INTESTATE INHERITANCE CLAIMS: DETERMINING A CHILD’S RIGHT TO INHERIT WHEN BIOLOGICAL AND PRESumptIVE PATERNITY OVERLAP

Megan Pendleton*

INTRODUCTION

Over the past fifty years family law in the United States has undergone tremendous change. The long-established conception of family has been significantly altered by an increase in children born to unmarried parents, same-sex parenting, surrogacy, and advancements in reproductive technology. The typical notion of a traditional or nuclear family includes a married couple whose only children are their biological offspring and who did not use any reproductive technology to procreate. Today, however, nearly one-third of American children are born to unmarried parents. This evolving paradigm has posed

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1 See Troxel v. Granville, 530 U.S. 57, 64 (2000); see also Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 Utah L. Rev. 93, 95 (arguing that modern probate law remains “entrenched in the nuclear family paradigm” while the numbers of American children being raised in alternative family arrangements continue to increase); David D. Meyer, Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood, 54 Am. J. Comp. L. 125 (discussing the struggle to adapt family law to evolving social conditions and the changing reality of the American family).


4 Meyer, supra note 1, at 132: The linkage between marriage and childbearing, long taken for granted by most Americans, has weakened substantially. As the stigma associated with unwed parenthood has faded, many more unmarried women are electing—or accepting—parenthood. Even as the birthrate among teenagers fell by 22 percent over the 1990s, non-marital births among all women increased and now constitute more than a third of all births. . . . The traditional ideal of a “nuclear family,” made up of a married couple raising their children, is fading, down from 40 percent of all households in 1970 to less than a quarter by 2000. It is probably not too much to say that “the domestic unit in

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challenges to courts and legislatures alike as they try to adapt the law to a more modern idea of family.5

One area of law that has been particularly affected by the evolving family structure is inheritance law.6 The initial determination of parentage is an essential factor in establishing heirship and probate succession.7 Thus, with the increase of children born outside of a traditional marriage, a proliferation of paternity challenges and inheritance claims have ensued.8 The resolution of paternity is critical because it determines who a child’s legal father will be and, accordingly, who will assume the rights and responsibilities of parenthood.9 In addition, legal paternity establishes a child’s right to certain benefits such as Social Security payments, child support, and inheritance rights.10 Consequently, more litigants are filing paternity claims to establish these rights.11

Historically, the legal system has recognized a presumption of paternity when a child is born to a married mother, which assumes that the mother’s husband is also the child’s father.12 The principal policy rationales underlying this presumption are to protect the child from the stigma of illegitimacy, to protect the child’s inheritance rights, to preserve the integrity of the family unit, and to promote individual early 21st century America [has become] a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions.”

Id.

5 Id.
6 See Brashier, supra note 1, at 143.
7 Id.
8 Id.

With nonmarital children now comprising an increasingly substantial part of the American population, the possible complications for estate administration under existing laws are obvious. Although cases concerning post-death conception, surrogacy, artificial insemination, homosexual parenting, and even adoption present newer and more highly publicized problems in parent-child relationships, probably none of these areas will create as many practical problems as will the profound increase in the number of paternity claims resulting from old-fashioned sexual relations outside of marriage.

Id.

10 See BRASHIER, supra note 3, at 141.
11 See N.A.H., 9 P.3d at 359 (noting in a case where a biological father sought to establish paternity over the presumed father that “[p]arenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities”).
12 See In re Trust Created by Agreement, 765 A.2d 746, 752 (N.J. 2001) (explaining the common law principle that a child born out of wedlock is “presumed to be the legitimate offspring of a husband and wife”; Smith v. Smith, 845 P.2d 1090, 1092 (Ala. 1993) (stating that the longstanding common law rule is that a child born to a married woman is presumed to be the offspring of her husband); In re Estate of Taylor, 609 So. 2d 390, 394 (Miss. 1992) (observing that the law has long presumed a child born during the course of a marriage to have been fathered by the husband).
responsibility for the child so it does not become a ward of the state. Since the father-child relationship was initially founded on the marital status of a child’s parents, determining the paternity of a marital child was traditionally a routine matter. Thus, the legal system primarily focused on establishing paternity for nonmarital children. However, changing norms in the American family and scientific advancements in genetic testing have challenged the strength of the marital presumption over the past several decades. Improvements in the accuracy of genetic tests have made it possible to determine biological paternity with near certainty. As a result, the paternity of children born during marriage is increasingly called into question. This has prompted the legal community to reconsider the role of the marital presumption as a means of establishing paternity. Thus, courts and legislatures ever more have to consider which relationships, biological or social, are most important in determining the existence of a father-child relationship.

The question of what factors should control in determining legal parentage raises critical concerns in probate law because the fact of parentage establishes a child’s inheritance rights. One particular issue that has not been adequately addressed by many state legislatures is whether, and under what circumstances, a child with a presumed father and separate biological father may rebut the presumption of paternity in order to inherit from the biological father’s estate. For example, assume

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13. See Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (holding in a plurality opinion a California statute constitutional where a presumption that the husband of the child’s mother is the child’s father does not violate the putative biological father’s due process rights under the Fourteenth Amendment). Justice Scalia, writing for the plurality, stated:

   The primary policy rationale underlying the common law’s severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate . . . hereby depriving them of rights of inheritance and succession . . . and likely making them wards of the state. A secondary policy concern was the interest in promoting the “peace and tranquility of States and families.”

Id.; see also Estate of Cornelius, 674 P.2d 245, 247 (Cal. 1984) (presumption of paternity promotes important social policies including, “preservation of the integrity of the family, protection of the welfare of children by avoiding the stigma of illegitimacy and keeping them off welfare rolls, and insurance of the stability of titles and inheritance.”). It is beyond the scope of this Note to assess the merits of the presumption of paternity. This analysis merely addresses the interplay between the existing presumption and inheritance rights.


15. Id.


17. Id. at 555-56.

18. Id. at 566.


20. Id.

21. See Brashier, supra note 1, at 121 (noting that presumptions are often the starting point in paternity challenges and that an irrebuttable presumption may be the ending point as well, since the child becomes an heir once paternity is established).
that while Ann is married to Brian she has an extra-marital affair with Carl and conceives Debra, who is Carl’s biological child. The determination of Debra’s legal paternity will be essential in establishing from whose estate Debra can inherit if either man should die intestate. When Debra is born, a presumption of paternity will arise in favor of Brian. Thus, if Brian dies without a will, Debra will inherit from his estate under the laws of intestate succession. However, if Carl dies without a will, and Debra can prove that he is her biological father, can she inherit from his estate as well? In other words, is the fact of biology enough to overcome the presumption of paternity for purposes of intestate inheritance? This scenario raises complicated questions about what factors should control when presumptive and biological paternity conflict. In light of this complicated situation, courts and legislatures must decide under what circumstances a presumption of paternity can be challenged, who has standing to challenge it, and whether there is a statute of limitations to challenge the presumption.

States have applied inconsistent solutions to resolve these issues.22 For example, some statutory schemes treat the fact of biology as dispositive in establishing paternity and allow a child with a presumed father to inherit from a separate biological father’s intestate estate, regardless of whether the biological parent had a role in the child’s upbringing.23 Other jurisdictions are more restrictive and preclude a child with a presumed father from establishing a filiation24 claim to a biological parent, even if the presumed father did not have a parental role in the child’s life.25 Both of these approaches can lead to undesirable results because such bright-line standards ignore the realities of who actually raised and cared for the child. One of the principal goals of intestacy law is to effectuate the decedent’s likely intent in the distribution of his property.26 Consequently, it makes sense that a decedent would intend his estate to pass to a child he actively raised and nurtured within his family.27 On the other hand, it is less

22 See discussion infra Part III.
23 See generally Estate of Martignacco, 689 N.W.2d 262 (Minn. 2004) (holding biological son, whose presumed father was a man other than decedent, to be decedent’s sole heir even though decedent did not have a substantial relationship with the son).
24 BLACK’S LAW DICTIONARY 661 (8th ed. 2004). Filiation is defined as “the fact or condition of being a son or daughter; relationship of a child to a parent.”
26 See Gary, supra note 2 at 7-8 (stating that “[t]he most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators).”
27 Id. at 19-27 (stating that the results of an empirical study on how people prefer to distribute their property indicate that the “quality of the parent-child relationship” affects these preferences and that “[t]he data provides overwhelming support for the proposition that the public believes
logical to presume that a decedent would intend to pass his estate to a child he may not even have known, simply on account of a biological connection or legal presumption.\textsuperscript{28}

This Note argues that neither biology nor a presumption of paternity should be the dispositive factor in heirship determinations; rather the threshold inquiry should be the nature of the parent-child relationship. Thus, legislatures should assign courts the discretion to evaluate the existence of a familial parent-child relationship when paternity is at stake in intestate inheritance claims. Furthermore, the Uniform Parentage Act (UPA) provides a comprehensive framework for such a discretionary approach that could be modeled in probate cases when a marital presumption is challenged.\textsuperscript{29} Although the UPA was principally drafted to resolve paternity issues for purposes of child support and custody determinations,\textsuperscript{30} and does not directly address the challenges of inheritance law, a comprehensive reading of the statute provides useful guidelines for resolving paternity challenges arising during inheritance claims. Thus, this Note suggests that the UPA’s discretionary method is superior to a bright-line approach that treats the fact of either biological or presumptive paternity as dispositive.

Part I of this Note provides an overview of the presumption of paternity, how it applies in modern jurisprudence, and how the presumption is rebutted. Part II examines the National Conference of Commissioners on Uniform State Laws approach to probate and family law and analyzes the interplay between the Uniform Parentage Act and the Uniform Probate Code. Part III outlines different statutory schemes jurisdictions have adopted to establish the parent-child relationship for inheritance distribution, and how various courts have responded when faced with competing paternity claims for purposes of intestate succession. Finally, Part IV concludes that the nature of the parent-child relationship should determine a child’s right to a father’s intestate estate and that the UPA provides useful guidance for evaluating parentage for purposes of intestate inheritance.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{See generally UNIF. PARENTAGE ACT (amended 2002). See discussion \textit{infra} Part II.}

I. Overview of the Presumption of Paternity and How It Is Rebutted

A. A Brief History of the Presumption of Paternity

Under early English common law, when a child was born during a marriage, the law presumed that the mother’s husband was the child’s father. This presumption of paternity, also termed a presumption of legitimacy, is still considered one of the strongest and most persuasive presumptions in law.31 Originally called Lord Mansfield’s Rule,32 the presumption was designed to preserve family integrity, to protect children from the stigma of illegitimacy, to promote individual rather than state responsibility for children, and to ensure efficient inheritance distribution.33 Historically, the presumption could only be rebutted by a showing that the husband and wife did not have access to each other during the probable time of conception.34 Initially, the only permissible evidence to prove non-access was demonstrating that the husband was “beyond the seas” at the time of conception; otherwise he would be conclusively presumed to be the child’s father.35 The rationale behind such a harsh evidentiary standard was to protect children from the misfortune of illegitimacy, as illegitimate children were not afforded support or inheritance rights from anyone.36 Over time, the strict standards of Lord Mansfield’s Rule abated and further evidence was

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31 See In re Trust Created by Agreement, 765 A.2d 746, 752 (N.J. 2001) (stating that the presumption of legitimacy remains one of the strongest rebuttable presumptions known to the law); In re Estate of Fey, 375 N.E.2d 735, 737 (N.Y. 1978) (finding that the established legal presumption that every person is born legitimate has often been described as one of the strongest and most persuasive presumptions known to the law).

32 See generally Kowalski v. Wojtkowski, 116 A.2d 6 (1955) (summarizing the history and evolution of the rule, beginning with its origins in the common law of England); see also Brashier, supra note 1, at 117 n.86. The author explains that the presumption originated in dictum announced by Lord Mansfield in Goodright v. Moss, 2 Cowp. 519, 98 Eng. Rep. 1257 (1777):

The Law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage. . . . It is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious.

Id.


34 See Glennon, supra note 16, at 562-63.

35 Id.

36 Id. See also BRASHIER, supra note 3, at 125. Under early common law, a nonmarital child was considered filius nullis, the child of no one. Therefore, that child had no inheritance rights from or through either parent and could not transmit inheritance except to his or her own biological children. Eventually the law changed to recognize the parent-child relationship between a mother and her nonmarital child. This was due to the fact that the identity of the mother is clearly ascertainable. Still, the law did not recognize a father-child relationship when a child was born out of wedlock until the later part of the twentieth century. Id.
allowed to rebut the presumption.\textsuperscript{37} In addition to proof of non-access, evidence that the husband was impotent or sterile, or that the wife had committed adultery was included.\textsuperscript{38} Although the legal and social liabilities of illegitimacy have subsided over the past several decades,\textsuperscript{39} challenging the presumption of paternity remained difficult throughout most of the twentieth century.\textsuperscript{40}

The ability to overcome a presumption of paternity has always turned on whether a challenger had adequate proof that the mother’s husband was not the child’s biological father.\textsuperscript{41} As modern genetic testing has made it possible to determine the identity of a child’s biological father with almost absolute accuracy, new questions are being raised as to whether and when genetic tests should be used to disestablish the presumptive paternity of one man and to establish the biological paternity of another.\textsuperscript{42} On one hand, courts and legislatures are reluctant to allow a child’s paternity to be disestablished because it may disrupt the child’s financial and emotional support and sever important family ties, causing the child irreparable harm.\textsuperscript{43} On the other hand, maintaining a system where a presumption of paternity is irrevocable may deny a child the opportunity to identify his biological father, which may not be in the child’s best interest for both medical and psychological reasons.\textsuperscript{44} As courts and legislatures struggle to balance these competing interests, inconsistent standards have emerged among the different states as to how and when the presumption of paternity can be challenged.\textsuperscript{45}

\textsuperscript{37} See Glennon, supra note 16, at 562-63.
\textsuperscript{38} Id.
\textsuperscript{39} A series of Supreme Court cases in the 1970s and 1980s addressed the law’s discriminatory treatment of children born outside of marriage and required states to treat marital and nonmarital children equally for purposes of inheritance and intestate succession. See \textit{Trimble v. Gordon}, 430 U.S. 762 (1977) (holding that an Illinois statute allowing the disinheri tance of children from a father’s estate where the children were born out of wedlock and not legitimated by a subsequent marriage of their parents was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment); \textit{see also} \textit{Reed v. Campbell}, 476 U.S. 852 (1986) (holding that the rule in \textit{Trimble v. Gordon} applies to a Texas statute prohibiting an illegitimate child from inheriting from his father’s estate where the child’s parents had not married, regardless of the fact that the \textit{Trimble} case was handed down after intestate’s death).
\textsuperscript{40} See Glennon, supra note 16, at 565.
\textsuperscript{41} See Roberts, supra note 14, at 44.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} \textit{Compare} Brinkley v. King, 701 A.2d 176 (Pa. 1997) (“The public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents.”), \textit{with} C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (arguing that policy favors eliminating conclusive presumption of legitimacy and allowing biological father to bring paternity action where there is
B. Modern Applications of the Presumption of Paternity

1. When a Presumption Arises

In a typical state statute, a presumption of paternity arises in favor of the mother’s husband when: (i) the child is born during a marriage; (ii) the child is conceived during a marriage but born after its termination; (iii) the child is conceived or born during an invalid marriage; (iv) or the child is born before a valid or invalid marriage and the husband took some voluntary step to establish his paternity such as acknowledging paternity, consenting to be named on the birth certificate, or assuming support obligations. In some jurisdictions, a presumption of paternity also arises in contexts outside of marriage. For example, a presumption may arise when a man receives a child into his home and openly holds the child out as his natural child. Furthermore, some statutes provide that genetic test results showing a high probability that a man is a child’s biological father creates a presumption of paternity. Under these criteria, competing presumptions may arise. For example, if a child is born during a marriage, a presumption of paternity will attach to the mother’s husband. Yet, if genetic test results show that another man is the child’s biological father, a presumption will arise in favor of that man as well. Thus, a presumption of paternity may simultaneously attach to both men. When presumptions overlap like this, statutes usually instruct courts to resolve the conflict based on the weightier considerations of policy and logic.

2. Rebutting a Presumption of Paternity

Just as states have different schemes under which a presumption of paternity arises, they also have varying approaches as to how the presumption is rebutted, including who has standing to challenge a

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46 See Roberts, supra note 42, at 55-56.
48 See, e.g., COLO. REV. STAT. § 19-4-105(1)(f) (2007); HAW. REV. STAT. § 584-4(a)(5) (2007); KAN. STAT. ANN § 38-1114(a)(5) (2006). While biological parentage is included as a presumption of paternity under these statutes, other statutes treat the fact of biology as a dispositive factor that overrides a presumption of paternity. See infra Part I.B.2.
49 See Roberts, supra note 42, at 63 (“If there are two presumptions operating in the case (i.e., the marital presumption and a presumption based on genetic tests), the court is to follow the one based on weightier considerations of policy and logic.”); see, e.g., KAN. STAT. ANN. § 38-1114(c) (2006); MINN. STAT. § 257.55, Subd. 2 (2007); R.I GEN. LAWS. § 15-8-3(b) (2007).
preemption and when a challenge can occur. While issues relating to paternity presumptions arise in a variety of family circumstances, there are some typical situations in which the presumption is challenged. First, an alleged biological father may want to rebut the presumption in order to establish his paternal rights as the child’s father. Second, a presumed father may attempt to rebut the marital presumption in order to avoid parental obligations such as child support. Finally, the mother or child may assert that a man other than the presumed father is the biological father in order to impose support obligations on the purported biological father.

A presumption of paternity is generally rebutted with clear and convincing evidence proving that the presumed father is not the child’s biological father. While proof of the presumed father’s sterility, impotence or non-access to the mother during the probable time of conception still meets the clear and convincing standard, today most presumptions are rebutted with genetic test results establishing that another man is the child’s biological father. Under some state statutes the fact of biology is dispositive and is enough to override a marital presumption. However, some jurisdictions prohibit a presumption of paternity from being rebutted if it is not in the best interest of the child. For example, certain courts will disallow a paternity challenge if an ongoing father-child relationship exists between the child and presumed father, even if another man is proven to be the biological father.

50 See Brasher, supra note 1, at 118-22 (suggesting that most paternity challenges are initiated by a party seeking to avoid child support obligations or a party seeking to impose such obligations).
51 Id.
52 Id.
53 Id.
54 See Roberts, Truth and Consequences, supra note 42, at 63.
55 Id. at 56-57.
57 See G.D.K. v. State Dep’t of Family Serv., 92 P.3d 834 (Wyo. 2004) (holding that in cases involving conflicting statutory presumptions, courts must consider the best interests of the child as a factor in determining paternity); N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000) (holding that when presumptive and biological parentage conflict, courts should look to child’s best interests to determine legal parentage); In re Paternity of Adam, 903 P.2d 207 (Mont. 1995) (holding that the best interest of the child standard should apply in deciding whether a judicial declaration of a father-child relationship in a paternity dispute was warranted).
58 In some cases, courts have disallowed an alleged biological father from rebutting a presumption of paternity because such a determination would not be in the best interest of the child. See, e.g., In re Paternity of C.A.S., 468 N.W.2d 719 (Wis. 1991) (holding that a putative father’s claim should be dismissed because he did not have a close relationship with the children and a judicial determination finding him to be the father of the children would not have been in their best interest). Other courts have not allowed a presumed father to rebut the marital presumption because it would not be in the best interest of the child. See, e.g., Pietros v. Pietros,
Many statutes limit standing to challenge a presumption of paternity to the parties most directly implicated in the outcome; including the mother, the child, and the presumed father. 59 State law varies as to whether an alleged biological father has standing to challenge a marital presumption. 60 Many states have adopted statutes that allow a man alleging himself to be the biological father of a marital child to initiate a paternity challenge. 61 Other statutes preclude an alleged biological father’s paternity challenge by limiting standing to a mother and presumed father. 62 Additionally, some courts have allowed an alleged biological father to challenge a marital presumption, despite statutory provisions that forbid such actions, if the putative father can prove that he had a substantial relationship with the child. 63 And in some states, an alleged biological father’s ability to initiate a paternity challenge depends on the marital status of the mother and presumed father. 64

In addition to standing requirements, many states have statutes of limitations that restrict when a paternity challenge can be initiated to rebut a presumption of paternity. Some states apply a strict statute of limitations that bars actions more than a specified time after the child’s

638 A.2d 545 (R.I. 1994) (estopping presumed father who knew that he was not biological father prior to marriage and promised to treat child as his own from escaping support obligation); M.H.B. v. H.T.B., 498 A.2d 775 (N.J. 1985) (estopping presumed father who knew he was not biological father yet represented to child and community that he was father from disclaiming his responsibility to child).

59 See Brashier, supra note 1, at 120.

60 See Glennon, supra note 16, at 572-74.


62 See, e.g., MICH. COMP. LAWS § 722.714 (2008); S.D. CODIFIED LAWS § 25-8-57 (2008). Statutes that prohibit an alleged biological father’s ability to initiate a paternity action have been subject to constitutional attack as a violation of the putative biological father’s due process and equal protection rights. In Michael H. v. Gerald D., the United States Supreme Court held, in a plurality opinion, that a conclusive presumption of paternity in the California Evidence Code was constitutional because the state’s policy was justified by the interest in protecting both marriage and the child’s established bonds within an intact marital family. 491 U.S. 110 (1989). Despite the Supreme Court’s decision in Michael H., some state courts have held that denying an alleged biological father standing to assert paternity did violate either due process or equal protection rights under their state constitutions. See Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) (holding that according to state law it is unconstitutional to deny a biological father a chance to establish paternity even when a child is born to a married woman whose husband accepted the child as his own).

63 C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990). While the Massachusetts statute did not give standing to an alleged biological father to challenge a marital presumption, the court eliminated the conclusive presumption of legitimacy through its equity jurisdiction, allowing a biological father to bring a paternity action where there was strong evidence of a substantial parent-child relationship. Id.

birth,\(^{65}\) while some statutes allow a challenge to commence any time before the child reaches the age of majority.\(^{66}\) Other legislation allows an action to rebut a marital presumption of paternity to be brought at any time.\(^{67}\) Finally, the statute of limitations sometimes varies depending on who initiates the challenge.\(^{68}\)

Most paternity claims are prompted by child support and custody issues.\(^{69}\) Accordingly, paternity challenges often occur when children are still minors. However, paternity determinations are also important in establishing a child’s inheritance rights.\(^{70}\) This is particularly true in cases where a marital child seeks to rebut her presumptive father’s paternity to establish another man as her biological father, because the outcome will determine her heirship status.\(^{71}\) Before the advent of genetic testing, heirship determinations were relatively straightforward when marital children were involved.\(^{72}\) The marital presumption ensured that children were heirs to the presumed father’s estate.\(^{73}\) However, not all children are the biological offspring of their mother’s husband, and genetic testing has made it possible to decisively establish when this is the case. Consequently, more adult children are initiating paternity challenges in order to establish heirship to a putative biological father’s estate.\(^{74}\) This has led to an increasingly complex relationship between family law and probate law.\(^{75}\) Considering the significant impact the advancements in genetic testing have had on paternity determinations over the past few decades, legislatures must reevaluate their current inheritance laws.\(^{76}\) One important policy question legislatures must consider is whether, and under what circumstances, a marital child should be deemed an heir to a biological father’s estate if the biological father is not the presumed father. In other words, should heirship determinations hinge on biology alone, or

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\(^{65}\) See, e.g., COLO. REV. STAT. § 19-4-107(1)(b) (2007) (an action to rebut a presumed father-child relationship can be brought no later than five years after the birth of the child).

\(^{66}\) See, e.g., IOWA CODE § 600B.41A(3)(a) (2008).

\(^{67}\) See, e.g., MO. REV. STAT. § 210.826.1 (2007) (an action may be initiated at any time for the purpose of declaring the existence or nonexistence of a presumed father-child relationship).

\(^{68}\) See, e.g., LA. CIV. CODE ANN. arts. 189, 197 & 198 (2007). In Louisiana, a child may institute a proceeding to prove paternity at any time unless the proceeding is for purposes of succession, in which case the proceeding must be initiated within one year of the death of the alleged father. Id. at art. 197. A presumed father may disavow his paternity within one year after he learned or should have learned of the child’s birth. Id. at art. 198. And an alleged father must institute an action to establish paternity within one year of the child’s birth. Id. at art. 198.

\(^{69}\) See Brashier, supra note 1, at 115.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) See Roberts, supra note 14.

\(^{73}\) Id.

\(^{74}\) See Brashier, supra note 1, at 143-44.

\(^{75}\) Id. at 147.

\(^{76}\) Id.
should other considerations, such as the nature of the parent-child relationship, play a role as well?

The National Conference of Commissioners on Uniform State Laws has constructed interrelated uniform acts, the Uniform Probate Code (UPC)\textsuperscript{77} and the Uniform Parentage Act (UPA),\textsuperscript{78} that function concomitantly to address issues regarding parentage and inheritance rights. The following section will define these acts as well as their intrinsic ambiguities and will suggest measures to correct these problematic features.

II. THE UNIFORM PROBATE CODE AND THE UNIFORM PARENTAGE ACT

A. Background: The Supreme Court Cases

While the presumption of paternity was designed to protect children born to married parents, the law historically prejudiced nonmarital children\textsuperscript{79} and denied them equal protection of inheritance rights.\textsuperscript{80} Two Supreme Court cases in the 1970s addressed this inequality and required states to treat marital and nonmarital children equally for purposes of inheritance and intestate succession. In \textit{Trimble v. Gordon},\textsuperscript{81} the Supreme Court declared an Illinois statute unconstitutional that permitted a nonmarital child to inherit through her mother but not her father, while a marital child could inherit through both parents.\textsuperscript{82} Though the \textit{Trimble} decision held it unconstitutional for a state to absolutely bar a nonmarital child from inheriting from her intestate father, the Court did recognize the important state interest in facilitating an orderly distribution of a decedent’s estate.\textsuperscript{83} The

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  \item \textsuperscript{77} See generally \textit{Unif. Probate Code} (amended 2003).
  \item \textsuperscript{78} See generally \textit{Unif. Parentage Act} (amended 2002).
  \item \textsuperscript{79} A nonmarital child is one whose parents were not married to each other at the time of his or her birth (traditionally called an illegitimate child). If a child has a presumed father—the man who was married to the mother at the time of birth—the child is considered a marital child. However, if it turns out that a marital child’s biological father is someone other than the presumed father, the child could be considered a nonmarital child.
  \item \textsuperscript{80} See supra Part I.A.
  \item \textsuperscript{81} 430 U.S. 762 (1977).
  \item \textsuperscript{82} \textit{Id.} at 764-65. Section 12 of the Illinois Probate Act provided in relevant part:
    An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father’s child is legitimate.
  \item \textsuperscript{83} \textit{Trimble}, 430 U.S. at 770. The Court reasoned as follows:
    The more serious problems of proving paternity might justify a more demanding
following year, the Supreme Court decided *Lalli v. Lalli*, which challenged a New York statute that permitted a nonmarital child to inherit from his father only if paternity had been legally determined during that father’s lifetime. In *Lalli*, the Court noted that because of the difficulty in proving paternity, a state may impose greater demands on a nonmarital child attempting to inherit from the father than a marital child making the same claim. Therefore, the statute was held constitutional because the requirement of a paternity judgment during the father’s lifetime ensures accuracy, simplifies estate administration, discourages fraudulent paternity claims, and does not condition the

standard for illegitimate children claiming under their fathers’ estates than that required either for illegitimate children claiming under their mothers’ estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State’s proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

Id. 84 439 U.S. 259 (1978).
Id. at 262. The statute at issue was New York’s Estates, Powers, and Trusts Law § 4-1.2, which required illegitimate children who would inherit from their fathers by intestate succession to provide a particular form of proof of paternity. Legitimate children were not subject to the same requirement. Section 4-1.2(2) provides:

An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

Id.

Id. at 268. The Court noted that the primary state goal underlying challenged aspects of the statute is to provide for the just and orderly disposition of a decedent’s property. Additionally:

This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult... [p]roof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. Thus, a number of problems arise that counsel against treating illegitimate children identically to all other heirs of an intestate father.

Id.

Id. at 271-72. In weighing the state’s interests against the individual’s rights, the Court found that the state’s interests were substantial and the means adopted by the statute furthered those interests:

The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences. Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

Id.
child’s inheritance right on the parents being married.88

Prior to the Trimble decision many states had statutes similar to the one in Illinois requiring nonmarital children to be legitimated by their parent’s marriage before they could inherit from the father.89 Following Trimble, state laws had to provide the nonmarital child legitimate ways to inherit from the father; however, the Supreme Court did not give legislatures significant guidance regarding how to enable such inheritance.90 Moreover, while the Court indicated that the states may impose some special requirements on nonmarital children to further state interests in facilitating probate proceedings, it did not specify what restrictions other than legitimation would pass constitutional muster.91 Consequently, the requirements for establishing paternity under probate law vary among the states.92 However, a number of states have adopted the UPC as a model for resolving paternity claims in inheritance cases.93

88 Id. at 273:

The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. Section 4-1.2 does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father’s lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

Id.

89 See, e.g., Lucas v. Handcock, 583 S.W.2d 491 (Ark. 1979) (declaring a state statute unconstitutional because it permitted a nonmarital child to inherit from the mother in the same manner as a legitimate child, but not from the father); Succession of Thompson, 367 So. 2d 796 (La. 1979) (finding a Louisiana statute unconstitutional because it provided that whenever a parent was survived by legitimate children, any inheritance from an acknowledged nonmarital child from either the father or mother was limited to what was strictly necessary for sustenance).

90 See Brashier, supra note 1, at 113.

91 Id.

92 Id.

B. The Statutory Scheme

1. The UPC

The purpose of the UPC is to simplify and clarify most aspects of probate law; to effectuate the intent of a decedent in the distribution of his property; to promote timely and efficient estate distribution; to facilitate the use and enforcement of certain trusts; and to unify the laws of various jurisdictions.94 The UPC provides guidelines for defining the parent-child relationship that can be particularly helpful in analyzing cases in which determining paternity is central to establishing intestate inheritance rights.95 UPC section 2-114(a) provides that, for purposes of intestate succession, an individual is the child of his or her natural parents regardless of their marital status.96 This provision clarifies that a nonmarital child has the same rights to inherit from an intestate father’s estate as a marital child. While section 2-114(a) allows a child an unqualified right to intestate succession by, through, or from his natural parents, section 2-114(c) precludes a parent from inheriting from the child unless that parent has openly treated the child as his or her own and has not refused to support that child.97

The UPC does not specifically stipulate how a parent-child relationship should be established for purposes of intestate succession; instead, it defers parentage determinations to the UPA or other relevant

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94 UNIF. PROBATE CODE § 1-102 (amended 2003).
95 The original UPC was drafted in 1969 before recent scientific advances in genetic testing increased the accuracy of paternity determinations. Thus, the original act did not contemplate the realm of scientific possibility in this area. Although the act was revised in 1990, the drafters of the revised Code did not address genetic testing as a means to achieve paternity determinations. The General Comment on Intestate Succession of the revised act states: “Although only a modest revision of the section dealing with the status of . . . children born of unmarried parents is made at this time, the question is under continuing review and further revisions may be presented in the future.” UNIF. PROBATE CODE, pt. 1, gen. cmt. To date, the UPC still does not directly address the use of genetic testing in establishing a parent-child relationship for purposes of intestate succession. See UNIF. PROBATE CODE § 2-114.
96 UNIF. PROBATE CODE § 2-114(a):
Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].
Id.
97 Id. at § 2-114(c):
Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.
Id.
state law. The UPA guidelines for establishing legal parentage are useful in cases involving inheritance rights because the existence of a parent-child relationship is often the starting point in such cases.

2. The UPA

The purpose of the UPA is to streamline the process of paternity establishment and affirm the principle that all children should have equal treatment under the law regardless of the circumstances of their birth. The UPA provides detailed rules for establishing paternity in a variety of settings and recognizes the import of genetic testing in this area. The UPA retains the traditional presumption of paternity and

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99 See Brashier, supra note 1, at 143.

100 See UNIF. PARENTAGE ACT, Prefatory Note (amended 2002). See also Summary, supra note 30. The UPA, originally drafted in 1973, became the seminal uniform act on parentage addressing such issues as the determination of parentage, paternity actions and child support. The UPA was revised in 2000 to address certain inadequacies in the 1973 version. The 1973 UPA did not address the relationship between a divorce and the determination of parentage, the standing of nonmarital fathers to file a filiation claim, genetic testing, or surrogacy and gestational agreements. The modern UPA provides detailed rules for establishing paternity in a variety of settings and recognizes the recent developments in genetic testing. Id.

101 Id.; see also UNIF. PARENTAGE ACT § 202 (providing “A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other”).

102 See Summary, supra note 30.

103 UNIF. PARENTAGE ACT § 204. The text of section 204 provides:

(a) A man is presumed to be the father of a child if:

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation;

(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is void or could be declared invalid, and the child is born during the void marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce, or after a decree of separation;
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stipulates that a man is presumed to be a child’s father if he is married to the child’s mother when the child is born, or if the child could have been conceived during the marriage, even if the marriage ends before the child is born.  

A man is also presumed to be a child’s father if he marries the mother after the child is born and took some voluntary step to establish his paternity such as asserting paternity in a properly filed writing, consenting to be named as the child’s father on the birth certificate, or officially assuming support obligations. Finally, a presumption arises under the UPA when a man lives in the same household as the child for the first two years of its life and openly holds the child out as his own.

When a presumption arises under one of these circumstances, there are limited ways to disestablish a presumptive father’s paternity. First, if a child’s presumed father is not her biological father, a voluntary acknowledgement of paternity can override the marital presumption and establish the child’s true paternity if the mother, the biological father, and the presumed father all agree to it. With the exception of a voluntary acknowledgement process, the presumption can only be rebutted through a judicial proceeding.

The UPA gives standing to adjudicate paternity to a variety of parties, including the child, the mother, a presumed father, and an alleged biological father. However, the UPA provides different time

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];
(B) he agreed to be and is named as the child’s father on the child’s birth certificate; or
(C) he promised in a record to support the child as his own; or

(5) for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.

104 Id. §§ 204(a)(1) to 204(a)(3).
105 Id. § 204(a)(4).
106 Id. § 204(a)(5).
107 See Roberts, supra note 42, at 65.
108 UNIF. PARENTAGE ACT §§ 301 to 305. For the acknowledgement to be valid, the mother and the man claiming to be the biological father must sign an acknowledgement of paternity and the presumed father must sign a denial of paternity. Id. This process is binding on all parties. Id. § 307. The UPA provides for a 60 day rescission period to an acknowledgement of paternity. Id. § 307. After the 60 day period has passed the acknowledgement is binding and can only be challenged by a showing of fraud, duress or material mistake of fact and the challenge is subject to a two year statute of limitations. Id. § 308.
109 UNIF. PARENTAGE ACT § 204(b) (“A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.”).
110 UNIF. PARENTAGE ACT § 602:

Subject to [Article] 3 and Sections 607 and 609, a proceeding to adjudicate parentage may be maintained by:

(1) the child;
(2) the mother of the child;
(3) a man whose paternity of the child is to be adjudicated;
(4) the support-enforcement agency [or other governmental agency authorized by
limitations for parents, children, and third parties to initiate a paternity proceeding. Under UPA section 606, if a child does not have a presumed father, there is no statute of limitations in a proceeding to establish paternity. However, a proceeding to adjudicate parentage after a child becomes an adult can only be initiated by the child. For a child having a presumed father, UPA section 607 provides a two-year statute of limitations, commencing at the child’s birth, on a proceeding brought by the mother, the presumed father, or the alleged biological father. Thus, section 607 establishes the right of both a mother and a presumed father to challenge the presumption of paternity, and it establishes the right of an alleged biological father to claim paternity of a child who has an existing presumed father. This limitation assumes

other law):
(5) an authorized adoption agency or licensed child-placing agency; [or]
(6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; [or]
(7) an intended parent under Article 8.

Id. § 606. The section provides in its entirety:
A proceeding to adjudicate the parentage of a child having no presumed, acknowledged, or adjudicated father may be commenced at any time, even after:
(1) the child becomes an adult, but only if the child initiates the proceeding; or
(2) an earlier proceeding to adjudicate parentage has been dismissed based on the application of a statute of limitation then in effect.

Id. This provision was prompted, to some extent, by the Welfare Reform Act. For a state to retain the federal child support enforcement subsidy, the Welfare Reform Act in 42 U.S.C. § 666(a)(5)(A)(i) mandates that a state must have laws that “permit the establishment of paternity of a child at any time before the child attains 18 years of age.” See Unif. Parentage Act § 606 cmt. The provision also reflects the notion that the right to determine one’s parentage is an important civil right and should not be subject to a time limitation, except when an estate has been closed. Id. The comment to § 606 states as follows:
The new UPA directs that an individual whose parentage has not been determined has a civil right to determine his or her own parentage, which should not be subject to limitation except when an estate has been closed. Accordingly, if the action is initiated by the child this section allows a proceeding to adjudicate parentage after the child has reached the age of majority. Such a proceeding is the exclusive province of the child, however. This limitation prohibits the filing of an intrusive proceeding by an individual claiming to be a parent of an adult child, or by a legal stranger. There appear to be no reported problems encountered in states without a statute of limitations for such actions.

Id.

Id. § 607. The section provides in its entirety:
(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.
(b) A proceeding seeking to disprove the father-child relationship between a child and the child’s presumed father may be maintained at any time if the court determines that:
(1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and
(2) the presumed father never openly held out the child as his own.

Id.; see also Unif. Parentage Act § 607 cmt. It should be noted that § 607 does not mention a child’s standing to initiate a paternity proceeding if the child has an existing presumed father. This ambiguity will be discussed in Part II.B.3.
that two years is enough time to resolve the status of a child who is born
with a presumed father, and that any longer period may have a harmful
impact on the child. However, the statute of limitations does not
apply if a presumed father did not cohabitate or have a sexual
relationship with the mother during the probable time of conception,
and never held the child out as his own.

Regardless of who initiates a challenge, the presumption of
paternity can only be rebutted if genetic test results prove that the
presumed father is not the biological father. No other evidence may
be offered. However, UPA section 608 incorporates the doctrine of
paternity by estoppel, giving the court discretion to deny genetic testing
in certain circumstances and declare the presumed father to be the
child’s legal father. These circumstances typically arise when the
presumed father has assumed a paternal role in the child’s life
regardless of a biological connection. In making this determination

In a law review article written prior to the UPA’s enactment, William Hoffman
describes the rationale for limiting the time in which the presumption of paternity can be
challenged:

In the case of a young child the most palpable relation that anyone has to the child is a
biological relationship. The child has no personality, he can communicate with no one,
and no one can be said to have exercised a formative influence on his character. But in
the case of an older child the familial relationship between the child and the man
purporting to be the child’s father is considerably more palpable than the biological
relationship of actual paternity. A man who has lived with a child, treating it as his son
or daughter, has developed a relationship with the child that should not be lightly
dissolved and upon which liability for continued responsibility to the child might be
predicated. This social relationship is much more important, to the child at least, than a
biological relationship of actual paternity. . . . Where a strong social relationship to the
child has not yet developed, the only basis for a duty on the husband’s part to support
the child is biological fatherhood of the child. . . . The adoption of a statute of
limitations . . . offers the obvious advantage of greatly simplifying the law and at the
same time molding the law to closer conformity with the relevant policies. . . . The
legislature should address itself squarely to the problem of defining a period after the
birth of a child during which biological paternity will be determinative of a husband’s
duty to support his wife’s child, and it should announce clearly that after this period
has expired biological nonpaternity shall be irrelevant.

William P. Hoffman, Jr., Recent Developments, California’s Tangled Web: Blood Tests and the

The most common situation in which estoppel should be applied arises when a man
knows that a child is not, or may not be, his genetic child, but the man has
affirmatively accepted his role as child’s father and both the mother and the child have
relied on that acceptance. Similarly, the man may have relied on the mother’s
acceptance of him as the child’s father and the mother is then estopped to deny the
man’s presumed parentage . . . [A]pplication of this section should be applied in those
meritorious cases in which the best interest of the child compels the result and the
conduct of the mother and presumed or acknowledged father is clear.

Id.
Courts are instructed to consider the best interest of the child.\textsuperscript{121} Under UPA section 608 courts are required to evaluate the parent’s conduct toward the child and whether it would be inequitable to allow the adjudication to go forward.\textsuperscript{122} Factors that influence whether courts will allow genetic testing include the length and nature of the relationship between the child and the presumed father, the nature of the relationship between the child and the biological father, the age of the child, the harm that may result to the child if the presumed paternity is disproved, and how much time has passed since the biological father’s identity has been asserted.\textsuperscript{123}

\textbf{C. The Interplay of the UPC and UPA in Paternity Challenges}

Under the affiliated schemes of the UPC and the UPA, if a paternity challenge arises in a probate proceeding, the UPC defers the determination of a parent-child relationship to the UPA.\textsuperscript{124} As stated above, when a child has a presumed father, section 607 limits standing to initiate a paternity adjudication to a mother, presumed father, and putative biological father, subject to a two-year statute of limitations commencing at the child’s birth.\textsuperscript{125} The statute of limitations does not apply to the child;\textsuperscript{126} however, since the UPA was principally designed to address issues of child support and custody, the statute was not written with inheritance in mind.\textsuperscript{127} Thus, the drafters did not likely anticipate paternity actions stemming from an adult child’s inheritance claim.

A comprehensive reading of the UPA would look to section 606 for guidance concerning the rationale for allowing an adult child to initiate a paternity proceeding for inheritance purposes.\textsuperscript{128} The UPA is clear that a child with no presumed father has standing to initiate an adjudication of paternity at any time, even after the child becomes an adult.\textsuperscript{129} The rationale behind this provision is that the right to determine one’s parentage is an important civil right and should not be subject to limitations.\textsuperscript{130} It follows, then, that a child with a presumed father would have the same right to establish her true paternity at any

\begin{footnotesize}
\begin{enumerate}
\item[121] Id. § 608(b).
\item[122] Id. § 608(a).
\item[123] Id. § 608(b).
\item[124] See supra note 96.
\item[125] See supra note 113.
\item[126] See supra note 110.
\item[127] See Summary, supra note 30.
\item[128] See supra note 111.
\item[129] Id.
\item[130] See supra note 112.
\end{enumerate}
\end{footnotesize}
time, including cases where the purpose of the paternity proceeding is to establish the biological paternity of an adult child in an inheritance claim.

A possible argument against this reading of the UPA, in the context of inheritance law, is that it could allow an undeserving heir to inherit from a biological father who the child may never even have known.131 For example, if a child was raised by a presumed father throughout his childhood, then discovered as an adult that a stranger was his biological father, he could challenge his presumptive father’s paternity and establish himself as an heir to the biological father’s estate. However, this scenario would be prevented under UPA section 608.132 Before the child could rebut his presumptive father’s paternity,

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131 One of the principle purposes of intestacy statutes is to carry out the decedent’s probable intent in the distribution of his estate. Thus, a child who the decedent did not know is, arguably, unlikely to be an intended recipient of his estate. Under those circumstances, the child would be an undeserving heir to the biological father’s estate. See text accompanying notes 26-28.

132 See supra note 119. UPA § 608 provides in its entirety:

(a) In a proceeding to adjudicate the parentage of a child having a presumed father or to challenge the parentage of a child having an acknowledged father, the court may deny a motion seeking an order for genetic testing of the mother, the child, and the presumed or acknowledged father if the court determines that:

(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and

(2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.

(b) In determining whether to deny a motion seeking an order for genetic testing under this section, the court shall consider the best interest of the child, including the following factors:

(1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;

(2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;

(3) the facts surrounding the presumed or acknowledged father’s discovery of his possible nonpaternity;

(4) the nature of the relationship between the child and the presumed or acknowledged father;

(5) the age of the child;

(6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;

(7) the nature of the relationship between the child and any alleged father;

(8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and

(9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.

(c) In a proceeding involving the application of this section, a minor or incapacitated child must be represented by a guardian ad litem.

(d) Denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence.

(e) If the court denies a motion seeking an order for genetic testing, it shall issue an order adjudicating the presumed or acknowledged father to be the father of the child.
the court would consider the factors enumerated in section 608 to
determine whether genetic testing would be appropriate to establish the
legal paternity of the biological father.133

Under this reading of the UPC and the UPA, if a child had a
presumed father and separate biological father, his inheritance rights
would be determined by the nature of the parent-child relationship
rather than a bright-line determination based on either biology or
presumptions alone. This approach would provide an equitable
resolution to paternity challenges when presumptive and biological
paternity conflict in the context of inheritance law. However, not all
states have adopted the uniform acts. Some states have adopted both
the UPC and the UPA,134 others have adopted only the UPC,135 some
have adopted only the UPA,136 while others have not adopted either
uniform law.137 Thus, state law remains inconsistent in this area.

III. HOW DIFFERENT JURISDICTIONS RESOLVE PATERNITY CHALLENGES
IN INHERITANCE CLAIMS WHEN PRESUMPTIVE AND BIOLOGICAL
Paternity Conflict

A. New Jersey

New Jersey has adopted both the UPC and the UPA and the
presumption of paternity under New Jersey’s Parentage Act is similar to
the presumption in the UPA.138 The presumption can only be rebutted
by clear and convincing evidence, and genetic test results proving that a
man other than the child’s presumed father is the biological father
conclusively satisfies the clear and convincing standard.139 A paternity
proceeding may be initiated by the child, the mother, the alleged father,

133 See supra notes 117-122.
134 These states include Colorado, Hawaii, Minnesota, Montana, New Jersey, Mew Mexico,
North Dakota, and Utah.
135 These states include Alaska, Arizona, Florida, Idaho, Maine, Michigan, Nebraska, South
Carolina, and South Dakota.
136 These states include Alabama, California, Delaware, Illinois, Kansas, Missouri, Nevada,
Ohio, Oklahoma, Rhode Island, Texas, Washington, and Wyoming.
137 These states include Arkansas, Connecticut, Georgia, Indiana, Iowa, Kentucky, Louisiana,
Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon,
Pennsylvania, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.
139 See N.J. STAT. ANN. § 9:17-43(b) (2007):
A presumption under this section may be rebutted in an appropriate action only by
clear and convincing evidence. If two or more presumptions arise which conflict with
each other, the presumption which on the facts is founded on the weightier
considerations of policy and logic controls. The presumption is rebutted by a court
order terminating the presumed father’s paternal rights or by establishing that another
man is the child’s biological or adoptive father.
or any other person with a justiciable interest in the child’s paternity.\textsuperscript{140} Such a proceeding cannot be brought more than five years after the child has reached the age of majority and is thus subject to a twenty-three year statute of limitations.\textsuperscript{141} However, while New Jersey’s Probate Code defers parental determinations to the Parentage Act, both statutes specifically provide that the twenty-three year statute of limitations to institute a paternity proceeding does not apply in probate cases.\textsuperscript{142} Furthermore, the New Jersey Parentage Act does not enumerate the same discretionary criteria as UPA section 608 to determine when genetic test results are admissible to rebut a presumption of paternity.\textsuperscript{143} Consequently, such evidence is always admissible in an appropriate action to rebut a presumption of paternity.\textsuperscript{144} Thus, under New Jersey’s statutory scheme, a child with a presumed father may rebut the presumption at any time using genetic test results to establish a parent-child relationship with a biological father for inheritance purposes.

This statutory approach may lead to objectionable results for

\begin{itemize}
  \item \textsuperscript{140} \textit{Id.} § 9:17-45:
  Action to determine existence of parent-child relationship:
  a. A child, a legal representative of the child, the natural mother, the estate or legal representative of the mother, if the mother has died or is a minor, a man alleged or alleging himself to be the father, the estate or legal representative of the alleged father, if the alleged father has died or is a minor, the Division of Family Development in the Department of Human Services, or the county welfare agency, or any person with an interest recognized as justiciable by the court may bring or defend an action or be made a party to an action at any time for the purpose of determining the existence or nonexistence of the parent and child relationship.

  \item \textsuperscript{141} \textit{Id.} § 9:17-45(b):
  No action shall be brought under P.L.1983, c.17 (C.9:17-38 et seq.) more than five years after the child attains the age of majority.

  \item \textsuperscript{142} \textit{Id.} § 9:17-45(f):
  This section does not extend the time within which a right of inheritance or a right to succession may be asserted beyond the time provided by law relating to distribution and closing of decedents’ estates or to the determination of heirship, or otherwise, or limit any time period for the determination of any claims arising under the laws governing probate, including the construction of wills and trust instruments.

  \item \textit{See also} N.J. STAT. ANN. § 3B:5-10 (2007):
  Establishment of parent-child relationship:
  If, for the purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from an individual, in cases not covered by N.J.S. 3B:5-9, an individual is the child of the individual’s parents regardless of the marital state of the individual’s parents, and the parent and child relationship may be established as provided by the “New Jersey Parentage Act,” P.L. 1983, c. 17 (C. 9:17-38 et seq.). The parent and child relationship may be established for purposes of this section regardless of the time limitations set forth in subsection b. of section 8 of P.L. 1983, c. 17 (C. 9:17-45).

  \item \textit{See supra} note 119.

  \item \textsuperscript{143} \textit{See supra} note 119.

  \item \textsuperscript{144} \textit{See} N.J. STAT. ANN. § 9:17-52(c) (providing that genetic test results are appropriate evidence to establish paternity).
\end{itemize}
several reasons. First, under this scheme, a child with a presumed father and a separate biological father could potentially be an heir to both men’s estates for intestacy purposes, even though there is no legal precedent for dual fatherhood.145 Furthermore, it permits a child to inherit from a genetic father’s intestate estate based on the fact of biology alone, regardless of whether the decedent had a role in raising or caring for the child. This type of distribution controverts the principal assumption of intestacy law—that a decedent would prefer his property to pass to those family members with whom he shared a significant relationship.146

These problematic features are illustrated by the New Jersey Supreme Court’s decision in *Wingate v. Estate of Ryan.*147 In *Wingate*, the court held that the Parentage Act’s twenty-three-year statute of limitations did not apply to a thirty-one year old claimant who sought to prove paternity and heirship under the Probate Code.148 When the claimant Joanne Wingate was born, her mother was married to Willard Wingate, whom she believed was her natural father until well after his death in 1988.149 In 1995 Joanne learned that another man, John Ryan, was her biological father.150 Ryan died shortly after Joanne learned the truth about her paternity.151 The day after Ryan’s death, Joanne filed a claim under the Probate Code to establish that she was an heir to Ryan’s intestate estate.152 Although her paternity action was barred under the Parentage Act’s statute of limitations, Joanne contended that action should be determined under the Probate Code, which was not subject to the same statute of limitations.153

The court concluded that the Parentage Act’s statute of limitations did not apply to probate actions because the two statutes were designed to address different primary rights.154 The Parentage Act was intended

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146 See supra note 26.
147 693 A.2d. 457 (N.J. 1997).
148 *Id.* The *Wingate* case was decided before the New Jersey Legislature added provisions in the Probate Code and Parentage Act specifying that the Parentage Act’s statute of limitations does not apply to probate cases.
149 *Id.* at 459.
150 *Id.*
151 *Id.* After Ryan’s death, Joanne obtained a court order permitting a DNA test on blood and hair samples taken from Ryan before embalming. The tests confirmed that Ryan was her biological father.
152 *Id.* at 458.
153 *Id.* at 460. The Probate Code provided a general limitations period for claims brought under the statute, which required that claims be brought “within a reasonable time after reasonable notice . . . as may be prescribed by the court.” *Id.*
154 *Id.* at 463. The court explains: The purpose of the Parentage Act is to establish “the legal relationship . . . between a child and the child’s natural or adoptive parents, incident to which the law confers or
to address child support and other parental obligations while the Probate Code functioned to determine who is entitled to share in a decedent’s estate.\textsuperscript{155} Thus, these separate purposes required different limitation periods for filing claims under the respective statutes.\textsuperscript{156} The court rejected the argument that the Parentage Act’s twenty-three year statute of limitations should be imposed to guard against spurious claims, reasoning that the accuracy of genetic testing alleviated the risk of false paternity claims.\textsuperscript{157}

While accurate genetic testing does reduce the threat of false paternity claims, it does nothing to assuage the potential for unworthy claims.\textsuperscript{158} In holding that the Parentage Act’s statute of limitations did not apply in probate cases, the Wingate decision increased the likelihood of such claims. Since the New Jersey Parentage Act does not have a provision similar to UPA 608 giving judges the discretion to determine whether genetic test results are appropriate to rebut a marital presumption, the statute of limitations was the only safeguard against unworthy heirship claims.\textsuperscript{159} Without a way to limit when a parent-child relationship can be established for inheritance purposes, the chances increase that an adult child will inherit from a biological parent who did not share a substantial familial relationship with the child. As a result, that child may take a portion of a decedent’s estate that would otherwise pass to his spouse, acknowledged children, or other relatives. This type of estate distribution is unlikely to reflect how the decedent would have preferred his estate to be distributed.\textsuperscript{160} Furthermore, this may encourage unacknowledged children who stand to inherit from a biological father’s intestate estate to wait until after his death to come forward as an heir, which can upset the decedent’s established family relationship and disrupt the efficiency of the probate process. Courts and legislatures should consider whether such a result is in keeping with sound policy. Despite these potential shortcomings, this approach appears to be the trend many courts are following.\textsuperscript{161}

imposes rights, privileges, duties, and obligations.” Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent’s real and personal property. The different purposes the two statutes serve, help to explain why the Legislature contemplated different periods of limitations for filing claims under those statutes.

\textit{Id.}\textsuperscript{155}
\textit{Id.}\textsuperscript{156}
\textit{Id.} at 464.
\textit{Id.} at 465.
\textit{Id.} at 465.
\textsuperscript{157} \textit{See supra} note 131.
\textsuperscript{158} \textit{See supra} note 119.
\textsuperscript{159} \textit{See supra} note 26.
\textsuperscript{160} \textit{See supra} note 26.
\textsuperscript{161} \textit{See, e.g.,} Estate of Martignacco, 689 N.W.2d 262 (Minn. 2004) (holding that the Parentage Act is not the exclusive means by which to establish paternity for purposes of intestate succession, and that the statute of limitations found in the Parentage Act does not apply in probate cases); Estate of Rogers, 81 P.3d. 1190 (Haw. 2003) (holding that “for purposes of intestate
B. California

Under the California Probate Code, a parent-child relationship is established pursuant to the state’s version of the UPA.\(^{162}\) As in New Jersey, a marital presumption arises under California’s Parentage Act in effectively the same manner prescribed in the UPA.\(^{163}\) Clear and convincing evidence is required to rebut the presumption, and proof that a man other than the presumed father is the child’s biological father conclusively rebuts the marital presumption.\(^{164}\) The statute gives standing to the child, the mother, and the presumed father to challenge a presumed father’s paternity and such an action must be initiated within succession, a purported heir may establish his or her parent-child relationship with the decedent by any means permitted by statute, including, but not limited to the [UPA]”); Taylor v. Hoffman, 544 S.E.2d 387 (W. Va. 2001) (holding that “[l]imitations provisions included within the paternity statute are inapplicable to a civil action by a child born out of wedlock seeking to inherit from his or her father”); In re Nocita, 914 S.W.2d 358 (Mo. 1996) (holding that “[b]ecause the legislature passed the Parentage Act without conforming the Probate Code, the General Assembly refused to make the Parentage Act the exclusive means to establish paternity for probate”); Lewis v. Schneider, 890 P.2d 148 (Colo. Ct. App. 1994) (holding that the statute of limitations contained in the UPA did not preclude the petitioner from establishing paternity under Colorado’s probate code); In re Estate of Greenwood, 587 A.2d 749 (Pa. 1991) (holding that “the ‘right to inherit’ in the case of intestacy is reserved exclusively to the probate code” and that there is “no reason to look solely to the support statute in evaluating the right of an illegitimate to inherit by intestate succession, nor the statute of limitations contained therein for doing so”); Ellis v. Ellis, 752 S.W.2d 781 (Ky. 1988) (holding that Kentucky’s parentage act “bears no relationship to the laws governing intestate succession,” including statutes of limitations, in cases “where no action has been brought under the [parentage act]”).

\(^{162}\) See CAL. PROB. CODE § 6453 (2007).

\(^{163}\) See CAL. FAM. CODE § 7611 (2007). The provision states in relevant part:

A man is presumed to be the natural father of a child if he meets... any of the following subdivisions:

(a) He and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child’s birth, he and the child’s natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child’s birth, he and the child’s natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child’s father on the child’s birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

\(^{164}\) Id. at § 7612.
a reasonable time after gaining knowledge of the relevant facts. 165 Thus, a child can rebut a presumptive father’s paternity with proof that another man is her biological father as long as the action is initiated within a reasonable time of learning the truth about her paternity. However, if that child subsequently seeks to establish her biological father’s paternity for heirship purposes after his death, she must do so under the Probate Code. The Probate Code stipulates that a child who does not have a presumed father, or whose presumed father has died, can only initiate a paternity proceeding if one of the following conditions is met: (i) a court order was entered during the father’s lifetime declaring paternity; (ii) paternity is established by clear and convincing evidence that the father has openly held the child out as his own; (iii) or it was impossible for the father to hold the child out as his own and paternity is established by clear and convincing evidence. 166 Consequently, if a marital child wants to establish her biological father’s paternity for heirship purposes after the biological father’s death, she must first satisfy one of the requirements enumerated above. The language of the statute indicates that some type of relationship must

165 Id. at 7630(a):
(a) A child, the child’s natural mother, a man presumed to be the child’s father under subdivision (a), (b), or (c) of Section 7611, an adoption agency to whom the child has been relinquished, or a prospective adoptive parent of the child may bring an action as follows:
(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611.
(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

166 See CAL. PROB. CODE § 6453(b) (2007). The statute provides:
(b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist:
(1) A court order was entered during the father’s lifetime declaring paternity.
(2) Paternity is established by clear and convincing evidence that the father has openly held the child out as his own.
(3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.
(c) A natural parent and child relationship may be established pursuant to Section 249.5.
See also CAL. FAM. CODE § 7630(c):
An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.
exist before the child can inherit from the biological father’s intestate estate.

In a recent case, the California Court of Appeals was asked to determine what evidence is required to satisfy the condition that the alleged father “has openly held out the child as his own.” In *In re Estate of Burden*, a child with a presumed father sought to establish heirship rights to his biological father’s intestate estate. The claimant alleged that he was entitled to a share of the estate because the biological father had acknowledged that the claimant was his child during his lifetime. While the biological father did not participate in the claimant’s upbringing or provide support financially, the court held that the decedent’s acknowledgement of paternity was enough to satisfy the condition that the father openly held the child out as his own.

The court’s interpretation of the statutory language ultimately favors a biological determination of paternity for heirship purposes over an analysis of the nature of the parent-child relationship. While the biology alone is not enough to establish heirship rights under the California statute, the court has determined that a biological father’s mere acknowledgement of a genetic connection to the child is enough. This decision contains the same principal inadequacy as the statutory scheme New Jersey has adopted. Both approaches emphasize a child’s right to inherit based on a biological connection to the decedent, as opposed to distributing the decedent’s property in a manner that would most likely resemble how he would allocate his estate in a will. In fact, the *Burden* court explicitly stated that whether or not the decedent would have wanted the biological child to inherit from his estate was irrelevant. This method can lead to unjustifiable results if a biological child, who shared nothing more than a genetic connection with the decedent, inherits a portion of an estate that would otherwise pass to those family members with whom the decedent shared a significant relationship. A more equitable interpretation of the California statute would be that if a child wants to establish heirship after the death of a putative father, he must prove that an actual parent-child relationship existed. This would prevent claims by biological

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168 *Burden*, 53 Cal. Rptr. at 392-93. According to the facts of the case, the claimant was raised and supported by his presumed father as if he were the presumed father’s own child. The claimant learned the truth of his paternity when he was 18 years old. He subsequently had contact with the biological father, but it was minimal. While the biological father “only grudgingly” admitted that the claimant was his son, he also indicated that he had “yet to feel the paternal pull” toward the claimant and the claimant’s children. Id. at 392-93, 396.

169 Id.

170 Id.

171 Id. at 396.
children after the putative father’s death for the sole purpose of inheritance.

C. Michigan

Michigan has adopted the UPC but not the UPA. However, the Michigan Probate Code contains a presumption of paternity that arises, for purposes of intestate succession, if a child is born to married parents. The statute also stipulates that if a presumption of paternity arises under the Probate Code, only a presumed parent has standing to challenge the parent-child relationship. However, section 700.2114(1)(b) provides that if a child is born to a married mother, but her husband is not the child’s father, the biological father’s paternity can be established in a variety of ways, including evidence that a

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172 See MICH. COMP. LAWS §700.2114(1)(a) (2008):

(1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:

(a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.

173 Id. §700.2114(5):

Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

174 Id. §700.2114(1)(b):

(b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child’s natural father for purposes of intestate succession if any of the following occur:

(i) The man joins with the child’s mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.

(ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child’s birth.

(iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

(iv) The man is determined to be the child’s father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(v) Regardless of the child’s age or whether or not the alleged father has died, the
mutually acknowledged relationship exists between the parent and child that begins before the child reaches the age of eighteen. While the statute explicitly provides that only a presumed parent has standing to rebut a marital presumption for purposes of intestate succession, it does not stipulate who has standing to establish a father-child relationship pursuant to section 700.2114(1)(b).

The Michigan Court of Appeals has held that a conclusive presumption of paternity bars children in a paternity action from presenting evidence of a parent-child relationship with a putative biological father for purposes of intestate succession. In *In re Estate of Quintero*, four siblings initiated a claim to establish that they were heirs to an alleged biological father’s estate. The children, who had a presumed father, sought to offer evidence that a mutually acknowledged relationship existed between them and the alleged biological father during his lifetime pursuant to section 700.2114(1)(b). The court held that before the claimants could offer evidence of a relationship with the decedent, the marital presumption must be rebutted. However, the court also determined that the children lacked standing to rebut their presumed father’s paternity because once a marital presumption attaches, only a child’s presumed natural parents have standing to challenge the presumption. Thus, despite the children’s claim that they had a mutually acknowledged parent-child relationship with the decedent, the court determined that the conclusive presumption of paternity outweighed the provision under section 700.2114(1)(b) for establishing paternity if the child is not an issue of the marriage. In making its determination, the court reasoned that the public policy favoring the marital presumption was implicit in the Michigan Probate court with jurisdiction over probate proceedings relating to the decedent’s estate determines that the man is the child’s father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

175 See id. at § 700.2114(1)(b)(iii).
177 Id. at 891.
178 Id. at 892.
179 Id. at 898. According to the facts of the case, the children’s mother and presumed father were divorced after the children were born and the mother was granted custody. The presumed father’s whereabouts were unknown at the time of the case. However, according to the divorce judgment, the children were acknowledged as being children of the marriage. Thus, the doctrine of res judicata barred the mother from rebutting the presumption of paternity. Id. at 892-95.
180 Id. at 893.
181 Id. at 895-98. The court reasoned that:

Clearly, any child born during a marriage is not subject to § 111(4) [now §700.2114(1)(b)(iii) in the revised Probate Code] unless this presumption has been disproved. Moreover, we would be unable to protect the legal and moral sanctity of marriage and the presumption of legitimacy if we were to permit third parties to allege that a child is the product of his mother’s adultery.

Id. at 895.
The Quintero court’s holding is problematic because it precluded the claimants’ potentially meritorious inheritance claim. The children were barred from establishing heirship to the putative biological father’s estate even though he allegedly had a parental role in their lives. A better reading of the statute would recognize that, by including section 700.2114(1)(b) in the statutory scheme, the Legislature intended to provide a mechanism for children to establish the existence of a parent-child relationship with a biological father who is not their presumed father for intestacy purposes. Furthermore, it seems likely that if the decedent did have an acknowledged parent-child relationship with the children, he would have intended for them to be included as distributees of his estate.

D. New York

New York has not adopted the UPC or the UPA. While New York does codify a presumption of paternity,\(^{183}\) case law holds that the purpose of the statutory presumption is to legitimize children and is not intended to establish paternity in contested proceedings.\(^{184}\) Thus, if a child with a presumed father wants to claim heirship to the estate of a different biological father, he can attempt to establish paternity as a nonmarital child pursuant to the New York Estates, Powers and Trusts Laws (EPTL).\(^{185}\) There is nothing in New York law indicating that a

\(^{182}\) Id. at 897:
Although this result requires the exclusion of possibly conclusive evidence that someone other than the presumed parent is the biological father, where the presumed father does not first disprove paternity, our interpretation of § 111 [now § 700.2114] is consistent with the express public policy of this state to preserve the sanctity of marriage. This necessarily includes preserving the family unit and protecting the legitimacy of children born during that marriage. We find no overriding policy reasons to ignore the presumed father’s rights (and attendant obligations) merely because the presumed father is no longer actively involved in his children’s lives or because the children’s mother eventually confesses that another now-deceased man fathered her children during an adulterous relationship.

\(^{183}\) See N.Y. DOM. REL. LAW § 24 (2007):
Effect of marriage on legitimacy of children:
1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.


\(^{185}\) See N.Y. EST. POWERS & TRUST LAW § 4-1.2 (2007). This section provides in relevant part:
child must rebut a marital presumption before he can initiate a paternity determination under the EPTL. New York probate law provides that nonmarital children are included as distributees of a father’s estate if paternity is clearly established.\textsuperscript{186} Section 4-1.2(a)(2) of the EPTL enumerates four ways an alleged nonmarital child can establish standing as a distributee, including: (A) an official court order declaring paternity; (B) an acknowledgement of paternity signed by the father; (C) clear and convincing evidence proving that the father has openly and notoriously acknowledged the child as his own; (D) a genetic test administered to the father which, together with other evidence, establishes paternity by clear and convincing evidence.\textsuperscript{187} To satisfy EPTL sections 4-1.2(a)(2)(A) and 4-1.2(a)(2)(B), an official paternity determination must have been issued during the putative father’s lifetime. Without an official determination or acknowledgement of paternity, a claimant must establish the existence of a father-child relationship by clear and convincing evidence pursuant to EPTL...

\begin{quote}

\textbf{Inheritance by non-marital children:} \\
(a) For the purposes of this article:\n
(1) A non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred. \\
(2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if: (A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or; (B) the father of the child has signed an instrument acknowledging paternity, provided that \(i\) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and \(i\) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and \(i\) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of paternity instrument acknowledged or executed by such father has been duly filed or; (C) paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own; or (D) a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence. \\
(3) The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgement of paternity as prescribed by subparagraph (2).
\end{quote}

\textsuperscript{186} \textit{id.} \\
\textsuperscript{187} \textit{id.} §§ 4-1.2(a)(2)(A) to 4-1.2(a)(2)(B).
However, the statute is unclear about whether a claimant must demonstrate that the alleged father openly and notoriously acknowledged the child as his own before genetic test results may be considered to establish standing as an estate distributee.

New York case law is split on this issue. In *In re Estate of Janis*, the court held that genetic testing must be administered during a putative father’s lifetime for the results to be admissible to establish paternity in an heirship proceeding. In *Janis*, the court denied an alleged nonmarital child’s request to exhume a decedent’s body for the purpose of conducting genetic tests on the ground that the past-tense wording in EPTL 4-1.2(a)(2)(D) does not contemplate post-death genetic testing in a proceeding to determine paternity. Furthermore, the court reasoned that the provision in section 4-1.2(a)(2)(D) should be construed in accordance with the Family Court Act, which stipulates that genetic testing in a paternity proceeding must be administered during an alleged father’s lifetime. Thus, posthumous genetic testing is not permissible to establish paternity for inheritance purposes under EPTL 4-1.2(a)(2)(D).

Since the *Janis* decision, some New York courts have taken a more permissive approach to the admissibility of posthumous genetic testing in probate proceedings and have allowed such evidence to be admitted under EPTL 4-1.2(a)(2)(C). For example, in *In re Estate of Bonanno*, the court held that posthumous genetic test results could be admitted to satisfy the clear and convincing evidence requirement of 4-1.2(a)(2)(C) in order to prove paternity in heirship claims. Furthermore, in *In re Estate of Morningstar*, the court held that there is no basis in the statute for requiring a party to first demonstrate that a decedent openly and notoriously acknowledged paternity before genetic testing may proceed pursuant to section 4-1.2(a)(2)(C). However, the court in *In re Estate of Davis* held the opposite, stating that such open and notorious acknowledgement of paternity was necessary before genetic testing.

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188 Id. §§ 4-1.2(a)(2)(C) to 4-1.2(a)(2)(D).
190 Id. at 101.
191 Id.; see also N.Y. FAM. CT. ACT § 519(c) (2007) (explicitly stating that a genetic test must have “been administered to the putative father prior to his death” to be admissible in a paternity determination).
192 See *Janis*, 210 A.D.2d. at 101.
194 745 N.Y.S.2d 813 (N.Y. Sur. Ct. 2002). The court noted that, despite the requirement that genetic testing be administered during a putative father’s lifetime under EPTL 4-1.2 (a)(2)(D), “[t]here is no basis in law or logic to exclude the results of posthumously conducted DNA tests on a decedent’s genetic material from the category of ‘clear and convincing’ evidence under EPTL 4-1.2 (a)(2)(C).” *Id.* at 815.
should be granted. In Davis, an alleged nonmarital child sought to conduct posthumous genetic testing to establish standing as a distributee of his putative father’s intestate estate. The court reasoned that the claimant must first prove an open and notorious acknowledgement of paternity pursuant to section 4-1.2(a)(2)(C) before genetic testing may be granted in order to minimize the potential for disruption in estate administration. The court stated that 4-1.2(a)(2)(C) was not created to grant rights to all nonmarital children, but only those who were known to the decedent and were openly acknowledged by him during his lifetime. Without requiring an open acknowledgement of paternity, children who were unknown to the decedent could potentially have rights to his estate. This outcome would be inconsistent with the state’s policy to minimize the potential for disruption of estate distribution and may result in “needless delay, expense and embarrassment.”

The Davis court offered the better reading of EPTL 4-1.2(a)(2)(C). The language of section 4-1.2(a)(2)(C) states that a nonmarital child can inherit from a biological father’s estate if “paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own.” The use of the word “and” indicates that both elements are required to establish paternity for inheritance purposes. This suggests that some type of parent-child relationship is required before a nonmarital child can inherit from a biological father’s estate. Without enforcing the open and notorious acknowledgment requirement, a nonmarital child could potentially become an heir to the estate of a biological father he did not even know. This result would be against New York’s policy to minimize disruptions in estate distribution and the potential for inheritance by undeserving heirs.

197 Id. at 125-26.  
198 Id.  
199 Id.  
200 Id.  
201 Id. at 129.  
202 N.Y. EST. POWERS & TRUST LAW § 4-1.2 (2007) (emphasis added).  
203 See Davis, 27 A.D.3d at 129:

With respect to the rights of nonmarital children, the State has an interest in minimizing “the potential for disruption of estate administration’ . . . which would not be served by indiscriminate posthumous DNA testing. Although technical advances in genetic testing have obviated difficulties in proving paternity and rendered such proof reliable and accurate in most cases, procedural difficulties remain. In the absence of an open and notorious acknowledgment of paternity by the decedent, persons unknown to the decedent and/or his or her personal representative potentially could have rights in an estate.
IV. THE NATURE OF THE PARENT-CHILD RELATIONSHIP SHOULD GOVERN IN INHERITANCE CHALLENGES WHEN BIOLOGICAL AND PRESUMPTIVE PATERNITY OVERLAP

Genetic testing has progressed to the point where biological paternity can now be ascertained with almost absolute accuracy. In light of this scientific advancement, state legislatures must address what factors should be most important in determining legal parentage for the purpose of intestate inheritance. Legislatures must decide whether biology should be the dispositive factor, or whether the nature of the parent-child relationship should govern. This Note suggests that since the primary goal of intestacy statutes is to effectuate the decedent’s probable intent in the distribution of his property, the familial relationship should govern. Thus, under intestacy law, a child would inherit from the estate of the father who actually raised and cared for her. Accordingly, if the biological father did not have a principal role in the child’s upbringing, but wanted to include her in his estate, he could still provide for that child in a will.

The examples above illustrate the inconsistent, but equally problematic, approaches states have taken when a child with a presumed father attempts to establish heirship to a different biological father’s estate for purposes of intestate succession. In some states biology is determinative. Consequently, a child can potentially inherit from a biological father’s estate even in the absence of a significant parent-child relationship, or any relationship at all. Furthermore, a child could possibly become an heir to both a presumptive and biological father’s estate, even though there is no legal precedent allowing a child to have dual paternity. Conversely, a conclusive presumption of paternity can prevent a potentially deserving heir from establishing a biological father’s paternity if certain formal requirements are not met. Some of these inequitable results are the product of a state’s statutory scheme, while others are a consequence of a court’s interpretation of the statute’s ambiguities.

Probate law should seek to promote an inheritance system that is both fair and efficient. Mechanical paternity determinations, based solely on biological connections or legal presumptions, risk granting unworthy heirs the right to inherit and excluding the people who should inherit. The discretionary approach of the UPA can provide legislatures a useful model for resolving paternity challenges arising during inheritance claims. Under this model, parentage is determined by the nature of the relationship between the child and decedent. UPA section 608 grants courts the discretion to evaluate whether genetic test results

204 See supra note 145.
should be permitted as evidence to rebut a presumptive father’s paternity and establish an alleged biological father’s paternity for purposes of intestate succession. The two considerations courts must evaluate in making this determination are the nature of the parent-child relationship and whether it would be inequitable to allow the adjudication to go forward. Thus, if a child with a presumed father wants to establish heirship to a biological father’s estate, the court would examine various factors to determine whether an actual parent-child relationship exists, and whether it would be just to allow the child to establish biological paternity for inheritance purposes. These factors include the age of the child, the length and nature of the relationship between the child and the presumed father, and the length and nature of the relationship between the child and the alleged biological father.

As the UPA was primarily drafted to address issues of child support and custody, there are some ambiguities that arise when an adult seeks to establish paternity for inheritance purposes. First, the UPA does not specify whether an adult child with a presumed father has standing to rebut a presumption of paternity under section 607. This ambiguity can be resolved by applying the logic of section 606, that a child’s right to determine her parentage should not be subject to limitations, and allow a child to initiate a paternity determination at any time. However, if the court finds that it would be inequitable to allow the child to establish the alleged biological father’s paternity for intestacy purposes, the court could deny the admission of genetic test results to rebut the presumed father’s paternity under UPA section 608. This prevents a child from adjudicating the parentage of a biological father, in the absence of a significant parent-child relationship, strictly for reasons of financial gain. Second, UPA section 608 stipulates that the court should apply the best interest of the child standard in determining whether to allow the admission of genetic test results to rebut a presumption of paternity. This standard is not appropriate for an adult child initiating a paternity determination in an heirship claim because it is almost always in a child’s best interest to inherit money. In this context, the court should base its reasoning on the weightier considerations of policy and logic.

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205 See supra note 119.
206 Id.
207 See Summary, supra note 30.
208 See supra note 113.
209 See supra note 112.
210 See supra note 119.
211 Id.
CONCLUSION

The form of the American family has changed dramatically throughout the past fifty years. As the family structure continues to evolve, the issue of what role biology plays in determining parentage is ever more significant. With a rising number of children born outside of a traditional marriage, and the advent of genetic testing that can conclusively establish biological paternity, probate courts are increasingly faced with paternity challenges during heirship determinations. Consequently, an ongoing concern affecting probate law is how parentage should be determined for purposes of intestate succession when presumptive and biological paternity overlap. The challenge of courts and legislatures is to address this issue in a fair and efficient manner. Allowing a child to inherit from a parent’s intestate estate solely on the basis of a genetic relationship can produce inequities in estate distribution. Conversely, precluding a child from establishing a legal relationship with a biological father who raised and cared for the child, strictly because a presumption of paternity exists, creates potential inequities as well. As one of the fundamental goals of intestacy law is to further the decedent’s likely intent in the disposition of his property, the threshold inquiry in establishing paternity for heirship purposes should be the existence and nature of the parent-child relationship. The UPA’s procedure for adjudicating paternity grants judges the discretion to determine whether genetic test results should be permitted to rebut a presumption of paternity in order to establish biological paternity. Under this approach paternity determinations are based on the nature of the parent-child relationship, rather than biology or presumptions alone. Legislatures should consider incorporating this discretionary approach in their intestacy statutes in order to promote an equitable system of intestate succession when presumptive and biological paternity conflict.