Comment, STANDING AS A CHILD'S FATHER

The U.S. Census Bureau reports that almost a quarter of America's children live with only their mother.[1] The majority of these mothers have never been married.[2] Only 3.4 percent of children reside with their father alone.[3] Among children raised in a single-parent household there is a small, but significant, group of children who live with a parent who is not biologically related to them.[4] Statistics reported by the Census Bureau over the last decade indicate a trend in which the number of single-parent households is increasing, as is the number of children living with a non-biological parent.[5] Even in two-parent households, more children today than in the past are raised by at least one non-biological parent.[6]

The changing dynamic of family living arrangements is just one example of how complicated family life and the parent-child relationship can be, and this demonstrates how perspectives of the parent-child relationship can transform over time. When parties cannot agree how to define their familial relationships, they at times look to the courts to do it for them. With improvements in assisted reproduction technology and medicine occasional confusion arises over who is a child's legal mother; however, historically more common are challenges regarding who is a child's legal father.[7] But not just anyone can seek a judge's declaration

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1 U.S. Census Bureau, America's Families and Living Arrangements: 2010 (Nov. 2010), http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Compare* U.S. Census Bureau, America's Families and Living Arrangements: 2010 (Nov. 2010), http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html, *with* U.S. Census Bureau, America's Families and Living Arrangements: March 2000 (June 2001), http://www.census.gov/population/www/socdemo/hh-fam/p20-537_00.html.

6 *Id.*

7 *See* Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U.J. GENDER SOC. POL'Y & L. 601 (2009). Kindregan asserts that, until recently, "there was no practical reason to dispute maternity." *Id.* at 603. But U.S. courts have re-

of paternity. To challenge or assert paternity in a lawsuit, one must possess standing to do so. Additionally, even a party who has the requisite standing may face other obstacles, such as time limits.[8] Ultimately, establishing oneself as a child's legal father is nowhere near as simple as changing a baby's diaper, playing catch with a son, or harassing a daughter's first boyfriend.

Although paternity cases themselves are emotionally trying, a potential father may never see the courtroom if he lacks standing. Whether a party has standing to file a paternity action is a question of law. This comment first examines the Uniform Parentage Act (UPA), which was designed to respond to the complexities of family life, and assesses how the UPA interfaces with the increasingly widespread use of technology in childbearing. Although many states have adopted all or part of the UPA, the law is still subject to interpretation by state courts. Thus, it is important to survey the various analyses of the UPA and how it is applied differently from state to state. The second part of this comment examines specifically a potential father's legal standing to bring a paternity action. Finally, parties other than a potential father may also have the legal standing required for a paternity suit. For families facing these issues, paternity challenges could prove to be one of the most daunting tasks of parenthood.

I. Uniform Parentage Act: Attempting to Define a Family

A. *History*

The National Conference of Commissioners on Uniform State Laws (hereinafter, the "Conference") first attempted to address the issue of parentage in 1922 when it adopted the Uniform Illegitimacy Act.[9] Although that Act was later withdrawn, the

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viewed paternity cases for almost two centuries, if not longer. One of the earliest cases in the United States where the court discussed the issue of paternity is *Pigeau v. Duvernay*, 4 Mart. (o.s.) 265 (La. 1816), in which a man was not entitled to inherit from his daughter, who died intestate, because he had never formally acknowledged paternity. Twenty-five years later the same court declared that "maternity is never uncertain." Eloi v. Mader, 1 Rob. 581, 585 (La. 1841).

8 *See* Paula Roberts, *Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 55, 60 (2003).

9 UNIF. ILLEGITIMACY ACT (1922) (withdrawn 1960).

Conference followed it up with the Uniform Act on Blood Tests to Determine Paternity[10] in 1952 and the Uniform Paternity Act[11] in 1960. Also, in 1969, changes relating to parentage were made in the Uniform Probate Code.[12] But none of these efforts were met with much success. By 1973 only nine states had adopted the Uniform Act on Blood Tests to Determine Paternity, while the Uniform Paternity Act found acceptance in only four states, and the Uniform Probate Code in five.[13]

Thus, in 1973 the Conference drafted the first Uniform Parentage Act[14] (hereinafter, the "UPA (1973)"), which is considered to be the most significant act impacting children born out of wedlock.[15] By 2000, nineteen states had adopted the UPA (1973), and many other states had implemented portions of it.[16] One reason the UPA (1973) was considered to be so important was that it declared all children equal, regardless of whether a child was born to parents who were married. Furthermore, the act rejected the term "illegitimate" in favor of "child with no presumed father."[17]

At this time, eliminating the notion of an illegitimate child was "revolutionary."[18] Although the Conference had previously asserted its position that all children should be entitled to equal rights of support and inheritance, many states still enforced laws that singled out children of unmarried parents for disparate treatment.[19] By 1973, however, a series of U.S. Supreme Court

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10 UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY, (1952) (superseded by UNIF. PATERNITY ACT (1960)).

11 UNIF. PATERNITY ACT (1960) (withdrawn 2000).

12 UNIF. PROBATE CODE (1969) (revised 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, and 2003, amended 2008), 8 U.L.A. 1 (2001 & Supp. 2010).

13 John J. Sampson, *Uniform Parentage Act (2000) With Prefatory Notes and Comments*, 35 FAM. L.Q. 83, 92 (2001)

14 UNIF. PARENTAGE ACT (1973) (withdrawn 2000), 9B U.L.A. 377 (2001 & Supp. 2010).

15 Sampson, *supra* note 13, at 92.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

decisions already rendered many of these laws unconstitutional under the Equal Protection Clause.[20]

It soon became apparent that the UPA (1973) failed to tackle what would later become key concerns in the parentage question. For example, the Act provides absolutely no guidance on determining parentage in relation to divorce proceedings.[21] Furthermore, it is practically impossible for the UPA (1973) to have anticipated the amazing technological advances seen since its inception, and thus the Act is inadequate for handling much improved paternity testing and assisted reproduction.[22]

Since 1973 the Conference saw needs for two additional acts. Both drafted in 1988, the Uniform Putative and Unknown Fathers Act[23] was a response to paternity registries which began appearing in states that decade[24] and the Uniform Status of Children of Assisted Conception Act[25] provided options for handling the increasingly popular gestational agreement.[26] Neither act attracted a following though, with only two states adopting the latter, and none adopting the former.[27]

Recognizing the need to consolidate and clarify the expanding variety of uniform acts dealing with parentage, the Conference promulgated a freshly drafted Uniform Parentage Act[28] in 2000 (hereinafter, the "UPA (2000)"), and withdrew all previous acts covering the topic.[29] Now the UPA (2000) is the only uniform act on parentage advocated for by the Conference.[30]

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20 *See, e.g.,* Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972). *See also* Gomez v. Perez, 409 U.S. 535 (1973).

21 Sampson, *supra* note 13, at 93.

22 *Id.* at 94.

23 UNIF. PUTATIVE AND UNKNOWN FATHERS ACT (1988) (withdrawn 2000).

24 Sampson, *supra* note 13, at 94.

25 UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) (withdrawn 2000).

26 Sampson, *supra* note 13, at 94.

27 *Id.*

28 UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 295 (2001 & Supp. 2010).

29 Sampson, *supra* note 13, at 94.

30 *Id.*.

B. *The Uniform Parentage Act of 2000: An Updated Perspective*

While some sections were left virtually untouched, the UPA (2000) boasts two entirely new sections, and many other substantive changes. The Conference added definitions to Article 1, General Provisions, for improved clarity and to bring the act up to date with current scientific and technical terminology.[31] Article 2, Parent-Child Relationship, remained relatively unchanged.[32]

Articles 3 and 4, Voluntary Acknowledgment of Paternity and Registry of Paternity, respectively, are both found only in the UPA (2000).[33] Article 3 outlines how a man may make a voluntary acknowledgment of paternity, potentially avoiding the need for adversarial paternity proceedings, as well as how paternity may be denied. It also describes how to challenge or rescind those claims.[34] This article was intended to reflect the widespread use of voluntary acknowledgments as an alternative to the courtroom, and the drafters sought to outline a comprehensive approach for compliance with a federal mandate that states boost the effectiveness of such acknowledgments.[35]

One way to make sure that voluntary claims of paternity are taken more seriously is to eliminate the frivolous claims. Section 301 requires that a man wishing to acknowledge paternity must do so by swearing that the child was conceived as a result of sexual intercourse between him and the child's mother.[36] While this raised concerns about invasions of privacy, the drafters chose this language to avoid false claims of paternity defrauding the genetic father.[37] Further increasing the efficacy of voluntary acknowledgments, the UPA (2000) imposes greater formality and warns that

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31 *Id.* at 95.

32 *Id.*

33 *Id.*

34 *Id.* at 109.

35 UNIF. PARENTAGE ACT (2000) Art. 3, prefatory cmt.(amended 2002), 9B U.L.A. 313 (2001 & Supp. 2010). In 1996 Congress passed the Personal Responsibility and Work Opportunity Act, which required states to pass laws that "greatly strengthen the effect of a man's voluntary acknowledgment of paternity" in order to receive federal funding for child support enforcement. Sampson, *supra* note 12, at 109.

36 *Id.* at § 301.

37 Sampson, *supra* note 13, at 111, note 18.

acknowledgments are "signed . . . under penalty of perjury."[38] The drafters also thought that acknowledgments would be taken more seriously if they could not be rescinded without judicial proceedings, as Section 307 of this article requires.

Article 4 reflects the Conference's acknowledgment of the widespread use of paternity registries, which were already in place in twenty-eight states.[39] Previously, the Conference had explicitly excluded paternity registries from its Uniform Putative and Unknown Fathers Act, instead choosing to focus on the rights of unknown fathers regardless of whether they registered.[40] But by 2000, paternity registries, having passed constitutional muster,[41] were accepted by the Conference as a method of expediting adoption proceedings so long as there were still exceptions to protect the rights of fathers who may not have had the chance to register.[42]

This article requires a man to register that he may be the father of a child either during the pregnancy or within thirty days following the child's birth. A man who has formed a relationship with the child or who has sought adjudication of paternity is exempt from this requirement.[43] However, even a man who has not

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38 UNIF. PARENTAGE ACT (2000) § 302 cmt. (amended 2002), 9B U.L.A. 314 (2001 & Supp. 2010).

39 Sampson, *supra* note 13, at 120.

40 UNIF. PUTATIVE AND UNKNOWN FATHERS ACT § 3, cmt. (withdrawn 2000). The comment specifically provided that:

> "The Act does not include a putative fathers registry requirement for, essentially, three reasons: (1) while 'ignorance of the law is no excuse,' most fathers or potential fathers – even very responsible ones – are not likely to know about the registry as a means of protecting their rights, and the objective is providing some actual protection, not relying on a cliché more relevant to the criminal law; (2) individual state registries do not protect responsible fathers in interstate situations; and (3) since the registries rely on unsupported claims, their accuracy is in doubt and their potential for an invasion of privacy and for interference with matters of adoption, custody, and visitation is substantial." *Id.*

41 *See* Lehr v. Robertson, 463 U.S. 248 (1983) (upholding the constitutionality of a New York statute requiring unmarried fathers to register with the putative father registry to receive notification of any termination of parental rights or adoption proceedings).

42 Sampson, *supra* note 13, at 120-21.

43 UNIF. PARENTAGE ACT (2000) § 402(a) & (b) (amended 2002), 9B U.L.A. 322 (2001 & Supp. 2010).

registered is still entitled to notice of adoption or termination of parental rights proceedings if the child is over the age of one year.[44]

Article 5 is on Genetic Testing, which was included in the UPA (1973), although not nearly as extensively. Originally, genetic testing was dealt with in merely one section, which referred only to blood tests, whereas the UPA (2000) dedicates eleven sections solely to the subject.[45] This expansion raised concerns about genetic privacy, evidenced by the fact that about a quarter of the act's discussion transcripts are occupied by debate on the issue.[46] For example, the drafters of the UPA (2000) elected to include the words "to determine parentage," relative to the article's purpose, after several commissioners expressed concern that genetic testing would be utilized for other purposes or that samples would be saved for later use.[47]

Article 5 also represents an attempt to bring the law in line with the scientific landscape. Section 503 requires that testing facilities be accredited by the American Association of Blood Banks, the American Society for Histocompatibility and Immunogenetics, or any lab designated by the federal Secretary of Health and Human Services.[48] This section also clarifies what kinds of samples are sufficient specimens for genetic testing, and, consistent with advances in medical technology, includes more choices than just blood, such as bone, hair, and "other body tissue or fluid."[49] Further, Section 505 imposes a requirement that there must be a 99 percent probability of paternity to identify a man as the father.[50] This statistical bar was set in accordance with the standards for genetic testing reliability in the scientific community at the time.[51] Recognizing that scientific standards were

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44 *Id.* at § 405(a) (amended 2002).

45 UNIF. PARENTAGE ACT (2002) Art. 5 (amended 2002), 9B U.L.A. 329 (2001 & Supp. 2010).

46 Sampson, *supra* note 13, at 127 n.36.

47 *Id.*

48 UNIF. PARENTAGE ACT (2000) § 503 (amended 2002), 9B U.L.A. 330 (2000 & Supp. 2010).

49 *Id.* at §503(b).

50 UNIF. PARENTAGE ACT (2000) § 505(a)(1) (amended 2002), 9B U.L.A. 332 (2000 & Supp. 2010).

51 UNIF. PARENTAGE ACT (2000) § 505, cmt. (amended 2002), 9B U.L.A. 333 (2000 & Supp. 2010).

likely to evolve, it was anticipated that heightened standards would be reflected in more stringent accreditation requirements.[52]

Article 6, entitled Proceeding to Adjudicate Parentage, is described as the "traditional litigation section."[53] Section 602 identifies the parties who possess standing to bring an action regarding parentage:

1. The child;
2. The mother of the child;
3. A man whose paternity is to be adjudicated;
4. The support-enforcement agency [or other governmental agency authorized by other law];
5. An authorized adoption agency or licensed child-placing agency; [or]
6. A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor [; or
7. An intended parent under [Article] 8[54]

Departing from the requirements in the UPA (1973), this article no longer names the child as a necessary party to the lawsuit.[55] Parentage may be adjudicated at any time, even after the child has reached the age of majority, so long as the child does not already have a presumed father.[56] Where the child does have a presumed father (typically the husband of the child's mother at the time of the child's birth), the UPA (2000) limits one's ability to request adjudication of parentage to within two years of the

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52 *Id.* "Given the rapid progress of science, it is likely that accrediting standards will rise over time. If the standard of practice becomes more strict, the newer standards will be made routine by the requirement that laboratories be accredited in order to perform testing under the Act. But, the legal significance of the genetic presumption stated in this section will be unaffected." Sampson, *supra* note 13, at 132.

53 Sampson, *supra* note 13, at 95.

54 UNIF. ACT (2000) § 602 (amended 2002), 9B U.L.A. 338 (2001 & Supp. 2010).

55 UNIF. PARENTAGE ACT (2000) § 603 (amended 2002), 9B U.L.A. 339 (2001 & Supp. 2010).

56 UNIF. PARENTAGE ACT (2000) § 606 (amended 2002), 9B U.L.A. 341 (2001 & Supp. 2010).

child's birth.[57] The UPA (2000) further limits one's ability to challenge a presumed father's paternity by incorporating the doctrine of paternity by estoppel into Section 608. Under this section a court may refuse both a presumed father's denial of paternity based on his conduct, and a challenge to the presumed father's paternity, if inequity would result from allowing his relationship with the child to be disproven.[58]

In constructing this section the drafters imagined that the most common situation would manifest where a child is born to a married couple, but is known not to be the biological child of the husband, and yet is treated by the husband as if the child were, in fact, his own.[59] Ultimately, the decision not to allow adjudication of parentage must be in the best interests of the child.[60] The UPA (2000) advocates consideration of nine factors for determining the best interests of the child.[61] Note that this list is not intended

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57 UNIF. PARENTAGE ACT (2000) § 607 (amended 2002), 9B U.L.A. 341 (2001 & Supp. 2010). . However, the two year limit is inapplicable if a court finds either that the mother and presumed father did not live together or have sexual intercourse at the time the child was likely conceived, or that the presumed father did not hold the child out openly as his own. *Id.* at § 607(b)(1)-(2).

58 UNIF. PARENTAGE ACT (2000) § 608(a) (amended 2002), 9B U.L.A. 342 (2001 & Supp. 2010).

59 UNIF. PARENTAGE ACT (2000) § 608, cmt. (amended 2002), 9B U.L.A. 343 (2001 & Supp. 2010).

60 UNIF. PARENTAGE ACT (2000) § 608(b) (amended 2002), 9B U.L.A. 343 (2001 & Supp. 2010).

61 *Id.* The factors listed are:

> 1) the length of time between the proceeding to adjudicate parentage and the time that the presumed father was placed on notice that he might not be the genetic father of the child; 2) the length of time during which the presumed father has assumed the role of father to the child; 3) the facts surrounding the presumed father's discovery of his possible nonpaternity; 4) the nature of the relationship between the child and the presumed father; 5) the age of the child; 6) the harm that may result to the child if presumed paternity is successfully disproved; 7) the nature of the relationship between the child and any alleged father; 8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and 9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child. *Id.*

to be exhaustive of all circumstances worthy of attention. Once paternity has been either acknowledged or denied, or has been adjudicated, a two-year period begins to toll. Attempts to rescind an acknowledgment or denial of paternity and challenges to the adjudication must be brought within this time frame.[62]

However, the fact that the child is no longer a necessary party under the UPA (2000) raised concerns about whether a child is bound by the results of adjudication or has a preserved right to challenge paternity in the future.[63] In only three circumstances is the child bound by a determination of parentage and without recourse:

1. The determination was based on an unrescinded acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing;
2. The adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or
3. The child was a party or was represented in the proceeding determining parentage by an [attorney ad litem].[64]

A determination of parentage is binding on all signatories, in the case of a voluntary acknowledgment or denial of paternity, or all parties, in the case of a previous adjudication where all jurisdictional requirements are met.[65] This section, however, is silent as to whether anyone other than the child, who was not a party to the previous adjudication, such as state agencies, may later raise challenges. It is presumed that this and other potential controversies arising subsequent to the initial adjudication will be handled in accordance with state law.[66]

Article 7, Child of Assisted Reproduction, and Article 8, Gestational Agreement, are essentially a recodification of the Uniform Status of Children of Assisted Conception Act.[67] As-

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62 UNIF. PARENTAGE ACT (2000) § 609 (amended 2002), 9B U.L.A. 344 (2001 & Supp. 2010).

63 UNIF. PARENTAGE ACT (2000) § 603, cmt. (amended 2002), 9B U.L.A. 339 (2001 & Supp. 2010).

64 UNIF. PARENTAGE ACT (2000) § 637 (amended 2002), 9B U.L.A. 352 (2001 & Supp. 2010).

65 *Id.*

66 *Id.* § 637, cmt.

67 Sampson, *supra* note 13, at 95.

sisted reproduction was not new to the UPA (2000), since it did appear briefly in the UPA (1973). In 1973, the Conference recognized and endorsed the use of artificial insemination, the only method of assisted reproduction available at the time. In commentary, however, the Conference cautioned that "many complex and serious legal problems [are] raised by the practice of artificial insemination," and that these issues deserve continued consideration by lawmakers.[68]

Article 7 applies only to children born from assisted reproduction, not as a result of sexual intercourse. Regardless of the parents' intentions, if the child's conception occurred during sexual relations between the parents, this article does not apply.[69] Section 702 attempts to draw a clear line regarding who are the child's parents, explicitly excluding a person who donated an egg or sperm for the child's conception.[70] This exclusion does not apply where a man or woman has donated his or her own gamete for the assisted reproduction of his or her own child.[71]

Should a dispute about paternity arise, however, the UPA (2000) has its limitations. A married man may only challenge his paternity of a child born to his wife via assisted reproduction if the challenge is brought within the two years after he first learns of the child's birth, and if he proves he did not consent to the use of assisted reproduction at any time.[72] In other words, a man may be barred from challenging his paternity if his actions following the child's birth, i.e. caring for and supporting the child, demonstrate constructive consent.[73] Where the mother's husband did not supply the sperm used in assisted reproduction, he may bring a paternity action at any time if he did not consent to assisted reproduction and has not lived with the mother since her use of

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68 *Id.* at 158-9, note 66.

69 UNIF. PARENTAGE ACT (2000) § 701 (amended 2002), 9B U.L.A. 354 (2001 & Supp. 2010).

70 UNIF. PARENTAGE ACT (2000) § 702 (amended 2002), 9B U.L.A. 355 (2001 & Supp. 2010).

71 *Id.* at § 702, cmt.

72 UNIF. PARENTAGE ACT (2000) § 705(a) (amended 2002), 9B U.L.A. 357 (2001 & Supp. 2010).

73 *See infra* n.101.

assisted reproduction. But, if he has openly held the child out as his own at any time, his paternity challenge will not be heard.[74]

Unfortunately, this may result in a child having no legally recognized father. Where a woman uses sperm from a donor other than her husband, and her husband is able to demonstrate the absence of his consent, the UPA (2000) provides that neither the donor nor the husband may be declared the father of the child.[75] Another situation that may result in the birth of a child with no legal father is divorce. If a woman proceeds with assisted reproduction following a divorce, her former husband is not considered a legal parent unless the divorce records reflect his consent to post-divorce assisted reproduction.[76] A similar outcome is found where a spouse dies before assisted reproduction occurs, unless the spouse consented in a record to be the parent prior to passing away.[77]

In addition to providing for assisted reproduction, the drafters of the UPA (2000) recognized the growing popularity of using gestational agreements to accomplish childbearing. Thus, the entirety of Article 8 is dedicated to this topic. It is particularly notable that this article was drafted at all, in light of much controversy. First, the article deals with confusion surrounding the term "surrogate" by replacing it with the phrase "gestational mother."[78] Also, drafters realized that gestational agreements require attention to more than just two parties, the mother and father, but also to the gestational mother, her husband, and if applicable, donors of specimens used for the pregnancy.[79]

The primary focus of Article 8 is to provide for judicial review of gestational agreements. It allows a court to declare that the intended parents are, in fact, the legal parents of the child

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74 UNIF. PARENTAGE ACT (2000) § 705(b) (amended 2002), 9B U.L.A. 357 (2001 & Supp. 2010).

75 *Id.* at § 705, cmt.

76 UNIF. PARENTAGE ACT (2000) § 706 (amended 2002), 9B U.L.A. 358 (2001 & Supp. 2010).

77 UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (2001 & Supp. 2010).

78 UNIF. PARENTAGE ACT (2000) Art. 8, prefatory cmt. (amended 2002), 9B U.L.A. 360 (2001 & Supp. 2010).

79 *Id.*

born to the gestational mother.[80] Under this article too, though, a child may be found without a legal father. For example, Section 808 contemplates the scenario where a single woman has a child who is the product of a gestational agreement, and then later marries. According to the UPA (2000), her husband is not the child's legal father unless he is the genetic father or chooses to adopt the child.[81]

The UPA (2000) was drafted in light of the adoption of two other important uniform acts, the Uniform Interstate Family Support Act,[82] adopted in 1996, and the Uniform Child Custody Jurisdiction and Enforcement Act,[83] adopted in 1997. These three acts are intended to be consistent with each other and together provide a comprehensive framework for courts in deciding parentage, custody, and support issues. Therefore, provisions regarding child support and custody, which were found in the UPA (1973), were left out of the new UPA (2000).

C. *Applying the UPA (2000): Not So Uniform in Practice*

As of the drafting of the UPA (2000), the UPA (1973) had been adopted in its entirety by nineteen states, and portions of it were adopted by several others.[84] While some states continue to operate under the principles set forth in the UPA (1973),[85] nine states have enacted the UPA (2000).[86]

At its inception, the drafters of the UPA (2000) recognized that states took different directions in applying the UPA (1973).[87]

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80 UNIF. PARENTAGE ACT (2000) § 807 (amended 2002), 9B U.L.A. 368 (2001 & Supp. 2010).

81 UNIF. PARENTAGE ACT (2000) § 808, cmt. (amended 2002), 9B U.L.A. 369 (2001 & Supp. 2010).

82 UNIF. INTERSTATE FAMILY SUPPORT ACT (1996), 9IB U.L.A. 281 (2001 & Supp. 2010).

83 UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997), 9IA U.L.A. 649 (2001 & Supp. 2010).

84 Sampson, *supra* note 13, at 92.

85 *See, e.g.,* CAL. FAM. CODE §§ 7600-7751.

86 These nine states include Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming. Uniform Law Commission, Legislative Fact Sheet – Parentage Act, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Parentage%20Act (last visited Mar. 13, 2011).

87 *See, e.g.,* Wolfgang Hirczy, *Larry Succeeds Where Michael Failed: Texas Courts Recognize Parental Rights Claims Denied by the United States Supreme Court*, 59 ALB. L. REV. 1621 (1996).

Thus, general issues typically governed by state law, previously included in the UPA (1973), were deliberately omitted from the UPA (2000). Although not completely ignored, the issues of parents' rights, custody, visitation, and child support were left to be handled by state courts and legislatures.[88]

Notwithstanding the more detailed treatment of some topics in the UPA (1973), some commentators argued that it afforded more discretion in the courtroom. For example, in the section on paternity presumptions, the UPA (1973) contained language which effectively authorized judges to base decisions on "weightier considerations of policy and logic."[89] The resulting concern is that a court could rely on this language to rationalize a decision in favor of the parent it preferred, despite convincing DNA evidence.[90] To address this potential problem, the drafters of the UPA (2000) make a point to note the exclusion of the statement containing these words in the new version.[91]

Both the 1973 and the 2000 versions of the UPA, as incorporated into state law, continue to be the subject of controversy.[92] One particular case, dubbed "Roe v. Wade for Men," received media attention when the National Coalition for Men provided legal representation for a young man challenging the constitutionality of Michigan's paternity statutes.[93] Denying the man's claim that the paternity statute violated his right to equal protection, the Sixth Circuit Court of Appeals concluded that the paternity statutes were rationally, if not substantially, related to the state's interest in child welfare.[94] Despite courts' decisions in

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88 Uniform Law Commission, Why States Should Adopt UPA, http://www.nccusl.org/Narrative.aspx?title=why%20States%20Should%20Adopt%20UPA (last visited Mar. 13, 2011).

89 UNIF. PARENTAGE ACT (1973) § 4(b) (withdrawn 2000), 9B U.L.A. 394 (2001 & Supp. 2010).

90 David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 140 (Supp. 2006).

91 UNIF. PARENTAGE ACT (2000) § 204, cmt. (amended 2002), 9B U.L.A. 311 (2001 & Supp. 2010).

92 *See generally* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

93 Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007).

94 *Id.* at 431.

favor of paternity laws, some commentators still criticize the UPA (2000) and its various applications among states.[95]

II. When Can a Father Claim to Be a Father?

A. *According to the Supreme Court*

Perhaps the most frequently cited case on the issue of standing in a paternity action is *Michael H. v. Gerald D*.[96] In that case, the U.S. Supreme Court upheld a California law, adopted from the UPA (1973), that prevented the child's biological father from asserting paternity by adhering to a statutory presumption that the mother's husband is the child's legal father. This case is particularly noted for the proposition that "a biological connection alone [is] not sufficient" to give the genetic father legal standing to challenge paternity.[97] In *Michael H.* this premise was strong enough even to override consideration of the fact that Michael, the biological father, had lived with the mother and daughter for a period of time and had treated the daughter as his own.

Notably, the Supreme Court asserts that its holding in *Michael H.* is not intended to represent a choice between two potential fathers. Rather the Court views its role as protecting California's right to employ a marital presumption and the state court's right under state law to refuse a paternity challenge.[98]

B. *The Challenge Stands*

Although the scheme applied in *Michael H.*, which may appear to result in an unfair outcome, continues to exist in California, many jurisdictions recognize at least a minimal right of the biological father to request some form of judicial proceeding

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95 *See* Sarah McGinnis, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U.J. GENDER SOC. POL'Y & L. 311 (2008) (arguing that paternity laws are insufficient in that they often "permit excessive judicial discretion, avoid compulsory lists of factors, and allow dual paternity").

96 Michael H. v. Gerald D., 491 U.S. 110 (1989). For a discussion of other notable Supreme Court cases dealing with paternity issues, see Stephen A. Sherman, *You Ain't My Baby Daddy: The Problem of Paternity Fraud and Paternity Laws*, 5 AVE MARIA L. REV. 273, 278-81 (2007).

97 Lisa I. v. Superior Ct., 133 Cal. App. 4th 605, 616 (Cal. Ct. App. 2005).

98 *Michael H.* 491 U.S. at 129-30.

before being banned from a child's life due to lack of standing.[99] For example, a biological father may have standing to challenge paternity, even though the biological mother was married to another man at the time she gave birth, if a court has made a prior determination that the child was born "out of wedlock."[100]

In *Wilson v. Cramer* the Missouri Court of Appeals addressed a situation where there was no presumed father, because the mother was not married, but instead, there was a voluntary acknowledgment of paternity.[101] In this case, a man was allowed to pursue a claim of paternity despite the fact that the mother had signed an agreement with an acknowledged father. In the acknowledgment, the acknowledged father agreed to assume all legal responsibility for the child, but the court held that such an agreement could not deprive another man of his standing to challenge paternity. Furthermore, even a state administrative order could not destroy his standing.

Alternatively, a man may have standing to bring a paternity action if he can establish that he is the presumed father, absent marriage, by virtue of the fact that he lived with the mother and child and held the child out as his own biological child.[102] He need not even offer proof of a sexual relationship with the mother that would indicate he is the biological father.[103]

More recently, a Florida court held that a biological father is entitled to a hearing to establish his standing to challenge paternity, even if the child already has a legal father.[104] In that case, however, the mother was already amid divorce proceedings with

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99 "[I]n at least 20 states alleged natural fathers in [similar circumstances] are entitled to some form of a hearing before they are forever excluded from the lives of their biological children." Dawn D. v. Superior Ct., 17 Cal. 4th 932, 960-61 (Cal. 1998).

100 Hickox v. Vanderark, No. 289715, 2009 WL 2477934 (Mich. Ct. App. Aug. 13, 2009).

101 Wilson v. Cramer, 317 S.W.3d 206 (Mo. Ct. App. 2010).

102 Zentz v. Graber, 760 N.W.2d 1 (Minn. Ct. App. 2009).

103 Sometimes paternity is established by estoppel, where a man's conduct demonstrates his "constructive consent" to fatherhood. *See* Gonzales v. Andreas, 369 A.2d 416 (Pa. Super. Ct. 1976); Monmouth County Div. of Social Servs. v. R.K., 757 A.2d 319 (Ch.Div. 2000); Tregoning v. Wiltschek, 782 A.2d 1001 (Pa. Super. Ct. 2001); Hubbard v. Hubbard, 44 P.3d 153 (Alaska 2002); In re L.C.B., No. M2003-02560-COA-R3-CV, 2005 Tenn. App. LEXIS 74 (Tenn. Ct. App. Feb. 4, 2005).

104 L.J. v. A.S., 25 So. 3d 1284 (Fla. Dist. Ct. App. 2010).

her husband at the time the child was conceived with another man. It seems that one pervasive theme courts focus on when deciding cases such as this is whether allowing a challenge to paternity will disrupt an intact family unit.[105] Where there may be a presumptive legal father already, courts are more willing to hear another man's claim of paternity if the attack does not endanger a cohesive family.[106]

C. *The Challenge Falls*

On the other hand, marriage to the mother of a child does not necessarily give a man standing to challenge or assert paternity.[107] In *Cravens v. Cravens* the court declined to allow a woman's second husband to claim paternity even after genetic testing revealed that her previous husband was not her child's biological father. Essentially, the court held that if a presumed father evinces an intention to continue to be the child's legal father, no one can challenge his paternity, regardless of his actual genetic relationship to the child or the existence of marriage to the mother.

Even if no other party claims to be a presumed father, an acknowledged father, or any kind of father at all, a court may find that a man lacks standing to assert paternity anyway. In *P. v. B.* the court found that, although the man could be considered a "virtual parent," he could not have standing since he was not biologically related to the child.[108] The court reached this decision in spite of the fact that the child only had one legal parent, a mother.

Under some circumstances, a man may attempt to assert a right to challenge paternity on behalf of another party, such as the child, or the child's mother. Courts have handled this situation with varied responses. In the case *In re Adoption of E.L.*an Indiana court allowed a putative father to bring a paternity suit on his child's behalf.[109] But where a man tried to bring an action

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105 Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, U.C. DAVIS J. JUV. L. & POL'Y 335, 343 (2007).

106 *Id.*

107 Cravens v. Cravens, 936 So. 2d 538, 541 (Ala. Civ. App. 2005).

108 P. v. B., 906 N.Y.S.2d 865, 868 (N.Y. Fam. Ct. 2010).

109 *In re* Adoption of E.L., 913 N.E.2d 1276 (Ind. Ct. App. 2009).

on his wife's behalf against her child's biological father, a Delaware court found no standing existed.[110]

Demonstrating the requisite standing to bring a lawsuit is the first hurdle for a man wishing to challenge paternity. The next section reveals that standing is also an issue for parties other than the father.

III. Challenges Raised by Non-Fathers

The UPA (2000) provides for parties other than the father—including the child, or even a state agency—to join in paternity challenges. It is also common for the child's mother to bring up the question of who is the father of her child. In some cases, another relative may attempt to raise the issue as well.

A. *The Child's Mother*

Contrary to the court's decision in *In re Adoption of E.L.*, other courts have ruled against allowing a mother to bring a paternity suit on behalf of her child. This was the result in a Colorado case where a mother tried to assert her child's right to be joined as a party in the lawsuit.[111] However, the Colorado court based its holding on a previous decision to preclude a father from doing the same.

Additionally, a mother lacks standing to challenge the paternity of a presumed father who continues to claim paternity. In the *Cravens* case, the mother contested her husband's paternity during the divorce proceeding, but she lacked standing because her husband maintained the position that he was, in fact, if not biologically, the child's father.[112]

B. *The Child*

Although the UPA (2000) lists only three circumstances under which a child is precluded from pursuing a paternity action, the *Cravens* case also exemplifies a rule that even the child cannot contest paternity if the presumed father does not wish to

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110 R.E.H. v. J.M.H., No. CK06-01697, 2009 WL 6340108 (Del. Fam. Ct. Oct. 23, 2009).

111 *In re* A.D., 2010 WL 1238841 (Colo. Ct. App. 2010).

112 *Cravens*, 936 So. 2d at 542.

abandon his status as legal father.[113] Generally though, a child's right to bring a paternity suit is independent of the rights of the mother or anyone else. The child must have standing to bring suit to protect his ability to enforce the right to child support against the child's father, regardless of the actions of other parties involved.[114] In some jurisdictions a child may even bring a suit for declaration of nonpaternity against a presumed father, even if the father has signed a voluntary acknowledgment of paternity, when DNA testing reveals that he is not the biological father.[115]

C. *Other Third Parties*

The UPA (2000) also provides standing for state agencies to initiate paternity proceedings. In some cases, the agency may be permitted to bring a suit even though there is a presumed father. A Hawaii court affirmed standing of the Child Support Enforcement Agency to challenge the presumed father's paternity.[116] This is exactly the opposite of the *Cravens* case, where the presence of the presumed father divested the other parties of standing to challenge his paternity.

It is typical that courts will refuse to extend standing to third parties such as alleged biological relatives, including grandparents.[117] Even where the child's mother has died, other relatives lack standing to challenge paternity on behalf of the child, if the child still has a surviving parent.[118]

Generally, laws in all fifty states provide for the initiation of paternity suits by both the child's mother and father, although the petitioner's standing can still serve as a basis for challenging the lawsuit. Today, federal law provides an incentive for states, as the receipt of federal funding for child support enforcement and welfare programs depends on the existence of such laws.[119] While

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113 *Id*. at 541-42.

114 Tia M. Young, Comment, *Removing the Veil, Uncovering the Truth: A Child's Right to Compel Disclosure of His Biological Father's Identity*, 53 How. L.J. 217, 228 (2009).

115 *In re* M.M., 928 N.E.2d 1281 (Ill. App. Ct. 2010).

116 Child Support Enforcement Agency v. Doe, 963 P.2d 1135 (Haw. Ct. App. 1998).

117 *See* R.J.S. v. Stockton, 886 N.E.2d 611, 614-15 (Ind. Ct. App. 2008).

118 J.R.W. *ex rel* Jemerson v. Watterson, 877 N.E.2d 487,492 (Ind. Ct. App. 2007).

119 42 U.S.C. § 654 (2011). *See also* Paula Roberts, *supra* note 8.

it is common for state agencies to bring paternity actions,[120] other third parties, however, generally lack standing.[121] Children are rarely precluded from asserting paternity claims.[122]

IV. Conclusion

Paternity issues can have a dramatic effect on an entire family. Determining who a child's father is will impact familial relationships, custody and support, and also issues that arise after death, such as intestate succession. Particularly in light of the ever-changing portrait of American families, it is important to know the legal significance of one's status as a parent, and the rights that attach to such a status. Often states impose time restrictions for claiming or disavowing paternity, as well as limits because of a party's conduct in relation to the child. The decision to have a child is life-changing, but in some cases, deciding who the child's parents are may be an even tougher task.

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120 *See, e.g., Child Support Enforcement Agency*, 963 P.2d 1135. *See also* State Comm. of Soc. Servs. *ex. rel* Clarke v. Pryce, No. FA030634241S, 2003 Conn. Super. LEXIS 1306 (Conn. Super. Ct. Apr. 18, 2003); Neville v. Perry, 648 N.Y.S.2d 508 (N.Y. Fam. Ct. 1996).

121 *See* discussion *supra* Part III.C.

122 *See* discussion *supra* Part III.B.