

Comment,
**IF THE GENES DON'T FIT: AN OVERVIEW
OF PATERNITY DISESTABLISHMENT
STATUTES**

I. Introduction

The biological relationship between father and child is an evolving relationship that, with today's technological advances, is afforded increasing influence in the current legal environment. "[F]amily law seems to be going in two directions at once."¹ More recognition is being given to non-biological relationship but still more weight is attributed to DNA."² These different directions involve the legal recognition of same-sex parents when one or both partners are not biologically related to the child and at the same time a push towards providing adjudicated fathers the ability to disestablish paternity based on proof that the child is not biologically his.

Although genetic ties between mother and child are almost always established at birth, the father-child relationship has proven more complicated.³ In previous decades, illegitimacy was a social stigma that placed great legal bounds on children—so much so, that instead of focusing on who the biological father of the child may actually be, the government created hurdles to prevent children from being illegitimated, including the marital presumption and Lord Mansfield's Rule.⁴ It appears the pendulum is swinging in the opposite direction, emphasizing legitimacy but allowing biology to refute the existence of such a relationship.

¹ Ellen Goodman, *What Makes a Father?*, BALTIMORE SUN, May 1, 2001, http://articles.baltimoresun.com/2001-05-01/news/0105010162_1_dna-duped-dads-men-rights/2 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

² *Id.*

³ See Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 62 (2006).

⁴ See Jayna Morse Cacioppo, Note, *Voluntary Acknowledgements of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 484 (2005).

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The federal government places an emphasis on legitimizing parent-child relationships as soon as possible in a child's life. An estimated one-third of children have no designated legal father at birth; encouragement of voluntary paternity acknowledgments helps minimize these numbers.⁵ Voluntary acknowledgment allows a putative father to become a legal father by acknowledging the child as his. They are by far the most common manner in which the paternity of a child born to an unwed mother is established, occurring in hospitals and social service offices throughout every state in the United States as required by Title IV-D.⁶ Voluntary paternity affidavits are a "powerful tool-both in the lives of children and in family courts."⁷ They provide opportunities for fathers to legalize their parent-child relationship as well as assist the single parent in obtaining support.

In recent years the question of whether a voluntary paternity acknowledgment should be binding on a father who has been proven, through DNA testing, not to be the biological father of the child, has become a prevalent issue of debate.⁸ The definition of fatherhood is constantly evolving with the technological developments of the modern era. Fathers' rights organizations are at the forefront of the disestablishment movement. This movement has followed the developing framework of fatherhood, leading to a number of changes throughout the United States. The emerging statutes now allow for disestablishment with the showing that the child is not biologically the father's child, allowing the father to be forgiven his future child support obligations and any rights or responsibilities toward the child.

This Comment will present an overview of the disestablishment statutes, discussing and contrasting the various state approaches for allowing disestablishment. Part II of this Comment will discuss the development of the modern child support system, following the evolution of the welfare system. Part III will ad-

⁵ Parness, *supra* note 3, at 60.

⁶ *Id.* at 62.

⁷ Cacioppo, *supra* note 4, at 481.

⁸ See Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29 (2003) (discussing the Supreme Court's determination that the marital presumption overrides a genetic relationship, and consequences as well as benefits of the biological father-child relationship; also providing that there is more than one appropriate father at times.)

dress the development and implementation of the voluntary acknowledgment as well as the rescission process provided by the federal government. Part IV will describe the progression of the fathers' rights movement and the effects this movement has had on state statutes regarding disestablishment of paternity. Part V will present recent changes in state laws regarding the disestablishment of paternity, discussing the different time limits, who has standing to bring an action, the requirements to bring an action, discretion given to the courts, and the effect the statute has on child support orders. Part VI will discuss policy ramifications of the disestablishment movement. Finally, Part VII will consider mandatory DNA tests at birth as an alternative to voluntary paternity establishments.

II. The Development of the Modern Child Support System

A. Illegitimacy

Illegitimate children are described as *filius nullius*, the children of no one.⁹ "A child born to unwed parents was considered illegitimate in the eyes of the law, and was subsequently treated as inferior to a child born in wedlock."¹⁰ A series of presumptions, including the marital presumption as well as Lord Mansfield's Rule, encompassed previous centuries' attempts at preventing illegitimate children. Lord Mansfield's Rule prohibited husband and wife from testifying against one another to overcome the marital presumption of fatherhood.¹¹ These standards prevented the mother and father from denying parentage of the mother's husband with the intent to illegitimate a child.¹²

The U.S. Supreme Court attempted to eliminate the distinction between children born to married mothers and illegitimate children beginning in 1968.¹³ These decisions presented the opinion that children, legitimate or illegitimate, are equal with regard

⁹ Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 656 (2008).

¹⁰ Cacioppo, *supra* note 4, at 483.

¹¹ *Id.* at 484.

¹² *Id.*

¹³ *Id.*

to social standing and deserve the same treatment.¹⁴ The marital presumption began to erode without the danger of creating illegitimate children by providing various measures, including voluntary acknowledgment of paternity to legalize parent-child relationships. The social stigma of illegitimacy is much less prevalent today, although the federal government still recognizes economic differences between legitimate and illegitimate children.

B. *Welfare Reform*

One of the benefits of establishing paternity early in a child's life includes creating health benefits for the child by providing a more stable father-child relationship. Not only do the children receive substantial advantages, the federal government also reaps the assistance of child support as well as the benefit of early paternity adjudication, preventing long, drawn out paternity cases.¹⁵ The federal government believed if it had a party to hold liable for child support, fewer single parent families would live in poverty.¹⁶ With these advantages in mind, the federal government strove for a more simplified, less stringent process leading to the development of the voluntary paternity acknowledgment.¹⁷ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 created voluntary paternity acknowledgment standards for births to unmarried women.¹⁸ State lawmakers vote to have states participate in these programs so the states can receive the benefits from the federal Title IV-D programs.¹⁹

The federal government's intention of creating more children who are legitimized at birth has led to numerous cases in which a man voluntarily acknowledged paternity of a child that

¹⁴ *Id.*

¹⁵ Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 345-46 (2005).

¹⁶ *Id.* at 344.

¹⁷ *Id.* at 347.

¹⁸ Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgment Rescissions and Other Paternity Disestablishments Under Illinois Law*, 39 J. MARSHALL L. REV. 1295, 1298 (2006).

¹⁹ *Id.*

was not biologically related to him.²⁰ Previously, child support obligations were not entitled to be eliminated once the adjudicated father was made aware of the fact he is not the biological father, unless the adjudicated father could prove fraud, duress or misrepresentation.²¹

III. Voluntary Acknowledgement

Title IV-D provides for two distinct methods of establishing paternity: first, either the mother or father can file a paternity suit, in which case the court orders genetic tests, or second, the parents can voluntarily acknowledge paternity through an informal civil procedure.²² The Social Security Act of 1975 (Title IV-D) governs the voluntary acknowledgment of paternity. This Act stipulates that state governments participating in certain federal assistance programs serving needy children have child support plans permitting the establishment of the paternity of a child at any time before the child attains eighteen years of age, providing “services relating to the establishment of paternity” for children for whom assistance is provided and requiring mothers receiving assistance on behalf of their children to cooperate in “good faith” in establishing paternity.²³ The Act mentions genetic testing only with regard to contested paternity cases, although does not mandate genetic testing in uncontested cases.²⁴

The requirements for a voluntary acknowledgment under Title IV-D include: the signature of the mother and putative father and prior notice must be given—“orally, or through the use of a video or audio equipment, and in writing”—of the alternatives, the legal consequences, and the rights and responsibilities that arise from signing the voluntary acknowledgment.²⁵

Under the Title IV-D program, a state must provide a procedure for a hospital-based program for voluntary acknowledg-

²⁰ See generally Parness, *supra* note 3, at 77-91. Due to the government’s requirements that women participate in naming the child’s father at birth, a number of cases have alleged paternity fraud. Parness presents a state-by-state analysis of paternity fraud cases.

²¹ Parness, *supra* note 18, at 1299.

²² 42 U.S.C.A. 666(a)(5)(B), (C) (2010).

²³ *Id.*

²⁴ 42 U.S.C.A. 666(a)(5)(B)(i).

²⁵ 42 U.S.C.A. § 666(5)(c)(i).

ment of paternity, which focuses on the period immediately before or after the child's birth, as well as a state agency responsible for maintaining the birth records to offer voluntary acknowledgment services.²⁶ With a hospital acknowledgment, neither judicial nor administrative process is required and it or the acknowledgement is still considered a "conclusive" status of paternity.

IV. Rescinding Voluntary Acknowledgment

Federal laws regulate the process for rescinding voluntary acknowledgment of paternity, providing a legal order of paternity can be rescinded within sixty days.²⁷ After the sixty days have expired, the acknowledgment can only be rescinded based on fraud, duress, or misrepresentation of fact, with the burden of proof on the challenger.²⁸ The Act does not provide a definition for the terms "fraud," "duress," or "material mistake of fact."²⁹ Although no federal definition of the terms is provided, state case law has furnished various interpretations. Some courts have held that a biological mother who insinuates that the presumed father is the biological father does not commit fraud, while some states find the opposite, allowing for the exercise of judicial discretion.³⁰ A Wyoming court provided relief for an adjudicated father based on fraud when the petitioner successfully proved the mother of the child knowingly concealed an affair with another man, while married to a third man at time of conception, along with DNA evidence excluding the father from being the child's biological father.³¹

A voluntary acknowledgment of paternity under the Uniform Parentage Act of 2000 (UPA) has similar requirements to Title IV-D, including an authenticated acknowledgment, under the penalty of perjury, that the child does not have a presumed

²⁶ 42 U.S.C.A. § 666(a)(5)(C)(ii), (iii).

²⁷ 42 U.S.C.A. § 666(a)(5)(D)(ii)(I).

²⁸ 42 U.S.C.A. § 666(a)(5)(D)(iii).

²⁹ *See id.*

³⁰ *See Appendix D: Major Cases Involving the Post-Divorce Disestablishment of Paternity 1997-2002*, 37 FAM. L. Q. 92 (2003); *see also Ex parte Jenkins*, 723 So.2d 649, 668 (Ala. 1998).

³¹ *State Dept. of Family Services v. PAJ*, 934 P.2d. 1257 (Wyo.1997).

father or another adjudicated father.³² Under the UPA, the mother of a child can be established at birth,³³ while the father-child relationship can be established between a man and a child by either an unrebutted presumption of the man's paternity of the child under Section 204 or an effective acknowledgment of paternity by the man under Article 3.³⁴ Article 3, Section 305 also provides a rescission process for a voluntary acknowledgment of paternity similar to that Title IV-D: within sixty days of acknowledgment or denial, or before the date of the first hearing to which the signatory is a party.³⁵ After the period for rescission has expired, a signatory may only challenge the acknowledgment or denial if it was based on fraud, duress, or mistake of fact, and the challenge comes within two years after acknowledgment or denial is filed.³⁶

One-third of states do not have a specific statutory process outside of the federal stipulations for rescinding voluntary acknowledgments.³⁷ These states have incorporated the basic federal provisions for rescission and challenging, but provide no specific detail expressing the process.³⁸

States that have adopted a model for rescission lay out a process expanding on the federal requirements through judicial or administrative process.³⁹ Iowa has a model process for administrative rescission, charging the Iowa Department of Public Health with creating a standardized rescission form.⁴⁰ Iowa's process has only one form, thus eliminating the confusion.⁴¹ This form is subsequently filed with the state registrar of vital statistics; the registrar then mails a written notice of the rescission to the signatory and the process is complete.⁴² The form can still

³² UNIF. PARENTAGE ACT § 302(a)(1)-(3) (2000).

³³ UNIF. PARENTAGE ACT § 201(a)(1)

³⁴ UNIF. PARENTAGE ACT § 201(b)(1), (2).

³⁵ UNIF. PARENTAGE ACT § 307(1), (2).

³⁶ UNIF. PARENTAGE ACT § 308(a)(1), (2).

³⁷ Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 39 (2003).

³⁸ *Id.* at n.21.

³⁹ *Id.* at 39.

⁴⁰ *Id.* at 40.

⁴¹ *Id.*

⁴² Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 40 (2003).

only be filed before the period for rescission has expired or with proof of fraud, duress or mistake of fact.⁴³

Other states have developed a judicial method for rescinding voluntary acknowledgments, requiring parties to present the rescission to a court.⁴⁴ The states that include statutory provisions for rescinding through the court consider voluntary acknowledgment of paternity as having the same force and effect as a judgment. The model process for a judicial rescission is in Massachusetts.⁴⁵ Within sixty days of signing an acknowledgment, the party wishing to rescind must file a petition in the probate and family court in the county in which the child and one of the parents resides.⁴⁶ The court is then required to notify the Title IV-D agency if a child is receiving public assistance.⁴⁷ Following the petition to rescind, the court orders a genetic marker test and proceeds to adjudicate paternity or non-paternity.⁴⁸

Rescinding paternity via judicial or administrative process leads to the same end, although the process is slightly different. A party interested in rescinding must still rescind before the sixty-day time period expires or with proof of fraud, duress or mistake of material fact, but the fathers' rights movements desire a more "fair" process for non-biological fathers to disestablish paternity.

V. The Disestablishment Movement

The media has glorified the issue of paternity. On Jerry Springer and Maury Povich, with their episodes of "Who's the Father" where DNA tests show that men are the father or are not, the audience cheers either way. In 2001, of 310,490 paternity tests conducted by the American Association of Blood Banks, nearly one-third of the putative fathers were excluded through

⁴³ *Id.*

⁴⁴ *Id.* at 41.

⁴⁵ *Id.* (citing MASS. GEN. LAWS ANN. 209C § 11 (West 2010)).

⁴⁶ *Id.*

⁴⁷ Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 41 (2003); see also MASS. GEN. LAWS ANN. 209C § 11(a) (West 2010).

⁴⁸ MASS. GEN. LAWS ANN. 209C § 11(a).

DNA.⁴⁹ Although these putative fathers were excluded as biological fathers, they were without the ability to overturn court-ordered child support because the sixty-day period to rescind had expired.

The disestablishment movement began in the 1970s resulting from many high profile cases in which men felt defrauded by the child support system.⁵⁰ Cases from Gerald Miscovich to Dennis Crane provide examples of men who feel “wronged” by the family court system because they were forced to support children to whom, biological tests proved, they were not genetically related. In Miscovich’s case, even amid evidence of genetic non-paternity, a court in Pennsylvania refused to overturn a court order for child support.⁵¹ The U.S. Supreme Court denied *certiorari*, upholding the Pennsylvania statute upon which Miscovich’s appeal was based.⁵²

The “movement was, and to some extent remains, focused on strengthening fathers’ rights to parent children,” along with a broader agenda, that includes the de-victimization of men by the family legal system.⁵³ These organizations view paternity adjudication as a criminal sanction, since adjudicated fathers are responsible for child support and if they do not comply, they can be held criminally liable.⁵⁴ The issue is phrased as a disestablishment of paternity that is “fair and just,” and the fathers tend to “strike back at ex-wives and girlfriends” who they believe have deceived them.⁵⁵ The children in each of these cases tend to get lost in the shuffle and it becomes more about the adjudicated father’s interest in being set “free.”⁵⁶

The following state statutes afford different weights to the effects of biology, as well as many other factors on a voluntary

⁴⁹ Shawn Seliber, Note, *Taxation Without Duplication: Misattributed Paternity and the Putative Father’s Claim for Restitution of Child Support*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 97, 102 (2007).

⁵⁰ Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 219 (2002).

⁵¹ See *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997).

⁵² See *Miscovich v. Miscovich*, 526 U.S. 1113 (1999); 119 S. Ct. 1757.

⁵³ Anderlik & Rothstein, *supra* note 50, at 219.

⁵⁴ *Id.* at 220.

⁵⁵ *Id.*

⁵⁶ *Id.*

acknowledgment of paternity. However, the fact remains that these disestablishment statutes allow adjudicated fathers to be relieved of their rights and duties as parents based on a genetic test.

VI. State Approaches to Disestablishment of Paternity

The fathers' rights movement brought to light an "injustice" of wrongfully adjudicated fathers believed to be occurring across the country. Prior to disestablishment statutes, various cases all led to the same result: adjudicated fathers who were unable to be relieved of their rights.

A controversial Ohio court decision enforced a child support order against a man who was proven not to be the biological father of the child, with the court stating: "unless courts enforce their child support orders, the children of Ohio would suffer immeasurably, the public will justifiably lose all respect for and confidence in the law, and lawlessness will prevail in our society."⁵⁷ The fathers' rights organizations did not accept this ruling, and effectively lobbied the Ohio legislature for a change. This lobbying resulted in the revision of Ohio Revised Code sections 3119.961 and 3119.962, allowing a court to grant relief from a paternity and/or child support order if the adjudicated father can disprove paternity based on genetic tests.⁵⁸ These provisions allow genetic evidence to be used to obtain relief from a final judgment, court order, or administrative determination, with proof of a zero percent probability that the male is the father.⁵⁹ In 2005, the Supreme Court of Ohio held section 3119.962 unconstitutional stating the "trial court lacked the authority to grant appellant's request to "terminate" his child support arrearage."⁶⁰

Although on more than one occasion, courts have held the Ohio statute unconstitutional,⁶¹ other states have effectively fol-

⁵⁷ *In re Contemnor Caron*, 744 N.E.2d 787, 795 (Ohio Com. Pl., 2000).

⁵⁸ Melanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 *YALE J.L. & FEMINISM* 193, 231 (2004).

⁵⁹ See, e.g., OHIO REV. CODE ANN. § 3119.962 (2010).

⁶⁰ *Jennifer H. v. Harold J.D.*, No. L-04-1053, 2005 WL 279949, at *3 (Ohio Ct. App. Feb. 4, 2005).

⁶¹ Jacobs, *supra* note 58, at 231.

lowed Ohio's attempt to create a new cause of action and to reopen paternity adjudications in order to address the effects of biology on paternity acknowledgments. Voluntary acknowledgments, in most states, create a rebuttable presumption of paternity, allowing for the establishment of child support orders without requiring further proceedings to establish paternity.⁶²

Many states have passed statutes that allow adjudicated fathers to disestablish paternity when the time for rescinding a voluntary acknowledgment has expired. These statutes have taken a wide variety of approaches and vary in terms such as time limits, standing, requirements for filing, allotted discretion of the court, and the statutes' effects on child support regarding past and future obligations.

A. Time Limitations

Unlike administrative or judicial rescinding, most disestablishment statutes allow more than sixty days to disestablish paternity. Time limitations range from being non-existent to a strictly enforced two-year time limit. For example, Arkansas, Georgia, and Maryland make no mention of time limits.⁶³

Missouri's recently adopted statute, on the other hand, allows for filing of such a petition at any time prior to December 31, 2011.⁶⁴ After December 31, 2011, the petition must be "filed within two years of the entry of the original judgment of paternity and support or within two years of entry of the later judgment in the case of separate judgments of paternity and support."⁶⁵ Similar time stipulations are seen in California: the statute states that if the voluntary acknowledgment was signed on or before December 31, 1996, "the acknowledgment creates a rebuttable presumption of paternity and may only be challenged based on genetic tests," which must be requested within three years of the date the last party signed the declaration.⁶⁶ Alabama's statute allows for the reopening of a case if scientific evi-

⁶² See, e.g., ARIZ. REV. STAT. § 25-812(A)(1) (2010).

⁶³ Jacobs, *supra* note 58, at 227-229 (referring to the requirements set forth by Maryland and Georgia, including the lack of a statute of limitations by both statutes).

⁶⁴ MO. REV. STAT. § 210.854(1) (2010).

⁶⁵ *Id.*

⁶⁶ C.A. Fam. § 7575 (2005).

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dence is available to prove the petitioner is not the father,⁶⁷ but the statute does not apply to cases that became final before April 26, 1994.⁶⁸ Another variation is seen in the Florida statute, which does not have a specific time limitation for filing,⁶⁹ although it provides that an action must be filed before the child reaches eighteen years of age.⁷⁰

These various time provisions have allotted a longer time limit for adjudicated fathers to discover the non-biological connection between the father and the child, at times far surpassing the time allowed for a rescission.

B. *Standing*

Another variation among disestablishment statutes is dictated by standing. The standing prescribed by each statute determines who has the legal ability in an adjudicated case to disestablish paternity. Most of the statutes, including Missouri, provide that a man adjudicated to be the father has standing to bring the petition.⁷¹ The Arkansas statute pertaining to modification of orders requires for standing to petition that a man be adjudicated pursuant to a voluntary acknowledgment of paternity *without* the benefit of scientific testing for paternity and that as a result, he was required to pay child support.⁷² Other statutes do not address who may file, leaving the option open to all parties involved in the original case or even a biological father who was not a party to the original order.

A California court provided that under the statute allowing for disestablishment, a biological, presumed or legal father had standing to challenge a voluntary declaration of paternity by an earlier presumed father.⁷³ The court granted a third party's petition to overturn a voluntary acknowledgment executed by the child's mother and the mother's boyfriend at the time of birth, awarding legal and physical custody of the child to the third

⁶⁷ ALA. CODE § 26-17A-1 (2010).

⁶⁸ See *Ex Parte Alabama ex rel. R.G.*, 721 So.2d 699 (Ala. 1998).

⁶⁹ See FLA. STAT. ANN. § 742.18(1) (West 2010).

⁷⁰ FLA. STAT. ANN. § 742.18(2)(g) (West 2010).

⁷¹ See MO. REV. STAT. § 210.828 (2010).

⁷² See ARK. STAT. § 9-10-115 (2010).

⁷³ *In re J.L.*, 72 Cal. Rptr. 3d 27, 33 (2008).

party, who was the child's biological father.⁷⁴ This decision was based on the intervenor's standing to challenge the voluntary declaration as provided by statute, as well as a due process right to challenge the acknowledgment.⁷⁵

C. Requirements

Much like standing, in which the petitioner sometimes must be a male with a child support order, a common requirement for petitioning under a disestablishment statute is that there must be a child support order in place. The Georgia statute stipulates in "any action in which a male is required to pay child support as the father of a child," a motion may be filed to set aside a determination of paternity.⁷⁶

Another common requirement relates to the child's status, with Georgia setting forth the strictest standard, requiring that: the adjudicated father could not have adopted the child, the child could not have been conceived through artificial insemination, and the adjudicated father could not have acted in a manner to prevent the true biological father of the child from asserting his paternal rights to the child.⁷⁷ Along with the previous requirements, the statute also requires the adjudicated father could not have acted with the knowledge that he is not the biological father by marrying the mother of the child, acknowledging paternity of the child by sworn statement, being named on the child's birth certificate with his consent, receiving a notice to undergo DNA testing and disregarding the notice, signing a voluntary acknowledgment, or proclaiming himself to be the child's biological father.⁷⁸ The father is estopped by the conditions discussed above from disaffirming paternity because the adjudicated father prevented another party from asserting their rights to the child.

States also set forth varying standards for the percentage needed to disestablish paternity. The Georgia statutes require a zero percent possibility the adjudicated father is the biological father of the child.⁷⁹ The standard set forth in Arizona is "clear

⁷⁴ *Id.* at 31.

⁷⁵ *Id.* at 29, 34.

⁷⁶ GA. CODE ANN. § 19-7-54(a) (2010).

⁷⁷ § 19-7-54(b)(2)-(4).

⁷⁸ § 19-7-54(b)(5)(A)-(G).

⁷⁹ § 19-7-54(a)(2).

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and convincing evidence,” leaving more discretion to the court to determine if vacating the determination of paternity is appropriate.⁸⁰ Without addressing the specific scientific threshold needed to disestablish, Florida courts first require a male who believes he is not the biological father of a child to show in support of his petition “newly discovered evidence that might have placed his paternity in controversy in circuit court,” not just a belief of wrongful paternity.⁸¹

The requirements in almost all of the statutes is scientific proof that the adjudicated father is not the biological father, which differs drastically from the rescission process that requires the father to prove misconduct (fraud, duress or misrepresentation) on the part of the mother or a state agency. Even though the adjudicated father can prove a lack of biological connection with the child, the father is not always guaranteed disestablishment because each statute affords a varying amount of discretion to the court hearing the case.

D. *Discretion of the Courts*

The most common and complicated factor among the statutes is the discretion granted to state courts to uphold or overrule paternity adjudication. This is mainly exercised through the use of the “best interests of the child” standard. The discretion is based on striking a balance between the rights of the adjudicated father and the rights of the children involved.

The various statutes for disestablishment set forth two primary methods of applying this standard in each case. The first application consists of the court determining whether allowing a DNA test would be in the best interest of the child, taking into account the effect the paternity test will have on the child.⁸² The second consideration is whether to set aside the paternity establishment based on the results of a DNA test. State legislatures generally focus on biological ties as a manner of establishing and maintaining a legal father-child relationship; however, the courts

⁸⁰ ARIZ. REV. STAT. ANN. § 25-812(E) (2010).

⁸¹ See, e.g., Florida Dept. of Revenue ex rel. Chambers v. Travis, 971 So.2d 157, 161 (Fl. Dist. Ct. 2007).

⁸² Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. Center for Fam. Child. & Cts. 3, 17 (2003); see also Langston v. Riffe, 754 A.2d 389 (Md. 2000).

are less willing to disestablish paternity of a non-biological father where the child's best interest will not be served.⁸³

Since the best interest of the child is not easily ascertainable, courts take various factors into consideration. The California statute sets forth factors to be considered, including: the age of the child, the length of time since the adjudication, the nature of the father-child relationship and the quality of the relationship.⁸⁴

A great divergence among people exists based on their beliefs about what makes a father: biology or functionality.⁸⁵ "The laws governing adoptions have acknowledged that parentage is comprised of a totality of factors, the least significant of which is genetics."⁸⁶ The UPA places great weight on the relationship between father and child when determining parentage, implying a presumption in favor of a man's legal fatherhood if "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."⁸⁷ These beliefs are taken into account when a judge is determining if disestablishment of paternity will be in the child's best interests. The societal view regarding fatherhood can be an important factor in a judge's consideration; consequently some state statutes look to eliminate the societal analysis. For example, the Arkansas statute requires the court to set aside paternity if the adjudicated father has proven he is not the biological father of the child, has met the requirements of the statute and provides no other considerations for the court.⁸⁸ Much like Arkansas, Maryland and other states have attempted to eliminate judicial discretion based on the best interests standard by holding "the 'best interests of the child' standard generally has no place in a proceeding to reconsider a paternity declaration."⁸⁹

⁸³ Cacioppo, *supra* note 4, at 493.

⁸⁴ CAL.FAM.CODE § 7575(b)(1)(A)-(H) (2010).

⁸⁵ Jacobs, *supra* note 58, at 202-03 (providing a discussion on functional parenthood versus biology-based determinations of parenthood).

⁸⁶ Hulett v. Hulett, 544 N.E.2d 257, 263 (Brown, J., concurring).

⁸⁷ UNIF. PARENTAGE ACT § 204(a)(5) (2000) (amended in 2002).

⁸⁸ ARK. CODE ANN. § 9-10-115(f)(1)(A)-(D) (2010).

⁸⁹ Langston v. Riffe, 754 A.2d 389, 404 (Md. 2000) (addressing whether the trial court must consider the best interests of a child prior to ruling on the declarations, involving three paternity appeals of previously adjudicated fathers who moved to set aside the judgments based on new evidence that each man was not the father).

E. *Child Support*

Although many motives exist for adjudicated fathers to petition to disestablish paternity, the termination of a child support order is the most likely outcome of a petition under all disestablishment statutes. Once disestablishment has been granted, the court must address how the finding affects a current child support obligation.⁹⁰ A disestablishment petition does not eliminate child support obligations during the proceedings. Almost all of the statutes provide that for the duration of the case for disestablishment child support obligations are still in full force. The California statute, for example, states that any order for custody, visitation or child support shall remain in effect “until the court determines that the voluntary declaration of paternity should be set aside.”⁹¹

Elimination of arrearages has been a large source of controversy for courts addressing disestablishment. An Arkansas court held that even though the statute in effect at the time of the father’s request for testing was filed permitted only prospective termination upon false paternity, arrearages and obligations were set aside.⁹² Maryland follows the reasoning applied by Arkansas courts, holding that once a paternity declaration that lead to the child support order which resulted in arrearages is vacated, the child support order is invalid and cannot be subject to the discretionary power of the courts.⁹³ This is a very different outcome than that reached by an Ohio court, which ruled the disestablishment statute unconstitutional because of a court’s attempts to alleviate a father’s arrearages.⁹⁴

Most of the statutes make specific mention that disestablishment of paternity does not entitle the party to restitution of child support paid by the adjudicated father. In Wyoming for example, if an action to overcome paternity is granted, any unpaid

⁹⁰ Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 70 (2003).

⁹¹ CAL. FAM. CODE § 7575(c)(3) (2005).

⁹² See Wesley v. Hall, 289 S.W.3d 143 (Ark. Ct. App. 2008).

⁹³ See Walter v. Gunter, 788 A.2d. 609, 619 (Md. 2002).

⁹⁴ See Jennifer H. v. Harold J.D., No. L-04-1053, 2005 WL 279949 (Ohio Ct. App. Feb. 4, 2005); see also Roberts, *supra* note 92, at 71-72 (discussing the ability of a court to grant forgiveness of arrearages following a disestablishment statute seen as a violation of the Bradley Amendment).

child support prior to the date of adjudication is “due and owing,” and provides no right to restitution for child support paid to the mother or the state of Wyoming.⁹⁵

Criminal violations for nonpayment of child support can be affected by the disestablishment of paternity. The Missouri statute provides that a petitioner who has pled guilty or been found guilty of an offense for criminal nonsupport, as to a child or children found not to be the biological children of the petitioner, may apply to the court to expunge the records.⁹⁶

Once the petition for disestablishment has been granted most statutes require future child support obligations be relieved.⁹⁷ These remedies often result in the future obligation of the government for support of the single mother and child, as well as other consequences that the government has attempted to eliminate through Title IV-D.⁹⁸ Although child support is a major consideration of a court in a disestablishment of paternity, many other deliberations must be made.

F. *Effects of Disestablishment Statutes*

Although the effects of disestablishment statutes have not been as overwhelming as legislatures predicted, there are still effects to be considered such as the cost endured after a disestablishment petition, as well as the future effectiveness of voluntary acknowledgments. The Missouri statute requires the family support division to track and report to the general assembly the number of cases known to the division in which a court, within the calendar year, set aside a previous judgment of paternity and could therefore report some critical numbers.⁹⁹

Cost considerations must also be addressed with regard to disestablishment because once a father is disestablished, the loss of a second source of income for single mother occurs. Although this is a concern, most states agree that fairness to the adjudicated father outweighs the future harm to the child.¹⁰⁰

⁹⁵ WYO. STAT. § 14-2-823(m)(vi) (2010).

⁹⁶ MO. REV. STAT. § 210.854(8) (2010).

⁹⁷ Roberts, *supra* note 90, at 70.

⁹⁸ *Id.* at 79.

⁹⁹ MO. REV. STAT. § 210.854(9) (2010).

¹⁰⁰ Roberts, *supra* note 90, at 79.

Lastly, an important consideration is the consequence of the disestablishment movement on the effectiveness of voluntary acknowledgments. In developing and enforcing the use of voluntary acknowledgments, the federal government provided an efficient manner for establishing paternity at hospitals or social service offices.¹⁰¹ With the raising disestablishment movement, will voluntary acknowledgments continue to be an effective measure for paternity establishment in the future? The federal government as well as each state may need to address the effectiveness of establishing paternity through voluntary acknowledgment and look for a more effective manner. Many scholars, including June Carbone and Naomi Cahn, have suggested alternatives to voluntary acknowledgments such as genetic tests at birth.¹⁰²

VII. Genetic Testing at Birth

Although most of the information provided above assumes that the government has an interest in establishing paternity early after a child's birth, another side contends that the government should not have an interest in establishing the paternity of a child born to a single mother because the costs associated with the process are too high.¹⁰³ Many critics argue that paternity establishments do not have the "desired effects," leaving open the option of a new government establishment process.¹⁰⁴

The discussion above presents the flaws with the system of voluntary acknowledgment of paternity, proven by the fathers' rights movements and the state-by-state adoption of disestablishment statutes. Public policy supports the view that a child's male parent should be designated early in life.¹⁰⁵ The adoption of disestablishment statutes provides for the cases in which a father has voluntarily undertaken rights and responsibilities of a child, developed a relationship and then wishes to disestablish parentage based on a lack of biological connection.¹⁰⁶ Several courts have noted that forcing a mother to name names at the time of

¹⁰¹ Parness, *supra* note 3, at 66.

¹⁰² Jacobs, *supra* note 58, at 239.

¹⁰³ Cacioppo, *supra* note 4, at 501.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 482

¹⁰⁶ *Id.*

birth in order to qualify for government assistance has led to incorrect declarations of paternity.¹⁰⁷ It is clear through the statutes' emphasis on genetic connection that today, more than in the past, the law places an emphasis on the biological relationship between father and child. But to what extent?

DNA testing at birth would establish a father-child relationship at birth, prevent future litigation regarding biology, and hold the correct parties responsible.¹⁰⁸ There are many reasons a child's biological father should be determined at birth. A recent federal commission provided some supporting reasons, including: clues to a child's biological background, fundamental emotional, social, legal and economic ties between parent and child, inheritance, and government benefits.¹⁰⁹

Just as an argument for DNA testing at birth exists, many reasons as to why it would be counterproductive can also be argued. First and foremost, instead of voluntary acknowledgments, fathers would be required to submit to genetic tests and if the men were unavailable or unwilling, this would create more illegitimate children.¹¹⁰ This invasion would also ruin relationships by proving infidelity, about which a party might be unaware. Finally, a father who wishes to take responsibility for a child and is not the biological father may be unable to do so.¹¹¹ This argument requires courts, lawmakers and the general public to address their feelings towards biology as the sole factor in determining fatherhood.

The costs of mandatory DNA testing at birth are not easily ascertainable. Although genetic testing is used to determine paternity in contested cases, a complete mandatory testing at birth program would require millions of tests a year. According to the Center for Disease Control and Prevention, 4,316,233 children are born in the United States every year.¹¹² The costs of mandatory paternity testing would include testing for *all* chil-

¹⁰⁷ Jacobs, *supra* note 58, at 239.

¹⁰⁸ *Id.*

¹⁰⁹ Jeffrey A. Parness, *Designating Male Parents at Birth*, 26 U. MICH. J.L. REF. 573, 574 (1993).

¹¹⁰ Cacioppo, *supra* note 4, at 505.

¹¹¹ *Id.*

¹¹² Centers for Disease Control and Prevention, *Births and Natality*, available at <http://www.cdc.gov/nchs/fastats/births.htm> (last visited Jan. 19, 2011)

dren, not just contested cases of paternity, because the same fathers who voluntarily sign acknowledgments without the assistance of a paternity test might opt out if there were an option.

Even though mandatory DNA tests at birth is discussed frequently as an option for paternity establishment, the advantages over voluntary acknowledgments or other available options are not conclusive.

VIII. Conclusion

The concept of fatherhood has transformed throughout the years, holding different aspects of the father-child relationship significant. Lord Mansfield's Rule along with marital presumptions created the belief that children belong to the husband, without regard to biology. With societal values regarding illegitimacy changing, the federal government has turned from placing importance on the marital presumption to allowing biological ties sufficient weight in paternity findings. Current paternity statutes, with their references to biology and the right to DNA tests, show that today's legal environment has become more concerned with biological ties to fatherhood.

Although the statutes vary in numerous ways, providing for different time limitations, standing, requirements, discretion allotted to the courts, and effects on child support orders, the statutes all provide adjudicated fathers an opportunity to appeal their judgment of paternity outside of the rescission period and without proving fraud, duress, or misrepresentation. The effects these statutes will have on paternity establishment have yet to be provided. Not only will the ability to disestablish paternity affect the child support system, it will also affect the initial adjudication of paternity in the long run. If the state and federal governments see disestablishment of paternity statutes as a threat to the paternity system, an option will be DNA testing at birth. It seems recent trends towards allowing disestablishment of paternity enforce the idea that parentage is related to biology, and although there are arguments towards parenthood without regard to DNA, paternity disestablishment cases will continue to occur until a new avenue towards parentage opens. As discussed above, this mandatory treatment will have consequences, both good and

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bad; nevertheless, mandated genetic testing might provide a more established manner for adjudicating paternity early in a child's life.

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