CHAPTER EIGHT
PATERNITY ESTABLISHMENT

INTRODUCTION

Under early common law, a child born out of wedlock was considered *filius nullius* -- the child of no one. 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 out-of-wedlock births, society has begun 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.[1] In 1973, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the original Uniform Parentage Act (UPA),[2] which 19 States subsequently adopted in full and other States adopted in part. The UPA 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 Child Support Enforcement (CSE or IV-D) program in 1975, State and local IV-D agencies have been required to establish the paternity of all children who were born out of wedlock and who either receive public assistance benefits or have applied for IV-D services. Further, the Child Support Enforcement Amendments of 1984[3] required each State to permit a paternity action to be brought at any time before a child's 18th birthday,[4] rather than allowing shorter statutes of limitations on paternity actions, as had been the practice previously. See Exhibit 8-1 for a list of State paternity statutes of limitations where there is no presumed father.

Historically, paternity was proven through somewhat unreliable means, if at all. Defendants in criminal paternity proceedings were entitled to jury trials, at which evidence might consist of testimony regarding the parents' relationship, the mother's relationships with other potential fathers, and the physical resemblance of the child to the defendant. Often, without an admission by the alleged father, it was difficult to establish paternity under the law.

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[1] *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).

[2] Unif. Parentage Act (amended 2000), 9 Pt. B U.L.A. 235 (1999). The National Conference of Commissioners on Uniform State Laws revised the UPA in 2000, as will be discussed later in this chapter.

[3] P.L. No. 98-378 (1984).

[4] 42 U.S.C. § 666(a)(5) (1994, Supp. IV 1998, & Supp. V 1999). Because statutes of limitation generally are viewed as procedural, this change may be applied retrospectively.

As the science of genetics advanced, its findings were applied to the establishment of paternity. Blood type testing was used to exclude men accused of fathering children out of wedlock. 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.

Today, genetic testing typically is able to 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 currently preferred over blood testing as the most accurate means. In addition to genetic testing, voluntary paternity establishment is also becoming more widely used. In many cases, the father will admit to paternity, and both parties will sign a paternity affidavit. These advances in paternity establishment have been very important for CSE efforts, as all child support orders require a legally identified parent.

OVERVIEW OF FEDERAL LAW

Although the determination of paternity is made under State law, the U.S. Congress has taken an interest in the subject and has imposed requirements on States as a condition of receiving IV-D funding. Thus, methods of paternity establishment are fairly uniform throughout the country.

Paternity Acknowledgment

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93)[5] required all States to adopt an in-hospital, voluntary acknowledgment process as a condition of receiving Federal IV-D funds. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[6] modified and expanded the required paternity acknowledgment procedures. 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. PRWORA encourages States to use other voluntary paternity resolution methods as needed and with the same notice requirements.[7]

Before signing the affidavit, both the mother and the alleged father must be given 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.[8] In each State, the

[5] P.L. No. 103-66 (1993).
[6] P.L. No. 104-193 (1996) (as subsequently amended by the Balanced Budget Act of 1997, P.L. 105-33 (1997)).
[7] 42 U.S.C. § 666(a)(5)(C)(iii)(II)(bb) (Supp. V 1999).
[8] 42 U.S.C. § 666(a)(5)(C)(i) (Supp. V 1999).

parents' completion of a voluntary paternity acknowledgment must create a conclusive finding of paternity.

Although each State designs its own paternity 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 elements are:

- 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;
- the address(es) of the mother and father;
- the birthplace of the child;
- a brief explanation of the legal significance of signing the affidavit;
- a statement that both parents have 60 days to rescind;
- signature lines for the mother and father; and
- signature lines for witnesses or notaries.[9]

In addition to the required elements, several optional elements are strongly recommended by OCSE. These are:

- the gender of the child;
- the father's employer; and
- the maiden name of the mother.

Other optional elements can include the place of execution of the affidavit, phone numbers for the mother and father, birthplaces of the mother and father, the hospital where the child was born, the ethnicity of the father, medical insurance information, an offer of name change for the child, a signature line for the guardian of a minor parent, an advisory to parents that they might want to seek legal counsel or obtain genetic testing prior to acknowledgment, and the custody status of the child.[10]

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[9] Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, Action Transmittal (AT-98-02) (1998) - Required Data Elements for Paternity Acknowledgment Affidavits.
[10] *Id.*

The finding of paternity by acknowledgment will remain in effect, unless either signatory rescinds his or her acknowledgment within the earlier of (1) 60 days; or (2) the date of an administrative or judicial proceeding to establish a support order in which the signatory is a party.[11] Federal law requires States to accept rescission of a paternity acknowledgment made within that time period.[12] States are split on how this is to be done.

Some States opt for a simple administrative procedure for rescission; others require a formal judicial action. Notice to the other signatory is generally required. The rescinding party might have to file a petition to determine parentage and to have genetic testing ordered. Also, if the father's name already appears on the child's birth certificate as a result of the acknowledgment, a court order permitting the rescission will permit the vital statistics agency to change the birth certificate and remove the man's name from birth records.[13]

In addition to the basic requirement that a voluntary acknowledgment automatically becomes a legal finding of parentage unless withdrawn, States are required to give full faith and credit to a paternity affidavit signed in another State according to its procedures.[14] As a condition of receiving Federal funds, they must also bar judicial or administrative proceedings to ratify an unchallenged acknowledgment of paternity.[15] Once signed, the acknowledgments must be filed with the State birth records agency.[16]

Prohibition against Jury Trials

Historically, State law determined whether a defendant in a paternity case had a right to a jury trial. However, PRWORA required States, as a condition of receiving Federal funds, to preclude jury trials in contested paternity matters.[17]

Some defendants denied jury trials have attempted to argue their right to a jury trial on constitutional grounds. Generally, courts have found that there is no right to a jury in a paternity trial.[18]

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[11] 42 U.S.C. § 666(a)(5)(D)(ii) (Supp. V 1999). Beyond that, proceedings to contest the finding must be pursued in court, and must be based on fraud, duress, or material mistake of fact. The person challenging the acknowledgment has the burden of proof, and the court cannot stay a signatory's support obligation during the contest. 42 U.S.C. § 666(a)(5)(D)(iii) (Supp. V 1999).
[12] 42 U.S.C. § 666(a)(5)(D)(ii) (Supp. V 1999).
[13] For a discussion of current State procedures, *see* Office of the Inspector General, U.S. Dep't of Health & Human Services*, Paternity Establishment: Use of Voluntary Acknowledgments,* OEI-06-98-00053 (April 2000). *See also* Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, Dear Colleague Letter (DCL- 00-93) (1993).
[14] 42 U.S.C. § 666(a)(5)(C)(iv) (Supp. 1999).
[15] 42 U.S.C. § 666(a)(5)(E) (Supp. V 1999).
[16] 42 U.S.C. § 666(a)(5)(M) (Supp. V 1999).
[17] 42 U.S.C. § 666(a)(5)(I) (Supp. V 1999).
[18] *See, e.g., Hoyle v. Superior Court of Arizona, County of Maricopa,* 161 Ariz. 224, 778 P.2d 259 (1989);*County of Sutter v. Davis,* 234 Cal. App. 3d 319, 285 Cal. Rptr. 736 (Cal. Ct. App. Dist. 3

Genetic Testing

PRWORA requires that States have laws requiring that genetic testing be ordered in any contested case.[19] The party requesting the testing must make a sworn statement that either alleges paternity, with a showing of a reasonable possibility of sexual contact between the parties, or denies paternity. The tribunal can compel genetic testing of the child and all parties.[20]

Genetic testing has made it possible to identify the father of a child quickly, relatively easily, and very accurately. It can either exclude the alleged father as the actual biological father of the child, or determine his paternity with a very high degree of probability. The use of genetic testing has transformed the determination of paternity, turning it into a routine procedure that is scientifically verifiable.[21]

When first developed, genetic, or DNA, testing was routinely questioned in court, requiring the CSE attorney to lay a strong foundation for its admissibility. Now, Federal law mandates that States have laws requiring that genetic test results be admissible without the necessity for foundation testimony or other proof, unless an objection is made.[22] 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.)[23]

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.[24]

Admission of genetic testing results showing a probability of paternity must create a presumption of paternity. For a State to receive Federal IV-D funds, its

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1991); *Dennis v. Dep't of Health & Rehabilitative Servs.,* 566 So. 2d 1374 (Fla. Dist. Ct. App. 1990); *Dep't of Revenue v. Spinale,* 406 Mass. 107, 550 N.E.2d 871 (1990).

[19] 42 U.S.C. § 666(a)(5)(B)(i) (Supp. V 1999).

[20] *Id*.

[21] In 1999, roughly 280,000 paternity tests were conducted, three times as many as in 1989. Twenty-eight percent of the tests resulted in exclusion of the man tested. Tamer Lewin, *Genetic Testing for Paternity, Law Often Lags Behind Science,* N. Y. Times, Mar. 11, 2001, at 1, col. 1.

[22] 42 U.S.C. § 666(a)(5)(F)(iii) (Supp. V 1999).

[23] 42 U.S.C. § 666(a)(5)(F)(i) (Supp. V 1999).

[24] 42 U.S.C. § 666(a)(5)(F)(ii) (Supp. V 1999).

laws must set a threshold probability, above which the test results create a presumption of paternity, which can be either rebuttable or conclusive.[25]

In a IV-D case, the agency is required to pay the cost of initial genetic testing, subject to reimbursement.[26] The requirement to advance the cost of genetic testing is consistent with the U.S. Supreme Court's decision in *Little v. Streater*[27] and several State court decisions, which established the right of an indigent alleged father to obtain paternity testing at State expense. Most courts reach this conclusion because the absence of genetic testing creates too high a risk of error. At least one court, however, found that the cost of testing must be advanced in any case in which the State is the moving party.[28]

If a party contests the results of the genetic testing, the IV-D agency will have additional tests performed, but the requesting party must pay for the additional tests.[29] In an interstate case, the responding State has the responsibility for establishing paternity, and it must attempt to get a judgment for the costs of the genetic testing.[30]

Default

Federal law also requires, as a condition of receiving Federal funds, that State law provide for the entry of a default order in a paternity case.[31] There must be a showing that the defendant was served with proper notice of the proceedings. In addition, the State can allow any additional showing(s) required by State law. Entry of such 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 IV-D program, a State must allow a party to move for temporary support in paternity cases while a judicial or 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.[32]

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[25] 42 U.S.C. § 666(a)(5)(G) (Supp. V 1999).
[26] 42 U.S.C. § 654(6)(D), (E) (Supp. V 1999).
[27] 452 U.S. 1 (1981).
[28] *See, e.g.*, *Boone v. State Dep't. of Human Resources*, 250 Ga. 379, 279 S.E.2d 727 (1982).
[29] 45 C.F.R. § 303.5(e)(3) (2000).
[30] 45 C.F.R. § 303.7(c)(7)(i) (2000).
[31] 42 U.S.C. § 666(a)(5)(H) (Supp. V 1999). The Wyoming Supreme Court has held that 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).
[32] 42 U.S.C. § 666(a)(5)(J) (Supp. V 1999).

PRACTICE ISSUES

Today, establishment of paternity often occurs in an administrative or simplified civil process. 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 nonexclusion and a high likelihood of paternity. Nonetheless, there are important things to keep in mind when a paternity case requires court action.[33]

Basic Elements of a Paternity Case

The following are the basic elements that must be proven to establish a *prima facie* case in a paternity proceeding:

- 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 father of the child.

Jurisdiction. The court making the paternity determination must have proper jurisdiction over the parties. Generally, personal jurisdiction is required, and it is achieved through reference to the State's paternity statute. Jurisdiction over a nonresident can be exercised through the State's long-arm statute or UIFSA.[34]

Standing. A paternity action can be brought by the mother of the child, the alleged father of the child,[35] or the CSE agency in a IV-D case.[36] As discussed below, the revised UPA extends standing in a paternity case to other parties, as well.

Burden of proof. When paternity actions are brought in court, they are civil in nature. Thus, the burden of proof is generally a preponderance of the evidence.[37]

Service of process. After the petition or complaint is filed, obtaining proper service of process upon the defendant is critical. State civil procedure laws specify how service can be accomplished.

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[33] General information on the conduct of a court case can be found in Chapter Seven: Advocacy Skills for Child Support Enforcement Attorneys. Additional information on jurisdiction can be found later in this chapter and in Chapter Twelve: Interstate Child Support Remedies.
[34] *See* Unif. Interstate Family Support Act (1996) [hereinafter UIFSA] § 201 (amended 2001), 9 Pt. 1B U.L.A. 275 (1999). Section 201 of UIFSA contains extensive long-arm provisions.
[35] 42 U.S.C. § 666(a)(5)(L) (Supp. V 1999).
[36] 42 U.S.C. § 654(4)(A) (Supp. V 1999).
[37] *See, e.g., Rivera v. Minnich,* 483 U.S. 574 (1987); *Erwin L.D. v. Myla Jean L.,* 41 Ark. App. 16, 847 S.W.2d 45 (1993); *In re R.E.,* 645 So. 2d 205 (La. 1994).

Pleadings. The pleadings in a paternity case should set out the elements for the *prima facie* case, as discussed above. [38]

Contested Cases

As discussed above, States must have laws to require that genetic testing be ordered at the request of either party in a contested paternity case.[39] 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.[40] Any necessity for a further showing of evidence is likely only if the test results do not come back with a conclusive determination, which is a rare occurrence.

Uncontested Cases

In an uncontested paternity case, it is unlikely that there will be any court involvement. In the past, the parties could agree to a consent decree. With the requirement that all States allow for acknowledgment of paternity without judicial ratification, however, such an order is no longer necessary.[41]

CURRENT TRENDS

Establishment of paternity has been revolutionized by the availability of genetic testing and the changing societal views toward children born out of wedlock. Following are discussions of some recent trends in paternity law. It is important to remember, however, that the law in this area is rapidly changing.

Uniform Parentage Act

As mentioned above, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Parentage Act (UPA) in 1973, reflecting then-current societal views and technology. In response to drastically changing genetic and reproductive technology in recent years, NCCUSL revised the UPA in 2000.[42] The revisions have been endorsed by the American Bar Association Family Law Section, the National Child Support Enforcement Association, the American Academy of Adoption Attorneys, and the National Association of Public Health Registrars. During the 2001 session, it was introduced in the legislatures of Maryland, Minnesota, Rhode Island, Texas, and West Virginia. Texas is the only State to have adopted it as of 2001.

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[38] More information on pleadings is found in Chapter Seven: Advocacy Skills for Child Support Enforcement Attorneys.
[39] 42 U.S.C.§ 666(a)(5)(B)(i) (Supp. V 1999).
[40] 42 U.S.C. § 666(a)(5)(G) (Supp. V 1999).
[41] 42 U.S.C. § 666(a)(5)(E) (Supp. v 1999).
[42] Unif. Parentage Act (2000), 9 Pt. B U.L.A. 21 (Supp. 2001) [hereinafter UPA 2000]. The complete text of the UPA can be found on the NCCUSL web site at http://www.law.upenn.edu/bll/ulc/upa/final00.htm.

The revised UPA is not a Federal mandate, although some of its provisions reflect current Federal requirements. For example, the revised UPA provides a comprehensive structure for both paternity acknowledgment and rescission, as required by PRWORA. It also provides for presumptions of paternity based on threshold findings of genetic testing.

Under the revised UPA, the legal father can be:

- an unrebutted presumed father;
- a man who has acknowledged paternity under the UPA;
- a man adjudicated to be the father under a judgment in a paternity action;
- an adoptive father;
- a man who consents to assisted reproduction; or
- an adjudicated father in a proceeding confirming a gestational agreement.[43]

The introduction of several new categories of potential fathers reflects the advances in the science of reproduction in the years since 1973.

Article 3 of the revised UPA allows a voluntary acknowledgment of paternity, reflecting current practice in all States. It further provides that such an acknowledgment has the force of a judgment, and it requires full faith and credit to be afforded acknowledgments executed in other States.

Genetic testing can be ordered without the necessity of filing a paternity action, upon a showing of a reasonable probability of sexual contact between the mother and the alleged father.[44] The UPA provides for a rebuttable presumption of paternity in cases in which genetic testing shows a probability of paternity of 99 percent or higher, unless rebutted by exclusionary genetic evidence or genetic evidence establishing the paternity of another man.[45] The UPA also allows a court to order genetic testing of the alleged father's relatives if he is unavailable for testing.[46]

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[43] UPA (2000), *supra* note 42, at Art. 2, pp. 25-27. For further discussion of gestational agreements, *see* page 135 *infra*.
[44] UPA (2000), *supra* note 42, at Art. 5, pp. 37-41.
[45] *Id.*
[46] *Id.*

Standing to bring a paternity action rests in any of the following:

- the mother of the child;
- the alleged father;
- a CSE agency;
- an adoption or child-placing agency;
- the representative of a deceased, incapacitated, or minor person; or
- an intended parent under a gestational agreement.[47]

Under the UPA, there is no statute of limitations on a paternity action if there is no legally established father. If there is a legally established father (for example, under the marital presumption or by a signed paternity acknowledgment), the statute of limitations to challenge the paternity of the legal father is 2 years from the child's birth.

Disestablishment of Paternity

In recent years, a new phenomenon has occurred in the paternity establishment area called the "disestablishment" of paternity. New genetic testing capabilities have made identification of a biological father more accurate than ever before, prompting some parties to attempt to overcome presumptions or previous determinations of paternity by using genetic test results. Outcomes of such cases are varied among jurisdictions; so far, no national consensus has emerged.[48] Many courts are unwilling to overcome a marital presumption of paternity, but some are willing to overturn a previous determination of paternity of a child born out of wedlock, when later genetic testing excludes the previously legally established father.[49]

Under common law, 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.[50] This policy continued in all States until recently, when genetic testing made paternity establishment much more reliable. Although a child born within a marriage is presumed to be the child of the marriage, this presumption has been challenged recently in court. Court decisions are far from consistent on this matter.

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[47] UPA (2000), *supra* note 42, at Art. 6, pp. 43-52.
[48] Some States have treated this issue in their statutes. *See, e.g.,* Calif. Fam. Code § 7540-7541 (West 1994); Iowa Code § 600B.41A (Supp. 1999).
[49] *See, e.g., Langston v. Riffe*, 359 Md. 396, 754 A.2d 389 (2000), *Cuyahoga Support Enforcement Agency v. Guthrie*, 84 Ohio St. 3d 437, 705 N.E.2d 318 (1999).
[50] The doctrine is known as Lord Mansfield's Rule.

Perhaps the earliest, and best-known, disestablishment case is *Michael H. v. Gerald D.*,[51] in which the U.S. Supreme Court considered a case from California. Under California law, a child born to a woman, who is cohabiting with her husband, is conclusively presumed to be a child of the marriage, unless the husband is impotent or sterile. In *Michael H.,* the mother was living with her husband, Gerald D., when Victoria was born. Gerald's name was placed on the birth certificate, and he claimed Victoria as his daughter. Michael H., however, was actually the child's biological father. During Victoria's first 3 years, she and her mother intermittently lived with Michael, who also held himself out as her father. Approximately 18 months after Victoria's birth, Michael filed a filiation action to establish his paternity and visitation rights. The Court considered whether the California presumption unconstitutionally infringed on a biological father's due process rights, and concluded that it did not. The Court 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 the man's relationship with the child.[52] Yet, five Justices refused to "foreclose the possibility that the natural father might ever have a constitutionally protected interest in his relationship with a child, whose mother was married to and cohabiting with another man at the time of the child's conception and birth."[53]

State decisions have varied. For instance, the Wyoming Supreme Court found the marital presumption to be a favored public policy. In the case of *L.C. v. T.L.,*[54] the court found the marital presumption conclusive, even though the mother's husband was sterile and the other man had taken the child into his home and held it out to be his own.

In *Callender v. Skiles,* however, the Supreme Court of Iowa held that a biological father did have a protected liberty interest in establishing a parental relationship with his child.[55] In that case, the mother was separated from her husband at the time of conception; the husband and wife reconciled, however, and were once again cohabiting when the child was born. The husband assumed responsibility for the child, and began to raise her as his own. Six months later, the child's biological father filed an application to establish paternity, custody, visitation, and child support. Although DNA testing showed that the husband was not the child's biological father, the trial court granted the husband's motion to dismiss the application. Its rationale was that a biological father lacked standing to challenge a husband's paternity, under Iowa's paternity statute. The Supreme Court of Iowa reversed the lower court decision, finding that the statutory provision violated the biological father's constitutional due process right.

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[51] 491 U.S. 110 (1989).
[52] *See also Dawn D. v. Superior Court of Riverside County*, 17 Cal. 4th 932, 952 P.2d 1139 (1998); *Treimer v. Lett,* 587 N.W.2d 622 (Iowa Ct. App. 1998).
[53] *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (Brennan, J., dissenting).
[54] 870 P.2d 374 (Wyo. 1994).
[55] 591 N.W.2d 182 (Iowa 1999). *See also Witso v. Overby,* 609 N.W.2d 618 (Minn. Ct. App. 2000).

In *T.D. v. M.M.M.*[56] the Supreme Court of Louisiana allowed a biological father to establish paternity and to overcome the marital presumption 6 years after the birth of the child. The case is unique, however, in that it established paternity in two men. The court reasoned that the advantages of having two fathers for support, inheritance rights, and nurturing favored allowing such a ruling.[57]

Estoppel

Application of estoppel to paternity cases has led some courts to hold that the actions of presumed fathers bar them from challenging the presumption of their paternity. The common law doctrine of estoppel requires the following three elements:

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

Reluctant to disturb existing parent/child relationships, courts have estopped denials of paternity from presumed or established fathers. For instance, in *W. v. W.,*[58] the Supreme Court of Connecticut estopped the husband from denying paternity of a daughter who was born before his marriage. Although he knew that the child was not his, the husband had treated her as his daughter and had represented her as such. He also had discouraged genetic testing, wanting the biological father to have no role in the child's life. When the parents divorced, the husband sought to disestablish paternity of the child. The court found that he was estopped, based on his actions and the prejudice suffered by the child in not developing a relationship with her biological father.[59]

Courts have also held mothers to be estopped from denying the paternity of presumed or adjudicated fathers. In *In re Marriage of K.E.V.,*[60] the court held that the mother could not deny the paternity of her husband because she had represented to him that he was the child's father throughout their marriage.

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[56] 730 So. 2d 873 (La. 1999).
[57] For further discussion of this topic, see Marilyn Ray Smith, *Paternity Litigation Involving Presumed versus Putative Fathers: Conflicting Rights and Results* (unpublished).
[58] 248 Conn. 487, 728 A.2d 1076 (1999).
[59] *See also Jeffries v. Jeffries,* 840 S.W.2d 291 (Mo. Ct. App. 1992); *Pietros v. Pietros,* 638 A.2d 545 (R.I. 1994); *William L. III v. Cindy E.L*, 201 W. Va. 198, 495 S.E.2d 836 (1997) (husband could not later deny paternity of child treated as child of the marriage in divorce decree). *But see Dews v. Dews,* 632 A.2d 1160 (D.C. 1993) (husband not estopped from denying paternity of child born to wife, who represented that she was artificially inseminated, but later admitted to affair).
[60] 883 P.2d 1246 (Mont. 1994).

Despite genetic tests excluding the husband as the child's biological father, she was not seeking to establish paternity in anyone else.[61]

Ethical Considerations[62]

As in any other area of the child support enforcement practice, an attorney must be aware of potential ethical problems when working in the area of paternity establishment. The attorney should always reveal to both the custodial parent and the alleged father the nature of his or her representation; it is important to advise both parties that they have the right to seek independent counsel.

Conflicts can arise in voluntary paternity acknowledgments, when both parties are signing the document, often in the presence of only the CSE attorney or a caseworker. The attorney must ensure that both parties are fully informed of their rights as well as the legal consequences and liability that will arise from execution of the document.

In disestablishment cases, the attorney's role can become that of an advocate for changing the law in his or her jurisdiction. The attorney should always be mindful of his or her professional obligation to uphold the law while responsibly advocating its change.

Special Populations or Circumstances

There are several situations that could be present in a paternity case and require special treatment. These involve specific populations or circumstances surrounding the birth of the child.

Unavailability of alleged father. Genetic testing has made it possible to determine the paternity of a child, even if the alleged father is unavailable or deceased, by testing his relatives. As mentioned above, the UPA allows a court to order such testing if the alleged father is not available.[63]

If the alleged father is deceased, genetic testing can still be requested. It is possible 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, an exhumation can be requested. 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)

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[61] *See also In re Donna M.,* 33 Conn. App. 632, 637 A.2d 795 (1994); *In re Marriage of Moore,* 328 Or. 513, 982 P.2d 1131 (1999).

[62] For an in-depth discussion of an attorney's ethical obligations, see Chapter Four: The Role of the Attorney in Child Support Enforcement.

[63] UPA (2000), *supra* note 42, at Art. 5, pp. 37-41.

against the consequences of not determining paternity, when deciding whether to proceed with a posthumous paternity determination.

Native Americans.[64] 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 Native Americans 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 many Tribal codes also contain provisions regarding paternity establishment.

Jurisdiction over a paternity establishment case involving a Native American party or child can be complicated. Whether subject matter jurisdiction to establish paternity lies in the State court[65] or in the Tribal court depends on several factors, one of which is the nature of the parties. When both the mother and alleged father are members of the same Tribe and reside on the Indian reservation,[66] jurisdiction rests with the Tribal court, if there is such a court authorized to determine paternity.[67] When parties, who are Tribe members, do not live on the reservation, such actions tend to be brought in State court.

When one party, who is a Tribe member, resides on the reservation and the other off, it is possible to have concurrent jurisdiction under Public Law 83-280 (Public Law 280), if applicable.[68] While the Tribe has a significant interest in establishing paternity in such cases, there also could be State concerns, such as the application for public assistance or IV-D services. Balancing State interests and Tribal interests is an important consideration in such cases. In a non-Public Law 280 State, jurisdiction lies with the Tribal court.

When the case involves a non-Indian alleged father living on the reservation, subject matter jurisdiction could still lie with the Tribal court. Similarly, cases involving members of two different Tribes can be handled in Tribal court, with cooperation between Tribal judges, if the need arises.

When there is an option to proceed in State court or Tribal court, it is important to note that Tribal courts might not use genetic testing for paternity establishment to the extent State courts do. Tribal courts also are less likely to

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[64] For general information on Tribal issues, see Margaret Campbell Haynes & June Melvin, *Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support* (Child Support Project, Center for Children and the Law, American Bar Association 1991).

[65] "State court" here includes any tribunal designated by the State to handle paternity establishment, including establishment by administrative process.

[66] For the purpose of this discussion, references to an Indian "reservation" include land recognized as Indian country.

[67] *Jackson County Child Support Enforcement Agency v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987); *McKenzie County Social Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986). *See also Becker County Welfare Dep't v. Bellcourt,* 453 N.W.2d 543 (Minn. App. 1990).

[68] P.L. No. 83-280 (1953). This law is commonly referred to as Public Law 280. *See* discussion of Public Law 280 in Chapter Nine: Establishment of Child Support Obligations.

recognize presumptions of paternity, and they historically have given limited recognition to the marriage presumption.

Assisted conception or gestational agreements. New reproductive technologies have led to new questions regarding parentage. Children are being conceived through the use of donor sperm, donor eggs, and gestational surrogates. As a result of these new means of conception, questions arise regarding the parentage of these children. Is the child's father the man whose sperm fertilized the egg or the man whose wife gave birth to the child? Is the child's mother the woman whose egg was fertilized or the woman who gave birth to the child? Is a woman who gave birth to a child, to whom she is not biologically related, the mother of the child? Clearly, science has outpaced the law in this area.

The Uniform Parentage Act seeks to address some of these questions. Under its provisions, if a man and woman are married and consent to assisted conception, they are the legal parents of a child to whom the wife gives birth as a result of the conception.[69] Neither an egg donor nor a sperm donor would be a legal parent to such a child.

Although gestational agreements are not legal in all States, the UPA addresses the issue of parentage in that context as well. Enactment of Article 8, which deals with the issue, is optional. Under the UPA, a woman who carries and gives birth to a child of assisted conception under a gestational agreement is not the legal mother; rather, the married couple, which undertook to have the child via the surrogate, are the legal parents. It is important to note that, under the provisions of the UPA, gestational agreements must be validated by a court to be enforceable.

INTERSTATE CASES

As with almost any other aspect of the CSE program, interstate paternity cases can present a particular challenge.[70]

Jurisdiction

Under the Uniform Interstate Family Support Act (UIFSA), a tribunal has jurisdiction over a nonresident party in a one-State action if one of the Act's long-arm provisions applies. UIFSA sets out eight bases for a State to assert long-arm jurisdiction over a nonresident defendant:

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[69] UPA (2000), *supra* note 42, at Art. 7, pp. 53-56. For further discussion of the UPA presumption involving gestational agreements, see page 129 *infra.*

[70] For a more detailed discussion of interstate proceedings, see Chapter Twelve: Interstate Child Support Remedies.

1. the individual is personally served within the State;

2. the individual submits to the jurisdiction of the State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

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 might have been conceived by that act of intercourse;

7. the individual asserted parentage in the putative father registry maintained in the State; or

8. there is any other basis consistent with the constitutions of the State and the United States for the exercise of personal jurisdiction.[71]

UIFSA's two-State provisions are used when long-arm jurisdiction is unavailable or inappropriate. Federal regulations require that a State use its long-arm statute to establish paternity, if available and appropriate.[72] If long-arm jurisdiction is used, a State can proceed with paternity establishment, even it is not the residence of the defendant, as long as it has personal jurisdiction over the defendant, pursuant to its State law.[73]

Full Faith and Credit

Perhaps the most important preliminary question is whether there already is a paternity determination entitled to recognition under the full faith and credit provisions of Federal law, UIFSA, or another State law. Federal law requires States 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."[74] Similarly, UIFSA precludes any collateral attack on a parentage decree or determination. Such a challenge must be pursued in the issuing State, not in a UIFSA proceeding.[75]

[71] UIFSA § 201 (amended 2001), 9 Pt. 1B U.L.A. 275 (1999).
[72] 45 C.F.R. § 303.7(b)(1) (2000).
[73] UIFSA § 301(c) (amended 2001), 9 Pt.1B U.L .A. 300 (1999).
[74] 42 U.S.C. § 666(a)(11) (Supp. V 1999).
[75] UIFSA § 315, 9 Pt. 1B U.L.A. 326 (1999).

CHAPTER EIGHT

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Exhibit 8-1, Statutes of Limitations for Establishment of Paternity (Children without Presumed Fathers)

STATE	LIMITATIONS PERIOD
Alabama	Age 19
Alaska	Age 18
Arkansas	None
Arizona	Age 18
California	None*
Colorado	Age 21
Connecticut	Age 18
Delaware	Age 18
District of Columbia.	Age 21
Florida	Age 22
Georgia	None
Hawaii	Age 21
Idaho	Age 18
Illinois	Age 20
Indiana	Age 20
Iowa	Age 19
Kansas	Age 18
Kentucky	Age 18
Louisiana	Age 19
Massachusetts	None

STATE	LIMITATIONS PERIOD
Maine	Age 18
Maryland	Age 18
Michigan	None
Minnesota	Age 18
Missouri	Age 21
Mississippi	Age 18
Montana	Age 18
Nebraska	Age 18
Nevada	Age 18
New Hampshire	Age 19
New Jersey	Age 23
New Mexico	Age 21
New York	Age 21
North Carolina	Age 18
North Dakota	Age 21
Ohio	Age 23
Oklahoma	Age 19
Oregon	None
Pennsylvania	Age 18
Puerto Rico	Age 22
Rhode Island	None
South Carolina	Age 18
South Dakota	None

STATE	LIMITATIONS PERIOD
Tennessee	Age 19
Texas	Age 20
Utah	Age 18
Vermont	Age 21
Virgin Islands	None
Virginia	Age 18
Washington	Age 18
West Virginia	Age 21
Wisconsin	Age 19
Wyoming	Age 21

* (IV-D agency enforces to age 18)

Source: U.S. Dep't of Health and Human Services, Office of Child Support Enforcement website (current as of February 23, 1999).

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