay child support and does not specifically state that he is not the father, paternity has been adjudicated.<sup>66</sup> Thereafter, the husband or the wife can challenge paternity only through judicial review. This can be done under the appeal process or through a motion to vacate the judgment.<sup>67</sup> Thus, in states using UPA (2002), the Rule 60(b) route to challenge the decree remains open so long as the party seeking to disestablish paternity acts timely.

A paramour who wishes to challenge the paternity of a child whose paternity has been adjudicated in a divorce decree may do so, but only if he files suit within two years

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<sup>55</sup> Id. § 607(b).

<sup>56</sup> Id. § 607(a). As with the presumed father, the mother can join her suit to an existing divorce, annulment, or child support proceeding. Id. § 610(a).

<sup>57</sup> Id. § 631(1).

<sup>58</sup> Id. § 502.

<sup>59</sup> Id. § 621(c).

<sup>60</sup> Id. § 608(a).

<sup>61</sup> Id. § 608(b). The court must also appoint a guardian ad litem to protect the child's interests. Id. § 608(c).

<sup>62</sup> Id.

<sup>63</sup> Id. § 608(e).

<sup>64</sup> Id. § 631(4).

<sup>65</sup> Id. § 636(f).

<sup>66</sup> Id. § 637(c).

<sup>67</sup> Id. § 637(e).

of the effective date of the divorce decree.<sup>68</sup> To prevail, the paramour must offer genetic tests that show that the adjudicated father is not the biological father or that he is the biological father.<sup>69</sup> The court can order such tests, or it can decline to order them under the same conditions as apply in challenges to the paternity of a presumed father.<sup>70</sup> (See discussion above.) If tests are ordered, and the paramour proves to be the biological father, his paternity will be established and the birth records amended.<sup>71</sup>

## CONCLUSION

There is wide variation among the states on the issue of paternity disestablishment for marital children. While some states have enacted legislation, few have adopted a comprehensive scheme that deals with potential challenges by husbands, wives, and paramours. Yet, states need to have a comprehensive scheme for addressing the concerns of all these potential parties. They also need to make clear that any paternity disestablishment action must consider the best interests of the child, and see to it that these interests are protected through the appointment of a guardian ad litem. UPA (2002) offers an excellent model for achieving all these goals.

However, UPA (2002) does not address the difficult question of what to do about child support obligations when paternity has been disestablished. The next monograph in this series tackles that intriguing subject.

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<sup>68</sup> Id. § 609(b).

<sup>69</sup> Id. § 631(a).

<sup>70</sup> Id. § 609(c).

<sup>71</sup> Id. §636.

**APPENDIX A:  
MAJOR DIVORCE CASES INVOLVING THE  
DISESTABLISHMENT OF PATERNITY 1997-2002**

STATE	CASE	ALLOWED TO PROCEED*	REASON
AK	B.E.B. v. R.L.B., 970 P.2d 514 (Alaska 1999)	Yes	Estoppel does not apply unless financial harm is shown
	T.P.D. v. A.C.D., 981 P.2d 116 (Alaska 1999)	No	Laches does not apply pre-judgment
CT	W. v. W., 728 A.2d 1076 (Conn. 1999)	No	Estoppel
GA	Baker v. Baker, No.S03A0123 (Ga. Sup. Ct. June 2, 2003)	No	Best interests of the child
IN	Cochran v. Cochran, 717 N.E.2d 892 (Ind. Ct. App. 1999)	Yes	No estoppel
KS	Ferguson v. Winston, 996 P.2d 841 (Kan. Ct. App. 2000)	Yes	“Best interests” hearing must be held before disestablishment
OR	Moore v. Moore, 934 P.2d 572 (Or. Ct. App. 1999)	No	Best interests of the child
	Sleeper v. Sleeper, 929 P.2d 1028 (Or. Ct. App. 1999)	No	Best interests of the children
W. Va.	William L. v. Cindy E.L., 495 S.E.2d 836 (W. Va. 1997)	No	Best interests of the child

\*The answer here does not mean that paternity was disestablished. It indicates that the party seeking dissolution was allowed to proceed.

**APPENDIX B:  
MAJOR CASES INVOLVING THE POST-DIVORCE  
DISESTABLISHMENT OF PATERNITY 1997-2002**

STATE	CASE	SOUGHT BY	ALLOWED TO PROCEED*	REASON
AL	C.T.G. v. M.A.B. (1998)	Husband	Yes	Rule 60(b)
AK	Dixon v. Pouncy (1999)	Husband	Yes	Rule 60(b)
AZ	Worcester v. Worcester (1997)	Wife	No	Rule 60(b) cannot be used by one who caused the mistake
AR	OCSE v. Williams (1999)	Husband	No	Res judicata
FL	Anderson v. Anderson (1999)	Husband	No	Res judicata
HI	Doe v. Doe (2002)	Wife	No	Estoppel
IN	Driskill v. Driskill (2000)	Wife	No	Estoppel
IA	Westendorf v. Westendorf (2000)	Husband	Yes	Statute
ME	Stitham v. Henderson (2001)	Wife & New husband	No Yes	Estoppel Non-party to divorce so no estoppel
MS	W.H.W v. J.J. (1999)  Rafferty v. Perkins (2000)	Wife & new husband  Wife	Yes  Yes	Statute  Res judicata not applicable to divorce decree
MO	W.B. v. M.G.R. (1997)	Wife & new husband	No	Statute of limitations
NE	Day v. Heller (2002)	Husband	Yes	NA
NM	Tedford v. Gregory (1998)	Child	Yes	Res judicata inapplicable
ND	P.E. v. W.C. (1996)	Wife	Yes	Statute of limitations not applicable when mother seeks to establish paternity in bio father with consent of ex-husband
PA	Fish v. Behrs (1998)	Wife	No	Estoppel
SD	Culhane v. Michels (2000)	Husband	No	Best interests of the child
VT	Godin v. Godin (1998)  Jones v. Murphy (2000)	Husband  Wife	No  Yes	Best interests of the child  No long-standing relationship with the child

\*The answer here does not mean that paternity was disestablished. It indicates that the party seeking dissolution was allowed to proceed.

**APPENDIX C:  
MAJOR CASES INVOLVING CHALLENGES BY ALLEGED BIOLOGICAL  
FATHERS TO THE PATERNITY OF MARITAL CHILDREN 1997-2002**

STATE	CASE	ALLOWED TO PROCEED*	REASON
CA	Dawn D. v. Sup. Ct. of Riverside County (1998)	No	No constitutionally protected liberty interest in establishing a relationship with the child
	Brian C. v. Ginger K. (2000)	Yes	Constitutionally protected interest in maintaining a relationship with the child
CO	N.A.H.& A.H. v. S.L.S. (2000)	Yes	Best interests of the child
IA	Calendar v. Skiles (1999)	Yes	Due process
MI	McHone v. Sosnowski (2000)	No	No standing
MN	Witso v. Overby (2001)	Yes	Statute gives standing
MS	Mo. Div. of Child Support Enforcement v. T.J. (1998)	No	Statute of limitations
PA	Strauser v. Stahr (1998)	No	Presumption irrebuttable if marriage is ongoing
	B.S. & R.S. v. T.M. (2001)	Yes	Married couple separated during period of conception, pregnancy, and birth. Later reconciliation does not matter.

\*The answer here does not mean that paternity was disestablished. It indicates that the party seeking dissolution was allowed to proceed.

**APPENDIX D:  
RECENT STATE STATUTES ALLOWING PATERNITY  
DISESTABLISHMENT OF MARITAL CHILDREN**

STATE	DESCRIPTION
<b>ALABAMA</b>  ALA.CODE §26-17A-1 (2001)	A man who has been declared a child's legal father in a paternity proceeding may reopen the case based on genetic test results. The court must admit genetic test results provided by the man into evidence or order new tests. The only exception is for adoptive fathers.
<b>ALASKA</b>  ALASKA STAT. §25.27.166(2002)	The state child support agency is charged with developing rules for the disestablishment of paternity in any case in which paternity was not established by court order. This includes cases where paternity is established by presumption. It does not include cases where paternity was established by voluntary acknowledgment or by genetic tests, however. A party can seek disestablishment only once and must bring the petition within three years after the child's birth or three years from the time the party knew or should have known of the putative father's paternity of the child. If genetic tests results are negative, paternity must be disestablished.
<b>ARKANSAS</b>  ARK. CODE ANN. §§9-10-115(e) & (f) (2002)	<p>If a man has been adjudicated the father of a child and ordered to pay support in a proceeding that did not include genetic tests, he may file a motion challenging the adjudication in a court of competent jurisdiction. The motion must be filed during the period he is required to pay support. He is entitled to one genetic test. If the genetic tests disprove paternity, the court must set aside the finding and relieve the man of his support obligation. It must also order the child's birth certificate to be changed.</p> <p>If paternity was established by acknowledgment, a similar process is provided so long as there is also an allegation of fraud, duress, or material mistake of fact.</p>
<b>COLORADO</b>  COLO. REV. STAT. §19-4-107(1)(b) (2002)	A child, mother, presumed father, or the child support program can bring an action to declare the non-existence of the father-child relationship if that relationship was created by one of the marital presumptions. The action must be brought within a reasonable time of obtaining knowledge of the relevant facts, but no later than five years after the child's birth. After the presumption has been rebutted, another man may be adjudicated the father if he has been joined in the action.
<b>GEORGIA</b>  GA. CODE §19-7-54 (2003)	If a man is required to pay child support as the father of a child, he may move to set aside the paternity determination at any time. The motion must be accompanied by 1) the results of genetic tests that have been administered within the last 90 days showing that there is a zero percent probability that the man is the biological father; and 2) an affidavit that this is newly discovered evidence that has come to the man's knowledge since entry of the judgment. If the man has not comported himself as if he were the child's father, the court must disestablish paternity. If he is the father by marital presumption or by other conduct such as voluntarily acknowledging the child, the grant of relief is discretionary or depends on other law. Relief is also discretionary where the man has adopted the child; the child was conceived through artificial insemination conducted during the marriage; and the man acted to prevent the biological father from asserting his parental rights. It also includes cases where the man acknowledged paternity knowing he was not the biological father.
<b>ILLINOIS</b>  750 ILL. COMP. STAT. §§45/7 & 45/8 (2002)	<p>The child, the mother, and the presumed father can bring an action to declare non-paternity when paternity is created by the marital presumptions. The action must be brought by verified complaint and must be filed within two years of the time the petitioner obtains relevant facts and before the child's 18<sup>th</sup> birthday. Thereafter, an affirmative action may not be filed, but non-paternity may be asserted as a defense in a paternity action. The presumption must be rebutted by clear and convincing evidence. Once rebutted, the paternity of another man may be established in the same action if he has been joined as a party.</p> <p>Post-divorce, an adjudicated father may bring an action to declare his non-paternity based on genetic test results. The action must be brought by verified complaint, and must be filed within two years of the man's obtaining relevant facts and before the child's 18<sup>th</sup> birthday. Thereafter, an affirmative action may not be filed, but non-paternity may be asserted as a defense in a paternity action.</p>



STATE	DESCRIPTION
<p><b>IOWA</b></p> <p>IOWA CODE §600B.41A (2001)</p>	<p>A mother, established father, child, or legal representative of any of them may move to disestablish paternity that has been previously established in Iowa under Iowa law through legal action, acknowledgment, or marital presumption. An exception is made for cases in which a court or administrative agency established paternity after July 1, 1992, and based the decision on genetic tests yielding a 95 percent or higher probability of paternity. In that situation, a disestablishment motion cannot be filed.</p> <p>The motion must be filed before the child reaches majority and a guardian ad litem must be appointed for the child.</p> <p>Notice is served on the other parties and the IV-D agency if that agency is providing services in the case. Genetic tests are conducted. If the results show non-paternity, the court must issue an order disestablishing paternity and relieving the father of support obligations. The only exception is if the established father objects to the disestablishment, the court finds that it is in the child's best interest to preserve the existing parent-child relationship, and the biological father is a party to the action and does not object to his parental rights being terminated.</p>
<p><b>LOUISIANA</b></p> <p>LOUISIANA CIV. CODE ARTS. 187-189 (2001 Supp.)</p> <p>LOUISIANA REV. STAT. §§14.125.1 &amp; 14.125.2 (2001 Supp.)</p>	<p>A husband is presumed to be the father of children born or conceived during the marriage. However, he can disavow paternity based on verified evidence such as genetic tests. The action must be filed within one year after the husband learned or should have learned of the birth of the child, unless he is unable to file for reasons beyond his control. Alternatively, the suit may be filed within one year of a paternity claim if the father lived separate and apart from the mother during the 300 days immediately preceding the birth of the child.</p> <p>However, a man who knowingly marries a pregnant woman cannot disavow paternity unless he can demonstrate her bad faith and that the child is not his biological child. In addition, a husband cannot disavow paternity of a child born through artificial insemination to which he consented.</p> <p>Louisiana also makes it a crime to swear falsely in a paternity case filed by or on behalf of the state. Recently it has also made it criminal to willfully and knowingly make a written or oral false statement concerning biological paternity in a birth certificate.</p>
<p><b>MISSOURI</b></p> <p>MO. REV. STAT. §210.826.1 (2002)</p>	<p>A mother, a presumed father, a man alleging himself to be a father, the child, any person with legal or physical custody of the child for more than 60 days, and the IV-D agency may bring an action at any time to establish or disestablish the father-child relationship created by the marital presumption of paternity. The presumption must be rebutted by clear and convincing evidence. If two or more presumptions arise, the one founded on the weightier considerations of policy and logic prevails.</p>
<p><b>MONTANA</b></p> <p>MONT. CODE ANN. §40-6-105 (3) (2002)</p>	<p>The marital presumption of paternity may be challenged in an appropriate action by a preponderance of the evidence or by scientific evidence resulting from a blood test that excludes the person as the child's natural parent.</p>
<p><b>OHIO</b></p> <p>OHIO REV. CODE. §§3119.961 &amp; 3119.962 (2002)</p>	<p>A man or male minor who has been adjudicated a father or is subject to a child support order for a child may file a motion for relief from the paternity determination or support order. The constraints of Rule 60(b) do not apply. The court must disestablish paternity if genetic tests administered no more than six months before the motion was filed show a zero percent probability that the man/male minor is the father. Exceptions to this are provided for adopted children and for marital children who are the product of artificial insemination conducted with the husband's consent as well as situations in which the man/male minor knew he was not the biological father but acted as if he were the father.</p>
<p><b>VIRGINIA</b></p>	<p>An individual may file a petition for relief from any judgment, court order, administrative order, obligation to pay support, or legal determination of paternity. The court may grant the petition if</p>

<b>STATE</b>	<b>DESCRIPTION</b>
VA.CODE § 20-49.10	genetic tests exclude the man named as the father in the legal determination. If it does so, it must order completion of a new birth certificate. The court may not grant relief if the individual named as the father acknowledged paternity knowing he was not the father, adopted the child, or knew that the child was conceived through artificial insemination.

## APPENDIX E: CASE SUMMARIES

### Challenges in Divorce

#### ALASKA

**B.E.B. v. R.L.B.**, 970 P. 2d 514 (Alaska 1999)—A child was born during marriage. Husband and wife knew the child was not the husband's but he agreed to treat the child as his own. When the child was four years old, the couple separated. In the divorce, the husband challenged paternity. The trial court found that he was estopped from doing so because of the potential emotional harm to the child. The Alaska Supreme Court reversed, finding that to support a finding of estoppel the child must suffer both emotional and financial harm. The case was sent back for further proceedings to determine whether financial harm could be proven.

**T.P.D. v. A.C.D.**, 981 P.2d 116 (Alaska 1999)—A child was born during the marriage. Both parents knew she was not the husband's biological child. Nonetheless, he held her out as his child. The couple separated and the mother began receiving Aid for Families with Dependant Children (AFDC) assistance. The state established a support order for the child. The husband then filed a motion to disestablish paternity and the wife counter-sued for divorce. The trial court found that the doctrine of laches (This means he waited too long to bring suit.) barred the husband's complaint. The Alaska Supreme Court reversed and remanded. It held that laches did not apply in cases where there had been no declaration of paternity.

#### CONNECTICUT

**W. v. W.**, 728 A. 2d 1076 (Connecticut 1999)—A child was born during the marriage and the husband held the child out as his own. In the divorce, he sought to deny paternity and the trial court held he was estopped from doing so. This judgment was affirmed on appeal. After that, the mother located the biological father, and the husband once again attempted to deny his paternity, alleging that the child could now pursue support from her biological father. The Connecticut Supreme Court again held he was estopped from doing so. The Court held that in child support cases, the mere fact that the biological father has been located does not relieve the husband of his obligation if—by his conduct—he has conducted himself in a way that led the child to rely on him to her future detriment. Here the husband had destroyed documents that the mother might have used to locate biological father and told her he wanted to raise the child as his own.

#### GEORGIA

**Baker v. Baker, S03A0123 (Ga. Sup Ct. June 2, 2003)**—A child was born during the marriage but both the husband and the wife knew that the child was not his biological child. The biological father (Staples) was in prison. It was undisputed that the husband provided financial and emotional support to the mother during the pregnancy, was listed

(with the mother's consent) as the father on the child's birth certificate, and always supported the child financially and emotionally even after the couple separated. The husband filed for divorce and sought custody of the child. The wife answered that he was not the child's biological father and thus was not eligible to seek custody. The biological father intervened in the suit, seeking to establish his paternity. The trial court ordered DNA testing, which proved that husband was not the biological father of the child. Since Georgia law allows the rebuttal of the paternity of a marital child by "clear and convincing evidence" the trial court found husband was not the biological father, granted a divorce, and refused to grant the ex-husband custody.

The Georgia Supreme Court reversed and remanded, holding that before disestablishing paternity, the court must conduct an analysis of the "best interests of the child." The Court noted that while Georgia law allows disestablishment by clear and convincing evidence, it is not contradictory to first require a "best interests analysis" before such evidence is presented. The Court also noted that the Georgia statute allows fathers to rebut paternity with DNA evidence, but only under certain specific circumstances. However, mothers are free to disestablish without such constraints. The Court urged the legislature to examine this issue. Three judges dissented. They felt that Georgia law clearly allowed a challenge without looking to the child's best interests, and the Court was bound to apply the law.

## INDIANA

**Cochran v. Cochran**, 717 N.E. 2d 892 (In. App. 1999)—Two children were born during the marriage. The couple separated and the husband filed for divorce. He then learned that his wife was pregnant by another man and this roused his suspicions. He requested genetic testing of the two older children, and the tests revealed that he was not the biological father of the younger child. The trial court found him to be the father of the older child, but not the younger and the wife appealed arguing estoppel and public policy. The Court of Appeals affirmed. It held that, before making a determination of support, custody, and visitation, the trial court was required to find that the husband was the father of the child. Once he raised the issue, the court rightly sought the evidence with which to make that determination. This was the just result for the husband and for the child, who had a right to proper identification.

## KANSAS

**Ferguson v. Winston**, 996 P. 2d 841 ( (Kansas App. 2000)—A couple cohabited and had a son. They later married and then divorced. At the time of the divorce, the wife told the husband that someone else was the child's biological father. The husband then filed a paternity action and requested genetic tests. They were done and it was established that he was not the biological father. However, the court dismissed the petition, and the husband appealed. The Kansas Court of Appeals reversed and remanded. The Court held that tests should never have been done until the trial court held a hearing on the best interests of the child as required by **In re marriage of Ross**, 783 P. 2d 331 (Kansas 1989). At the hearing, the trial court must consider the physical, mental, and emotional

needs of the child. The Court went on to note that even if the trial court determined it was in the child's best interest, the court could not rely on genetic testing alone. Other evidence had to be considered. Moreover, the child (who was now an adult) had to be joined as a party, and counsel to represent his interests was required. (In cases involving minors, the court strongly urged that a guardian ad litem be appointed to protect the child's interests.)

## OREGON

**Moore v. Moore**, 934 P. 2d 572 (Oregon App.1997)—A teen couple had a baby and married one month later. Then they separated and the wife received AFDC. They reconciled then separated again. For a substantial amount of time, the husband had custody of the child. Eventually, he filed for divorce and permanent custody. The wife countered with a claim that he was not the child's biological father, and this was confirmed by genetic tests. The trial court allowed the tests into evidence and awarded custody to the mother. The Court of Appeals reversed. The Oregon Supreme Court concurred holding that the custody determination should be based on the best interests of the child. The father (with the mother's blessing) had established a parent-child relationship and, therefore, had a statutory right to seek custody.

**Sleeper v. Sleeper**, 929 P. 2d 1028 (Oregon App. 1997)—Two children were born during the marriage. The husband knew he was not the biological parent of either child but he was their primary caretaker throughout the marriage. At divorce, the husband sought custody of the children. The wife argued that he was not entitled to custody since he was not the children's biological parent. The trial court found that the wife was estopped from denying his paternity. It applied the "best interests" test and awarded custody to the husband. The wife appealed. The Court of Appeals affirmed the lower court as did the Oregon Supreme Court. The Supreme Court relied on statutory interpretation of a law governing custody disputes between a biological parent and a non-parent who has a parent-child relationship with the child. Once the husband established that he had such a relationship, the statute required a "best interests" analysis. Using that analysis, award of custody to him was proper.

## WEST VIRGINIA

**William L. v. Cindy E.L.**, 495 S.E. 2d 836 (West Va. 1997)—A child was born during the marriage. At divorce, the husband said the child's paternity was questionable. Divorce proceedings were bifurcated, and a divorce was granted. Genetic tests were done, and they showed the husband was not the biological father. A Hearing Master took testimony on the paternity issue. The wife testified she told the husband she was not sure of paternity and that they should have genetic tests shortly after the baby's birth and at least once thereafter. The husband denied this. The Hearing Master recommended that the genetic test results not be admitted into evidence since the husband had held himself out as the child's father for a sufficient period to make disproving paternity not in the child's best interest. On appeal, the Supreme Court of Appeals of West Virginia upheld the recommendation. The court affirmed its earlier decision in **Michael K.T. v. Tina L.T.**,

387 S.E.2d 264 (West Va. 1989) that a trial judge should refuse to admit genetic tests that would disprove paternity when the person offering those tests has held himself out as the father of the child for such a long time that disestablishing paternity would result in undeniable harm to the child. While there is no hard and fast rule as to the time involved, the court noted that results should not be admitted if more than a “relatively brief” period of time had passed.

### **Post-Divorce Challenges**

#### **ALABAMA**

**C.T.G. v. M.A.B.** , 723 So. 2d 644 (Ala. App. 1997)—A child was born six-and-a-half months post divorce. The husband acknowledged the child and a paternity judgment was entered. Nine years later, the husband sought to reopen the judgment based on a new statute that allowed paternity challenges based on post-judgment genetic tests. The Supreme Court of Alabama said that the new statute could only apply to judgments entered after its effective date. Otherwise, the statute would overturn final judicial orders in violation of the constitutional separation of powers between the legislature and the judiciary. Since the order here was final before the statute was enacted, it did not apply. However, the Court felt that the husband might be entitled to relief under Rule 60(b) and sent the case back for a determination of that issue.

#### **ALASKA**

**Dixon v. Pouncy**, 979 P. 2d 520 (Alaska 1999)—A child was born to a couple that later separated. The wife began receiving AFDC and the state obtained a child support order for her. Four years later, the husband filed for divorce alleging there was one child born to the marriage. There were some acrimonious visitation disputes and the parties underwent genetic testing, which excluded the husband as the child’s father. He then moved under Rule 60(b) to set aside the portion of the divorce decree finding him to be the child’s father and ordering him to pay support. The trial court denied the motion on res judicata grounds. The Alaska Supreme Court reversed and sent the case back for further proceedings. It found that the genetic test results present a change of circumstances that could make the continued enforcement of the order inequitable. The trial court was directed to determine whether he had acted within a “reasonable time.”

**CSED v. Maxwell** , 6 P.3d 733 (Alaska 2000)—During the marriage, two children were born to the wife. Neither was the biological child of the husband, and he knew this. However, by state law, his name appeared on their birth certificates. In divorce proceedings, the oldest child was named as a child of the marriage and the second child was not mentioned. In fact, another man had acknowledged paternity of the second child and eventually obtained a paternity judgment that also required him to support the child. The wife went on public assistance and the child support agency pursued the husband for support of the oldest child. He then disestablished his paternity of that child. The agency then pursued the ex-husband for support of the second child. He sought to disestablish paternity based on the biological father’s establishment of his paternity. The court

allowed this and relieved him of support obligations from the date the biological father filed his paternity action. The child support agency appealed. The Alaska Supreme Court affirmed, finding that to do otherwise would deprive the husband of due process and he was therefore entitled to relief under Rule 60(b).

## ARIZONA

**Worcester v. Worcester** (Arizona)—A child was born to a couple that divorced three years later. In the divorce decree, the child was listed as a child born to the marriage. Shortly thereafter, the mother moved under Rule 60(c) to set aside reference to the child and eliminate any support, custody, or visitation orders. She produced genetic tests she had obtained showing that another man was the child's biological father. The trial court granted the motion and the husband appealed. The Court of Appeals reversed and the mother appealed to the Supreme Court. The Arizona Supreme Court held that the mother could not seek relief under Rule 60(c) because that rule is available only where mistakes or errors occurred despite a party's diligent efforts. Here the mother herself had misrepresented the facts so she could not seek relief. The Court went on to note that the husband was the child's presumptive father and there was nothing in Arizona law that allowed the presumption to be challenged unless the mother was seeking to establish paternity and obtain support from another man. Since she had not done this, there was no statutory authority for the court to entertain a disestablishment motion.

## ARKANSAS

**OCSE v. Williams** (Arkansas)—During an 11-year marriage, the couple had three children. They divorced and the divorce decree declared the children to be issue of the marriage and provided for their support. The husband failed to pay and the family received public assistance. The child support agency pursued him and he entered a consent judgment, again acknowledging his liability. He again failed to pay and the agency filed for contempt. At that point, the husband raised questions about paternity of two of the children. He sought genetic tests and an abatement of his support obligation. Tests were ordered and showed that he was not the genetic parent of the two children. The trial court, while acknowledging that *res judicata* applied, found non-paternity and abated the support obligation. The mother and the child support agency appealed. The Arkansas Supreme Court held that *res judicata* applied and barred the husband's claim. Interpreting Arkansas law, the Court also held that a state statute allowing the reopening of paternity judgments did not apply when paternity was established within a divorce decree. The relationship between the husband and the children is different: there has been a marriage and the children know the husband as their father. This is very different from the non-marital situation.

## FLORIDA

**Anderson v. Anderson**, 746 So. 2d 525 (Florida App. 1999) *aff'd* No. SC00-59 (January 9, 2003)—Husband and wife were married in 1994. At the time, the wife was pregnant. She subsequently gave birth to a child. In 1995, the couple divorced and the judgment

ordered the husband to pay child support. During visitation, the husband had genetic tests done, and they showed he was not the child's father. Five months later, he filed a motion for relief from his support obligation under Florida's equivalent of Rule 60(b). He based his claim on fraud. The trial court ruled that the divorce decree was res judicata and this was affirmed by the district court. The Florida Supreme Court agreed, citing its decision in **D.F. v. Dept. of Revenue**, 823 So. 2d 97 (Florida 2002) that a divorce decree is a final determination of paternity and can only be challenged by timely motion under Rule 60(b). Here, while the motion was timely, the husband had not proven fraud.

## HAWAII

**Doe v. Doe**, 52 P. 3d 255 (Hawaii 2002)—Two children were born during the marriage. At divorce, the children were named as children of the marriage, and the husband was ordered to pay support. Two years later, the mother brought a paternity action against another man alleging that he was the biological father of the youngest child. She also requested genetic tests. The trial court held that she was estopped from bringing the paternity action and refused to order testing. The Court of Appeals reversed, finding that she was not estopped and that the Hawaii statute gave the trial court no discretion; it was required to order genetic tests. Moreover, the child has a right to know the truth of his/her parentage. The Hawaii Supreme Court reversed finding that the mother was estopped from bringing an action to establish paternity in someone other than her former husband. In reaching this decision, the Court notes its consistency with UPA (2000).

## INDIANA

**Driskill v. Driskill**, 739 N.E. 2d 161 (Ind. App. 2000)—Three months after cohabitation began, a woman gave birth to a child, and she and her partner named the partner as the child's father on the birth certificate. They also signed an acknowledgment of paternity. (At the time, the woman was legally married to someone else and the child was actually the biological child of a third party.) The partner knew all of this when he acknowledged the child. The couple married, but separated a few months later. In their divorce, (and several subsequent orders relating to visitation) the partner was named as the "father." The partner later petitioned to adopt the child (with the consent of the biological father), and the ex-wife countered, challenging his paternity and requesting genetic tests. The trial court denied her motions. The Court of Appeals affirmed, finding the wife was estopped from denying the former husband's paternity. The court noted its reluctance to bastardize a child and found that in only rare circumstances would that be allowed.

## IOWA

**Westendorf v. Westendorf**, 611 N.W. 2d 512 (Iowa 2000)—A couple were married and had three children. Five years after the birth of the last child, they divorced. The husband was ordered to pay support for the three children. Five years later, the husband moved to disestablish his paternity of the youngest child. He named the person believed to be the boy's biological father, and testing showed that he was. Iowa statute allows disestablishment and abatement of support from the date of disestablishment. This action



involved the amount of abatement the husband was entitled to and whether he could sue the biological father for recoupment of expenses. The Iowa Supreme Court held that the original order was res judicata until the new order was entered, so the husband was responsible for all support accrued up to that date.

## MAINE

**Stitham v. Henderson**, 768 A. 2d 598 (Maine 2001)—A child was born during the marriage. The couple divorced and the divorce decree treated the child as a child of the marriage. The wife remarried and she, the child, and the second husband underwent genetic testing to determine if the second husband was the child's biological father. He was, and wife tried to obtain a post-divorce judgment that the first husband was not the biological father. The first husband objected and the court ruled that the wife is estopped from denying the first husband's paternity. The second husband then brought a paternity suit. The first husband counterclaimed for a determination that he was the child's equitable parent. The trial court disestablished the first husband's paternity and dismissed the counterclaim because there were motions pending in the divorce case in which the first husband could raise this claim. The Maine Supreme Court affirmed. It held that, because the second husband was not a party to the divorce, res judicata did not apply to him. The second husband could file a paternity suit and, since he has proven his biological parenthood, he was entitled to summary judgment. The District Court, which granted the divorce, should now determine whether it is in the child's best interest to have the first husband continue his role as her de facto parent.

## MICHIGAN

**Opland v. Kiesgan**, 594 N.W. 2d 505 (Michigan App. 1999)—A daughter was born during the marriage, and the divorce decree named the husband as the child's father. A year after the divorce, the wife brought a paternity suit against Kiesgan. He objected and the appellate court ruled that the wife was estopped from establishing paternity in a person other than the husband. The wife and husband then amended their divorce decree to disestablish the husband's paternity. The wife then filed a second paternity action against Kiesgan and this time joined the daughter as a plaintiff. The trial court dismissed the suit on res judicata grounds. The Court of Appeals reversed. It held that, while the wife could not bring a paternity action as long as the divorce decree remained unchanged, once the husband's paternity was disestablished, the wife could pursue the biological father. The Court also found that the child had an independent right to bring a paternity action. To hold otherwise would deny her equal protection under both the federal and Michigan constitutions since non-marital children have the right to bring paternity suits at any time before their 18<sup>th</sup> birthdays.

## MISSISSIPPI

**W.H.W. v. J.J.**, 735 So. 2d 990 (Miss. 1999)—Twins were born to a married couple. Four years later, they divorced. The wife then remarried, and the second husband and the wife filed an action to terminate the parental rights of the first husband and establish the

second husband as the twins' father. The first husband objected. The case went to trial and the second husband was declared the twins' father. The first husband appealed and the appellate court reversed. A second motion for genetic tests was then filed and the first husband refused to comply. The trial court declined to force him to do so and second husband appealed. The Supreme Court ruled that the trial court had no discretion: once genetic tests were requested, the first husband had to submit to them. Since he had refused to do so, the court should have entered summary judgment for the second husband.

**Rafferty v. Perkins**, 757 So. 2d 992 (Mississippi 2000)—A child was born during the marriage. The parents divorced and the husband was ordered to pay support. Later, the mother brought an action to disestablish the husband's paternity and establish someone else as the father of the child. The husband objected. However, genetic tests were conducted and his paternity was excluded. Nonetheless, a jury ruled for the husband, declaring him to be the child's father. The Supreme Court reversed. It held that since the divorce decree was silent on paternity, it was not res judicata. This was the first proceeding in which paternity had actually been in issue and the evidence showed that the husband was not the genetic father.

## MISSOURI

**W.B. v. M.G.R.**, 955 S.W.2d 935 (Missouri Banc 1997)—A child was born to a married couple. The couple divorced, remarried, and divorced again. In both divorce decrees, the child was called a child of the marriage. After the second divorce, the wife married again, and her new husband sought to establish his paternity of the child. The first husband objected. The trial court dismissed the second husband's petition with prejudice and he appealed. The Missouri Supreme Court affirmed. At the relevant time, Missouri law required challenges to paternity of a marital child to be brought within five years of the child's birth and limited challengers to the mother, the presumed father, and the child. Subsequently, the law was changed. The five-year limit was eliminated and putative fathers were allowed to sue to establish their paternity. The Court found that retroactive application of the law would be unconstitutional. Once five years had passed, the first husband had a vested right to be free from challenges to his paternity. The Court did not find persuasive the second husband's argument that his constitutional rights were violated if he was not able to establish paternity of his child. The Court noted "A man who impregnates a woman who is married to another has no inherent right to have that child legally treated as his own." The Court also dismissed the child's due process claim. It found that the legislature's scheme was rational and passed intermediate scrutiny analysis for due process purposes.

## NEBRASKA

**Day v. Heller**, 653 N.W. 2d 475 (Neb. 2002)—A child was born to a married couple, who later divorced. The husband paid support. The wife remarried and her new husband adopted the child, with the first husband's consent. The first husband then had genetic tests done showing he was not the biological father of the child. He sued the mother for

fraud, emotional distress, and money damages. The trial court granted summary judgment to the mother. The first husband appealed. The Nebraska Court of Appeals reversed. The court held that the first husband was not challenging the legal finding of paternity in the divorce decree and therefore there was no res judicata problem. There were genuine issues of fact between the parties. Therefore, the case was sent back for trial.

## NEW MEXICO

**Tedford v. Gregory**, 959 p. 2D 540 (New Mex. App. 1998)—A daughter was born during the marriage. The parents subsequently divorced. The child was declared a child of the marriage and the husband supported her both during her minority and through college. When the child was 20 years old, the wife brought a paternity action against a former lover (Gregory) to establish that he was the daughter’s father and obtain retroactive support. That suit was dismissed on collateral estoppel grounds. A few months later, the daughter filed suit. Genetic tests indicated that Gregory was her biological father. The trial court established his paternity and ordered retroactive support back to the date of her birth. The trial court also ordered Gregory to reimburse the husband for some of the support he had provided to the child. The Court of Appeals found that the child had a statutory right to bring the action and seek retroactive support. She was not barred by collateral estoppel or any other equitable concept from doing so. The court went on to note that the “best interests” test does not apply when the child in question is no longer a minor. She is entitled to establish paternity and obtain support pursuant to the child support guidelines. However, the husband was collaterally estopped from pursuing reimbursement.

## NORTH DAKOTA

**P.E. v. W.C.**, 522 N.W. 2d 375 (North Dak. 1996)—A child was born five months after the couple divorced. The divorce decree said that no children were born of the marriage and both husband and wife acknowledged that the child was not the husband’s. Nonetheless, the presumption of paternity applied as the child was born within 300 days of the divorce. Five years later, the wife filed a paternity suit against the biological father and sought support. The biological father opposed saying that, under North Dakota law, the child was the presumptive child of the husband and that the husband’s time to challenge his paternity (five years from birth) had expired. The trial court required the husband and the child to be joined as parties and ordered tests. The genetic tests showed that husband was not the father and that the paramour was the father. The court established the paramour’s paternity and ordered him to pay support. He appealed. The North Dakota Supreme Court affirmed. It held that the five-year statute of limitations was a bar to a husband, wife, or child who brings an action to disestablish paternity. However, it could not be used by the paramour to defeat an action to establish his parentage, as this would be contrary to legislative intent and public policy. The court also noted that, while the statute precluded the husband from bringing an action to establish his non-paternity, it did not preclude him from raising non-paternity as a defense to a support enforcement action. Thus, he could indirectly disestablish his paternity. A concurring judge noted his disagreement with this dictum.

## OKLAHOMA

**Cornelius v. Cornelius** , 15 p. 3D 528 (Okla. App. 2000)—A couple divorced and the divorce decree specifically found that a daughter born to the wife was not the husband's child. The husband later brought a paternity case, and genetic tests established that he was the biological father. The wife argued that the divorce decree was *res judicata*, citing a long line of Oklahoma cases. The Court of Appeals held that a finding of non-paternity in a divorce decree was not the same as a finding of paternity, especially where, as here, the issue was not tried but settled by stipulation of the parties.

## PENNSYLVANIA

**Fish v. Behers** , 741 A. 2d 721 (Penn. 1999)—A child was born during the marriage. The wife told the husband the child was his, and he was listed on the child's birth certificate as the father. When the child was three years old, she told the husband the truth. He left the marital home and filed for divorce. He agreed to support their two other children, but not the youngest child. The wife then sued her paramour for paternity and support. He objected saying that before she could file suit against him, the husband's paternity would have to be disestablished. He also argued that she was estopped from asserting his paternity because she had led her husband to believe that he was the child's father. The trial court denied the paramour's motion, but the appellate court reversed, holding that the mother was estopped from establishing the paramour's paternity. On appeal from that decision, the Pennsylvania Supreme Court held that once the marriage was over there was no marriage or intact family to preserve. Therefore, the irrebuttable presumption that the husband was the child's father ends. However, the mother's conduct estops here from challenging the husband's paternity. Allowing another man to now substitute for the only father the child has known is not in the child's best interests.

## SOUTH DAKOTA

**Culhane v. Michels**, 615 N.W. 2d 580 (South Dak. 2000)—Two children were born during the marriage. The parties divorced and the husband was ordered to pay support and alimony. He did not do so and 11 years post-divorce the wife sued to recover what was owed. In response, the husband requested genetic testing. The trial court denied the request and the husband appealed. The South Dakota Supreme Court affirmed. It held that belated efforts to challenge the paternity of a marital child should seldom prevail. The child's interest in stability outweighs any interest the husband may have in finding out whether the wife perpetrated a fraud on him.

## VERMONT

**Godin v. Godin**, 725 A. 2d 904 (Vermont 1998)—Husband and wife had a premarital relationship. She became pregnant and they married. A daughter was born and six years later, the couple divorced. The divorce decree names the child as a child of the marriage and orders the husband to pay support. Six years later, the husband filed a Rule 60(b)

motion to set aside the judgment, alleging that he was not the child's father. The trial court held that the husband could have contested paternity in the divorce. Having failed to do so, he could not bring a subsequent action. The Vermont Supreme Court affirmed. It ruled that, where a man has held himself out as a child's father and engaged in an ongoing parent-child relationship for a period of years, he may not disavow that relationship solely for his own self-interest.

**Jones v. Murphy** (Vermont)—A child was born during a marriage. Shortly after the birth, the husband and wife divorced. In the decree, the husband was named as father, and support and visitation were set. Shortly thereafter, genetic tests were done. They showed that the husband was not the biological father. The parents tried to amend the divorce judgment to remove the husband's obligations but made procedural mistakes in doing so. The wife filed a paternity action against the biological father and he replied saying that paternity had already been established and the wife was estopped from claiming he was the father. The Vermont Supreme Court held that *res judicata* did not bar her paternity claim. Unlike the situation in **Godin v. Godin**, 725 A.2d 904 (1998), there was no long-standing parent-child relationship to protect. However, the action was barred until the wife went back and had the original divorce judgment properly amended under Rule 60(c).

#### WEST VIRGINIA

**Betty L.W. v. William E.W.**, 569 S.E. 2d 77 (W.Va. App. 2002)—A couple had three children, the youngest of whom was born in 1989. They divorced in 1996 and the divorce decree stated that three children were born of the marriage. In March 2001, the husband had DNA tests done and discovered that the youngest child was not his biological child. He immediately moved to terminate his child support obligation. A family law master recommended that he be estopped based on *res judicata*. The lower court agreed and the husband appealed. The West Virginia Supreme Court affirmed. As between the husband and wife, a divorce decree is *res judicata* on the issue of paternity of children born during the marriage.

The husband had argued that prior case law should be overturned. The Court said its prior case law was sound. The most important thing was the best interests of the child. A trial court should refuse to admit genetic tests that disprove paternity of a marital child when the person seeking to disestablish paternity has held himself out as the father for a sufficient time that denial of paternity would result in undeniable harm to the child. Moreover, a guardian ad litem should be appointed for the child in any action to disprove his/her paternity.

#### **Challenges by Alleged Biological Father in Context of an Ongoing Marriage**

#### CALIFORNIA

**Dawn D. v. Superior Court of Riverside County**, 72 Cal. Rptr 2d 871 (Cal. 1998)—After six years of marriage, the wife left her husband and began cohabiting with another man. She became pregnant by him, but returned to her husband. The child was born and

the paramour brought a paternity suit alleging that he had a due process right to parent the child. The husband and wife sought to dismiss, citing the marital presumption that the husband was the child's father. The trial court allowed the action to proceed and the married couple appealed. The appellate court denied the appeal and the couple petitioned the California Supreme Court for review. The Supreme Court held that the paramour lacked standing to bring a paternity action. In doing so, it rejected his constitutional claim. The Court noted that "a mere biological connection is insufficient to establish a liberty interest on the part of an unwed father..." citing **Michael H. v. Gerald D.**, 491 US 110 (1989). Unless the biological father has an ongoing, personal relationship with the child, he has no interest to assert.

## COLORADO

**N.A.H. & A.H. v. S.L.S.**, 9 P.3d 354 (Colorado 2000)—A child was born during a troubled marriage. There were allegations of domestic violence and the mother had an extra-marital affair. She told the biological father that he was the child's father and allowed him to have contact with the girl. The wife and husband then reconciled and the wife cut off the biological father's access to the child. The paramour then sued to establish his paternity. The husband opposed, asserting the presumption that he was the child's father. The case went through the court system several times to resolve the issue of genetic testing. Eventually tests were done and showed that the paramour was the biological father. The court established the paramour's paternity. This decision was upheld on appeal. The husband and wife then appealed to the Colorado Supreme Court. The Supreme Court ruled that, when there are competing presumptions of paternity, the best interests of the child must be considered. While the court must order genetic testing without regard to the child's best interest under the Colorado statute, the test results themselves are not dispositive. They simply create another presumption that must be weighed against the marital presumption and in light of the child's best interest.

## IOWA

**Callendar v. Skiles**, 591 N.W.2d 182 (Iowa 1999)—A couple was separated and the wife had an affair. She became pregnant. She then reconciled with her husband who accepted the child as his. The biological father sued to establish his paternity. Tests were ordered and they established that the paramour was the father. He then began limited visitation with the child. He wanted more and sued to disestablish the husband as the child's father. The husband and wife moved to dismiss, challenging his standing. The Iowa Supreme Court ruled that the biological father had a constitutionally protected due process right to a relationship with his child so long as the relationship was in her best interests. On remand, paternity was established in the biological father and he was given visitation.

## MICHIGAN

**McHone v. Sosnowski**, 609 N.W. 2d 844(Mich. App.2000)—A husband and wife had three children, the last of whom was born a year before they divorced. The husband treated the child as his, and the child was declared a child of the marriage in the divorce

decree. The alleged biological father then came forward and sought to establish his paternity. The husband and wife moved to dismiss for lack of standing and the trial court agreed. The Court of Appeals upheld this decision. Relying on a Michigan Supreme Court case, **Girard v. Wagenmaker**, 470 NW2d 372 (1991), the court said that before an outsider can bring a paternity action, there must be a prior determination that the child was not the child of the marriage. Since neither parent had brought such an action, the third party was precluded from suit.

#### MINNESOTA

**Witso v. Overby**, 609 N.W. 2d 618 (Minn. App. 2000)—A child was born to a husband and wife, both of whom asserted the child was theirs. A man who had an affair with the wife brought a paternity suit, alleging that he was the child's biological father. He sought genetic tests. The trial court denied his motion and dismissed his suit. The Minnesota Supreme Court reversed. It construed the statutory language to grant the man standing and to require genetic testing in any case where it was requested and there was sufficient evidence of the requisite sexual contact to create a genuine issue of paternity. The Court went on to note that if the genetic tests showed a high probability of paternity, the trial court would then have competing presumptions to weigh. The presumption with the greater considerations of public policy and logic should prevail.

#### PENNSYLVANIA

**Strauser v. Stahr**, 726 A. 2d 1052 (Penn. 1999)—A child was born to a married couple. The wife's paramour asserted that he was the child's father and sought custody of her. He alleged that the wife had allowed him to have contact with the child and that genetic tests showed he was the child's biological father. The wife opposed his suit and the husband joined the suit asserting that he was the girl's presumptive father. The husband also asserted equitable estoppel since the paramour had not financially or emotionally supported the child. The trial court found that the mother's conduct equitably estopped her from asserting non-paternity. Over the husband's objections, the court received genetic test evidence and found the paramour to be the biological father. The husband and wife both appealed and the appellate court held that since there was an ongoing marriage, and husband had assumed responsibility for the child, his paternity was irrebuttably presumed. Genetic tests should not have been accepted into evidence. The paramour appealed to the Pennsylvania Supreme Court, which held that so long as the marriage is intact at the time the husband's paternity is challenged, the presumption that the husband is the child's father is irrebuttable.

**B.S. & R.S. v. T.M.**, 782 A. 2d 1031 (Penn. Super. 2001)—A married couple separated, and the wife began cohabiting with another man. She became pregnant and gave birth to a daughter. One month after the birth, she returned to her husband and they reconciled. Her paramour attempted to establish his paternity, and the husband and wife opposed, citing the marital presumption since the child was born during their marriage. The Superior Court held that the marital presumption did not apply since it was undisputed that the husband did not have access to the wife during the probable period of conception.

Thus an “intact marriage” did not exist and therefore there was no public policy reason to preserve it.

### Other

#### ALASKA

**Rubright v. Arnold** , 973 P. 2d 580 (Alaska 1999)—Husband and wife had four children and then separated. The wife brought a paternity action against a man (Rubright) she alleged was the father of one of the children. He signed an affidavit of paternity and then changed his mind, denying that he was the child’s biological father. Rubright also said that the husband must be made a party in order for paternity to be resolved. The court agreed and the ex-husband was joined. Genetic tests were ordered but Rubright did not submit. The court then found him to be the father of the child. The court said this decision was both a sanction for his refusal to test and a decision on the merits based on the signed/notarized paternity acknowledgment. The Supreme Court affirmed the decision and the reasoning.

**Sielak v. CSED**, 958 P. 2d 438 (Alaska 1998)—A couple were married and never divorced. The wife moved in with another man and had two children. She then went on public assistance and the state child support agency went after her husband for child support. He failed to respond. Six years later, the state asked for a modification of the support order, and the husband raised the paternity issue. The IV-D agency refused to consider his motion because it had no jurisdiction to disestablish paternity. The husband appealed and the Alaska Supreme Court agreed. The husband was required to go to superior court for a finding of non-paternity before he could proceed on the support issue.

#### MISSOURI

**Mo. Div. of Child Support Enforcement v. T.J.**, 981 S.w. 2d 149 (Missouri 1998)—A child was born to a married mother. Nine years later she filed a petition to establish paternity and obtain support from either her husband or another possible father. The husband failed to appear, but the paramour did appear and denied his paternity. The trial court found that until the husband’s paternity had been disestablished, the other man could not be found to be the father. It also dismissed the suit against the husband. The Supreme Court of Missouri agreed that the paternity of the other man could not be established until the presumed father’s paternity had been disestablished. However, by Missouri law the paternity of a marital child can only be disestablished within five years of birth. Thus, the husband was irrebuttably the child’s father. The case was sent back with directions to dismiss against the paramour and enter an order declaring the husband to be the child’s father.

#### SOUTH CAROLINA

**Douglas v. Boyce** , 542 S.E. 2d 715(South Car. 2001)—A child was born to a married couple that divorced shortly after his birth. The husband was listed on the birth certificate as the child’s father. The child alleges that he is the biological child of the mother’s



paramour, who was killed in an auto accident. The paramour's parents filed a wrongful death suit and did not include the child as a beneficiary of the proceeds of the settlement. The child then sued them and the attorneys handling his parent's divorce, as well as the tort attorneys. He alleged that they all had a statutory duty to him to establish his paternity and make him a beneficiary of the settlement. The trial, appellate, and state supreme courts all held that the attorneys had no obligation to him. The South Carolina Supreme Court interpreted the state statute requiring a guardian ad litem for a child in any action that threatens to make a child illegitimate to be inapplicable in divorce cases.

## WYOMING

**R.W.R. v. E.K.B.**, 35 P. 3d 1224(Wyo. 2001)—The husband and wife divorced. The divorce decree said there were no children of the marriage. Several months later the wife gave birth. She believed that the child's father was her new husband and he believed this as well. Several years later, they divorced and their divorce decree says the child is a child of their marriage. The second husband had genetic tests done and they showed he was not the biological father. The mother sought assistance from the child support agency to disestablish the second husband's paternity and establish the paternity of her first husband. Genetic tests were conducted, and they did show that the first husband was the biological father. The first husband wanted nothing to do with the child, and the second husband was likewise not desirous of having a relationship with the child. The trial court found the first husband to be the child's father, and this was upheld on appeal. The Wyoming Supreme Court, reading all the state statutes *in parii materia*, held that once a party requested genetic testing, there was no authority for a court to deny such tests. The Court was very troubled by the social implications of this case and a concurring opinion questions whether the IV-D agency should be involved in proceedings to disestablish paternity.