

EMERGING ISSUES IN PATERNITY ESTABLISHMENT SYMPOSIUM SUMMARY

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I. Introduction to the Emerging Issues in Paternity Establishment Project

When a child is born to a married couple, the husband is presumed to be the child's legal father and paternity does not need to be established. However, non-marital children must have their legal paternity established in order to give the child the right to such benefits as child support payments, social security payments and insurance benefits, inheritances, and the father's medical history. Paternity also is a prerequisite for establishing a father's legal right to have access to the child in order to develop emotional and social ties with the child, and to have a role in decisions about the child's life such as religious affiliation or place of residence. In the past, paternity was primarily established by courts when the mother or the child support enforcement agency filed a paternity suit in order to pursue child support. A judge or jury established paternity based on testimony, physical appearances, or blood type. Contested cases were common and paternity trials were seen as cumbersome, expensive and uncertain in their results. With the development of more sophisticated technology, courts have come to rely on DNA testing, especially in contested cases, because testing can determine genetic parentage with more than 99 percent accuracy. If paternity is contested in a case in the Title IV-D Child Support Enforcement Program, the child support enforcement agency must pay for genetic testing if either party requests it, although they may recoup testing costs from the father if paternity is established. An enhanced federal financial participation rate of 90 percent is available for the state costs for genetic testing in Title IV-D cases.

Recognizing the broad benefits of early paternity establishment for children and the specific efficiencies for the child support enforcement program, Congress passed and the President signed into law as part of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) provisions requiring that every state enact procedures allowing parents to voluntarily acknowledge paternity by signing a written admission of paternity. P.L. 103-66 also required states to give full faith and credit to paternities voluntarily acknowledged in another state, allow paternity to be established or acknowledged at least until the child is eighteen years old, have programs that offer new unwed parents the chance to voluntarily establish the child's paternity in the hospital at the time of the child's birth, and allow paternities to be voluntarily acknowledged at state vital records offices. Either parent may rescind a voluntary paternity acknowledgement within the earlier of 60 days or the date of an administrative or judicial proceeding to establish a support order involving a signing party. After that, voluntary acknowledgements can generally only be challenged on the grounds of fraud, duress, or mistake of fact. The Personal Responsibility and Work Opportunity Act of 1996 (PRWORA) added several additional provisions, including the requirement that states must provide the putative father with standing to establish paternity even over the objections of the mother and that states have procedures to establish paternity by default.

The provisions in P.L. 106-33 and PRWORA, plus the greater certainty of DNA results in contested cases, have been extremely successful in increasing paternity establishment. Paternity was established in more than 1.5 million child support enforcement cases in FY 2002, a 60 percent increase from 1995. Over half of these paternities were established

through voluntary acknowledgements by the parents in the hospital at the birth of the child.

Recently, it appears that a growing number of voluntary acknowledgements and paternities established by virtue of marriage or otherwise have been challenged because the legal father has been shown through DNA testing not to be the biological parent of the child. Because it is now possible to prove with certainty that a father and child are not biologically related, paternity disestablishment is emerging as a difficult issue that state child support enforcement programs must address. Paternity disestablishment challenges several of the central premises on which family law and child support practice are based, such as the presumption of parentage for any child born within marriage and that a child support award can be treated as a final judgment not subject to retroactive changes. Paternity disestablishment is also drawing much attention in the media and in state legislatures, particularly when a man who was erroneously led to believe a child was his own is required to pay support after it is determined that he is not the biological parent.

Potential changes to the paternity establishment process to decrease the possibility of erroneous establishment of paternity could impact the performance of the child support enforcement system. For example, DNA testing is not currently required for all paternity establishments. If it were required prior to a voluntary establishment of paternity, establishment rates might fall and administrative costs would rise, potentially leading to decreased child support collections and higher costs. Additionally if government and/or

custodial mothers would be required to reimburse men who paid child support for children whose legal paternity was erroneously established, this could be a potential drain on state and federal child support funds as well as economically harming families.

To take a broad look at the policy issues raised by paternity disestablishment, the Office of the Assistant Secretary for Planning and Evaluation in the Department of Health and Human Services initiated a project to analyze the issues surrounding disestablishment, focusing on how paternity disestablishment may impact child support enforcement, child welfare and access to other federal benefits based on the legal parent-child relationship. Consideration was be given to broad social factors such as the emotional, social and financial well being of the child; fairness and justice to the wrongly named father; and the social and legal implications of paternity disestablishment. While paternity disestablishment also affects parents married at the time of the birth of the child, the focus of this project was on non-marital paternity establishment.

The analysis found that the current available research literature on paternity disestablishment is sparse. Published material in the academic and professional literature focuses predominantly on the legal aspects of paternity disestablishment and court challenges to paternity judgments. Several cases have received widespread attention in the popular media, but the focus has always remained on the legal and subsequent financial aspects, predominately child support. There does not appear to be any comprehensive empirical study on the prevalence of legal paternity disestablishment or the effects of paternity disestablishment on various domains of child well-being.

As part of this project, on January 25, 2006, ASPE convened an invitational symposium in Washington, D.C. The symposium's goal was to look beyond just the economic implications of paternity disestablishment for the child support program and consider the emotional, social and financial well-being of the child; the societal and legal implications of paternity disestablishment, including maintaining the integrity of the paternity establishment process; and the affect of child support enforcement and other federal programs, especially child welfare.

The project first conducted a literature review of both academic and popular media. Four background papers were presented by the authors and a discussant: *The State of Paternity Establishment Policy*, *Implication of Principles of Family Law*, *Paternity Disestablishment*, *Father Involvement and the Best Interests of the Child: Lessons from Child Welfare and Family Law*, and *Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment*. Those invited, including law professors, child welfare researchers, state and federal administrators, and academics, were engaged in a discussion of the framework under which paternity disestablishment should be further examined. The symposium's goal was to identify what is understood about the relationship between paternity establishment/disestablishment law and procedures and the well-being of children, and to determine critical questions and future research needs to better inform policy discussions and decisions on these issues.

Paternity disestablishment touches on areas such as child wellbeing, marriage and family formation, health promotion, and the interaction between science and society. The

research is anecdotal; the magnitude of paternity disestablishment is unknown. This symposium is a very preliminary look at an emerging issue.

II. Summary of Background Paper and Discussant Presentations

A. The State of Paternity Establishment Policy Presented by Susan F. Paikin

During the past 30 years, paternity establishment proceedings evolved from criminal to pure civil actions to user-friendly acknowledgements totally outside the judicial system. The national child support enforcement program created by Congress under Title IV-D of the Social Security Act has been the primary mechanism driving this change. On a parallel though interrelated track during these same decades, illegitimate children gained greater rights, and the role of nonmarital fathers matured in law, policy, and public discourse.

Paikin discussed the laws, policies and procedures for establishing paternity through voluntary paternity acknowledgments, by default orders, and after genetic testing. The first two methods allow for legal parentage to be established for a man who is not the child's biological parent (although this is not the intent of the policies), while inexpensive and widely available testing offers scientific certainty as to whether a man is or is not a child's genetic parent. Fanned by advocates and media coverage, a growing political, legal and societal discussion topic is how to respond to and balance the increased risk that paternity established by acknowledgment or default may be disestablished at a later time because the legally determined father is not the child's biological parent.

Changes in paternity establishment policy have overwhelmingly benefited children born outside of marriage. The federal requirements and financial support provided under the national child support enforcement program offers inexpensive, streamlined procedures

by which legal fatherhood may be established – both voluntarily and in contested cases. In FY 2004 alone, 1.6 million children had paternity either established or acknowledged. What is unknown is the level of parental discrepancies (i.e. a difference between who is the child’s legal father and who is the child’s biological father) created by these policies. The discussion explored whether the potential for a discrepancy between legal and biological parentage requires or recommends changing the voluntary paternity acknowledgement and default order laws and procedures (e.g. encouraging or mandating genetic testing before legal parentage may be established). . The interests of children, legal and biological parents, the IV-D program and society were considered.

B. Implications of Principles of Family Law Presented by Marsha Garrison

Garrison posits that throughout history and family law, it is the preference for children’s interests which leads to the identification of two legal parents from whom children may enjoy care and support. Two parents offer greater insurance to the child for economic support as well as physical and emotional caretaking. Family law uses a variety of tools to achieve these results, including procedural presumptions, evidentiary rules, equitable principles, and substantive law.

Specific doctrines tend to reflect the social and economic conditions that lead to stresses in family life. At one time, common-law courts relied on the marital presumption of legitimacy and a ban on parentage establishment by illegitimate children to accomplish this aim. Today, courts turn to a variety of sources – marital status, contract, evidentiary presumptions, equitable doctrines such as estoppel and laches, procedural principles such as *res judicata* and collateral estoppel – to meet the same goal. Legislatures, citing children’s interests, have adopted statutory standards governing child custody, support, visitation, adoption, child protection, paternity establishment and disestablishment that also aim at ensuring two-parent care where possible and preserving the child’s existing parental bonds.

New paternity disestablishment statutes that permit disestablishment based on biological evidence and without consideration of the child's interests conflict with these long-standing policy goals, but procedural safeguards against erroneous parentage determinations – enhanced notice requirements, counseling, mandated or suggested genetic testing – do not. A key goal that needs to be accounted for is to provide two-parent care where possible and preserve established relationships where relied on by the child. However, when paternity is misattributed, the parent - child relationship is more fragile. Shock, anger, and rejection are clearly not in a child's best interest. Because safeguards against erroneous paternity *establishment* do not conflict with family law's long-standing commitment to children's interests, such safeguards should be preferred to liberal *disestablishment* procedures, which may conflict with children's interests.

C. Discussion by Linda Elrod

Elrod argues that genetic parentage is being given disproportionate weight today. Perhaps because it can be known, arguments favoring a strict “sperm for liability” agenda unduly discount legal and social parenting, she suggests. It is important to ensure a man who impregnates a woman takes responsibility for any resulting child. Child support matters. Emotional support matters. However, legal relationships between parents and children are formed through marriage, adoption, acknowledgement, consent to artificial insemination of a spouse, and judicial decree. Elrod disagreed that the law always protects children. Rather, it is the interest of parents that are favored.

Elrod pointed out the limitations of the analogy to adoption. In adoption, the lack of biological relationship is a known from the beginning; therefore dissolving the parent-child relationship is allowed in only the rarest of circumstances – akin to a termination of parental rights, not paternity disestablishment. Despite all the above, the underpinning of voluntary paternity acknowledgement laws is that the man signing the acknowledgment is the child's biological parent. Although used that way, the statute is not intended to be an expedited “step-parent” adoption process. Accordingly, the discussant proffered that the child and putative father should be genetically tested at the hospital at the child's birth. The decision to acknowledge would be made without false pretense – whether it is

an acknowledgment to assume parental rights or to sign them away so the child may be adopted by another. Universal genetic testing at birth would ensure that the social bond later formed between child and father could not be broken through a disestablishment claim. Using this simple, low-cost testing would also protect low-income men from an improper financial burden.

Despite support for universal genetic testing at the outset, Elrod asserted that social relationships with children who are not genetically related are undervalued. Policies should be examined to strengthen, for example, responsibilities to step-children. Limiting the scope of future inquiries to legal and biological parents, may miss and inadvertently or purposefully undermine the critical role of established social relationships.

D. Paternity Disestablishment, Father Involvement and the Best Interest of the Child: Lessons from Child Welfare and Family Law

Presented by Waldo E. Johnson, Jr. and Wayne L. Salter

The “best interest of the child” doctrine, as understood in child welfare practice and family law, is helpful in understanding the disruption of the father-child legal and social relationships, whether at the request of the father or over his objections. However, the term is used broadly. It is constructed and understood differently depending on the context. At this moment the term does not afford common denominators that stand in for child-well being across the legal spectrum.

The best interest of the child doctrine was initially articulated in the context of child abuse and neglect cases as an administrative tool for determining whether children should remain in parental care. Child welfare has viewed paternity establishment as a means of identifying fathers for the purpose of legally disconnecting them from the child to move toward adoption or other permanency plans. In the child welfare literature, the term has emerged from a deficit perspective.

Increasingly, the “best interest of the child” also is invoked in a variety of other situations, including child support, visitation agreements, custody determinations,

adoption, and paternity actions. In particular, child support has been in the forefront, establishing fatherhood in many cases for the purpose of collecting financial support. Examining the “best interest of the child” doctrine from the child welfare perspective suggests it is an important yet incomplete framework for decision making regarding the preservation or termination of the father-child relationship. In contrast, from the perspective of family case law, the meaning of the “best interest of the child” in regard to the father-child relationship appears to be determined on a case by case basis without specific reference to its core concepts of safety, permanency and child well-being. Variation in state statutes and policies regarding paternal rights and responsibilities further contribute to the lack of a common understanding of how to apply the principal of the best interest of the child with regard to fathers. Reliance on biology alone raises concerns. A more apt consideration is best characterized as “biology plus” – biology plus time, effort, support, emotional engagement with the child and socialization. The law and practice around paternity disestablishment should focus on these critical factors when ascertaining whether the best interest of the child are served in maintaining or terminating a non-biological parent’s rights.

E. Conceiving the Father: An Ethicist’s Approach to Paternity Disestablishment

Presented by Joanna Bergmann, Arthur Caplan, and Nadia Sawicki

For the bioethics community, novel reproductive technologies challenge traditional understandings of parenthood. Traditionally, society and the law have taken the view that paternal responsibilities arise from biology. Hence, until recently, biological paternity was a necessary uncertainty. Accordingly, this view was translated into a presumptive social model under which a husband was deemed the legal father of any child born within his marriage to the child’s mother. In addition to settling the issue of paternity under the law, this model operated to protect children from the economic disadvantages and social stigma of illegitimacy. Today, however, non-traditional family structures such as co-habitation, adoption, single parent households, and same-sex

partnership, as well as novel assisted reproductive technologies such as surrogate parenthood, gamete harvesting, and reproductive organ transplants are calling into question the assumptions grounding this view of paternity. Surrogate motherhood, ovarian transplants, post-mortem sperm donation all lead to the same initial questions: What is a mother? What is a father? How do these parental rights and responsibilities arise?

The presenters considered these basic questions, and further, how should society and the law respond when, for want of genetic ties, the father of a child seeks to relinquish his parental rights and responsibilities? How should policy makers, legislators and judges negotiate and reconcile the conflicting values and stakeholder interests which lie at the heart of such disputes? There is surprisingly little consistency in the law. Past cases reveal a confusing series of legislative and judicial choices which, when deployed, do not always yield ethically acceptable outcomes. Existing models by which society and the law recognize paternity in order to identify the chief social, familial and individual values grounding paternity's establishment include marriage or presuming, intent-based, and genetic. Each model offers key values which may be promoted or are at stake in paternity's disestablishment. Those values include but are not limited to: medical, social and legal interests of the child, legal and biological parents; administrative efficiency; preserving and promoting certain views of the family; discouraging premarital sex; and reproductive responsibility.

Two criticisms that have been leveled against existing paternity disestablishment laws are: they are parent- or father-centered as opposed to child-centered; and they unjustifiably elevate genetic ties and, hence, genetic paternity, over and above other forms of and values attaching to paternity. Paternity disestablishment should reflect values that are not at odds with those in place in paternity establishment. While it is hard to make overarching statements without specific cases, it is appropriate to explore the issue from a utilitarian viewpoint – how can we make as many people as happy as possible or how can we ensure that the fewest people are harmed.

Bergmann and her colleagues proposed three value-based models as potential frameworks for the analysis and resolution of paternity disestablishment contests. These principles could be applied to weigh the disparate interests to influence policy. Beneficence or nonmaleficence considers what policy can bring the most benefit to most people. Justice as fairness considers both substantive and procedural fairness. People similarly situated should be treated similarly. If paternity establishment is based on genetic identity, disestablishment policy should do the same. Are decisions about whether or not to disestablish substantively fair, particularly for the child? Autonomy and privacy is the final pair of critical values. Parents are autonomous beings but disestablishment arises because parents are not always exercising their autonomy and responsibility in a logical fashion. An option is to require genetic testing at birth so parents have baseline information from which to make decisions. However, familial privacy is an equally critical value in society. Mandatory genetic testing may not serve the societal interest of limiting government intervention to that necessary. Policy that incorporates a values-driven model of paternity disestablishment is comprehensive in scope and ethical in process and product.

F. Discussion by Esther Wattenberg

Wattenberg suggested that Paul Melli from the University of Wisconsin “cracked the code” on what it is that provides resiliency for children in adverse circumstances – a sunny temperament, combined with a decent IQ, and someone who cared about them. This intuitive common sense should be kept in mind when thinking about paternity disestablishment. One missing piece of the discussion is: what is the origin of paternity disestablishment? Does it come from an American belief that if we are not happy we should do something about it? Or from a propensity to abandon lifelong obligations that prove difficult, such as caring for a disabled child? Or the belief that we can help social policy by finding out who can and cannot pay child support?

Wattenberg noted that although long-standing research supports the notion of an in-hospital paternity acknowledgment program, genetic parenting does matter. It matters when children are young, when they are adults, and particularly on health issues. There

are thus three themes from child welfare that might be helpful in structuring paternity disestablishment policy. First, emphasize stability. Expect initial decisions to remain constant but build in a thorough court review for the exceptional cases. Second, do a better job of getting it right at the front end. Third, consider using family-group decision making and expanded family resources to provide a sense of child well-being beyond the nuclear family.

III. Symposium Themes and Identified Research Issues

A. Magnitude of the Problem

i. Symposium Discussion

The current research literature on paternity disestablishment is sparse. Published material in the academic and professional literature focuses predominantly on the legal aspects of paternity disestablishment and court challenges to paternity judgments. A handful of paternity disestablishment cases have received significant attention in the popular media, but the focus has always remained on the legal and subsequent financial aspects of allegations of “paternity fraud.” At this time, there does not appear to be any comprehensive empirical research on the prevalence of legal paternity disestablishment.

Where the original paternity determination was made after and consistent with genetic testing, disestablishment is not an issue. Paternity disestablishment of nonmarital children therefore is considered based on one of the three circumstances by which paternity was established:

- ❑ The legal father signed a voluntary paternity acknowledgment or consented to paternity before a tribunal knowing he was not the biological father but wanting to assume the responsibilities of parenthood.
- ❑ The legal father signed a voluntary paternity acknowledgment or consented to paternity before a tribunal believing he was the child’s father.
- ❑ A tribunal determined paternity by default.

The discussion acknowledged that reported legal cases possibly are skewed by the economics of appellate litigation. These decisions tend to involve either marital children or families with greater financial resources. Generally, states do not quantify or report cases where a disestablishment action is filed. A growing number of very broad state statutes authorize genetic testing solely based on the fact that bio-identity was not previously determined. Thus, states such as California or Ohio soon may provide “raw” numbers that could be used to extrapolate the scope of the paternity disestablishment issue. Even so, it is uncertain whether states would likely capture the context in which the issue of biological parentage is raised, who sought disestablishment, and the result.

For example, anecdotal reports suggest that the legal father’s lack of genetic connection to a child is most frequently offered as a defense to a petition to enforce or modify upward an existing support order, rather than as an independent legal action. However conferees noted that the issue also arises in a child welfare or initial child support proceeding because mother names as her child’s biological father a man different from the legally determined parent, raising a conundrum for the state agency. And where the legal argument is raised in the context of a Rule 60B or other motion to reopen a court order, there is no separate case number (other than the original petition under which the order was entered) to count.

While counting and reporting disestablishment petitions filed is challenging, conferees suggested that paternity disestablishment may occur on a more informal but widespread basis in local child support agencies. Child support workers may schedule genetic testing upon request, even where paternity was earlier determined legally by voluntary acknowledgement or default order. Conferees described wide difference in policy, procedure and control among the states. Research would be valuable to ascertain if there is significant variation between written policy and grass roots practice. From a policy perspective, several participants asserted it was critical to ascertain whether or not voluntary acknowledgments were being given the status of final determinations, as required by federal and state law.

A conferee asserted that reporting the results of subsequent genetic testing was highly important. Advocates for “paternity fraud” statutes consistently argue that genetic testing excludes the man named in almost 30 percent of tests. This statistic appears to be derived from an annual survey of genetic testing laboratories by the American Association of Blood Banks (ABA). In 2003, the ABA reported 354,000 paternity tests, double the annual count from a decade ago.¹ Conferees discussed the lack of evidence that exclusion rate can be extrapolated to the population in general, or even to non-marital births, as the testing is usually ordered only in *contested* cases. A participant noted that, from a different perspective, in over 70% of contested cases, the putative father is also the child’s biological parent. Massachusetts’ IV-D agency records show that 15 to 18 percent of named putative fathers are excluded by genetic testing.

The symposium members agreed that quantifying the magnitude of the problem was a necessary precedent to all other research and policy decisions. Those in attendance expressed uncertainty as to whether paternity disestablishment was a highly visible but extremely contained issue or a wide-spread problem, though all acknowledged it is a serious political and policy problem as the perception of inequity is widespread. Data is required both to ascertain to what extent the issue should be “tackled” – and what resources committed. As an attendee put it, “If it ain’t broke, don’t fix it.” All agreed there is a different policy response if paternity disestablishment impacts a relatively small percent of families rather than if it is more widespread. In the former case, the system can accommodate an individualized trial with a case by case response. The latter situation calls into play the validity and efficacy of existing policy choices.

Similarly, if the overwhelming number of disestablishment cases derive from default orders, this would suggest that it is those policies and procedures that need be addressed and the successful voluntary paternity acknowledgment program. Nevertheless, public

¹ It is important to note that there is no evidence that this rate could be applied to the population in general. Much of the testing done by the ABA is ordered in contested cases, and it is possible that multiple men will be tested concurrently for paternity of the same child, meaning that at least one man must be excluded.

perception of fairness were agreed to drive the political discussion. Thus, accurately defining the magnitude of the issue would inform state and federal legislators, and policy makers and the public.

RATES OF PATERNAL DISCREPANCY: A meta-analysis of rates of paternal discrepancy (that is, a genetic mismatch between the tested man and the child), found ten studies on paternal discrepancy conducted in the United States, although many of the studies are small and all have methodological drawbacks (Bellis et. al. 2005). The studies were divided into cases in which the testing was conducted as a result of a dispute about the child's paternity, which are likely to exaggerate rates of paternal discrepancy for the population as a whole, and those in which the testing was conducted for some other reason. Four U.S. studies from non-disputed samples show rates of paternal discrepancy from 1.4 percent to 18 percent. The studies with the largest samples, and so presumably stronger results, had rates of 1.4 percent and 2.7 percent. Among disputed paternities in the U.S. (6 studies), rates of paternal discrepancy varied from 25.5 percent to 53 percent. The 53 percent rate is based on 37 prenatal tests. Most of these studies had rates of paternal discrepancy in the 25 to 29 percent range. – Mark A. Bellis, Karen Hughes, Sara Hughes and John R. Ashton, "Measuring Paternal Discrepancy and its Public Health Consequences," *Journal of Epidemiology and Community Health*, 2005; 59; 749-754.

ii. Research needs

1. Identifying the magnitude of incidences of challenges to legal paternity and paternity disestablishments was the most pressing research need identified by symposium participants. To fully inform researchers, policymakers, and practitioners, this should include the method of paternity establishment, who is seeking to disestablish (e.g. mother, legal father, and claiming biological father), age of the child at the time of establishment and disestablishment, and analysis by subgroup.

B. The Sooner the Better

i. Symposium Discussion

Conferees accepted the premise that children grow better in healthy functioning families, though they recognized individual disagreement as to the form such families might take. For non-marital children, federal policy has moved the legal establishment of paternity

from predominately contested court proceedings toward a preference for a user-friendly voluntary acknowledgment process. The father-child relationship is formalized at or soon after the child's birth, when the relationship between the mother and father was perceived to be the strongest. Simultaneously federal law has emphasized the independent importance of establishing a legal father-child relationship. For example, child support services are available for those seeking only to establish paternity, regardless of whether the client is a putative father or mother. TANF mandates the recipient identify the father and cooperate in establishment of paternity and child support. And performance requirements for state child support agencies set a high bar, requiring action to establish paternity for almost all children born outside of marriage.

While contested paternity cases involving non-marital children are decided on the basis of genetic testing, federal law also requires the entry of default orders when a putative father fails to appear for and participate in paternity establishment proceedings. As with voluntary acknowledgments, default paternity determinations are concluded without establishing any biological relationship between father and child. The ground is thus laid for a later claim to disestablish the legal father-child relationship. One core theme presented in the background papers and by symposium participants is whether policy and practice should be changed so that paternity is established based on bio-identity from the start.

However, consensus was not reached on whether the paternity establishment in non-marital cases means exclusively identifying a child's biological father. Some participants asserted that the expanding role of genetics in medical health and treatment is so critical that accurate genetic identification of a child's parents now trumps all other interests. For this group, the import of biology weighs in favor of genetic testing and paternity established in accord with those tests. Given the general agreement that the critical time to "get it right" is the first time legal paternity is determined, those asserting biological identity as the ultimate determination of paternity were more favorably disposed to considering mandatory genetic testing before a voluntary acknowledgement could be signed or a default order entered. This group noted that a growing number of state

legislatures and court rulings provide for genetic testing where legal paternity was determined without it. It is far better to test from the beginning rather than to entangle the child in a disestablishment dispute later in life, where the trauma of dissolving an existing relationship will likely be greater.

Other conferees expressed reservations over the premise that “getting it right” equaled bio-identity. They note that medical technology is moving so fast that it has leapt over the need to know the genetic make up of either parent; the child’s genome provides the critical information for diagnosis and treatment of disease. A participant suggested that family stability is perhaps as or more important than living with two biological parents. She suggested a need to examine further the impact of non-biological paternity determination on the adult behavior of children raised in such family settings. Given the prevalence of blended and adoptive families, conferees considered that many men successfully act as fathers to children with whom they have no genetic connection. Conferees also discussed how the law treats children born through a range of assisted reproductive technologies. In such cases, the law frequently identifies as parents and grants parental rights to individuals with no genetic connection to the child.

It was suggested by more than one conferee and discussant that there were considerable legal and policy considerations to be analyzed and addressed before adopting a policy that would mandate genetic testing for non-marital children but not marital children. If bio-identity is declared paramount, should that conclusion be different for marital children?

Practical concerns were identified and discussed. Conferees agreed that mandating genetic testing before permitting a voluntary acknowledgement to be signed would run counter to the policy goal of providing a user-friendly procedure to legally establish the paternity of non-marital children. While genetic identity would be accurate, conferees were concerned that the disruption was too high, particularly as the scope of the disestablishment problem is unknown. (See earlier discussion.)

Conferees considered the experience of the Texas IV-D program in its 2004 study at Parkland Hospital. Genetic testing was offered at no cost in the hospital at the time of the child's birth. Of the 5,332 births to unmarried mothers during in the study, genetic testing was requested in only 79 cases – 1.5 percent. Of this total, testing was completed in 31 cases-.6 percent of the total births. Of the 31 completed genetic tests, seven alleged fathers learned that they were excluded as biological fathers. During the study period, 3,835 alleged fathers chose not to have the free testing and instead signed the voluntary Acknowledgment of Paternity. A symposium participant identified possible conflicting human dynamics at work here: The unmarried father is in a relationship with the mother and concerned about being kicked out of the home should he request genetic testing. Another noted that for an unknown number of low income families, the voluntary acknowledgement process offers a free step-parent adoption process – both parties sign knowing the signatory is not the child's biological father but wish to form a family nonetheless.

Participants agreed that the procedure to rescind a voluntary acknowledgment within the allowable 60-days was unclear in many states. There was a consensus that model procedures should be evaluated and all states required to adopt and to publicize those procedures. And, where an acknowledgement is rescinded, the issue of paternity establishment should be immediately joined and litigated, along the lines of the procedures incorporated into the Uniform Parentage Act (2002). A child's paternity should be ascertained at the earliest possible moment.

Other conferees suggested that further analysis is required of the impact mandatory genetic testing would have on adoption law and practice. For example, both safe harbor laws and putative father registries aim to quickly free children for adoption without formally establishing paternity. Participants agreed further research is required to determine whether such laws could be harmonized with a requirement to establish biological identity for all nonmarital children. Also, what roadblocks would exist in a child welfare case where the agency seeks to bring in paternal relatives and genetic testing had not been completed?

While there were significant differences in approach on key issues, conferees were nearly unanimous that default paternity orders offer the greatest opportunity to change procedures in favor of determining the biological parent of a child. Currently state child support agencies report total paternities established and the number of determinations by voluntary acknowledgement. Participants agreed that federal reporting by the states should include the number of cases where paternity is established by default. Additionally, state default practices should be examined, including notice and what steps could be taken to ensure procedural fairness. While default practices vary from state to state, court to agency or even court to court, Los Angeles County, California illustrates a system overwhelmed by defaults orders. Two years ago, L.A. reported that 70 percent of its orders were established by default. (The report did not differentiate between paternity and non-paternity cases.) A conferee cautioned that entering final and binding default orders is critical to the court process in order to provide the appropriate sanctions for putative fathers who knew of the hearing and refused to appear. . (It is also mandated by federal law, subject to whatever safeguards a state elects.) All agreed that states with low default rates should be studied and recommended practices shared with other states.

ii. Research Needs

Symposium participants suggested that, because the risk of paternal discrepancy may be greater when paternity is established by default, these establishment procedures should be further analyzed to determine the proportion of paternities that are established by default, the role of the mother and of the child welfare system in providing information on the father's identity, and "best practices" in states and localities with low default rates.

C. Stability

i. Symposium Discussion

All symposium participants considered "stability" for children a critical value in weighing the competing interests in whether or not to permit paternity to be challenged.

However the discussants quickly acknowledged that term encompassed a range of issues pertaining both to child well being and legal status. The group first explored varying concepts of “stability”, without reaching a consensus definition.

A commenter pointed out that in child welfare, stability is important to all developmental phases of children and essential to growing up competent and secure. Without stability, the child lives in chaos. Child welfare experts use the term with particularity, measuring the child’s living arrangements during a prior period – 6 months or a year. The opposing child welfare concept is disruption. Several participants linked the need to study the emotional impact of disruption on children with ascertaining the “best interest of a child”. Conferees noted that the few studies available focus on adoption disruption, not the withdrawal of a father through paternity disestablishment. There was a consensus that measuring disruption and stability needs to be made relative to the child’s developmental level.

A conferee noted that the interests and what is required to satisfy the various “stakeholders” in a paternity disestablishment decision, are not necessarily going to be stable over time. For example, even assuming the genetic father may best meet the child’s emotional interests in love and support at the time of the child’s birth, after a paternal relationship is formed between father and child, that need may be best met by preserving the stability of the existing relationship, regardless of whether it is with the genetic father.

A participant pointed out that in terms of family law, stability, like “best interest of the child” is an imprecise term, ascertained on a fact-driven case by case basis. Another discussion examined the fact that while the law tends to protect legal stability, it cannot ensure social stability. One question is the extent to which courts weigh stability in determining whether or not to grant genetic testing requests.

Little is known about how paternal discrepancy and the paternity disestablishment process affect the father-child relationship—and the mother-father relationship—and interact with overall child wellbeing. Participants identified at least three categories of

cases where quality and stability of the relationship might be explored: disestablishment is raised but testing is blocked based on legal principles such as *res judicata*; genetic testing establishes that the legal father is not the child's biological parent but paternity is not disestablished on other grounds – such as the family remains intact and it is a third party who seeks to assert his rights; and, father (or mother) asserts he is not the child's biological parent but genetic testing proves him wrong. More than one symposium member suggested that the threat of instability alone causes harm. Depending on the age of the child, despite confirmation of bio-identity, the challenge itself is disruptive. While laws such as the UPA (2002) aim to balance the outcomes –and favor the interests of children over adults – participants discussed whether the law can prevent or mitigate harm in an environment of inexpensive, non-invasive, self help genetic testing.

ii. Research Needs

1. Symposium participants found many unanswered questions on the interaction between child wellbeing, stability, and paternity disestablishment. In particular, there was interest in identifying more common ground between family law/child support and child welfare/adoption contexts, including considering the “best interest of the child.” In addition, research on the interaction between paternity disestablishment and child wellbeing could be informed by research on child wellbeing and adoption disruption.

D. Biology and Beyond

i. Symposium Discussion

During the morning presentation of all four background papers, several interrelated themes emerged and were carried forward to the afternoon's discussion. Symposium members referred to the balancing test between legal, social and biological parenting as “biology plus”. It was the group's consensus that key goals of both paternity establishment and disestablishment policy are to provide two-parent care where possible and to preserve established relationships. While bio-identity was recognized by all to be

a powerful emotional force and important factor for all involved, there was no corresponding universal support for what a participant identified as a “strict sperm liability” policy – where paternity is fixed irrevocably at conception by the contribution of genetic material.

Participants suggested that it is reasonable to explore whether genetic parentage trumps other interests. However, others suggested that a pure genetics model built on the ascendancy of a biological imperative ignores evidence from adoptive, step- and non-traditional families that children can be successfully nurtured and raised by adults with whom they do not share genes. Other conferees noted that modern reproductive technologies challenge traditional understandings of parenthood. Surrogate motherhood, ovarian transplants, and post-mortem sperm donation all call into question: What is a mother? What is a father?

This discussion encompassed two key disparate concepts. First, under what circumstances and to what extent should those social and emotional “plus” factors – involvement, nurturing, and legal identity as a parent – outweigh bio-identity, if ever? When weighing such factors does it matter who brings the action to disestablish? It is not always the case that paternity disestablishment arises when a legal father seeks to terminate his relationship to the child – or to the mother – and end his financial support. Disestablishment litigation occurs when a mother uses non-biology to oust the child’s legal father. A biological father may also seek to establish his legal and emotional relationship with a child with whom he shares a genetic identity. As a participant noted, while they may contain common stories, the human twists are inevitably unique.

The second concept is drawn primarily from the child welfare model – the more adults positively engaged with a child the better. Participants discussed looking at multiple fathers in this context – a legal father, a social father and perhaps a separate biological father. A member suggested such a model would find a parallel in open-adoptions and foster care cases. The viability of such as solution was considered to be dependent on positive relationships among those involved and a reliance on mediation and co-

parenting. There was agreement that the failure of cooperation would default to a government decision – and a low probability that legislatures and courts would adopt widely the multiple father models. A participant suggested that while the concept of multiple fathers was appealing, the complication of parceling out both rights and responsibilities was unrealistic. For example, who would pay child support – all, the legal father, or the biological parent? Even the idea of multiple social parents is inevitably complicated by the propensity of American families to move. Despite important laws, such as UIFSA and the UCCJEA, designed to bring more consistency to interstate child support and child custody litigation, conferees highlighted the inevitable complications when litigation and evidence-gathering crosses state borders.

The discussion considered the role of step-parents as a possible model. Several analogies were proffered. A participant suggested that step-parents are evidence that social parents don't see themselves as replacing biological parents. However, neither do step parent families provide the same benefit as intact families. She suggested that if step-parents are obligated to care for stepchildren, it would affect the decision-making on whether or not to get involved. The group discussed the fact that second marriages break up more often than first marriages. However, a participant noted that the way many single mothers get out of poverty is through marriage. She posited that it was counterproductive to penalize step-fathers for supporting their wives' children during marriage by making them financially responsible for the children should the marriage dissolve.

Others observed that the tendency was to equate non-biological legal parents to step-parents. It was suggested that a more apt model on which practice and policy should be weighed is adoption. Such a model promotes the values of stability for the child and permits – in accord with and limited by state law – the child to explore his or her bio-identity as an adult, without disruption of the legal relationship during minority.

Finally, the discussion mirrored some of the concerns identified and discussed earlier. To what extent are voluntary paternity acknowledgement laws used as an inexpensive, self-

help adoption? What are the triggers for bringing the disestablishment action, including disability or illness of a child, child support enforcement, or new relationships?

ii. Research Needs

1. Symposium participants suggested that the following additional research would assist policymakers in evaluating the relative importance of non-biological factors: Explore the impact on children where there are multiple fathers involved, specifically, a legal father, social father, and biological father. The research should focus on lessons from the child welfare system, including step-parents, foster parents, and adoptive parents and the way all these individuals influence a child's life.
2. What are the parallels between voluntary paternity acknowledgement and adoption? The research on this question should consider the approach incorporated into UPA (2002) and include an analysis parents who acknowledge children with whom they have no genetic connection, but want to form a family.
3. Analyze legal resources and restrictions on adult child ascertaining and legally establishing biological father post majority.

E. Consistency and Fairness

i. Symposium Discussion

The final overarching theme during the symposium was fairness and consistency. As with the other topics, several principals are intertwined into this category. Discussants raised substantive and procedural fairness as integral to a public perception that the justice system and government was acting appropriately in these cases. The bottom line is: Are similar cases similarly treated? Conferees considered that attaining consistency is challenging for two critical reasons. First, state laws govern and vary greatly on such key issues as whether and under what circumstances a legal paternity determination may be reopened or challenged. Second, paternity disestablishment cases are fact-specific,

complex and nuanced, with conflicting interests asserted by the legal father, the mother, the biological father, the child and the state.

As to the first point, participants saw little merit in a policy that would make a uniform federal law paramount in disestablishment matters. They commented that family law still reflects the values of the citizens of the states. As a result lack of uniformity among states was to be expected and accommodated, although inconsistency within a state challenged notions of legal consistency.

Attendees recommended that states laws on matters such as adoption, termination of parental rights (TPR), child support, child welfare and inheritance be catalogued, inconsistencies identified and, to the extent possible, laws harmonized. There was considerable discussion about whether and how a the best interest of the child standard should be defined and applied, and if so, whether that term would have a consistent result when the underlying legal issue changed. One example cited was adoption. Putative father registries were established, and found constitutional, as a means to expedite infant adoption when no man self-declared his connection to the child. Here a participant noted the policy is to give a man little time to become a legal father because “we’re in a hurry to place the child in a nurturing environment.” Participants considered whether such lack of consistency was “fair” – and whether fairness to the child and the father who might later come and assert parental rights were in conflict. Similar policy choices have been made by safe harbor laws.

Beyond the traditional family law areas, legal parental identity also impacts inheritance laws and entitlement to public and private benefits. Several members recommended that states consider the Uniform Parentage Act (2002). Drafted by the National Conference of Commissioners on Uniform State Laws, UPA (2002) is designed to make uniform state paternity establishment and disestablishment laws and procedures across the full range of such state legal issues. UPA (2002) has been enacted in seven states. It is not mandated by federal law but discussants suggested that it offers a consistent way to implement federal mandates. Most attending commented that consistency in such matters as the

procedures to use when a signor timely seeks to rescind a voluntary acknowledgment and what then happens regarding ascertaining parentage would provide greater equity in the process.

While parentage determination is a state law issue, the circumstances where the federal government must ascertain whether a person qualifies as a child for purposes of receiving federal benefits. Currently, there is not consistency across types of federal benefits and rights due children. See attached Appendix C for further information.

As to how to ensure that individual decisions are substantively fair, the symposium contained considerable discussion as to what principals and procedures would bring “equity to the decision-making process”. There was not a consensus on what procedures to include but there was agreement that establishing at least a broad structure as to how to approach individual cases would provide much needed standards. However, a member cautioned that cultural trends are fast-changing and the current notion of what is right – for children, for the adults involved, or for government - may not be an accurate predictor of what is right in the future.

ii. Research Needs

Recommendations for a more in-depth research analysis of both how paternity disestablishment cases arise were reiterated, together with a closer exploration of whether the environment in which the case arises – predominately child support or child welfare – make a difference in actions by the mother, the legal father or the biological father. Comparative analysis of how different jurisdictions deal with establishment, paternal discrepancy, and disestablishment issues would also be useful.

Summary

The symposium discussion with rich and wide-ranging, identifying many areas for further inquiry. The most important questions were around the magnitude of the paternity disestablishment problem and the context in which the issue arises. It would be similarly helpful to catalogue further federal and state laws policy and procedures on how a father is legally identified. Finally, research on child well being and the impact of parental disruption - due to paternity disestablishment, termination of parental rights, adoption disruption, or other child welfare activities – could be expanded and shared across programs and academic disciplines.

Appendix A



Emerging Issues in Paternity Establishment

Expert Symposium January 25, 2006

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Appendix B

Agenda Emerging Issues in Paternity Establishment Expert Symposium

WEDNESDAY, JANUARY 25, 2006

HUBERT H. HUMPHREY BUILDING
200 INDEPENDENCE AVE SW; ROOM 705A
WASHINGTON, DC 20201

8:30 am to 9:00 am	Registration
9:00 am to 9:15 am	Welcome, Introductions, and Symposium Goals
9:15 am to 10:30 am	Presentation of Background Papers: <ul style="list-style-type: none">– <i>The State of Paternity Establishment Policy</i> by Susan Paikin– <i>Implications of Principles of Family Law</i> by Marsha Garrison Discussant: Linda Elrod, Washburn University School of Law
10:30 am to 10:45 am	Morning Break
10:45 am to 12:00 pm	Presentation of Background Papers: <ul style="list-style-type: none">– <i>Paternity Disestablishment and Child Wellbeing: Lessons Learned from Child Welfare and Family Law</i> by Waldo Johnson and Wayne Salter– <i>Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment</i> by Joanna Bergmann, Arthur Caplan, and Nadia Sawicki Discussant: Esther Wattenberg, University of Minnesota School of Social Work
12:00 pm to 1:00 pm	Lunch
1:00 pm to 2:45 pm	Facilitated Discussion
2:45 pm to 3:00 pm	Afternoon Break
3:00 pm to 4:00 pm	Facilitated Discussion (continued)
4:00 pm to 4:30 pm	Summary and Closing

Appendix C

Federal Direct Determination of Parent-Child Relationship

Determining eligibility for direct federal benefits, such as social security, uses state laws and federal program determinations for parentage, exemplifies the complex relationship between federal social policy and state paternity law. For example, social security benefits are provided to the “child of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual...” (42 U.S.C. §402(d)) Federal social security law has an expansive definition of “child” – beyond a person’s natural and adopted children, 42 U.S.C. §416(c) includes stepchildren, and grandchild or stepgrandchild.

When considering who qualifies as a “child” the Commissioner of Social Security first looks to the intestate provisions of state inheritance law. If they can inherit, they are considered the decedent’s child for purpose of benefits, even if they are not the decedent’s biological child. (As to which state law controls, 42 U.S.C. §416(h)(2) contains choice of law rules that are beyond the scope of this paper.) *Saunders ex rel Wakefield v. Apfel*, 85 F. Supp. Ed 1275 (M.D. Fla. 1999) provides an interesting example of potential complexities. The U.S. District court found a child qualified for OASDI benefits as the decedent’s son, over ruling the agency. The decedent had acknowledged the child on the child’s birth certificate and identified him to be his child on an insurance application. Under Florida law that permitted the child to claim a share of the decedent’s estate under that state’s intestacy laws. The child was awarded benefits even though there had been subsequent paternity litigation and the genetic test results established that he was not the child’s biological parent. SSA was bound by Florida’s intestacy rather than paternity law.

Every state's intestate law presumes paternity for children born during a marriage. As a result, federal paternity decisions generally involve nonmarital children. State laws vary on whether such children (or children born after decedent's death) are deemed "legitimate". Again, this example is only illustrative of the complexities of federal benefit determinations. (It is interesting to note that when NCCUSL redrafted the Uniform Parentage Act, the drafting committee included members of the estate bar, an attempt to harmonize, at least on a state level paternity and inheritance laws.)

Unlike OASDI, the Longshoreman's and Harbor Worker's Compensation Act, has a more explicit but broader definition of "child" that relies on a state's paternity rather than intestate law. One oft cited case example involves a woman who lived with another man down the road from her husband. She had nine children by her companion; they lived together but she and her husband never divorced. When her husband died, she applied for benefits for all nine children under the Longshoreman's Act. The District Court dismissed her claim, finding quite correctly that none were the decedent's biological children. The Court of Appeals reversed. Under Louisiana law, the husband is presumed to be the father of children born during the marriage. Legitimacy could not be attacked unless the decedent had brought a timely action. *Ellis v. Henderson*, 204 F.2d 173 (5th Cir. 1953).