CHAPTER NINE – ESTABLISHMENT OF PATERNITY

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ESTABLISHMENT OF PARENTAGE

INTRODUCTION

Under early common law, a child born to unmarried parents was considered *filius nullius* – the child of no one.[1] If paternity was established at all, the parents suffered the indignities of criminal "bastardy" proceedings, and the child had few legal rights. Perhaps prodded by a soaring increase in births to unmarried parents, society began to recognize the social and fiscal costs of ignoring these children. Starting in 1968, the U.S. Supreme Court decided a series of cases that precluded discrimination against this population of children, by states or the federal government, without a compelling state interest.[2] In 1973, the National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission (ULC), approved the original Uniform Parentage Act (UPA).[3] The UPA (1973) declared equality for parents and children without regard to the parents' marital status.

Congress also has grasped the importance of paternity establishment. From the outset of the nation's Title IV-D child support program in 1975, state and local child support agencies have been required to establish the paternity of all children who were born to unmarried parents who either receive public assistance benefits or have applied for IV-D child support services. Further, the Child Support Enforcement Amendments of 1984[4] required each state to permit a paternity action to be brought at any time before a child's 18th birthday,[5] rather than allowing shorter statutes of limitations on paternity actions, as had been the practice previously. That is a minimum period; some states allow a paternity action to be brought after the child has turned 18.[6]

Historically, paternity was proven through somewhat unreliable means, if at all. Defendants in criminal paternity proceedings were entitled to jury trials, at

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[1] Black's Law Dictionary 705 (9th ed. 2009).
[2] *See, e.g.*, *United States v. Clark*, 445 U.S. 23 (1980); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).
[3] The ULC has amended the UPA twice since its original enactment. In 2002 the ULC drafted a modernized version of the UPA that addressed DNA testing. In 2002 it made further changes to the act to also cover questions of parentage arising in cases of unwed parents. To date, 10 states have enacted the UPA (2002). In 2017 the ULC amended the UPA to address children born to same-sex parents, *de facto* parents, and advancements in assisted reproduction. To date, three states have enacted the UPA (2017). The UPA (2017) is discussed later in this chapter. *See* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0 (last visited Feb. 4, 2021).
[4] Pub. L. No. 98-378, 98 Stat. 1305 (1984).
[5] 42 U.S.C. § 666(a)(5) (2018).
[6] For information about each state's statute of limitations for the establishment of paternity, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide (IRG), Question E.2, https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1 (last visited February 4, 2021).

which evidence might consist of testimony regarding the parents' relationship and the mother's relationships with other potential fathers. Prosecutors would argue the physical resemblance of the child to the defendant by presenting the child for the judge or jury to view. Often, without an admission by the alleged father, it was difficult to establish paternity under the law.

As the science of genetics advanced, courts relied on blood type testing to exclude men accused of fathering children outside of marriage. Although this represented a major step forward, it still had its limitations. Attorneys had to lay the foundation for the admission of the scientific evidence and expert testimony, which was not always uniformly accepted by the courts. Blood typing, although useful, could not reliably identify the father of a child, but could only exclude possible fathers. Nor did it provide the court a high percentage probability of paternity.[7]

Today, genetic testing typically can identify a man as the father of a child with a high degree of accuracy. The procedure of scientific testing for paternity has changed significantly, with DNA testing providing the most accurate results. However, genetic testing often is not necessary because the parties voluntarily acknowledge paternity. Federal legislation requires states to provide not only for civil acknowledgment procedures, but to also make such procedures available at hospitals and other birthing facilities.[8] These advances in paternity establishment have been very important for child support efforts, as all child support orders require a legally identified parent.

For some families today, however, there may be no genetic tie between the child and the child's parents, especially where the parents are of the same gender. While these families historically may not have been able to establish legal parentage under state law, states began recognizing same-sex marriage in 2003, thereby changing the legal landscape for same-sex couples and their children.[9] In 2015, the U.S. Supreme Court recognized the constitutional right of same-sex couples to marry, justified in part by the need to protect children born to these couples.[10]

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[7] For a review of determining paternity through conventional blood testing (red blood cell grouping, HLA as well as DNA) *see* Parts III and IV, Alan R. Davis, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases,* 1994 B.Y.U. L. Rev. 129.

[8] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

[9] *See Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[10] *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Court explained that children born to same-sex couples outside of marriage "suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life" and that states that ban marriage "harm and humiliate the children of same-sex couples").

BENEFITS OF PARENTAGE ESTABLISHMENT

Establishing parentage provides benefits not only to the child but also to the parents who are ensuring that their child has the same rights as a child born to married parents. A finding of parentage provides the child an opportunity to develop important relationships with both parents. Once parentage is legally established, a child gains certain rights and privileges. These include financial support, rights to a parent's medical and life insurance benefits, inheritance rights, and rights to Social Security and, under certain circumstances, veterans' benefits. It can be important for the health of the child for doctors to have knowledge of both parents' medical history.

Both parents also benefit from a legal determination of parentage. Benefits to the custodial parent include financial assistance with the costs of raising the child and allocation of the responsibility to provide medical coverage for the child. Benefits to the noncustodial parent include being named on the child's birth certificate, being able to establish a parenting time plan or seek custody of the child, and being able to inherit from the child. Because of these benefits, the Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs rule contained a new provision that gives states the flexibility to allow applicants for child support services to request help with establishing paternity only, so long as both parents reside in the state.[11]

OVERVIEW OF FEDERAL LAW

As a condition of receiving federal funds, Congress has required states to establish a number of laws and procedures related to paternity establishment.[12] Therefore, although states have flexibility with regard to procedure, methods of paternity establishment are fairly uniform throughout the country.

Paternity Acknowledgment

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93)[13] required all states, as a condition of receiving federal funds, to adopt a civil process for voluntarily acknowledging paternity that includes a hospital-based program for parents to voluntarily acknowledge paternity around the time of their child's birth. The acknowledgment procedures must explain the rights and responsibilities of acknowledging paternity and include due process protections. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[14]

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[11] 81 Fed. Reg. 93,492 (Dec. 20, 2016). *See* 45 C.F.R. § 302.33(a)(6) (2019).
[12] Because of their sovereign status, tribes are not subject to the same requirements as states. *See* 45 C.F.R. §§ 309.01–309.170 (2019).
[13] Pub. L. No. 103-66, 107 Stat. 312 (1993).
[14] Pub. L. No. 104-193, 110 Stat. 2105 (1996) (as subsequently amended by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251).

modified and expanded the required paternity acknowledgment procedures.[15] While in-hospital paternity acknowledgment remains most effective, PRWORA also requires that, as a condition of receiving federal funds, state birth records agencies must offer paternity establishment services. PRWORA encourages states to use other voluntary paternity resolution methods as needed and with the same notice requirements.[16]

Before signing the acknowledgment, both the mother and the alleged father must receive notice, orally (or through the use of video or audio equipment) and in writing, regarding the alternatives to, the legal consequences of, and the rights and responsibilities that result from the acknowledgment.[17] In each state, the parents' completion of a voluntary paternity acknowledgment must create a legal finding of paternity.[18]

Some states allow the voluntary acknowledgment process to be used by same-sex couples to establish parentage for their child conceived through assisted reproductive technologies.[19] The state may use one form for both opposite-sex and same-sex couples, or the state may elect to use different forms.[20] The UPA (2017) provides that voluntary acknowledgments of parentage may be signed by intended and presumed parents regardless of gender, in addition to alleged genetic fathers.[21]

Although each state designs its own acknowledgment form, the federal Office of Child Support Enforcement (OCSE) has issued a list of required and optional data elements for paternity acknowledgment affidavits.

Required data elements. A state paternity acknowledgment form must include the following data elements:

- The current full names of the mother, father, and child;
- The Social Security numbers (SSNs) of the mother and father;
- The dates of birth of the mother, father, and child;

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[15] *See* 64 Fed. Reg. 11,802 (Mar. 10, 1999) for the final rule implementing parts of the paternity establishment provisions contained in PRWORA. *See also* OCSE-AT-99-02: *Final Rule: Implementing Part of the Paternity Establishment Provisions in PRWORA* (Mar. 10, 1999).
[16] 42 U.S.C. § 666(a)(5)(C)(iii)(II)(bb) (2018).
[17] 42 U.S.C. § 666(a)(5)(C)(i) (2018).
[18] In FFY 2019, child support agencies reported over 1.4 million paternity determinations, largely through in-hospital and other acknowledgment programs. *See* Office of Child Support Enforcement, *FY 2019 Preliminary Report* (June 23, 2020).
[19] *See, e.g.,* Nev. Rev. Stat. Ann. §§ 126.053, 126.680 (2019); 15C Vt. Stat. Ann. § 301 (2019).
[20] *Id*. Nevada has different forms; Vermont has one form.
[21] *See* Article 3 of the UPA (2017) at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0 (last visited February 4, 2021).

- The address(es) of the mother and father;
- The birthplace of the child (city, county, and state);
- A brief explanation of the legal significance of signing the acknowledgment and a statement that both parents have 60 days to rescind the acknowledgment;
- A clear statement signed by both parents indicating they understand that signing the acknowledgement is voluntary and that they understand what their rights, responsibilities, alternatives, and consequences are;
- Signature lines for the mother and father; and
- Signature lines for witnesses or notaries, along with notary seal.[22]

Optional data elements. In addition to the required elements, OCSE recommends the following optional data elements:

- Daytime phone number (mother and father);
- Birthplace – mother and father (city, county, and state);
- Hospital of birth (child);
- Gender of child;
- Father's employer;
- Ethnicity of father;
- Medical insurance;
- Maiden name of mother;
- Place where acknowledgment or affidavit was completed;
- Offer of name change for child;
- Signature line for guardian ad litem or legal guardian of minor(s);

[22] OCSE-AT-18-03: *Required and Optional Data Elements for Paternity Affidavits* (April 20, 2018). OCSE-AT-18-03 refers to the list of required and optional data elements for Paternity Establishment Affidavits set forth in OMB Form # 0970-0171 (Table 1). Table 1 is set to expire on January 31, 2021. OCSE issued DCL-20-06 on August 25, 2020, asking for public comments on Table 1.

- Three-way signature offered on form (husband, wife, and biological father);
- An advisory to parents that they may wish to see legal counsel or obtain a genetic test before signing; and
- A statement concerning the custody status of the child vis-à-vis state law.[23]

A signed, voluntary paternity acknowledgment is considered a legal finding of paternity subject to the right of any signatory to rescind the acknowledgment within the specified timeframes.[24] The finding of paternity by acknowledgment will remain in effect unless either signatory rescinds their acknowledgment within the earlier of (1) 60 days; or (2) the date of an administrative or a judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party.[25] Beyond that, a party must file a proceeding in court to challenge the acknowledgment and must base such a challenge on fraud, duress, or material mistake of fact.[26] The person challenging the acknowledgment has the burden of proof, and the court, except for good cause shown, cannot stay a signatory's support obligation during the contest.[27]

Federal law requires states to accept rescission of a paternity acknowledgment if made within the time periods as set forth above. However, states are divided on how this is done. Some states opt for a simple administrative procedure for rescission; others require formal judicial action.[28] Both methods usually require notice to the other signatory. The rescinding party might be required to file a petition to determine parentage and order genetic testing. If the father's name already appears on the child's birth certificate as a result of the acknowledgment, a court order granting the rescission will permit the vital statistics agency to change the birth certificate and remove the man's name from the birth records.[29]

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[23] *Id*. OCSE has made no changes in the data elements since 1998. *Compare* OCSE-AT-98-02: *Required Data Elements for Paternity Acknowledgement Affidavits* (Jan. 23, 1998) *with* OCSE-AT-18-03: *Required and Optional Data Elements for Paternity Affidavit* (April 20, 2018).
[24] 42 U.S.C. § 666(a)(5)(D)(ii) (2018).
[25] *Id*.
[26] 42 U.S.C. § 666(a)(5)(D)(iii) (2018). *See Doyle v. Chaplen*, 194 A.3d 1198 (Conn. App. 2018) (allowing mother to challenge signed paternity acknowledgment based on mistake of fact).
[27] *Id*.
[28] For a discussion of state procedures, *see* Office of the Inspector General, U.S. Dep't of Health & Human Servs., *Paternity Establishment: Use of Voluntary Acknowledgments, OEI-06-98-00053* (Apr. 2000), https://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf.
[29] For a review of several states' laws governing rescission, *see* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. Balt. L. Rev. 53, 83-87 (Fall 2010).

In addition to the basic requirement that a voluntary acknowledgment becomes a legal finding of parentage unless rescinded, states must give full faith and credit to an out-of-state voluntary acknowledgment of paternity signed in another state according to the other state's procedures.[30] As a condition of receiving federal funds, states must also bar judicial or administrative proceedings to ratify an unchallenged acknowledgment of paternity.[31] Once signed, the acknowledgment must be filed with the state birth records agency.[32]

If a state enacts either the UPA (2017) or the UPA (2002), its law will comply with many of these federal requirements.[33] For example, Section 311 of the UPA (2017) provides that a court must give full faith and credit to a parentage acknowledgment effective in another state if the acknowledgment was in a signed record and otherwise complies with the law of the other state.[34] Also, Section 308 limits any rescission to a maximum of 60 days from the date the acknowledgment is filed.[35] Section 309 permits a collateral court challenge after 60 days only within two years after the acknowledgment is filed and must be based on fraud, duress, or material mistake of fact.[36] Importantly, the local law of the state that established parentage governs the order.[37]

Prohibition against Jury Trials

Historically, state laws determined whether respondents in paternity cases had a right to jury trials. The 1973 version of the UPA prohibited jury trials in parentage proceedings on the basis that the use of jury trials is not desirable in such emotional atmospheres.[38] Congress agreed; PRWORA requires states, as a condition of receiving federal funds, to prohibit jury trials in contested paternity cases.[39] Although some respondents denied jury trials have argued that this denial is in violation of their constitutional rights, courts have generally held that there is no constitutional right to a jury trial in a paternity case.[40]

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[30] 42 U.S.C. § 666(a)(5)(C)(iv) (2018).
[31] 42 U.S.C. § 666(a)(5)(E) (2018).
[32] 42 U.S.C. § 666(a)(5)(M) (2018). For state requirements to add the father's name on the birth certificate and fees for requesting searches, paternity documents, and data from the state's bureau of vital statistics, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide (IRG), Paragraph H, https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1 (last visited Feb. 4, 2021).
[33] Comment to Article 3, Unif. Parentage Act (2017) and Unif. Parentage Act (2002).
[34] Unif. Parentage Act § 311 (2017).
[35] Unif. Parentage Act § 308 (2017).
[36] Unif. Parentage Act § 309 (2017).
[37] Unif. Parentage Act § 105 (2017).
[38] Unif. Parentage Act § 14(d), Comment (1973) (the ULC bracketed the jury prohibition clause "only because in some states constitutions may prevent elimination of a jury trial in this context").
[39] 42 U.S.C. § 666(a)(5)(I) (2018).
[40] *See, e.g.*, *Hoyle v. Superior Court of Ariz., Cnty. of Maricopa*, 778 P.2d 259 (Ariz. 1989); *Cnty. of Sutter v. Davis,* 285 Cal. Rptr. 736 (Cal. Ct. App. Dist. 3 1991); *Dep't of Revenue v. Spinale,* 550 N.E.2d 871 (Mass. 1990). *But see B.J.Y. v. M.A.*, 617 So. 2d 1061 (Fla. 1993).

Genetic Testing

As a condition of receiving federal funds, PRWORA requires that states have procedures requiring that the child and parties[41] submit to genetic testing, upon request, in any contested paternity case unless otherwise barred by state law.[42] The party requesting the testing must make a sworn statement that either (1) alleges paternity, with a showing of a reasonable possibility of sexual contact between the parties; or, (2) denies paternity, with a showing of a reasonable possibility of the nonexistence of sexual contact between the parties. The court or state child support agency can compel genetic testing of the child and all parties.[43]

Genetic, or DNA testing, has revolutionized the identification of the father in paternity cases. Based on genetic information a child receives from their biological parents, genetic testing can either exclude the alleged father as the biological father or determine his paternity with a high degree of probability. A child receives one half of their genetic markers from the child's father and the other half from the mother. In evaluating a DNA test result, the initial determination is what markers the alleged father and mother share. The genetic marker not identifiable from the mother must come from the biological father. If the alleged father does not have that genetic marker, he is excluded; however, if he does, there is no exclusion.

When first developed, attorneys for the alleged father routinely challenged the genetic test results in court, requiring the child support attorney to lay a strong foundation for its admissibility. Now, pursuant to federal law, states have laws requiring that genetic test results are admissible without the need for foundation testimony or other proof, unless an objection is made.[44] States must require the admission of genetic tests into evidence upon a showing that:

- The type of test is generally considered reliable by accreditation bodies; and
- The test was performed by a laboratory approved by such an accreditation body. (The Secretary of the Department of Health and Human Services designates the appropriate accreditation bodies.)[45]

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[41] There is an exception for individuals found under 42 U.S.C. § 654(29) to have good cause for refusing to cooperate.
[42] 42 U.S.C. § 666(a)(5)(B)(i) (2018). S*ee also* 45 C.F.R. 303.5(d)(2) (2019) ("A contested paternity case is any action in which the issue of paternity may be raised under State law and one party denies paternity.").
[43] *Id*.
[44] 42 U.S.C. § 666(a)(5)(F)(iii) (2018).
[45] 42 U.S.C. § 666(a)(5)(F)(i) (2018).

States must also place a limit, based on either the date of the hearing or the date of receipt of the results, on the period during which a written objection can be filed to the admission of the genetic testing results.[46]

For a state to receive federal funds, its laws must set a threshold probability of paternity, above which the test results create a presumption of paternity, which can be either rebuttable or conclusive.[47]

In a IV-D case, the child support agency may charge any individual who is not receiving assistance under Title IV-A (TANF) or Title XIX (Medicaid) a reasonable fee for performing genetic tests, but the fee cannot exceed the actual costs of the tests.[48] If paternity is established in a case where the agency ordered genetic tests, the agency must pay the cost of such tests, subject to reimbursement from the alleged father who denied paternity.[49]

If a party contests the results of the genetic testing, the child support agency must have additional tests performed, but must require the requesting party to pay for the additional tests in advance.[50] In an intergovernmental case, the responding state has the responsibility for establishing paternity[51] and paying the costs it incurs, including the costs of genetic testing. At its election, it may seek a judgment for the costs of testing from the alleged father who denied paternity.[52]

Default

Federal law also requires, as a condition of receiving federal funds, that states provide for the entry of a default order in a paternity case upon a showing of service of process on the defendant and any additional showing required by state law.[53] Depending on state law, the default order may be entered by a court or the child support agency. When entering a default order, there are certain suggested practices that should be followed to ensure fairness and avoid having the order set aside:

- Make a finding that the respondent was served with proper notice of the proceedings;

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[46] 42 U.S.C. § 666(a)(5)(F)(ii) (2018).
[47] 42 U.S.C. § 666(a)(5)(G) (2018).
[48] 45 C.F.R. § 303.5(e)(1), (e)(2) (2019).
[49] 42 U.S.C. § 666(a)(5)(B)(ii)(I) (2018); 45 C.F.R. § 303.5(e)(3) (2019).
[50] 45 C.F.R. § 303.5(e)(3) (2019).
[51] 45 C.F.R. § 303.7(d)(6)(i) (2019).
[52] 45 C.F.R. § 303.7(e)(1) (2019). *See also* OCSE-DCL-10-26: *Responding States' Option to Recover the Cost of Paternity Testing* (Dec. 17, 2010).
[53] 42 U.S.C. § 666(a)(5)(H) (2018). *See also* 45 C.F.R. § 303.5(f) (2019). The Wyoming Supreme Court has held that the entry of a default order in a paternity case does not violate the alleged father's constitutional due process rights. *See D.M.M. v. D.F.H.,* 954 P.2d 976 (Wyo. 1998). *See also Fowler v. State Dep't of Revenue, Child Support Servs. Div.,* 168 P.3d 870 (Alaska 2007).

- Make a finding as to jurisdiction;
- If asserting jurisdiction over a non-resident respondent, ensure there is a basis for long-arm jurisdiction under the Uniform Interstate Family Support Act (UIFSA), Section 201;
- If the respondent is a service member, appoint counsel pursuant to the Servicemembers Civil Relief Act (SCRA); [54]
- Determine if the respondent is incarcerated (this information is available online in each state's court system); and
- Establish follow-up procedures to document that the respondent received a copy of the default order.[55]

There are significant differences in state law and practice regarding entry of a default order. However, in all states, entry of a default order is considered a binding legal determination of paternity and may serve as the basis for a support order.

Entry of a Support Order

To receive federal funding for its child support program, states must allow parties to move for temporary support in paternity cases while a judicial or an administrative determination of paternity is pending. Such support must be ordered if there is clear and convincing evidence of paternity, based on genetic tests or other evidence.[56]

The tribunal should include the following in a temporary support order:

- A written finding of the basis of personal jurisdiction;
- A recitation of due process basics;
- An affirmative statement that no other support order exists;
- A finding as to how paternity is established;

[54] 50 U.S.C. § 3931(b)(2) (2018).
[55] For a full discussion of default orders and strategies designed to promote the defendant's appearance in court, review National Council of Juvenile and Family Court Judges, *A Practice Guide: Making Child Support Orders Realistic and Enforceable* (Feb. 2008), https://www.ncjfcj.org/publications/a-practice-guide-making-child-support-orders-realistic-and-enforceable/ (last visited Feb. 5, 2021). *See also* Office of Child Support Enforcement, *Entering Default Orders Bench Card* (May 8, 2012).
[56] 42 U.S.C. § 666(a)(5)(J) (2018).

- If the respondent is a member of the armed services, a statement that the provisions of the SCRA have been met or waived;[57]

- If the respondent is not a service member, a finding of this fact in the order;

- Direction that the child support payment be made through the State Disbursement Unit (SDU); and

- Direction that both the custodial parent and the noncustodial parent must update address and employment information with the child support agency.

The tribunal should also ensure that copies of the order and applicable guideline worksheets are sent to the child support agency and the parents to allow for timely appeals and reviews.[58]

FEDERAL PERFORMANCE MEASURES

Authorized by the Child Support Performance and Incentive Act of 1998, states receive incentive payments each fiscal year based on their collections and performance levels pursuant to five statutory performance measures: (1) paternity establishment; (2) child support order establishment; (3) collections on current support; (4) collections on arrears; and (5) cost effectiveness.[59] States have the choice of being evaluated on one of two measures for their paternity establishment percentage (PEP).[60] Those measures are:

- IV-D Paternity Establishment Percentage – The ratio that the total number of children in the IV-D caseload in the fiscal year who have been born to unmarried parents and for whom paternity has been established or acknowledged, bears to the total number of children in

[57] *See* 50 U.S.C. §§ 3901–4043 (2018).
[58] For a useful checklist published by the National Council of Juvenile and Family Court Judges, *see* the bench card *A Practice Guide: Making Child Support Orders Realistic and Enforceable*, National Council of Juvenile and Family Court Judges (Feb. 2008), https://www.ncjfcj.org/publications/a-practice-guide-making-child-support-orders-realistic-and-enforceable/ (last visited Feb. 5, 2021).
[59] Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645. The portion on incentives payments is now codified at 42 U.S.C. § 658a (2018).
[60] The count does not include any child who is dependent because of the death of parent (unless paternity is established for that child). Nor does it include any child where the agency found the parent had good cause for refusing to cooperate in the establishment of paternity, or for whom the state agency determines it is against the best interest of the child to pursue paternity. 45 C.F.R. § 305.2(a)(1) (2019).

the IV-D caseload as of the end of the preceding fiscal year who were born to unmarried parents.

- Statewide Paternity Establishment Percentage – The ratio that the total number of minor children who have been born to unmarried parents and for whom paternity has been established or acknowledged during the fiscal year, bears to the total number of children born to unmarried parents during the preceding fiscal year.[61]

Each year OCSE provides a report to Congress on each state's performance measures. Included in the information that states report related to paternity establishment are the number of births to unmarried parents in the IV-D caseload for the current or prior year, the number of IV-D paternity establishments or acknowledgments, and the number of statewide births to unmarried parents for the current and prior year.[62]

UNIFORM PARENTAGE ACT

As mentioned earlier, the ULC promulgated the Uniform Parentage Act (UPA) in 1973, reflecting then-current societal views and technology. In response to dramatically changing genetic and reproductive technology, the ULC revised the UPA in 2000 and 2002 to modernize the law for determining parents of children.[63] The ULC revised the UPA again in 2017 to address issues related to children born to same-sex couples, *de facto* parentage, assisted reproduction, and surrogacy.[64] As a result, the UPA (2017) contains gender neutral language reflecting that parentage establishment may be for a man or woman. As of January 2021, Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming have enacted the UPA (2002); and California, Rhode Island, Vermont, and Washington have enacted the UPA (2017).

There is no federal requirement that states enact the UPA. However, as model legislation, it provides direction to states in how to meet the federal requirements within PRWORA. For example, both the UPA (2017) and UPA (2002) provide a comprehensive structure for parentage acknowledgment and rescission, and require full faith and credit to acknowledgments executed in other states. They also provide that an individual will be identified as a genetic parent

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[61] *Id*.
[62] *See* Office of Child Support Enforcement, FY 2019 Preliminary Report (June 23, 2020). Table P-72 contains the paternity establishment report. States using the statewide paternity measure for the determination of incentives also report the number of statewide paternities established or acknowledged.
[63] *See* the complete text of the Uniform Parentage Act (2002) with comments at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ee7ce93f-78bf-da90-292c-39680396eb82&forceDialog=0 (last visited Feb. 4, 2021).
[64] *See* the complete text of the Uniform Parentage Act (2017) with Comments, *supra* note 3.

of a child if genetic testing complies with the provisions in the UPA and the results show a probability of paternity of 99% or higher.[65] The only exception is if the test is challenged by other exclusionary genetic evidence or genetic evidence establishing another individual as a possible genetic parent.[66]

Standing

The UPA (2017) addresses standing to maintain a parentage action and provides that the following individuals and entities may initiate a proceeding to adjudicate parentage:

- The child;
- The mother of the child;
- An individual who is a parent under the UPA;
- An individual whose parentage of the child is to be adjudicated;
- The child support enforcement agency;
- An authorized adoption or child placing agency; or
- A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor.[67]

Establishment of Parent-Child Relationship

Under the UPA (2017), a party may establish a parent-child relationship between an individual and a child by:

- An unrebutted presumption of parentage arising because the individual was married to the woman who gave birth to the child;[68]
- An unrebutted presumption of parentage arising because the individual resided in the same household as the child for the first two years of the child's life and openly held out the child as the individual's child;[69]
- An effective acknowledgment of parentage by the individual, unless the acknowledgment has been rescinded or successfully challenged;[70]

[65] Unif. Parentage Act § 506(a)(1) (2017).
[66] Unif. Parentage Act § 506(b) (2017).
[67] Unif. Parentage Act § 602 (2017).
[68] Unif. Parentage Act § 204(a)(1) (2017).
[69] Unif. Parentage Act § 204(a)(2) (2017).
[70] Unif. Parentage Act § 201(5) (2017).

- An adjudication of parentage;[71]
- Adoption of the child by the individual;[72]
- The individual's consent to assisted reproduction by a woman under Article 7, which resulted in the birth of the child;[73]
- A valid gestational surrogacy agreement entered into by the individual that resulted in the birth of the child;[74] or
- An adjudication confirming the individual as a parent of a child born to a genetic surrogate if the agreement was validated under Article 8.[75]

Historically, courts have usually not allowed an alleged genetic father to successfully challenge the paternity of a child born during the marriage of the mother to another man if the husband persists in the marital presumption of paternity.[76] If the alleged genetic father does not assert parentage within two years of the child's birth, the presumption of parentage for the individual married to the woman who gave birth cannot be overcome. However, if the presumed parent never resided with the child and never held the child out as the presumed parent's child, the presumption may be overcome.[77]

Categories of Parents

In the UPA (2017), the classification of parents reflects modern family structures and advances in the science of reproduction. The UPA categories are: (1) acknowledged parent, (2) adjudicated parent, which includes a *de facto* parent, (3) alleged genetic parent, (4) presumed parent, and (5) intended parent.[78]

Acknowledged parent. The UPA (2017) defines "acknowledged parent" as an individual who has established a parent-child relationship under Article 3, which is the Article governing voluntary acknowledgment of parentage.[79] While the UPA (2002) permitted only alleged genetic fathers and presumed fathers to acknowledge paternity, the UPA (2017) allows intended parents and presumed

[71] Unif. Parentage Act § 201(3) (2017).
[72] Unif. Parentage Act § 201(4) (2017).
[73] Unif. Parentage Act §§ 201(6), 703 (2017).
[74] Unif. Parentage Act §§ 201(7), 809 (2017).
[75] Unif. Parentage Act §§ 201(7), 815 (2017).
[76] *See, e.g., Ex parte T.J.*, 89 So. 3d 744, 747 (Ala. 2012) (holding that biological ties are not as important as the parent-child relationships that give young children emotional stability) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).
[77] Unif. Parentage Act § 608(b) (2017).
[78] *See* Unif. Parentage Act §§ 102, 609 (2017).
[79] Unif. Parentage Act § 102(1) (2017).

parents regardless of gender, in addition to the alleged genetic father, to acknowledge parentage.[80]

Adjudicated parent. An adjudicated parent is an individual who has been determined by a court with jurisdiction to be the parent of a child.[81] The classification includes an individual adjudicated by a court to be a *de facto* parent after the individual demonstrated by clear and convincing evidence that all of the factors set forth in Section 609 of the UPA (2017) were met, including that continuing the relationship between the individual and the child is in the best interest of the child.[82]

Alleged genetic parent. An alleged genetic parent is an individual who is alleged to be, or alleges that he or she is, a genetic parent or a possible genetic parent of a child whose parentage has not been adjudicated. Under the UPA (2017), the term does not include a presumed parent, an individual whose parental rights have been terminated or declared not to exist, or a donor.[83]

Presumed parent. Under the UPA (2017), "presumed parent" means "an individual who under Section 204 is presumed to be a parent of a child, unless the presumption is overcome in a judicial proceeding, a valid denial of parentage is made under [Article] 3, or a court adjudicates the individual to be a parent."[84] Section 204 sets forth four fact patterns that establish a presumption of parentage. One deals with a child born during a marriage, regardless of whether the marriage is or could be declared invalid; one deals with a child conceived during marriage but born after its termination; and one deals with a child born before a valid or invalid marriage, accompanied by other facts indicating the spouse is the child's parent.[85] The fourth fact pattern creates a presumption if the individual resided in the same household as the child for the first two years of the child's life and openly held out the child as his own.[86]

Intended parent. An "intended parent" is an individual who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.[87] Marriage status and gender are not relevant. Both the UPA (2002) and the UPA (2017) require the individual to consent to conception by assisted reproduction in a record. However, failure to do so is not fatal in the UPA (2017) because there is an alternative way set forth in Section 704 to prove, and a court to find, intent to be legally bound as a parent.[88]

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[80] Unif. Parentage Act § 301 (2017).
[81] Unif. Parentage Act § 102(2) (2017).
[82] Unif. Parentage Act § 609 (2017).
[83] Unif. Parentage Act § 102(3) (2017).
[84] Unif. Parentage Act § 102(17) (2017).
[85] Unif. Parentage Act § 204(a)(1) (2017).
[86] Unif. Parentage Act § 204(a)(2) (2017).
[87] Unif. Parentage Act § 102(13) (2017).
[88] Unif. Parentage Act § 704(b) (2017).

Statute of Limitations

Under the UPA (2017), there is no statute of limitations to adjudicate parentage for a child having no presumed, acknowledged, or adjudicated parent (other than the birth mother); therefore, a party may commence a proceeding at any time before the child becomes an adult, and a child may commence a proceeding even after becoming an adult.[89] If there is a presumed parent, a proceeding to adjudicate the presumed parent as the parent of the child may be commenced any time before the child becomes an adult. If the action is brought by the child, it may be filed after the child becomes an adult.[90] A party must commence a proceeding to disprove a presumed parent-child relationship before the child attains two years of age, unless the court determines that the presumed parent is not a genetic parent, never resided with the child, and never held out the child as the presumed parent's child; or the child has more than one presumed parent.[91]

Resolving Multiple Parentage Claims

Because parentage under the UPA may be established in many ways, including through marriage, genetic tie, intent, or close bond to the child, the UPA (2017) provides a procedure for resolving multiple parentage claims for a child. When there are competing parentage claims, Section 613 requires the court to adjudicate parentage in the best interest of the child based on the following factors:

- The age of the child;
- The length of time during which each individual assumed the role of parent of the child;
- The nature of the relationship between the child and each individual;
- The harm to the child if the relationship between the child and each individual is not recognized;
- The basis for each individual's claim to parentage of the child; and
- Other equitable factors arising from the disruption of the relationship between the child and each individual or the likelihood of other harm to the child.[92]

The UPA (2017) also affords states two options for the number of legally recognizable parents for a child. The first option, set forth as Alternative A in Section 613, is that a court is prohibited from adjudicating more than two parents

[89] Unif. Parentage Act § 607(a) (2017).
[90] Unif. Parentage Act § 608) (2017).
[91] Unif. Parentage Act § 608(b) (2017).
[92] Unif. Parentage Act § 613(a) (2017).

for a child.[93] The second option, Alternative B, provides the court discretion to adjudicate more than two parents for a child if the court finds that it would be detrimental to the child to recognize only two parents.[94] Alternative B reflects an emerging trend in both legislation and case law that recognizes that in rare circumstances a court should have the ability to establish parentage in a manner that will not cause harm to the child.[95]

PRACTICE ISSUES

Child support attorneys should know the parentage laws of their state, including the extent to which the law recognizes non-biological parents, such as *de facto* parents, intended parents, and presumed parents married to the birth mother. Most cases in the Title IV-D program, however, involve establishing the paternity of the genetic father through an administrative or a simplified civil judicial process. The discussion below focuses on such a paternity establishment case. Frequently, although the alleged father initially denies the allegations, the case becomes uncontested at a later stage, particularly after the receipt of genetic testing results that indicate non-exclusion and a high likelihood of paternity. Nonetheless, there are important things to keep in mind when a paternity case requires court action.[96]

Basic Elements of a Paternity Case

The following are the basic elements that the petitioner must prove to establish a *prima facie* case in a paternity proceeding involving a child born to unmarried parents:

- During the probable period of conception, the mother engaged in sexual intercourse with the alleged father, resulting in conception and birth of the child; and

- The alleged father is the biological father of the child.

Jurisdiction. The tribunal determining parentage must have proper jurisdiction over the child support matter and the parties. Jurisdiction over the issue of child support is called subject matter jurisdiction. The petitioner must

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[93] Unif. Parentage Act § 613(c) (Alternative A) (2017).
[94] Unif. Parentage Act § 613(c) (Alternative B) (2017).
[95] Unif. Parentage Act § 613, Comment (2017). *See, e.g.,* Cal. Fam. Code § 7612(c) (2019); *In re Parentage of J.B.R.*, 336 P.3d 648, 653 (Wash. App. Ct. 2014) ("The fact that [the child] has two living biological parents does not prohibit [the child's stepparent] from petitioning for *de facto* parentage.").
[96] General information on practice in a court or an administrative proceeding can be found in Chapter Eight: Advocacy Skills for Child Support Attorneys. Additional information on jurisdiction can be found later in this chapter and in Chapter Thirteen: Intergovernmental Child Support Cases.

make sure that the action is filed in a forum with legal authority to determine paternity. The parties cannot confer subject matter jurisdiction by consent, nor can they waive lack of subject matter jurisdiction.[97] Subject matter jurisdiction is critical because if the tribunal lacks it, the order is void regardless of whether the parties appeal it.[98] Jurisdiction over the parties is called personal jurisdiction. It refers to the tribunal's legal authority to make decisions directly affecting, and binding, the parties. The establishment of parentage requires personal jurisdiction over both parties. By filing an action, the petitioner submits to the tribunal's jurisdiction. In order to have personal jurisdiction over the respondent, the respondent must have certain minimum contacts with the forum.[99] Such contacts can become an issue of litigation when the respondent is a nonresident of the forum state. UIFSA (2008) includes bases for long-arm jurisdiction over a nonresident.[100]

Standing. A paternity action can be brought by the mother of the child, the alleged father of the child,[101] or the child support agency in a IV-D case.[102] As discussed above, both the UPA (2017) and UPA (2002) extend standing in a parentage case to other parties, as well.

Burden of proof. Parentage actions filed in court are civil in nature. The dominant opinion throughout the country is that the proper burden of proof is a preponderance of the evidence.[103]

Service of process. After the petition or complaint is filed, obtaining proper service of process upon the respondent is critical. State or tribal civil procedure laws specify how to accomplish service.

Where there is no known address for the alleged father, the child support agency can access various state and government sources, including the Federal Parent Locator Service (FPLS), which includes the Federal Case Registry (FCR) and the National Directory of New Hires (NDNH).[104]

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[97] *See, e.g.*, *Warner v. Bicknell*, 12 A.3d 1042, 1046 (Conn. App. 2011); *In re Adoption of Kassandra B.*, 540 N.W.2d 554 (Neb. 1995).
[98] *See, e.g.*, *Ex parte J.E.W.*, 608 So. 2d 728, 729 (Ala. 1992); *Keveloh v. Carter*, 699 So. 2d 285, 287 (Fla. Dist. Ct. App. 1997).
[99] *See Kulko v. Superior Court of Cal.*, 436 U.S. 84 (1978).
[100] Unif. Interstate Fam. Support Act §§ 201, 308(b) (2008).
[101] 42 U.S.C. § 666(a)(5)(L) (2018).
[102] 42 U.S.C. § 654(4)(A) (2018).
[103] *See, e.g.*, *Rivera v. Minnich,* 483 U.S. 574 (1987); *H.Z. v. M.B.*, 204 A.3d 419 (Pa. Super. Ct. 2019); *Utah ex rel. S.H.*, 119 P.3d 309 (Utah Ct. App. 2005).
[104] For more information on location, *see* Chapter Five: Location of Case Participants and Their Assets.

Pleadings. The pleadings in a paternity case should set out the elements for the *prima facie* case, as discussed above.[105]

Uncontested Cases

In an uncontested paternity case, depending upon state law, there may be a simple administrative process to establish paternity without any court involvement, or the parties may agree to a consent decree. In most cases where paternity is not contested, the parents will use the acknowledgment process; all states must allow for acknowledgment of paternity without judicial ratification.[106]

Contested Cases

A contested paternity case is defined under federal regulations as "any action in which the issue of paternity may be raised under State law and one party denies paternity."[107]

Presumption of paternity. Under the common law doctrine known as Lord Mansfield's Rule, a child born to a married woman was presumed to be the child of the woman's husband; no challenges were allowed to this presumption. In 1975, the conclusive marital presumption was almost universal in the states. A husband or wife was not allowed to challenge that presumption. Nor was a third party allowed to assert parentage. This common law doctrine continued until genetic testing results became reliable and routinely admitted in paternity litigation. Increasingly, there are cases when an alleged genetic father, the mother, or the child support agency challenges the marital presumption, asserting that someone other than the husband is the father of the child. There also are cases where the presumed father – usually the husband – denies that he is the father. In the absence of statutory authority, some courts are unwilling to overcome the marital presumption of paternity. However, some courts are willing to overcome the marital presumption when genetic testing excludes the previously legally established father.[108] Often a ruling on a genetic test request is the first step in opening "Pandora's Box."

The best known case involving the marital presumption is *Michael H. v. Gerald D.,*[109] a U.S. Supreme Court case reviewing California's presumption that a child born to a woman, who is cohabiting with her husband, is conclusively presumed to be the child of the marriage, unless the husband is impotent or sterile. In *Michael H.,* the mother was living with her husband Gerald D; however,

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[105] For more information on pleadings, *see* Chapter Eight: Advocacy Skills for Child Support Attorneys.
[106] 42 U.S.C. § 666(a)(5)(E) (2018).
[107] 45 C.F.R. § 303.5(d)(2) (2019).
[108] *See, e.g.*, *Cnty. of Fresno v. Sanchez,* 37 Cal. Rptr. 3d 192 (Cal. Ct. App. 2005); *Langston v. Riffe,* 754 A.2d 389 (Md. 2000); *Alisha C. v. Jeremy C.,* 808 N.W.2d 875 (Neb. 2012); *Cuyahoga Support Enforcement Agency v. Guthrie,* 705 N.E.2d 318 (Ohio 1999).
[109] 491 U.S. 110 (1989).

Michael H. was actually the child's biological father. The Court considered whether the California presumption unconstitutionally infringed on the biological father's due process rights and, in a deeply divided, plurality opinion, concluded that it did not. The Court further held that the biological father had no protected liberty interest in the parental relationship and that the state's interest in preserving the marital union was sufficient to support termination of his relationship with the child.[110]

State court decisions since *Michael H.* have varied. The Supreme Court of Oklahoma declared the marital presumption to be favored public policy "intended for the benefit of children 'born during the marriage.'"[111] In *Clark v. Edens*, the court found the marital presumption conclusive, even though genetic testing showed that the man was not the child's biological father and the man filed a divorce decree stating that there were no children born of the marriage.[112] However, in *Castro v. Lemus*, the Supreme Court of Utah held that the alleged biological father had standing to file a petition to establish his paternity of a child born to a marriage.[113] The question of whether a biological tie exists between the husband and child, which can now be accurately resolved through simple DNA testing procedures, continues to be a core consideration in actions to rebut the marital presumption. Further, the nationwide legalization of same-sex marriage calls into question the future of the marital presumption and the role that genetics-based considerations will play in the application of the marital presumption.[114]

Increasingly states have passed legislation recognizing the right to challenge the marital presumption of paternity.[115] The UPA (2017) addresses the presumption of parentage in Sections 204 and 608. As discussed earlier, Section 204 lists four fact patterns that establish a presumption of parentage, three of which are based on marital presumptions. Section 608(b) provides that the presumption of parentage established under Section 204 cannot be overcome once the child attains two years of age if the mother and her spouse resided with the child, unless the child has more than one presumed parent. The presumption of parentage may be attacked by the mother, the presumed parent, or a third-party individual during this limited period, and the court will adjudicate parentage in the best interest of the child based on the factors set forth in Section 613(a) and (b).[116] The presumption of parentage may be challenged at any time if the

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[110] *See also Lehr v. Robertson*, 463 U.S. 248 (1983) (biological father's rights under the due process and equal protection clauses were not violated by failing to receive notice of his child's adoption because the father did not have a significant relationship with the child).
[111] *Clark v. Edens*, 254 P.3d 672, 676 (Okla. 2011).
[112] *Id.* at 673.
[113] 456 P.3d 750, 758-59 (Utah 2019).
[114] Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 Minn. L. Rev. 243 (Fall 2019).
[115] *See, e.g.*, 750 Ill. Comp. Stat. 46/608 (2018); Minn. Stat. § 257.55 (2019); Ohio Rev. Code Ann. § 3111.03 (2019).
[116] Unif. Parentage Act § 608(c) (2017).

presumed parent never resided with the child, never held out the child as their own, and is not the genetic parent.[117]

Paternity by estoppel. Depending upon the facts of a case, courts have held that a man is barred by estoppel from challenging paternity. As defined in Black's Law Dictionary, estoppel is a "bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."[118] There are two types of estoppel:

- Collateral estoppel prevents a repeated legal action for an issue already decided in a prior proceeding; and
- Equitable estoppel prevents a person from challenging a status they previously accepted.

The common law doctrine of estoppel requires the following three elements:

- A misleading representation by a party sought to be estopped;
- Reliance on the representation by another party; and
- Prejudice caused by the reliance.

If a party denies paternity in a legal proceeding and requests genetic testing, the other party or the court may raise estoppel in response. In such a circumstance, the court has several options:

- Decide that paternity was previously established and there is no right to genetic testing;
- Dismiss the action if the court finds that the current action is inappropriate; or
- Permit genetic testing.

Reluctant to disturb existing parent/child relationships, courts have estopped denials of paternity from presumed or established fathers.[119] Courts have also held mothers to be estopped from denying paternity of presumed or adjudicated fathers.[120]

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[117] Unif. Parentage Act § 608(b) (2017).
[118] Black's Law Dictionary 629 (9th ed. 2009).
[119] *See, e.g.*, *In re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001). *See also McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017) (equitable estoppel applied to same-sex couple).
[120] *See, e.g.*, *Williamson v. Williamson*, 690 S.E.2d 257 (Ga. App. 2010); *Matter of Inoue v. Inoue*, 185 P.3d 834 (Haw. Ct. App. 2008); *Juanita A. v. Kenneth Mark N.*, 930 N.E.2d 214 (N.Y. 2010); *Randy A. J. v. Norma I. J.*, 655 N.W.2d 145 (Wis. Ct. App. 2002).

In *K.E.M. v. P.C.S.*,[121] the court went through an extensive review of the legal doctrines of both presumption of paternity and paternity by estoppel. The mother in the case had sought child support from the biological father of her child. The biological father responded with a motion to dismiss, relying upon the mother's intact marriage at the time of the child's birth as establishing a presumption of paternity, and on the husband's assumption of parental responsibilities as implicating paternity by estoppel. The trial court granted the biological father's motion to dismiss the support action, finding that the presumption of paternity was controlling and, alternatively, that the husband should be regarded as the child's father based on paternity by estoppel. That decision was upheld on appeal to the superior court, which concluded that the presumption of paternity had been destroyed in the minds of the parties in the case by the knowledge of the true biological father but that the doctrine of paternity by estoppel supported the trial court's dismissal.

The mother appealed to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court allowed the appeal to consider the application of the doctrine of paternity by estoppel in the particular case, and, more broadly, its continuing application as a common law principle. The Court noted that the common law doctrine of equitable estoppel involves a legal determination that it is in the best interests of the child to continue to recognize the husband as the father of the child; genetic test results are not controlling. The Court held that there remains a role for paternity by estoppel. It supported the position of the American Law Institute's Principles of Family Dissolution that endorses the application of paternity by estoppel to a person who has "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting arrangement with the child's legal parent ... to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests...."[122] The Court concluded that the operative language was the best interest of the child. What is determinative is not the longevity of the parental relationships but an individualized focus on the particular child in the case. The Court remanded the case to the trial court for testimony on the child's relationship with the husband: "We do not believe a court should dismiss a support claim against a purported biological father based on an estoppel theory vesting legal parenthood in another man without the latter being brought before the court at least as a witness." [123]

Sometimes the age of the child is determinative with regard to paternity by estoppel. In the case of *V.E. v. W.M*,[124] the Pennsylvania Superior Court ruled that the trial court was correct in concluding that paternity by estoppel was

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[121] *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).
[122] ALI, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(1)(b)(iii) (2002).
[123] *K.E.M. v. P.C.S.*, 38 A.3d 798, 809 (Pa. 2012).
[124] 54 A.3d 368 (Pa. Super. Ct. 2012).

inapplicable: "[A]s a matter of law, 'it is impossible for a four month old child to suffer any damaging trauma from the performance of genetic testing . . . as there has been an insufficient amount of time for any bonding to have occurred between any father and child.'"

Admissibility of genetic test results. As discussed in the section on Genetic Testing, if paternity has not been established, states must have laws requiring that genetic testing be ordered at the request of either party in a contested paternity case.[125] Results of the testing must be admitted into evidence, and there must be a presumption of paternity if the test results meet the threshold established by the state.[126] Any necessity for a further showing of evidence is likely only if the test results fail to establish a high probability of paternity.

Disestablishment of paternity. As noted earlier, genetic testing capabilities have made the identification of a biological father so accurate that some parties attempt to overcome not only presumptions of paternity, but also previous determinations of paternity by proffering later genetic testing results that exclude the previously legally established father.[127] This is called "disestablishment of paternity."

Paternity disestablishment is a challenging issue for states, and many have enacted paternity disestablishment statutes.[128] Such legislation permits a man to challenge his previously established paternity by presenting genetic evidence excluding him as the biological father. Some of the statutes limit the time period in which the challenge may be raised. Some of them require an appointment of a guardian *ad litem* on behalf of the child. Many of them require the court to consider the best interest of the child in deciding whether to allow the disestablishment of paternity.

For adjudicated parents, the UPA (2017) references other state law governing a collateral attack on a judgment.[129] For acknowledged parents, Section 309(a) discusses challenges to an acknowledgment of parentage, which constitutes a legal determination of parentage. After the 60-day rescission period permitted by PRWORA, this section allows a signatory of the acknowledgment to commence a proceeding to challenge the acknowledgment within two years from

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[125] 42 U.S.C. § 666(a)(5)(B)(i) (2018).
[126] 42 U.S.C. § 666(a)(5)(G) (2018).
[127] *See, e.g.*, *In re Marriage of Sparks*, 122 N.E.3d 715 (Ill. App. Ct. 2018); *Kamp v. Dep't of Human Servs.*, 980 A.2d 448 (Md. 2008); *Alisha C. v. Jeremy C.,* 808 N.W.2d 875 (Neb. 2012); *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).
[128] *See, e.g.,* Alaska Stat. § 25.27.166 (2019); Colo. Rev. Stat. § 19-4-105(2) (2019); Ga. Code Ann. § 19-7-54 (2019); Iowa Code § 600B.41A (2019); Md. Code Ann., Fam. Law § 5-1038 (2019); Mich. Comp. Laws § 722.1443 (2019); Ohio Rev. Code Ann. § 3119.962 (West 2018). For a general discussion, *see* Vanessa S. Browne-Barbour, *"Mama's Baby, Papa's Maybe": Disestablishment of* Paternity, 48 Akron L. Rev. 263 (Spring 2015); Brandon James Hoover, *Establishing the Best Answer to Paternity Disestablishment*, 37 Ohio N.U. L. Rev. 145 (2011).
[129] Unif. Parentage Act § 611 (2017).

when it is filed with the agency maintaining birth records; however, the only basis for the challenge is fraud, duress, or material mistake of fact.[130]

In the absence of statutory guidance, whether courts allow the disestablishment of paternity depends on the facts of the case and the weighing of competing interests.[131] These competing interests include:

- Stability of the family (especially a marital family).[132]
- Right of the child to know their biological father.[133]
- Right of the child to keep a relationship with the father they have known.[134]
- Duty of the biological father to support a child and the perceived unfairness that a non-biological father should support a child that is not his.[135]
- Right of a non-biological father to continue to raise a child he has always believed to be, and held out as, his own.[136]
- Finality of judgments.[137]
- Societal concerns against leaving a child fatherless.[138]

If paternity is disestablished, courts generally do not order the child support agency or the mother to return child support already paid. However, they usually do relieve the obligor from future current support and arrears.[139]

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[130] Unif. Parentage Act § 309 (2017).
[131] *See K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012) (In deciding that mother's case for child support against alleged biological father could proceed even though she was still married to child's legal father, Supreme Court of Pennsylvania recognized "the intransigent difficulties in this area of the law involving social, moral, and very personal interests.").
[132] *See Michael H.*, *supra* note 109, at 120, 124 (describing how inquiries into paternity would harm "family integrity and privacy" and noting that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").
[133] *See Godin v. Godin*, 725 A.2d 904 (Vt. 1998).
[134] *See Kamp v. Dep't of Human Servs.*, 980 A.2d 448 (Md. 2008).
[135] *See* Susan Ayres, *Paternity Un(certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women's Sexuality*, 20 J. Gender Race & Just. 237, 245 (Spring 2017).
[136] *Id.*
[137] *See Martin v. Pierce*, 257 S.W.3d 82, 86-87 (Ark. 2007).
[138] *See Michael H.*, *supra* note 109, at 161. *See also F.B. v. A.L.G.,* 821 A.2d 1157 (N.J. 2003) (the acknowledged father was not allowed to sever the legal relationship, and corresponding financial obligation, where there was no biological father to assume the role).
[139] *See, e.g.*, *Walter v. Gunter*, 788 A.2d 609 (Md. 2002). *See also* Hoover, *supra* note 128, at 158-160. *But see Ferguson v. Alaska Dep't of Rev.*, 977 P.2d 95 (Alaska 1999).

There are no federal regulations that govern disestablishment of paternity. As noted by OCSE, "[f]or the most part, paternity disestablishment is a state, rather than a federal, issue," and the "direct federal interest relates to the impact of these laws on state IV-D programs."[140]

Although state law or practice is unique, child support attorneys should consider the following guidance regarding paternity disestablishment:[141]

- There is no federal requirement that child support agencies provide services to noncustodial parents who seek to disestablish paternity.
- Federal funding is available for genetic testing in IV-D paternity disestablishment cases in which paternity was established but is now contested in accordance with state law.
- If a state requires genetic testing in every case of a child born to unmarried parents, federal IV-D funding is only available for genetic testing in IV-D cases.
- A court may not require genetic testing before accepting a voluntary acknowledgment in a IV-D case.
- A state paternity disestablishment law requiring that a support order be vacated and arrearages owed under that order also be vacated if paternity is disestablished, does not violate 42 U.S.C. § 666(a)(9), otherwise known as the "Bradley Amendment."[142]

Ethical Considerations[143]

As in any other area of child support practice, a child support attorney must be aware of the potential ethical problems when establishing paternity. The America Bar Association's (ABA) Model Rules of Professional Conduct and Code of Judicial Conduct were adopted by the ABA House of Delegates in 1983 and serve as a model for ethics rules for all states except California. These rules define the attorney-client relationship and address how an attorney should interact with an unrepresented person.[144] The IV-D attorney should always reveal to both the custodial parent and the alleged father the nature of the attorney's representation; most states have statutes or bar ethics opinions stating that the

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[140] *See* OCSE-PIQ-03-01: *Paternity Disestablishment* (Apr. 28, 2003).
[141] *Id.*
[142] *Id.* The "Bradley Amendment" is named after its chief sponsor Senator Bill Bradley (New Jersey).
[143] For an in-depth discussion of an attorney's ethical obligations, *see* Chapter Four: The Role of the Attorney in the Child Support Program.
[144] ABA Model Rule 4.3 deals with unrepresented persons. It provides that when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

IV-D attorney represents the state rather than either parent. It is important to advise both parties that they have the right to seek independent counsel.[145]

In *Ussery v. Gray*,[146] the Texas Court of Appeals reviewed a claim that the state attorney should be disqualified in a paternity suit against a man who previously had the services of not only the state but the same state attorney in his pursuit to collect child support from the man's ex-wife. The court concluded that the state attorney did not need to be disqualified.

If both parties sign a voluntary paternity acknowledgment in the presence of a child support attorney, it is important that the attorney ensure that both parties are first fully informed of their rights as well as the legal consequences and liability that will arise from the execution of the document. If the parties have any legal questions, the child support attorney should not give legal advice but should advise them to seek independent counsel.[147]

Special Circumstances

There are situations that may be present in a parentage case and require special treatment.

Unavailability of alleged father. The UPA (2017) allows a court to order genetic testing of the alleged genetic parent's relatives if the alleged parent is unavailable for testing.[148] These relatives include:

- The parents of the alleged genetic parent;
- A sibling of the alleged genetic parent;
- Another child of the alleged genetic parent and the woman who gave birth to the other child; and
- Another relative of the alleged genetic parent necessary to complete genetic testing.[149]

To issue such an order, the court must find that the need for genetic testing outweighs the legitimate interests of the individual sought to be tested.[150]

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[145] *See* ABA Model Rule 4.3. For state statutes or citations that define the attorney–client relationship between the state's attorney and the agency, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Question A.2 and subset questions, https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.
[146] 804 S.W.2d 232 (Tex. Ct. App. 1991).
[147] ABA Model Rule 4.3.
[148] Unif. Parentage Act § 509(a) (2017).
[149] *Id*.
[150] Unif. Parentage Act § 509(b)(2017).

"For good cause shown," the UPA (2017) also authorizes genetic testing of a deceased individual.[151] According to the Comment, this section provides authority for a court with jurisdiction to adjudicate paternity to order disinterment of a deceased individual.

Even if a state has not enacted the UPA, if the alleged father is deceased, it may be appropriate for the child support attorney to file a motion for testing, particularly if the body has not yet been buried or if genetic material from the alleged father remains (as a result of an autopsy, for example). If necessary, the attorney can request an exhumation. As this is a very sensitive area, and could be very difficult for the surviving family, the attorney should consider whether there is any less intrusive means available to establish paternity before making such a request. The attorney should also balance the advantages to be gained for the child (such as survivor's benefits) against the consequences of not determining paternity, when deciding whether to proceed with a posthumous paternity determination.[152] State law will govern how to serve the executor of the decedent's estate with pleadings for genetic testing in order to establish paternity of one who is deceased. State law will also govern who has standing to initiate an action for posthumous paternity establishment.

Assisted Reproductive Technologies (ART). Modern assisted reproductive technology (ART) has led to legal questions regarding maternity and parentage. Conception can now occur through the use of donor sperm, donor eggs, gestational surrogates, or genetic surrogates.[153] "If a woman gives birth to a child conceived using sperm from a man other than her husband, she is the mother and her husband, if any, is the presumed father. However, the man who provided the sperm might assert his biological paternity, or the husband might seek to rebut the marital presumption of paternity by proving through genetic testing that he is not the genetic father."[154] "Similarly, assisted reproduction may involve the eggs from a woman other than the mother – perhaps using the intended father's sperm, perhaps not."[155] "Theoretically, it is even possible that, absent governing legislation, the mother could attempt to deny maternity based on her lack of genetic relationship. Finally, many couples employ a common ART procedure that combines sperm and eggs to form a pre-zygote that is then frozen for future use. If the couple later divorces or one of them dies, absent legislation there are no clear rules for determining the parentage of a child resulting from a

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[151] Unif. Parentage Act § 510 (2017).
[152] For a discussion of the law regarding posthumous paternity testing, *see* Ruth H. Stirton & Mark J. Wilkinson, *In Search of a Father: Legal Challenges Surrounding Posthumous Paternity Testing*, 23 Med. Law Rev. 531 (2015); Illene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(a)(2)(D)*, 60 Alb. L. Rev. 947, 951–58 (2006).
[153] The first surrogacy case to garner national attention was *In re Baby M*, 537 A.2d 1227 (N.J. 1988), *superseded by statute*, 1993 N.J. ALS 345, 1993 N.J. Laws 345, 1993 N.J. Ch. 345, 1992 N.J. A.N. 1418, 1993 N.J. ALS 345, 1993 N.J. Laws 345, 1993 N.J. Ch. 345, 1992 N.J. A.N. 1418.
[154] Comment, Article 7 Child of Assisted Reproduction, Unif. Parentage Act (2002), *supra* note 63.
[155] *Id*.

pre-zygote implanted after divorce or after the death of the would-be father."[156] Clearly these are all issues on which courts seek guidance. Article 7 of the UPA (2002) addressed these questions and the UPA (2017) made few substantive changes to Article 7.[157]

Assisted reproduction. Article 7 of the UPA (2017), Assisted Reproduction, applies only to children born as the result of assisted reproduction technologies; a child conceived by sexual intercourse is not covered by the article, regardless of the alleged intent of the parties.[158] Section 702 of both the UPA (2017) and UPA (2002) provides that if a child is conceived as the result of assisted reproduction, the donor[159] (whether of sperm or egg) is not a parent of the resulting child.[160] When the birth mother and an individual give their signed consent in a record to assisted conception with the intent to be the child's parents, they are the legal parents of the child born to as a result.[161]

Surrogacy agreements. Prior to the UPA (2002), there was no single standard statutory scheme regulating surrogacy agreements.[162] In some states without legislation, a case is "judge specific."[163] The Massachusetts Supreme

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[156] Cooper, *supra* note 152.
[157] Comment, Article 7 Assisted Reproduction, Unif. Parentage Act (2017), *supra* note 3.
[158] *Cf. Bruce v. Boardwine*, 770 S.E.2d 774 (Va. App. 2015) (Virginia's assisted conception statute was not applicable when the child's mother artificially inseminated herself with the father's sperm without a physician's assistance through the use of a turkey baster in her own home and the father provided the sperm at the mother's request. Therefore, child's biological father was entitled to establish a parent-child relationship through visitation with the child, despite the mother's intent that she wanted to be the "sole parent.").
[159] Section 102 of the Unif. Parentage Act (2017) provides that the term "donor" does not include (A) a woman who gives birth to a child conceived by assisted reproduction; or (B) a parent under Article 7 governing assisted reproduction or an intended parent under Article 8.
[160] Unif. Parentage Act § 702 (2017). *See also* Comment to Unif. Parentage Act § 702 (2002) ("The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation."). *See also A.A.B. v. B.O.C.*, 112 So. 3d 761 (Fla. Dist. Ct. App. 2013) (despite lack of a written agreement or the involvement of a clinical setting, it was clear that the man was a sperm donor without any parental rights). For a discussion of how state legislatures and courts have defined the boundaries of legal parentage for children conceived with sperm provided by someone known to the intended parent, *see* Deborah L. Forman, *Exploring the Boundaries of Families Created With Known Sperm Providers: Who's In and Who's Out?*, 19 Pa. J.L. & Soc. Change 41 (2016).
[161] Unif. Parentage Act § 704 (2017).
[162] *See* Ashley Peyton Holmes, *Baby Mama Drama, Parentage in the Era of Gestational Surrogacy,* 11 N.C.J.L. & Tech. On. 233 (2010) (the authors urge states to adopt legislation to address the growing business of gestational surrogacy and compare case law that bans all paid surrogacy agreements (New Jersey) to states that allow such agreements in some cases (California). They also urge adoption of legislation that mirrors Art. 7, Alternative B, of the American Bar Association Model Act Governing Assisted Reproductive Technologies).
[163] *See* Brett Thomaston, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. Marshall L. Rev. 1155; Adam P. Plant, *With a Little Help From My Friends: The Intersection of the Gestational Carrier, Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 Ala. L. Rev. 639 (2003).

Judicial Court, in *Culliton v. Beth Israel Deaconess Med. Ctr.*,[164] had to decide the legal effect of a gestational agreement case without statutory law. Some states enforce surrogacy agreements, some states ban them, and other states permit enforcement under the circumstances of the specific case.[165]

The UPA (2002) addressed this issue by the enactment of Article 8. Recognizing the controversial nature of surrogacy agreements, the drafters of the UPA (2002) nevertheless thought it was critical to clarify the status of children born each year pursuant to such agreements. Article 8 is an optional article, so states may enact the UPA without enacting this article.

Because very few states chose to enact Article 8 when they adopted the UPA (2002), the UPA (2017) significantly amended Article 8 to reflect current surrogacy practice.[166] Article 8 continues to be an optional article for states adopting the UPA (2017).[167]

The UPA (2017) defines a surrogacy agreement as "an agreement between one or more intended parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived under the agreement."[168] While the UPA (2002) did not distinguish between surrogacy agreements, the UPA (2017) provides two categories: a genetic surrogacy agreement and a gestational surrogacy agreement.[169]

The UPA (2017) defines a genetic surrogate as a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using her own gamete under a surrogacy agreement.[170] In contrast, a gestational surrogate is a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not her own, again pursuant to a surrogacy agreement.[171] Section 802 provides the eligibility requirements for both the potential surrogate and the intended parents. Section 803 sets forth the requirements for the execution of the agreement, such as independent legal representation. All of the following must be parties to the agreement: the prospective gestational or genetic surrogate, her spouse, if she is married, and the intended parents. Section 804 outlines requirements for the content of the agreement. Specifically, the agreement must provide that the intended parents will be the exclusive parents of any child born pursuant to the agreement while the surrogate and her spouse, if married, have

[164] 756 N.E.2d 1133 (Mass. 2001).
[165] *See* Holmes, *supra* note 162, at 236–41.
[166] Unif. Parentage Act, Article 8 Comment (2017). Of the 10 states that have enacted the UPA (2002), only two – Texas and Utah – enacted the surrogacy provisions based on Article 8.
[167] Unif. Parentage Act, Article 8 Legislative Note (2017).
[168] Unif. Parentage Act § 801(3) (2017).
[169] Unif. Parentage Act § 801 (2017).
[170] Unif. Parentage Act § 801(1) (2017).
[171] Unif. Parentage Act § 801(2) (2017).

no claim to parentage, unless the surrogate terminates the agreement or the child was not conceived by assisted reproduction.[172]

The process for validating a surrogacy agreement is different for a gestational surrogate, who has no genetic relationship to the child, than a genetic surrogate, who is the biological mother of the child.[173] Part 2 of Article 8 in the UPA (2017) contains the special rules for gestational surrogacy agreements. Section 811 allows a party to the agreement to obtain a judgment before, on, or after the birth of a child that establishes each intended parent is a parent of the child; and the surrogate and her spouse, if any, are not parents of the child. Part 3 of Article 8 sets forth the special rules for genetic surrogacy agreements. Section 813 requires that a genetic surrogacy agreement must be validated by a court before the assisted reproduction process begins. This allows the court to make sure that all of the genetic surrogacy agreement requirements are satisfied, and that all parties entered into the agreement voluntarily and understand the terms.

Same-Sex Couples

In *Obergefell v. Hodges*, the U.S. Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional.[174] An integral part of that decision was the recognition that children are harmed by laws that discriminate against same-sex parents.[175] In 2017, the Supreme Court held in *Pavan v. Smith* that a state may not, consistent with *Obergefell*, deny married same-sex couples recognition on their children's birth certificates that the state grants to married opposite-sex couples.[176] These cases have significantly changed the legal landscape for same-sex couples and their children.

There were approximately 605,500 same-sex couple households in the United States in 2011. Out of those households, approximately 99,000 (16%) reported having children under the age of 18 present in the household.[177] Not surprisingly, same-sex families and relationships break up just as opposite-sex families and relationships do. After *Obergefell* and *Pavan*, parentage laws that

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[172] Unif. Parentage Act §§ 804(a)(2), (4) (2017).
[173] *See* Unif. Parentage Act, Article 8, Part 2 Comment (2017).
[174] 576 U.S. 644 (2015).
[175] *Id.* at 2600-01.
[176] 582 U.S. __, 137 S. Ct. 2075, 2078–79 (2017).
[177] Jonathan Vespa, Jamie M. Lewis, & Rose M. Kreider, *America's Families and Living Arrangements: 2012*, Table 9, U.S. Census Bureau, P20-570 (Aug. 2013), https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-570.pdf (last visited Feb. 4, 2021). *Cf.* Daphne Lofquist, *Same-Sex Couple Households*, American Community Survey Briefs, U.S. Census Bureau, ACSBR/10-03 (Sept. 2011), https://www2.census.gov/library/publications/2011/acs/acsbr10-03.pdf (last visited February 4, 2021) (providing information from the 2010 American Community Survey). *See also* Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute (Feb. 2013), https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us (last visited Feb. 4, 2021).

treat children born to same-sex couples differently than opposite-sex couples may be unconstitutional.[178]

Child support attorneys should be familiar with the parentage law related to same-sex parents (both statutory and case law) of their state, as well as *Obergefell* and *Pavan*. Attorneys also should recognize that parentage laws predating *Obergefell* and *Pavan* that discriminate against same-sex couples may be unconstitutional. For same-sex parents, factors other than biology are used to define the parent-child relationship.[179]

Presumption of parentage. For a married opposite-sex couple, there is usually a statutory presumption that the husband is the father of a child conceived during the marriage, regardless of his biological relationship to the child. For same-sex couples, there is usually no similar statutory presumption "in favor of the same-sex partner of the biological parent as the child's second legal parent."[180]

As explained earlier, the UPA (2017) uses gender-neutral language for the marital presumption; therefore, the presumption applies to the spouse of the birth mother regardless of gender.[181] Courts also are starting to examine whether a statutory marital presumption of paternity in opposite-sex marriages must apply equally to establish parentage for children born to same-sex spouses. In *McLaughlin v. Jones*, the Arizona Supreme Court relied on *Obergefell* and *Pavan* to hold that refusing to apply that state's marital presumption equally to same-sex spouses would violate the due process and equal protection clauses of the U.S. Constitution.[182]

Even before *Obergefell* and *Pavan*, some courts applied a presumption of parentage in a same-sex relationship in order to establish legal parentage. One such case is *Elisa B. v. Superior Court of El Dorado County*.[183] In this California case involving a lesbian couple, one woman gave birth to a son, and the other gave birth to twins. The women lived together as a family and held the children out as their own but did not sign a domestic partnership agreement[184] nor formally adopt each other's children. After the couple separated, the mother of the twins began receiving public assistance and the child support agency sought support from her former partner. The former partner denied a support duty, arguing that she was neither the biological nor legal parent of the twins. The

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[178] Unif. Parentage Act, Prefatory Note (2017).
[179] *Id. See, e.g., Kristine H. v. Lisa R.*, 117 P.2d 690 (Cal. 2005) (birth mother could not disestablish parentage of her lesbian ex-partner).
[180] Nora Udell, Comment, *A Riddle for Dr. Seuss: "Are You My (Adoptive, Biological, Gestational. Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?" And an Answer for Our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 Tulane J.L. & Sexuality 147,153 (2012).
[181] Unif. Parentage Act § 204(a) (2017).
[182] 401 P.3d 492 (Ariz. 2017).
[183] 117 P.3d 660 (Cal. 2005).
[184] The case pre-dates California's recognition of same-sex marriages.

court noted that the defendant had resided with the twins in her home and held them out as her own. Applying the presumption of paternity in the UPA, the court found that the defendant was the parent of the twins.[185]

Intent to establish parent relationship. As explained earlier, the UPA (2017) recognizes an intended parent as having manifested an intent to be legally bound as a parent of a child conceived by assisted reproduction.[186] Similarly, courts may look to the intent of the parties in determining whether there is a legal support obligation in a same-sex relationship. For example, in a Florida case involving a woman who had donated her ova, which was then fertilized and carried by her former partner, the Supreme Court of Florida found that the woman who had donated her ova was the legal mother of the child and not a donor. In making that finding, the court held that the Florida statute related to assisted reproductive technology (ART) was unconstitutional; in requiring an egg or sperm donor to relinquish any claim of parental rights, it excepted cases of a "commissioning couple," defined as the intended mother and father of a child who will be conceived through ART using the biological material of at least one of the intended parents, and fathers who have executed a preplanned adoption agreement. However, it made no exception for same sex couples where there was a similar intent to parent. The court found the statute violated the Due Process and Equal Protection Clauses by denying same-sex couples the statutory protection against the automatic relinquishment of parental rights that it afforded to heterosexual unmarried couples seeking to utilize the identical assistance of reproductive technology. The court concluded that the biological mother in this case was the intended parent and had participated in raising the child and, therefore, had a fundamental constitutionally protected right to parent her child.[187]

De facto parentage. In many states, if an individual can establish that he or she has developed a strong parent-child relationship with the consent and encouragement of a legal parent, the individual may be recognized as a legal parent.[188] The terms used to describe the legal parent vary and include: *de facto* parent, psychological parent, *in loco* parentis, and parent by estoppel. The UPA (2017) provides a procedure and lists the elements necessary for a court to declare an individual to be a *de facto* parent.[189] Section 609 requires the individual claiming to be a *de facto* parent to demonstrate by clear and convincing evidence that the individual:

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[185] *See also Chatterjee v. King*, 280 P.3d 283 (N.M. 2012).
[186] Unif. Parentage Act § 102(13) (2017).
[187] *D.M.T. v. T.M.H.*,129 So. 3d 320 (Fl. 2013). *See also Shineovich v. Kemp*, 214 P.3d 29 (Or. App. 2009); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006); *L.F. v. Breit*, 736 S.E.2d 711 (Va. 2013).
[188] Unif. Parentage Act § 609, Comment (2017).
[189] Unif. Parentage Act § 609 (2017).

- Resided with the child as a regular member of the child's household for a significant period;
- Engaged in consistent caretaking of the child;
- Undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- Held out the child as the individual's child; and
- Established a bonded and dependent relationship with the child which is parental in nature, and another parent of the child fostered or supported the bonded and dependent relationship.

The individual also must show that continuing the relationship is in the child's best interest.[190]

Courts have applied similar tests to recognize *de facto* parenthood. A case in point is the Maryland case of *Conover v. Conover*, which involved a divorce of a lesbian couple and the parental status of the non-birth partner.[191] The state's highest court overruled prior case law to recognize the doctrine of *de facto* parentage. Although Maryland statutory law was silent on *de facto* parenthood, the court held that recognition of the doctrine would serve to "effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state."[192] The factors for a court to consider in deciding whether to declare someone a *de facto* parent are rooted in the well-settled best interest of the child determination.

Voluntary acknowledgment of parentage. Pursuant to PWRORA, every state must have a law providing that a signed acknowledgment of paternity constitutes a legal determination of paternity, subject to the earlier of: at least a 60-day rescission period, or the date of an administrative or a judicial proceeding relating to the child in which the signatory is a party. The UPA (2017) extends the acknowledgment process to intended and presumed parents regardless of gender.[193] In 2017, Nevada similarly extended the acknowledgment process to same-sex couples wishing to establish parentage for their children.[194]

Intergovernmental cases. Complications that exist in determining parentage in a contested case when the child is born to a same-sex couple multiply when the parties live in different jurisdictions.

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[190] *Id.*
[191] *Conover v. Conover*, 141 A.3d 31 (Md. 2016).
[192] *Id.* at 42.
[193] Unif. Parentage Act § 301 (2017).
[194] Nev. Rev. Stat. §§ 126.053; 440.285 (2019).

Establishment of parentage. UIFSA allows the establishment of parentage in an intergovernmental case. In a two-state proceeding, the law of the responding state applies to determine parentage and the support duty. Therefore, it will be the law of the responding state that determines whether there is a legal basis to require a person who was in a same-sex relationship to pay support for a child when that person is not the child's biological or adoptive parent.[195]

Recognition of another state's determination of parentage. Issues also arise in intergovernmental cases when there is an existing order establishing parentage in a same-sex relationship. For example, assume there is an order establishing parentage and setting support that was issued in State 1 recognizing same-sex marriages. The custodial parent then seeks enforcement of the order in State 2 that does not recognize same-sex marriages. The most important governing law is the Full Faith and Credit Clause of the United States Constitution.[196] It requires that a final judgment entered by an American court must be given "as much preclusive effect it would receive in a state where it was rendered."[197] In short, if a Maryland court issues a child support order, that order must be given as much respect in Delaware and every other state as it would receive in Maryland, and "the public policy of neither Delaware nor Maryland has any bearing on the question of whether Delaware should enforce a Maryland judgment for child support involving same-sex parents."[198]

In addition to the U.S. Constitution, there is a federal statute requiring the recognition and enforcement of child support orders: the Full Faith and Credit for Child Support Orders Act (FFCCSOA).[199] If a determination of parentage is made in the context of the child support order, FFCCSOA requires a state to recognize that determination. At the state level, every state has enacted UIFSA (2008).[200] Section 315, Nonparentage as Defense, provides: "A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this [Act]."

What if there is an acknowledgment of parentage, but no court order establishing parentage? As discussed earlier, a signed voluntary acknowledgment constitutes a legal determination of parentage, subject to a 60-day rescission period.[201] In the absence of a successful challenge during that time period, other states must give the acknowledgment of parentage full faith and credit.[202]

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[195] *See* Susan F. Paikin & William L. Reynolds, *Parentage and Child Support*: *Interstate Litigation and Same-Sex Parents*, 24 Delaware Lawyer 26 (Spring 2006).
[196] U.S. Const., Art. IV, § 4, Cl. 1.
[197] U.S. Const., Art. IV, § 4, Cl. 1.
[198] Paikin and Reynolds, *supra* note 195, at 28.
[199] 28 U.S.C. § 1738B (2018).
[200] *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944 (2014) (codified at 42 U.S.C. § 666(f) (2018)).
[201] 42 U.S.C. § 666(a)(5)(D)(ii) (2018).
[202] 42 U.S.C. § 666(a)(5)(C)(iv) (2018).

INTERGOVERNMENTAL CASES

Federal child support regulations define an "intergovernmental IV-D case" as "a IV-D case in which the noncustodial parent lives and/or works in a different jurisdiction than the custodial parent and child(ren) that has been referred by an initiating agency to a responding agency for services."[203] An intergovernmental IV-D case may include any combination of referrals between states, tribes, and countries, as well as cases where a state has asserted authority over a non-resident under long-arm jurisdiction.[204] As with almost any other aspect of the child support program, intergovernmental paternity cases can present a particular challenge to the child support attorney.[205] The Act that applies in U.S. states to the establishment of parentage in intergovernmental cases is UIFSA (2008).[206]

Interstate Cases

UIFSA (2008) has a broad definition of "state." It includes not only a U.S. state, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to U.S. jurisdiction, but also an Indian nation or tribe.[207] Although UIFSA includes tribes within the definition of "state," there is no federal requirement that a tribe enact UIFSA as a condition of receiving federal Title IV-D funding.[208]

Within UIFSA (2008), four provisions are particularly important in paternity cases. Section 201 contains long-arm provisions, which allow a state to assert personal jurisdiction over a nonresident individual. Pursuant to Section 201, in a proceeding to determine parentage, a tribunal may exercise personal jurisdiction over a nonresident individual if:

(1) the individual is personally served within the state;

(2) the individual submits to the state's jurisdiction by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;

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[203] 45 C.F.R. § 301.1 (2019).
[204] *See* 75 Fed. Reg. 38,612 (July 2, 2010) for the final rule governing intergovernmental child support. *See also* OCSE-AT-10-06: *Final Rule: Intergovernmental Child Support* (July 2, 2010).
[205] For a more detailed discussion on intergovernmental proceedings, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[206] UIFSA was promulgated by the Uniform Law Commission. PRWORA required states to enact UIFSA (1996) as a condition of receiving federal funds. In 2008 the Uniform Law Commissioners amended UIFSA again in order for the Act to be the implementing legislation in the United States for the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. In 2014, Congress required states to enact UIFSA (2008) as a condition of receiving federal funds. *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944 (2014).
[207] *See* Unif. Interstate Fam. Support Act § 102(26) (2008).
[208] The requirement for states to enact UIFSA is in 42 U.S.C. § 666(f) (2018).

(3) the individual resided with the child in the state;

(4) the individual resided in the state and provided prenatal expenses or support for the child;

(5) the child resides in the state as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse;

(7) [the individual asserted parentage in the [putative father registry] maintained in the state][209]; or

(8) there is any other basis consistent with the constitutions of the state and the United States for the exercise of personal jurisdiction.[210]

A child support attorney should review the facts of a case before the agency files an action asserting long-arm jurisdiction, in order to ensure that use of the long-arm statute is appropriate.

Section 315, Nonparentage as Defense, is also relevant. It provides that a party whose parentage of a child has been previously determined may not plead nonparentage as a defense in the UIFSA proceeding. If the party wants to challenge parentage, the party must do so in the issuing state. According to the Comments to Section 315:

> Arguably this section does no more than restate the basic principle of *res judicata*. However, there is a great variety of state law regarding presumptions of parentage and available defenses after a prior determination of parentage. As long as a proceeding is brought in an appropriate forum, this section is intended neither to discourage nor encourage collateral attacks in situations in which the law of a foreign jurisdiction is at significant odds with local law. If a collateral attack on a parentage decree is permissible under the law of the issuing jurisdiction, such a proceeding must be pursued in that forum and not in a UIFSA proceeding.

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[209] Note that in the Act, subsection (7) of the long-arm provision is bracketed because not all states use putative father registries. A putative father registry allows a man who believes that he may have fathered a child, outside of marriage, to register in order to be notified of a proceeding for adoption of, or termination of parental rights regarding, the child that he may have fathered. *See* Article 4 of the Unif. Parentage Act (2017).

[210] Unif. Interstate Fam. Support Act § 201(a) (2008).

The only collateral attack that a party may raise in the UIFSA proceeding is one based on lack of due process.

Section 316 presents special rules of evidence. It provides that the physical presence of a nonresident party[211] is not required for the determination of parentage. Subsection (d) further provides that copies of bills for parentage testing, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party a certain time period prior to trial, are admissible in evidence to prove the amount of the charges and that the charges were reasonable, necessary, and customary. Subsection (i) states: "A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child."

Finally, Section 402, "Proceeding to Determine Parentage,"[212] authorizes a "pure" parentage action, in the interstate context, not joined with a claim for support. According to the Official Comment, "[t]he mother, an alleged father of a child, or a support enforcement agency may bring such an action." An action to establish parentage under UIFSA is treated identically to such an action brought intrastate within the responding state. Usually, however, an action to determine parentage also includes a request for establishment of a support order. Although UIFSA (2008) allows a parentage only action, federal regulations only allow state IV-D agencies to provide the limited service of paternity-only services in intrastate, not intergovernmental, cases. [213]

Child support attorneys should be mindful that UIFSA most often applies in situations where the parties reside in different jurisdictions. Federal regulations require the initiating child support agency to determine whether the noncustodial parent is in another jurisdiction and whether it is appropriate to use its one-state remedies to establish paternity and establish a support order. Only if it determines that one-state remedies are not appropriate, should the agency refer an intergovernmental IV-D case to the appropriate State Central Registry, Tribal IV-D program, or Central Authority of a country for action.[214] As noted earlier, child support attorneys should review any pleading alleging long-arm jurisdiction to ensure the facts establish one or more of UIFSA's long-arm jurisdictional bases. If there is no long-arm jurisdiction, the agency can file a paternity action using UIFSA's two-state process. That means the initiating state agency will complete the applicable federal forms for initiating an intergovernmental paternity action and forward them to the responding state agency for filing in the responding state, which will usually be where the respondent lives. Any hearing will be in the responding state, and the applicable laws are those of the responding state.

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[211] Unif. Interstate Family Support Act § 316(a) (2008).
[212] Unif. Interstate Family Support Act § 402 (2008).
[213] 45 C.F.R. § 302.33(a)(6) (2019).
[214] 45 C.F.R. § 303.7(c) (2019).

Tribal Cases[215]

In 1996, PRWORA authorized tribes and tribal organizations to operate Title IV-D child support programs.[216] Because of the sovereignty of tribes, federal regulations governing tribal IV-D agencies differ in some areas from those governing state IV-D child support agencies. For example, as noted earlier, federal regulations do not require tribes to enact UIFSA. Therefore, in processing paternity cases initiated by other jurisdictions, the tribe will apply tribal law and custom.

Federal regulations governing paternity establishment. Federal regulations setting paternity establishment procedures that must be part of a tribal IV-D program appear at 45 C.F.R. § 309.100. Like states, a tribal IV-D program must provide for the establishment of paternity through a voluntary acknowledgment process.[217] However, there are no federal regulations prescribing the voluntary acknowledgment process for tribes as there are for states. Like states, tribal IV-D programs must have procedures requiring that, in a contested paternity case (unless otherwise barred by tribal law), the child and all other parties must submit to genetic tests upon the request of any such party.[218] The phrase "otherwise barred by Tribal law" is intended to cover situations in which, either by action of one or both of the parties or the application of tribal law, or both, paternity has already been conclusively determined and may not be reconsidered. In such cases, genetic testing to challenge the paternity determination would not be authorized.[219]

A tribal IV-D plan must provide for the establishment of paternity "by the process established under Tribal law, code, and/or custom."[220] Federal regulations expressly state that establishment of paternity pursuant to a tribal IV-D program requirement has no effect on tribal enrollment or membership.[221] However, in reality, paternity establishment can affect enrollment if a tribe's enrollment process requires a birth certificate and/or descent line. In such

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[215] For a comprehensive legal resource, *see* OCSE-IM-07-03: *Tribal and State Jurisdiction to Establish and Enforce Child Support* (Mar. 1, 2007) (hereinafter referred to as Tribal and State Jurisdiction).
[216] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, 110 Stat. 2105. For a list of tribes that operate Title IV-D child support programs, *see* https://www.acf.hhs.gov/css/training-technical-assistance/tribal-child-support-agency-contacts.
[217] 45 C.F.R. § 309.100(a)(2) (2019).
[218] 45 C.F.R. § 309.100(a)(3) (2019).
[219] Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,658 (Mar. 30, 2004) ("Examples of such a paternity determination would include a voluntary admission of paternity or circumstances under which the Tribe has other means of recognizing paternity under Tribal law. A Tribe, through its own custom, tradition or procedure, may recognize a man as the father or may preclude a man who holds himself out to be the father from challenging paternity. Similarly, a Tribe may have a conclusive presumption of paternity when a child is born to married parents or if a noncustodial parent has been validly served in a paternity proceeding and failed to contest paternity in such proceeding.").
[220] 45 C.F.R. § 309.100(a)(1) (2019).
[221] 45 C.F.R. § 309.100(d) (2019).

circumstances, if a man's name is on the birth certificate, the child can be enrolled into the tribe – regardless of whether the name is on the certificate due to a paternity adjudication, a default paternity order, or a paternity acknowledgment, and regardless of whether the man is the child's biological father. [222] Enrollment may also be what drives a request for paternity establishment after the death of the alleged father. In some circumstances, the Department of Interior may also determine the issue in a probate proceeding involving Indian trust land. Therefore, child support attorneys and case workers need to remember the importance of paternity establishment for potential tribal children.

Reuniting Native American fathers and their children is important for several reasons. Knowing who and where the father is obviously affects the children and other family members who want to reclaim kinship ties. In Native American culture, fathers are expected to provide food and shelter for their families. They are also traditionally viewed as teachers, guides, role models, leaders, and nurturers. As noted, for some tribes, determination of paternity may also be a step toward tribal enrollment. "Tribal membership has a direct effect on Federal benefits for which the Tribe may be eligible. Membership also has implications for legal jurisdiction, inheritance of restricted or trust lands, and voting rights."[223]

In developing regulations that govern tribal IV-D programs, the federal government recognized that tribes may provide for the legal determination of paternity not only pursuant to laws, but also pursuant to custom and religious practice. Such regulations define "Tribal custom" to make it clear that the term means unwritten law that has the force and effect of law.[224]

Tribes that do not receive federal IV-D funding may also provide forums for the establishment of paternity. They do not need to meet federal IV-D regulatory requirements.

Full faith and credit. Pursuant to the Full Faith and Credit for Child Support Orders Act,[225] states and tribes are required to recognize and enforce valid child support orders. If such orders are premised on a finding of paternity, the state or tribe must honor such paternity findings.[226]

Personal jurisdiction. Assuming subject matter jurisdiction, tribal codes typically assert personal jurisdiction in a civil action over any person who is a

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[222] Tribal and State Jurisdiction*, supra* note 215.
[223] Office of Child Support Enforcement, *Strengthening the Circle: Child Support for Native American Children* (Dec. 1, 1998).
[224] 45 C.F.R. § 309.05 (2019).
[225] 28 U.S.C. § 1738B (2018).
[226] *See* Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,658 (Mar. 30, 2004).

member of the tribe.[227] There may be limits to the exercise of civil jurisdiction over a nonmember Indian or non-Indian. For example, The Three Affiliated Tribes of Fort Berthold Reservation (North Dakota) limit civil jurisdiction in domestic relations cases to actions involving enrolled members of the tribe.[228] Tribal codes usually also assert personal jurisdiction over persons who are present, domiciled, or a resident on the tribal reservation or other tribal lands.[229] Some codes specifically address non-Indians in that context. For example, the Tribal Code of Keweenaw Bay Indian Community of L'Anse Indian Reservation (Michigan) states the following:

> Any person, whether Indian or non-Indian, and whether natural or created by law, who is found within the territorial jurisdiction of this Court as defined by Section 1.501 . . . shall be subject to the jurisdiction of this Court. Non-Indian persons, by their residence, employment, or by their participation in any other activity within the territorial jurisdiction of this Court impliedly consent and submit to the provisions of this Code and the jurisdiction of this Court.

Ch. 1.5, § 1.502.

If the respondent is a nonresident, many tribal codes have long-arm statutes authorizing the assertion of personal jurisdiction under circumstances similar to state long-arm statutes.[230]

The definition of "residence" was raised in the case of *Father v. Mother*, No. 3 Mash. 204 (Mashantucket Pequot Tribal Court 1999). Denying the defendant's Motion for Relief, the tribal court in Connecticut found that it possessed exclusive subject matter jurisdiction over a paternity and custody action brought by the member father if the child was residing on the reservation at the time the original action was begun. The mother, a non-member Indian who lived in the State of Virginia, had argued that the child did not reside on the reservation; she characterized the child's 10-month stay there as a visit. In ruling that the child was a resident of the reservation, the court rejected "the historically gendered and sexist rules of the western common law" that presumed the child's residence was that of the mother's. Rather, it looked to tribal law with its focus on the well-being of the tribal member children:

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[227] *See, e.g.*, Law and Order Code, Fort McDowell Yavapai Community, Arizona, § 1-7(B)(1)(b) (2019); Coquille Tribal Code § 610.200(c)(1) (2017). The Coquille Tribal Code also asserts personal jurisdiction over persons who are eligible for Tribal enrollment, or who have consented to the court's jurisdiction by marriage to a Tribal member.
[228] Section 2(a)(3) (2004).
[229] *See, e.g.*, Laws of the Confederated Salish & Kootenai Tribes of the Flathead Reservation § 1-2-104(2)(a) (2013); Law and Order Code, Fort McDowell Yavapai Community, Arizona, § 1-7(B)(1)(a) (2015); Coquille Tribal Code § 610.200(c)(1) (2017).
[230] *See, e.g.*, Sisseton-Wahpeton Sioux Tribal Code §§ 45-01-01, 45-01-02 (2014).

> The Family Relations Law and Child Protection Law does not require a Tribal member child to have resided on Nation lands for any minimum amount of time before this Court may exercise its jurisdiction over him or her. In Tribal law, this is not an unusual omission. The lack of a requirement that residency be of a minimum duration reflects the special ties of native Americans to their ancestral homelands and reservations, and to the Tribal history, culture and extended family relations that are alive there . . . . Thus for the Native American, the reservation is unlike any other place on the face of the earth.

Subject matter jurisdiction. Establishing paternity when any party or the child is a Native American Tribe member presents unique issues that the attorney must consider. State provisions for establishing paternity make no distinction between members of an Indian tribe and other individuals; they apply to any person who is subject to the jurisdiction of the state. It is important to keep in mind, however, that Indian tribes are sovereign nations. As such, they have subject matter jurisdiction over issues involving paternity where one of the parents or alleged parents is a tribal member. Whether subject matter jurisdiction to establish paternity lies in the state court,[231] the tribal court, or concurrently in both courts depends on several factors. Such factors include the application of Public Law 280,[232] where conception occurred, whether a party is receiving public assistance, whether the parties are tribal members, and where the parties reside.[233]

General facts to remember. Whether a child support attorney is a tribal program attorney or a state program attorney, the attorney should keep in mind the following:

- Tribal sovereignty: Each tribe is a sovereign government that possesses inherent authority to govern its own people, lands, and business entities.

- Tribal codes/laws: Many tribes have their own codes and laws, including domestic relations and child support codes. Regardless of whether the tribe operates a federally-funded IV-D program, the tribe may issue child support orders.

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[231] "State court" in this context includes any tribunal designated by the state to handle paternity establishment, including establishment by administrative process.
[232] Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326). For an explanation of Public Law 280, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[233] For a discussion of various paternity fact patterns and relevant state and tribal case law, *see* OCSE-IM-07-03: *Tribal and State Jurisdiction to Establish and Enforce Child Support* (2007).

- Tribal custom: Federal regulations define "Tribal Custom" as "unwritten law that has the force and effect of law within a particular Tribe."[234]

- Appropriate forum: On occasion, both tribal and state courts share concurrent jurisdiction. The child support attorney should decide whether the tribal or state court is the appropriate forum to hear the paternity matter in question.

- Cooperation: Tribal and state IV-D child support programs are required to respond to all requests from, and cooperate with, state and tribal child support agencies and recognize child support orders entered by tribes or states.[235]

International Cases

Parentage establishment may also arise in cases where one parent or the child lives in another country.[236] These are cases for which a child support agency will likely request an attorney's assistance.

On August 30, 2016, President Obama signed the U.S. instrument of ratification of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[237] The United States deposited its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on September 7, 2016. As a result, the Convention entered into force for the United States on January 1, 2017.[238] The Hague Child Support Convention contains several provisions specifically relevant to parentage establishment:

- "The provisions of this Convention shall apply to children regardless of the marital status of the parents."[239]

- In relation to applications under Chapter III of the Convention, Central Authorities must take all appropriate measures "to provide assistance in establishing parentage where necessary for the recovery of maintenance."[240]

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[234] 45 C.F.R. § 309.05 (2019).
[235] 45 C.F.R. § 309.120 (2019).
[236] For more information, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[237] *See* https://www.hcch.net/en/instruments/conventions/full-text/?cid=131 for the full text of the Convention.
[238] For a list of countries with which the U.S. has a treaty relationship under the Hague Child Support Convention, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[239] *See* the 2007 Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, Article 2, subsection 4, https://www.hcch.net/en/instruments/conventions/full-text/?cid=131 (last visited Feb.4, 2021).
[240] *See* the Hague Child Support Convention, Article 6, subsection 2(h).

- A creditor in a requesting State seeking to recover maintenance under the Convention may file an application for "establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage."[241]

The attorney needs to be aware of three limitations under the Convention regarding parentage establishment:

- An application for the establishment of a support order, including where necessary the establishment of parentage, is only available to a creditor; a debtor cannot file an application seeking to establish parentage and support. In a Convention establishment proceeding, the law of the requested State[242] applies.

- There is no requirement that a Convention country establish parentage, even if the child was born outside of marriage, if the requested country's laws provide for the establishment of a support order without the necessity of first establishing parentage.

- A creditor cannot bring an application to establish parentage only.

In PRWORA, Congress for the first time included authority for the Secretary of State, with the concurrence of the Secretary of Health and Human Services, to declare reciprocity with foreign countries if certain mandatory elements are met.[243] This legislation requires the foreign country to have in effect procedures available to United States residents for the establishment of paternity, the establishment of support orders for children and custodial parents, and the enforcement of support orders for children and custodial parents, including procedures for collection and distribution. These procedures must be available to United States residents at no cost. The law also permits states to enter into reciprocal arrangements with countries that are not the subject of a federal declaration. Unless superseded by a federal declaration, previous state declarations of reciprocity remain in effect.

The international page of OCSE's website provides a list of the countries that have federal-level reciprocity with the United States.[244] It also provides case processing, payment processing, and contact information; language requirements; and other information specific to each foreign reciprocating country

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[241] *See* the Hague Child Support Convention, Article 10, subsection 1(c).
[242] A Requested State is the Convention country receiving the application. A Requesting State is the Convention country transmitting an application.
[243] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 371, 110 Stat. 2105, 2252 (codified as amended at 42 U.S.C. § 659a (2018)).
[244] https://www.acf.hhs.gov/css/partners/international (last visited Jan. 29, 2021). *See also* Chapter Thirteen: Intergovernmental Child Support Cases.

(FRC). In addition, there are Caseworker's Guides for the FRCs.[245] The Guides include information about the FRC's laws, policies, and procedures, as well as preferred forms.

UIFSA (2008) includes provisions that address how child support agencies and tribunals should respond to petitions from foreign countries and requests to enforce foreign support orders.[246] Article 7 governs proceedings under the Hague Child Support Convention.

Intergovernmental Child Support Hearings

UIFSA (2008) includes special provisions for transmitting and receiving testimony (including telephonic hearings) as well as other evidence.[247] Section 316 governs the admissibility of evidence. Under that section, the tribunal cannot require the physical presence of the nonresident applicant. The tribunal must allow the electronic transmission of documents. Additionally, the tribunal must permit a nonresident witness or party to testify by telephone, audiovisual means, or other electronic means. Section 317 explicitly authorizes a tribunal to communicate with a tribunal from outside the state, which means another state (defined to include an Indian nation or tribe), foreign country, or foreign nation that does not meet UIFSA's definition of a foreign country. Section 318 is similarly broad, authorizing a tribunal to help a tribunal from outside the state with the discovery process.

[245] *See* Office of Child Support Enforcement, A Caseworker's Guide to Processing Cases with Australia (2018); Office of Child Support Enforcement, A Caseworker's Guide to Processing Cases with Canada (2013); Office of Child Support Enforcement, A Caseworker's Guide to Processing Cases with El Salvador (2007); Office of Child Support Enforcement, A Caseworker's Guide to Processing Cases with Israel (2009); Office of Child Support Enforcement, A Caseworker's Guide to Processing Cases with Switzerland (2009). *See also* OCSE-IM-03-07: A Caseworker's Guide for Cases with Foreign Reciprocating Countries (2003).

[246] Section 102 of UIFSA (2008) defines "foreign country" to include many, but not all, foreign nations.

[247] Unif. Interstate Fam. Support Act § 316 (2008).

Federal regulations require responding state IV-D agencies to provide timely notice to the initiating state agency in advance of any hearing before a tribunal that might result in establishment of an order.[248] "Timely" in the phrase "provide timely notice" means sufficiently in advance to provide the initiating agency the opportunity to participate and to ensure the petitioner receives notice and the opportunity to participate as well. OCSE defers to each state's own procedures to define adequate notice of hearings following its own due process requirements.[249]

Full Faith and Credit

The most important preliminary question is whether there is already a parentage determination entitled to recognition.

In 1994, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA).[250] As noted earlier, both states and tribes are subject to FFCCSOA.[251] It requires courts and administrative agencies to give full faith and credit to any child support order properly issued by another state or tribe with personal and subject matter jurisdiction. Therefore, if the child support order is premised on a finding of parentage, both states and tribes must give full faith and credit to that underlying determination. In addition, federal law requires states, as a condition of receiving federal funds, to have laws giving "full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes."[252] The statute does not address tribes.

Similarly, UIFSA precludes any collateral attack on a parentage decree or a determination. A party must raise such a challenge in the issuing state, not in a UIFSA proceeding.[253] States, but not tribes, are required to enact UIFSA.

CONCLUSION

Parentage establishment has changed dramatically since the beginning of the IV-D child support program in 1975. Genetic testing has revolutionized the identification of the biological father, and paternity trials before a judge or

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[248] 45 C.F.R. § 303.7(d)(7) (2019). *See* 75 Fed. Reg. 38,612 (July 2, 2010) for the final rule governing intergovernmental child support. *See also* OCSE-AT-10-06: *Final Rule: Intergovernmental Child Support* (July 2, 2010).
[249] *See* 75 Fed. Reg. 38,612, 38,635–36 (July 2, 2010).
[250] Pub. L. No. 103–383, 108 Stat. 4063 (1994). Congress amended the Act in 2014. *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944-1945 (2014). The Act is now codified at **28 U.S.C. § 1738B (2018).**
[251] For a quick review of the provisions of FFCCSOA, *see* OCSE-AT-02-03: *Applicability of the Full Faith and Credit for Child Support Orders Act to States and Tribes* (May 28, 2002).
[252] 42 U.S.C. § 666a(11) (2018).
[253] Unif. Interstate Fam. Support Act § 315 (2008).

administrative hearing officer are now the exception rather than the norm. In states that have adopted the UPA, state child support attorneys rely on statutory guidance in addressing the issues of parentage, genetic testing, same-sex couples with children, assisted reproduction, and surrogacy, as well as special rules to adjudicate parentage when there are multiple parentage claims. In states that have not adopted any version of the UPA, child support attorneys must keep abreast of continually evolving statutes and case law related to parentage establishment for non-traditional families.

Establishing parentage for children of same-sex couples requires careful representation by the child support attorney and a knowledge of the developing case law. Similarly, paternity disestablishment cases and intergovernmental parentage cases present unique challenges. When handling difficult parentage issues and cases, the child support attorney should remember that what is at stake is a legal parent-child relationship with the attendant constitutionally recognized parental rights and responsibilities.

CHAPTER NINE

TABLE OF STATUTES AND AUTHORITIES

Statutes, Rules, and Regulations **Page**

Tribal Rules and Codes **Page**

Case Law **Page**

Case Law **Page**

Model Codes **Page**

Model Codes **Page**

Model Rules **Page**

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