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Criminal Law - The Supreme Court Expands the Witt Principles to Exclude a Juror Who Would Follow the Law. *Uttecht v. Brown*, 127 S. Ct. 2218 (2007).

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FAMILY LAW & CIVIL PROCEDURE—DADDY DILEMMA: SHOULD THE TRUTH MATTER? *Martin v. Pierce*, No. 06-950, 2007 WL 1447911 (Ark. May 17, 2007).

I. INTRODUCTION

Imagine a father and son playing catch in the backyard, or a father consoling his little princess when she has a nightmare. Picture a father and child spending quality time together every birthday, Christmas Day, Thanksgiving, and Fathers' Day for sixteen years. Now imagine all of this being shattered in the blink of an eye simply because the father and child share no DNA match.

Recently, the Arkansas Supreme Court faced a similar dilemma in *Martin v. Pierce*.¹ After sixteen years of an established parent-child relationship, the putative father sought a DNA test which excluded him as the biological father of the child.² The father then asked the court to vacate all his legal obligations with regard to the child.³ The Arkansas Supreme Court, however, refused to terminate his legal obligations to the child and ordered the putative father to continue paying child support.⁴ The supreme court followed years of precedent and held that if a court rendered a final divorce order and a putative father subsequently discovered that he is not the biological father of a child born during his marriage, he is barred, by the doctrine of res judicata, from raising the issue of paternity.⁵ The result was correct; the court effectively takes into account the importance of an established parent-child relationship and serves the best interest of the child by adhering to a strict application of res judicata to preclude a paternity challenge when paternity has previously been established under a divorce decree.

This note begins with an introduction explaining the presumption of paternity, then it examines the doctrine of res judicata, how res judicata is applied in cases of divorce, and the fraud exception to res judicata.⁶ This part also contains a discussion of cases dealing with paternity disestablishment after the entry of a divorce decree and fraud in the paternity context.⁷ Next, the note outlines the facts and reasoning utilized in the *Martin* deci-

1. No. 06-950, 2007 WL 1447911 (Ark. May 17, 2007).

2. *Id.* at *1.

3. *Id.*

4. *Id.* at *4.

5. *Id.* at *3-4.

6. See *infra* Part II.A.-B.

7. See *infra* Part II.C.

sion.⁸ The note concludes that the Arkansas Supreme Court came to the correct conclusion based on the particular facts in *Martin* but also points out questions that are left unanswered and proposes a solution to solve the potential conflict that arises in paternity resolutions.⁹

II. BACKGROUND

This section briefly addresses the presumption of paternity, its history, and the policy rationale it furthers.¹⁰ Then, the section will explain the doctrine of res judicata and how courts apply res judicata to cases of divorce.¹¹ This section also contains a discussion of how different courts deal with the issue of paternity disestablishment after the entry of a divorce decree.¹² Finally, the section explores the various exceptions to res judicata.¹³ This section will also expand upon the fraud exception and contain a discussion of cases dealing with fraud in the paternity context.¹⁴

A. The History of the Presumption of Paternity

“[T]he presumption is one of the strongest and most persuasive known to the law”¹⁵ Prior to the development of genetic testing, the marital presumption was designed to create a biological certainty when there was no other way of doing so.¹⁶ This presumption of legitimacy arose out of English common law and stated that “any child born into a lawful marriage was presumed to be fruit of the marriage.”¹⁷ The presumption served a number of overlapping goals, but most importantly, it served to avoid the title of “illegitimate child” and clarified whose duty it was to care for the child.¹⁸

Under traditional common law, the presumption was “nearly irrebuttable.”¹⁹ Historically, it was essential that the husband prove impossibility to

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part II.A.

11. See *infra* Part II.B.

12. See *infra* Part II.B.

13. See *infra* Part II.C.

14. See *infra* Part II.C.

15. *In re Findlay*, 170 N.E. 471, 472 (N.Y. 1930).

16. Niccol D. Kording, *Little White Lies That Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, Note, 6 J.L. & FAM. STUD. 237, 242 (2004).

17. Stephen A. Sherman, *You Ain't My Baby Daddy: The Problem of Paternity Fraud and Paternity Laws*, 5 AVE MARIA L. REV. 273, 275 (2007).

18. *Id.* at 276.

19. Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006). See also *In re Findlay*, 170 N.E. at 472 (“If

overcome the presumption.²⁰ For example, strong evidence that the husband was sterile, impotent, or did not have access to his wife during the period of conception would suffice.²¹ The law treated the husband and wife as a unit and “regardless of what transpired during the marriage” the law was not to interfere.²²

Even with the scientific advancement of DNA testing, which can establish biological paternity with certainty, some courts have continued to apply the presumption of paternity.²³ In *Michael H. v. Gerald D.*,²⁴ the United States Supreme Court rejected the idea that a natural father had a constitutional right to maintain a relationship with a child who was presumptively fathered by another man.²⁵ Despite a DNA test proving with ninety-eight percent accuracy that Michael H. was the child’s biological father,²⁶ the Court upheld a California statute that created the presumption that a child born to a married woman is the child of the marriage.²⁷ The Court emphasized its tradition of protecting the marital family and the role of the presumption in preserving the stability of the family unit.²⁸

Albeit with restrictions, courts have loosened the common law presumption of paternity by allowing men to contest paternity without a showing of traditional means of refutation.²⁹ Although the presumption is still applied, “[t]he dramatic shift in family composition over the last several decades in the United States has made the marital presumption increasingly inadequate as the sole definition of fatherhood under the law.”³⁰ A large number of courts therefore apply the doctrine of *res judicata* to preserve the unitary, nuclear family.³¹

a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity.”).

20. Sherman, *supra* note 17, at 276.

21. *Id.*

22. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 24 (2004).

23. Brie S. Rogers, Comment, *The Presumption of Paternity in Child Support Cases: A Triumph of Law Over Biology*, 70 U. CIN. L. REV. 1151, 1154 (2002). See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998).

24. 491 U.S. 110 (1989).

25. *Id.* at 127.

26. *Id.* at 110.

27. *Id.* at 119–21.

28. *Id.* at 123–25.

29. Sherman, *supra* note 17, at 274. Refute means “to prove (a statement) to be false” or “to prove (a person) to be wrong.” BLACK’S LAW DICTIONARY 1308 (8th ed. 2004).

30. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 326 (2005).

31. See Melanie B. Jacobs, *When Daddy Doesn’t Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 193 (2004).

B. Res Judicata

Res judicata refers to "claim preclusion" because it precludes parties from relitigating the same cause of action.³² The purpose of the doctrine "is to put an end to litigation by precluding a party who has had the opportunity for one fair trial from drawing the same controversy into issue a second time before the same or a different court."³³

The Arkansas Supreme Court has ruled that res judicata barred relitigation of a subsequent lawsuit if:

(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies.³⁴

Res judicata is not limited to claims that were actually litigated.³⁵ In fact, the doctrine also bars the relitigation of claims that could have been litigated in the former suit.³⁶ In *Benedict v. Arbor Acres Farm, Inc.*,³⁷ the Arkansas Supreme Court wrote:

The law of [r]es judicata provides that a prior decree bars a subsequent suit when the subsequent cause involves the same subject matter as that determined or which could have been determined in the former suit between the same parties; the bar extends to those questions of law and fact which 'might (well) have been but were not presented.'³⁸

Similarly, the doctrine of res judicata will apply even if the subsequent lawsuit addresses new legal issues and remedies, provided that the case at bar is based on the same events and subject matter of the previous lawsuit.³⁹ The key question therefore is whether or not the party "had a full and fair opportunity to litigate the issue in question,"⁴⁰ because if they did not, the doctrine of res judicata will not apply.⁴¹

32. *Swofford v. Stafford*, 295 Ark. 433, 434-35, 748 S.W.2d 660, 661-62 (1988).

33. *Taggart v. Moore*, 292 Ark. 168, 171, 729 S.W.2d 7, 9 (1987).

34. State Office of Child Support Enforcement v. Williams, 338 Ark. 347, 350, 995 S.W.2d 338, 339 (1999); *Miller County v. Opportunities, Inc.*, 334 Ark. 88, 94, 971 S.W.2d 781, 785 (1998); *Hamilton v. Ark. Pollution Control & Ecology Comm'n*, 333 Ark. 370, 374, 969 S.W.2d 653, 655 (1998).

35. *Wells v. Ark. Pub. Serv. Comm'n*, 272 Ark. 481, 483, 616 S.W.2d 718, 719 (1981).

36. *Id.*, 616 S.W.2d at 719.

37. 265 Ark. 574, 579 S.W.2d 605 (1979).

38. *Id.* at 577, 579 S.W.2d at 607 (quoting *Turner v. State*, 248 Ark. 367, 372, 452 S.W.2d 317, 319 (1970)).

39. *Swofford v. Stafford*, 295 Ark. 433, 435, 748 S.W.2d 660, 662 (1988).

40. *Brandon v. Ark. W. Gas Co.*, 76 Ark. App. 201, 210, 61 S.W.3d 193, 199 (2001).

41. *See id.*, 61 S.W.3d at 199.

1. *Res Judicata Effect of Divorce Decrees on the Paternity Issue*

Paternity determinations vary from state to state.⁴² Whereas some states preclude paternity challenges altogether, some allow them at any time.⁴³ Arkansas, however, recognizes that res judicata bars an adjudicated father from challenging the paternity of a child after the establishment of paternity under a divorce decree.⁴⁴ Courts that apply this principle to the adjudicated father treat the dissolution of marriage as a final judgment.⁴⁵ Thus, even if the issue of paternity is not formally raised or adjudicated in a divorce proceeding, res judicata may bar the subsequent adjudication of any issues in relation to a divorce, such as paternity, custody, and child support.⁴⁶ This approach locks a man into the role of the father even if he is not the biological father. Although this may appear unjust, courts have held that the best interest of the child outweighed any unfairness experienced by the father in protecting the established parent-child relationship.⁴⁷

2. *Arkansas's Application of Res Judicata to Divorce Decrees*

In the context of divorce, Arkansas courts have applied the doctrine of res judicata in various ways. This section will discuss a situation in which res judicata does not apply,⁴⁸ parties to whom res judicata does not apply,⁴⁹ and various situations in which Arkansas courts have applied the doctrine of res judicata to preclude the relitigation of paternity.⁵⁰

a. Situation where res judicata does not apply

In *Golden v. Golden*,⁵¹ during divorce proceedings the wife sought dismissal of custody and visitation issues after a DNA test excluded her husband as the father of a child born during the marriage.⁵² The father ar-

42. Kording, *supra* note 16, at 240.

43. *Id.*

44. See *McCormac v. McCormac*, 304 Ark. 89, 90–91, 799 S.W.2d 806, 807 (1990).

45. *Sherman*, *supra* note 17, at 285.

46. See *State Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 352, 995 S.W.2d 338, 340 (1999). See also Donald M. Zupanec, Annotation, *Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incidental Thereto*, 78 A.L.R. 3d 846 (1977), for a detailed discussion of the effect of paternity findings or implications of such, made incidental to a divorce decree, on subsequent proceedings.

47. See *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998); *Rogers*, *supra* note 23, at 1156.

48. See *infra* Part II.B.2.a.

49. See *infra* Part II.B.2.b.

50. See *infra* Part II.B.2.c.

51. 57 Ark. App. 143, 942 S.W.2d 282 (1997).

52. *Id.* at 146, 942 S.W.2d at 283.

gued that the lower court erred by failing to estop the wife from denying his paternity of the child born during the marriage.⁵³ Furthermore, he argued that the doctrine of res judicata prevented his wife from relitigating the issue of paternity.⁵⁴ The Arkansas Court of Appeals found the father's argument unavailing because there had only been one action in this case.⁵⁵ The doctrine of res judicata did not apply because the wife raised the issue of paternity for the first time in the course of the divorce proceedings.⁵⁶

b. To whom res judicata does not apply

The Arkansas Court of Appeals, in *Scallion v. Whiteaker*,⁵⁷ addressed whether a divorce decree was res judicata to a paternity challenge brought by the mother's present husband.⁵⁸ The court noted that it is settled in Arkansas that a former husband and wife are bound by res judicata when paternity issues are litigated in a prior action.⁵⁹ The mother's present husband, however, was not a party to the proceedings that dissolved the prior marriage; therefore, the court found that the doctrine of res judicata did not preclude a challenge to the child's paternity.⁶⁰

Eight years later, the Arkansas Supreme Court heard the case of *State Office of Child Support Enforcement v. Willis*,⁶¹ which also stands for the principle that a divorce decree will only have a res judicata effect on parties to the prior action or their privities.⁶² In this case, John and Merigayle Triplett married and had a child during the marriage.⁶³ The couple later obtained a divorce in 1992, and their divorce decree stated that the parties had one child.⁶⁴ John and Merigayle, however, remarried in 1993, and then Merigayle informed John that he was not the child's father.⁶⁵ In 1997, the couple filed for divorce again, and John requested a DNA test to establish his biological relationship to the child.⁶⁶ The DNA test excluded John as the child's

53. *Id.* at 150, 942 S.W.2d at 285.

54. *Id.*, 942 S.W.2d at 285.

55. *Id.*, 942 S.W.2d at 285.

56. *Id.*, 942 S.W.2d at 285.

57. 44 Ark. App. 124, 868 S.W.2d 89 (1993).

58. *Id.* at 125, 868 S.W.2d at 90.

59. *Id.* at 126, 868 S.W.2d at 90.

60. *Id.*, 868 S.W.2d at 90.

61. 347 Ark. 6, 59 S.W.3d 438 (2001).

62. *Id.* at 13, 59 S.W.3d at 443.

63. *Id.* at 9, 59 S.W.3d at 440.

64. *Id.*, 59 S.W.3d at 440.

65. *Id.*, 59 S.W.3d at 440.

66. *Id.* at 10, 59 S.W.3d at 440. In reaching its decision the court found it significant that Merigayle did not object to John's request for DNA testing to establish the child's paternity and furthermore that she did not argue the res judicata effect of the previous divorce decree in

father, and the 1998 divorce decree found that no children were born of the marriage.⁶⁷

Subsequent scientific evidence revealed Christopher Willis as the child's father, and, as a result, the Office of Child Support Enforcement (OCSE) filed a paternity complaint against Willis.⁶⁸ Willis denied paternity and raised the affirmative defense of *res judicata*.⁶⁹ The Arkansas Supreme Court, however, found that because Willis was not in privity with a party to the 1992 divorce decree and did not participate in any way, the principle of *res judicata* could not govern the outcome of the case.⁷⁰ The subsequent paternity action between OCSE and Willis, therefore, was not barred by *res judicata* and could proceed.⁷¹

c. Positive application of *res judicata*

In *McCormac v. McCormac*,⁷² the Arkansas Supreme Court held that *res judicata* barred a mother from relitigating the paternity issue following a divorce decree.⁷³ The mother sought to re-litigate paternity in response to her ex-husband's motion asking the court to hold her in contempt for failing to comply with visitation.⁷⁴ In the original divorce decree, the court awarded custody, set child support, and fixed visitation.⁷⁵ Furthermore, the mother pled in the divorce action that the child was born of the marriage, and the father admitted this fact.⁷⁶ The court held, therefore, the mother could not relitigate the paternity of the child.⁷⁷

Less than a year later, the Arkansas Court of Appeals heard the case of *Benac v. State*.⁷⁸ The divorce decree entered in the State of North Carolina found that there was one child born of the marriage.⁷⁹ After moving to Arkansas, the State sued the father for child support through its child support enforcement unit.⁸⁰ In response, the father claimed that he was not the

the 1998 divorce proceedings. *Id.* at 14, 59 S.W.3d at 444. The court noted therefore, "[T]he 1998 decree leaves Megan without a biological father." *Id.*, 59 S.W.3d at 444.

67. *Willis*, 347 Ark. at 10, 59 S.W.2d at 440–41.

68. *Id.*, 59 S.W.2d at 441.

69. *Id.*, 59 S.W.2d at 441.

70. *Id.* at 13–14, 59 S.W.3d at 443.

71. *Id.* at 14, 59 S.W.3d at 444.

72. 304 Ark. 89, 799 S.W.2d 806 (1990).

73. *Id.* at 91, 799 S.W.2d at 807.

74. *Id.* at 90, 799 S.W.2d at 806.

75. *Id.*, 799 S.W.2d at 806.

76. *Id.*, 799 S.W.2d at 806.

77. *Id.* at 91, 799 S.W.2d at 807.

78. 34 Ark. App. 238, 808 S.W.2d 797 (1991).

79. *Id.* at 239, 808 S.W.2d at 798.

80. *Id.* at 238–39, 808 S.W.2d at 798.

child's father and requested a blood test to determine paternity.⁸¹ The court subsequently found that the child's paternity had been established by the North Carolina court and that the issue was barred by *res judicata*.⁸² The court denied the father's motion for blood testing.⁸³ Judicial refusal to order scientific testing "parallel[s] the historic refusal[] to admit testimony about 'access' and they strongly suggest that the law treats paternity as a social construction not a biological fact."⁸⁴

In 1999, in *State Office of Child Support Enforcement v. Williams*,⁸⁵ the Arkansas Supreme Court held that a man had to continue to pay child support for two children not biologically his.⁸⁶ The court noted that the divorce decree stated that children were born during the marriage and that the issues of custody, child support, and visitation were resolved during the divorce proceeding.⁸⁷ Later, the father filed a petition to modify the child support order and requested blood tests to establish paternity.⁸⁸ The lower court ordered the paternity test, and when the results excluded the appellee as the biological father, the court abated his child support obligations.⁸⁹

OCSE appealed the lower court's judgment and argued that the prior divorce decree between the parties was *res judicata* on the paternity issue.⁹⁰ The Arkansas Supreme Court agreed and held that the issue of paternity was decided during the divorce proceedings.⁹¹ The court noted that the father had an opportunity to raise the paternity issue in the divorce action; he failed to do so.⁹² Furthermore, the court addressed significant policy considerations that favor this effect of divorce decrees on issues of paternity.⁹³

81. *Id.* at 239, 808 S.W.2d at 798.

82. *Id.*, 808 S.W.2d at 798. The court further noted that it is under a "constitutional command" to give full faith and credit to the judgments of other state courts. *Id.* at 240, 808 S.W.2d at 798.

83. *Id.* at 240, 808 S.W.2d at 798.

84. Baker, *supra* note 22, at 14.

85. 338 Ark. 347, 995 S.W.2d 338 (1999).

86. *Id.* at 352, 995 S.W.2d at 340-41.

87. *Id.*, 995 S.W.2d at 340.

88. *Id.* at 349-50, 995 S.W.2d at 339.

89. *Id.* at 350, 995 S.W.2d at 339.

Prior to the entry of [the] order, the court ruled from the bench that from a purely legal standpoint, the argument that *res judicata* applied was correct, but that from an equitable standpoint, he was not going to force the appellee to pay child support on two children who were not biologically his. *Id.*, 995 S.W.2d at 339 (emphasis omitted).

90. *Id.*, 995 S.W.2d at 339.

91. *Williams*, 338 Ark. at 352, 995 S.W.2d at 340.

92. *Id.*, 995 S.W.2d at 340.

93. *Id.* at 351-52, 995 S.W.2d at 340. The court cited the Vermont Supreme Court for some insight to some of these policy concerns:

Although we understand plaintiff's interest in ascertaining the true genetic make-up of the child, we agree with the many jurisdictions holding that the financial

The court also addressed Arkansas Code section 9-10-115(d), "which addresses modification of a child-support order when it is determined in a paternity suit that a man is not the biological father of a child."⁹⁴ The court concluded that section 9-10-115(d) is part of the Paternity Code, and therefore is not applicable to divorce decrees.⁹⁵ During a marriage, a husband and child establish a parent-child relationship with one another.⁹⁶ The same is usually not true in an adjudication of paternity in a paternity suit.⁹⁷ The court noted that "[t]his distinction lies at the heart of the disparate treatment accorded scientific testing after a finding of paternity under the Paternity Code and scientific testing which occurs after a divorce decree under our case-law."⁹⁸

3. *What Other States Are Doing*

a. Cases enforcing paternity judgments

Many other states have made it difficult for legal fathers to disestablish paternity subsequent to a paternity judgment or divorce decree.⁹⁹ Below are some cases that address how other states have relied on the doctrine of res judicata and various courts' policy considerations that encompass this approach.

In 1997, the Georgia Court of Appeals barred a putative father's attempt to establish paternity of the child of his former wife when the couple's

and emotional welfare of the child, and the preservation of an established parent-child relationship, must remain paramount. . . . Whatever the interests of the presumed father in ascertaining the genetic "truth" of a child's origins, they remain subsidiary to the interests of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship. Therefore, absent a clear and convincing showing that it would serve the best interests of the child, child, a prior adjudication of paternity is conclusive.

Id., 995 S.W.2d at 340 (quoting *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998)).

94. *Id.* at 353, 995 S.W.2d at 341.

95. *Id.*, 995 S.W.2d at 341.

96. *Id.*, 995 S.W.2d at 341.

97. *Williams*, 338 Ark at 353, 995 S.W.2d at 341.

98. *Id.*, 995 S.W.2d at 341.

99. See, e.g., *In re Paternity of Rogers*, 697 N.E.2d 1193, 1197-98 (Ill. App. Ct. 1998), superseded by statute, Illinois Parentage Act of 1984, Pub. L. No. 90-715, 750 ILL. COMP. STAT. 45/7(b-5), as recognized in *Jackson v. Newsome*, 758 N.E.2d 342, 350-51 (Ill. App. Ct. 2001). (invoking principles of res judicata to uphold former husband's paternity and duty to pay child support); *Hackley v. Hackley*, 395 N.W.2d 906, 907 (Mich. 1986) ("A party cannot withhold a defense to be used in the retrial of a paternity dispute when that defense could have [been] brought in the prior suit."); *Beyer v. Metze*, 482 S.E.2d 789, 791 (S.C. Ct. App. 1997) (holding that a divorce decree which states that children were born during the marriage is sufficient to constitute a determination of paternity).

divorce decree was silent on the issue of children.¹⁰⁰ The putative father, Grice, and Detwiler, the wife, married on June 11, 1982, but soon separated and obtained a divorce.¹⁰¹ Even though a child was born during the marriage, the wife amended her complaint for divorce to say that it was physically impossible for Grice to be the child's father.¹⁰² The divorce decree issued on January 3, 1983, was silent on the issue of children.¹⁰³ In 1983, the wife married Ogle and had the child's last name changed to the name of her current husband.¹⁰⁴ Detwiler and Ogle divorced in 1989, and their divorce decree stated that two children were born of the marriage.¹⁰⁵

After receiving information that the child was his biological son, Grice filed a petition to establish paternity and sought custody.¹⁰⁶ Ogle moved to dismiss Grice's action, claiming that the 1983 divorce decree constituted *res judicata* on the issue of Grice's paternity.¹⁰⁷ The court noted that while Grice knew that a question existed regarding his paternity in the 1983 divorce action, he failed to do anything to resolve the issue.¹⁰⁸ Furthermore, even though Grice asserted allegations of fraud, the court found that the allegations were "insufficient to overcome the *res judicata* effect of the first divorce decree."¹⁰⁹ Ogle acknowledged the child as his son and cared for him for thirteen years.¹¹⁰ The court, therefore, refused to disturb the established parent-child relationship that existed between the two.¹¹¹

In *Godin v. Godin*,¹¹² the Supreme Court of Vermont denied the request of a former husband who sought to have his paternity vacated six years after

100. *Grice v. Detwiler*, 488 S.E.2d 755, 756 (Ga. Ct. App. 1997).

101. *Id.* at 755.

102. *Id.* at 756.

103. *Id.*

104. *Id.* The wife had a brief affair with Ogle before her marriage to Grice and therefore she assured Ogle that he was the child's biological father. *Id.* at 755-56. For the next twelve years Ogle thought this was the truth. *Id.* at 756.

105. *Id.*

106. *Grice*, 488 S.E.2d at 756.

107. *Id.*

108. *Id.* at 757.

109. *Id.*

110. *Id.*

111. *Id.* The court wrote:

It is clear from our examination of the legitimation and paternity statutes that the primary purpose of these statutes is to provide for the establishment rather than the disestablishment of legitimacy and paternity. . . . That these statutes should be used to establish legitimacy and paternity is appropriate; it is certainly not in the legitimate child's best interest to be rendered illegitimate. Moreover, public policy will not permit a mother and an alleged father to enlist the aid of the courts to disturb the emotional ties existing between a child and his legal father after sitting on their rights for the first three years of the child's life.

Id. (quoting *Ghrist v. Fricks*, 465 S.E.2d 501, 505-06 (Ga. Ct. App. 1995)).

112. 725 A.2d 904 (Vt. 1998).

the entry of a divorce decree.¹¹³ After hearing rumors within his family, the former husband became suspicious that he was not the child's biological father.¹¹⁴ He began to re-evaluate his relationship with the child's mother and realized that ten months elapsed between the child's alleged conception and her birth.¹¹⁵ The father thereafter sought genetic testing, and he asked the court to vacate the part of the divorce decree that established his paternity.¹¹⁶

Mr. Godin argued that due to the fraud perpetrated by the mother during the divorce proceedings, the court should set aside his paternity and child support obligations.¹¹⁷ The court, however, determined that merely alleging that the child was born of the marriage did not constitute fraud for the purpose of vacating judgment.¹¹⁸ Mr. Godin could have challenged paternity based on the elapsed time during his divorce; this however was not newly discovered evidence to justify relitigation of the issue.¹¹⁹

Even more compelling were the policy concerns that dictate finality of determinations of paternity.¹²⁰ Mr. Godin lived with the child as her father for the first eight years of her life and continued to treat her as his daughter for six years thereafter.¹²¹ The court added, "[i]t is thus readily apparent that a parent-child relationship was formed, and it is that relationship, and not the results of a genetic test, that must control."¹²²

In a similar case, the Supreme Court of Appeals of West Virginia prevented a divorced father from contesting the paternity of his eleven-year-old daughter, Crystal.¹²³ The divorce action occurred in 1996, and a divorce decree was filed stating that three children were born of the marriage.¹²⁴ Five years later, William discovered through scientific testing that he was not Crystal's biological father and subsequently filed a petition to terminate child support.¹²⁵ William argued that it was not in the child's best interest to apply the doctrine of res judicata when an alleged father learns that he is not the child's biological father.¹²⁶ The court, however, disagreed and found it significant that William maintained a parent-child relationship with Crystal

113. *Id.* at 911–12.

114. *Id.* at 906.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Godin*, 725 A.2d at 908.

119. *Id.* at 909.

120. *Id.* at 910–11.

121. *Id.*

122. *Id.* at 911.

123. *Betty L.W. v. William E.W.*, 569 S.E.2d 77, 80 (W. Va. 2002).

124. *Id.* at 80.

125. *Id.*

126. *Id.* at 81.

for over six years before the divorce and continued to exercise his visitation privileges after the divorce.¹²⁷ Furthermore, the court discussed that although courts previously addressed children's rights within the perspective of competing adults' rights, the current trend is to give greater recognition to children's rights.¹²⁸

b. Courts refusing to apply res judicata in paternity disestablishment cases

Despite the policy concerns considered above, some states have rejected the application of res judicata to paternity disestablishment cases.¹²⁹ Rather than focusing on the best interest of the child, these states have framed their analysis in terms of the nonbiological father's best interest.¹³⁰

In *Spears v. Spears*,¹³¹ the Kentucky Court of Appeals allowed a former husband to challenge a finding of paternity in a dissolution action.¹³² While the court acknowledged that prior courts have held that res judicata bars the relitigation of paternity issues, it refused to apply the doctrine to the case at bar.¹³³ The court held that applying res judicata in that case would only work an injustice.¹³⁴ Furthermore, the court noted that the doctrine "must at times

127. *Id.* at 86. The court, quoting its opinion in *Michael K.T. v. Tina L.T.*, explained "that a reviewing court must examine the issue of whether an 'individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.'" *Id.* (quoting *Michael K.T. v. Tina L.T.*, 387 S.E.2d 866, 871 (W. Va. 1989)).

128. *Id.* (quoting State Dep't of Health and Human Res., Child Advocate Office *ex rel.* Cline v. Pentasuglia, 457 S.E.2d 644, 648 (W. Va. (1995))). The court emphasized the importance of finality in paternity determinations by quoting its opinion in *Nancy Darlene M. v. James Lee M., Jr.*:

If we were to recognize that the appellee could continue to raise the issue of paternity nearly five years after the birth of his putative daughter, then our domestic relations law would be replete with cases in which paternity is denied, and, consequently, child support payments, necessary for the daily needs of children's lives, would never be met.

Id. (quoting *Nancy Darlene M. v. James Lee M., Jr.*, 400 S.E.2d 882, 886 (W. Va. 1990)).

129. See *Spears v. Spears*, 784 S.W.2d 605 (Ky. Ct. App. 1990); *Langston v. Riffe*, 754 A.2d 389 (Md. 2000).

130. *Id.*

131. 784 S.W.2d 605 (Ky. Ct. App. 1990).

132. *Id.* at 607-08.

133. *Id.*

134. *Id.* at 607. The court added that "res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice, or so as to work an injustice." *Id.* (quoting 46 AM. JUR. 2d *Judgments* § 402 (1990)).

be weighed against competing interests, and must, on occasion, yield to other policies.”¹³⁵

In *Langston v. Riffe*,¹³⁶ the Court of Appeals of Maryland also recognized the injustice that results from precluding an alleged father from challenging paternity after DNA tests prove he is not the child’s biological father.¹³⁷ The court also agreed with several policy concerns in favor of challenging paternity made in a dissenting opinion from a Maryland court.¹³⁸ If a putative father is barred from relitigating paternity, a child may never know the true identity of his or her father and may be “prevented from inheriting or receiving benefits from his [or her] actual father, who might be more financially stable than the putative father.”¹³⁹ Aside from the financial standpoint, accurate paternity determinations are important because “a child may later be in need of a blood transfusion or an organ transplant from a compatible family member. A child may face decisions about marriage and child-bearing based on the risk of passing on what the child believes are inherited conditions.”¹⁴⁰

Both the Kentucky and Maryland courts’ analyses vary in great degree with the courts that strictly apply the principle of *res judicata* to preclude an adjudicated father from challenging paternity. Each court values public policy, but the difference lies in the courts’ public policy objectives.

C. Exceptions to Res Judicata

Adjudicated fathers are not without recourse; they may seek relief from a final judgment through the use of Federal Rule of Civil Procedure (FRCP) 60(b).¹⁴¹ Most states employ some form of FRCP 60(b).¹⁴² For instance, Rule 60(c) of the Arkansas Rules of Civil Procedure allows a party to obtain relief from a final judgment.¹⁴³ Rule 60(c) states:

The court in which a judgment . . . has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such

135. *Id.* (quoting 46 AM. JUR. 2d *Judgments* § 402 (1990)).

136. 754 A.2d 389 (Md. 2000).

137. *Id.* at 404 n.13.

138. *Id.* at 403 n.11 (citing *Tandra S. v. Tyrone W.*, 648 A.2d 439, 451 (Md. 1994), *superseded by statute*, Act effective Oct. 1, 1995, 1995 Md. Laws, MD. CODE ANN., FAM. LAW § 5-1038 (West 2007), *as recognized in* *Tyrone W. v. Danielle R.*, 741 A.2d 553, 561 (Md. Ct. Spec. App. 1999) (Eldridge, J., dissenting)).

139. *Id.* (citing *Tandra S. v. Tyrone W.*, 648 A.2d at 451 (Eldridge, J., dissenting)).

140. *Id.* (quoting *Tandra S.*, 648 A.2d at 451 (Eldridge, J., dissenting)).

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

142. *See, e.g.*, ALA. R. CIV. P. 60(b); KY. R. CIV. P. 60.02; WYO. R. CIV. P. 60(b).

143. ARK. R. CIV. P. 60(c).

judgment or order: (1) By granting a new trial where the grounds therefore were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(b), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds . . . ; (2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear . . . ; (3) For misprisions of the clerk; (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party; (5) For erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings; (6) For the death of one of the parties before the judgment in the action; (7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years upon a showing of cause.¹⁴⁴

Rule 60(c) therefore gives putative and biological fathers an extra pathway to contest a ruling that they are or are not a child's father.¹⁴⁵

The fraud exception to *res judicata* is the most popular remedy in paternity disestablishment cases.¹⁴⁶ Although paternity fraud has occurred for many years, it has become a widespread problem.¹⁴⁷ Fraudulent concealment occurs when a father is justified in believing that he is the child's biological father, and the mother fails to inform him otherwise.¹⁴⁸ State courts are left with the decision of what legal doctrines to apply in paternity fraud cases.¹⁴⁹ Although "many courts still rule against the presumed fathers in paternity fraud cases, there has been a growing trend in courts to find for the presumed fathers and allow them to discontinue child support."¹⁵⁰ The following section will consider how Arkansas applies the fraud exception¹⁵¹ and also how the exception is applied in other states.¹⁵²

144. *Id.*

145. *Id.*

146. ARK. R. CIV. P. 60(c)(4).

147. See *Betty L.W. v. William E. W.*, 569 S.E.2d 77, 88 (W. Va. 2002) (Maynard, J., dissenting) for the following:

In 1999 alone, almost one-third of 280,000 paternity cases evaluated by the American Association of Blood Banks excluded the individual tested as the biological father of the child. In a period of only one year, that is almost 100,000 men who were falsely accused of being the father of a child which they simply did not father.

Id. (Maynard, J., dissenting).

148. Kording, *supra* note 16, at 243.

149. Sherman, *supra* note 17, at 281.

150. *Id.*

151. See *infra* Part II.C.1.

152. See *infra* Part II.C.2.

1. *Arkansas's Application of the Fraud Exception*

Prior to 2000, an Arkansas court would only set aside a judgment under Rule 60(c)(4) for extrinsic, but not intrinsic, fraud.¹⁵³ Extrinsic fraud is fraud that "prevented the unsuccessful party from fully presenting his case, or which operated as an imposition on the jurisdiction of the court."¹⁵⁴ Furthermore, it can include a fraud upon the court in obtaining a judgment.¹⁵⁵ Some examples of extrinsic fraud include:

Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side¹⁵⁶

In contrast, evidence of intrinsic fraud, which includes false testimony or forged documents, was not sufficient to set aside a judgment.¹⁵⁷ The purpose of excluding intrinsic evidence "is to preserve finality of judgments and avoid re-litigating issues the party had an opportunity to present at the original proceeding on the matter."¹⁵⁸ In January 2000, however, the legislature amended Rule 60(c)(4) to eliminate the distinction between intrinsic and extrinsic fraud.¹⁵⁹ Arkansas Civil Procedure Rule 60(c)(4) now provides that a judgment may be set aside any time after ninety days "[f]or misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party."¹⁶⁰

In 2003, the Arkansas Court of Appeals heard the case of *Graves v. Stevison*,¹⁶¹ which verified that Arkansas's application of the fraud exception

153. *Graves v. Stevison*, 81 Ark. App. 137, 140, 98 S.W.3d 848, 850 (2003).

154. *Johnson v. Johnson*, 169 Ark. 1151, 1153, 277 S.W. 535, 535 (1925).

155. *Parker v. Sims*, 185 Ark. 1111, 1116, 51 S.W.2d 517, 520 (1932).

156. *Alexander v. Alexander*, 217 Ark. 230, 235, 229 S.W.2d 234, 236 (1950) (quoting *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878)).

157. *Turley v. Owen*, 188 Ark. 1067, 1071, 69 S.W.2d 882, 884 (1934). See also *Alexander*, 217 Ark. at 236, 229 S.W.2d at 237 (holding that falsifying testimony only amounted to intrinsic fraud, which was not the type of fraud necessary to modify or vacate the decree).

158. Kording, *supra* note 16, at 256. See also *Johnson*, 169 Ark. at 1153, 277 S.W. at 535 ("The mischief in retrying every case in which a decree rendered on false testimony given by perjured witnesses would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.").

159. *Graves v. Stevison*, 81 Ark. App. 137, 140, 98 S.W.3d 848, 850 (2003).

160. ARK. R. CIV. P. 60(c)(4).

161. 81 Ark. App. 137, 98 S.W.3d 848 (2003).

in paternity disestablishment cases is very limited.¹⁶² After learning that he was not the child in question's father, Graves filed a petition for relief from judgment in the previous divorce action.¹⁶³ He further requested that the court terminate all child-support obligations.¹⁶⁴ Graves argued that he was entitled to have his paternity disestablished because his ex-wife committed intrinsic fraud by not disclosing to him that he was not the child's biological father.¹⁶⁵ The issue required the court to determine whether or not such fraud defeated the defense of *res judicata*. After reviewing the *Williams* case, the court concluded that the type of fraud exhibited in the case at bar was well tolerated in Arkansas for public policy reasons.¹⁶⁶

The court, however, expressed its distaste for such a policy, stating, "it is bad policy to reward an adulterous, deceitful, nefarious, lying litigant to saddle an unsuspecting man with such a burden, but it appears to be the law, and this Court is obliged to enforce it."¹⁶⁷ Albeit unwillingly, the court held that *Williams* controlled and that the amendment to Rule 60(c)(4) did not warrant setting aside the determination of Graves' paternity in the divorce decree.¹⁶⁸

In his concurring opinion, Judge Griffen also stated his distaste for a public policy forcing men to pay child support for children that are not their own.¹⁶⁹ Judge Griffen claimed that although children deserve child support, they only deserve to get that support from men responsible for their existence.¹⁷⁰ Judge Griffen further acknowledged that "[w]e do not allow perpetrators of fraud to profit from their deceit in any other area of the law,"¹⁷¹ and therefore "we should [not] make an exception in family law."¹⁷²

Judge Griffen claimed that the consequences of following *Williams* are disturbing in other respects. "The law can take a man's money by court or-

162. See *id.* at 140-43, 98 S.W.3d at 851-52.

163. *Id.* at 139, 98 S.W.3d at 849.

164. *Id.*, 98 S.W.3d at 849.

165. *Id.* at 140, 98 S.W.3d at 850.

166. *Id.* at 141, 98 S.W.3d at 850. See *State Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 351-52, 995 S.W.2d 338, 339-41 (1999) (indicating that the best interest of the child must prevail over any unfairness to the father, and that children of such marriages are entitled to support).

167. *Graves*, 81 Ark. App. at 141, 98 S.W.3d at 850. The court further noted that since the mother named the true father in an affidavit, "[i]t is not as though the child will remain in blissful ignorance of the true fact." *Id.* at 141, 98 S.W.3d at 850-51.

168. *Id.* at 141, 98 S.W.3d at 851.

169. *Id.* at 144-46, 98 S.W.3d at 852-54 (Griffen, J., concurring).

170. *Id.* at 145, 98 S.W.3d at 853.

171. *Id.*, 98 S.W.3d at 853 (Griffen, J., concurring). "Any process that defies the truth it discovers in favor of a lie it formerly believed is ultimately unjust and undeserving of respect, no matter how much we rationalize it and despite our success in compelling deceived men to obey it." *Id.* at 146, 98 S.W.3d at 854.

172. *Id.* at 145, 98 S.W.3d at 853.

der, however, no court can force a man to love a child he knows is not his own."¹⁷³ The main point of Judge Griffen's concurring opinion was that by continuing to follow *Williams*, the courts were unjustly rewarding the fraudulent mothers. Judge Griffen, however, agreed with the majority's affirmation that the Arkansas Court of Appeals must follow and apply the law set forth by the Arkansas Supreme Court in *Williams*.¹⁷⁴

In *McGee v. McGee*,¹⁷⁵ the father filed a motion requesting DNA testing to determine the issue of paternity.¹⁷⁶ During a hearing held by the trial court, the mother admitted that when the twins were born, she did not know whether McGee was the biological father.¹⁷⁷ The trial court found that res judicata barred the relitigation of paternity.¹⁷⁸ McGee appealed and asserted the defense of fraud.¹⁷⁹ The court, however, reaffirmed its holding in *Graves* and held that "*Williams* strongly suggests that this is not the type of fraud that will provide a 'defrauded' father the opportunity to relitigate the issue of paternity."¹⁸⁰

2. How Other States Apply the Fraud Exception

Although the fraud exception is widely recognized as an exception to the doctrine of res judicata, many courts follow Arkansas's approach and allow public policy to dictate whether a putative father will be allowed to disestablish paternity or cease making child support payments.¹⁸¹ States that take this approach place the emphasis on the child's best interest in preserving financial stability and the parent-child relationship over the best interest of the father.¹⁸² This, however, is not true of all courts. Although in the minority, some courts allow a putative father to institute a subsequent paternity

173. *Graves*, 81 Ark. App. at 146, 98 S.W.3d at 853–54 (Griffen, J., concurring).

174. *Id.* at 146, 98 S.W.3d at 854.

175. No. CA 06-1342, 2007 WL 2713362 (Ark. Ct. App. Sept. 19, 2007).

176. *Id.* at *1.

177. *Id.*

178. *Id.*

179. *Id.* at *2.

180. *Id.*

181. *See, e.g., Ince v. Ince*, 58 S.W.3d 187, 191 (Tex. App. 2001) (failing to set aside paternity established in a divorce decree because wife's statements only amounted to intrinsic, rather than extrinsic fraud). The *Ince* court further noted that, "[b]eing a parent has always meant more than simply proving the DNA necessary to create human life originated from a particular individual." *Id.*

182. *See, e.g., Paternity of Cheryl*, 746 N.E.2d 488, 498–99 (Mass. 2001) (holding that a mother's actions of not telling adjudicated father that he may not be biological father does not constitute fraud upon the court). The *Cheryl* court further added that when the father and child have a substantial parent-child relationship, "an attempt to undo a determination of paternity 'is potentially devastating to a child who has considered the man to be the father.'" *Id.* at 495–96 (quoting *Hackley v. Hackley*, 345 N.W.2d 906, 913 n.11 (Mich. 1986)).

action based on a mother's fraudulent concealment.¹⁸³ Rather than considering the best interest of the child, these courts focus solely on the deceit exercised by the child's mother and upon the rights of the nonbiological father to have his paternity judgment vacated.

For example, a recent Pennsylvania decision discounted the best interest of the child and focused on the unfairness placed upon a man who had been forced to pay child support for a child that was not biologically his.¹⁸⁴ In *Doran v. Doran*,¹⁸⁵ the ex-husband asked the court to dismiss his child support obligations of his eleven year old child after DNA testing revealed that his probability of paternity was zero percent.¹⁸⁶ Soon after this discovery, Mr. Doran "as gently as possible removed himself from the child's life in a way which he felt would cause the child the least amount of anguish and hurt."¹⁸⁷

The court held that the former husband was not estopped from denying the child's paternity because of the wife's fraud.¹⁸⁸ The court found sufficient evidence supporting the trial court's finding that Mr. Doran would not have acted as the child's father or provided him emotional and financial support but for the ex-wife's misrepresentation of Mr. Doran's paternity.¹⁸⁹

Furthermore, the court quoted and adopted in large part the trial judge's opinion. The trial judge portrayed the nonbiological father as a hero who supported another man's child as a result of the deceitfulness of the child's mother.¹⁹⁰ The court noted that if the child's mother had told the truth in the

183. See *In re Marriage of M.E. & D.E.*, 622 N.E.2d 578, 583 (Ind. Ct. App. 1993) (finding that the mother perpetrated fraud upon the court and, therefore, the issue of paternity was not barred by res judicata); *Love v. Love*, 959 P.2d 523, 526 (Nev. 1998) (holding that res judicata did not bar a challenge to paternity because an issue of material fact existed as to whether the wife fraudulently concealed the child's paternity); *Masters v. Worsley*, 777 P.2d 499, 503 (Utah App. 1989) (holding that putative father's action challenging paternity was not barred by res judicata because he had no knowledge of alleged facts supporting his fraud claim at time of divorce); *Batrouny v. Batrouny*, 412 S.E.2d 721, 723 (Va. Ct. App. 1991) (finding that a former husband could challenge paternity and support issues because former wife committed fraud on court by misrepresenting that eldest child was born of the marriage).

184. *Doran v. Doran*, 820 A.2d 1279, 1283-85 (Pa. 2003). This case is significantly different from a previous decision of a Pennsylvania court, which held that an ex-husband could not disestablish paternity despite genetic proof of nonpaternity. *Miscovich v. Miscovich*, 688 A.2d 726 (1997). In *Miscovich*, the court characterized the ex-husband's attempt to disestablish paternity as disgusting. *Id.* at 732.

185. 820 A.2d 1279 (Pa. 2003).

186. *Id.* at 1281.

187. *Id.*

188. *Id.* at 1284-85. The court noted that "application of estoppel would punish the party that sought to do what was righteous and reward the party that has perpetrated a fraud." *Id.* at 1283-84.

189. *Id.* at 1284.

190. *Id.*

beginning, things might have turned out differently.¹⁹¹ “Unfortunately, her deceit, falsehoods and misrepresentations gave Mr. Doran no reason but to treat the child as his own-with love, care and respect, as only a decent human being would do under the circumstances.”¹⁹²

Although the fraud exception exists, it is evident that states have allowed a wide amount of discretion to determine how to apply the exception. It depends upon whose interest the court places emphasis and the particular facts of each case.

III. THE CASE

A. Facts

Kevin Martin and Lisa Pierce were married in 1988, and in 1997 Pierce filed a complaint for divorce.¹⁹³ The court entered a divorce decree on July 8, 1997, and found that two children were born of the marriage.¹⁹⁴ The property settlement agreement incorporated into the decree required Martin to pay child support to Pierce.¹⁹⁵

On November 8, 2004, Pierce, the appellee, filed a petition for contempt against Martin, the appellant, for failing to comply with the prior court order with respect to child support¹⁹⁶ and medical expenses for the child, C.M.¹⁹⁷ The appellant filed a response and counterclaim alleging that any implicit adjudication of paternity in the parties’ divorce decree was due to the appellee’s alleged fraud, and the appellant subsequently requested a paternity test.¹⁹⁸ The appellant claimed that prior to the entry of the divorce decree, without his knowledge, the appellee told an acquaintance that the appellant was not C.M.’s biological father.¹⁹⁹ The appellant further requested that the support order concerning C.M. be vacated.²⁰⁰ The circuit court granted the paternity test, and the results excluded the appellant as C.M.’s biological father.²⁰¹

191. *Doran*, 820 A.2d at 1284.

192. *Id.* (quoting the lower court’s decision, Order No. DR-454 of 1994 (Penn. Ct. Comm. Pl. 2002)).

193. *Martin v. Pierce*, No. 06-950, 2007 WL 1447911, at *1 (Ark. May 17, 2007).

194. *Id.*

195. *Id.*

196. *Id.*

197. Reply Brief for Appellee at 1, *Martin v. Pierce*, No. 06-00950 (Ark. Ct. App. Nov. 22, 2006).

198. Appellant’s Abstract, Briefs, and Addendum at 1, *Martin v. Pierce*, No. 06-00950 (Ark. Ct. App. Oct. 16, 2006).

199. *Id.*

200. *Martin*, 2007 WL 1447911, at *1.

201. *Id.*

Later, the appellant filed an amended counterclaim to include damages for outrage.²⁰² The appellant also asked that the court's prior decree and orders obligating him to pay support for C.M. be vacated, and he demanded a jury trial.²⁰³

Subsequently, the appellee filed a pro se motion for appointment of an attorney ad litem, which the circuit court ultimately granted because C.M. stood to be substantially affected by any decisions rendered and, therefore, was entitled to representation.²⁰⁴ On January 13, 2006, C.M., by and through his attorney ad litem, filed a motion for declaratory judgment asking the lower court to declare that the appellant was his father.²⁰⁵ The appellant responded that declaratory relief was not appropriate for a nonparty and that the motion should be denied.²⁰⁶ The appellant went even further and supplemented his response to the motion to argue that it would be a violation of equal protection if divorced men were not permitted to challenge their paternity pursuant to Arkansas Code section 9-10-115.²⁰⁷

The circuit court held, however, that because Arkansas Code section 9-10-115 was part of the Paternity Code, it did not apply to cases involving a divorce decree.²⁰⁸ The circuit court, therefore, granted the motion for declaratory judgment and declared that the appellant was established as the father of C.M. in the divorce decree and could not attack the decree.²⁰⁹ The circuit court also held that all challenges by the appellant with respect to the paternity of C.M., his duty to pay child support, and any other legal obligations were dismissed based on the doctrine of res judicata.²¹⁰ Furthermore, the court found that subsequent amendments to Arkansas Code section 9-10-115 did not change the outcome of the decision.²¹¹ "Due to factors concerning the remaining issues between the parties,"²¹² the circuit court held that an immediate appeal was appropriate.²¹³

The appellant appealed the circuit court's judgment,²¹⁴ and the case was certified to the Arkansas Supreme Court.²¹⁵ The appellant argued the following three points on appeal: (1) that the circuit court erred in appointing an

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Appellant's Abstract, Briefs, and Addendum, *supra* note 198, at 2.

207. Reply Brief for Appellee, *supra* note 197, at 2.

208. *Id.*

209. *Martin*, 2007 WL 1447911, at *1.

210. *Id.*

211. *Id.*

212. Appellant's Abstract, Brief, and Addendum, *supra* note 198, at 2.

213. *Id.*

214. *Martin*, 2007 WL 1447911, at * 1.

215. *Id.*

attorney ad litem; (2) that the circuit court erred by holding that res judicata barred the appellant from revisiting the issue of paternity and child support; and (3) that the circuit court erred in finding that subsequent amendments to Arkansas Code section 9-10-115 did not change the outcome of the decision.²¹⁶ This note will only address the appellant's second and third points on appeal.

B. Reasoning

Justice Hannah wrote for the majority.²¹⁷ The court largely mirrored its approach in *State Office of Child Support Enforcement v. Williams*,²¹⁸ finding that Arkansas Code section 9-10-115 is part of the Paternity Code²¹⁹ and that there is nothing to suggest that it should apply to divorce decrees.²²⁰ In *Martin v. Pierce*,²²¹ the Arkansas Supreme Court held that when the issue of paternity is established under a divorce decree, the principle of res judicata applies.²²² A father, therefore, cannot challenge his paternity of and duty to pay child support for the minor child subsequent to the decree.²²³ Furthermore, even after the General Assembly made substantial changes to the statute, the court concluded that § 9-10-115 did not apply to paternity actions arising as a matter of presumption under a divorce decree.²²⁴

Justice Brown filed a dissenting opinion in which he disputed the majority's view that once there is a divorce decree declaring a man to be the father, that adjudication is irrevocable regardless of a DNA test excluding that man as the child's biological father.²²⁵ Justice Brown also rejected the majority's interpretation of the General Assembly's intent with regard to the amendments made to Arkansas Code section 9-10-115.²²⁶ Justice Corbin joined in Justice Brown's dissenting opinion.²²⁷

216. *Id.*

217. *Id.*

218. 338 Ark. 347, 995 S.W.2d 338 (1999).

219. *Martin*, 2007 WL 1447911, at *5-6.

220. *Id.*

221. No. 06-950, 2007 WL 1447911 (Ark. May 17, 2007).

222. *Id.* at *4.

223. *Id.*

224. *Id.* at *6.

225. *Id.* (Brown, J., dissenting).

226. *Id.*

227. *Martin*, 2007 WL 1447911 at *7.

1. *Majority Opinion*

a. *Res judicata*

Justice Hannah began the analysis by discussing the circuit court's reliance on the *Williams* case.²²⁸ In *Williams*, the Arkansas Supreme Court discussed facts strikingly similar to the present case and held that a former husband's failure to raise and litigate the issue of paternity before entry of the divorce decree (which stated that children were born of the marriage) triggered a res judicata bar to relitigation of paternity suit.²²⁹ The majority noted that the *Williams* case was not the only instance when it had applied the doctrine of res judicata to paternity issues.²³⁰

The court then discussed how it had applied the doctrine of res judicata earlier in *McCormac v. McCormac*.²³¹ In *McCormac*, a mother sought to relitigate paternity following a divorce decree.²³² The mother and father both agreed in the divorce action that the child was born of the marriage; therefore, the Arkansas Supreme Court barred the mother's claim under the doctrine of res judicata.²³³

The majority also added that the Arkansas Court of Appeals had held similarly in several cases and it emphasized that other jurisdictions were in agreement with its view of the res judicata effect of divorce decrees on the paternity issue, citing several cases to that effect.²³⁴

Having set the stage for deciding the present case, the majority pointed out policy considerations, raised by the Vermont Supreme Court, that favor this view of the res judicata effect of divorce decrees in paternity disputes.²³⁵ The Vermont Supreme Court emphasized the importance of an established parent-child relationship and reasoned that a father's interest in determining the true genetic makeup of a child shall "remain subsidiary to the interest of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship."²³⁶ The Vermont Supreme Court also felt that making a prior adjudica-

228. *Id.* at *2, 4-6 (majority opinion).

229. *Id.* at *2.

230. *Id.* at *3.

231. 304 Ark. 89, 799 S.W.2d 806 (1990).

232. *Martin*, 2007 WL 1447911 at *3.

233. *Id.*

234. *Id.* at *3-4. See, e.g., *Grice v. Detwiler*, 488 S.E.2d 755 (Ga. Ct. App. 1997); *In re Paternity of Rogers*, 697 N.E.2d 1193 (Ill. Ct. App. 1998); *Love v. Love*, 959 P.2d 523 (Nev. 1998); *Beyer v. Metze*, 482 S.E.2d 789 (S.C. Ct. App. 1997).

235. *Martin*, 2007 WL 1447911, at *4.

236. *Id.* (quoting *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998)).

tion of paternity conclusive would help “deter parents from dissolving their parental bonds for financial or other self-serving reasons.”²³⁷

The majority concluded its *res judicata* analysis by holding that because the appellant failed to contest the issue of paternity during the divorce, it was decided in the divorce decree.²³⁸ The doctrine of *res judicata*, therefore, applied.²³⁹

b. Arkansas Rule of Civil Procedure 60

The majority recognized, but disagreed with, the appellant’s argument that the alleged fraud committed by the appellee excused him from the finding of paternity in the divorce decree.²⁴⁰ The appellant argued that, pursuant to Arkansas Civil Procedure Rule 60,²⁴¹ he was entitled to relief and cited *Dickson v. Fletcher*²⁴² to support this proposition.²⁴³ The *Dickson* case involved a husband who failed to disclose his ownership of securities in his discovery responses during his divorce.²⁴⁴ The Arkansas Supreme Court, therefore, applied Rule 60(c)(4) and allowed modification of the divorce decree to include the division of such property.²⁴⁵

The appellant argued that, like the appellant in *Dickson*, the court should allow him the opportunity to modify his divorce decree because the appellee had committed fraud.²⁴⁶ The majority, however, refused to apply the reasoning of *Dickson* to the present case because of public policy concerns.²⁴⁷ They reasoned that “the public policy against the bastardization of a sixteen-year-old child is not analogous to the intentional concealment of marital property.”²⁴⁸ The majority, therefore, concluded that Rule 60(c)(4) could not be used to modify a divorce decree under the facts of the case at bar.²⁴⁹

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. ARK. R. CIV. P. 60(c)(4) provides the following:

(c) The court in which a judgment . . . has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of the judgment with the clerk of the court, to vacate or modify such judgment or order: (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

242. 361 Ark. 244, 206 S.W.3d 229 (2005).

243. *Martin*, 2007 WL 1447911, at *5.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Martin*, 2007 WL 1447911, *5.

c. Act 1736 of 2001

The majority began its analysis of Act 1736 by illustrating how it had addressed the prior version of Arkansas Code section 9-10-115 in *Williams*.²⁵⁰ In *Williams*, the Arkansas Supreme Court noted that it previously held in *Littles v. Flemings*²⁵¹ that a father was entitled to relief from child support after DNA testing proved he was not the child's biological father.²⁵² The majority further quoted its language from *Williams* in order to make a distinction between judicial findings of paternity and presumptions of paternity in divorce decrees.²⁵³ The court in *Williams* held that section 9-10-115 was part of the Paternity Code and was not intended to extend to divorce decrees.²⁵⁴ Furthermore, in *Williams*, the court reasoned that, in the latter situation, there was a marriage; therefore, a parent-child relationship had already been established.²⁵⁵

The majority then acknowledged Act 1736 of 2001, which declares when a paternity test can be administered and the effects thereof.²⁵⁶ The General Assembly passed the Act after the Arkansas Supreme Court's decision in *Williams*.²⁵⁷ The majority recognized, but disagreed with, the appellant's argument that *Williams* had been abrogated by Act 1736 of 2001.²⁵⁸ The appellant argued that Act 1736 allowed for any man to challenge the paternity of a child, including those doing so in the context of a divorce pro-

250. *Id.*

251. 333 Ark. 476, 970 S.W.2d 259 (1998).

252. *Martin*, 2007 WL 1447911, at *5. It is important to note that in *Littles* the putative father had been adjudicated as the father in a previous paternity suit. *Littles v. Flemings*, 333 Ark. 476, 478, 970 S.W.2d 259, 260-61 (1998).

253. *Martin*, 2007 WL 1447911, at *6.

254. *Id.*

255. *Id.*

256. Act 1736 amended ARK. CODE ANN. § 9-10-115 to include the following relevant provisions:

(e)(1)(A) When *any man* has been adjudicated to be the father of a child or is deemed to be the father of a child pursuant to an acknowledgment of paternity without the benefit of scientific testing for paternity and as a result was ordered to pay child support, he shall be entitled to one (1) paternity test, pursuant to § 9-10-108, at any time during the period of time that he is required to pay child support upon the filing of a motion challenging the adjudication or acknowledgment of paternity in a court of competent jurisdiction.

(f)(1) If the test administered under subdivision (e)(1)(A) of this section excludes the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity as the biological father of the child and the court so finds, the court shall set aside the previous finding or establishment of paternity and relieve him of any future obligations of support as of the date of the finding.

ARK. CODE ANN. § 9-10-115(e)(1)(A), (f)(1) (LEXIS Repl. 2002) (emphasis added).

257. *Martin*, 2007 WL 1447911, at *6.

258. *Id.*

ceeding and allowed him to have his support obligations terminated if scientific testing excluded him as the biological father.²⁵⁹

The majority addressed the basic rules of statutory construction and pointed out that effect must be given to the intent of the General Assembly.²⁶⁰ After a review of the language of Act 1736 of 2001, the majority noted that it was not persuaded that the General Assembly intended to overrule *Williams*.²⁶¹ The court reasoned that even though the statute was amended, it was part of the Paternity Code, and despite the distinction made by the *Williams* court regarding the difference between “adjudicated father” under the paternity code and “adjudicated father” under divorce decrees, the legislature did not enact legislation outside of the Paternity Code.²⁶² The majority further pointed out that “the legislature is presumed to know the decisions of the supreme court, and it will not be presumed in construing a statute that the legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language.”²⁶³ The majority concluded that Act 1736 of 2001 did not abrogate *Williams*, and subsequent amendments to Arkansas Code section 9-10-115 did not apply to a paternity determination arising as a matter of presumption under a divorce decree.²⁶⁴

2. *Justice Brown’s Dissenting Opinion*

Justice Brown, in his dissent, criticized the majority’s reading of Arkansas Code section 9-10-115, as amended in 2001, and argued that the section should apply to any man adjudicated to be the father of a minor child.²⁶⁵ Justice Brown cited *McCormac v. McCormac*²⁶⁶ to show that the Arkansas Supreme Court had previously held that a divorce decree qualifies as an adjudication of paternity.²⁶⁷ Justice Brown also argued that the General Assembly’s insertion of the words “any man” into the statute was unambiguous and clearly an attempt to extend the Paternity Code’s applicability to divorce decrees.²⁶⁸ Justice Brown added that the distinction made by the majority “flies in the face of the clear and exact language of Act 1736.”²⁶⁹

259. *Id.* at *5.

260. *Id.* at *6.

261. *Id.*

262. *Id.* at *7.

263. *Martin*, 2007 WL 1447911, at *7.

264. *Id.*

265. *Id.* at *7 (Brown, J., dissenting).

266. 304 Ark. 89, 799 S.W.2d 806 (1990).

267. *Martin*, 2007 WL 1447911, at *8 (Brown, J., dissenting).

268. *Id.*

269. *Id.*

Justice Brown further noted that because Act 1736 extended the time frame for challenging a paternity adjudication to anytime during which the father is required to pay child support, the appellant fell under the statute because he was still required to pay child support at the time he challenged his paternity.²⁷⁰ For the above stated reasons, Justice Brown concluded that the language in Act 1736 was intended to encompass divorce decrees and stated that both the circuit court and majority erred in dismissing the appellant's challenge to the child support obligation.²⁷¹

IV. ANALYSIS

The following section discusses the majority's emphasis in *Martin v. Pierce* on the established parent-child relationship in making its decision not to allow paternity disestablishment or child support termination. Based on the particular facts of this case, public policy dictated strict adherence to res judicata in favor of the best interest of the child. *Martin* leaves unanswered, however, the question of how Arkansas would resolve the issue of paternity disestablishment when public policy does not dictate such a rigid application of res judicata. To resolve the conflicting interests that evolve from this issue, this note proposes mandatory paternity testing at the child's birth.

"The most important legal determination affecting children is the legal definition of parenthood and the lines of responsibility that connect parents and children."²⁷² In *Martin*, the Arkansas Supreme Court valued an established parent-child relationship as something more than shared DNA and concluded that a continued relationship was in the child's best interest.²⁷³ A man who functioned as a child's father for a number of years is every bit as much a parent as a man who is biologically related to a child.

When balancing the best interests of fathers and children, the Arkansas Supreme Court was correct to strike the balance in favor of the best interest of the children. Any other decision of the Arkansas Supreme Court would have rendered a sixteen-year-old child illegitimate and without support from the only father C.M. had ever known. This was not a situation in which another man was asserting paternity of the child, but one which would have left C.M. with no father at all.

The majority in *Martin* relied heavily on the public policy concerns discussed by the Vermont Supreme Court in *Godin v. Godin*.²⁷⁴ *Godin* is similar to *Martin* in that both fathers sought to render a child illegitimate

270. *Id.*

271. *Id.* at *9.

272. Naomi Cahn & June Carbone, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1014 (2003).

273. *Martin*, 2007 WL 1447911, at *3-6.

274. 725 A.2d 904 (Vt. 1998). See also *supra* note 93 and accompanying text.

after several years of a parent-child relationship. Both children faced the possibility of being abandoned by the only fathers they had ever known. The majority's reliance on *Godin* was well placed, and Arkansas should continue to follow this line of reasoning in situations in which a child is facing bastardization after several years of an established parent-child relationship.

Although the father obviously suffers by either being forced to continue paying child support or providing for the child's needs, the child is the true victim in this situation. This does not mean that a presumed father's interest in "ascertaining the genetic 'truth' of a child's origins"²⁷⁵ is irrelevant, but, instead, that it is outweighed by the best interest of the child.

A. Psychological Importance of Fathers

It is often asserted that children do best when raised in a two-parent household.²⁷⁶ Unfortunately, it is impossible for all children to be raised by both parents in a marital union. Thus, the law must articulate ways to protect children who are the product of a divorce and who might find themselves without a father present in their lives.

Psychological studies show the negative effects on children when a parent disappears from their life.²⁷⁷ These studies show that a child who feels abandoned by his or her father "may exhibit confusion, depression, an inability to get along with others, withdrawal, difficulty in school, and eventual sexual problems."²⁷⁸ Thus, a child needs to have an established relationship with both parents who share the responsibility and concern for the child's well-being.²⁷⁹ Even when the father's presence is scarce, the child still needs and uses his or her father.²⁸⁰

The withdrawal of a father from a child's life can have devastating effects, and the Arkansas Supreme Court was correct to avert those effects. The law must do what is best for the child, despite any inconvenience forced upon the presumed father. An established parent-child relationship should not be destroyed because they do not share the same DNA; "[p]arenting,

275. *Godin*, 725 A.2d at 910.

276. Sheila F. G. Schwartz, *Toward a Presumption of Joint Custody*, 18 FAM. L.Q. 225, 230 (1984).

277. Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 6-8 (2004).

278. Schwartz, *supra* note 276, at 230.

279. *Id.* at 232.

280. *Id.* "Even in these proof relationships the father's presence kept the child from worrying about abandonment and total rejection and the nagging self-doubts which followed. The father also provided a presence, however limited, which diminished the child's sense of vulnerability and aloneness, and total dependency on one parent." *Id.* at 232-33.

once undertaken, is or should be a lifetime responsibility.”²⁸¹ When a parent-child relationship has been established, as in *Martin*, “genes should not define fatherhood,”²⁸² and the law should not penalize children for the actions of their mothers.²⁸³ The majority in *Martin*, therefore, was correct to protect the stability of the family unit by requiring Martin to continue his relationship with the child.

B. Weaknesses of a Strict Application of Res Judicata in All Paternity Determinations

The court draws a distinction between an acknowledgment of paternity under the Paternity Code and an acknowledgment of paternity in a divorce decree.²⁸⁴ The majority rests this distinction on the fact that, in the latter situation, “children have known the husbands as their fathers.”²⁸⁵ A parental relationship, therefore, has been established and the stability of the family unit is at issue.²⁸⁶ The court emphasizes that “this distinction lies at the heart of the disparate treatment accorded scientific testing after a finding of paternity under the Paternity Code and scientific testing which occurs after a divorce decree under our caselaw.”²⁸⁷

Based on the circumstances in *Martin*, the court rested its decision solely on the grounds of public policy. But what happens when the circumstances do not dictate such a strict application of res judicata to paternity determinations? Consider the following situation.

281. Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 324 (2004).

282. Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 134 (2003).

283. Rather than focusing on the injustice forced upon them, adjudicated fathers should instead focus on the lifelong relationships they could have with these children. Unfortunately this does not seem to be the trend. For example, after biological tests showed no DNA match between a father and his six-year-old twins the father commented, “[t]he anger grows and grows, and it just keeps chipping away at your love for those children.” Julie Rawe, *Duped Dads Fight Back*, TIME, Jan. 19, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1580398-1,00.html>. Or consider a man who has centered his life around battling paternity fraud rather than focusing on his relationship with his fourteen-year-old daughter. Patrick McCarthy was unsuccessful in terminating his legal obligations to his fourteen-year-old daughter after learning that he was not the biological father. As a result, McCarthy formed an organization “that recently paid \$50,000 for nine billboards along highways that show a pregnant woman and reads ‘Is It Yours? If Not, You Still Have to Pay!’” Jacobs, *supra* note 31, at 195.

284. *Martin v. Pierce*, No. 06-950, 2007 WL 1447911, at *6 (Ark. May 17, 2007).

285. *Id.*

286. *Id.*

287. *Id.*

What if a child is born during the marriage and the parents divorce two months later? The divorce decree states that a child was born of the marriage, and the court awards custody, orders child support, and sets visitation. Suppose that three months after the decree is entered, the presumed father learns that he is not the child's biological father. In addition, the child's biological father, who is more financially stable than the putative father, is identified and willing to raise the child. If the putative father requests a DNA test and asks that all child support obligations be terminated, would the Arkansas Supreme Court come to the same conclusion as it did in *Martin*? Would Arkansas courts still require the putative father to continue to pay child support for a nonbiological child, even though public policy no longer dictates such a result? Based on the court's decision in *Martin* and subsequent Arkansas decisions, the answer appears to be "yes."

The public policy concerns, however, no longer dictate such a strong adherence to *res judicata* in the preceding hypothetical. In contrast to *Martin*, no parent-child relationship has yet been established, and there is no risk of the child being rendered illegitimate. In the previous hypothetical, the child even has the possibility of being supported by someone who is more financially stable than the putative father. Forcing the nonbiological father to continue paying child support for a child with whom he has no parental relationship is unfair when the concerns for the best interest of the child are no longer present.

So where should the courts draw the line? When has a parent-child relationship been established? At what age will the courts consider it to be in the best interest of the child for a nonbiological father to continue to pay child support? *Martin v. Pierce* leaves these questions unanswered. In *Martin*, public policy outweighed any inconvenience forced upon the father by having to continue to pay child support for a child that was not his, but, as illustrated in the previous hypothetical, that will not always be the case.

C. Mandatory Paternity Testing as a Solution

As a solution to this problem, the law should require mandatory paternity determination at birth.²⁸⁸ Biological testing should be made a routine part of the birth process, and then doubts regarding biological certainty would be resolved at the beginning of the parent-child relationship rather than later.²⁸⁹

288. "Fathers are more likely to remain committed to their children if they are either certain of paternity, or they have, with or without the formality of adoption, knowingly accepted responsibility for someone else's child." Cahn & Carbone, *supra* note 272, at 1067.

289. *Id.* at 1067.

Men, however, should be allowed to waive testing. But if a man waives DNA testing at the time of the child's birth, he will do so with the knowledge that he will be estopped from subsequent challenges to paternity.²⁹⁰ In order to receive recognition as the father, however, the husband "should be required to acknowledge the possibility that he is not a biological parent, and that he is nonetheless assuming the full responsibilities and obligations of parenthood."²⁹¹ Later, therefore, a man cannot disclaim responsibility for a child for whom he has functioned as a father.²⁹²

This solution promotes stability for the child and "impose[s] legal obligations on those who self-identify through voluntary acknowledgments or paternity testing at the time of a child's birth."²⁹³ Similarly, this proposal will deter fraud and eliminate the possibility that a man will have to unwillingly continue to pay child support for a child that is not biologically his. Courts will continue to face similar conflicts in the future as more paternity disputes arise, and mandatory paternity testing at birth will eliminate these conflicts by effectively taking into account the perspective of both the father and the child.

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290. *Id.* at 1068.

291. *Id.* "Present law draws a clear distinction between married men, who are presumed on the basis of marriage to be fathers, and unmarried men, who must hold out a child as their own. The distinctions between married and unmarried men should largely be eliminated, and both should be subject" to this set of rules. *Id.* at 1067.

292. Similarly, a mother should be required to join in the acknowledgement of paternity so that she cannot contest paternity in the event she realizes that someone else fathered the child. Both parties, therefore, "signing such a declaration without paternity testing would then be estopped from later challenging the parental status established through the declaration." *Id.* at 1068.

293. *Id.* at 1069. This proposal is controversial, in part, because mandatory paternity testing at birth may break up a number of marriages. The court's focus, however, should be on the child's need for secure parental relationships.

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