

Michigan's Revocation of Paternity Act: The Plight of the Putative Father
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INTRODUCTION

Consider the story of Joe. Joe has dated Mary for three years. He is in love with Mary and always dreamed of the day that he could start a family with her, as he adored children. He knew that Mary was technically still married to her husband, Tom, but Mary always said they were planning on divorcing soon and they lived apart. Joe was absolutely delighted when Mary told him that she was pregnant with his child, despite the fact that they were not yet married. Joe was excited about the future birth of his child. Abruptly, only a few months into her pregnancy, Mary announced she was leaving Joe. In fact, she decided that she would rather settle down with Tom and forget about getting the divorce. Just a few months later, the child was born. Though extremely disheartened that his relationship with Mary was over, Joe still wanted to be the best possible parent to his child. However, because Tom and Mary were married when Mary had the baby, Tom was considered the legal parent of the child under the marital presumption. Joe is now faced with an uphill battle to try to establish paternity and get paternal rights to the child – a formerly impossible task in Michigan, but now simply an improbable one. This is Joe’s plight of the putative child.

The paternity of a child can be established in a variety of ways. One of the oldest methods used to establish paternity is through the use of the marital presumption. The marital presumption, a common law doctrine adopted by many states, declares that a child born to a married woman is a child of the marriage. This presumption can be rebutted, but under very limited circumstances, meaning the actual biological father may have no way of establishing paternity. Many states have inconsistently adopted, reformed, or altered this presumption through statute, and Michigan belatedly did so in June of 2012 with the Revocation of Paternity Act (RPA).¹ Alt-

¹ MICH. COMP. LAWS § 722.1441 (2012); 2012 Mich. Pub. Acts 159 *available at* <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0160.pdf>.

though the RPA is a step in the right direction, it does not provide the putative father² (the man attempting to prove paternity), a sufficient opportunity to establish parenthood, and it should be modified. Additionally, all statutes that carry forth the presumption are outdated in a changing and technologically advanced society, and the presumption should be reformed.

In Part I, the paper will first describe paternity establishment in general, including detailing the presumption, current law, and various state approaches. Part II will speak of Michigan's law before and after the RPA. Part III will analyze the problems with the RPA. Finally, Part IV will suggest possible modifications to the RPA and solutions to the presumption problem in general.

I. PATERNITY ESTABLISHMENT

A. Paternity In General

Under common law, a biological father had no right to bring a paternity suit and had no standing in a proceeding to determine custody of a child, as the mother's rights were consistently held to be superior to the rights of the biological father.³ Paternity laws were eventually reformed under the belief that children benefit from the support of both parents, and lawmakers wanted a child to have two legal parents responsible for the child's upbringing.⁴ Paternity establishment turned into a civil proceeding regulated by federal law, with the goal to provide all children with monetary support from that child's father.⁵

The Personal Responsibility and Work Opportunity Reconciliation Act (PWORA), states that paternity can be established when either parent brings a paternity suit at any time until the child

² Note that Michigan now refers to a putative father as an "alleged father."

³ Tiana M. Hinnant, *Family Law-Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption-Michael H. v. Gerald D.*, 25 WAKE FOREST L. REV. 617, 623 (1990).

⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.T. 3734, 104th Congress (1995-1996).

⁵ *Id.*

attains age eighteen or when both parents acknowledge paternity.⁶ The act may require genetic testing. Though PWORA is primarily a funding act covering child support collection issues, the Act was one of the first to establish paternity guidelines, motivated by the child support payor that would be established through a paternity proceeding.⁷

There are many different ways that paternity can be established or by which a man may be deemed to be a child's legal father. Different methods include simple genetic testing; a Voluntary Acknowledge of Parentage (VAP), an admission by a man that he is the father if there is no other presumed father; adoption, registry; the creation of a "social father," where a man holds himself out as the father and others are estopped from denying his parental rights; and the marital presumption.⁸

B. The Marital Presumption

One of the primary ways in which paternity was established under the common law was through the marital presumption.⁹ The marital presumption dates as far back as the 1700's, where English common law held that a child born to a married couple was presumed to be the child of that couple.¹⁰ The only way the mother and presumed father could rebut that presumption was by proving that the husband had no access to his wife during the period of conception.¹¹ However, this was nearly impossible to do, because the person disputing the presumption would have to

⁶ *Id.*

⁷ *Id.* In Fact, requiring states to adopt stronger measures to establish paternity is one of PWORA's five major goals in its reformation of the child support program. The five goals are: 1) automating many child support enforcement procedures; 2) establishing uniform tracking procedures; 3) strengthening interstate child support enforcement; 4) requiring States to adopt stronger measures to establish paternity; and 5) creating new and stronger enforcement tools to increase actual child support collections. *Id.*

⁸ See *Paternity Establishment*, DEPT. OF HUMAN SERVICES (2013), http://www.michigan.gov/dhs/0,4562,7-124-5528_61204_41278---,00.html.

⁹ *Michael H. v. Gerald D.*, 491 US 110 (1989).

¹⁰ COMMENTARIES ON THE LAW OF EVID. IN CIVIL CASES § 97(96) (1913).

¹¹ *Id.*

prove total lack of access, such as the man's location overseas.¹² By the late 19th and early 20th centuries, many states retained the presumption, but slightly expanded the types of evidence admissible to rebut the presumption.¹³ However, this expansion still required evidence such as the presumed father's impotence or sterility, meaning it was still rare that a putative father could offer evidence to rebut the presumption.¹⁴

The signature marital presumption case was decided by the United States Supreme Court in *Michael H. v. Gerald D.*¹⁵ in 1988. In *Michael H.*, a child, Victoria, was born to Carole D., who was married to and lived with Gerald.¹⁶ Gerald was listed as the father on Victoria's birth certificate and Gerald had always claimed Victoria as his daughter.¹⁷ However, blood tests showed a 98.07% probability that Michael H., with whom Carole had an affair, was actually Victoria's father.¹⁸ During the first three years of Victoria's life, Victoria and Carole sometimes lived with Michael, who held her out as his own, and sometimes lived with Gerald, with whom she has lived with since.¹⁹ Michael filed a filiation action to establish his paternity and right to visitation.²⁰ The court granted Gerald's motion for summary judgment, finding no triable issues under California's application of the marital presumption, which provides that "a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and [] this presumption may be rebutted only by the husband or wife, and

¹² Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000).

¹³ COMMENTARIES ON THE LAW OF EVID. IN CIVIL CASES § 97(96) (1913).

¹⁴ Patricia Bundschuh Blumberg, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 VAND. L. REV. 1587, 1603 (1983).

¹⁵ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹⁶ *Id.* at 114-16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

then only in limited circumstances.”²¹ Michael was also denied visitation, on the grounds that the law denied visitation against the wishes of the mother to a putative father who had been prevented from establishing his paternity.²²

Thus, under *Michael H.*, the common law marital presumption of fatherhood was applied, and the court found that a child conceived and born during the marriage of the child’s mother to her husband is *legally presumed* to be the child of the husband. The law considered the father the husband, regardless of whether the husband was even with the wife at the time of conception of the child. This presumption could be challenged only by the wife or husband, and not by the putative father, and even then, only evidence of impotency or other rare circumstances would serve to rebut the presumption. Therefore, the Supreme Court followed the marital presumption, leaving putative fathers facing harsh obstacles to overcome the presumption.

1. *Reasons for & Consequences of the Presumption*

This presumption was originally created because it was believed that it would preserve the sanctity of marriage and promote stable marriages by preventing adulterers from breaking up marriages. A husband who defended his parental rights with the support of the child’s mother had an advantage over the natural father, as courts were inclined to protect the marital union, instead of allowing a third party to potentially disturb the married couple.²³ The presumption stemmed from the common law concept that only biological mothers, not fathers, had a right to bring a paternity suit, as the rights of a mother outweighed those of the father.²⁴ Additionally,

²¹ *Id.* at 110.

²² *Id.*

²³ 84 A.L.R. 4th 655 (originally published in 1991).

²⁴ *See Hinnant, supra* note 3, at 623.

there was incentive to apply the presumption to prevent children from being “bastardized” and to prevent the immoral conduct of the parents from being exposed.²⁵

The presumption appears to focus on the best interests of the mother and married couple, instead of focusing on the best interests of the child. The presumption was thought to protect society’s desire for stability and certainty in nuclear families, possibly due to property implications which required clear rules on paternity and patrilineal descent.²⁶ Additionally, Courts stated they were reluctant to allow putative fathers to gain rights toward children, as husbands who established loving relationships with the children would become legal strangers and children would lose their father figure, with the remaining risk that a relationship between the biological father and child would not form.²⁷

Frequently, the marital presumption creates perplexing results. When a mother conceives a child, her husband is presumed to be the father, regardless of if her husband is actually the child’s biological father. This presumption even applies if the mother and husband were divorced at the time that the child was born.²⁸ The presumption also applies despite the fact that the husband may have no actual relationship with the child or lacks any emotional ties to that child.²⁹

Some would argue it is quite ludicrous that under this presumption, a biological father who strongly desires to have a relationship with his child would be prevented from asserting his parentage because the mother happened to be married at the time of the child’s birth, but divorced shortly thereafter with her ex-husband having no emotional or actual connection with the child

²⁵ Casenote, *The “Lord Mansfield Rule” as to “Bastardizing the Issue,”* 3 MD. L. REV. 79, 82 (1938).

²⁶ See Harry Willekens, *Long Term Developments in Family Law in Western Europe: An Explanation*, in *The CHANGING FAMILY: INT’L PERSPECTIVE IN FAM. LAW* at 52-53 (eds. John Eekelaar & Thandabantu Nhlapo, 1998).

²⁷ Glennon, *supra* note 12, at 550-51.

²⁸ Hinnant, *supra* note 3, at 624-25.

²⁹ *Id.*

whatsoever. This man's existence and timing resulted in his parentage, to the exclusion of the actual father.

C. State and Secondary Source Approaches

Secondary sources and many states have addressed the presumption. While the original presumption was valued because of the belief that it protected the integrity of the family, the change in laws to allow limited rebuttal has suggested that the presumption no longer serves the purpose it once did. Instead, it is often accepted that once a family member challenges the presumption, the break-up of the family has already occurred, and there is nothing left to preserve.³⁰ Additionally, advances in technology have caused some states to address the presumption and the use of genetic tests.³¹

1. *1973 Uniform Parentage Act*

The Uniform Parentage Act (UPA) was one of the first set of guidelines created for paternity and parentage issues, and was adopted in part or in whole by many states. Some states have adopted parts of the 1973 version and some have followed the 2000 version, so it is important to understand their provisions.

The 1973 version of the Uniform Parentage Act was primarily intended to identify fathers of children born outside of wedlock for child support purposes, but it also contained sections pertaining to children born to married mothers. This version was the first to outline procedures for challenging the presumption, and acknowledged evidentiary issues, including the admission of blood tests that might be used to rebut that presumption.³²

Section 4 of the UPA lays forth scenarios where a presumption of paternity may be established. It first states that a man is presumed to be the natural father of a child if he and the child's

³⁰ Hinnant, *supra* note 3, at 625.

³¹ See *infra* Subsection I.C.3.

³² Glennon, *supra* note 12, at 555.

mother have been married and the child is born during that marriage, or within 300 days after the marriage is terminated by death, annulment, divorce, or other manner.³³ A man is also presumed to be the father if before the child's birth, the mother and child's natural father attempted to marry each other, even if that marriage is later determined invalid.³⁴ A man is presumed to be the father if after the child's birth, he and the child's mother have married or attempted to marry, he acknowledged paternity, and is named as the father on the child's birth certificate with his consent.³⁵ Additionally, if he receives the child into his home and openly holds out the child as his own natural child, paternity is presumed.³⁶

Importantly, § 4(5) of the 1973 UPA finds that paternity is presumed if a man acknowledged his paternity in a writing filed with the court that the mother does not dispute.³⁷ If another man is presumed under the section to be the child's father, acknowledgment of a putative father is only effective with the written consent of the presumed father after the putative father rebuts the presumption.³⁸ This would prevent a putative father from establishing paternity absent the approval of the presumed father.

Finally, § 4(b) states that a presumption of fatherhood may be rebutted only by clear and convincing evidence, and if multiple presumptions arise, the presumption which is founded on stronger policy and logic will control.³⁹ The presumption is rebutted by a court decree establishing paternity of the child by another man.⁴⁰

The 1973 version continues to describe that the natural mother and the man presumed to be the father may bring an action to declare the existence of that father-child relationship within any

³³ U.P.A. § 4(a)(1) (1973).

³⁴ *Id.* at § 4(a)(2).

³⁵ *Id.* at § 4(a)(3).

³⁶ *Id.* at § 4(a)(4).

³⁷ *Id.* at § 4(a)(5).

³⁸ *Id.*

³⁹ *Id.* at § 4(b).

⁴⁰ *Id.*

reasonable amount of time. However, they can only bring an action to declare the non-existence of that relationship after obtaining knowledge of “relevant facts” and no longer than five years after the birth of the child.⁴¹ Section 6(b) allows any “interested” party to bring an action, but only when there is no presumed father or where the presumption is based on the conduct of an unmarried father.⁴²

It is significant that the 1973 Act did not permit a putative father to bring a paternity action to assert his parental rights to a child born during the mother’s marriage, as § 6 only provided ways for the presumed father or mother to bring such an action.⁴³ The 1973 UPA allowed actions to establish the non-existence of paternity in the presumed marital father, but did not state what type of evidence could rebut this presumption. Instead, the UPA merely stated that “clear and convincing” evidence was required, and later vaguely referred to blood tests as available evidence, with language that was so unclear that states have not uniformly adopted this part of the code.⁴⁴ In sum, the 1973 UPA did not afford a putative father an opportunity to bring a paternity action, and left confusing instructions on how to establish the non-existence of fatherhood by the marital parent.

2. 2000 UPA

The UPA was modified in 2000, but drafters still did not provide much resolution to a presumption of paternity conflict, as the 2000 version relied heavily on the 1973 version, and failed to create consistency amongst the states.⁴⁵

UPA § 201 states that a father-child relationship is established upon an un-rebutted presumption of a man’s paternity; effective acknowledgement of paternity by the man unless acknowl-

⁴¹ *Id.* at § 6.

⁴² *Id.* at § 6(b); *See* Glennon, *supra* note 12, at 566-68.

⁴³ Glennon, *supra* note 12, at 566-68.

⁴⁴ *See id.*

⁴⁵ *Id.* at 658-59.

edgment has been rescinded; adjudication of a man's paternity; adoption of a child; the man's consent to assisted reproduction by a woman; or adjudication confirming a man as a parent of a child born to a gestational mother.⁴⁶

UPA § 204 states that a man is presumed to be the father of a child if he and the mother are married and the child is born during the marriage; he and the mother were married to each other and the child was born within 300 days after the marriage was terminated by death, annulment, declaration of invalidity, or divorce; if before the birth of the child, he and the mother marry each other and the child is born during the invalid marriage or within 300 days after its termination; or if after birth, he and the mother marry each other in compliance with the law and the assertion of parentage is in a record filed with the state agency maintaining birth records and the man agrees to be and is named the child's father on the birth certificate or he promised in record to support the child as his own.⁴⁷

Finally, under § 607 of the UPA, a proceeding brought by the presumed father, mother, or another individual to adjudicate parentage when a presumed father exists must be commenced no longer than two years after the child's birth.⁴⁸ A proceeding seeking to disprove a father-child relationship between a child and the child's presumed father may be maintained *at any time* if the court determines that the presumed father and mother neither cohabitated nor engaged in sexual intercourse during the probable time of conception and the presumed father never openly held out the child as his own.⁴⁹

The 2000 version acknowledges unmarried fathers only through written acknowledgment of paternity or through legal action brought against them to establish paternity. Unmarried fathers

⁴⁶ U.P.A. § 201 (2000).

⁴⁷ *Id.* at § 204.

⁴⁸ *Id.* at § 607.

⁴⁹ *Id.*

can no longer be presumed a father by taking a child into his home as was the case in the 1973 version.

The 2000 Act still doesn't provide guidance in a paternity conflict between a biological father and a husband in an action brought within two years of the child's birth. The presumed father can estopp the putative father from requesting genetic testing if a court determines that the conduct of the mother or presumed father would make it inequitable to dis-establish that relationship.⁵⁰ As estoppel is an issue that is fact-based and differs amongst jurisdictions, the UPA did not provide clear guidance to resolve this presumption issue.⁵¹ The court determines the best interest of the child, and has discretion to deny any type of genetic testing. If the action is brought over two years from the child's birth, the presumed father's paternity can't be contested by anyone, even the presumed father.

In sum, the 2000 version relaxes the common law marital presumption as laid out in *Michael H*, because it at least gives the putative father the opportunity to rebut the martial presumption. However, the putative father would have to prove that the presumed father and mother didn't co-habit or engage in sexual intercourse during the probable time of conception.⁵² This could be hard to prove, as the parties need to simply lie to get around this. The 2000 version brings some gains and losses for unmarried fathers: they lose the right to become a presumed father by developing a relationship with the child and holding the child out as their own, but are now permitted to bring an action to assert parentage to children born to married mothers, though the restrictions and conditions on this right are numerous.⁵³

⁵⁰ Glennon, *supra* note 12, at 570-71.

⁵¹ *See id.*

⁵² U.P.A. § 607 (2000).

⁵³ *See id.* at 568-69.

3. *State Approaches*

The circumstances in which the marital presumption may be rebutted vary drastically amongst and even within the states. Varying factors include the identity of the party bringing the suit, the timing of the action, marital status of the mother and presumed father, and promises made or actions performed by the presumed or putative father.⁵⁴ Many states have passed statutes that give putative fathers potential opportunities to establish paternity, providing some relief from the marital presumption of paternity and extending the circumstances in which the presumption can be rebutted. These states express the belief that biological ties are an adequate basis for both parental responsibility and the only basis for legal father-child relationships that will withstand court challenge.⁵⁵ Initially, states did this for the purpose of collecting child support from unwed fathers, but additionally expanded the categories of people who could challenge the presumption and the circumstances in which those people could be successful.⁵⁶

Currently, over thirty states allow a man to rebut the marital presumption, as long as the action is commenced within two years of the child's birth and various criteria are met.⁵⁷ Some states enacted the entire UPA, while others enacted only parts of the UPA.⁵⁸ Notably, the UPA doesn't cover all aspects of parentage, so there are still discrepancies among the states that adopt it. Courts in California have held that a putative father has no standing to sue intact families to assert paternity rights, but other UPA states (like Colorado and Texas) have held that a putative father has a constitutional right to challenge paternity in this situation.⁵⁹

⁵⁴ *Id.* at 568.

⁵⁵ *Id.* at 550.

⁵⁶ *Id.*

⁵⁷ See *Establishing Paternity*, NAT'L PARALEGAL COLLEGE (2013), http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelations/Parenthood/EstablishingPaternity.asp.

⁵⁸ *Id.*

⁵⁹ *Id.*

Due to changing societal mores and advancements in technology and genetic testing material to determine paternity, the UPA's revised version was adopted in several states, including Delaware, Texas, Washington and Wyoming, and it was recently introduced in California, Illinois, Maine and Utah (where it died in the State Legislature).⁶⁰ Some states with similar genetic testing provisions hold that scientific evidence of paternity creates a presumption of paternity, which would allow a putative father to establish paternity and rebut the presumption through a mere test.⁶¹ Other states with similar genetic testing provisions refuse to allow putative fathers to assert paternity by genetic testing where the presumption exists.⁶² In those states where genetic evidence is not treated as a conclusive presumption of paternity, courts are left to decide if results of genetic testing are enough to rebut the presumption, or if other factors, including the best interests of the child, would prevent the presumption from being rebutted. Courts thus have little guidance in this area, and are often guided by assumptions about parenthood.⁶³

In sum, many states have modified the common law presumption to alleviate some of the burden putative fathers face when trying to challenge paternity. However, there is much inconsistency among and even within states and courts have been provided with no clear direction. Even courts with similar statutes come to drastically different conclusions regarding when rebuttal of the presumption is appropriate.⁶⁴ While some states might provide relief for putative fathers, generally, putative fathers are given few chances to establish paternity of their biological child because of the lingering marital presumption.

⁶⁰ *Id.*

⁶¹ Glennon, *supra* note 12, at 568.

⁶² Deborah A. Ellingboe, *Sex, Lies, and Genetic Tests: Challenging the Marital Presumption of Paternity Under the Minnesota Parentage Act*, 78 MINN. L. REV. 1013, 1044 (1994).

⁶³ Glennon, *supra* note 12, at 568.

⁶⁴ *Id.*

II. MICHIGAN LAW

A. Michigan Law before June 2012

Before June of 2012, Michigan putative fathers had an extremely difficult time attempting to establish paternity of a child, because Michigan law followed the common law presumption that a child who was conceived and born during a marriage is the child of the mother's husband.⁶⁵ The mother's husband was considered the "presumed father," and to rebut the presumption that the child was the issue of the husband, a putative father had to prove that the child was "born out of wedlock" by clear and convincing evidence.⁶⁶

A child born out of wedlock was defined to be a child "begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."⁶⁷

To prove that the child was born out of wedlock, a putative father would need to show that the mother and husband were not married for the entire period from conception to the birth of the child.⁶⁸ Alternatively, the putative father could show that a judicial determination was previously entered stating that the child was not an issue of the marriage.⁶⁹ Unless there had been a court determination, a putative father would have to prove that the mother and husband were divorced during the entire course of the pregnancy, not just any period during the pregnancy for the child to be born "out of wedlock."

In sum, before June of 2012, putative fathers could only overcome the marital presumption by showing that the child was born out of wedlock, which was a very difficult task.

⁶⁵ *In re KH*, 677 N.W.2d 800, 801 (Mich. 2004).

⁶⁶ *Girard v. Wagenmaker*, 470 N.W.2d 372, 376 (Mich. 1991).

⁶⁷ *Id.* at 242; MICH. COMP. LAW § 722.711(a).

⁶⁸ *Aichele v. Hodge*, 259 Mich. App 146, 154, 156 (2003).

⁶⁹ *Id.*

B. Michigan Law after June's 2012 Revocation of Paternity Act

A recent change in Michigan Law has drastically altered the opportunities for putative fathers to attempt to establish paternity of children.⁷⁰ The Michigan Legislature passed the Revocation of Paternity Act (RPA), effective as of June 12, 2002, which includes provisions that allow a putative father to attempt to establish paternity in certain situations despite the fact that the mother of that child is married to a different man.⁷¹ The RPA modifies the presumption that a husband is the father of all of his wife's children born during their marriage, and despite the mother's marriage, the paternity of the presumed father may be set aside, and a putative father may seek an order of filiation (a declaration of parentage).⁷²

Under the RPA, an alleged father may seek an order of filiation by proving by clear and convincing evidence that he is the child's father.⁷³ Under section 11 of the RPA (now codified in MCL § 722.1441), a putative father has the option to file an action to determine that a presumed father is not the child's father and to establish his own paternity.⁷⁴ There are three different scenarios in which a putative father may take this action. Under the first scenario, the putative father must show that he did not know or did not have reason to know that the mother was married at the time of conception; the presumed father, putative father, and mother at some point in time must mutually and openly acknowledge a biological relationship between the putative father and

⁷⁰ 2012 Mich. Pub. Acts 159 available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0160.pdf>; MCL 722.1441. The case that inspired the Michigan legislature to pass this act was that of Daniel Quinn, a Michigan man who sought custody of his child for five years. Jessica Harthorn, *Fenton father Dan Quinn one step closer in updating Michigan's Paternity Act*, MINBCNEWS.COM (April 12, 2011), <http://www.minbcnews.com/news/story.aspx?id=604746#.UYHM2oLpwXw>. He had a child with a woman who claimed to be married at the time. *Id.* He then lived with the mother and child for three years, raising the child, until the mother abruptly returned to live with her estranged husband and prevented Daniel from seeing his child. *Id.* Despite the fact that the child was at one point placed into foster care, Daniel has not been able to establish standing to fight for custody. *Id.*

⁷¹ 2012 Mich. Pub. Acts 159 available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0160.pdf>; MCL 722.1441.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

the child; *and* the action must be filed within three years of the child's birth for the the putative father to file to establish paternity.⁷⁵ All three elements must be satisfied.

Alternatively, if the putative father did not know or have reason to know the mother was married at the time of conception and the presumed father has failed to provide support for the child for two years before the filing of the action, has not complied with a support order, or the child is less than three years of age and the presumed father lives separately and apart from the child, the putative father may file to establish paternity.⁷⁶

Finally, the putative father may show that the mother was not married at the time of conception and if the action is filed within three years of the child's birth, then the putative father may file to establish paternity.⁷⁷ These are all ways to bring a paternity action that were not available under previous Michigan law, although they still may be hard to meet.

However, even if one of these three scenarios are met, § 722.1443 of the RPA goes on to state that a court may refuse to enter an order to set aside a paternity determination if the court finds evidence that the order would not be in the best interests of the child.⁷⁸ The child's best interests include whether the presumed father is estopped from denying parentage because of his conduct, the length of time the presumed father was on notice that he might not be the child's father, the facts surrounding the presumed father's discovery that he might not be the child's father, the relationship between the presumed or alleged father, the age of the child, the harm that could result to the child, and "any other factor that the court determines appropriate to consider."⁷⁹

⁷⁵ M.C.L. § 722.1441(3)(a).

⁷⁶ *Id.* at § 722.1441(3)(b).

⁷⁷ *Id.* at § 722.1441(3)(c).

⁷⁸ *Id.* at § 722.1443(4).

⁷⁹ *Id.* See Lori T. Williams, *New Rights for Fathers Under the Michigan Paternity Act*, BIRMINGHAMPATCH (March 19, 2013), http://birmingham.patch.com/blog_posts/new-rights-for-fathers-under-the-michigan-paternity-act.

III. ANALYSIS: PROBLEMS WITH MICHIGAN'S RPA

Although the RPA finally provides an opportunity for putative fathers to establish paternity, the strict requirements that must be met under the Act realistically give fathers little opportunity to bring a paternity action. Michigan belatedly followed the lead of other states in making it easier for a putative father to rebut the marital presumption, but the proof and factors that the putative fathers must establish impose too high of a burden.

A. RPA Provision Problems

Two of the three scenarios by which a putative father may bring an action require the putative father to have no knowledge or no reason to have knowledge that the mother was married.⁸⁰ This is likely a hard condition for a putative father to meet. If the actual father and the mother were in a relationship and conceived a child, it is likely that he would know of her marital status. This provision is essentially only allowing standing for putative fathers if the relationship that resulted in the conception of the child was a “one night stand.” Only then does it seem likely that the putative father would not know that the mother of his child is married. There certainly might be times when the child’s mother misrepresents herself to the child’s father, but it seems unlikely that this will frequently be the case.

The RPA also allows a putative father to make a claim if the biological father, mother, and putative father all sign an agreement acknowledging that the putative father, not the husband, is the father.⁸¹ This also fails to give the putative father relief. The old act already gave the mother and husband standing to rebut the presumption as well as the ability to mutually agree that someone else is the father, so the RPA is really adding no new right for the putative father. The prob-

⁸⁰ See M.C.L. § 722.1441.

⁸¹ See *id.*

lem remains when the husband does not wish to give up paternity, where it would be unlikely for the husband to sign such an acknowledgment. Unless the husband wants no obligation to support the child, it seems unlikely that the child's mother and her husband would acknowledge by agreement another man's paternity.

One scenario under the RPA by which a putative father may challenge paternity requires that the putative father demonstrate that the presumed father was not paying support for the child.⁸² It seems unlikely that a putative father would have any knowledge of how financially supportive the presumed father is and hard to imagine how a putative father could prove this. Unless the mother's husband has publicly deserted her, there appear to be few circumstances that would satisfy this scenario.

The three-year time frame for a putative father to bring a claim is a requirement that is similar to those found in other states. But if a biological parent has no idea that the child was born, why should he be punished for failing to bring a claim sooner if he didn't know that he had a claim? A mother's failure to inform the father of the child shouldn't bar the putative father's opportunity to petition for paternity.

Finally, the "best interests" provision of MCL 722.1443 allows the court to refuse to set aside a presumed father's paternity even when the putative father has satisfied the other criterion of the RPA. This gives the court wide discretion to refuse an order based on whatever the "court determines appropriate to consider,"⁸³ and permits the court to completely thwart the ability of a putative father to establish paternity. While it is often appropriate for a court to consider a child's best interests, the RPA already does consider a child's interests by making it extremely difficult

⁸² *See id.*

⁸³ *Id.*

for a putative father to even have standing to bring an action,⁸⁴ and this provision simply gives the courts a tool to punish adulterers by withholding parental rights.

While the RPA offers three scenarios for the presumption to be rebutted, all of them contain provisions that will be very hard for a putative father to demonstrate.⁸⁵ The RPA technically makes the presumption easier to rebut, but in actuality its conditions render the burden almost as difficult for a putative father to meet as the former act.

B. Theoretical Problems with the Presumption

The presumption frequently prevents an actual biological parent of a child from establishing parental rights, as most states have retained the presumption, with exceptions that offer little relief to putative fathers who wish to rebut the presumption. Parents have constitutionally protected parental rights, usually care, custody, and control.⁸⁶ Yet under the presumption, biological parents are prohibited from enjoying these parental rights. The question becomes who is a parent, and who actually gets these rights? It is hard to understand how a biological parent can be barred from asserting any rights over the child because of a common law presumption that no longer serves the purposes it was designed to serve.

Modern technology has advanced to a point where genetic tests can determine with almost absolute certainty the identity of a child's biological father.⁸⁷ Before, there might have been worries that marriages should not be disrupted when technology might incorrectly find a child to be the child of a putative father. This risk of inaccuracy is far less likely, as technology

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁸⁷ *All About DNA Testing Accuracy*, DNAGENETICCONNECTIONS (2013), http://www.dna-geneticconnections.com/dna_accuracy.html.

has advanced to a point where errors are rare, but these genetic advancements have not been reflected in the law.⁸⁸

Societal norms have changed, as the nuclear family is becoming less common, and more children are born out of wedlock or to a single parent.⁸⁹ While it may not be considered ideal, it is also not as uncommon for a married woman to have a child with another man. While it is understandable that earlier courts wanted to protect the sanctity of marriage, society itself does not view marriage the same way that marriage was viewed under the common law, and it would not be unconscionable to society to acknowledge the actual father of a child, even if that father was outside of the marriage.

IV. SOLUTIONS

A. Solutions to RPA

The RPA should be modified to allow putative fathers a real opportunity to rebut the marital presumption. The provision requiring that the putative father have no knowledge of the mother's marital status should be removed, as that requirement alone would stop a great number of potential actions. A putative father can't be faulted for not knowing the marital status of a woman with whom he conceived a child when he still wishes to play a role in that child's life.

The three-year time limitation should also be extended, or should not toll until the putative father is aware of the child's birth. Currently, the RPA imposes the three-year time limitation needed to bring forth an action, but if the mother does not inform the putative father of her pregnancy or the child's birth, the putative father may not be on notice to challenge the

⁸⁸ *Id.*

⁸⁹ Rebecca M. Ginzburg, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in Belle Terre*, 83 B.U. L. REV. 875, 876 (2003).

child's paternity.⁹⁰ The idea of limiting it to three years is perhaps important to ensure that a family or child's life isn't disrupted because of the putative father's delay in bringing an action. However, because the right to bring an action means nothing if the putative father is unaware of the child's existence, there should be a qualification that the putative father must have notice for this two year limitation to apply.

It would not be difficult for the mother to provide proof of notice, as the mother could show records of letters or phone calls, so the burden of showing that notice was given should be on her. Otherwise, if the putative father brings an action over three years after the child's birth and the mother cannot provide evidence that she notified the putative father about the child's existence, then the putative father should not be barred from bringing the action.

Admittedly, it may not be practical for a putative father to bring a claim many years after a child's birth. If the putative father received no notice of the birth until the child was a teenager, it would perhaps be disruptive to that child if the putative father were permitted to establish parental rights at such a late stage in the child's life. At the very least, an older child could make his own decision as to the role the putative father will have in that child's life. An older child has some discretion in how he would interact with the putative father, as an older child's preference is typically given weight with courts.⁹¹ Accordingly, if a putative father established parental rights when the child was a teenager and the teenager wanted nothing to do with the putative father, a judge would probably give great weight to the child's custody and parenting time preferences, and the putative father's actual role in the child's life would be limited. If the presumption was rebutted when the child was still young, then the possible disruption may be minimized. It is

⁹⁰ See Revocation of Paternity Act of 2012 Mich. Pub. Acts 159 available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0160.pdf>.

⁹¹ See M.C.L. 722.23. For example, Michigan's best interest factors that a judge must utilize to determine custody or parenting time considers "the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference."

difficult to arbitrarily determine an age after which a putative father would be prohibited from bringing a claim, but a notice requirement might encourage the mother to take steps to ensure that any disruption occurred early in the child's life.

Finally, the power of the court to refuse to issue an order under MCL 722.1443 is unnecessarily harsh and should be eliminated. The provision gives the courts too much power to reject a putative father's attempt to establish paternity. If the putative father has already fulfilled the difficult task of earning standing under MCL 722.1441, he should not be stopped from continuing with his action simply because a court finds that "other factors" would make the action inappropriate.⁹² Most of the best interest factors listed by the court are already encompassed in other provisions of the act,⁹³ and the provision simply allows courts to deny claims based on disdain for adulterers.

While some of the RPA components themselves are problematic, the marital presumption itself should be reformed.

B. Broader Solutions

All states that rebut the marital presumption do so with varying restrictions and limitations, creating inconsistencies amongst the states and a lack of guidance for courts to work with. There may be some solutions that could benefit not just Michigan, but all states.

Subsection IV.B.1: Bright- Line Rule – Genetic Test Rebutts Presumption

The legislature could step in to create a bright-line standard to be applied to all of the states. As society has evolved, marital norms have changed, and technology has improved, paternity establishment and the marital presumption have become a point of conflict and uncertainty

⁹² M.C.L. § 722.1443(4)(h).

⁹³ For instance, one of the best interest factors requires the courts to consider how long the putative father waited to bring an action after acquiring knowledge of the child's existence. *Id.* at § 1443(4). However, the three year limitation already prevents claims over three years after the child's birth, so there can't have been knowledge for too long.

among the states.⁹⁴ The Legislature could address the issue and lay forth a clear rule regarding the standing of putative fathers, so that states don't have to independently and individually come to their own conclusions. This would also eliminate a case-by-case inquiry.

If a bright line rule were to be established, it seems appropriate that a putative father should be permitted to rebut the marital presumption by a mere genetic test showing that he is the biological father. As genetic tests are now capable of determining paternity at an accuracy rate of 99.9 percent,⁹⁵ the validity of a finding could be assumed. Instead of having to prove the difficult provisions of the RPA or other similar state statutes, a genetic finding that the putative father is the biological father could immediately and on its own rebut the presumption, and allow the putative father to assert parental rights. A finding that genetic proof of parentage automatically rebuts the marital presumption would be easy for courts to apply, would be consistent with the changing mores of society, and would prevent the biological father from the unjust situation of not being permitted to assert any parental rights to his child.

Subsection IV.B.2: Rule would Better Comport with Today's Norms of Marriage

There is no longer a pressing need to protect the sanctity of marriage, when the definitions and views of marriage that motivated the presumption during the common law years no longer exist.⁹⁶ Instead of strictly the nuclear family, many different types of families are now accepted, including families with multiple parents or same-sex parents. The nuclear family is less common than it used to be, and many people choose not to marry or have children as a single parent.⁹⁷ In

⁹⁴ See *supra* Subsection 1.B.3.

⁹⁵ *All About DNA Testing Accuracy*, DNAGENETICCONNECTIONS (2013), http://www.dnageneticconnections.com/dna_accuracy.html.

⁹⁶ See Ginzburg, *supra* note 89, at 876.

⁹⁷ See Kirsten Andersen, *The number of US children living in single-parent homes has nearly doubled in 50 years: Census Data*, LIFESITENEWS.COM (Jan. 04, 2013), <http://www.lifesitenews.com/news/the-number-of-children-living-in-single-parent-homes-has-nearly-doubled-in/>.

fact, twenty-five percent of American children are born to a single parent.⁹⁸ As many more children are born out of wedlock, it is no longer true that a child born out of wedlock is viewed as a “bastard,” which was one of the incentives for the original rule.⁹⁹ As one commentator noted, “[what] once used to be called illegitimacy . . . now [] is the new normal.”¹⁰⁰ Because societal norms recognize many different types of families, the sanctity of the marital nuclear family is not the same as it once was, meaning the presumption no longer serves the purpose it once did. A finding that biological proof that a putative father is the father would not be offensive to the modern day conception of the family, and would not threaten stable families in a world where the concept of family has already been turned upside down.

Subsection IV.B.3: All Could Play Parental Role

If a putative father is allowed to dispute and establish paternity, this doesn’t necessarily mean the husband would have to dissociate himself from the child, as courts have held that this parent may still have legal parental rights. The law is increasingly recognizing that a child can have more than two parents.¹⁰¹ Different theories of social parenting have been accepted by courts, where a third parent can establish legal rights based on his or her action and interaction with a child.¹⁰² As courts have recognized three parents in some cases, this could extend to this situation, with the mother, presumed father, and putative father all having parental rights and duties to the child.

Other theories have been recognized by the courts that could be implicated to ensure that a presumed father maintains some parental rights. An increasing number of courts have recognized

⁹⁸ *One in FOUR Children in the U.S. is raised by a single parent*, DAILYMAIL.CO.UK, (Apr. 27, 2011), <http://www.dailymail.co.uk/news/article-1381069/One-FOUR-children-U-S-raised-single-parent.html>.

⁹⁹ See Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?pagewanted=all&_r=0.

¹⁰⁰ *Id.*

¹⁰¹ See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (PA Super 2007).

¹⁰² See *id.*

that legal parental relationships may be established based on functional relationships or on the intent of the parties, and that biology is not the only way to establish parenthood.¹⁰³ In some cases, courts have relied on the doctrine of in loco parentis to grant a husband or ex-husband custody or joint custody of a child born during the marriage, even if that child was not the natural offspring of the husband or ex-husband.¹⁰⁴ Courts have also found that a husband may become the psychological parent of his wife's child, who was later proven to be not his child.¹⁰⁵ Finally, some jurisdictions have recognized the equitable parent doctrine, which supports a presumed father's request for visitation rights to a child that he erroneously believed was his.¹⁰⁶ These doctrines all suggest that courts are willing to recognize some form of parental rights for a father (in this case the husband), who erroneously believed the child was his. This would mean that while a genetic test's paternity results would give the putative father parental rights, this does not necessarily mean that the presumed father would lose all rights.

At the very least, a putative father should be permitted to play the role of another parent instead of limiting a child to two parents, leaving the putative father on the outside. However, courts are increasingly willing to recognize multiple parents, and already existing theories and doctrines could play a role to ensure all play a role in the child's life.

Subsection IV.B.4: Rule would Result in Child-Oriented Approach

Allowing the putative father to establish parenthood upon a genetic establishment would help guide this area of family law to a more child-oriented approach. Applying the presumption may not be in the children's best interests, but that is not a factor that courts or statutes have seemed to consider. It may be in the child's best interests to have a relationship with their biological parent

¹⁰³ Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J. OF LAW & FEMINISM 193, 208-213 (2004).

¹⁰⁴ 84 A.L.R. 4th 655 (originally published in 1991); *In Re Marriage of O'Brien*, 772 P2d 278 (1989).

¹⁰⁵ *See Ettore I. V Angela D.*, 513 NYS2d 733 (1987).

¹⁰⁶ 84 A.L.R.4th 655 (originally published in 1991).

and experience the biological bond. Previously, courts and states seemed to put the marital relationship above the interests of the child, but this would put the child's back into focus. Of course, it could be argued that giving the putative father parental rights would be disruptive to the child, but in all likelihood, the rebuttal of this presumption would happen early in the child's life, the court would consider an older child's preferences in making custody determinations, and the presumed father would still have some form of parental rights with the child as well.¹⁰⁷ Even if courts are reluctant to give the presumed father parental rights after granting the putative father parental rights, if the presumed father is still with the mother then he won't be ripped out of the child's life. If he is no longer with the mother, then this is just further justification that the presumption shouldn't operate to prevent the biological father from asserting rights if the marital union no longer exists. This approach considers the biological father's perspective, instead of just the biological mother's.

CONCLUSION

Since the 1700's, the putative father has encountered a difficult, if not impossible, task in attempting to establish paternity and gain parental rights of his or her child, due to the common law marital presumption. While some states have backed away from the presumption, most states still require putative fathers to satisfy complicated criterion to have the opportunity to rebut the presumption. Michigan has finally created some ways in which a putative father may rebut the presumption with the Revocation of Paternity Act, but until some provisions the Act are changed, putative fathers will still have an uphill battle when it comes to establishing paternity. Putative fathers would benefit from the elimination or modification of the marital presumption nationwide, as a bright-line rule finding genetic testing enough to rebut the presumption would go far to alleviate the impossible burden currently faced by putative fathers.

¹⁰⁷ See *supra* Subsection IV.B.3.