
YOU ARE NOT THE FATHER: HOW STATE PATERNITY LAWS PROTECT (AND FAIL TO PROTECT) THE BEST INTERESTS OF CHILDREN

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I. INTRODUCTION

On February 8, 2007, Anna Nicole Smith, a model and former Playboy Playmate, died.¹ She left behind an infant daughter, and at least two different men quickly claimed paternity in hopes of taking part in the multi-million-dollar inheritance that the baby will receive one day.² Further complicating the matter, one potential father of Smith’s baby claimed he was Smith’s husband and had raised the baby as his own since her mother’s death.³

Despite the incredible media spectacle surrounding Smith’s death and her child’s questioned paternity, the issue raised is hardly unique in modern America.⁴ A recent report noted that the number of DNA tests ordered to determine paternity has more than quadrupled during the past twenty years.⁵ As relationships between mothers and fathers become less permanent, questions of paternity occur more frequently, increasing the need for legal adjudication of the issue.⁶

1. See, e.g., Suzette Laboy, *Sudden, Early End to a Tabloid Life: Anna Nicole Smith Dies at 39 in Florida*, N.J. REC., Feb. 9, 2007, at A8.

2. See John Hayes, *Anna Nicole Smith Dies at 39: Implausible Life of Celebrity Ends with Collapse in Florida Hotel*, PITTSBURG POST-GAZETTE, Feb. 9, 2007, at A1 (reporting that despite Howard K. Stern’s name on the girl’s birth certificate, at least one other man claimed paternity, and also suggesting that the baby’s large inheritance drove the men’s frenzy to claim her as theirs).

3. See Robert Nolin, *A Showgirl and Her Demons*, HERALD SUN (Austl.), Feb. 10, 2007, at 4 (adding that Stern and Smith exchanged vows and publicly expressed their commitment to each other during a ceremony, although it was not legally binding).

4. See Kathryn Masterson, *Growth of Paternity Tests Sires Tricky Societal Issues*, CHI. TRIB., Mar. 18, 2007, at 1 (describing the more than two-fold increase in DNA tests between 1994 and 2004, and implying that more frequent paternity disputes contributed to the increasing number of DNA tests).

5. See Gail Rosenblum, *Paternity Tests Not Just for Rich, Famous*, ALBANY TIMES UNION, Mar. 25, 2007, at G5 (mentioning that men order the tests both to prove and disprove paternity).

6. See Hannah Davies, *Now More Men Ask, Who’s The Daddy?*, LEICESTER MERCURY (Eng.), June 21, 2005, at 3 (arguing that paternity is questioned more commonly because relationships between men and women have become more unstable and temporary).

This Comment argues that state paternity laws frequently fail to act in children's best interests because they permit excessive judicial discretion, avoid compulsory lists of factors, and allow dual paternity. Part II details the history of the "best interests of the child" standard, the British origins of American paternity law, and current approaches to regulating fatherhood in the United Kingdom, California, and Louisiana. Part III argues that excessive judicial discretion, a lack of compulsory factors to consider, and dual paternity fail to protect children's interests. Part IV compiles lessons learned from the states and the United Kingdom to recommend that state policy should include a clear presumption of paternity and that judges should evaluate cases more carefully. Part V concludes that states can best protect children's interests by updating their laws' clarity.

II. BACKGROUND

A. Introduction to Family Law, the "Best Interests of the Child" Standard, and Paternity Presumptions

Family law cases involving children operate under a single guiding principle: children's well-being is the paramount concern in any judge's decision.⁷ Because family law falls under the control of the states, and not the federal government, states and courts articulate the standard differently.⁸ Like the best interests standard, laws governing unwed fathers' rights originated in the British legal system and initially developed out of the need to shield children from the legal and social consequences of their parents' indiscretions.⁹ Many years later, legal scholars developed the Uniform Parentage Act ("UPA") to guide state legislatures, encourage uniformity of outcomes in parentage cases, and better protect the interests of children.¹⁰

7. See *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989) (adding that courts sometimes appoint psychologists to determine what constitutes acting in a child's best interests).

8. See Masterson, *supra* note 4, at 1 (citing the confusing "legal thicket" of paternity laws that has resulted from widely variant state procedures governing how to contest paternity).

9. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 197, 218 (UNC Press 1985) (citing the consequences of naming a child a "bastard," including social ostracism and denial of legal benefits like inheritance rights).

10. See UNIF. PARENTAGE ACT prefatory note (2002) (implying that concern over children's suffering, when states deem them illegitimate, motivated the committee to modify the UPA).

1. *The “Best Interests of the Child” Standard*

The “best interests of the child” doctrine requires that courts rule in whatever manner best advances the child’s position.¹¹ Despite the relatively straight-forward definition, the standard varies widely depending on the state in which the family law case is brought and which judge hears the case.¹²

American courts have used the best interests standard since at least 1815, when the Pennsylvania Supreme Court held in *Commonwealth v. Addicks* that two children should remain with their mother after her divorce because they would fare best under her care.¹³ However, early American courts faced conflicting concerns; although they wanted to protect children’s needs, they also hesitated to override fathers’ wishes when they advocated for custody.¹⁴ Increasing rights for women further illuminated the gender implications of such concerns.¹⁵

2. *History of Fatherhood Presumptions*

Family law is rooted in the British system, and therefore an examination of paternity presumptions properly begins in the United Kingdom.¹⁶ Historically, British law included a legitimacy presumption that was exceedingly difficult to overcome.¹⁷ To overcome the presumption, a

11. See BLACK’S LAW DICTIONARY 170 (8th ed. 2004) (adding that courts may also consider previous relationships that men have had with the child and, if he or she is old enough, the child’s wishes).

12. Compare CONN. GEN. STAT. ANN. § 46b-59 (West 2004) (requiring a judge’s consideration of the child’s wishes if the child is of sufficient age), with HAW. REV. STAT. ANN. § 571-46(7), (9) (LexisNexis 2007) (mandating a judge to consider the presence or absence of domestic violence when assigning custody in divorce situations).

13. See 2 Serg. & Rawle 174, 174 (Pa. 1815) (admitting that given the girls’ ages of seven and ten-years old, they would be cared for best by their mother, but also berating the mother for causing the divorce by having an extramarital affair). The girls were nine and thirteen at the time of the 1815 case, but the decision allowing the mother to retain custody occurred two to three years prior. *Id.*

14. See *Prather v. Prather*, 4 S.C. Eq. (4 Des. Eq.) 33, 34 (S.C. 1809) (debating over whether the father—the children’s natural guardian—should be denied custody absent evidence of gross misconduct or abuse, because the laws of God and the country invest him with the right to raise his children).

15. See GROSSBERG, *supra* note 9, at 235, 238 (describing the conflict between a father’s historical authority over his family and the emerging acceptance of women as legally significant and distinct players in custody disputes, and connecting the debate over women’s rights with the campaign for maternal rights).

16. See Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 53 (2006) (describing how family law was one type of English law that early American courts accepted because colonists brought their legal system with them to America).

17. See GROSSBERG, *supra* note 9, at 197, 201 (implying the reason behind the strongly-rooted legitimacy presumption was the important government interest in strong families, particularly concerning costs to the public and the well-being of bastard children).

father had to demonstrate that he was outside the United Kingdom (“beyond the four seas”) for more than nine months during the time in which his wife conceived.¹⁸ However, this outcome carried different connotations than it would today, including the designation *filius nullius*, or child of no one.¹⁹ If the court found the father to have not fathered his wife’s child, the court declared that child “illegitimate” and therefore subject to harsh treatment by the government.²⁰

Fortunately, early American laws began to treat illegitimate children and their parents more compassionately than British laws, and public perception of these children softened.²¹ By the advent of DNA testing in the 1970s, illegitimate children had lost much of their historical stigma. State laws shifted their focuses toward the protection of fathers’ rights and children’s best interests, regardless of the circumstances surrounding the children’s births.²²

The case *Michael H. v. Gerald D.*, in which two California men disputed the paternity of a child, represents one key development in the establishment of legal paternity and its relation to biological determinations.²³ Justice Scalia, who wrote the Supreme Court’s majority opinion, upheld the California law that presumes that a man living with the mother at the time of a child’s birth is the child’s legal father.²⁴ Ultimately, the Court found that the mother’s husband, Gerald D., was the only person with a claim to legal fatherhood, despite convincing biological evidence that another man, Michael H., fathered the married couple’s child.²⁵

18. WILLIAM BLACKSTONE, 1 COMMENTARIES 434, 443 (requiring that the husband have no possible access to the mother to demonstrate the impossibility of his paternity).

19. See GROSSBERG, *supra* note 9, at 197, 233 (describing the downfall of the crippling *filius nullius* designation in the twentieth century, and subsequent expansion of children’s rights).

20. See *id.* (adding that a bastard child could not obtain the same legal relations of inheritance, maintenance, and custody with his or her parents as legitimate children, and that illicit couples had no rights regarding their illegitimate children).

21. See *Hartwell v. Jackson*, 7 Tex. 576, 578 (1852) (holding that children’s rights are independent of their status as bastards or legitimate offspring of married parents because they are unaware of the crime that their parents committed).

22. See GROSSBERG, *supra* note 9, at 231 (describing a typical incarnation of a state’s illegitimacy laws as safeguarding against blackmail and protecting paternal rights).

23. See 491 U.S. 110, 115 (1989) (detailing the issue at hand as relating to the California presumption that a child born to a woman who is living with her husband at the time of birth is the product of that marriage and therefore the offspring of the husband).

24. See *id.* at 131 (reasoning that although an adult contesting parentage already has caused a disruption in family stability, allowing the child to bring an illegitimacy claim would disrupt the family more).

25. See Adam K. Ake, *Unequal Rights: The Fourteenth Amendment and De Facto Parentage*, 81 WASH. L. REV. 787, 798 (2006) (implying that *Michael H.* effectively ruled that unless fathers are married to their biological child’s mother, they cannot

3. *The Uniform Parentage Act*

Another key development in paternity law was an attempt to promote equality for all children, regardless of their parents' marital status, through the creation of the Uniform Parentage Act ("UPA").²⁶ The UPA is a model statute originally developed in 1973 by the National Conference of Commissioners on Uniform State Laws and reworked in 2000 to reflect changes in society.²⁷ Many states have adopted the UPA, incorporating some or all of its guidelines into their existing family law statutes.²⁸

Originally, scholars created the UPA because the Supreme Court declared many state paternity laws unconstitutional.²⁹ Of those allowed to remain, state laws governing paternity differed dramatically in their treatment of legitimate and illegitimate children.³⁰ The original UPA also introduced the description "child with no father," in an attempt to encourage a more enlightened approach to such children.³¹

B. Approaches to Regulating Unwed Fathers' Legal Status in the United Kingdom, California, and Louisiana

1. The United Kingdom

The United Kingdom has moved far beyond its original presumptions of legitimacy and into a body of law more grounded in the reality of family situations.³² In particular, the influential Children Act 1989 represented the drastic changes in how the United Kingdom handled increasingly complex family situations.³³ The Act introduces the concept of parental

petition for elevated status in the eyes of the court).

26. See UNIF. PARENTAGE ACT prefatory note (2002) (stating the UPA's original purpose to protect the equality of all children regardless of parental status and eliminating the use of the term "illegitimate").

27. See *id.* (citing significant scientific advances in genetic testing as a reason to update the UPA, and expressing hope that the new UPA will better address modern families' situations).

28. See Veronica Sue Gunderson, *Personal Responsibility In Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 340 (2007) (noting that as of the summer of 2007, eighteen states had adopted the original UPA: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming).

29. See UNIF. PARENTAGE ACT prefatory note (2002).

30. See *id.* (justifying the need for a uniform act because the idea of legal equality for all children was revolutionary at the time).

31. See *id.*

32. See Liz Trinder & Michael E. Lamb, *Measuring Up? The Relationship Between Correlates of Children's Adjustment and Both Family Law and Policy in England*, 65 LA. L. REV. 1509, 1524 (2005) (describing the foundation of the Children Act 1989 as resting on principles of child psychology).

33. See N.V. Lowe, *The Allocation of Parental Rights and Responsibilities—The*

responsibility for children and automatically assigns responsibility to unmarried fathers who jointly register a child's birth with the mother.³⁴ It also reflected the country's strong disinclination for the courts to intervene in family matters unless absolutely necessary and preference that families resolve their disputes without the court's input.³⁵ The Children Act 1989, as amended in 2002 by the Adoption and Children Act, details ways in which an unmarried father can establish himself as his child's legal parent, such as through a responsibility order.³⁶ These methods, however, have limitations: a responsibility order, for example, exists only to grant a father responsibility when he seeks it and can be taken away by the courts at their discretion.³⁷

2. California

The complexity of California's parentage laws lies in overlapping conclusive and rebuttable presumptions of paternity; moreover, even the conclusive presumption is rebuttable to an extent.³⁸ The conclusive presumption states that the child of a married woman living with her husband—who is not impotent or sterile—is the husband's child.³⁹ A number of people, however, can use blood tests to disprove this conclusive presumption, including the mother's husband, a man who is a presumed father under the rebuttable presumption, or the birth mother herself.⁴⁰

Position in England and Wales, 39 FAM. L.Q. 267, 267 (2005) (citing, as an example of the significant effect the Children Act 1989 had on English law, the replacement of the ad hoc approach to family law with a cohesive, well-organized approach capable of encouraging uniformity).

34. See Trinder & Lamb, *supra* note 32, at 1524 (highlighting the importance of children's relationships with both parents as the reason behind the emphasis on both parents' responsibility).

35. See *id.* at 1525 (citing potential harm to children as a situation in which courts could intervene).

36. See Lowe, *supra* note 33, at 270 (noting that, to establish paternity, a father can: (1) register himself as the father (with the mother's permission), (2) enter into a formal parental responsibility agreement with the mother, (3) receive a court-created parental responsibility order in his favor, or (4) receive a court-created residence order in his favor).

37. See *id.* at 271.

38. See Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 639 n.5 (2003) (observing that the presumed father, the child's mother, and the presumed father under section 7611 may rebut the so-called conclusive presumption; furthermore, even a biological father may not rebut the presumption unless he is also a presumed father); see also CAL. FAM. CODE § 7540 (West 2004) (stating that unless a mother's husband is impotent or sterile, he is her child's legal father).

39. See CAL. FAM. CODE § 7540 (noting that the presumption does not violate the rights of the biological father).

40. See Miller, *supra* note 38, at 644 (adding that a child's biological unwed father, who never had the opportunity to raise the child, would be unable to rebut the

California's rebuttable presumption, modeled on the UPA, states that a court presumes that a man is the biological father of a child if: (1) the man and the natural mother are or were married, and the child was born either during their marriage or within three-hundred days after they divorced; (2) the man married or attempted unsuccessfully to marry the child's mother before or after the child's birth, and he is named the child's father on the birth certificate voluntarily or is obligated by the court to pay child support; or (3) the man raises the child in his home and holds the child out to society as his own.⁴¹ The law also cites loose guidelines for which presumption controls if two or more presumptions conflict.⁴²

Likewise, the comparable section in the UPA (2000) presumes a man to be the father if: (1) he is married to the mother at the time of the child's birth, (2) the child was born within three-hundred days after the man's marriage to the child's mother ended, (3) the man and the mother attempted to marry before the child's birth, or (4) the man married the child's mother after the child's birth and voluntarily asserted paternity.⁴³ California's legislature modeled the rebuttable presumptions after those found in the UPA, although notably lacking a time frame for how long a man must claim a child as his own in order for him to become a presumed father.⁴⁴

3. Louisiana

Demonstrating a different approach to updating parentage laws in light of changing times, Louisiana recently became the first state to allow children to have two legal fathers.⁴⁵ In *Smith v. Cole*, the Louisiana

presumption).

41. See *id.* at 650-51 (adding that the reasoning behind these restrictions is the need to perpetuate the parent-child relationship, which imposes rights and obligations on parents).

42. See CAL. FAM. CODE § 7612(b) (favoring the presumption that is "grounded on the weightier considerations of policy and logic" as the controlling presumption).

43. See UNIF. PARENTAGE ACT § 204 cmt. (2002) (citing similarities between UPA (2000) and UPA (1973) on this point, but also noting that UPA (2000) does not include a presumption of paternity for the man who holds a child out as his own).

44. Compare CAL. FAM. CODE § 7611(d) (requiring only that a man hold the child out as his own and in his home, but not specifying a length of time for which the child must live with him), with UNIF. PARENTAGE ACT, § 204 cmt. (explaining the reasons for including a time frame as: (1) clarifying confusion caused by UPA (1973), which lacked a time frame and could have been interpreted in widely variant ways; and (2) matching a similar requirement for married men in order to ensure equal treatment of married and unmarried couples' children).

45. See, e.g., *Geen v. Geen*, 666 So. 2d 1192, 1197 (La. Ct. App. 1995) (awarding two men paternity rights, although the mother's ex-husband, the legal father, was awarded domiciliary custody of the child and the mother's current husband, with whom the mother had an affair and who was the child's biological father, received visitation privileges); see also Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 853 (2006) (describing Louisiana's policy of allowing both biological and "social" fathers to have simultaneous legal rights to raise a child, although technically one father is named the primary caregiver and the other

Supreme Court held that courts may presume a child's mother's husband to be the child's legal father, while courts may also recognize the biological father as the child's actual father.⁴⁶ Dual paternity allows for the court to assign one father parental rights at birth and to assign a second man similar rights if DNA tests prove his paternity.⁴⁷ Moreover, Louisiana requires in such cases that both legal fathers support their child financially.⁴⁸ The *Smith* court cited the unfairness in permitting a biological father to escape his child support obligations simply because another man had raised the child and therefore became the child's legal father.⁴⁹ Louisiana's approach reflects how America's definition of what constitutes a family has adapted beyond a traditional two-parent household.⁵⁰

III. ANALYSIS

A. *State Laws on Paternity Should Respond to Evolving Family Structures*

States that properly follow the best interests standard reasonably modify their laws and practices to reflect new types of family arrangements, while other states fail to consider the interests of children by retaining outdated laws and practices.⁵¹ Although states must guard against dramatically changing their laws at the slightest shift in societal circumstances, they fail to adequately protect children's best interests if they do not ensure that their laws accurately reflect the current composition of their citizens' families.⁵²

holds a less substantial role in the eyes of the court).

46. 553 So. 2d 847, 854-55 (La. 1989) (adding that unless the mother's husband challenges the court's decision, he will become the child's legal father).

47. *See id.* (stating the potential benefits in having fathers who serve different roles in a child's life, such as the benefit obtained when a genetic father can educate his child about his or her family history and the benefit obtained when a social father actively and enthusiastically parents a child).

48. *See id.* at 854 (holding that even though the biological father shares responsibility for a child with another man, the biological father is not exempted from his support obligations).

49. *Id.* (specifying the child's financial necessity in this case as the reason for the unfair requirement that both men pay child support).

50. *See, e.g.,* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996) (listing potential modern family arrangements as including biological parents, adoptive parents, homosexual couples, grandparents, and step-parents).

51. *See* Miller, *supra* note 38, at 638 (arguing that California's parentage laws are outdated because they have not evolved beyond their roots in a time when it was impossible to determine parentage with scientific certainty); *see also* Jacobs, *supra* note 45, at 813, 853 (asserting that when courts strictly adhere to a two-parent paradigm, they exclude the less traditional types of families that are increasingly common). Louisiana represents a positive example of a state that changed its laws when society's "typical family" changed. *Id.*

52. *See* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis:*

1. By Awarding Judges Excessive Discretion or Allowing Them to Take No Action in Paternity Disputes, Some Legislatures Fail to Properly Consider Children's Best Interests

By permitting judges to opt out of deciding paternity disputes at their discretion, some legislatures fail to apply the best interests standard and therefore fail to adequately protect children involved in disputes.⁵³ The United Kingdom drafted the Children Act 1989 under the strong preference that families resolve their difficulties without a court's interference whenever possible.⁵⁴ In practice, however, the United Kingdom's preference for non-intervention results in devoting a small amount of time to a particular child's case, which contradicts the stated objective of the Children Act 1989 to serve the interests of every child as comprehensively as possible.⁵⁵ While the policy of discouraging court intervention might encourage parents to resolve their personal difficulties independently and without the court's opinion, courts that fail to intervene in a paternity dispute ignore the best interests standard.⁵⁶ Just as parental conflict harms children by distracting a parent and diverting his attention away from his child, devoting a miniscule amount of time to each child's situation in a paternity dispute is inconsistent with maintaining the interests of that child as paramount because children's needs can be overlooked.⁵⁷

Furthermore, unlike situations in which parties actively seek out and receive court intervention in resolving disputes, the United Kingdom's non-intervention policy amounts to a denial of parties' requests for court assistance.⁵⁸ By instigating a civil motion to resolve a paternity dispute, parties demonstrate that they want courts to make a decision regarding the

Putting Law School Into Practice, 29 STETSON L. REV. 1193, 1196 (2000) (implying that up-to-date laws are more useful than outdated laws).

53. *See In re S*, [2002] UKHL 10, [2002] 2 A.C. 291, 304 (H.L.) (appeal taken from Eng.) (reiterating the principle that courts should not intervene into family matters unless absolutely necessary to prevent harm to children).

54. *See id.* at 292 (referencing the "cardinal principle" that while local authorities are occasionally permitted to intervene in family matters, courts may not pass judgment on local authorities' decisions unless failing to do so would clearly harm children).

55. *See Trinder & Lamb, supra* note 32, at 1525 (citing study results finding that the vast majority of district judges spent five minutes or less reading an entire family law case file, and in only one out of nearly four-hundred cases did the court exercise the powers granted to it by the Children Act by ordering a welfare report).

56. *See id.* at 1525-26.

57. *See id.* at 1513 (describing the harm that befalls children when their parents are in conflict with one another, particularly aggression and behavior problems).

58. *Compare Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (suggesting that courts be made available to parties who, if they desire court interference, actively seek their assistance in resolving discriminatory situations), *with Lancashire CC v. B.* (2000) 2 W.L.R. 590, 591-92 (H.L.) (Eng.) (noting the minimum circumstances that must be present in a family law case for a court to even contemplate intervention and implying a strong preference for non-intervention in family situations).

familial situation that would most benefit their children.⁵⁹ United Kingdom judges who refrain from hearing paternity cases, therefore, fail to serve the best interests of the children involved in the disputes because they leave the family in the same situation it was in when it initially sought court assistance.⁶⁰

Furthermore, the U.K. legislature forces courts and local judicial authorities to place considerable weight on the parents' wishes when determining what constitutes the best interests of a child, while simultaneously acknowledging that conflicts created by the parents often cause the family to turn to courts in the first place.⁶¹ This inconsistency demonstrates the United Kingdom's failure to properly consider children's best interests by affording judges great discretion in determining whether to intervene in family matters and by allowing them to consider a parent's unreasonable wishes to the potential detriment of children involved in paternity disputes.⁶²

On the opposite end of the spectrum of court involvement in family matters, California's statutes create a convoluted, confusing, and expansive role for the courts.⁶³ The mixture of overlapping conclusive and rebuttable presumptions muddles the role that courts should play.⁶⁴ If a court adheres to the conclusive presumption, the court is not able to use wide discretion in determining parentage because it is required to name one man as the father. This was demonstrated in *In re Elijah V.*, where the appellate court held that the trial court erred in ordering blood tests because it should have

59. See generally *Mason v. Fuelburg*, No. H-06-2424, 2007 WL 2220965, at *2 (S.D. Tex. July 31, 2007) (implying that parties enter into civil suits in order to receive a judgment from the courts regarding which outcome the court believes is preferable).

60. See *Martin v. Saint Mary's Dep't Soc. Servs.*, 346 F.3d 502, 506 (4th Cir. 2003) (suggesting that courts try to improve familial situations when troubled families enter the legal system).

61. See *Regina (G) v. Barnet London Borough Council*, [2003] UKHL 57, [2004] 2 A.C. 208, 214.

62. See *In re L*, [2001] 2 W.L.R. 339, 359 (A.C.) (appeal taken from Eng.) (U.K.) (recognizing the tremendous impact that a parent's wishes have upon a judge when determining what constitutes the best interests of a child, even if that parent does not want her child to receive a helpful service, such as a psychiatric evaluation).

63. Compare David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 139-40 (2006) (stating California's requirement that when presumptions conflict, judges must apply the one holding the weightier considerations of policy and logic, and subsequently arguing that this drastically expands the court's role), with Miller, *supra* note 38, at 638-39 (describing the confusion resulting from the fact that the conclusive presumption of paternity is actually rebuttable and implying that this confusion leads to varying interpretations of the judiciary's role).

64. See Miller, *supra* note 38, at 642 (arguing that California family law has been characterized by uncertainty, the need for judges to fill in legal gaps left by that uncertainty, and criteria for determining who ought to be a parent that are difficult for courts to implement).

applied the conclusive presumption, which would have provided the answer to the paternity question without requiring biological proof.⁶⁵ Accordingly, absent evidence of a genetic link, courts are bound by the presumption to name the mother's husband as the legal father of her child.⁶⁶

On the other hand, if a court adheres to the rebuttable presumption modeled on the UPA, it has greater leeway in ascertaining the legal father because it can choose to accept or reject offered evidence of paternity.⁶⁷ Statutory presumptions exist to guide judges' rulings, and herein lies the flaw in California's system of weighing conflicting presumptions: judges are utilizing a vague standard to weigh which presumption they think the legislature intended them to use.⁶⁸ This creates a conflict in the checks and balances system and obscures the purpose of statutory presumptions.⁶⁹ Furthermore, California judges can now utilize great discretion when choosing who to award custody by examining a variety of relevant factors, such as quality of care-giving and marital status, instead of by adhering to a statutory presumption.⁷⁰

For example, the case of *Steven W. v. Matthew S.*—in which one man, Matthew, was presumed conclusively to be a child's father and another man, Steven, was presumed rebuttably to have fathered the child—illustrates the great discretion that judges may use when applying or not applying presumptions.⁷¹ Because the two presumptions conflicted, the

65. 25 Cal. Rptr. 3d 774, 780 (Cal. Ct. App. 2005) (explaining that the biological proof exception to the conclusive presumption did not apply to the man in question because he was not a presumed father, and therefore, the lower court should have applied the conclusive presumption without ordering a DNA test).

66. See generally *Kusior v. Silver*, 354 P.2d 657, 660 (Cal. 1960) (remarking on the strength of conclusive presumptions, their resilience to contradictory evidence, and typical instructions to juries to ignore such evidence).

67. See *Gabriel P. v. Suedi D.*, 46 Cal. Rptr. 3d 437, 441 (Cal. Ct. App. 2006).

68. See Jennifer Giordano-Coltart, *Walking the Line: Why the Presumption Against Extraterritorial Application of U.S. Patent Law Should Limit the Reach of 35 U.S.C. § 271(f)*, 2007 DUKE L. & TECH. REV. 4, 31 (outlining the procedure that courts should undergo to determine whether a legislatively-created presumption should be applied, including searching a presumption's legislative history for evidence of congressional intent).

69. See BLACK'S LAW DICTIONARY 1223 (8th ed. 2004) (defining a conclusive presumption as a statutory rule calling for a certain outcome regardless of any contrary evidence); see also *Hall v. Taylor (In re Estate of Cornelious)*, 674 P.2d 245, 247 (Cal. 1984) (describing the conclusive presumption as a codification of the principle of non-intervention by the courts in family matters).

70. *In re Jesusa V.*, 85 P.3d 2, 13-14 (Cal. 2004) (reasoning that in cases where multiple men qualify as potential parents, judges should weigh considerations of policy and logic to determine which man would make the best parent). This reduces the influence of the biological factor from paramount to simply another consideration to be weighed against others, and implicitly granting courts greater power in determining parentage. *Id.*

71. 39 Cal. Rptr. 2d 535, 538-39 (Cal. Ct. App. 1995) (finding that two men, the

statute required the court to apply a balancing test, weighing considerations of policy and logic, to determine which presumption controlled.⁷²

Steven W. demonstrates the absurdity of codifying both conclusive and rebuttable presumptions when a balancing test exists to determine which applies: the balancing test, as applied in California, simply restates the best interests of the child standard.⁷³ Ultimately, the court simply concluded that the rebuttable presumption controlled because Steven acted more like a father to the child than Matthew, and therefore the child's best interests would be better served by placing the child with Steven.⁷⁴ If legislatively-created presumptions are reduced to a judge's determination of who would best parent the child—a conclusively-presumed father or a rebuttably-presumed father—then presumptions are rendered useless; the judge might as well not consider any presumptions and simply rule on what arrangement promotes the child's best interests.

Like the miners in *Pittston Coal Group v. Sebben*, who suffered health consequences when confusing presumptions obscured their understanding of legal remedies available to them, children's best interests suffer when legislatures require courts to weigh conflicting and confusing presumptions without adequate legislative guidelines.⁷⁵ Therefore, a proper standard considers a child's best interests by either allowing only one presumption to exist without the presence of the other presumption, or by creating a clear hierarchy of presumptions in order to minimize judicial confusion and encourage uniformity.⁷⁶

Even if the weighing test for presumptions is not completely unnecessary, it certainly is outdated.⁷⁷ The drafters of the most recent UPA noted in their commentaries that the UPA included a weighing test for conflicting presumptions, but the drafters removed it when writing the

child's mother's husband and the child's biological father, were presumed fathers under the conclusive and rebuttable presumptions, respectively).

72. *See id.*

73. *Compare id.* at 537-38 (reasoning that the child's best interests precluded implementation of the conclusive presumption, resulting in the court awarding Steven guardianship of the child), with BLACK'S LAW DICTIONARY 170 (8th ed. 2004) (defining "best interests of the child" as a determination of what guardianship arrangement would best suit a child's needs).

74. *See Steven W.*, 39 Cal. Rptr. 2d at 539 (holding that the policy interests in maintaining existing father-son relationships required Steven to be the child's legal father).

75. *See* 488 U.S. 105, 110, 129 (1988) (arguing that when presumptions are confusing, mistakes occur on the parts of judges and parties alike, and implying that legislatures must avoid drafting presumptions that lead to such confusion).

76. *See, e.g.,* *Gainey v. Flemming*, 279 F.2d 56, 59 (10th Cir. 1960).

77. UNIF. PARENTAGE ACT § 204(b) cmt. (2002) (noting language changes between the two versions of the UPA, including elimination of weighing conflicting presumptions).

newer version.⁷⁸ As a result, California has reverted to language used in an outdated version that since has been discredited and discarded by the writers of the UPA due to its irrelevance.⁷⁹ By retaining language that the more recent UPA's drafters removed years ago, California has responded inadequately to societal changes that the drafters of the most recent UPA observed and considered when writing it. Consequently, California has failed to protect children's best interests.⁸⁰

Arguments that California has distorted the true purpose of the UPA by modifying its guidelines before incorporating them into state laws are inaccurate because such modification is critical to maintaining the strong role of state governments in regulating family law.⁸¹ The UPA provides guidelines for states that could be adopted or abandoned. If a state chooses to use the UPA as the basis for creating its own laws that are tailored to the particular needs of its citizens, then that state is incorporating the best of both worlds.⁸² Such a state can take advantage of a widely tested and researched model act while simultaneously adding its own twist to the UPA and thereby retaining as much control as possible over the outcome of family law cases.⁸³ Therefore, criticism of states that tweak the UPA to better fit their needs is unwarranted.⁸⁴

78. *Id.* (declaring the removal of the language regarding weightier considerations of policy and logic as one of the more substantial and fundamental changes found in the current UPA).

79. *Id.* (noting the development of modern genetic testing as the reason behind removing the original language in the UPA regarding weighing considerations of policy and logic).

80. See Rowe, *supra* note 52, at 1196.

81. See Meyer, *supra* note 63, at 140 (arguing that California courts are interpreting the UPA in ways that were never intended by the statute's UPA's drafters, and asserting that the novel interpretation dramatically extends the original understanding of the judicial role found in the UPA).

82. *In re Cornelious*, 674 P.2d 245, 247-48 (Cal. 1984).

83. See, e.g., State Dep't of Health & Welfare *ex rel. Oregon v. Conley*, 971 P.2d 332, 335 (Idaho Ct. App. 1999) (mentioning that out of the eighteen states that adopted the UPA, three chose not to require courts to appoint an indigent defendant counsel, and implying that the UPA affords states wide discretion in choosing which model clauses to adopt and which to ignore).

84. See *In re Cornelious*, 674 P.2d at 247-48.

2. *State Laws and Courts That Fail to Consider Detailed and Comprehensive Lists of Factors, Including Children's Wishes and Potential Fathers' Actions, as Significant Elements in Their Paternity Determinations Harm Children's Best Interests*

States that fail to consider detailed, comprehensive lists of factors when determining a child's paternity fail to consider that child's best interests.⁸⁵ The United Kingdom properly considers children's best interests through a novel method: it focuses on "parental responsibility," which emphasizes parents' actions instead of simply marital status and better protects the interests of the child.⁸⁶ Furthermore, the United Kingdom's legislature drafted a strongly-worded list of factors for courts to evaluate, which ensures that children's best interests are paramount considerations in courts' parentage decisions.⁸⁷ Among the factors listed by the legislature for consideration are the wishes of the child, viewed in light of his age and ability to understand his situation.⁸⁸ A number of courts recognize the importance of children's input in legal matters that ultimately affect them more than the adults involved, particularly in situations in which a child has the capacity and maturity to voice a logical opinion regarding his or her own future accommodations.⁸⁹ Just as potential policy changes require input from the public who will be most affected by those changes, children's input also is required in matters in which they will be affected most.⁹⁰ By codifying these factors, the Children Act 1989 ensures

85. See, e.g., LA. CIV. CODE ANN. art. 134 (2007) (suggesting factors to consider, such as the living arrangements at each potential parent's home).

86. See Lowe, *supra* note 33, at 267-69 (describing the changes made by the Children Act 1989, especially the novel concept of parental responsibility replacing the former language of parental rights and duties, implying that parents have a primary obligation to care for their children, not to simply have access to them).

87. See Margaret Ryznar, Note, *Adult Rights as the Achilles' Heel of the Best Interests Standard: Lessons in Family Law From Across the Pond*, 82 NOTRE DAME L. REV. 1649, 1661 (2007).

88. See Children Act 1989, c. 41, § 1(3) (Eng.) (listing the other factors to consider: (1) the physical, emotional, and educational needs of the child; (2) the presence of any predictable effects on the child due to a change in his situation; (3) potentially relevant characteristics, such as age, sex, and background of the child; (4) the presence of past, existing, and likely harm to the child; (5) the capability of his or her parents and other relevant people of meeting the needs of the child; and (6) the powers available to the judges under the Children Act in the particular situation).

89. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 569 (2000) (explaining that children's interests are overlooked frequently during intense battles between parents, and arguing that children should be joined as a party in custody disputes in order to ensure that courts consider their wishes).

90. See, e.g., *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 267 (1st Cir. 2003) (identifying the lack of public input regarding a major change in the Coast Guard's rescue, safety, and salvage operations at sea as a reason for rejecting the new policy).

consideration of children's best interests.⁹¹

By contrast, Louisiana's dual paternity laws do not reflect the same degree of concern for the wishes of children as the United Kingdom's Children Act 1989.⁹² Like the United Kingdom, Louisiana codified a list of factors for courts to consider when determining what constitutes the best interests of a child, including the reasonable wishes of a mature child, the capacity of each potential parent or party to give the child love and affection, and the child's continued education and development.⁹³ Unlike the list codified in the Children Act 1989, Louisiana's factors are loosely worded and are intended explicitly to be guidelines for judges, not steadfast formulas.⁹⁴ The list's structure renders it susceptible to the judge's will, who may evaluate the factors or ignore them as he sees fit.⁹⁵

As further evidence of how Louisiana's list of factors is non-binding on judges, the *Walker v. Walker* court held that judges are not required to report the specific ways in which they balanced the factors in each case; rather, they merely are encouraged to do so for the sake of transparency.⁹⁶ Indeed, at least one court outright dismissed the list of factors codified by the legislature in Article 134 as a "laundry list" that did not need to be examined with regard to the particular case at hand, and that court's holding was upheld on appeal.⁹⁷ While trial judges receive significant

91. Ryznar, *supra* note 87, at 1661.

92. *Compare* Children Act § 1(3) (singling out a particular list of factors that courts shall consider whenever faced with any decision regarding what constitutes the best interests of a child, including the child's ascertainable wishes), *with* LA. CIV. CODE ANN. art. 134 (2007) (listing a similar set of factors to consider, including the reasonable wishes of a comparatively mature child, but using softer language such as "may include" when describing how a court shall go about ascertaining the best interests, which implies that the court does not have to consider the factors listed).

93. *See* LA. CIV. CODE ANN. art. 134 (listing several other factors, including: (1) the length of time the child has lived in a stable, adequate environment, and the desirability of allowing the child to remain in that environment; (2) the moral fitness of each potential parent or party, insofar as it affects the well-being of the child; (3) the ability of each potential parent or party to provide the child with material needs such as food, clothing, and medical care; and (4) each potential parent's willingness and ability to facilitate a close and continuing relationship between the child and others who wish to become the child's parent).

94. *Compare id.* (noting that courts shall consider all relevant factors when determining the best interests of the child and permitting judges to only consider the listed factors if they choose to take them into account), *with* Children Act 1989 § 1(3) (leaving out any notion that judges are free to disregard the factors if they so choose).

95. *See* LA. CIV. CODE ANN. art. 134 (requiring further that the wishes of a child of proper age be reasonable, which allows judges to dismiss the wishes of a mature teenager simply because the judge disagrees with him or her).

96. 880 So. 2d 956, 960 (La. Ct. App. 2004).

97. *See* Luplow v. Luplow, 924 So. 2d 1135, 1143-44 (La. Ct. App. 2006) (expressing regret that the trial court failed to consider the Article 134 factors when making its custody decision, but nonetheless deferring to its ruling because the trial court had the unique opportunity to observe the witness' testimony first hand).

discretion in determining what constitutes the best interests of a child, judges are not permitted to disregard factors that the state legislature enacted to guide their evaluations, yet the *Luplow* judge effectively overlooked the Article 134 factors by dismissing them as optional.⁹⁸

Courts that fail to consider not only the children's input, but also an alleged father's overt and observable actions, fail to properly consider children's best interests because they inadequately determine whether an alleged father would make a suitable parent.⁹⁹ Because courts are free to take away the privileges associated with fatherhood, it follows that men in contested paternity situations have to earn those privileges through demonstrated capability to parent.¹⁰⁰ However, one scholar notes that under the most recent UPA, unmarried fathers who behave like married fathers by raising their children in their own homes and by holding them out to society as their own offspring are vulnerable nonetheless to attack on their parenthood status for the rest of their lives.¹⁰¹

This result runs counter to the most recent UPA's insistence that married and unmarried couples' children are treated as equally as possible in paternity disputes.¹⁰² Furthermore, this policy runs contrary to the best interests of the children standard because it does not consider whether the biological father or the social father would make the best parent; instead, it simply assumes that a married man is suited better to raise children.¹⁰³

98. *Bynog v. Bynog*, 663 So. 2d 86, 89 (La. Ct. App. 1995) (holding that judges may neither disregard factors nor unduly emphasize one factor at the expense of others).

99. *See Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 124 (Cal. Ct. App. 1994) (holding that actual relationships between the child and his presumed father are more telling than biological connections and that such a relationship is more important to the child than a biological relationship consisting of only genetic paternity).

100. *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (holding specifically that an adulterous father had no fundamental right to visit his biological child and generally that visitation privileges are not part of our conception of ordered liberty, and therefore, they are not fundamental rights).

101. Glennon, *supra* note 89, at 569 (noting that there is no statute of limitations limiting the time during which one may bring a paternity action against an unwed but presumed father).

102. *See* UNIF. PARENTAGE ACT § 202 cmt. (2002) (describing the new UPA's preference to not distinguish on the grounds of marital status by referencing the original UPA, which did treat the children of married couples differently from the children of unmarried couples in paternity proceedings).

103. *See* Glennon, *supra* note 89, at 577.

B. When States Permit Dual Paternity, They Fail to Protect Children's Best Interests Because Dual Paternity Favors the Unwed Father's Interests Over the Child's

By failing to balance the biological father's rights against competing concerns, Louisiana fails to protect children's best interests because it allows a man with a potentially small interest in the child's well-being to have rights that courts typically only assign to the legal father.¹⁰⁴ In dual paternity situations, the unwed biological father's interest in attaining legal rights regarding his genetic child exists simultaneously and frequently clashes with other important interests, such as the child's interests, the state's interests and intact families' interests. Generally, when multiple significant interests compete and all cannot prevail simultaneously, Supreme Court precedent strongly suggests that courts should utilize a balancing test to determine which competing interest prevails.¹⁰⁵ In paternity cases specifically, courts acknowledge that a biological unwed father's interests can conflict with other interests, including his child's best interests, that these often cannot exist simultaneously, and that they must be balanced to determine which one prevails.¹⁰⁶

A biological unwed father enjoys some sort of interest in participating in his child's future, but that interest has not been recognized for very long nor is it generally accepted.¹⁰⁷ The question of whether or not a constitutionally protected liberty interest safeguards the relationship a biological unwed father shares with his children severely divided the *Michael H.* court.¹⁰⁸ When evaluating the case, five justices refused to eliminate the possibility that a biological unwed father would ever attain a liberty interest, protected by the Constitution, in having a relationship with

104. See *T.D. v. M.M.M.*, 730 So. 2d 873, 879 (La. 1999) (Knoll, J., concurring) (arguing that children's interests are protected best not when courts ignore biological unwed fathers' rights in favor of procedural distractions, but when courts hold hearings to determine whether these purported fathers do, in fact, hold substantive rights strong enough to outweigh competing interests); see also *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (finding that unless an unwed biological father accepts at least some parental responsibility, the state is under no constitutional obligation to listen to his views on his child's best interests because he lacks a liberty interest in the father-child relationship).

105. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

106. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978) (finding that while an unwed biological father enjoyed some substantive rights to a relationship with his child, the child's best interests clashed with the father's rights and ultimately outweighed them, because the two rights could not co-exist).

107. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (deeming the right to conceive and to raise one's child an essential and basic civil right of man). *But see Michael H. v. Gerald D.*, 491 U.S. 110, 111 (1989) (ruling that Michael had failed to demonstrate that his interest as an unwed biological father was embedded so deeply in our society's history as to be called a fundamental right).

108. See generally *Michael H.*, 491 U.S. at 123-24.

his child whose mother was living with her husband when the child was conceived and born.¹⁰⁹ Five justices noted the procedural flaw in a conclusive presumption that eliminates a constitutionally-protected interest without a hearing.¹¹⁰ Four justices argued that a biological, unwed father had a constitutionally-protected interest in developing a relationship with his child; one assumed the truth of the preceding argument.¹¹¹ Moreover, a biological unwed father's interests are weakened further by the fact that his biological tie with his child is neither necessary nor sufficient on its own to preserve the father's parental rights.¹¹²

After identifying the nature of the biological unwed father's interest, the balancing test requires identifying the interests that compete with those of the biological unwed father.¹¹³ One competing interest is the state's interest in preserving intact marriages and the benefits that accompany them.¹¹⁴ Courts have long recognized this interest and placed it on par with other significant state concerns.¹¹⁵ By allowing an outsider to contest the paternity of a child who is a member of an intact marital family, such as in dual paternity situations, courts infringe upon the state's recognized interest.¹¹⁶

A second competing interest belongs to the child, who has a strong interest in growing up within a stable family structure composed of the parents with whom he or she becomes familiar.¹¹⁷ When a biological unwed father claims paternity of a child who already has a legal father

109. *See id.* at 163.

110. *See id.*

111. *See id.*

112. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (requiring a biological father to do more than simply provide genetic material if he wants to establish a relationship with his child, and suggesting that the father accept responsibility and seize the opportunity to prove his worthiness, implying that his rights are not inherent and must be earned through his actions).

113. *See T.D. v. M.M.M.*, 730 So. 2d 873, 877 (La. 1999) (Knoll, J., concurring) (arguing that the majority should have balanced the biological father's interests with competing interests because if the court determines that the father has a significant constitutionally-protected interest, then that interest cannot be ignored).

114. *See id.* at 878.

115. *Michael H.*, 491 U.S. at 111 (citing the state interest in preserving the marital unit as one that society traditionally has protected against claims by outsiders challenging paternity); *see also Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (likening the marital institution to national security in that both are legitimate state interests).

116. *See T.D.*, 730 So. 2d at 878 (Knoll, J., concurring) (implying that the biological father in this case might have been able to assert his paternity had the child's mother not been married, because no marital unit would exist that requires state protection).

117. *See Staten v. Brown*, 940 So. 2d 105, 110 (La. Ct. App. 2006) (identifying that interest as the reason why the Louisiana legislature incorporated time limits for when a hopeful father can bring a paternity claim).

because of a marital family unit, he disrupts the child's stable family life.¹¹⁸

Finally, the marital family has a legitimate interest in maintaining a private realm that the state cannot enter without a compelling reason.¹¹⁹ In *Finnerty v. Boyett*, the court recognized that the state cannot force another person to encroach on an intact marital family because it would violate that family's right to remain free from state intrusion.¹²⁰ Such disruption also violates family rights of integrity and privacy by permitting outsiders to enter into the family realm.¹²¹

Unlike the family's interest in protection from unnecessary state intrusion, the state's interest in protecting the marital family from outsider intrusion, and the child's interest in a stable family life, the biological father's interest does not exist on its own accord.¹²² Because the father must also demonstrate that he accepted responsibility for his child in order for the court to have reason to preserve his right to a relationship with his child, his interest is subordinate to other competing interests.¹²³ Therefore, Louisiana fails to act in the child's best interests by allowing a man to receive paternity rights at the expense of other important interests that strongly affect children and outweigh his own interests.¹²⁴

IV. POLICY RECOMMENDATION: LEGISLATURES SHOULD GUIDE JUDGES BY SUPPLYING CLEAR LISTS OF FACTORS TO CONSIDER, AND JUDGES SHOULD BOTH SPEND MORE TIME REVIEWING PATERNITY CASES AND AVOIDING JUDICIAL BIAS

The availability of comprehensive, thoughtful paternity laws affecting unwed fathers and their children is becoming more and more crucial with the increasing number of contested paternity cases.¹²⁵ Furthermore,

118. *See id.*

119. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

120. 469 So. 2d 287, 289-90 (La. Ct. App. 1985) (agreeing with the trial court's determination that allowing the biological father to "intrude" into the child's existing and stable family life would disrupt the family and fail to promote the child's best interests).

121. *Michael H. v. Gerald D.*, 491 U.S. 110, 111 (1989).

122. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (suggesting that while the biological father-child relationship is unique, the state is not obligated to provide a forum in which the biological father can assert his claim to paternity unless he demonstrated a willingness to accept parental responsibility).

123. *See id.* at 248 (holding that the Constitution does not compel a state to listen to a biological unwed father's opinion of what serves his child's best interests, unless that father has taken responsibility for the child, and implying that the child's best interests are more significant than the father's interests).

124. *See Staten v. Brown*, 940 So. 2d 105, 109 (La. Ct. App. 2006) (recounting a previous opinion, which held that the balance tips in favor of preserving the marital unit and therefore against unwed biological fathers' interests).

125. *See Julie Davidow, Home Tests Go Beyond Pregnancy and Glucose*, BRADENTON HERALD, Apr. 20, 2006, at 16 (noting the Genelex company's claim that

paternity cases are becoming more complex due to scientific developments in procreation and surrogacy.¹²⁶ In order to ensure that the best interests of children are met in these complicated cases, state legislatures should reconsider their existing paternity laws.¹²⁷

First, state legislatures should verify that they have codified a comprehensive, detailed, non-exhaustive list of factors, such as Louisiana's list, that judges must consider when evaluating every case that affects a child's interests.¹²⁸ Such a list should consider potential parents' abilities to provide proper homes for the children, including: (1) their capability of giving the children love and affection and continuing the children's education and development; (2) their ability to provide the children with material needs such as food, clothing, and medical care; (3) the current existence of love, affection, and any other relevant emotional ties, between each potential parent and the children; (4) the moral fitness of each potential parent or party, insofar as it affects the child's well-being; (5) the degree and extent of responsibility for the care and rearing of the child previously exercised by each party; (6) the willingness and ability of each potential parent or party to facilitate and encourage a close and continuing relationship between the child and others who wish to become the child's parent; and (7) each potential parent or party's physical and mental health, insofar as it affects children's well-being.¹²⁹

Furthermore, the list should incorporate guidelines that judges must use when considering the appropriateness of the environment in which the children would be raised under each potential family structure, including: (1) the length of time during which the child has lived in a stable, adequate environment, and the desirability of allowing the child to remain in that environment; (2) the permanence, insofar as it constitutes a family unit, of the existing or proposed home or homes in which the child is to be raised; (3) the child's social history, in particular that of his home, school, and

sales of its home DNA testing kit have increased by three-hundred percent since September 2002, with 2,300 kits purchased).

126. See, e.g., *Buzzanca v. Buzzanca (In re Buzzanca)*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (introducing a case involving multiple potential parents of a child, due to a married couple's in vitro fertilization of an unrelated surrogate mother).

127. See, e.g., UNIF. PARENTAGE ACT prefatory note (2002) (explaining the reasoning behind creating a new UPA as resting on the changes that have occurred since the inception of the first UPA, such as technological and scientific developments and changes in family structures).

128. See LA. CIV. CODE ANN. art. 134 (2007) (providing an example of such a list, noting that judges should be given discretion in weighing the factors, describing the above list as comprehensive but not exhaustive, and recommending that judges consider other factors if they deem other factors to be relevant).

129. See *id.* art. 134 rev. cmt. a (noting that these factors are not intended to direct parents' conduct, but simply to serve as a basis for determining which arrangement best suits the child).

community; and (4) the distance between the homes of the parties.¹³⁰ Finally, if the children involved are old enough to formulate mature and expressive opinions regarding their future, courts should consider their reasonable wishes.¹³¹

In cases of contested paternity in particular, legislatures should expand the list to include a specific provision for consideration of the overt and observable actions of both mothers and fathers as evidence of their intent and desire to parent.¹³² This would require a potential legal father to prove that he has taken specific steps, such as attempting to spend time with his child or taking him to the doctor, while ensuring that courts evaluate mothers and fathers on more equal grounds.¹³³

The roles played by judges in paternity cases must be evaluated carefully because, too often, legislatures create statutes designed to guide judges, only to have the judges disregard the factors in favor of an overly case-specific analysis.¹³⁴ This allows judicial bias to enter intensely debated situations like unwed fatherhood.¹³⁵

While both legislation and appellate courts should encourage all judges to spend a sufficient amount of time reviewing contested paternity cases, legislatures must also be careful not to infringe on the autonomy of judges by codifying the amount of time they should spend reviewing a case.¹³⁶ One solution would permit varying levels of judicial deference in cases depending on the amount of time each judge spends on a particular case. Judges who devote more time to reviewing a case would receive broad

130. *See id.* art. 134 rev. cmt. h (elaborating on negative consequences from poor home environments after court decisions are made, including the impracticality of visitation arrangements).

131. *See id.* art. 134 rev. cmt. g.

132. Lowe, *supra* note 33, at 268-69 (describing introduction of the novel concept of parental responsibility in the Children Act 1989, which replaced the former language of parental rights and duties, and noting that parental responsibility is a significant factor to be considered when determining whether an adult would make a competent parent).

133. *See Buzzanca v. Buzzanca (In re Buzzanca)*, 72 Cal. Rptr. 2d 280, 285 (Cal. Ct. App. 1998) (describing previous cases in which courts have examined whether a biological father took active steps, such as participating in Lamaze classes and referring to the child as “ours,” to demonstrate acceptance of responsibility for his child in determining whether he should be afforded rights equal to the mother’s rights).

134. *Luplow v. Luplow*, 924 So. 2d 1135, 1143-44 (La. Ct. App. 2006) (expressing regret that the trial court dismissed the Article 134 factors and referred to them as a “laundry list” when making its custody decision).

135. *See Clark Freshman, Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1719 (1997) (noting the extreme judicial bias observed in situations involving same-sex marriage, another highly emotional topic, and describing several cases that resulted in absurd rulings by blatantly homophobic judges).

136. *See Shawnee Tribe v. United States*, 423 F.3d 1204, 1217 (10th Cir. 2005) (holding that separation of powers prevents Congress from commanding a court to reach a particular result).

judicial deference from higher courts if that case is appealed, and those who choose to spend a smaller amount of time on cases would have their opinions reviewed more carefully by the higher courts.¹³⁷ This policy would allow appellate courts who observe trial court judges spending too little time on cases or disregarding statutory lists of factors to operate under a lower standard of judicial deference, and it would encourage lower court judges to spend more time on family law cases.¹³⁸

States should also review their statutory paternity presumptions to ensure that they do not overlap.¹³⁹ If such overlap is unavoidable, then the legislature should incorporate a detailed weighing system for the judges to follow.¹⁴⁰ Detailed weighing systems are important to ensure the uniform application of presumptions and therefore uniform outcomes in best interests of the child cases.¹⁴¹

V. CONCLUSION

Children undoubtedly are harmed the most when issues arise concerning their fathers' identities.¹⁴² While courts maintain a common standard when handling custody debates—the best interests of the child standard—wide variance among judges, courts, states, and countries reveals vastly different ways of interpreting what constitutes best interests.¹⁴³ To properly safeguard the best interests of children, judges must carefully examine each case, but can neither receive too much discretion or deference, else they will inject their personal beliefs into controversial family situations.¹⁴⁴ Legislatures must also ensure that judges spend appropriate time reviewing cases that strongly affect children.¹⁴⁵ Finally, legislatures can provide

137. See Trinder & Lamb, *supra* note 32, at 1525.

138. See Luplow, 924 So. 2d at 1144 (noting that a more thorough articulation of the trial court's reasoning would have been desirable and helpful).

139. See, e.g., *In re Jesusa V.*, 85 P.2d 2, 11 (Cal. 2004).

140. See, e.g., *T.R.W., Inc. v. Andrews*, 534 U.S. 19, 33 (2001) (describing a carefully-worded exception to a rule created by Congress, and implying that incorporating such careful terminology in legislation results in the courts following congressional intent).

141. See Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids*, 45 FAM. CT. REV 600, 612 (2007) (discussing the lack of uniformity when courts apply the best interests standard and suggesting that courts adopt an alternative model).

142. *Commonwealth v. Addicks*, 2 Serg. & Rawle 174, 174 (Pa. 1815) (expressing concern for the children involved in their parents' divorce and implying that their well-being is more important than their parents' well-being).

143. Compare CAL. FAM. CODE § 7540 (West 2004) (describing the conclusive presumption of paternity), with *Finnerty v. Boyett*, 469 So. 2d 287, 293 (La. Ct. App. 1985) (recognizing Louisiana's policy of permitting dual paternity in order to best serve children's interests).

144. See, e.g., Freshman, *supra* note 135, at 1719.

145. See Trinder & Lamb, *supra* note 32, at 1525.

judges with the guidance they request by codifying clear and comprehensive factors for judges to consider when evaluating the best interests of children.¹⁴⁶

146. LA. CIV. CODE ANN. art. 134 (2007).