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# NO GENETIC TIES, NO MORE FATHERS: VOLUNTARY ACKNOWLEDGMENT RESCISSIONS AND OTHER PATERNITY DISESTABLISHMENTS UNDER ILLINOIS LAW

BY

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## INTRODUCTION

Public policy for all governments within the United States supports early, accurate, informed, and conclusive legal designation of parenthood as of the time of birth.<sup>1</sup> Genetic ties often, but not always, determine or help to determine legal parentage at the time of birth.<sup>2</sup> Where births result from consensual sexual intercourse between adults, genetic ties always determine maternity and usually determine or help to determine paternity.<sup>3</sup> With men, even where genetic ties are determinative

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1. A 1992 federal study, entitled "Supporting Our Children," said this: Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government provided dependent's benefits, inheritance, and an accurate medical history for the child.  
U.S.COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992).
2. This paper employs the terms "maternity" and "paternity" to cover legal designations of parentage operative as of the time of birth, though the conduct prompting at least certain paternity designations may occur long after birth (and include at times holding a born child out as one's own, and supporting that child financially).
3. *In re Estate of Poole*, 799 N.E.2d 250, 256-59 (Ill. 2003) (noting that a parent and child relationship does not arise under law for a man simply because no one disputes biological parentage; statutes often seek to insure

or important, often the presence of genetic linkage is only presumed. Paternity presumptions can, however, arise in settings where there is little chance of actual genetic ties, and such presumptions frequently are subject to rebuttal through testing long after birth.

Paternity presumptions usually arise for husbands when children are born to their wives.<sup>4</sup> In contrast, where mothers are unmarried, paternity founded on actual, presumed, or alleged genetic ties can arise from varying acts, including voluntary acknowledgments, lawsuits, concessions, and actual parenting. Male assumptions about the presence of genetic ties may be needed to undertake certain formal acts (such as voluntary acknowledgments), or can simply prompt other human conduct (such as concessions or defaults in lawsuits, or actual parenting) having legal paternity consequences. In over little more than a decade, paternity establishments for children born to unwed mothers in Illinois have most frequently arisen from voluntary paternity acknowledgments, usually completed in hospitals shortly after birth.<sup>5</sup>

Initial legal paternity designations can be overcome, however. Marital presumptions as well as paternity presumptions involving children born to unwed mothers may be rebutted via testing, at times long after birth. The standards for disestablishing legal paternity<sup>6</sup> of children born to unmarried women based upon a lack

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that legal fathers “are parents in more than the genetic sense”).

4. Paternity presumptions may also arise for former husbands, as when their former wives conceived or were pregnant at some time during the marriage. *See, e.g.*, 750 ILL. COMP. STAT. 45/5(a)(1) (creating a presumption of natural fatherhood for a husband where child is “born or conceived” during marriage).

5. For example, in Illinois in 1994 there were no in-hospital voluntary paternity acknowledgments, in 1995 there were 874, in 1996 there were 4,626, and in 1997 there were 29,220. THE OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, TABLE 39A: IN-HOSPITAL VOLUNTARY PATERNITY ACKNOWLEDGMENTS, *available at* [http://www.acf.hhs.gov/programs/cse/pubs/1998/reports/22nd\\_annual\\_report\\_congress/st39a.pdf](http://www.acf.hhs.gov/programs/cse/pubs/1998/reports/22nd_annual_report_congress/st39a.pdf). Similar increases have occurred in other states. For example, California went from 4,323 in 1994, to 126,922 in 1998. In Michigan, by contrast, there were 19,677 in 1994, and 22,437 in 1998. *Id.*

6. Herein, I employ the phrase “legal paternity” (as well as “legal fatherhood,” “genetic father in law” and “father under law”) to encompass legal designations of fatherhood as of the time of birth, whether or not such designations are made at birth or later and whether or not they are founded on circumstances existing at the time of birth (e.g., genetic ties or marriage) or thereafter (e.g., actual parenting). I assume here that only a man (whether or not impotent) may be subject to a legal paternity designation. *But see* Smith v. Cole, 553 So. 2d 847 (La. 1989) (noting that “dual paternity” is recognized in Louisiana); *In re Jesusa V.*, 85 P.3d 2 (Cal. 2004) (holding that there may be two competing paternity presumptions for a child at birth, though only one man is then deemed by a court to be the father under law).

of genetic ties sometimes preclude certain nongenetic fathers from pursuing rebuttal even when other nongenetic fathers, genetic fathers, children, mothers, or state welfare agencies may pursue rebuttal for the same reason. Any legal distinctions between those pursuing paternity disestablishment, of course, must be reasonable and comport with federal and state constitutional safeguards. Unfortunately, certain contemporary distinctions in Illinois paternity disestablishment laws are unsound on policy grounds, if not unconstitutional.<sup>7</sup> These distinctions became quite evident in the 2004 Illinois Supreme Court decision involving Romel Smith.<sup>8</sup>

This paper begins, in Part I, by examining federal paternity standards involving voluntary paternity acknowledgments of children born to unmarried women. These standards are increasingly important as voluntary acknowledgments are now typically required for birth certificate recognitions of paternity and as the number of births to unmarried women in the United States has doubled in the past two decades.<sup>9</sup> Part II of this paper then illustrates the nationwide confusion that results when males initiate paternity disestablishment proceedings seeking to rescind voluntary paternity acknowledgments based on lack of genetic ties.<sup>10</sup> Next, in Part III the paper reviews other paternity disestablishment standards in Illinois. In doing so, it reveals that the conditions for paternity disestablishment frequently are dependent upon the same techniques employed for paternity establishment. Here, certain legal distinctions are, at the least, unsound. The paper concludes in Part IV with suggested reforms for both federal and Illinois laws on initial paternity designations,<sup>11</sup> and on later paternity disestablishments.

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7. See, e.g., *In re D.W.*, 827 N.E.2d 466 (Ill. 2005) (holding that statute differentiating between categories of genetic mothers subject to parental rights terminations violated equal protection).

8. *People v. Smith*, 818 N.E.2d 1204 (Ill. 2004).

9. There were about 660,000 in 1980 and about 1.4 million in 2002. See 52 NAT'L VITAL STAT. REP. No. 10, at 10 (2003) (showing also that the percent of births to unmarried women rose from about nineteen to thirty-four percent during the same time).

10. There is some evidence that many acknowledgments are incorrect in asserting, without testing, the existence of genetic ties between the signing father and the child. See, e.g., *Who Is Your Daddy?*, 24 J. JUVENILE L. 91, 99 (2003) ("[T]he American Association of Blood Banks reported that in 1999, thirty percent of 280,000 cases excluded the tested men as the father of the tested child.").

11. Early, accurate, informed and conclusive legal paternity designations are crucial not only to genetic fathers and nongenetic fathers who actually parent from birth, but also to mothers, their children, and others (such as grandparents). See, e.g., James A. Gaudino Jr., et al., *No Fathers' Names: A Risk Factor for Infant Mortality in the State of Georgia, USA*, 48 SOC. SCI. & MED. 253, 263 (1999) (concluding that "missing fathers' names on birth

## I. FEDERAL MANDATES ON ESTABLISHING AND RESCINDING VOLUNTARY PATERNITY ACKNOWLEDGMENTS

Under federal law, voluntary paternity acknowledgment standards for births to unmarried women originate in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>12</sup> There, Congress replaced the Aid to Families with Dependent Children (AFDC) program, contained in Title IV-A of the Social Security Act, with a program of block grants to the states for Temporary Assistance for Needy Families (TANF).<sup>13</sup> Although state participation in the TANF (and AFDC) program was voluntary, participation required compliance with the requirements of Title IV-D of the Social Security Act and with its accompanying regulations, including mandates regarding paternity establishment.<sup>14</sup>

Within Title IV-D, Congress enacted guidelines to improve paternity establishment techniques as well as the enforcement of child support orders. One key provision requires unwed mothers receiving public aid to cooperate “in good faith” in establishing legal paternity in the genetic father where appropriate (as with most unmarried mothers who bear children as a result of consensual sexual intercourse between adults).<sup>15</sup> Another important section addresses voluntary acknowledgments of paternity by putative fathers.<sup>16</sup> In this section, Congress described methods by which a participating state must provide a putative father with the opportunity to execute a voluntary acknowledgment.<sup>17</sup> One general provision requires states to

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certificates, a measure of paternity, was a more important risk factor for infant mortality in Georgia than unmarried status. This finding suggests that fathers, in some way, may influence infant health”).

12. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-93, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

13. Temporary Assistance for Needy Families Act, 42 U.S.C. § 601 (2000).

14. See, e.g., 42 U.S.C. § 654(20) (child support enforcement effectiveness); 42 U.S.C. § 666(a)(2) (expedited administrative and judicial procedures for establishing paternity). The limits on federal funding programs conditioned on compliance with Congressional mandates are reviewed in *South Dakota v. Dole*, 483 U.S. 203 (1987).

15. 42 U.S.C. § 654(29)(A).

16. 42 U.S.C. § 666(a)(5)(C)-(E); see also Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 486-88 (2005) (reviewing the guidelines and their history).

17. See 42 U.S.C. § 666(a)(5)(C) (requiring a state to provide the opportunity in a hospital or in a state agency office). Incidentally, such acknowledgments may go by different names in state statutes. See, e.g., N.J. STAT. ANN. § 9:17-41 (West 2006) (“Certificate of Parentage”); N.J. STAT. ANN. § 26:8-28.1 (West 2006) (noting that a “Certificate of Parentage . . . shall serve as the voluntary acknowledgment of paternity by a father”).

establish procedures for a “simple civil process for voluntarily acknowledging paternity.”<sup>18</sup> Another, more specific, provision declares that states should have procedures for a “hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after the birth of a child.”<sup>19</sup> Yet another provision says “the State agency responsible for maintaining birth records” must offer “voluntary paternity establishment services.”<sup>20</sup> State laws must follow these federal guidelines<sup>21</sup> in order for states to participate in Title IV-D programs.

Related federal law requires states to develop procedures to include the name of the father on the birth certificate of a child of unmarried parents, but only if “the father and mother have signed a voluntary acknowledgment of paternity” or if “a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.”<sup>22</sup> Another says that states must consider a signed voluntary acknowledgment of paternity to be a legal finding of paternity.<sup>23</sup> This legal finding can be rescinded, however, within the earlier of: (1) sixty days of the signing; or (2) “the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.”<sup>24</sup> Thereafter, a signed voluntary acknowledgment of paternity can be challenged only on the “basis of fraud, duress, or material mistake of fact, with the burden on proof upon the challenger.”<sup>25</sup>

Federal statutes do not provide meaning for the terms “fraud,” “duress” or “material mistake of fact,” nor do federal regulations or the legislative history of the Social Security Act. One federal regulation does say that when there are allegations that “fraud has been practiced” in a TANF program the “definition of fraud . . . will be determined in accordance with State law.”<sup>26</sup> In other federal programs, similar terms have been specifically defined. For example, when the Department of Housing and

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18. 42 U.S.C. § 666(a)(5)(C)(i).

19. 42 U.S.C. § 666(a)(5)(C)(ii).

20. 42 U.S.C. § 666(a)(5)(C)(iii)(I).

21. There are both federal statutory — for example, parent’s social security numbers — and federal regulatory, as established by the Secretary of the Department of Health and Human Resources, guidelines. *E.g.*, 42 U.S.C. § 652(a)(7); 42 U.S.C. § 666(a)(5)(c)(iv).

22. 42 U.S.C. § 666(a)(5)(D)(i)(I)-(II).

23. 42 U.S.C. § 666(a)(5)(D)(ii).

24. 42 U.S.C. § 666(a)(5)(D)(ii)(I)-(II).

25. 42 U.S.C. § 666(a)(5)(D)(iii). Implementation of these rescission standards, on occasion, proves challenging. See N.J. STAT. ANN. § 9:17-41b (providing for rescission within 60 days); N.J. STAT. ANN. § 26:8-30 (West 2006) (seemingly declaring that rescission may occur within 60 days only for “fraud, duress or material mistake of fact”).

26. 45 C.F.R. § 235.110 (2005).

Urban Development seeks a recovery based on fraud, it is defined, in part, as “a single act or pattern of actions . . . that constitutes false statement, omission, or concealment of a substantive fact, made with intent to deceive or mislead.”<sup>27</sup> And, when an individual represents a client before the United States Patent and Trademark Office, fraud means “conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”<sup>28</sup> Within Title IV-D and related written federal laws, it remains unclear whether for fraud there must be an “intent” or “purpose” to “deceive.”

While federal lawmakers have remained silent on the meaning of fraud, duress, and material mistake of fact in voluntary paternity acknowledgment settings, surely paternity disestablishments have now become more difficult. A Maine case illustrates an earlier, more sympathetic attitude toward nongenetic fathers who challenged voluntary paternity acknowledgments. The case involved Jerome Blaisdell, who lived with Pamela Flewelling beginning in 1991.<sup>29</sup> Between 1993 and 1996 Jerome worked in northern Maine during the week, returning home to Pamela only on weekends.<sup>30</sup> In 1994 Pamela gave birth to a son, Ryan.<sup>31</sup> A trial court found that at the time of birth, Jerome “was aware of the possibility” that he was not Ryan’s genetic father.<sup>32</sup> Nevertheless, in the Fall of 1996, Jerome signed papers acknowledging paternity.<sup>33</sup> Later that year, the Maine Department of Human Services (DHS) commenced a paternity proceeding. In doing so, it advised Jerome he “could undergo genetic testing.”<sup>34</sup> Jerome declined and a trial court ordered him to pay past and future child support.<sup>35</sup> In June, 1999 the relationship between Jerome and Pamela ended, a relationship which the Maine high court later said Jerome “believed” was “monogamous.”<sup>36</sup> At the time of the breakup, Pamela told Jerome “he was not Ryan’s [genetic] father,” shocking Jerome.<sup>37</sup> As time

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27. 24 C.F.R. § 792.103 (2005).

28. 37 C.F.R. § 11.1 (2005).

29. Dep’t. of Human Services v. Blaisdell (Blaisdell I), 816 A.2d 55, 55 (Me. 2002).

30. Dep’t. of Human Services v. Blaisdell (Blaisdell II), 847 A.2d 404, 405 (Me. 2004).

31. *Blaisdell I*, 816 A.2d at 55.

32. *Blaisdell II*, 847 A.2d at 404.

33. *Id.* at 405-06 (Jerome “freely acknowledged paternity”).

34. *Id.*

35. *Id.*

36. *Blaisdell I*, 816 A.2d at 56.

37. *Id.*

passed, Jerome heard “persistent rumors,”<sup>38</sup> finally prompting him to obtain “genetic testing” in 2001.<sup>39</sup>

In March, 2001 Jerome moved to modify the 1996 judgment under a Maine civil procedure rule allowing modification for a “reason justifying relief.”<sup>40</sup> The trial court granted the motion and the parties agreed that the trial court “acted within its discretion in amending the 1996 judgment to indicate Blaisdell [was] not the child’s father.”<sup>41</sup> There was no mention of fraud, duress or material mistake of fact; of the true genetic father (and whether he had ever stepped up to, or was forced into, parental responsibilities); of the reasonableness of the timing of Jerome’s suspicion nor of the time lag in Jerome’s pursuit of testing once he had cause for suspicion; or, of Pamelas’s, or Ryan’s, or Maine’s stance on disestablishment.<sup>42</sup> Under TANF-driven mandates in Maine today,<sup>43</sup> Jerome’s road to paternity disestablishment likely would be far more rocky, whether or not his acknowledgment was guided by federal law.<sup>44</sup>

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38. *Id.*

39. *Blaisdell II*, 847 A.2d at 405.

40. *Blaisdell I*, 816 A.2d at 56 (citing ME. R. OF CIV. P. 60(b)(6)).

41. *Blaisdell II*, 847 A.2d at 406. Additionally, in *Blaisdell I* the court had found that DHS had a “vested right to the overdue payments” though Jerome would have no new support obligations; DHS had a right to payments as it had “furnished support” for Ryan. 816 A.2d at 56.

42. Pamela and Ryan, upon the high court directive in *Blaisdell I*, “participated” in the proceeding involving Jerome’s request for modification of the 1996 judgment, but may not have been included within the “parties” who agreed the trial court acted “within its discretion” in granting the request. *Id.* at 405-406.

43. ME. REV. STAT. ANN. tit. 19-A, § 1616(1) (2006) (providing that after the right to rescind within 60 days ends, a signed voluntary paternity acknowledgment may be challenged in court only for “fraud, duress or material mistake of fact”).

44. Not all court-labeled paternity acknowledgments may be subject to federal guidelines. The “simple civil process for voluntarily acknowledging paternity” subject to federal limitations, 42 U.S.C. § 666(a)(5)(C)(i), may extend only to “hospital-based” acknowledgments “immediately before or after” birth, 42 U.S.C. § 666(a)(5)(C)(ii), and to “State agency . . . voluntary paternity establishment services,” 42 U.S.C. § 666(a)(5)(C)(iii). Thus, for example, acknowledgments during in-court paternity proceedings technically may not be limited by federal rescission guidelines. See, e.g., *F.B. v. A.L.G.*, 821 A.2d 1157 (N.J. 2003) (holding that man who “acknowledged under oath” that he was the genetic father during a “typical paternity and support action” against him and also was described as having “signed . . . sworn Admission of Paternity,” could seek disestablishment under the law on relief from judgments). However, in *F.B.*, no mention is made of New Jersey Statute § 9:17-41b on rescissionrescissions of voluntary acknowledgments based on fraud, duress, or mistake grounds, though fraud was relevant in the Rule 4:50-1 analysis. Yet troublesome equality issues clearly arise when states differentiate comparable statements acknowledging paternity by where the statements were signed. It is unclear where Jerome Blaisdell signed his acknowledgment.



The lack of precise federal standards on fraud, duress, and material mistake has led to the use of state laws without much inquiry into the balance of federal and state governmental interests. Such interests include the desirability for uniformity via the use of federal law and the traditional federal constitutional deference to state laws on family matters. As a result, there is no uniform treatment of similarly-situated men who voluntarily acknowledge paternity in the absence of genetic ties,<sup>45</sup> though uniformity could be achieved by more particular federal laws. The following cases illustrate interstate differences on fraud, duress, and material mistake of fact.<sup>46</sup>

## II. STATE LAWS ON RESCINDING VOLUNTARY PATERNITY ACKNOWLEDGMENTS BY NONGENETIC DADS

### A. Illinois

In September, 2004, the Illinois high court decided *People v. Smith*. The case involved Romel Smith, an unwed man who sought to rescind his October 11, 1997 in-hospital voluntary paternity acknowledgment to Kendra Smith, born October 9, 1997,<sup>47</sup> that established a presumption he was “the natural father.”<sup>48</sup> The rescission request was based on an erroneous “representation” of his genetic ties by the unwed mother, Valerie Dawson,<sup>49</sup> around the time of birth. Romel attempted rescission after DNA testing in 2002 established a lack of genetic ties.<sup>50</sup>

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45. There is also no uniformity in many other realms of American paternity law. See, e.g., David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126-27 (2006) (noting that “it is plain enough that social and legal conceptions of what it means to be a ‘parent’ are now in play as never before”).

46. There are other interstate differences on rescissions of federally-guided voluntary paternity acknowledgments. For example, in some, but not all states there are time limits on presenting fraud, duress, or material mistake challenges to earlier acknowledgments. Compare, e.g., MASS. GEN. LAWS ch. 209C, §11 (2004) (“challenge within one year”), with 750 ILL. COMP. STAT. 45/6(d) (2004) (no time limit mentioned), and N.Y. FAM. CT. ACT § 516-a(b) (McKinney 2005) (no time limit mentioned).

47. *Smith*, 818 N.E.2d at 1205.

48. 750 ILL. COMP. STAT. 45/5(a)(3) (2004).

49. *Smith*, 818 N.E.2d at 1206. Smith signed the acknowledgment at the hospital two days after Kendra’s birth; the acknowledgment was a two-sided legal form developed by the Illinois Department of Public Aid. Brief of the Plaintiff-Appellee, *Illinois v. Smith*, No. 97120, 2004 WL 3221803, at \*4 (Ill. March 2, 2004). The form was also signed by Valerie who therein claimed that Romel “is the biological father of this child”. Petition for Leave to Appeal, *Illinois v. Smith*, No. 97120, 2003 WL 24033201, at \*6 (Ill. October 10, 2003).

50. *Smith*, 818 N.E.2d at 1206 (noting that Romel undertook testing because Kendra “did not share any of his physical characteristics”). The testing evidently was done “without Valerie’s permission or knowledge” during

Romel's request was opposed by the state, which had secured a court order of child support against Romel on behalf of the Department of Public Aid in 1998.<sup>51</sup> Romel failed in his effort to rescind as the high court determined that section 5 of the Illinois Parentage Act makes conclusive the presumption of natural fatherhood arising out of Romel's voluntary acknowledgment of paternity. Under sections 5(a) and (b), there could be no easy rescission if the acknowledgment was not challenged before the earlier of: (1) sixty days after the acknowledgment was signed; or (2) the date of an administrative or judicial proceeding involving the child in which the signatory was a party.<sup>52</sup> Thereafter, Section 6(d) of the Act only allows a challenge by a presumed natural father like Romel "on the basis of fraud, duress, or material mistake of fact."<sup>53</sup> The court did not rule on whether fraud, duress, or material mistake of fact applied to Romel, as these issues were not properly raised.<sup>54</sup> It did say, however, that any post-sixty day attack on these issues would be governed by the Civil Procedure Code provision on relief from judgments<sup>55</sup> as well as by federal laws.<sup>56</sup> The Illinois high court also suggested that if the legal

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a period when Romel had visitation. *Petition for Leave to Appeal*, *supra* note 49, at \*7.

51. *Smith*, 818 N.E.2d at 1206-07.

52. 750 ILL. COMP. STAT. 45/5(a)(3), (b) (2004). The same standard applies to a voluntary acknowledgment of parentage. 750 ILL. COMP. STAT. 45/5(a)(4), (b) (2004). Notably, an acknowledgment of parentage occurs under the Vital Records Act, 410 ILL. COMP. STAT. 535/12, while an acknowledgment of paternity occurs under the Public Aid Code, 305 ILL. COMP. STAT. 5/10-17.7. But, 750 ILL. COMP. STAT. 45/5(a)(3)-(4) (2004) parentage acknowledgments seemingly differ from paternity acknowledgments as only the former are tied to birth certificate practices around the time of birth. *See* 410 ILL. COMP. STAT. 535/12(4) (parentage); 305 ILL. COMP. STAT. 5/10-17.7 (paternity).

53. *Smith*, 818 N.E.2d at 1208, n.1 (stating that Romel never amended his complaint to allege a cause of action on a section 6(d) grounds); *see also Brief of the Plaintiff-Appellee*, *supra* note 49, at \*9 (stating that, though Romel "urged" the trial court to consider "whether his complaint contained an allegation of fraud," the court ruling was "confined" to to "Section 7(b-5) relief"); 750 ILL. COMP. STAT. 45/6(d) (2004) (providing that one who challenges a voluntary paternity acknowledgment has the burden of proof).

54. *Smith*, 818 N.E.2d at 1208, n.1 (noting that Romel did not amend his complaint); *see also Brief of the Plaintiff-Appellee*, *supra* note 49, at \*9 (stating that Romel "urged the trial court to consider whether his complaint contained an allegation of fraud").

55. *See Smith*, 818 N.E.2d at 1210 (finding that 735 ILL. COMP. STAT. 5/2-1401(a) was amended at the time section 6(d) was added so as to differentiate section 6(d) petitions from other postjudgment proceedings).

56. *See Smith*, 818 N.E.2d at 1212 (noting that the section 6(d) amendment was "not passed on a whim," but served to bring Illinois law "in line with Title IV-D of the Social Security Act"). In fact, section 6(d) goes beyond the federal mandate as it applies the sixty day rule, with its exceptions, to all voluntary acknowledgments, not just to those involved with federal welfare law (i.e., acknowledgments involving children receiving federally-subsidized aid). *Cf.*,

paternity of Romel had been established in some other way, as through a lawsuit involving the dissolution of a marriage between Romel and Valerie, the sixty day period would not have applied.<sup>57</sup>

In the aftermath of *Smith*, Illinois policies on rescissions of voluntary paternity acknowledgments remain unclear. Can an erroneous "representation" by an unwed mother like Valerie ever lead to fraud, duress, or material mistake? If so, what constitutes a "representation"? Are outright lies (including an "intent" or "purpose" to "deceive") necessary? After *Smith*, there will continue differing policies for Illinois men seeking to disestablish paternity due to a lack of genetic ties, with the differences dependent upon the techniques employed for paternity establishment. Thus, married men subject to legal paternity through marital presumptions (as opposed to unmarried men subject to legal paternity through voluntary acknowledgment presumptions) now have more than sixty days to seek disestablishment. Upon challenge, will the variations between different fathers-in-law who seek disestablishment due to lack of genetic ties be deemed reasonable and constitutional? Moreover, is it important that the state, rather than Valerie (or an alleged genetic father), oppose the disestablishment request?

While the Illinois Supreme Court did not address fraud in Romel's case, other Illinois decisions shed some light on how these guidelines will be read.<sup>58</sup> In civil cases not involving Section 6(d) of the Illinois Parentage Act, there are "two types of fraud"<sup>59</sup> governing petitions for relief from trial court judgments. Extrinsic fraud prevents a court from truly acquiring authority, giving it only colorable jurisdiction. It includes circumstances where "the unsuccessful party has been prevented from exhibiting fully his case . . . as by keeping him away from court . . . or where the defendant never had knowledge of the suit . . ."<sup>60</sup> Extrinsic fraud has also been described as "conduct that is collateral to the issues in the case and . . . prevents the unsuccessful party from having a fair opportunity to participate and defend in the action."<sup>61</sup> By

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*e.g.*, LA. CIV. CODE ANN. ART. 196 ("Except as otherwise provided in custody, visitation, and child support cases, the acknowledgment does not create a presumption in favor of the man who acknowledges the child.").

57. See *Smith*, 818 N.E.2d at 1210 (mentioning marriage dissolution cases). Romel, in fact, urged that he had more time under 750 ILL. COMP. STAT. 45/7(b-5) (2004) because he had been "adjudicated" to be the father in a "judgment" since his voluntary acknowledgment had, by statute, "the same effect as a judgment." *Id.* at 1207. Romel lost on that argument. *Id.*

58. See also 750 ILL. COMP. STAT. 45/6(d) (placing "the burden of proof" in a voluntary paternity acknowledgment challenge upon the "challenging party").

59. *Falcon v. Faulkner*, 567 N.E.2d 686, 694 (Ill. App. Ct. 1991).

60. See *Falcon*, 567 N.E.2d at 694-5 (quoting *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878)).

61. *Doctor's Assoc. Inc. v. Duree*, 745 N.E.2d 1270, 1280 (Ill. App. Ct. 2001).

contrast, intrinsic fraud occurs after a court has acquired jurisdiction, as when there is false testimony or concealment.<sup>62</sup> Under Illinois precedents, only extrinsic fraud can support a petition to render a judgment void.<sup>63</sup> While there is no Illinois precedent, elsewhere state courts are divided on whether Valerie's acts would constitute extrinsic or intrinsic fraud.<sup>64</sup> Notwithstanding the *Smith* ruling, the variations on fraud in procuring a court judgment seem inappropriate in a voluntary paternity acknowledgment setting. There is no trial judge at the hospital or at an agency to insure procedural fairness and that the testimonials of voluntary acknowledgers are trustworthy and uninhibited, based on real fears of perjury or other sanctions for lies.<sup>65</sup> In fact, rather than using the general standards on fraud for modifying a judgment (where a judgment is often not even entered around the time of the voluntary paternity acknowledgment), the court in *Smith* could have required the use of the special fraud standards operative in comparable paternity disestablishment settings.<sup>66</sup> For example, many paternity judgments arising after

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62. *Falcon*, 567 N.E.2d at 694 (declaring that a judgment debtor may not attack a judgment on "grounds that could have been presented . . . when the judgment was rendered").

63. *Duree*, 745 N.E.2d at 1280.

64. In Florida, for example, the lower appellate courts are divided. See *Parker v. Parker*, 916 So. 2d 926 (Fla. Dist. Ct. App. 2005) (reviewing other state cases and agreeing with the majority view that paternity misrepresentation in a divorce case is a matter of intrinsic fraud, though there was contrary precedent in the First District Court of Appeal in Florida). *But see Temple v. Archambo*, 161 S.W.3d 217 (Tex. 2005) (using an extrinsic/intrinsic fraud analysis when a former husband sought to disestablish paternity arising out of an agreed decree from eleven years earlier; court found no extrinsic fraud, though there was intrinsic fraud, and former husband lost).

65. In a civil case setting, a de facto paternity acknowledgment can be made, for example, when a man agrees with woman's allegation that a child is his genetic offspring. Here, however, there may be lawyers and there surely is a trial judge overseeing, with that judge often significantly concerned with truth-seeking (as in marriage dissolution cases involving kids). As well, in court cases there seemingly would be a more significant fear of perjury, sanction, or other fallout from lying or misrepresenting than in paper acknowledgments that occur in hospitals (where there are no governmental officials), or in agency offices.

66. See, e.g., *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006) (sustaining the special statutory provisions on rescissions as they do not infringe on judicial rulemaking powers). Incidentally, the Ohio provision in *Loyd* may face new challenges, as it seemingly mandates rescissions of voluntary paternity acknowledgments after sixty days without fraud or duress and allows material mistake of fact to encompass men who "did not know" they lacked genetic ties before acknowledging paternity, without any statutory indication of time limits or of barriers to rescission caused by the delay in seeking rescission after learning post-birth of the lack of genetic ties. See OHIO REV. CODE ANN. § 3119.962(A)(2)(c) (2004).

court proceedings are founded on defaults or on settlements regarding genetic fatherhood involving solely statements of alleged fathers (and perhaps mothers) which, like voluntary acknowledgments, go significantly untested for accuracy or truthfulness. Illinois legislators should now consider revising the *Smith* decision by amending the Illinois statute on voluntary paternity acknowledgment rescissions.<sup>67</sup> In doing so they should explicitly unify the procedural standards employed for undoing all comparable paternity concessions, be they in voluntary paternity acknowledgments, court proceedings, or in agreements on fatherhood.

Similarly, the substantive Illinois rescission standards involving either duress or material mistake of fact should be unified to govern all comparable forms of paternity concessions, including admissions in parentage or marriage dissolution cases. As with fraud, the articulated substantive standards on relief from civil case judgments do not explicitly mention duress or material mistake of fact<sup>68</sup> and do not easily translate into paternity acknowledgment settings.

Other state courts have ruled on similar post-sixty-day attacks on voluntary paternity acknowledgments founded on a lack of genetic ties. They demonstrate that there are significant interstate differences even though all in-hospital and in-agency acknowledgments are guided by the Social Security Act.<sup>69</sup>

### B. Connecticut

A Connecticut Superior Court ruled in *Thompson v. Fulse*<sup>70</sup> that a February, 2004 motion to reopen a December 4, 1989 Connecticut court judgment based on a voluntary acknowledgment signed in Florida by Willie Fulse on October 16, 1989,<sup>71</sup> about

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67. 750 ILL. COMP. STAT. 45/6(d) (2004). For postjudgment attacks on paternity designations in circuit court actions, Illinois legislators might consider a special statutory provision overriding the general provision of 735 ILL. COMP. STAT. 5/2-1401(a) (2004). See, e.g., GA. CODE ANN. § 19-7-54 (2004).

68. 735 ILL. COMP. STAT. 5/2-1401(a) (2004).

69. Rescission petitions usually are presented in trial court proceedings, most often by nongenetic fathers seeking paternity disestablishment. These proceedings can begin as child support claims presented against nongenetic fathers. Thus, Romel Smith sought to rescind his voluntary acknowledgment of paternity, dated October 11, 1997, in a proceeding begun on December 3, 1997, by the State of Illinois for child support on behalf of his alleged daughter, Kendra. *Smith*, 818 N.E.2d at 1205-07.

70. *Thompson v. Fulse*, No. FA890605982S, 2004 WL 1832891 (Conn. Super. Ct., July 6, 2004).

71. *Thompson*, 2004 WL 1832891, at \*1. Willie was in Florida to attend college, having commenced in the latter part of 1989. *Id.*

seven months after the birth of Rishawn Fulse in Connecticut,<sup>72</sup> could only be pursued on the basis of “fraud, duress or material mistake of fact . . . with the burden of proof upon the challenger.”<sup>73</sup> On fraud, the Connecticut court required proof:

(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon the false representation to his detriment.<sup>74</sup>

Willie failed to show fraud because the mother, Andrea Thompson, did not “intentionally” keep her sexual liaisons with Trevor, her former boyfriend, from Willie,<sup>75</sup> although she had told Willie while she was pregnant that he was the father. Around March of 1990, Willie learned from Andrea that he “was not Rishawn’s father.”<sup>76</sup> Willie did not then seek rescission of his voluntary paternity acknowledgment because he thought “the matter had been taken care of” by Andrea.<sup>77</sup> Willie only realized that it had not been taken care of on April 21, 2003, when he was served with papers to appear in a Connecticut child support proceeding, seemingly prompted by Andrea’s receipt of state assistance.<sup>78</sup> Before then, Willie “had some minimal contact” with Rishawn but had never been asked by Andrea for child support.<sup>79</sup> While Willie Fulse failed to prove fraud, he nevertheless did obtain a Connecticut court order vacating the paternity acknowledgment due to a “material mistake of fact.”<sup>80</sup> It would seem that Romel Smith was far more mistaken as to his paternity, but, unlike Willie Fulse, Romel obtained no rescission.

### C. Tennessee

In Tennessee a man can rescind a voluntary paternity acknowledgment on the basis of extrinsic or intrinsic fraud, as well

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72. *Id.* at \*1 (noting that Rishawn was born in Hartford, Connecticut while the parents “were 17-year-old high school students”).

73. *Id.* at \*2 (quoting CONN. GEN. STAT. § 46b-172 (2005)).

74. *Id.* at \*2. The court also noted the heavy burden of proof, “clear and satisfactory evidence,” more stringent than mere preponderance. *Id.* (internal quotation marks omitted).

75. *Id.* at \*3. Andrea, though, “may have failed to disclose.” *Id.*

76. *Id.* at \*1. Willie could not be the genetic father as Rishawn had Sickle Cell Anemia. *Id.*

77. *Id.* at \*1.

78. *Id.*

79. *Id.* at \*2.

80. *Id.* at \*3-5 (finding that, in this “unique” case, Willie’s arguments were “slightly more persuasive, particularly from Rishawn’s point of view,” as the child might be helped “from a medical history standpoint” if Trevor was named legal father; accordingly, the trial court retained jurisdiction and ordered genetic testing of Andrea, Willie, and Rishawn).

as duress or material mistake of fact.<sup>81</sup> In *Granderson v. Hicks*, a mother, Lisa Stephens Hicks, and a putative father, Larry C. Granderson, entered in 1986 into “a voluntary consent order of paternity” in a paternity case involving Myisha Stephens, then about four months old.<sup>82</sup> In 1997, Larry sought to set aside related paternity and child support orders, or, in the alternative, to require blood tests after Lisa sought an increase in child support. The basis for Larry’s request was that Lisa had told another man that he was Myisha’s father and had “openly held out to others that the third party [was] Myisha’s father.”<sup>83</sup> The trial court denied the request without an evidentiary hearing.

An appeals court reversed,<sup>84</sup> initially noting a Tennessee statute allowing a trial court in any civil proceeding wherein there is a “question of parentage” to order, when “equitable,” testing “for purposes of establishing or disproving parentage.”<sup>85</sup> Yet it also said that this statute “must be construed along with” the statutory provisions for undoing voluntary paternity acknowledgments,<sup>86</sup> which may be challenged for fraud, duress, or mistake within five years,<sup>87</sup> or beyond five years where there is “fraud in the procurement of the acknowledgment by the mother” and “the requested relief will not affect the interest of the child, the state, or any Title IV-D agency.”<sup>88</sup> In reversing, the appeals court concluded that an evidentiary hearing should have been ordered on the allegation of “fraud in the procurement of the Consent Order.”<sup>89</sup> Thus, in Tennessee, there may be comparable paternity fraud standards applied to concessions in Title IV-D acknowledgments and in civil cases. In Tennessee, the requirement as to fraud varies depending upon how long ago it occurred and whether the government fisc will be impacted.

The ruling in *Granderson* was relied upon in the 2005 Tennessee decision of *State v. Wilson*. There, Cedrick Cortez Wilson sought, in December 2003, “to rescind his voluntary legitimation of [his] child,” Cortarius Tyrez Taylor, born in 1999.<sup>90</sup> He did not seek a similar remedy regarding Cedric Cortez Wilson, Jr., born in 1995. Both boys were born to Brandi Shantika Taylor and were determined to be Cedrick’s sons under a February, 2002

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81. TENN. CODE ANN. § 24-7-118(e) (2003).

82. No. 02A01-9801-JV-00007, 1998 WL 886559, at \*1 (Tenn. Ct. App. Dec. 17, 1998).

83. *Granderson*, 1998 WL 886559, at \*1.

84. *Id.* at \*4.

85. *Id.* at \*2 (quoting TENN. CODE ANN. § 24-7-112(a)(2) (2003)).

86. *Id.* at \*4.

87. *Id.* at \*3 (citing TENN. CODE 24-7-118(e)(1)-(2)).

88. *Id.* (quoting TENN. CODE 24-7-118(e)(2)).

89. *Id.* at \*4.

90. *State v. Wilson*, No. W2004-00275-COA-R3-JV, 2005 WL 517548, at \*3-4 (Tenn. Ct. App. March 3, 2005).

Juvenile Court order.<sup>91</sup> The rescission request to end Cedrick's child support obligations to Cortarius was prompted when Brandi informed Cedrick "there was a possibility that he was not the father."<sup>92</sup> A trial court denied the petition to disestablish paternity in June, 2003. It recognized custody of both boys in Cedrick, who then took the boys "to his home in California." He later had testing of both boys done that confirmed genetic ties only between Cedrick and Cedrick, Jr.<sup>93</sup> Cortarius was returned to Brandi in July, 2003.

In December, 2003, Cedrick filed "a Petition to Rescind Voluntary Legitimation" of Cortarius as well as a request to modify related custody and support orders.<sup>94</sup> On January 9, 2004, this petition was dismissed by the trial court. On January 22, 2004, Brandi sought custody of Cortarius based on DNA testing showing a lack of genetic ties between him and Cedrick.<sup>95</sup> Cedrick appealed the dismissal, urging that a Tennessee civil procedure rule allowed him to obtain relief from the February, 2002 order.<sup>96</sup> The rule allows relief "within a reasonable time" when "it is no longer equitable that a judgment should have prospective application."<sup>97</sup>

The appeals court granted Cedrick's rescission petition after "analyzing the burdens . . . on all who have an interest," which it said included Cedrick, Brandi, Cortarius, and the State of Tennessee.<sup>98</sup> Interestingly, when it ruled, Brandi and Cortarius were likely living in Mississippi,<sup>99</sup> and Cedrick (and Cedrick Jr.) apparently were living in California. The interest analysis was undertaken against a backdrop of several Tennessee cases, including *Granderson*, which "strongly" established the state policy "favoring the requiring of biological parents to bear responsibility for their own children."<sup>100</sup> In ruling that the trial court "abused its discretion in failing to grant relief to Mr. Wilson,"<sup>101</sup> the appellate court revealed the "suggestion in the record" that the genetic father of Cortarius was then "incarcerated in Oklahoma."<sup>102</sup> It also found it "unlikely" that the existing relationships between Cortarius and the two Cedricks would be

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Id.* at \*2 (referencing TENN. R. CIV. P. 60.02).

97. *Id.* (quoting TENN. R. CIV. P. 60.02(4)).

98. *Id.* at \*4.

99. *See Id.* at \*1 (relying on a suggestion in the briefs regarding the residence of Brandi and Cortarius).

100. *Id.* at \*4-5.

101. *Id.* at \*5.

102. *Id.*



severed as Cortarius still had a “half-brother,” Cedric Jr., who was fathered by Cedrick, Sr.<sup>103</sup> While using *Granderson*, the Wilson court seemingly did distinguish out-of-court and in-court acknowledgments, with the latter at times more easily rescinded since Title IV-D mandates do not technically apply (though the *Granderson* court found them helpful in construing state public policy).

#### D. New York

The New York voluntary paternity acknowledgment statute declares that sixty days after signing, a father “may challenge the acknowledgment of paternity in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the party challenging the voluntary acknowledgment.”<sup>104</sup> The statute further says that upon receiving a challenge to an acknowledgment, “the court shall order genetic marker tests or DNA tests for the determination of the child’s paternity and shall make a finding of paternity, if appropriate.”<sup>105</sup> In a 1999 case, *Wilson v. Lumb*, a trial judge required “genetic marker tests or DNA tests”<sup>106</sup> on behalf of a man who had signed a voluntary acknowledgment shortly after birth and more than sixty days earlier, but who later “became suspicious of the child’s parentage.”<sup>107</sup> The challenge came during a proceeding in which the man was sued for child support.<sup>108</sup> While ruling that genetic testing should precede any “hearing on fraud, duress or material mistake of fact,”<sup>109</sup> the trial court noted the “lack of case precedent” on the statute, “which may not be clearly worded.”<sup>110</sup> It also noted the absence of any express direction that the best interests of the child be considered before testing is ordered.<sup>111</sup> It further opined

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103. *Id.*

104. N.Y. FAM. CT. ACT § 516-a(b) (McKinney 2005).

105. *Id.*

106. 696 N.Y.S.2d 398, 401 (N.Y. Sup. Ct. 1999).

107. *See id.* at 399 (noting that “sometime later” suspicion arose when relatives told the man and/or his mother that “he might not be the baby’s father,” and when a letter was found addressed to the mother about 9 months before the baby’s birth).

108. *Id.*

109. *Id.* at 401. *Cf. Hammack v. Hammack*, 737 N.Y.S.2d 702 (N.Y. App. Div. 2002) (finding that a different New York statute, N.Y. FAMILY COURT ACT § 418(a) (McKinney 2005), was applicable when a divorced man sought to undo paternity established during an earlier marriage dissolution proceeding for children born during marriage; § 418(a) was read to require denial of requested testing when not in children’s best interests).

110. *Wilson*, 696 N.Y.S.2d at 400.

111. *Id.* at 401 (opining that perhaps legislators thought “active misrepresentation or wrongdoing” by a mother is enough “justification” for rescission). *But see* *Melissa B. v. Robert W.R.*, 803 N.Y.S.2d 672 (N.Y. App. Div. 2005) (presenting a contrary analysis to *Wilson* on both the pretest need

that while “blood test results” alone do not always “establish biological parentage,”<sup>112</sup> voluntary paternity acknowledgments may be “more easily set aside” with such test results than certain court orders of filiation, including court orders accompanied by “stricter, more comprehensive” waivers of rights.<sup>113</sup> Thus, like the *Wilson* court in Tennessee, the *Lumb* court in New York recognized paternity acknowledgments by nongenetic fathers, though the New York court focused on voluntariness rather than on biology and viewed more warily requests for rescissions of acknowledgments.<sup>114</sup>

### E. Oklahoma

In a case reminiscent of Romel Smith’s, an Oklahoma appellate court ruled on a rescission plea by Billy J. Chisum, who sought disestablishment of a voluntary paternity acknowledgment signed on the date of a child’s birth, June 7, 1999, and used in a 2000 administrative child support order.<sup>115</sup> Chisum proffered the rescission request in April, 2001 after completing private testing prompted by the mother’s statement that “Chisum was not the father.”<sup>116</sup> The appellate court avoided difficult issues regarding fraud, finding there was a “material mistake of fact” even though Chisum could have insisted on genetic testing before his acknowledgment.<sup>117</sup> It found no “neglect” by Chisum in failing to act on testing.<sup>118</sup> It reasoned that any testing at birth prompted by Chisum “would likely inject an element of hostility into . . . often times already volatile emotional relationships,” would be “expensive,” and may prompt unfortunate perceptions about “an

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for a hearing on fraud, duress, or mistake, and on the best interests of children).

112. *Wilson*, 696 N.Y.S.2d at 400 (citing *Clara C. v. William L.*, 692 N.Y.S.2d 569, 578-79 (N.Y. Fam. Ct. 1999)); see also *Charles v. Charles*, 745 N.Y.S.2d 572 (N.Y. App. Div. 2002) (notwithstanding a lack of genetic ties, a man may be a legal father if a child’s best interests are served).

113. *Wilson*, 696 N.Y.S.2d at 401 (citing *Ulster Cty. Dept. of Soc. Serv. v. Wilbert D.*, 145 Misc. 2d 362, 363 (N.Y. Fam. Ct. 1989)). Of course, there may not be such “stricter” waivers in filiation proceedings if the cases are simply based on previous acknowledgments of paternity. See *Mark D. v. Marion M.*, 785 N.Y.S.2d 204, 205 (N.Y. App. Div. 2004) (diverging from the *Wilson* case in that the acknowledged father seeking disestablishment proceeded on a motion for relief from a filiation judgment that he himself pursued eight years earlier, arguing “newly-discovered evidence” of infertility under N.Y. C.P.L.R. 5015(a)(2) (McKinney 2005); the father lost without any court ordered DNA or other testing).

114. *Wilson*, 696 N.Y.S.2d at 400-01.

115. *Dep’t. of Human Servs. v. Chisum*, 85 P.3d 860, 861 (Okla. Civ. App. 2004). Notably, the administrative order was “docketed” in a trial court in May 2000. *Id.*

116. *Chisum*, 85 P.3d at 861, n.1.

117. *Id.* at 862 (citing OKLA. STAT. tit. 10 § 70 (2005)).

118. *Id.* at 862.

attack on the mother's veracity and an attempt to shirk responsibility for the child."<sup>119</sup>

The court's rule seemingly facilitates attacks on paternity acknowledgments by mistaken nongenetic fathers regardless of how the mistakes arose. In doing so, it rejected arguments about the applicability of a best interests of the child, or an equitable estoppel analysis.<sup>120</sup> Further, it encouraged the current male partners of unwed new mothers to take on parentage by opening the door widely to rescissions once the partnerships end and genetic ties are found lacking.

#### F. Louisiana

In Louisiana, the standards on rescinding voluntary paternity acknowledgments are quite different in that they vary depending upon whether and when the acknowledging man was a husband of the mother and whether or not TANF services were in play. In *Faucheux v. Faucheux*,<sup>121</sup> a Louisiana appeals court ruled in October 2000 on an attempt by Ray Faucheux to void a paternity acknowledgment due to "fraud and duress." The acknowledgment covered Carley, a daughter born to Amy Faucheux before Ray and Amy even met.<sup>122</sup> One relevant statute said that an acknowledgment may be rescinded more than sixty days after the signing, but only if it "was induced by fraud, duress, or material mistake of fact, or that the father is not the biological father."<sup>123</sup> Another provided "for the acknowledgment of an illegitimate child by authentic act,"<sup>124</sup> and another said "every claim, set up by illegitimate children, may be contested by those who have any interest therein."<sup>125</sup> Given these laws, the appeals court found that "there is no prescriptive period for filing an action to rescind an acknowledgment,"<sup>126</sup> and that an acknowledgment usually cannot be valid where the acknowledging man is not the biological father.<sup>127</sup>

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119. *Id.* at 862 & n.2. Such testing would be problematic "at least where there is evidence that the mother has made positive assertions to the putative father concerning his paternity". *Id.* at 862.

120. *Id.* at 862-63. The court, though, noted that some precedents outside Oklahoma support such approaches, including *Monmouth Cty. Div. of Soc. Serv. v. R.K.*, 757 A.2d 319, 324 (N.J.Super. 2000). See also *Young v. Oklahoma*, 119 P.3d 1279, 1286 n.10 (Ok. Civ. App. 2005) (asserting that under *Chisum* rescissions rescission of paternity acknowledgments used for child support orders are guided by OKLA. STAT. tit. 10 § 70 rather than by the statutory standards for reopening final judgments).

121. 772 So. 2d 237 (La. Ct. App. 2000).

122. *Faucheux*, 772 So. 2d at 238.

123. *Id.* (quoting LA. REV. STAT. ANN. § 9:392(7)(b) (2005)).

124. *Id.* (describing then LA. CIV. CODE ANN. art. 203 (2005)).

125. *Id.* (quoting then LA. CIV. CODE ANN. art. 207 (2005)).

126. *Id.*

127. See *id.* (referencing then LA. CIV. CODE ANN. arts. 193-97, 203, to show

The *Faucheux* court cited to *Rousseve v. Jones*,<sup>128</sup> a 1997 Louisiana Supreme Court decision, which opined that an acknowledgment of an illegitimate child, executed in connection with a Title IV proceeding,<sup>129</sup> only creates a presumption of biological parentage which can be overridden whenever genetic ties are lacking, “absent some overriding concern of public policy.”<sup>130</sup> When such an acknowledgment forms the basis of a court judgment for child support, the *Rousseve* court recognized that Louisiana law then allowed an attack on the judgment if procured “by fraud or ill practice . . . within a year of the discovery of the fraud or ill practice.”<sup>131</sup> By contrast, the *Rousseve* court also noted that an action to disavow paternity by a man who was at some point in time the husband of the mother “generally must be filed within 180 days after the husband has learned . . . of the birth of the child.”<sup>132</sup> Yet, where such a husband “believed, because of misrepresentation, fraud, or deception by the mother, that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief or for ten years, whichever ends first.”<sup>133</sup>

Because unwed Matthew Rousseve had not yet proven his allegations, “that he had just become aware of fraud or misrepresentation by the child’s mother”<sup>134</sup> when he sought paternity disavowal, the high court remanded the case to the trial court for a hearing.<sup>135</sup> Clearly, though, because Matthew had never been married to the mother, he had more time to “sit on” his newfound discovery of nonpaternity (one year) than he would have had if he were a married man (180 days). As well, it was only a suggestion (or dictum) by the high court in *Rousseve* that a voluntary paternity acknowledgment unprompted by a court proceeding can be rescinded whenever no genetic ties are found. Perhaps the earlier-described Title IV federal guidelines on such rescissions express an “overriding concern of public policy”<sup>136</sup> that

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that the word filiation describes the fact of biological parentage).

128. *Id.*

129. *Rousseve v. Jones*, 704 So. 2d 229, 230 (La. 1997).

130. *Id.* at 232-33. The court, however, did not explore any possible public policy exceptions.

131. *Id.* at 233 (citing LA. CODE CIV. PROC. ANN. art. 2004 (2005)).

132. *Id.* at 231 & n.4 (citing LA. CIV. CODE ANN. art. 189 (2005)).

133. *Id.* at 231 (citing LA. REV. STAT. ANN. § 9:305 (2005)); *see also* LA. CIV. CODE art. 198 (2005) (providing that an action to establish paternity of a child presumed to be the child of another man shall be instituted within a year of birth, but up to ten years when the “mother in bad faith deceived” the genetic father); LA. REV. STAT. ANN. § 9:395.1 (2005) (establishing that the time period does “not apply to the Department of Social Services providing services in accordance with 42 U.S.C. 666”).

134. *Rousseve*, 704 So. 2d at 230.

135. *Id.* at 233.

136. Today, some statutes differentiate at times perhaps between voluntary

disallows easy rebuttals of presumed genetic ties arising with in-hospital and in-agency Title IV paternity acknowledgments. This analysis, however, was not undertaken in *Faucheux*.

### G. Summary

There is disagreement among state courts over the fraud, duress, or material mistake of fact that can undo in-hospital and in-agency voluntary paternity acknowledgments.<sup>137</sup> Five years to act, ten years to act, no real time limit on action? Is there a “material mistake” whenever a man is wrong about genetic ties, though there is no fraud? Should “neglect” to seek earlier testing be relevant, even though “hostility” and attacks on mothers’ veracity will be encouraged? Should the Title IV-D agency’s interests be considered when determining whether rescission can be pursued?

The cases reflect differing treatment of similarly-situated men, and of others involved in certain paternity disestablishments. Decreasing inequality and advancing uniformity are significant federal governmental interests that should prompt serious reconsideration of federal law standards.<sup>138</sup> In their absence, proposed “uniform” standards available to state legislators would be helpful.<sup>139</sup> Unifying federal standards, of

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paternity acknowledgments related (*Rousseve*) and unrelated (*Faucheux*) to Title IV proceedings. See, e.g., LA. REV. STAT. ANN. § 9:392(A)(7)(b) (2005) (providing that an attempt after sixty days to rescind a paternity acknowledgment may be based on absence of genetic ties, as well as “fraud, duress, or material mistake of fact”); LA. REV. STAT. ANN. § 9:392(B) (requiring that, in addition to Civil Code requirements, paternity acknowledgments must be in compliance with 42 U.S.C. 652(a)(7)); LA. REV. STAT. ANN. § 9:395.1 (providing that the generally applicable time period does not apply to the Department of Social Services acting under 42 U.S.C. 666).

137. See Paula Roberts, *Truth or Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 82 app. B (2003) (assembling and briefly describing state statutory provisions on rescinding voluntary paternity acknowledgments).

138. Federal law standards would also obviate troubling choice of law issues where relevant conduct occurred in several states. See, e.g., *In re Adoption of Colette Lichtenberg*, No. CA2002-11-125, 2003 WL 868306 (Ohio Ct. App. March 5, 2003) (describing uncertainty regarding whether Indiana or Ohio law applied to conduct of genetic father in an Ohio adoption case where child was born in Indiana to Indiana parents, but where an Indiana adoption agency placed the child with a prospective adoption couple in Ohio a few days after birth).

139. The available forms of the Uniform Parentage Act fail to provide sufficient guidance. For example, the 1973 Act only recognizes that a voluntary paternity acknowledgment (which initially need not be accompanied by the mother’s consent) can prompt a presumption of natural fatherhood that may be rebutted by “clear and convincing evidence” and may be overcome by a man who also has presumed natural father status, as via a marriage where “weightier considerations of public policy and logic control.” UNIF. PARENTAGE ACT § 4(a)(5), 4(b) (1973); see also UNIF. PARENTAGE ACT prefatory note (1973)

course, would mean that individual states could no longer balance for themselves the competing interests, including: the desirability of more certainty in initial paternity designations; a continuation of the strong correlations between actual genetic ties and legal paternity; the problems with consents to paternity that are uninformed or founded on lies; and, the benefits of recognizing legal paternity for men who have actually parented children from birth. Even without preemptive federal standards or uniform state law proposals, many individual states seemingly could do better in balancing the competing interests when addressing fraud, duress, and material mistake of fact in voluntary acknowledgment settings. In Illinois, legislative or common law initiatives are needed in order to eliminate the uncertainties arising from the decision in the *Smith* case. General Assembly action is preferable. In addressing fraud, duress, and material mistake of fact standards, legislators should also consider related substantive and procedural issues: repose (no rescission beyond a certain time); standing (i.e., who can sue to rescind, or to establish a parent-child relationship which would necessarily undo a voluntary paternity acknowledgment); and, when, if ever, a child's best interests might foreclose rescission of a voluntary paternity acknowledgment by a nongenetic father.

As suggested in *Granderson*, fraud, duress, or material mistake of fact may also be used to disestablish legal paternity due to a lack of genetic ties where there was an earlier admission of paternity, but no earlier in-hospital or in-agency voluntary paternity acknowledgment. Of course, legal paternity designations do not always require admissions, acknowledgments, or the like, of genetic ties by the men deemed fathers under the law. The following section explores Illinois statutes and precedents relating to other means of establishing and disestablishing legal paternity, demonstrating that again there are troubling differences between similarly-situated men.

### III. ILLINOIS STANDARDS RELATING TO OTHER PATERNITY DISESTABLISHMENTS

Beyond in-hospital voluntary acknowledgments by men like

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("All presumptions of paternity are rebuttable in appropriate circumstances."). The 2000 Uniform Parentage Act simply provides that "[a]fter the period for rescission under Section 307 has expired, a signatory of an acknowledgment of paternity or denial of paternity may commence a proceeding to challenge the acknowledgment or denial" on the basis of "fraud, duress or material mistake of fact," but fails to define "fraud, duress or material mistake." UNIF. PARENTAGE ACT § 308 (2000); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03(d) (2000) (noting that legal paternity (and its disestablishment by a married man) "is a matter outside the scope" of the Principles).

Romel Smith, there are many other ways to establish legal paternity in Illinois. Similarly, there are many ways to disestablish legal paternity beyond rescission. Other establishment and disestablishment standards often vary greatly from the standards applicable to Title IV-D in-hospital and in-agency voluntary acknowledgments.

In Illinois, legal paternity can arise: from acknowledgments (or admissions, concessions, or the like) occurring outside of hospitals or agencies; from adjudicatory proceedings in and out of the general jurisdiction trial courts; and, from such conduct as marrying, actual parenting, or contracting.<sup>140</sup> Genetic ties with a child do not always assure a man a real chance of legal parentage, even where the mother never married. As the United States Supreme Court observed:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother . . . . In some circumstances the actual relationship between father and child may suffice to create in the . . . father parental interests.<sup>141</sup>

The lack of paternity rights under law for a genetically-tied man does not necessarily mean that he cannot be assessed parental responsibilities, even long after birth. Often, even though genetic fathers have lost or abandoned the parental opportunity interests recognized by the U.S. Supreme Court, mothers, children, state agencies, or perhaps others can establish their paternity in order to secure money for child support or child support reimbursement.<sup>142</sup> Here, no meaningful father-child relationships may ever be contemplated.

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140. While contracts between genetic mothers and nongenetic fathers can lead to paternity, similar contracts usually cannot end paternity, even for genetic fathers. See, e.g., *Kristine M. v. David P.*, No. A109655, 2006 WL 74129 (Cal. Ct. App. Jan. 13, 2006).

141. *Caban v. Mohammed*, 441 U.S. 380, 397 (1974).

142. When child support is secured through a legal paternity designation against a genetic dad who earlier lost parental opportunities that were or may have been available, it is unclear whether such a man has a constitutionally-protected right to child visitation or custody, even assuming that a best interests test might also apply. See, e.g., Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 82-83 (2003) (“[L]awmakers should also consider more seriously the circumstances appropriate for ‘revived’ legal paternity.”). Here there would be no retroactivity since the genetic father would obtain legal fatherhood effective only at some time after birth, perhaps when child support is first ordered and where paternal childrearing rights from that time on serve the child's best interests.

Paternity disestablishments founded on a lack of genetic ties can be pursued not only by nongenetic fathers (like Romel Smith), but also by mothers, children, and state agencies (like Valerie Dawson, Kendra Smith, and the Department of Healthcare & Family Services (formerly the Illinois Department of Public Aid)). For the varying pursuers, the legal standards can differ. As well, the standards can differ for the same pursuers depending upon the technique employed to establish paternity.

Applicable standards on paternity establishment and disestablishment in Illinois may involve such considerations as: timing, state-of-mind, a child's best interests, the existence of an intact marriage, and state-supported financial assistance. The standards may originate from several lawmakers, including legislators, administrative agency officials, and judges.

The following sections briefly review Illinois paternity establishment standards and their related disestablishment standards. It begins with a closer review of the voluntary acknowledgment laws at play for Romel Smith and then explores other techniques for establishing legal paternity (whether or not driven by the Social Security Act). The results demonstrate some disturbing distinctions.

#### A. *In-Hospital Voluntary Acknowledgments*

In Illinois, under the Illinois Parentage Act, a parent and child relationship may be "established" voluntarily by the "signing and witnessing" of a voluntary acknowledgment of paternity at a hospital in accordance with the Vital Records Act.<sup>143</sup> If the mother of the child was not married to the alleged father at either the time of conception or birth, the name of the father is entered on the birth certificate only if the mother and the alleged father have signed a voluntary acknowledgment of parentage.<sup>144</sup> In the event that the mother was married at the time of conception or birth and the mother's husband is not the genetic father, the alleged genetic father is entered on the birth certificate only if he and the mother sign a voluntary acknowledgment of paternity, and if the mother and her husband (a presumed father under law) sign a denial of the husband's paternity.<sup>145</sup> Such a voluntary acknowledgment means the signing "man is presumed to be the natural father"<sup>146</sup> and usually "conclusively establishes a parent and child

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143. See 750 ILL. COMP. STAT. 45/6(a) (2004) (Illinois Parentage Act of 1984); 410 ILL. COMP. STAT. 535/12 (2004) (Vital Records Act). At times the relevant statutes use the phrase voluntary "acknowledgment of parentage," as in sections 5(a)(4) and 6(a) of the Parentage Act.

144. 410 ILL. COMP. STAT. 535/12(4), (5)(a).

145. *Id.*

146. 750 ILL. COMP. STAT. 45/5(a)(3) (2004).



relationship.”<sup>147</sup> With such a voluntary acknowledgment, neither a judicial nor an administrative proceeding is required.<sup>148</sup>

Notwithstanding its “conclusive” status, as permitted by the Social Security Act, such a voluntary acknowledgment usually may be easily rescinded within sixty days.<sup>149</sup> Similarly, it may be challenged after sixty days “on the basis of fraud, duress or material mistake of fact,”<sup>150</sup> the standard that was applicable to Romel Smith.

### *B. In-Agency Voluntary Acknowledgments*

Paternity may also be established in Illinois through a statutory form of voluntary acknowledgment that involves a presumption, but not conduct at a hospital or other location where birth occurs.<sup>151</sup> Under the Vital Records Act,<sup>152</sup> a “local registrar or county clerk after the birth shall” provide the opportunity for genetic parents married or unmarried to each other “to sign an acknowledgment of parentage”<sup>153</sup> on a form supplied by the Illinois Department of Public Aid.<sup>154</sup> As with a voluntary acknowledgment in a hospital, here too there is a presumption that the signing man is “the natural father.”<sup>155</sup> The “signing and witnessing of the acknowledgment of parentage . . . conclusively establishes a parent and child relationship.”<sup>156</sup>

An in-agency acknowledgment may only be rescinded in the way that an in-hospital acknowledgment (such as the one completed by Romel Smith) may be rescinded, meaning that fraud,

147. 410 ILL. COMP. STAT. 535/12(4), 5(a); *see also* 750 ILL. COMP. STAT. 45/5(b) (providing that the presumption is generally “conclusive”). *But see* 750 ILL. COMP. STAT. 45/5(b) (providing that if a minor signs a paternity acknowledgment, the presumption is conclusive six “months after the minor reaches majority or is otherwise emancipated”).

148. 750 ILL. COMP. STAT. 45/6(c) (2004).

149. 750 ILL. COMP. STAT. 45/5(b)(1).

150. 750 ILL. COMP. STAT. 45/6(d).

151. *See, e.g.*, 410 ILL. COMP. STAT. 535/12(4), (5) (placing responsibilities for registering a live birth to an unmarried woman, or to a married woman where her husband is not the “biological father” at the time of birth, on “the institution” where birth occurred, and “after birth” on the “local register or county clerk”).

152. 410 ILL. COMP. STAT. 535/1-29; *see also* 305 ILL. COMP. STAT. 5/10-17.7 (2004) (providing for administrative parentage determinations for those “given access to child support enforcement services” under the Illinois Public Aid Code).

153. 410 ILL. COMP. STAT. 535/12(5)(a)(i)-(ii). The statute requires that, “if the presumed father is not the biological father, an opportunity for the mother and presumed father to sign a denial of paternity” be provided. 410 ILL. COMP. STAT. 535/12(5)(a)(ii).

154. 410 ILL. COMP. STAT. 535/12(5)(a).

155. 750 ILL. COMP. STAT. 45/5(a)(4).

156. 410 ILL. COMP. STAT. 535/12(5)(a); *see also* 750 ILL. COMP. STAT. 45/5(a)(4), (b) (providing for acknowledgment under the Vital Records Act).

duress or material mistake of fact are needed after sixty days.<sup>157</sup> While in-hospital and in-agency acknowledgments are similar in many respects, it seems that only the latter *must* be available under written laws to unmarried couples not involved with public aid or state child support services, though both forms are in fact usually made available to all unmarried couples.<sup>158</sup>

### C. Common Law Voluntary Acknowledgments

Besides Vital Records and Public Aid Code voluntary paternity acknowledgments, there is Illinois precedent for at least one form of common law (nonstatutory) voluntary acknowledgment that prompts a similar presumption of natural fatherhood.<sup>159</sup> In *Jackson v. Newsome*,<sup>160</sup> an Illinois appellate court found in 2001 that Anthony Newsome had signed and acknowledged paternity in an agreed order dated January 22, 1992, and entered in a parentage case brought by Elma Jackson on December 6, 1991.<sup>161</sup> In seeking to disestablish his paternity of Alecia Jackson, born December 17, 1989, Anthony sued Elma in February, 2000.<sup>162</sup> The appellate court held that his acknowledgment was comparable to an acknowledgment filed with a local registrar or a county clerk under the Vital Records Act<sup>163</sup> and thus similarly prompted a presumption of natural fatherhood under the Parentage Act.<sup>164</sup> The court then said Anthony could seek to undo the acknowledgment under a provision of the Parentage Act allowing a suit to declare the non-existence of a parent-child relationship through DNA tests since there had been

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157. See 750 ILL. COMP. STAT. 45/5(b) (sixty day limit to rescind generally); 410 ILL. COMP. STAT. 535/12(7) ("fraud, duress or material mistake of fact," with no set time limit).

158. Compare 305 ILL. COMP. STAT. 5/10-17.7 (in-agency), with 410 ILL. COMP. STAT. 535/12(5) (in-hospital and in-agency). Anecdotal evidence gathered by the author in a 2005 survey of Illinois birthing facilities suggests that Illinois hospital personnel offer in-hospital acknowledgment opportunities to all unwed heterosexual couples whether or not governmental aid has been or will be provided. The survey results are on file with the author.

159. The Illinois Supreme Court has already recognized a common-law paternity claim involving an unwed man's actual consent to artificial insemination even though there was no compliance with the Illinois Parentage Act guidelines on children conceived artificially by married couples. *In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003).

160. 758 N.E.2d 342 (Ill. App. Ct. 2001).

161. *Jackson*, 758 N.E.2d at 344.

162. *Id.* Before suing, Anthony sought post-judgment relief in Elma's parentage case in December 1997 (as well as an order for "blood testing" in May 1997), but lost in April 1998. *Id.* at 344-45.

163. See *id.* at 348 (noting that the only differences involved "minute and ministerial technical requirements").

164. *Id.* at 349 (citing 750 ILL. COMP. STAT. 45/7(b-5) (2004)).

an earlier "adjudication of paternity," as required by the Act.<sup>165</sup> DNA testing was completed in December 29, 1998.<sup>166</sup>

This statutory provision on a declaration of no parent-child relationship was available for Anthony's use as long as he acted within two years of obtaining "knowledge of relevant facts," a period that would toll during the time "the natural mother or the child refuses to submit" to DNA tests.<sup>167</sup> This same provision was unavailable to Romel Smith as his acknowledgment had not been accompanied by any "adjudication of paternity."<sup>168</sup> But for Valerie Dawson's poverty, and thus reliance on public aid, perhaps Romel Smith would have only acknowledged paternity when sued for support; like Anthony Newsome, he then probably would have been able to seek disestablishment, since he would have acted within two years of learning he was not Kendra's genetic father.

The *Jackson* precedent suggests that other common law forms of voluntary acknowledgments are also possible. The *Jackson* ruling can be quite reasonably read to recognize in-court acknowledgments during not only paternity establishment cases involving unwed couples, but also during dissolution cases as long as the in-agency acknowledgment procedures of the Vital Records Act are followed. Stretched a bit further (but not unreasonably), the *Jackson* decision suggests that in-hospital acknowledgments should be available to individuals who are not involved with public aid or state child support services, as long as Public Aid Code procedures are followed.<sup>169</sup> Finally, the *Jackson* precedent may even allow other forms of common law voluntary paternity acknowledgments (outside of hospitals, agencies, and courts). For example, acknowledgments in lawyer's offices might be legally binding as long as accompanied by fair (i.e., Vital Record Act) procedures.

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165. *Id.*

166. *Id.* at 351.

167. 750 ILL. COMP. STAT. 45/8(a)(4) (2004). The court in *Jackson* found that Anthony had acted within two years because his "knowledge of relevant events" only arose when he completed the DNA tests, not when he first asked a court to order tests. *Jackson*, 758 N.E.2d at 351. This decision rested, in part, on the proposition that Anthony could not begin a disestablishment proceeding without DNA tests. *Id.* at 351-52. This proposition is now in doubt. See *John M.*, 817 N.E.2d at 506 (reading 750 ILL. COMP. STAT. 45/11(a) to permit a court, upon filing a petition to establish parentage, to order DNA testing, and requiring the court to do so upon request of a party).

168. *Smith*, 818 N.E.2d at 1207.

169. A 2005 survey by the author of Illinois birthing facilities shows that in-hospital acknowledgment services are made available to all unmarried mothers. Results of this survey are on file with the author.

#### D. Birth Certificates

Legal paternity, at least for some purposes, can still be recognized in Illinois for a man who was simply designated as the father on a birth certificate (with no accompanying voluntary acknowledgment). An amendment to such a certificate then can disestablish parentage under law as of the time of birth, divesting the earlier-named man of whatever legal rights or responsibilities accompanied the birth certificate designation. However, far from all birth certificates issued in Illinois during the last century address completely the legal parentage of a child born in Illinois as of the time of birth.<sup>170</sup> Many children born in Illinois never have a birth certificate designating legal paternity,<sup>171</sup> though it is rare for a child born to have no such certificate designating maternity (motherhood as of the time of birth).<sup>172</sup>

Notably, the disestablishment of the paternity of an earlier-named man with no genetic ties through a birth certificate amendment relating back to the time of birth<sup>173</sup> does not mean that the genetic father, some other man, or some other intended parent (i.e., a woman) will be substituted. There need not be at some point two parents (one being the birth mother) recognized under law for a single child as of the time of birth.

For about a decade, birth certificate designations in Illinois have only reaffirmed, and not themselves established, legal paternity for either married or unmarried genetic fathers. Married men usually are automatically presumed fathers, even when they go unnamed on birth certificates, so that naming them adds little.<sup>174</sup> Unmarried men, since August 9, 1996, can only be

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170. See, e.g., 410 ILL. COMP. STAT. 535/12(4) (2004) (establishing that the name of the father of a child born to an unmarried mother may “be entered on the child’s birth certificate only if the mother and the person to be named the father have signed an acknowledgment of parentage”).

171. See, e.g., 410 ILL. COMP. STAT. 535/14 (“[The] birth of a person in Illinois, whose birth is not registered, may [not must] be recorded by delayed registration . . . .”); ILL. ADM. CODE tit. 77, § 500.10 (2004) (defining “[d]elayed birth registration” to mean registration three days after the event).

172. But see 410 ILL. COMP. STAT. 535/14 (recognizing that an unrecorded birth is possible).

173. Of course, legal paternity can be disestablished and a birth certificate amended effective sometime after birth, as when a birth certificate is amended so as to recognize an adoption of a child whose legal father as of the time of birth has had his parental rights ended voluntarily or involuntarily. See 410 ILL. COMP. STAT. 535/17(1)(a).

174. 750 ILL. COMP. STAT. 45/5(a)(1), (2) (2004). This includes men married at time of conception or birth, or married thereafter, as long as the man is named on the birth certificate. *Id.* As to the latter, this marital presumption may be superfluous as it is unclear whether a birth certificate can name a later-married man without an acknowledgment of paternity, since an

included on birth certificates of children born to unmarried women if they earlier signed acknowledgments of parentage,<sup>175</sup> which are “conclusive” of natural fatherhood and thus of legal paternity.<sup>176</sup>

Before August 9, 1996, however, under Illinois statute, a birth certificate for a child born to an unmarried woman seemingly could itself establish legal paternity. No earlier acknowledgments were necessary and a man could be named on a birth certificate simply with his consent and the written consent of the mother.<sup>177</sup> Before July 28, 1993, a putative genetic father could even more easily establish legal paternity through signing a birth certificate. Back then, the relevant statute did not expressly require maternal consent. It also demanded that birthing facility personnel responsible “for preparing and filing the birth certificate” undertake “a reasonable effort to obtain the signatures of both parents.”<sup>178</sup>

Any new disestablishments of birth certificate paternity established prior to 1996 on the grounds of a lack of genetic ties undoubtedly will be rare. Should such an initiative be undertaken, the most likely vehicle would be either an amendment to the birth certificate that excludes the named father<sup>179</sup> or a civil action to declare the existence (e.g., on behalf of another man),<sup>180</sup> or the nonexistence (e.g., for the named father)<sup>181</sup> of a parent-child relationship. After 1996, many, but perhaps not all, disestablishments sought by mothers or fathers of the legal paternity recognized through the birth certificates of children born to unwed mothers will be guided chiefly by the aforedescribed federal disestablishment standards on in-hospital voluntary acknowledgments. Yet, given that these significant requirements,

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acknowledgment seemingly is required when a then unmarried man is to be named on the certificate under 410 ILL. COMP. STAT. 535/12(4), an acknowledgment that prompts its own presumption, *see* 750 ILL. COMP. STAT. 45/5(a)(3), (4). Moreover, married men may not be the presumed fathers, as where births stem from artificial insemination undertaken outside the statutory standards. *See* 750 ILL. COMP. STAT. 45/6(a)(1).

175. *See* 410 ILL. COMP. STAT. 535/12(4) (effective August 9, 1996).

176. 750 ILL. COMP. STAT. 45/5(b). While conclusive, under some conditions an acknowledgment may be “rescinded.” *Id.*

177. *See* 410 ILL. COMP. STAT. 535/12(4) (1995) (amended 1996).

178. 410 ILL. COMP. STAT. 535/12(4) (1992) (amended 1993).

179. *See, e.g.*, 410 ILL. COMP. STAT. 535/22(6) (providing that the original birth record must be amended to reflect a different paternity designation found by a circuit court or an administrative agency).

180. *See* 750 ILL. COMP. STAT. 45/7(a) (establishing that an action to determine the existence of a father-child relationship may be brought by a man “alleging himself to be the father,” even if such a relationship has already been presumed for another man).

181. *See* 750 ILL. COMP. STAT. 45/7(b-5) (providing that an action to determine nonexistence of a father-child relationship may be brought by presumed father who had acknowledged paternity, as long as there was also an “adjudication”).

involving fraud and the like, may only apply to acknowledging mothers and fathers, it may be that others — including actual genetic fathers, children, and state officials — can more easily disestablish paternity through new civil actions.<sup>182</sup>

### E. Paternity Presumptions

The Illinois Parentage Act<sup>183</sup> creates certain presumptions that prompt parent/child relationships.<sup>184</sup> One is that a man is presumed to be the natural father of a child if “he and the child’s natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage . . . .”<sup>185</sup> Another is that a man is presumed to be the natural father of a child if “after the child’s birth, he and the child’s natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the child’s father on the child’s birth certificate.”<sup>186</sup> Unlike voluntary acknowledgments, these presumptions are not conclusive. Under the Illinois Parentage Act of 1984, “they may be rebutted only by clear and convincing evidence.”<sup>187</sup> As well, there are no short and absolute time periods, such as sixty days, to limit rebuttals.

For a man to disestablish his own paternity grounded on either marital presumption, he may proceed on a “verified complaint”<sup>188</sup> in a court action “to declare the non-existence of the parent and child relationship,” whether or not the presumption led to “an adjudication of paternity in any judgment.”<sup>189</sup> Rebuttal

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182. Under federal statute, “a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact” after the running of a sixty day period. 42 U.S.C. 666(a)(5)(D)(iii). But this sixty day period only applies to “the right of any signatory to rescind the acknowledgment.” 42 U.S.C. 666(a)(5)(D)(ii)(I). Thus, there seemingly are no written federal statutory guidelines on undoing TANF driven voluntary paternity acknowledgments by other than signatories (post sixty day attacks are characterized under federal law as contests or challenges, and not simply as rescissions, which seemingly has application only to signatories under (D)(ii)(I)). *Cf.* ARIZ. REV. STAT. ANN. § 25-812(E) (2001) (providing that, pursuant to ARIZ. CIV. PRO. R. 60(c), a “mother, father or child, or a party to the proceeding may challenge a voluntary acknowledgment of paternity established in [the] State at any time after the sixty day period only on the basis of fraud, duress, or material mistake of fact”).

183. 750 ILL. COMP. STAT. 45/1-28.

184. 750 ILL. COMP. STAT. 45/4(2), 5(a).

185. 750 ILL. COMP. STAT. 45/5(a)(1).

186. 750 ILL. COMP. STAT. 45/5(a)(2).

187. 750 ILL. COMP. STAT. 45/5(b).

188. 750 ILL. COMP. STAT. 45/7(b), 7(b-5).

189. *See* 750 ILL. COMP. STAT. 45/7(b-5) (presumption led to an adjudication); 750 ILL. COMP. STAT. 45/7(b) (presumption did not lead to an adjudication). While data is hard to find, there appear to be significant numbers of children

often is grounded on DNA tests,<sup>190</sup> and can follow “an agreement . . . between an alleged or presumed father and the mother,” regardless of its terms, as long as the agreement was not “a settlement approved by the court.”<sup>191</sup> The man presumed to be the father has two years to seek disestablishment from the time he obtained “knowledge of relevant facts,”<sup>192</sup> though this period cannot “extend beyond the date on which the child reaches the age of 18 years.”<sup>193</sup> So, had Romel Smith been married to Valerie Dawson, he likely would not have acknowledged paternity and thus might well have been able to disestablish his presumed paternity,<sup>194</sup> as where a marital presumption simply arose or where a marital presumption was utilized in a marriage dissolution proceeding.<sup>195</sup>

Others may also seek to directly disestablish paternity grounded solely on a marital presumption. By statute, the “child” and the “natural mother” can each seek to “declare the non-existence of the parent and child relationship” in a civil action by rebutting either of the marital presumptions.<sup>196</sup> They have two

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born to married women where their husbands are not the genetic fathers. See, e.g., Naomi Cahn & June Carbone, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1067 n.230 (2003) (“Robin Wright estimates that from five to twenty-five percent of all births to married women involve fathers other than the mother’s husband. Wright, however, does not provide the particulars of the study on which she relies, and those statistics have never been established with certainty.”).

190. See, e.g., 750 ILL. COMP. STAT. 45/7(b-5) (providing that an “adjudicated father” may use DNA tests to show he is not “the father of the child”).

191. 750 ILL. COMP. STAT. 45/7(d).

192. See 750 ILL. COMP. STAT. 45/8(a)(3) (presumption with no adjudication); 750 ILL. COMP. STAT. 45/8(a)(4) (presumption with an adjudication); see also, e.g., *In re Marriage of Adams*, 701 N.E.2d 1131 (Ill. App. Ct. 1998) (illustrating a husband in a dissolution case successfully disestablishing paternity under 750 ILL. COMP. STAT. 45/8(a)(3) for a ten-year old born during the marriage as he acted about a month after the wife first told him the child was born as a result of an extramarital affair and not as a result of artificial insemination).

193. See 750 ILL. COMP. STAT. 45/8(a)(3) (presumption with no adjudication); 750 ILL. COMP. STAT. 45/8(a)(4) (presumption with adjudication). For disestablishment petitions where there are adjudications, the two year limit also “shall not apply to periods of time where the natural mother or child refuses to submit” to DNA tests. 750 ILL. COMP. STAT. 45/8(a)(4). The time limits are also tolled when a “party is not subject to service of process or is otherwise not subject to the jurisdiction” of Illinois courts. 750 ILL. COMP. STAT. 45/8(b).

194. Rebuttal would seem to have been available to a married Romel Smith so long as he sued within two years of obtaining “knowledge of relevant facts,” 750 ILL. COMP. STAT. 45/8(a)(4), and the 1998 Public Aid case judgment against Romel was not “a settlement approved by the court,” 750 ILL. COMP. STAT. 45/7(d).

195. See *Smith*, 818 N.E.2d at 1210 (distinguishing a marriage dissolution from Romel’s voluntary acknowledgment).

196. 750 ILL. COMP. STAT. 45/7(b).

years to act after obtaining knowledge of relevant facts,<sup>197</sup> which cannot extend beyond the date on which the child reaches the age of eighteen years.<sup>198</sup> By contrast, neither the child nor the mother may so easily disestablish paternity arising from an earlier marriage dissolution proceeding in which they were active participants (i.e., the child through a guardian).<sup>199</sup>

While no others are expressly granted the right to pursue "an action to declare the non-existence of the parent and child relationship" founded solely on a marital presumption,<sup>200</sup> as noted earlier any person or entity who has provided or who is providing financial support to a child, as well as any man "alleging himself to be the father of the child," by verified complaint can pursue an "action to determine the existence of the father and child relationship whether or not such a relationship is already presumed" through a marital presumption.<sup>201</sup> Such an action to determine a father-child relationship usually is only "barred if brought later than 2 years after the child reaches the age of majority."<sup>202</sup> Thus, though there is a marital presumption, where the alleged father or the supporting person or entity prevails in establishing a father-child relationship based upon the genetic ties of a man other than the husband, seemingly the "non-existence" of the husband-child relationship under law, i.e., the disestablishment of the marital presumption, would follow,<sup>203</sup> since two men cannot concurrently be the subject of legal paternity for a single child in Illinois.<sup>204</sup>

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197. 750 ILL. COMP. STAT. 45/8(a)(3).

198. 750 ILL. COMP. STAT. 45/8(a)(3).

199. *See, e.g., Simcox v. Simcox*, 546 N.E.2d 609, 611 (Ill. 1989) (asserting that res judicata/collateral estoppel could operate against a wife/mother, or a child represented by guardian in a paternity action); *see also In re Rogers*, 665 N.E.2d 36, 39 (Ill. App. Ct. 1996) (reading *Simcox* to allow a child to proceed in a new case notwithstanding an earlier dissolution decree if the child was not represented and there is new and better (DNA) evidence). Of course, in such a case the mother or child may petition to reopen the dissolution proceeding in order to obtain a court order modifying the decree as to paternity. *See, e.g.,* 735 ILL. COMP. STAT. 5/2-1401 (2004).

200. 750 ILL. COMP. STAT. 45/7(b).

201. 750 ILL. COMP. STAT. 45/7(a).

202. 750 ILL. COMP. STAT. 45/8(a)(1). If a public agency, other than the Illinois Department of Public Aid, acts on behalf of a child after it has "ceased to provide assistance to the child," then the action is "barred 2 years after the agency has ceased to provide assistance to the child." *Id.*

203. *In re Parentage of John M.*, 817 N.E.2d 500, 506 (Ill. 2004) (suggesting a man alleging himself to be the genetic father of a child born to a married couple, upon filing "a petition to establish parentage," can secure DNA tests and can rebut a marital presumption if testing shows "the presumed father is not the biological father").

204. Compare California, where two presumed fathers compete for a single, legal paternity designation, and Louisiana, which allows at times "dual paternity." *See In re Jesusa V.*, 32 Cal. 4th 588, 598 (2004) (noting that choice



The Illinois Supreme Court decided a case in 2004, *In re Parentage of John M.*, wherein judicial guidance was sought regarding disestablishments of legal paternities founded solely on marital presumptions by men who allege they are genetic fathers and who seek visitation and child support orders.<sup>205</sup> Unfortunately, the high court could not provide much help,<sup>206</sup> in part because disputed facts (over the nature of the husband-wife and genetic father-mother relationships) were never subject to evidentiary hearings.<sup>207</sup> The court did, however, suggest that the alleged genetic father had a right to demand DNA testing.<sup>208</sup> The court also suggested that genetic fathers who are rapists, or who “come in ten years later” saying “I want a cotton swab, I’m the dad,” would likely lose.<sup>209</sup> But it also hinted that genetic fathers

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between two presumed natural fathers, each of whom held the child out as his own and received the child into his home, was based upon “the weightier considerations of policy and logic”); *T.D. v. M.M.M.*, 730 So. 2d 873, 875 (La. 1999) (recognizing dual paternity, here encompassing both a husband presumed to be the legal father and the biological father, though the two male parents will not always possess similar parental rights; a biological father can seek to establish paternity in a nonstatutory “avowal” action). At times, even in Illinois, paternity may vest in two men, but in different contexts. *See, e.g., In re Marriage of Purcell*, 825 N.E.2d 724 (Ill. App. Ct. 2005) (holding that paternity was disestablished for former husband for support purposes so that child could recover SSD benefits after his genetic father died; former husband, however, pursuant to an earlier marriage dissolution settlement agreement, was allowed to continue with child visitation).

205. *See In re Parentage of John M.*, 817 N.E.2d at 502 (noting that plaintiff Javier sought to establish a father-child relationship under 750 ILL. COMP. STAT. 45/7 with baby John, born to defendant Maria during her marriage to Dennis).

206. The court ruled that it is not unconstitutional to allow at least some genetic fathers to pursue a paternity action involving a child born to a mother who was at some point during the pregnancy or at the birth married to another man in the absence of “a prior best interests [of the child] hearing.” *Id.* at 509.

207. *See id.* at 508-09 (holding that the trial court should not have ruled on the argument that the Parentage Act of 1984 was unconstitutional “as applied” to the husband and the child because the court never held an evidentiary hearing). The husband had argued that the Act was unconstitutional because it did not mandate a “best interest” of the child determination before allowing an interloper into a marriage to proceed. *Id.* at 502.

208. *Id.* at 506 (citing 750 ILL. COMP. STAT. 45/11(a) (2004)). An earlier, similar ruling was reached in *J.S.A. v. M.H.*, 797 N.E.2d 705, 709 (Ill. App. Ct. 2003), *vacated on procedural grounds by J.S.A. v. M.H.* 841 N.E.2d 983 (Ill. App. Ct. 2005).

209. *In re Parentage of John M.*, 817 N.E.2d at 510 (referencing arguments made by the husband to show how a disestablishment order procured by the genetic father would be unconstitutional). The “absence of any time limit” also bothered the trial judge. *Id.* at 503 (quoting from trial court ruling); *see also* 750 ILL. COMP. STAT. 45/8(a)(1) (2004) (providing that an action to determine the existence of a father and child relationship by a man alleging himself to be the genetic father is only “barred if brought later than 2 years after the child

who lived with their children since birth, with the marriages between the presumed fathers/husbands and mothers/wives "already disintegrated," would win.<sup>210</sup> The high court urged that reformers who had public policy difficulties with such disestablishments should go to the General Assembly rather than the courts.<sup>211</sup> Such General Assembly consideration is only a part of the possible legislative reform contemplated herein.

#### F. Administrative Determinations

The Illinois Department of Public Aid can, "by rule," provide for administrative determinations of paternity in cases involving "applicants for or recipients of financial aid."<sup>212</sup> Final administrative decisions in the Department are reviewed in accordance with the Administrative Review Law<sup>213</sup> and "have the full force and effect of a court judgment of paternity entered under the Illinois Parentage Act of 1984."<sup>214</sup> These decisions need not involve proof of actual genetic ties between the child and the man deemed to be the father. For example, "default" determinations "may be made" after proper service,<sup>215</sup> and deoxyribonucleic acid (DNA) tests are not mandated where the alleged father does appear.<sup>216</sup>

The Illinois Administrative Code distinguishes the processes for "uncontested" and "contested" administrative determinations,<sup>217</sup> though both processes lead to similar administrative paternity orders.<sup>218</sup> Parties "aggrieved" by such orders can petition the Department for "release" more than thirty days after entry.<sup>219</sup>

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reaches the age of majority").

210. *In re Parentage of John M.*, 817 N.E.2d at 510 (observing that the husband "ha[d] not shown why it would be unconstitutional" to allow disestablishment by the genetic father in this setting, even though there was no "best interest" of the child hearing).

211. *Id.* at 511. Earlier, similar pleas were voiced in *J.S.A.*, 797 N.E.2d at 711 (Barry, J., specially concurring) ("[I]t is necessary that the legislature amend the Parentage Act . . .").

212. 305 ILL. COMP. STAT. 5/10-17.7 (2004).

213. 735 ILL. COMP. STAT. 5/3-101 to -113 (2004).

214. 305 ILL. COMP. STAT. 5/10-17.7.

215. *Id.*

216. *Id.* "[I]n determining paternity," an administrative hearing office should act "in accordance with Section 11 of the Parentage Act of 1984," *id.*, which provides in section (a) that upon the request of a party testing is ordered, and in section (h) that officers may order tests on their own motions and that the "expense of the tests" should be paid by requesting alleged fathers who are not indigent, 750 ILL. COMP. STAT. 45/11 (2004).

217. ILL. ADMIN. CODE tit. 89, § 160.61(b)-(c) (2004).

218. ILL. ADMIN. CODE tit. 89, § 160.61(d).

219. ILL. ADMIN. CODE tit. 89, § 160.61(e)(1). Aggrieved parties seemingly are limited to parents. ILL. ADMIN. CODE tit. 89, § 160.61(e)(3) (establishing that notice of filing a copy of a petition "must be served on the other parent by certified mail"). *Cf.* 305 ILL. COMP. STAT. 5/10-12(a) (providing that a

These de facto disestablishment petitions usually must be filed within two years of entry, though more time is allotted anyone from whom "the ground for relief is concealed from the person seeking relief."<sup>220</sup>

### G. Circuit Court Actions

Illinois circuit courts can determine paternity in marriage dissolution proceedings,<sup>221</sup> as well as in civil actions based upon verified complaints seeking "to determine the existence of the father and child relationship."<sup>222</sup> The latter may be pursued: "by the child; the mother; a pregnant woman; any person or public agency who has custody of, or is providing or has provided financial support to, the child . . . ; or a man presumed or alleging himself to be the father of the child or expected child."<sup>223</sup> Such actions may be pursued even if there is already a father recognized under law who is not "the person or persons alleged to be the father of the child."<sup>224</sup> But, such actions usually are "barred if brought later than 2 years after the child reaches the age of majority."<sup>225</sup>

A circuit court action determining paternity in a marriage dissolution case may be challenged by the parties pursuant to a

"responsible relative aggrieved by an administrative order . . . under Section 10-17.7" may petition for release or modification within 30 days).

220. ILL. ADMIN. CODE tit. 89, § 160.61(e)(2)(C)(iii); *see also* 305 ILL. COMP. STAT. 5/10-12(b) (providing that "a man against whom a default determination of paternity has been entered" may seek an order vacating the determination within thirty days of being served); 305 ILL. COMP. STAT. 5/10-14.1 (establishing a two year period for a responsible relative or recipient of child support services to seek relief from an administrative determination of paternity under the relief from judgments statute, 735 ILL. COMP. STAT. 5/2-14.1 (2004)).

221. *See, e.g.*, 750 ILL. COMP. STAT. 5/505(a) (2004) ("In a proceeding for dissolution of marriage . . . the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct.").

222. 750 ILL. COMP. STAT. 45/7(a) (2004).

223. 750 ILL. COMP. STAT. 45/7(a). Where the child is under eighteen, the action on the child's behalf may need to be pursued by a guardian, next friend or the like, rather than simply by the child. *Klak v. Skellion*, 741 N.E.2d 288 (Ill. App. Ct. 2000).

224. *See* 750 ILL. COMP. STAT. 45/7(a) (providing that a paternity action is permitted even if a father-child relationship "is already presumed under Section 5" of the Illinois Parentage Act (relating to children born to married couples)); *see also, e.g., J.S.A.*, 797 N.E.2d at 705 (illustrating a parentage claim by man who had an affair with a married woman and who sued after their relationship ended, about three years after birth).

225. 750 ILL. COMP. STAT. 45/8(a)(1). The limitations period is shorter in certain instances involving public agencies, as where a public agency, other than the Illinois Department of Public Aid, acts on behalf of a child after it has "ceased to provide assistance to the child," in which case the action is "barred 2 years after the agency has ceased to provide assistance to the child." *Id.*

motion for relief from judgment.<sup>226</sup> Parties always include the husband and wife and may include a child born before, during, or after the marriage, as when the child is made a party through the appointment of a guardian ad litem. Where such a child was not a party, or in privity with a party,<sup>227</sup> in the dissolution case, the child seemingly is not precluded by the dissolution decree from litigating paternity later.<sup>228</sup> Thus, a child may effectively disestablish a husband's paternity through a new civil action to determine the existence of a father and child relationship with a man who was not the husband.<sup>229</sup> A similar civil action apparently can also be pursued by a public agency acting on behalf of a child, as well as on the agency's own financial interests in securing reimbursement of child support.

Besides a motion for relief from judgment, a marriage dissolution judgment addressing paternity may also be challenged in a new civil action by the husband. A circuit court action determining "the existence" of paternity upon exploring "the father and child relationship"<sup>230</sup> may be challenged later under statute by "the man adjudicated to be the father" if the earlier parentage designation was founded on a marital presumption of paternity and if the man demonstrates by DNA tests that he is "not the natural father."<sup>231</sup> Such a challenge must be brought within "2 years after the petitioner obtains actual knowledge of relevant facts."<sup>232</sup>

While the aforementioned statute does not expressly grant standing to others to challenge earlier circuit court paternity determinations in marriage dissolution cases via new cases

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226. See 735 ILL. COMP. STAT. 5/2-1301(e) (filing less than thirty days after judgment entry, relief is granted where "reasonable"); 735 ILL. COMP. STAT. 5/2-1401(a) (filing more than thirty days after judgment entry, relief may be granted on a number of grounds, including those traditionally available).

227. For a case involving the children's legal interests and illustrating the situation when children are in privity with a married or formerly married parent, see, for example, *Singer v. Brookman*, 578 N.E.2d 1, 3-4 (Ill. App. Ct. 1991). For a general review of Illinois privity precedents, see *Yorulmazoglu v. Lake Forest Hospital*, 834 N.E.2d 468 (Ill. App. Ct. 2005).

228. See, e.g., *Simcox* 546 N.E.2d at 611 (noting that earlier dissolution judgment only binds child, under preclusion principles, where child was in privity with a parent, and privity is not presumed as a parent's and a child's interests may differ).

229. See, e.g., *In re Rogers*, 665 N.E.2d at 39 (saying courts should determine each paternity case on an individual basis, as each case arises or falls on its particular set of facts).

230. 750 ILL. COMP. STAT. 45/7(a).

231. 750 ILL. COMP. STAT. 45/7(b-5). DNA tests disproving genetic ties are a precondition to these circuit court actions. *In re Marriage of Kates*, 761 N.E.2d 153, 158 (Ill. 2001).

232. 750 ILL. COMP. STAT. 45/8(a)(4). However, the limitations period is not to extend beyond the time the child turns eighteen. *Id.*

founded on the “existence of the father and child relationship,”<sup>233</sup> another statute does allow a civil action “to declare the non-existence of the parent and child relationship” to be “brought by the child, the natural mother or a man” subject to a marital paternity presumption.<sup>234</sup> This provision may allow a child or a mother to challenge, indirectly, an earlier marriage dissolution judgment of paternity similar to the way “the man adjudicated to be the father” may do directly.<sup>235</sup> Any such challenge in a new civil action must also be presented within “2 years after the petitioner obtains knowledge of relevant facts.”<sup>236</sup> If this provision does not allow such a challenge, as when preclusion principles estop the child or mother,<sup>237</sup> presumably a child or a natural mother may still challenge the earlier paternity finding in a dissolution case founded on a marital presumption through a motion for relief from judgment.<sup>238</sup>

Where there are challenges to circuit court paternity judgments that are not founded on marital presumptions, as where the mothers were unwed, the aforementioned statutes clearly do not apply. In these cases relief from judgment petitions under general civil procedure standards<sup>239</sup> can serve as paternity disestablishment vehicles. Petitions for relief from such paternity court judgments “must be filed not later than 2 years” after entry, though timing is tolled when “the ground for relief is fraudulently concealed.”<sup>240</sup> Finally, should an alleged error in such a paternity judgment appear very shortly after entry of judgment (within thirty days of the order), the court may undo the judgment where “reasonable.”<sup>241</sup>

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233. 750 ILL. COMP. STAT. 45/7(a).

234. 750 ILL. COMP. STAT. 45/7(b). Note that a new civil action pursued by an alleged genetic father is not sanctioned. *See, e.g., Lisa I. v. The Superior Court of Los Angeles County*, 34 Cal. Rptr. 3d 927 (Cal. Ct. App. 2005) (holding that the alleged genetic father could not pursue paternity of a child conceived during marriage that was dissolved before birth, where the child had no personal relationship with the father).

235. 750 ILL. COMP. STAT. 45/7(b-5).

236. 750 ILL. COMP. STAT. 45/8(a)(3). However, the limitations period is not to extend beyond the time the child turns eighteen. *Id.*

237. *See, e.g., Simcox*, 546 N.E.2d at 611 (noting that children who were not parties to earlier marriage dissolution proceedings would not be bound by any findings of paternity).

238. *See* 735 ILL. COMP. STAT. 5/2-1401 (2004) (governing a motion for relief filed more than thirty days after judgment entry); *see also, e.g., In re Marriage of Klebs*, 554 N.E.2d 298 (Ill. App. Ct. 1990) (employing the Parentage Act provisions, including the two year limitations period, to a section 2-1401 motion for relief from a marriage dissolution judgment where the mother sought to disestablish her husband’s paternity).

239. 735 ILL. COMP. STAT. 5/2-1401(a).

240. 735 ILL. COMP. STAT. 5/2-1401(c).

241. 735 ILL. COMP. STAT. 5/2-1301(e).

One case involving a post-thirty-day petition for relief from a nonmarital paternity court judgment is *Lipscomb v. Wells*.<sup>242</sup> There, Tyree Wells agreed to a paternity case judgment on July 29, 1988, without prior DNA testing. His conduct was based upon statements by the mother, Beatryce Lipscomb, that “he was the natural father” of Veronica Lipscomb and that she “had no other relations with other men” around the time of Veronica’s conception.<sup>243</sup> After being told in December, 1998 by Beatryce at her home that he was not the child’s natural father,<sup>244</sup> Tyree filed a verified petition on February 2, 2000, under Section 2-1401 of the Code of Civil Procedure, seeking an order to compel DNA testing in order to determine parentage.<sup>245</sup> Beatryce argued that the two-year statute of limitations under section 2-1401 had expired. Tyree responded that the period was tolled due to Beatryce’s fraudulent concealment. The trial court found for Tyree, stating that he was deprived of the opportunity to request a DNA test in 1988 by Beatryce’s concealment of a “material fact.”<sup>246</sup> In affirming, the appellate court noted that typically “fraudulent concealment sufficient to toll a statute of limitations consists of affirmative acts designed to prevent discovery of a cause of action or grounds for relief and silence alone does not constitute fraudulent concealment.”<sup>247</sup> Here, the appellate court found that Beatryce was “not merely silent” as to her child’s paternity, but rather “asserted with certainty” that Tyree was, in fact, the genetic father.<sup>248</sup> The court hinted that Tyree could not have challenged the paternity judgment in an action to declare the nonexistence of a parent-child relationship as DNA testing was a prerequisite.<sup>249</sup> The court distinguished a similar Section 2-1401 case by suggesting that the “abuse of discretion review” standard effectively allowed trial judges finding comparable facts to rule differently on the issue of fraudulent concealment.<sup>250</sup>

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242. 761 N.E.2d 218, 219 (Ill. App. Ct. 2001).

243. *Id.* at 219.

244. The admission came during a quarrel over Christmas shopping money for Veronica. *Id.* at 220.

245. *Id.* at 219.

246. *Id.* at 220.

247. *Id.* at 222 (quoting *Halas v. Executor of Estate of Halas*, 445 N.E.2d 1264, 1271 (Ill. App. Ct. 1983)).

248. *Id.*

249. *Id.* at 226.

250. *Id.* at 225. The court in *Lipscomb* distinguished *Ptaszek v. Michalik*, 606 N.E.2d 115 (Ill. App. Ct. 1992), on the basis that the court in *Ptaszek* refused to overturn a trial court’s denial of relief based on abuse of discretion with facts distinguishable from *Lipscomb*, whereas in *Lipscomb* the court was upholding a grant of relief and thereby validated the trial court’s discretion. Such differing results, seemingly a matter of discretion, would be less likely if there were special statutory standards guiding petitions for relief from paternity court judgments. See, e.g., CAL. FAM. CODE § 7645-47 (West 2004);

Besides petitions for postjudgment relief, paternity court judgments not founded on marital presumptions may also be subject to challenge through new civil actions, especially by those not parties to the earlier proceedings. Thus, a judgment of paternity in a parentage action involving a determination of the existence of a "father and child relationship,"<sup>251</sup> as between an unwed mother and one alleged father, may be subject to challenge in a new civil action involving the same child, but brought by either the child or by a second man alleging that he is the genetic father. Under statute, this new civil action may be pursued even if there is already a father recognized under law who is not "the person or persons alleged to be the father of the child."<sup>252</sup>

#### *H. Artificial Inseminations*

At the time of birth, a parent-child relationship may be established, in the absence of consensual sexual intercourse between adults,<sup>253</sup> through a gestational surrogacy arrangement meeting statutory requirements.<sup>254</sup> These requirements demand certifications from those most intimately involved (gestational surrogate, her husband, intended mother, and intended father) regarding intentions as well as the sources for sperm and egg donations.<sup>255</sup> Seemingly, surrogacy pacts must anticipate two different sex parents, as both an intended mother and an intended father are required.<sup>256</sup> As well, a licensed physician must certify

OHIO REV. CODE ANN. § 3119.961 (West 2004).

251. 750 ILL. COMP. STAT. 45/7(a) (2004).

252. 750 ILL. COMP. STAT. 45/7.

253. Other parent-child relationships arising at the time of birth in the absence of consensual adult sex (as with at-birth adoptions, or with children born of rapes (statutory or otherwise), or of turkey basters) are not discussed herein.

254. 750 ILL. COMP. STAT. 45/6(a). There is no discussion herein of what some might describe as a gestational surrogacy arising from consensual sexual intercourse. For a review and critique of the Illinois Gestational Surrogacy Act, see Jeremy J. Richey, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. UNIV. L.J. 169 (2005) (suggesting a change in the reasonableness criteria on compensation, change to allow a prospective gestational surrogate to breach a surrogacy contract before she becomes pregnant, and change to address the matter of abortion).

255. 750 ILL. COMP. STAT. 45/6(a)(1)(A)-(D).

256. 750 ILL. COMP. STAT. 45/6(a)(1)(C), (D). *Cf.* Kristine H. v. Lisa R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004) (reading California statute on presumed "fathers" to apply to second mothers in a case involving two lesbian partners whose relationship ended after each parented a child for two years, one of the partners had given birth to the child, and both had obtained a prebirth court judgment founded on their agreement that they be "joint intended legal parents"), *reversed on other grounds*, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (ruling that birth mother is estopped from challenging prebirth court judgment almost two years later while noting that public policy favors a child having two parents rather than one).

that any later-born child “is the biological child of the intended mother or the intended father or both and that neither the gestational surrogate nor the gestational surrogate’s husband, if any, is a biological parent.”<sup>257</sup> There is a presumption of legal parentage for the gestational surrogate and her husband (if she has one) if the statutory guidelines are not “met prior to the birth of the child.”<sup>258</sup>

Similarly, a parent-child relationship under common law, with one mother and one father, can arise in other settings where birth results from artificial insemination. For example, there may be an artificially-inseminated unmarried woman who intends to be the legal mother. Illinois statutory provisions guide married couples<sup>259</sup> while common law precedents guide unmarried heterosexual couples.<sup>260</sup>

These days, more and more couples deemed nontraditional in the eyes of the law, e.g., same sex, seek to establish legal parentage at birth founded on prebirth agreements involving artificial insemination. Clearly, any legal recognition of dual paternity or dual maternity are more controversial,<sup>261</sup> and have generated few Illinois precedents to date.<sup>262</sup>

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257. 750 ILL. COMP. STAT. 45/6(a)(1)(E). The intended mother and the intended father need not be biologically connected to the child as each may employ a “donor.” 750 ILL. COMP. STAT. 45/6(a)(1)(C), (D).

258. 750 ILL. COMP. STAT. 45/6(a)(2).

259. 750 ILL. COMP. STAT. 40/3 (2004).

260. *In re M.J.*, 787 N.E.2d at 152 (recognizing a common law action founded on oral contract or promissory estoppel for child support arising out of an unwed man’s consent to artificial insemination).

261. See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that a former lesbian partner is responsible for the support of a child born to the other partner through artificial insemination by an anonymous donor where the two women had agreed to coparent before conception and had actually coparented for a few years); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding that lesbians in domestic partnership are both parents where one woman’s eggs were used by the other woman who went through in-vitro fertilization to bear a child); *Kristine H.*, 117 P.3d at 696 (holding that two lesbians were both parents pursuant to a prebirth stipulated judgment declaring them joint legal parents of any later-born child resulting from an in-home artificial insemination using the semen of a friend who was paid and who agreed in writing not to seek custody or visitation); see also *In re Parentage of L.B.*, 122 P.3d 161, 170 (Wash. 2005) (declaring a “de facto parentage” for former lesbian partner for a child born as a result of artificial insemination). See generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006) (arguing that the presumption should not be available for all surrogacy cases or in all jurisdictions); Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633 (2005) (arguing that pre-birth parentage orders should not be available for all surrogacy cases or in all jurisdictions).

262. *But see, e.g., In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (holding that transsexual male did not have standing to seek visitation



As well, there is little Illinois precedent or statutory guidance on disestablishments of paternity arising from artificial inseminations, as when, for example, birth mothers seek to disestablish paternity of men who thought they were genetically-tied and parents as a result, but who were later shown to have no biological links.

### I. Actual Parenting

Finally, legal paternity can arise for a nongenetic father in Illinois based upon actual pre-birth and/or at-birth parenting,<sup>263</sup> usually with maternal consent.<sup>264</sup> More often, legal paternity will arise for a nongenetic father retroactively, after an extended period of actual post-birth parenting that began before or at birth.<sup>265</sup> Thus, in *Koelle v. Zwiren*,<sup>266</sup> Erik Koelle, a nongenetic father who had parented Jane Roe, born in 1984, during her first eight years, was able to pursue a claim for visitation against the birth mother, Jan Zwiren, who allegedly misrepresented to Erik that he was the genetic father.<sup>267</sup> Erik never completed a paternity

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with a child born to his/her "wife" via artificial insemination undertaken by couple jointly).

263. Similarly, legal parenthood, or quasi-parenthood, might arise for others (who never could have been genetic parents) based upon actual parenting, often with maternal consent. See, e.g., *In re Custody of Walters*, 529 N.E.2d 308 (Ill. App. Ct. 1988) (involving a grandparent); *In re Marriage of Engelkens*, 821 N.E.2d 799 (Ill. App. Ct. 2004) (involving a stepparent). For a review of the de facto parentage doctrine, see *L.B.*, 122 P.3d at 166-69 (applying doctrine to same-sex couple who agreed to raise a child born to one of the partners artificially inseminated with the help of a male friend).

264. Whether prebirth or at-birth maternal consent is always required is unclear. See, e.g., *In re Custody of Townsend*, 427 N.E.2d 1231, 1233 (Ill. 1981), *overruled on other grounds by In re R.L.S.*, 844 N.E.2d 22 (Ill. 2006) (holding that natural mother's stepdaughter may have visitation rights with child over objection of natural father who sought full and exclusive custody (the natural mother was in prison for killing natural father's wife)). Maternal consent leading to a man's visitation rights may even involve a married woman who consents to her husband's actual parenting even though he was not genetically-tied. See *In re Marriage of Purcell*, 825 N.E.2d at 728 (illustrating a situation where paternity for support purposes, but not visitation, was disestablished, and consent came via an agreed order in a marriage dissolution case).

265. Such legal paternity "relates back" so that postbirth conduct will result in the man being deemed a legal parent as of the time of birth (so that, for example, failed child support responsibilities can be pursued in court proceedings leading to financial child support obligations accruing since birth). Cf. FED. R. CIV. P. 15(c) (providing that an amended pleading relates back to date of original pleading).

266. 672 N.E.2d 868 (Ill. App. Ct. 1996).

267. See *Koelle*, 672 N.E.2d at 870-71 (noting that Jan had been Erik's stepmother before Erik's father died and before they engaged in sexual intercourse, and that Jan was concerned about whether everyone knew the genetic father was a wealthy, married man who was a client of Jan's

acknowledgment nor filed early on a paternity suit.<sup>268</sup> Based on Jan's representations, Erik simply developed a loving and caring relationship with Jane.<sup>269</sup> When Erik discovered through testing in 1992 that he was not the genetic father, he sought visitation rights.<sup>270</sup> Jan objected, arguing that Erik was not entitled to visitation "because he was not a natural or adoptive parent."<sup>271</sup> An appellate court found that visitation may be appropriate if Jane "wants to see" Erik and if visitation is in Jane's best interests. The court ruled that there needed to be a hearing that included "testimony from competent experts."<sup>272</sup> In remanding for such a hearing, the court seemingly determined not only that Erik's "paternity" was or could be established by actual parenting, but also that any "paternity" could be disestablished and his visitations discontinued if Jane's desire for visits and her best interests were not demonstrated, given the presumption favoring Jan's "superior" right as the birth mother to care for her child.<sup>273</sup>

### J. Summary

There are varying ways in Illinois to establish legal paternity. Some, but not all, are governed by statute. The nonstatutory forms remain especially unclear. Some, but not all,<sup>274</sup> roads to paternity demand an indication of genetic ties between men and children. Some, in fact, exclude genetic fathers who wish to parent (as when there are intact marriages). Some require consent by the men while others do not. Some require maternal cooperation before men can become fathers-in-law, at times even when the men are genetically-tied. Some arise under written laws governing children who are receiving public aid or who are involved in state child support services. Childrens' best interests at times are not actually considered in designating legal paternity.<sup>275</sup>

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advertising agency).

268. Erik sought visitation in a lawsuit that also alleged claims against Jan for fraud and intentional infliction of emotional distress arising from Jan's conduct by initiating sexual contact while lying about her chances for pregnancy and then later lying about Erik's genetic ties. *Id.* at 870-71.

269. *Id.* at 871.

270. *Id.* at 872. Erik also sought money damages from Jan for fraud and intentional infliction of emotional distress. *Id.* at 870. The appellate court sustained the sufficiency of these claims. *Id.* at 875.

271. *Id.* at 872.

272. *Id.* at 873.

273. *Id.* at 872 (citing *In re Custody of Townsend*, 427 N.E.2d at 1234).

274. *But see* Crystal M. Pipher, Note, *The Effect of In re Devon M. on the Illinois Parentage Act and Illinois Public Policy*, 29 S. ILL. U. L.J. 531 (2005) (suggesting that "paternity as a sanction" against a man who refuses to submit to a court-ordered paternity test should rarely be utilized).

275. This approach is well-criticized in Steven N. Peskind, *Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of*

There are, as well, differing standards for disestablishing paternity.<sup>276</sup> Disestablishments do not always follow proof that the established fathers-in-law have no genetic ties with their children. Some disestablishment petitioners have very short limitations periods while others have extended time. Some disestablishment petitions require proof of fraud, duress, or material mistake of fact. At times, disestablishment proceedings involve a state agency that is also seeking a paternity designation for a second man where some form of public aid has been afforded the child. Moreover, paternity disestablishments may be unaffected by proof of significant maternal misconduct regarding the circumstances of birth.<sup>277</sup>

Certain distinctions in paternity establishment and disestablishment settings are necessary. Similar parental rights and responsibilities are not warranted for all genetic fathers, for all nongenetic fathers who have actually parented, or for all men first designated as fathers-in-law as of the time of birth. All genetic mothers should not have to act similarly when legal paternity is at issue — married mothers need different standards than unmarried mothers.

Yet, due process and equal protection limits always must be honored. These limits are quite substantial for paternity laws since often “a fundamental constitutional right is implicated,”<sup>278</sup> including “the interest of parents in the care, custody and control of their children . . . perhaps the oldest of the fundamental liberty interests,” with deep roots “in this Nation’s history and tradition.”<sup>279</sup> Unfortunately, paternity establishment and

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*Parenthood*, 35 LOY. U. CHI. L.J. 811 (2004).

276. Paternity establishments and disestablishments sought after the death of the alleged genetic father are not reviewed herein. See generally *Binion v. Chater*, 108 F.3d 780 (7th Cir. 1997) (illustrating a suit to establish paternity under Illinois law of a dead husband, a presumed father, as the genetic father, and thus the legal father for purpose of a child’s recovery of Social Security survivor’s benefits, where the husband was unnoted on the birth certificate and where the husband was not deemed to be the legal father in a later divorce decree).

277. Compare 750 ILL. COMP. STAT. 5/505(a) (2004) (instructing that child support order in marriage dissolution proceeding should not reflect consideration of any “marital misconduct”), with 750 ILL. COMP. STAT. 45/6(d) (2004) (providing that fraud or duress may be used to rescind voluntary acknowledgment of paternity).

278. *In re D.W.*, 827 N.E.2d at 480 (declaring that when there is no fundamental right at play, due process and equal protection mandates still require that lawmakers act only when their initiatives “bear[] a rational relationship to a legitimate state interest”).

279. *Id.* at 481 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989)). It is unclear at times who such parents are. Do nongenetic dads who have actually childreared since birth, with maternal consent, ever gain the fundamental federal constitutional right to parent, or are such parental rights simply matters for state lawmakers, who are often moved to recognize

disestablishment distinctions are, at times, problematic on public policy, if not constitutional, grounds.

#### IV. REFORMING ILLINOIS PATERNITY DISESTABLISHMENT STANDARDS

Fundamental rights<sup>280</sup> are usually implicated in Illinois paternity disestablishment proceedings regardless of the technique employed for establishing paternity or of the party seeking disestablishment. When such rights are implicated, due process requires that such proceedings promote “compelling” state interests with laws that are “narrowly tailored” and that utilize “the least restrictive means consistent with the attainment of the government’s goal.”<sup>281</sup> As well, “the constitutional guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner.”<sup>282</sup> Unfortunately, many Illinois paternity disestablishment standards, at times prompted by federal welfare statutes, fail to measure up. They fail both procedurally and substantively, thus infringing upon “the most basic” of civil rights — conceiving and raising (or nowadays more frequently perhaps just raising) children.<sup>283</sup> The following, more particular observations on contemporary Illinois paternity disestablishments suggest areas for reform by both the Illinois General Assembly and the United States Congress.<sup>284</sup>

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parental rights in order to further the best interests of children rather than interests of genetic fathers?

280. *See id.* (discussing the “fundamental constitutional right” of parents “to control the upbringing of their children”).

281. *Id.* at 481. Disestablishment of the paternity opportunity interest a genetic father has in his child may also be sought though the man has not yet become a parent under law with the fundamental right to childrear. *See Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (concurring with a prior observation of Justice Stewart’s that the fundamental right of parentage requires the existence of an enduring relationship in order to arise, and does not merely spring from biological connections). As this interest also has federal constitutional protection, there are federal due process (and equal protection) safeguards, though they are less than the safeguards afforded genetic fathers recognized as parents under law. Paternity opportunity interests are more fully described in Jeffrey A. Parness, *Federalizing Birth Certificate Procedures*, 42 BRANDEIS L.J. 105, 109-17 (2003) (also comparing maternity and paternity laws).

282. *In re D.W.*, 827 N.E.2d at 482.

283. *Id.* at 481 (internal quotation marks omitted). The court also noted that such rights are perhaps “the oldest of the fundamental liberty interests.” *Id.* (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989)).

284. While the focus here is on disestablishments, there is much clearly wrong with paternity establishment procedures as well. *See, e.g.*, *Dep’t of Pub. Aid v. Liesman*, 578 N.E.2d 310 (Ill. App. Ct. 1991). Because actions to establish father and child relationships need not involve as parties all legally interested persons (mother, child, any putative father), successive actions involving parentage of the same child are permitted. In *Liesman*, the

Consider first the varying forms of statutory and nonstatutory voluntary acknowledgments of paternity. Securing such an acknowledgment around the time of birth to an unwed mother seems important whether or not the mother has received, or will soon receive, public assistance. The state should be similarly interested in designating legal fatherhood for all newborns, and not simply become truly interested only when financial reimbursement or reduced welfare payments come into play. A birth certificate for a child born to an unwed mother should normally contain the name of the genetic father, secured upon the reasonable belief of blood ties. Earlier Illinois birth certificate laws reflected this policy (though implementation too frequently was lacking).<sup>285</sup> Such a policy would promote the longstanding public interest in early, accurate, informed, and conclusive designations of legal paternity. Voluntary acknowledgments should be permitted shortly before birth as well as at birth (since testing is not required), and should be subject to execution in varying locations — hospitals, agency offices, courts, etc. — though with similar procedural safeguards in place everywhere. At times, perhaps, as with soldiers in Iraq, executions by expectant mothers and fathers should be permitted at different times and in different locations.

Alternatively, a voluntary paternity registration opportunity for the unwed mother alone, or for the unwed father alone, could be modeled on the Putative Father Registry<sup>286</sup> for men believing that he is or will be a genetic father whose child may be placed for adoption by the mother. A singular registration should be founded on the unwed mother's or the alleged father's clear and unequivocal representation of genetic ties between the unborn child and the named man, at least where there is no reason to doubt the registrar. A man named by a woman would be given notice so that he could act to formalize paternity as well as

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Department of Public Aid could proceed on behalf of the child to establish paternity (so that it could receive reimbursement for financial assistance it had provided) against a man who had earlier prevailed (for procedural reasons involving the mother's discovery failures) in a similar suit brought by the same department with the same mother. *Id.*; see also *Dep't of Pub. Aid v. Wheeler*, 618 N.E.2d 1311 (Ill. App. Ct. 1993) (illustrating a case similar to *Leisman* but where mother's earlier paternity suit was dismissed for unknown reasons).

285. See, e.g., 410 ILL. COMP. STAT. 535/12(4) (1992) (amended 1993) (providing that birthing facility personnel were responsible "for preparing and filing the birth certificate," and should have undertaken "a reasonable effort to obtain the signatures of both parents"). On the failure of implementation, see Jeffrey A. Parness, *Designating Male Parents at Birth*, 26 U. MICH. J.L. REFORM 573, 575-78 (1993) (describing in part the results of author's 1991 survey of Illinois birthing facilities).

286. The guidelines are found in 750 ILL. COMP. STAT. 50/12.1 (2004) (seemingly limited to settings where there will or may be an adoption).

actually parent, or at least so that he is aware of the potential for future child support responsibilities. Likewise, a mother would be given notice of a man's registration, alerting her to the potential for later child visitation, custody, or support petitions, as well as barriers to adoption.

Moreover, it is important to trust unwed mothers who name men absent at birth as the genetic fathers. Mothers must be made fully aware, however, of the negative consequences that can follow any affirmative misrepresentations (e.g., as to the man and/or as to her certitude of his genetic ties). In contrast, there may be less reason to trust men who declare their genetic ties in the absence of testing and of maternal cooperation.

Single paternity registrations hopefully will help prompt more genetic fathers of children born to unwed mothers to become actual parents, regardless of whether they are present at the birth and whether they wish to be recognized under law at the time of birth.<sup>287</sup> The fact that federal statutes require that voluntary paternity acknowledgments be deemed the equivalents of judicial paternity determinations, and thus need both maternal and paternal signatures,<sup>288</sup> does not mean that states cannot permit single paternity registrations by expectant mothers or by alleged genetic fathers. Single registrations, of course, would not constitute legal findings and should operate like putative father registries (including, then, certain confidentiality assurances).

Further, it makes little sense to treat differently comparable voluntary paternity concessions. Men in different settings may be similarly motivated to admit paternity due to perceived genetic ties. Significant comparability among all concessions is furthered if similar forms and related procedures are utilized in hospitals, in agency offices, in courts, and perhaps even in lawyers' offices and elsewhere, when paternity admissions are made by men around the time of birth. The forms and procedures utilized in court cases may need to differ in some respects, but they too should be substantially comparable.<sup>289</sup> All voluntary paternity concessions

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287. Of course, genetic fathers whose sexual assaults led to pregnancies or whose acts of domestic violence can be clearly anticipated are different. Such a maternal registration would likely not automatically trigger fundamental childrearing rights for the man named, as he would usually have to take some initiative under state law in order to move from simply a federal parental (or paternity) opportunity interest to the fundamental federal and state childrearing right. See, e.g., Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345, 374-80 (2000).

288. 42 U.S.C. 666(a)(5)(c), (d) (2000).

289. See, e.g., GA. CODE ANN. § 19-7-4(b)(5) (providing no relief from paternity and child support judgment where nongenetic father under law, while knowing of the lack of genetic ties, acknowledged paternity in a "sworn statement," signed a "voluntary acknowledgment" form, "proclaimed" himself

should be undertaken, to the extent possible, with informed and reasonable assent.

More uniform voluntary paternity concession procedures in different settings, and greater encouragement of early paternity identification should be accompanied by more unified guidelines on undoing legal paternity. Men whose children do not receive public aid should not have longer to rescind certain forms of paternity concessions and should not have different rescission guidelines. Men seeking to rescind comparable paternity admissions based upon fraud, duress, or material mistake of fact should not have procedural or substantive standards significantly differentiated by when and where the admissions were given.

In considering possible paternity law reforms in Illinois, early on it will be crucial to ponder the respective roles of the General Assembly, the courts, and certain administrative agencies. Common law developments for certain issues may be wise, as when slowly evolving legal standards are optimal in light of everchanging human experience and scientific understanding.<sup>290</sup> A one-statute (or one-case or one-rule) fits all approach is wrong, especially where regulated human conduct is largely unpredictable and ever-changing. Localized experimentations (as with single parent (female and male) registrations beyond the Putative Father Registry) should also be considered. Kinks can be worked out more easily and public awareness and acceptance of new legal standards can develop slowly. For other issues, exclusive statutory guidance may be prudent, as it will better secure desirable uniformity and demand that democratic processes inquire into and reflect public opinion. General Assembly action, of course, could override judicial precedents deemed unsound.<sup>291</sup> Yet for other issues, regulatory initiatives might be best, especially where technical expertise, practical experience, and the flexibility of agency rulemaking procedures will be important to formulating sound public policy.

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the genetic father, or agreed to child support in writing).

290. On the dangers of employing common law developments to address legal parentage issues (including the undermining of the General Assembly's responsibilities in reflecting social change, especially in statutory adoption proceedings), see *King v. S.B.*, 837 N.E.2d 965, 969 (Ind. 2005) (Dickson, J., dissenting) (asserting that the majority opinion in a former lesbian partners case opened "a veritable Pandora's Box of troublesome" issues). See also *Parker*, 916 So. 2d, at 934 (ruling on the extrinsic/intrinsic fraud distinction in paternity misrepresentation cases involving requested relief from earlier judgment over a year old, the court opined that countervailing "relevant policy considerations . . . are best addressed by the legislature").

291. See, e.g., *County of Fresno v. Sanchez*, 37 Cal. Rptr. 3d 192 (Cal. Ct. App. 2005) (describing a General Assembly override, less than four months later, of an appellate court decision on the standards for reopening of default paternity judgments by nongenetic fathers).

Paternity disestablishment reforms would be well served by a statewide taskforce inquiry into the varied techniques for establishing and undoing legal paternity designations. Such an inquiry should now be prompted, perhaps by the General Assembly or by the Illinois State Bar Association (perhaps at the urging of the Illinois Supreme Court).

#### CONCLUSION

The resolution of the case of Romel Smith, Valerie Dawson, and Kendra Smith failed to bring clarity to certain paternity disestablishment proceedings in Illinois. More significantly, the high court decision suggests that new law reform initiatives are needed in Illinois (if not Congress) regarding certain paternity establishments and disestablishments. Sound public policy (and perhaps due process and equal protection) demand that American lawmakers again promote more vigorously the early, accurate, informed, and conclusive designations of fathers-in-law around the time children are born. In particular, legal standards should promote more fully birth certificate designations of paternity. They should also dictate that when earlier paternity designations do not accurately reflect the necessary genetic ties, paternity disestablishment guidelines should be more fair and just.



