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Establishing the Best Answer to Paternity Disestablishment

BRANDON JAMES HOOVER, ESQ.[1]

I. INTRODUCTION

Imagine, if you would, the following: Jim and Cathy met their senior year of college and quickly fell in love and got married. During their marriage they gave birth to a beautiful daughter named Rebecca. However, after twelve years of marriage, Jim and Cathy ultimately decided to go their own ways and petitioned for a divorce on the grounds of irreconcilable differences. The parties filed for joint legal custody of Rebecca. Cathy received primary physical custody of Rebecca, and Jim received the standard visitation rights for his daughter, and he looked forward to the time with his daughter. Jim never missed a visit and always had something fun planned for it. Additionally, Jim was ordered to and gladly paid his $500 a month child support obligation. Most months Jim paid nearly double that amount so that Rebecca could live a good life and have the things she needed. The divorce was as picture-perfect as any divorce could have been.

Then, three years after the divorce, Jim attended an alumni event from his college and ran into some old friends. Throughout the course of conversation, Jim was made privy to the fact that Cathy had cheated on him during their marriage with a former classmate of theirs. After this conversation, Jim began to question whether Rebecca was really his daughter. After all, neither he nor Cathy had red hair. About a year later, Jim took Rebecca, who was then fifteen, and had a DNA test performed. This test conclusively determined that Jim was not Rebecca's father. After this, Jim filed a motion with the local court to disestablish paternity of Rebecca as well as a motion to end child support obligations, to return the child support he had paid, and to forgive the arrears that had accrued after Jim found out he was not Rebecca's biological father.

What will be the outcome of this perplexing paternity situation? The answer depends in large part on the jurisdiction in which Jim lives. The issue of paternity disestablishment is an issue that has come to the forefront of domestic relations law and has generated a wide variety of responses

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from courts and legislatures. This paper will explore the various ways in which jurisdictions handle paternity disestablishment and will include a brief discussion of the current statutes dealing with support obligations once paternity has been disestablished. Additionally, this paper will discuss the various issues to be considered in paternity disestablishment, such as the best interests of the child and the best interests of the father. Finally, this paper will conclude with a recommendation of how to handle paternity disestablishment suits.[2]

II. THE CURRENT STATE OF THE LAW ON PATERNITY DISESTABLISHMENT

Presently, various mechanisms are employed throughout the states for a putative father to attempt to dissolve paternity. These mechanisms vary from presumptions carried over from the common law to equitable doctrines, rules of civil procedure, and statutes aimed at disestablishment. This portion of the paper will present a sampling of the different ways that paternity may be disestablished in American jurisdictions.

A. The Use of the Marital Presumption

In some jurisdictions, the courts will apply a marital presumption when a child is born to a man and a woman while they are married.[3] "The marital presumption of paternity is the legal rule that identifies the husband of a married woman as the legal father of any child born during that marriage."[4] This rule was originally referred to as "Lord Mansfield's Rule," and in common law times was a hard presumption to overcome.[5] The rule provided that, unless there was statutory authority to do so, neither the husband nor the wife could testify against the presumption of paternity.[6] In order for the husband to overcome the presumption he had to present a total lack of access to his wife.[7] To do this, he had to demonstrate "that he was

2. While paternity disestablishment issues are multi-faceted, and in some jurisdictions may be brought by multiple parties, including the mother, or the biological father against the marital father, (*see*, *e.g.*, In re Shockley, 123 S.W.3d 642 (Tex. App. 2003); Boone v. Ballinger, 228 S.W.3d 1 (Ky. Ct. App. 2007)), this paper will focus solely on paternity disestablishment petitioned by putative fathers seeking to dissolve paternity for themselves.

3. As a practical note, the marital presumption would not apply in instances where the child's putative father was not married to the child's mother.

4. Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006).

5. T. Carmen Loconto, *Family Law-The Substantial Relationship Test: The Putative Father Gains Standing to Rebut the Presumption of Legitimacy* - C.C. v. A.B, 14 W. NEW ENG. L. REV. 79, 81-82 (1992).

6. *Id.* at 82.

7. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 563 (2000).

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'extra quatuor maria,' beyond the seas, otherwise he would be presumed to be the child's father."[8]

The marital presumption served several important goals. First, biological paternity used to be difficult to prove, but this presumption provided a legal standard for succession and inheritance.[9] The presumption also preserved the sanctity of marriage through the appearance that all children born during the marriage were of the marriage.[10] Finally, the marital presumption promoted the best interests of the child.[11] Under the common law, the consequences of being a bastard child were harsh.[12] Bastard children were referred to as "fillius nullius," which meant "son of nobody."[13] As the child of nobody, neither the mother nor the father was required to support the child, and the child faced a tremendous social stigma.[14]

This marital presumption flowed over into American law, and many states have different ways of dealing with the marital presumption in modern times. Some states still uphold the strict nature of the marital presumption. However, changes in recent years have called into question the necessity for the marital presumption. For example, with medical science technology, biological paternity is no longer all that difficult to establish. The availability of genetic testing has allowed a clear and rather inexpensive way to determine the biological father of a child.[15] DNA testing has thus fueled the demand for paternity disestablishment suits.[16] One scholar explains that "[a]lthough DNA technology was envisioned as a tool to establish paternity without the need for judicial involvement, it has been eagerly embraced by litigants who seek to disestablish their status as legal parents."[17] Included in this group are men who voluntarily acknowledged paternity and now seek to have the final judgment set aside and have the court order genetic testing, as well as men who seek to enter results of genetic tests they themselves had performed as evidence.[18]

In modern times, some states still apply the marital presumption. The State of California has a conclusive marital presumption.[19] This

8. *Id.* (citing 1 BLACKSTONE'S COMMENTARIES 457 (Lewis ed. 1814)).
9. Singer, *supra* note 4, at 248-49.
10. *Id.* at 249.
11. *Id.*
12. *Id.*
13. *Id.*
14. Singer, *supra* note 4, at 249.
15. *Id.* at 252.
16. *Id.* at 253.
17. *Id.*
18. *Id.*
19. *See* CAL. FAM. CODE § 7540 (Deering 2010).

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presumption is applicable if the husband and wife live together and the man is not sterile or impotent.[20] However, the statute provides for blood tests to rebut this presumption for up to two years after the child's birth.[21]

One recent case exemplifying this approach to paternity disestablishment is *Miscovich v. Miscovich*.[22] In this case, Gerald and Elizabeth were married in 1986, and in 1987 Elizabeth birthed a son.[23] The couple separated in 1989.[24] At the time of the divorce, Gerald did not question paternity of the child.[25] But, two years later when he realized that the child had a different eye color than either him or his ex-wife, he became suspicious and had a DNA test performed on himself and the child.[26] The test proved that Gerald was not the biological father of the child.[27] After the test, Gerald cut off all contact with the four-year-old child.[28]

When Gerald brought the issue before the court, the trial court held that the marital presumption could not be overcome because Gerald "had failed to present clear and convincing evidence of non-access, sterility or impotency."[29] Hence, because he could not overcome the presumption, the court refused to issue DNA testing.[30] On appeal, the court discussed the traditional importance of the marital presumption and the difficulty in overcoming the presumption.[31] The court, however, ultimately determined that where a child is born during wedlock (i.e. marriage) blood tests may not be ordered unless the presumption of paternity has been rebutted by clear and convincing evidence.[32] Further, the court recognized that "the presumption is irrefutable where the mother, child and husband live together as an intact family, with the husband assuming parental responsibility."[33] Here, the court determined that the presumption had not been rebutted.[34] The court's opinion ended by stating, "[w]e recognize that there is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he had been

20. *Id* § 7540.
21. *Id* § 7541(b).
22. 688 A.2d 726 (Pa. Super. Ct. 1997).
23. *Id.* at 727.
24. *Id.*
25. *Id.*
26. *Id.* at 727-28.
27. *Miscovich*, 688 A.2d at 727.
28. *Id.*
29. *Id*. at 728.
30. *Id*.
31. *Id.* at 729.
32. *Miscovich*, 688 A.2d. at 730.
33. *Id.* at 730.
34. *Id.* at 733.

accepting and recognizing as his own."[35] So, because Gerald "offered no evidence of non-access, sterility or impotency," he did not rebut the presumption and his obligation to support the child remained intact.[36]

Miscovich represents strict adherence to the marital presumption. In jurisdictions that still maintain a strict adherence to the presumption, it is very hard for a married or formerly married man to disestablish a child unless the father is able to show that he was sterile, impotent, or did not have access to the child's mother at the time she got pregnant. Another state that still maintains a strict adherence to the marital presumption is Louisiana.[37]

B. The Rules of Civil Procedure Approach

Another way that paternity disestablishment can occur is through the Rules of Civil Procedure. Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial . . . ; (3) fraud, misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.[38]

Further, this rule provides that sections one through three must be filed within one year of the judgment, and the other provisions of the rule must be filed within a "reasonable time."[39] Now, as a practical note, although state courts do not employ the Federal Rules of Civil Procedure, most have "a procedural vacatur rule modeled after the broad language of Federal Rule 60(b)."[40]

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35. *Id.* at 732 (citing Commonwealth ex rel. Goldman v. Goldman, 184 A.2d 351 (Pa. Super. Ct. 1962)).

36. *Id.* at 733.

37. *See* LA. CIV. CODE ANN. art. 189 (2010).

38. FED. R. CIV. P. 60(b)(1)-(6) (parenthetical omitted).

39. FED. R. CIV. P. 60(c)(1).

40. Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CAL. L. REV. 867, 876 (1997).

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An example of a case that adopted the Rule 60(b) final judgment set aside method for paternity disestablishment is *In re Paternity of Cheryl*.[41] In this case, a putative father had voluntarily acknowledged paternity for five years.[42] Then, he took a paternity test and found out that the child was not his.[43] The main issue of the case turned on whether Rule 60(b) had been met, most notably whether the petition had been filed "within a reasonable time."[44] The mother had given birth to a child in August 1993 and in November 1993 the department filed a petition against the alleged father for child support.[45] The man was told that a paternity test would be provided to him, and that the department of child services would advance the costs of the test.[46] He would only have to pay for the test if it were determined that he was the father of the child.[47] However, instead of taking this test, the man opted to accept paternity of the child knowing that it would be a judgment against him and that he would be ordered to pay support.[48]

The case arose as a result of the department seeking to increase the weekly child support by $33.50.[49] As soon as the department sought to increase support, the man challenged paternity.[50] In his motion he provided that he knew he was not the child's father for quite some time.[51] He included various reasons including that the child's mother had told him.[52] Additionally, he possessed a doctor's report that stated that he had a low sperm count.[53] The trial judge denied the motion for genetic testing.[54] However, several months later, the man took the child and had a DNA test performed which confirmed that the child was not his.[55] He again moved to vacate the judgment under Rule 60(b).[56]

This time, the trial judge granted an order for a genetic test and "the judge said that if the tests established that the father was not the biological parent of Cheryl, he would be entitled to relief from [the judgment against

41. 746 N.E.2d 488 (Mass. 2001).
42. *Id*. at 490.
43. *Id.*
44. *Id.* at 490 (citing FED. R. CIV. P. 60(c)(1)).
45. *Id.* at 491.
46. *Cheryl*, 746 N.E.2d at 491.
47. *Id.*
48. *Id.*
49. *Id.* at 492.
50. *Id.*
51. *Cheryl*, 746 N.E.2d at 493.
52. *Id.* at 492.
53. *Id.* at 493.
54. *Id*.
55. *Id.*
56. *Cheryl*, 746 N.E.2d at 493.

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him]."[57] The judge, however, ruled that he would not be entitled to retroactive relief because "the father's 'interests in no longer being obligated to support a child not his own' outweighed Cheryl's interests 'in maintaining a relationship with someone she believed to be her biological father.'"[58] The facts further provided that the child in question referred to the man as "Daddy."[59]

On appeal, the child's mother argued that if Rule 60(b) applied this case would be time-barred because it had not been brought within a reasonable time.[60] The disestablished father countered that the 1993 judgment was not equitable.[61] Further, he argued that the motion was timely because he was not certain whether he was the child's father until right before the action was commenced.[62]

In evaluating Rule 60(b), the court determined that the reasonable time standard needed to be calculated on a case-by-case basis.[63] However, as a general rule, challenges to paternity "should not be permitted beyond 'a relatively brief passage of time.'"[64] The court held that this was the proper standard because of the compelling public interest in the finality of paternity decisions and the best interests of the child.[65] The court recognized that "what is in the child's best interests will often weigh more heavily than the genetic link between parent and child" and that the effect of paternity disestablishment may be devastating to the child.[66] Based on this reasoning the court determined that the motion had not been brought in a timely manner.[67] The court ultimately determined "that a father's challenge to a paternity judgment may be untimely even though he may establish conclusively that he is not a child's genetic parent."[68] Further, the court dismissed the notion that the mother's action would amount to a fraud on the court.[69]

However, the court mentioned two situations in which the outcome could be different. First, "[a] different result might be mandated if a man named by a mother in these circumstances had no opportunity to undergo

57. *Id.*
58. *Id.* at 493-94.
59. *Id.* at 492.
60. *Id.* at 494.
61. *Cheryl*, 746 N.E.2d at 494.
62. *Id.*
63. *Id.*
64. *Id.* at 495 (quoting Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872 (W. Va. 1989)).
65. *Id.*
66. *Cheryl*, 746 N.E.2d at 495-96.
67. *Id.* at 496-97.
68. *Id.* at 497.
69. *Id. at* 498.

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genetic testing before he acknowledged paternity."[70] Second, "[a] different result might be mandated if a man named by a mother in these circumstances promptly challenged the paternity judgment on obtaining information that he might not be the child's biological father."[71] Thus, not only does *In re Paternity of Cheryl* provide insight into the Rule 60(b) approach, it also provides insight into ways in which putative fathers may be successful in their actions in states that provide this method of paternity disestablishment.

C. The Estoppel Approach

Equitable estoppel is a legal doctrine that could apply to prevent a father from disestablishing paternity.[72] The general rule of equitable estoppel in paternity disestablishment is that courts are generally willing to estop a presumed father from asserting nonpaternity when the man had knowledge, actual or constructive, that the child was not his, yet failed to act.[73] Courts are more likely to estop an assertion of nonpaternity when there is detrimental reliance regarding the child, especially if another man would possibly have been pursued for support.[74]

One case that demonstrates the court's application of equitable estoppel in paternity disestablishment is *Clevenger v. Clevenger*.[75] This case presents the issue of the duty to support that "a husband owes to his wife's illegitimate child when the husband, from the date of the birth of the child, accepts the child into his family, publicly acknowledges the child as his own and treats the child as if he were legitimate."[76] In *Clevenger*, the child was conceived when the husband and wife were apart: the husband was in Fort Missoula, Montana and the wife was in San Francisco, California.[77] The trial court determined that although the husband was not the biological father of the child, because he had treated the child as a legitimate child, he should be obliged to support the child.[78] On appeal, the court recognized that based on "basic moral and social considerations" it must uphold the

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70. *Id.* at 499.
71. *Cheryl*, 746 N.E.2d at 499-500.
72. Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CENTER FOR FAMILIES, CHILD., AND CTS. 3, 6 (2003).
73. *Id.* at 6-7.
74. *Id.*
75. 11 Cal. Rptr. 707 (Cal. Ct. App. 1961).
76. *Id.* at 708.
77. *Id.* at 709.
78. *Id.* at 709-10.

judgment if at all possible.[79] The court reasoned that "[t]here is an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child's support, announces, and relies upon his bastardy."[80] The court then laid out various arguments to be considered on remand, and most notably the issue of estoppel.[81]

According to the court, the issues of estoppel included that the father represented to the child that he was the father, the man wanted the child to act on this representation, the child relied on the representation, the child treated the man as his father by showing love and affection, and the child was ignorant of the true facts of the situation.[82] The court determined that if all of these elements were present, paternity by estoppel could be established.[83]

The court further discussed the benefits that both the husband and the child would receive if paternity by estoppel were applied.[84] The court opined that the husband would receive the benefit of the love of the child, the benefit of the custody of the child, and the benefit of community recognition for being a father, which the court determined was a status of "prestige and fulfillment."[85] As for the child, the court believed that disestablishment of paternity would hurt the child because the mother had previously been deprived of the opportunity to find the true father.[86] Also, the court believed that the child should be able to rely on the fact that the husband had induced him to accept the man as his father, and that paternity should be retained because the child had held the husband out to the community as his father.[87]

So, as this case points out, paternity by estoppel is a doctrine that requires a man who has held a child out as his own to continue to support the child despite the fact that the man is not the child's biological father. This doctrine is applied in some jurisdictions to prevent men from stepping away from a child for whom they have acted as a father over time.[88]

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79. *Id.* at 710.
80. *Clevenger*, 11 Cal. Rptr. at 710.
81. *Id.*
82. *Id.* at 714.
83. *Id.*
84. *Id.*
85. *Clevenger*, 11 Cal. Rptr. at 714.
86. *Id.*
87. *Id.* at 714-15.
88. *See*, *e.g*,, Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990); John M. v. Paula T., 571 A.2d 1380 (Pa. 1980).

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D. The Statutory Approach to Paternity Disestablishment

In addition to the aforementioned methods of disestablishing paternity, several states have enacted statutes that deal with paternity disestablishment. These statutes tend to vary from state to state. Additionally, both the Uniform Parentage Act, published by the National Conference of Commissioners of Uniform State Laws, and the Principles of the Law of Family Dissolution, published by the American Law Institute, provide model legislation on the issue.[89] State legislatures have acted to ensure men the ability to disestablish paternity should the occasion present itself.[90] In some instances, statutes are passed as a response to a court decision that the state legislature finds repugnant. For instance, Georgia's current statute was passed as a result of a court decision that the state legislature did not agree with.[91] In response to this case, Georgia passed a law that if a man, who has not acted as a child's father, has results from a genetics test from within the last ninety days showing a zero percent probability of being the biological father, and that man files an affidavit that this new information has been brought to his attention since the final judgment, the court must disestablish paternity.[92] According to this statute, if the man had previously acted as the child's father, then the court has the discretion to disestablish paternity.[93] Georgia's statute offers one of the most paternity disestablishment-friendly methods in the nation.

Ohio has a law similar to Georgia's.[94] The Ohio statute was passed in response to backlash from the Columbus, Ohio decision *In re Contemnor Caron*[95] by a visiting judge from Cleveland.[96] In this case, even though Caron had genetic proof that he was not the biological father of the child in question and ultimately paid the child support obligation, Caron was held in criminal contempt of court and was ordered to be jailed for thirty days.[97] Not only did this case attract the attention of the citizens of Columbus, who wrote letters to the editor of the Columbus Dispatch, but it also caught the

89. Anderlik, *supra* note 72, at 13-15; *see* UNIF. PARENTAGE ACT (2000); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1), 3.03 (2002).

90. Anderlik, *supra* note 72, at 13.

91. William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A. J. 38, 43 (2003).

92. GA. CODE ANN. § 19-7-54 (West 2010).

93. *Id.*

94. *See* OHIO REV. CODE ANN. § 3119.961 (West 2010).

95. 744 N.E.2d 787 (Ct. Com. Pl. 2000).

96. *See* Charles R. Evans, Op-Ed., *Case Points Out Judicial System Flaws*, COLUMBUS DISPATCH, Nov. 18, 2000, at 11A.

97. *Caron*, 744 N.E.2d at 839; Evans, *supra* note 102, at 11A.

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eye of the Ohio General Assembly.[98]. The legislation passed by the Ohio General Assembly provides that:

> [n]otwithstanding the provisions to the contrary in Civil Rule 60(B) . . . a person may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person . . . is the father of a child or from a child support order under which the person . . . is the obligor.[99]

In essence, the Ohio legislation provides the protection of Rule 60(b) without the "reasonable time" limitation.[100]

Another type of statute has been passed that is similar to Ohio and Georgia's but includes a statute of limitations. An example of such a law is an Alaska statute that provides that a party can seek disestablishment only once and must bring the petition within three years after the child's birth or three years from the time the party "knew or should have known of the father's putative paternity of the child."[101] If such tests determine that the man in question is not the father of the child, then paternity must be disestablished.[102] Similarly, a Colorado statute requires that an action to disestablish paternity must be brought within a reasonable amount of time; however, under no circumstance should that reasonable amount of time exceed five years after the child's birth.[103] Additionally, other states have adopted similar statutes, although, the time involved varies from state to state.[104]

The Uniform Parentage Act of 2000 provides a presumption of paternity based on the existence of a social relationship plus conduct indicative of a parental relationship.[105] This model statute allows a proceeding to adjudicate parentage to be commenced within two years of the child's birth.[106] The statute provides an additional two-year period for challenges when there is voluntary acknowledgment of paternity for "fraud, duress, or

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98. *See*, *e.g.*, Evans, *supra* note 102, at 11A (Evans' letter asked why Caron was jailed when he was not the biological father of the child, why he was jailed when he had ultimately paid the support obligation, and finally why a judge was brought in who was not elected by or held directly accountable to the citizens of Columbus to hear this decision).

99. OHIO REV. CODE ANN. § 3119.961(A) (West 2010).

100. *See* FED. R. CIV. P. 60(b).

101. ALASKA STAT. § 25.27.166(b)(2) (2010).

102. *Id* § 25.27.166(c).

103. COLO. REV. STAT. ANN. §19-4-107(1)(b) (West 2010).

104. *See*, *e.g*„ 40 ILL. COMP. STAT. ANN. 45/8-(2),(3) (West 2010); MICH. COMP. LAWS ANN. § 722.714(3) (West 2010).

105. UNIFORM PARENTAGE ACT § 204 (2000).

106. *Id.* § 607(a).

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material mistake of fact."[107] A few states, including Delaware, Texas, Washington, and Wyoming, have adopted the Uniform Parentage Act of 2000.[108]

One final, noteworthy type of statute is the Principles of the Law of Family Dissolution published by the American Law Institute (ALI).[109] The ALI places emphasis on the components of parenting and defines a parent not only in the conventional way, but also to include a parent by estoppel.[110] The ALI proposes that courts consider certain factors when they are determining whether paternity should continue and thus the support obligation continue for a child who is not the biological child of the man.[111] These factors include: how the person and child acted towards one another; whether relationships supplanted the opportunity for the child to develop a relationship with the absent parent; and whether the child otherwise has two parents who are able and available to discharge the obligation of support.[112]

E. The Judicial Factor-Weighing Approach

In West Virginia, the model for paternity disestablishment was established by the Supreme Court of Appeals in *Michael K.T. v. Tina L.T.*[113] In this case, Michael and Tina had been married for two years when Tina gave birth to Brittany.[114] A year later, the couple no longer lived together as husband and wife.[115] At the divorce hearing, the family law master concluded that, as a matter of law, Michael was not the biological father of Brittany and that he had no legal responsibilities toward her.[116] The master made this determination on the basis that two separate blood tests absolutely precluded Michael from being Brittany's father; that Michael did not have access to his wife at the time because he was participating in a military exercise; and that Tina had admitted that she had sexual intercourse with another man while her husband was away during the military exercise.[117]

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107. *Id.* § 308(a).
108. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 Fam. L.Q. 527, 532 (2004).
109. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002).
110. *Id.* § 2.03 (defining parent as: an individual who had a reasonable, good faith belief that he was the child's father, lived with the child, and fully accepted the responsibility of parenthood for at least two years).
111. *Id.* § 3.03(1)-(2).
112. *Id.* § 3.03(2).
113. 387 S.E.2d 866 (W. Va. 1989).
114. *Id*. at 868.
115. *Id*.
116. *Id.*
117. *Id.*

The Circuit Court did not accept the family law master's recommendations with respect to the paternity issue.[118] Therefore, Michael appealed the matter to the Supreme Court of Appeals of West Virginia.

On appeal, the Supreme Court of Appeals discussed the marital presumption that a child born of a marriage is the child of that marriage.[119] The court noted that the common law allowed but two exceptions to rebut this presumption: nonaccess and impotence.[120] The court, however, explained that *under certain circumstances* it would add a third exception, blood tests, to rebut the common-law presumption of legitimacy.[121]

The court further delineated the circumstances that blood testing may be used to disprove paternity.[122] The Court provided the following caveat:

> [e]ven if blood test evidence excludes paternity in a given case, the trial judge should refuse to permit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.[123]

The court noted that this resembles the principle of equitable estoppel.[124]

The court delineated that a circuit court should conduct an in camera hearing to make a preliminary determination whether the equities warrant admissions of blood test results.[125] The Court reiterated, "the best interests of the child is the polar star by which decisions must be made which affect children."[126] The court then offered eight factors for circuit courts to consider in determining whether to permit blood testing to disprove paternity.[127] These factors include:

> (1) length of time following when putative father was first placed on notice [before contesting paternity]; (2) the length of time during which the individual desiring to challenge paternity assumed the role of father to the child; (3) the facts surrounding the putative father's discovery of nonpaternity; (4) the nature of father/child

118. *Michael K.T.*, 387 S.E. 2d at 868.
119. *See id*. at 869.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Michael K.T.*, 387 S.E. 2d at 871.
124. *Id*. at 871.
125. *Id*. at 870-71.
126. *Id*. at 872.
127. *Id.*

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> relationship; (5) the age of child; (6) the harm which may result to the child if paternity were successfully disproved; (7) the extent to which the passage of time reduces the chances of establishing paternity and child support obligation in favor of the child; and (8) all other factors which may affect the equities involved in the potential disruption of the parent/child relationship or the chances of undeniable harm to the child.[128]

Finally, the Court looked to the best interests of the child by providing "[t]he appointment of a guardian ad litem is necessary to protect the child's interests with respect to paternity."[129] The Court explained that either the parents or the state would bear the cost of the guardian ad litem.[130] In the actual matter before the Court, the issues were remanded to the circuit court to consider the factors provided by the Supreme Court of Appeals.[131]

III. THE CURRENT STATE OF THE LAW ON SUPPORTING A DISESTABLISHED CHILD

A. The Statutory Approach to Payment of Support Obligations after Disestablishment.

Once paternity has been disestablished, child support obligations typically end.[132] The typical statute provides that the support payments may stop or the petition to stop payments may be filed at the exact time that the court orders paternity disestablished.[133] The typical statute, like that of Arkansas, provides that when paternity is disestablished the court must relieve the obligor from having to pay any more support payments.[134] Other states, like Minnesota, provide that the courts must terminate all future support and the court may also terminate the obligation for past due support that accrued pending the paternity disestablishment hearing.[135] However, other states, like Virginia, explicitly provide that courts cannot retroactively modify an order for child support except for obligations that accrued since the date of the filing of the paternity disestablishment action.[136]

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128. *Michael K.T.*, 387 S.E. 2d at 872.
129. *Id*. at 873.
130. *Id.* at 873.
131. *Id*.
132. *See*, *e.g*, ARK. CODE ANN. § 9-10-115(f)(1)(B) (2010).
133. *See*, *e.g.*, MINN. STAT.§ 257.75 (2009).
134. ARK. CODE ANN. § 9-10-115(f)(1)(B) (2010).
135. MINN. STAT. ANN. § 257.75(4)(a) (2010).
136. VA. CODE ANN. § 20-49.10 (2010).

Additionally, at least two states have statutes allowing courts to forgive arrears when the obligor is disestablished of his paternity responsibility.[137] In Alaska, the statute provides that when paternity is disestablished the child support obligation is modified retroactively to extinguish arrears.[138] Iowa's statute requires that, when paternity is disestablished, the court is required to order all unpaid support obligations satisfied.[139]

Finally, some state statutes expressly forbid recouping child support payments after paternity has been disestablished.[140] The typical statute provides that there can be no claim brought against the child's mother for return of child support money that has already been paid.[141] States with similar statutes include Alabama,[142] Connecticut,[143] Delaware,[144] and Utah.[145] Tennessee's statute, on the other hand, only provides that the action cannot be brought against the State of Tennessee for return of monies paid for child support.[146]

B. Judicial Approaches in regard to Support Obligations

Courts in states that do not have specific statutory provisions for stopping support obligations also provide relief from child support obligations to the party who has disestablished paternity through equitable doctrines and judicial activism.[147]

In regard to arrears, courts have been rather careful in their approaches. One reason for this is because Rule 60(b) only provides for prospective relief, not for retroactive relief.[148] In *Ferguson v. Alaska Dep't of Revenue*,[149] the court had disestablished paternity, and the disestablished father was seeking relief from present child support obligations as well as the arrears that he had accrued.[150] The trial court held, and the Alaska Supreme Court agreed, that Rule 60(b) can only remedy prospective

137. *See*, *e.g.*, ALASKA STAT. § 25.27.166(d) (2010); IOWA CODE § 600B.41A(4) (2010).
138. ALASKA STAT. § 25.27.166(d) (2010).
139. IOWA CODE § 600B.41A(4) (2010).
140. *See*, *e.g.*, ALA. CODE § 26-17A-2 (LexisNexis 2010); DEL. CODE ANN. tit. 13, § 8-638 (2010).
141. *See*, *e.g.*, ALA. CODE § 26-17A-2 (LexisNexis 2010); DEL. CODE ANN. tit. 13, § 8-638 (2010).
142. ALA. CODE § 26-17A-2 (LexisNexis 2010).
143. CONN. GEN. STAT. § 46B-172 (2010).
144. *See* DEL. CODE ANN. tit. 13, § 8-638 (2007).
145. UTAH CODE ANN. § 78B-15-308(6) (2010).
146. TENN. CODE ANN. § 36-5-101(n)(2) (2010).
147. Paula Roberts, *Truth and Consequences Part III: Who Pays When Paternity is Established?* 37 FAM. L.Q. 69, 71 (2003).
148. *Id.* at 73.
149. 977 P.2d 95 (Alaska 1999).
150. *Id*. at 97-98.

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payments.[151] The court listed a variety of public policy reasons why the forgiveness of arrears would be problematic. These reasons included that it would be a benefit to people who did not pay attention to their legal obligations, forgiving arrears would encourage potential fathers to drag litigation on because a speedy result would not benefit them, and so forth.[152]

In regard to disestablished fathers seeking reimbursement of their previously paid support obligations, "disestablished fathers have had little success in obtaining orders of reimbursement from the courts."[153] Courts have used a variety of reasons for their decisions, including state sovereign immunity.[154] Hence, courts, like legislatures, are quick to forgive future support obligations to disestablished fathers, but are generally unwilling to forgive arrears or reimburse funds already paid.

IV. ANALYSIS

In considering paternity disestablishment, many legal, ethical, and moral issues come to the forefront. Depending on which of these issues one deems most significant may shape one's view of the issue of disestablishment as a whole. In general, the two leading issues to consider are the best interests of the child and the best interests of the father. However, this causes the question to arise regarding who should support a child if paternity disestablishment does in fact occur. This section of the paper will discuss the best interests of the child, the best interests of the father, and the financial issues that are raised in paternity disestablishment.

A. The Best Interests of the Child

The best interests of the child standard is the prevailing standard for domestic relations actions in general.[155] The best interests of the child standard also plays an important role in paternity disestablishment issues.[156] When paternity disestablishment issues turn on the best interests of the child, the rulings frequently go against the pecuniary interest of the father.[157] One reason the best interests of the child standard is used in such

151. *Id.* at 100.
152. *Id.* at 101.
153. Roberts, *supra* note 153, at 76.
154. *See* White v. Armstrong, No. M1999-00713-COA-R3-CV, 2001 WL 134601 (Tenn. Ct. App. Feb. 16, 2001).
155. Matthew B. Firing, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and its Constitutional Implications,* 20 QUINNIPIAC PROB. L.J. 223, 249 (2007).
156. Maegan Padgett, *The Plight of a Putative Father: Public Policy v. Paternity Fraud*, 107 W. VA. L. REV. 867, 898 (2005).
157. *See generally In re* Betty L.W. v. William E. W., 569 S.E.2d 77 (W. Va. Ct. App. 2002).

cases is because the child is the innocent victim of the situation.[158] Accordingly, "while some individuals are innocent victims of deceptive partners, adults are aware of the high incidence of infidelity and only they, not the children, are able to act to ensure that the biological ties they may deem essential are present."[159] Under this theory, the court recognizes that the father has the option to determine whether there are, in fact, biological ties at the very moment the child is born.[160] If the putative father chooses not to do this when he has the opportunity and enters a relationship with the child, then it is the child's interests that must be put on the forefront.[161]

The best interests of the child standard can include many different factors. The Supreme Court of Appeals of West Virginia has included several factors to consider.[162] These factors include: the amount of time the child thought the putative father was his father;[163] the child's relationship with the putative father;[164] the age of the child;[165] the child's right to support;[166] and any other factor that is likely to cause undeniable harm.[167] Additionally, the best interests of the child analysis should focus on who will support the child.[168] When child support obligations of fathers stop, there is an increased burden on the state for support.[169]

When courts base their decisions on the biological connection of the man to the child, the best interests of the child is avoided.[170] When biology plays a role, a man can at any time find out that he is not the biological father of a child.[171] At this time, the man can walk away from the child and his obligation to the child.[172] Decisions made under such a biological approach do not consider the relationship that the man had with the child before the testing.[173] Nor does the purely biological model take into

158. Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 57 (2003).

159. Anderlik, *supra* note 72, at 18. (citing Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, 8 DUKE J. GENDER L. & POL'Y 269, 282 (2001)).

160. *See In re* Marriage of Freeman v. Freeman, 53 Cal. Rptr. 2d. 439, 444 (Cal 4th Dist. Ct. App. 1996).

161. *See id.* at 446.

162. Padgett, *supra* note 158 at 897-898.

163. *In re Betty L.W. v. William E. W.,* 569 S.E.2d 77, 86 (W. Va. Ct. App. 2002).

164. *See id.*

165. *See* Cleo A.E. v. Rickie Gene E., 438 S.E.2d 886, 888-89 (W.Va. 1993).

166. *See* Wyatt v. Wyatt, 408 S.E.2d 51, 54 (W.Va. 1991).

167. *See Cleo*, 438 S.E.2d at 888-89.

168. Kristen Santillo, *Disestablishment of Paternity and the Future of Child Support Obligations*, 37 Fam.L.Q. 503, 504 (2003).

169. *Id*.

170. Singer, *supra* note 4, at 254.

171. *Id.* at 253.

172. *Id.* at 254.

173. *Id.*

account the well-being of the child. Furthermore, the availability of DNA testing allows men who are unhappy with their child support obligation to attempt to disestablish paternity.[174] Men do this because, financially speaking, "'they have nothing to lose and everything to gain.'"[175]

However, the marital presumption does seem to foster the best interests of the child,[176] especially when courts require the father to overcome the presumption by proving lack of access, sterility, or impotence.[177] Regardless of the biological outcome, unless the man can overcome a rather high wall he cannot shirk his responsibility to the child—at least financially, which the state is authorized to regulate.[178]

Cases that hinge on paternity estoppel also look to the best interests of the child because these cases look at the social relationship that has developed between the father and the child.[179] These cases look to how the father has treated the child, and how the child looks to the father.[180] The biological relationship between the players is not important in this situation—so again, paternity by estoppel clearly looks to the best interests of the child.[181]

When a father disestablishes paternity of a child, the child is quite likely to become a socially stigmatized child.[182] As one court held, "nothing could be more devastating to the fragile psychology of a child than the sudden breach of a long established paternal relationship followed by being proclaimed a bastard and left without a father."[183] When courts do not look to the best interests of the child, but rather the interests of the father, more often than not these children are likely to face social stigmatization.[184]

A father's presence in a child's life is quite beneficial. Statistics show that children who are raised in homes without fathers suffer at a higher rate than children raised in homes with fathers.[185] Statistics show that children raised in a home without a father are eight times more likely to go to prison;[186] five times more likely to commit suicide;[187] and twenty times

174. *Id.* at 253-254.
175. Singer, *supra* note 4, at 254 (quoting Langston v. Riffle, 754 A.2d 389, 418 n.4 (Md. Ct. App. 2000) (Bell, C.J., dissenting)).
176. Glennon, *supra* note 7, at 562-563.
177. *Id.* at 565.
178. *Id.* at 570.
179. *See Clevenger v. Clevenger*, 11 Cal. Rptr. 707, 716 (Cal. Ct. App. 1961).
180. *See id.* at 714-715.
181. *See id.* at 717.
182. *Id*. at 596.
183. Knill v. Knill, 510 A.2d 546, 556 (Md. 1981) (Murphy, C.J., dissenting).
184. *See* Glennon, *supra* note 7, at 596.
185. *Id.* at 560; Firing, *supra* note 155, at 251.
186. Firing, *supra* note 155 at 253 n.204.
187. *Id.*

more likely to have behavioral problems.[188] Also, children raised in a home without a father are twenty times more likely to become rapists;[189] thirty-two more times likely to run away;[190] and ten times more likely to abuse chemical substances.[191] Children raised in a home without a father are nine times more likely to drop out of high school;[192] thirty-three times more likely to be seriously abused;[193] seventy-three times more likely to be fatally abused;[194] one tenth as likely to get A's in school.[195] Therefore, although courts cannot force these men to continue to act as fathers to their children, the courts can order support to continue.[196] In ordering support, it can be hoped that mens' hearts will follow their money.[197]

B. The Best Interests of the Father

In light of decisions against men who are deemed not to be the biological father of children but are required to pay child support, organizations in support of these men have emerged. One in particular is a website dealing with paternity fraud.[198] According to Carnell Smith, founder and executive director of the organization as well as self-proclaimed victim of paternity fraud:

> Any attempts to force or extort money from a non-paternal man that does not want to remain in the child support money machine (in my humble opinion), should be a violation of his civil rights, state sponsored extortion, duress, lack of equal protection, lack of subject matter jurisdiction, involuntary servitude or simply call it "slavery."[199]

This organization encourages all men who are involved in either divorce or child support actions to obtain DNA testing to determine whether the children actually belong to them.[200] This website further asks, "does

188. *Id.*
189. *Id.*
190. *Id.*
191. Firing, *supra* note 155,at 253 n.204.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *See* Dye v. Geiger, 554 N.W.2d. 538, 538-539 (Iowa 1996).
197. *See id*. at 541.
198. http://www.paternityfraud.com.
199. Carnell Smith, Citizens Against Paternity Fraud: About Us (last visited November 16, 2010). http://www.paternityfraud.com/paternityfraud-aboutus.html.
200. Paying child support on another man's child after being duped, Paternity Fraud Center, (last visited November 16, 2010). http://www.paternityfraud.com/dna-with-pna-form.html.

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common sense demand your [the nonpaternal man's] release from child support upon prima facie proof of non-paternity?"[201]

This website points out a variety of other arguments including the fact that paying child support for a child that does not belong to the man is a burden on the man's already existing biological children because his money is spent on other children and not his own family.[202] Additionally, it is pointed out that to facilitate truth and honesty, a state cannot support making a man pay for a child who is not his biological child.[203] A reference to the Bible is made as well that says in the Book of Revelation that all persons will be held responsible for their own actions.[204] Therefore, "since God holds each person individually responsible for their own actions, should the law of the land not do the same?"[205]

To step back and look at the best interests of the man, it appears that the interests that are most looked to are the interests a man has in his money.[206] As highlighted above, grassroots movements all seek to have a man reimbursed financially.[207] These organizations do not look at the people involved or the other issues; the money is the most important issue.[208] These organizations do not look to the relationship that the father has provided to the child over the years, the love the father has shown to the child, or the child's dependency on the father for emotional as well as financial support.[209] But rather they seek only to stop money from going into the "child support money machine."[210]

C. Who Should Pay for these Children?

While money is obviously important, it seems that, especially in instances where a father has taken care of a child for many years and has

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201. *Id.*
202. *Id.*
203. Ray Pitts, Judicial Justice: The Paternity Fraud Constitution (last visited November 16, 2010). http://www.paternityfraud.com/justicial-justice.html.
204. FAQs—Paternity (last visited November 16, 2010). http://www.paternityfraud.com/paternity-fraud-faqs.html.
205. *Id.* It is quite interesting that this website will quote the Bible from the book of Revelation in regard to one's judgment, yet overlook the basic premise of Christianity—loving one another. Specifically, the passage of Matthew 25: 31-46 should be taken into consideration. Most notably, the Words of Christ in verse 40: "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."
206. Carnell Smith, *About Us*, http://www.paternityfraud.com/paternityfraud-aboutus.html (last visited Nov. 28, 2009).
207. *See*, *e.g.*, *id.*
208. *See id.*
209. *See Michael K.T. v. Tina L.T.*, 387 S.E.2d 866, 872 (W. Va. 1989)).
210. Carnell Smith, *About Us*, http://www.paternityfraud.com/paternityfraud-aboutus.html (last visited Nov. 28, 2009).

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established a relationship with a child, the life of that child trumps the money interest of the father. The best interests of the child would best be served by having a father figure who supports them. Additionally, although the law certainly cannot compel it, such men who have served as father figures should continue to have a relationship with the child they have grown to love over the years and look at the situation as more than just a money situation.. Therefore, with these thoughts in mind, the following proposed legislation should be considered.

V. A PROPOSAL TO PATERNITY DISESTABLISHMENT

As this article demonstrates, there are many different approaches to the issue of paternity disestablishment. State laws vary considerably. However, it appears that the very best mechanism would be for a state to adopt legislation that clearly spells out factors to be considered in allowing paternity disestablishment. It is the opinion of this author that legislation like the Principles of the Law of Family Dissolution published by the American Law Institute is effective because it provides a variety of factors to be considered. This type of legislation seems to be superior to the Rule 60(b) approach or the Marital Presumption approach as it weighs a variety of factors. As mentioned earlier, the American Law Institute's model statute provides factors such as the relationship between the child and the putative father, whether the child could develop a relationship with an absent parent, and whether the child has other ways of support.[211]

It appears that the Supreme Court of Appeals of West Virginia struck the nail on the head when it delineated its list of factors for circuit judges to consider. The court included seven specific factors and then a catchall.[212] The first factor is the length of time following when the putative father was first placed on notice before contesting paternity.[213] This factor is important because the goal for all children should be permanency. If a man is placed on notice that he may not be a child's father yet continues to act in that role, there becomes a legitimate reason to continue the relationship. The man knew he was not the father, yet he continued to act in that capacity.

The second factor is the length during which the individual desiring to challenge paternity acted as a father.[214] This factor is very important. Children need stability in their lives, and removing a man from the picture who has acted as father for a number of years will cause dramatic effects on

211. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.03 (2002).
212. *Michael K.T.*, 387 S.E.2d at 872.
213. *Id.*
214. *Id.*

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the child's life. The longer the relationship, the less likely it will be for paternity to be established with another man, which is the seventh factor handed down by the Court.[215] Additionally, the fifth factor, the age of the child, is a valid consideration.[216] Children who have known one man as "Dad" for a number of years should not be deprived of that right.

The fourth factor is the nature of the father/child relationship.[217] This is a very important factor be considered. If a man has acted as a father toward a child and finds out that he is not the biological father, perhaps the strong character of the relationship can remain. This is especially likely to be true in an instance where the man will not be able to disestablish paternity. This appears to carry over into the sixth factor, which is the harm that would result if paternity was disestablished.[218] This is an important factor, as it is likely that in some instances no harm would be done, whereas others would cause tremendous harm. The third factor considers how the man found out he was not the father, and the eighth factor is a catch all for any other factors.[219]

States, including West Virginia, should consider passing legislation that includes the factors that the Supreme Court of Appeals of West Virginia handed down in *Michael K.T.*.[220] By adopting a multi-factored statute, legislatures could ensure that standard procedures are being followed throughout the state, yet allow courts the necessary discretion to recognize the uniqueness of each and every situation that involves paternity disestablishment.

Further, states should follow the guidance of the Supreme Court of Appeals of West Virginia and specifically legislate that children have the right to a guardian ad litem to protect their best interests in paternity disestablishment matters. All too often the child may be forgotten in a battle such as this. The appointment of a guardian ad litem would further ensure that the child's best interests are protected.

VI. CONCLUSION

In conclusion, while the state of the law on paternity disestablishment is currently up in the air, on issues of such importance, a need for consistency is desirable. By adopting the proposed method in regard to paternity disestablishment, both the best interests of the child and those of the

215. *Id.*
216. *Id.* at 872.
217. *Michael K.T.*, 387 S.E.2d at 872.
218. *Id.*
219. *Id.*
220. *See id.*

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potential father are taken into consideration. As for relationships that have been ongoing, the hat would tip in favor of the child. The best interests of the child would remain the "polar star" in the paternity disestablishment constellation.

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