

Comment,
THE 2017 UNIFORM PARENTAGE ACT:
A RESPONSE TO THE CHANGING
DEFINITION OF FAMILY?

“Life affords no greater responsibility, no greater privilege, than the raising of the next generation.”¹

As the definition of family continues to evolve, it becomes inevitable that the laws pertaining to the establishment of parentage must also follow suit. The Uniform Parentage Act (UPA) originally formulated in 1973 and revised in 2002 and 2017 serves to provide a uniform legal framework for establishing paternity of minor children born to married and unmarried couples.² The 2017 UPA updates continue to promote the well-being of children by addressing five different areas of family law to reflect this evolution of the family structure.³

Part I of this Comment provides a short historical background of parentage law in the United States. Part II will discuss several reasons why the 2017 UPA was proposed. Part III will explain some of the problems that the 2017 UPA was meant to address and will examine the reception that the 2017 UPA has subsequently received.

I. Historical Background

Parentage determination originated from the common law. An important aspect of parentage law dates back to Lord Mansfield’s rule,⁴ where a child born outside of marriage was considered to be a bastard. This law had the unfortunate result of preventing a child from inheriting anything legally.⁵ This archaic

¹ See C. Everett Coop, *C. Everett Koop Quotes and Sayings*, INSPIRING QUOTES, <https://www.inspiringquotes.us/author/9817-c-everett-koop> (last visited Sept. 28, 2019).

² See UNIF. PARENTAGE ACT (Unif. Law Comm’n 2017).

³ In referencing the UPA, this Comment refers to the 2017 version, unless otherwise specified.

⁴ See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.7, 104 (2d ed. 1987).

⁵ See, e.g., Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

rule also functioned as a direct protection of a father's property by establishing the legitimacy of the child. With the passage of time emerged the construct in which marriage, instead, began to define parenthood. The marital presumption states that a child born to a married woman is considered the child of her husband. Today, this rebuttable presumption exists in all fifty states.⁶

The rights of unmarried biological fathers were first recognized in *Stanley v. Illinois*,⁷ a 1970's Supreme Court case in which the state of Illinois deprived custody to the biological father of three children. The Court held that a biological father had a constitutionally protected right to a relationship with his child that should be legally recognized.⁸ Later, in *Lehr v. Robertson*,⁹ the Supreme Court further recognized the significance of a biological connection, however, the Court held that a father is additionally required to have taken steps towards assuming responsibility for a child.¹⁰ This is referred to as the "biology plus" requirement.¹¹

In *Levy v. Louisiana*, the U.S. Supreme Court struck down the state-imposed differential treatment of children born within and outside the context of marriage¹² as a violation of the Equal Protection Clause of the U.S. Constitution. The Court held that states may not draw a line that constitutes invidious discrimination against a particular class, in this case against "illegitimate" children who are persons within the meaning of the Equal Protection Clause.¹³ As a result of these changes the National Conference of Commissioners on Uniform State Laws (now referred to as the Uniform Law Commission (ULC)) was formed by join-

⁶ June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 223 (2011).

⁷ 405 U.S. 645 (1972).

⁸ *Id.*

⁹ 463 U.S. 248 (1983).

¹⁰ *Id.*; See also Mary Kay Kisthardt, *Who Is a Parent and Who Is a Child in a Same-Sex Family?—Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: the U.S. Perspective*, 30 AM. ACAD. MATRIM. LAW. 55 (2017).

¹¹ See Kisthardt, *supra* note 10.

¹² *Levy v. Louisiana*, 391 U.S. 68 (1968); See John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 15-18 (1969).

¹³ *Id.*

ing practicing lawyers, judges, legislators, legislative staff, and law professors, appointed by state governments. The collective goal was to “provide states with non-partisan, well-conceived and well drafted legislation that brings clarity and stability to critical areas of statutory law.”¹⁴ This group was responsible for advancing and promoting the idea of equality by drafting model legislation (such as the UPA) that could be adopted by individual states.

In 1973 the ULC proposed the first Uniform Parentage Act. The Act was intended to promote the objective that “the parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent.”¹⁵ This groundbreaking version of the UPA was adopted in nineteen states and subsequently influenced state legislatures to form their own legislation while many courts also referred to it in reported decisions.¹⁶ Marriage was no longer the exclusive means of obtaining parental rights.

In 1988, the Uniform Status of Children of Assisted Conception Act (USCACA) was proposed to address continued litigation over the rights of fathers not married to the mothers of their children. During this time, the ULC also adopted the Uniform Putative and Unknown Fathers Act (UPUFA).¹⁷ As a continued response to the increased number of children born outside of marriage and those born as a result of assisted reproductive technology, the ULC revised the UPA in 2000 and amended it again in 2002. The 2002 UPA integrated the 1973 UPA, USCACA and the UPUFA into a single Act and contained an optional article related to surrogacy.¹⁸

The focus of the newly revised 2017 UPA is addressing parentage in terms of the following areas: (1) children born to same-sex couples, (2) the recognition of nonbiological caregivers as parents, (3) the increased use of surrogacy, (4) the rights of chil-

¹⁴ See UNIF. PARENTAGE ACT, *supra* note 2.

¹⁵ See Uniform Law Commission, Parentage Act Summary, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act>.

¹⁶ See Harry L. Tindall & Elizabeth H. Edwards, *The 2017 UPA: Strengthening Protections for Children and Families*, 39 FAM. ADVOC. 30 (Spring 2017).

¹⁷ UNIF. PUTATIVE AND UNKNOWN FATHERS ACT (1988) .

¹⁸ Steven H. Snyder & Richard B. Vaughn, *The Modern Family: Why the 2002 UPA Needs Updating*, 39 FAM. ADVOC. 32 (2017).

dren born through assisted reproductive technology, and (5) children born as the result of a sexual assault.¹⁹ These five areas offer options that align with advances in legal, medical, and social progress.

II. Why the 2017 UPA Was Proposed

A. Recognition of Marriage Equality

In *Obergefell v. Hodges*,²⁰ a landmark case, the Supreme Court of the United States made same-sex marriage legal and recognizable throughout the country. The Court held that state laws barring marriage between two people of the same sex were unconstitutional. Later, in a brief per curiam opinion, the Court emphasized that the state's "differential treatment infringes *Obergefell's* commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'"²¹ Prior to this, marriage laws in many states specified marriage as being between a "man and a woman" or otherwise supported marriage as only applying to heterosexual relationships.²² This case finally settled the pervasive ongoing issues regarding the ability of some states to legalize same-sex marriage and other states' refusal to acknowledge these marriages.

Furthermore, the Supreme Court has struck down an Arkansas statute that treated same-sex couples differently than opposite-sex couples regarding their child's birth certificates.²³ The birth certificate statute provided that "the mother is deemed to be the woman who gives birth to the child" and that, "[i]f the mother was married at the time of either conception or birth, . . . the name of [her] husband shall be entered on the certificate as

¹⁹ See, Uniform Law Commission, 2017 Annual Meeting Issues Draft, http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_Issues_Memo.pdf

²⁰ 135 S. Ct. 2584 (2015).

²¹ *Pavan v. Smith*, 198 L.Ed.2d 636 (2017), https://www.supremecourt.gov/orders/courtorders/062617zor_8759.pdf

²² See, e.g., Hunter Swarz, *California Has Officially Repealed the Marriage Law that Led to Prop. 8* (July 7, 2014), <https://web.archive.org/web/20130418150058/http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.

²³ See *Pavan*, 198 L.Ed.2d 636.

the father of the child.”²⁴ Although the trial court held the statute conflicted with *Obergefell*, the Arkansas Supreme Court disagreed, focusing on the biological relationship versus the marital relationship.²⁵ The Supreme Court, noting the disparate treatment, however, reversed the decision and remanded the case.

Consequently, states came under pressure to change the language of parenting laws to reflect gender-neutrality. For instance, courts in Utah²⁶ and Arizona²⁷ interpreted the holding very broadly and made changes in their laws to follow suit. Now, the language of the 2017 UPA provisions is also gender-neutral, aligning with this broad interpretation of *Obergefell*. This language, which is intended to “remove . . . unnecessary distinctions based on gender,”²⁸ uses the term “parent” as opposed to “mother” or “father,” and replaces “maternity” and “paternity” with terms depicting “parentage” in general.

B. *Advances in Medical and Reproductive Technology*

The area of medical technology known as assisted reproductive technology (ART), has seen major advances over the past few decades. The UPA updated provisions were initially prompted by the vast increase in usage of this technology. In 2013, as a result of ART procedures, approximately 18,400 infants were born.²⁹ The Centers for Disease Control (CDC) publishes an annual report in accordance with the 1992 Fertility Clinic Success Rate and Certification Act.³⁰ According to these reports, between 1999 and 2013 approximately 30,927 (2%) of all

²⁴ See Samantha Pallini, *Supreme Court Finds Arkansas Statute Unconstitutional*, SYRACUSE L. REV. (July 13, 2017), <http://lawreview.syr.edu/supreme-court-finds-arkansas-statute-unconstitutional-holds-both-same-sex-parents-names-should-be-on-childs-birth-certificate/>.

²⁵ See *id.*

²⁶ *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734, *3 (D. Utah, July 22, 2015).

²⁷ *McLaughlin v. Jones*, 382 P.3d 118 (Ariz. Ct. App. 2016).

²⁸ See UNIF. PARENTAGE ACT prefatory note § 201 cmt. (Nat’l Conference of Comm’rs of Unif. State Laws, Draft for Discussion Only 2017).

²⁹ *Id.*

³⁰ National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, *ART and Gestational Carriers* (Aug. 5, 2016), <https://www.cdc.gov/art/key-findings/gestational-carriers.html>.

assisted reproductive technology cycles used a gestational carrier.³¹ The number of gestational carrier cycles increased from 727 in 1999 to 3,432 in 2013.³²

The controversial nature of surrogacy caused very few states to adopt the 2002 UPA Article 8, which applied to genetic and gestational surrogacy agreements, and many other states held back from establishing any legislation addressing these types of agreements at all.³³ Additionally, the 1973 version only addressed ART in terms of a married couple using a sperm donor. The updated 2017 provisions, however, focus on intentional parenthood regardless of genetic contribution,³⁴ and aim to create more consistency with current surrogacy practice. For example, the provision that incorporates parentage when using assisted reproductive technology now reads: “an individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by assisted reproduction is a parent of the child.”³⁵

Due to the fact that gestational surrogacy has now become more prominent³⁶ than genetic surrogacy, the 2017 UPA addresses the two differently. While additional requirements applying to only genetic surrogacy were added, the rules governing gestational surrogacy agreements were made less stringent. Under section 802, the eligibility requirements to enter gestational or genetic agreement, a woman must have: (1) attained the age of 21; (2) previously given birth; (3) completed a medical evaluation; (4) completed a mental health evaluation; and (5) independent legal representation.³⁷ The requirement of having previously given birth (to at least one child) was not a part of the 2002 UPA but was added based on the knowledge that the surro-

³¹ *Id.*

³² *Id.*

³³ *Gestational Surrogacy Laws Across the United States*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Apr. 11, 2019).

³⁴ See generally Courtney G. Joslin, *Protecting Children: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

³⁵ UNIF. PARENTAGE ACT 2017 § 301.

³⁶ Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DE PAUL L. REV. 799, 802 (2012).

³⁷ See UNIF. PARENTAGE ACT 2017 § 802.

gate is less likely to become attached to the child if it is not their first.³⁸ The overriding objective was that this provision may help decrease litigation over children born through surrogacy in general.

The validity of the agreement rests on meeting the following requirements: (1) the surrogate agrees to attempt to become pregnant by means of ART; (2) the surrogate (and spouse if applicable) agree to have no claim to parentage of the child conceived; (3) the intended parent(s) agree to be the exclusive parent(s) of the child or children; (4) how surrogacy-related expenses and medical expenses of the child will be covered; and (5) the surrogate is permitted to make all health and welfare decisions regarding herself and her pregnancy.³⁹

Requirements for genetic surrogacy include a provision for pre-pregnancy court validation and genetic surrogates are permitted a withdrawal of consent up to seventy-two hours after the birth of the child.⁴⁰ In the case of a breach of the agreement by a genetic surrogate, specific performance would not be an available remedy for the surrogate's refusal to be impregnated, not terminating a pregnancy, or submitting to specific medical procedures⁴¹ since this kind of court order would violate her constitutional rights.⁴² However, specific performance is an acceptable remedy (if breached by a genetic surrogate) if an intended parent is prevented from exercising full rights of parentage seventy-two hours after the birth, or when breached by an intended parent who prevents the intended parent's acceptance of parentage seventy-two hours after the birth.⁴³

C. Demographic & Social Changes

Changing family structures is clearly one of the most influential reasons that necessitated the revision of the UPA. Although the "traditional nuclear family type" still accounts for approxi-

³⁸ Nick Stanley, Comment, *Freedom of Family: The Right to Enforceable Family Contracts*, 31 AM. ACAD. MATRIM. LAW. 223, 235 (2018).

³⁹ *See id.*

⁴⁰ *See* UNIF. PARENTAGE ACT § 814.

⁴¹ *See id.* § 818.

⁴² *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

⁴³ *Id.*

mately half of households,⁴⁴ it is no longer the norm for modern families. The United States is getting bigger, older, and more diverse,⁴⁵ and data from the five-year American Community Survey (2010-2014) indicated approximately 10,276 different types of households.⁴⁶ For example, common modern family structures are one parent with one or more children, one biological parent with one adoptive or step-parent with one or more children, and same-sex married or unmarried parents with one or more children. Couples (same-sex or opposite-sex) without children, extended families, and other unrelated cohabitants also form a family. It is apparent that when expanding on the above examples, the modern family structures multiply significantly.

The reasons attributable to changes in the modern family are vast. They are often the result of other changes. Changes in the divorce rate, attitudes towards same-sex relationships, attitudes about ethnicity and race, and attitudes towards single adults choosing parenthood,⁴⁷ for example, all significantly contribute to changes in the family structure. Families are more culturally diverse than ever which continues to account for increased variation in family customs, celebrations, and parenting styles. Finally, access to multiple forms of communication and geographic mobility help to redefine what it means to be a family. As a result, the UPA must also continue to evolve.

III. Further Aims of the 2017 UPA

A. Creating Stronger Families with De facto Parentage

Due to the previously mentioned variances in family demographics, it has become more common for a non-biological caregiver to become a primary caregiver to a child. In accordance with the best interest standard, it is often in the best interest of the child for that child to have the opportunity for someone other than a biological parent to have legal parentage.

⁴⁴ Paola Scommenga, *U.S. Growing Bigger, Older, and More Diverse*, Population Reference Bureau (Apr. 2004), <http://www.prb.org/>.

⁴⁵ *Id.*

⁴⁶ See IPUMS USA, *IPUMS American Community Survey*, <https://usa.ipums.org/usa-action/variables/group?id=h-constr>.

⁴⁷ Robert A. Simon, *On Talking with Younger Children About Their Nontraditional Families*, 40 *FAM. ADVOC.* 44 (2018).

The UPA now has a provision to award legal parentage to a caregiver in this situation if they meet requirements of a “de facto parent.” Every state has addressed this a bit differently.⁴⁸ De facto custodians⁴⁹ have been recognized by some states where the nonbiological caregiver has an established relationship with the child. In loco parentis, psychological parent, and parent by estoppel are other equitable doctrines that states use to recognize and protect an established parent-child relationship.⁵⁰ Other states use third party custody or visitation statutes to ensure ongoing contact for a nonbiological caregiver, but do not grant parental rights.⁵¹

Specifically, many states have recognized the importance of awarding legal parentage to a person who is functioning as a parent to a child who is not connected through either biology or marriage.⁵² In the past ten years, some state supreme courts have concluded that the provision that presumes parenting based on holding oneself out as a father should apply even if the parent is not genetically related.⁵³ *In re Guardianship of Madeline B.*, the New Hampshire Supreme Court explained that these decisions are, “[c]onsistent with the . . . policy goal[s] . . . [in which] paternity provisions are driven, not by biological paternity, but by the state’s interest in the welfare of the child and the integrity of the family.”⁵⁴

⁴⁸ See, e.g., Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752-753 (2013) (reviewing state laws recognizing de facto adoptions).

⁴⁹ See, e.g., KY. REV. STAT. § 403.270(1)(a) (2018).

⁵⁰ See generally Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

⁵¹ For a listing of states that have recognized that a non-biological and non-adoptive parent may seek visitation or custody even if they are not the legal parents, see National Center for Lesbian Rights, *Legal Recognition of LGBT Families*, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (last updated 2016).

⁵² See Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31 (Spring, 2018) (referring to jurisdictions in Maine, Kansas, New Mexico, and California).

⁵³ See *id.* (referring to California, Colorado, Connecticut, Massachusetts, and New Hampshire).

⁵⁴ 98 A.3d 494 (N.H. 2014).

A small number of states took opposing positions and only recognized parentage based on biology or adoption.⁵⁵ Arizona, for example, just recently recognized parentage where a former partner of a biological mother was significantly involved in raising the child.⁵⁶ “[This] . . . is a critical advancement from the child’s perspective. . . [r]ecognizing such a person as a legal parent means that the child is entitled to all of the protections that a child is normally entitled to receive from and through a parent.”⁵⁷

The 2017 UPA continues to address this jurisdictional inconsistency by granting parental rights to nonbiological caregivers and providing a list of rules that must be met to establish *de facto* parentage. The legislative purpose in creating this section was to better reflect trends in state family law. The individual must demonstrate by clear and convincing evidence that he or she: (1) resided with the child as a regular member of the household for a significant period of time; (2) engaged in consistent caretaking; (3) took full and permanent responsibilities of a parent without expectation of financial compensation; (4) held out the child as their child; (5) established a bonded and dependent relationship which another parent supported; and (6) the continuation of the relationship is in the best interest of the child.⁵⁸

There are several limitations on the scope of section 609. An action to establish legal parentage must begin prior to the child reaching the age of eighteen. The heightened standing requirements that must be satisfied are included to ensure legal parents are not subjected to unwarranted and unjustified litigation and only permit the individual alleging himself to be a *de facto* parent to initiate the proceeding.⁵⁹ Finally, the substantive

⁵⁵ See Joslin, *supra* note 52, at 33.

⁵⁶ See *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017) (where supplemental case brief stated, “[t]o date, the legislature has never extended parentage beyond biology or adoption”).

⁵⁷ Joslin, *supra* note 52, at 33.

⁵⁸ UNIF. PARENTAGE ACT, *supra* note 2, at prefatory note, § 609 cmt. (Nat’l Conference of Comm’rs of Unif. State Laws, Draft for Discussion Only 2017).

⁵⁹ See *id.*; See also Jeffrey A. Parness, *Dangers in De Facto Parenthood*, 37 U. ARK. LITTLE ROCK L. REV. 25 (2014).

requirements are based on child custody factors developed under the common law.⁶⁰

B. *Promoting Children's Rights to Information*

When parents choose donor conception, the procurement of gametes is an arrangement in which the offspring are clearly not involved.⁶¹ As children reach adulthood, however, they have their own individual rights. The children's rights regarding their knowledge that they are donor-conceived as well as the right to learn the identity of the donor are two central issues that the family inevitably will need to address.⁶²

It is initially up to the parents whether they inform their child about the origins of the child's conception. Single-parent and LGBTQ families commonly choose to disclose due to the fact that they cannot "pass" in the same way as different-sex couples as having legitimately conceived.⁶³ Although parents who use donor gametes are not usually advised as to the pros and cons of disclosure to the child, adoptive parents are almost always advised to inform their children that they are adopted and to celebrate the child's "special" status. Accessing information regarding the donor's identity provides children with a better understanding of their social, cultural, and biographical heritage as well as learning about unknown medical risks.⁶⁴ Children deserve to know their genetic origins and denying them this information in adulthood demonstrates a double standard in the argument that genes are important to parents but should be irrelevant to their children.⁶⁵

Due to the vast increase in the number of children born as a result of ART,⁶⁶ the importance of the child's access to her ge-

⁶⁰ See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005), *cert. denied*, 547 U.S. 1143 (2006); *V.C. v. J.M.B.*, 748 A.2d 539, 551 (N.J.), *cert. denied*, 531 U.S. 926 (2000), *Custody of J.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

⁶¹ Naomi Cahn, *The New "ART" of Family: Connecting Assisted Reproductive Technology & Identity Rights*, 2018 U. ILL. L. REV. 1443, 1454.

⁶² *Id.*

⁶³ *Id.* at 1455.

⁶⁴ See *id.* at 1456.

⁶⁵ See *id.* at 1457.

⁶⁶ Centers for Disease Control, *ART Success Rates*, <http://www.cdc.gov/art/reports/> (last updated May 4, 2017).

netic background is increasingly apparent.⁶⁷ In response, the UPA has added an article requiring fertility clinics and gamete banks to make a good-faith effort to provide a child who attains eighteen years of age with identifying information of the donor unless the donor signed and did not withdraw a declaration regarding disclosure. Regardless, the child will be provided with access to the nonidentifying medical history of his donor.

Prior to this version of the UPA, most of the focus surrounding ART was limited to the adult's abilities to access these technologies.⁶⁸ The Convention on the Rights of the Child ("CRC") was one of the first international documents, however, to recognize a child's right to his identity⁶⁹ and likely influential to establishment of these UPA provisions. States, however, continue to debate these ethical dilemmas regarding access to genetic information and tend to limit the information to that of medical history due to its necessity for the individual's physical health.⁷⁰

A. *Changing the Lives of Children Conceived as a Result of Rape*

In the 2017 update to the UPA, a provision was included to address the parent-child relationship by the perpetrator of a rape that resulted in the conception of the child.⁷¹ Section 614 specifically precludes the establishment of parentage by a perpetrator of sexual assault.⁷² This section now allows a mother to bring the

⁶⁷ Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1098 n.164 (2014).

⁶⁸ Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 INT'L J. JURIS. FAM. 35, 37 (2010).

⁶⁹ Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Right of the Child and the European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137, 138 (2007).

⁷⁰ See Cahn, *supra* note 61.

⁷¹ See UNIF. PARENTAGE ACT, *supra* note 2, at prefatory note.

⁷² (a) In this section, "sexual assault" means [cite to this state's criminal rape statute]. (b) In a proceeding in which a woman alleges that a man committed a sexual assault that resulted in the woman giving birth to a child, the woman may seek to preclude the man from establishing that he is a parent of the child. (c) This section does not apply if: (1) the man described in subsection (b) has previously been adjudicated to be a parent of the child; or (2) after the birth of the child, the man established a bonded and dependent relationship with the child which is parental in nature. (d) Unless Section 309 or 607 applies, a wo-

action to adjudicate parentage. The UPA does not necessarily change state laws but instead acts as a legal framework at the federal level. The 2017 UPA section 614 provision also complies with the federal Rape Survivor Child Custody Act (RSCCA).⁷³

Prior to the updated UPA, in 2015, the U.S. Congress adopted into law the RSCCA. This act provides a state with grant funding if that state creates a law allowing a rape victim, who conceived a child as a result, to seek termination of her rapist's parental rights if she can show clear and convincing evidence that the rape occurred.⁷⁴ In the criminal court system, the standard for a conviction of rape is "beyond a reasonable doubt," which can be very difficult to prove.⁷⁵ Preceding the adoption of laws allowing female rape victims the right to seek paternity termination for a rapist, obtaining a conviction of rape was often the only way for the perpetrator's parental rights to be terminated. Due to the vast number of difficulties with gaining a conviction, including the fact that (in many cases) the perpetrator will plead

man must file a pleading making an allegation under subsection (b) not later than two years after the birth of the child. The woman may file the pleading only in a proceeding to establish parentage under this [act]. (e) An allegation under subsection (b) may be proved by: (1) evidence that the man was convicted of a sexual assault, or a comparable crime in another jurisdiction, against the woman and the child was born not later than 300 days after the sexual assault; or (2) clear-and-convincing evidence that the man committed sexual assault against the woman and the child was born not later than 300 days after the sexual assault.

(f) Subject to subsections (a) through (d), if the court determines that an allegation has been proved under subsection (e), the court shall: (1) adjudicate that the man described in subsection (b) is not a parent of the child; (2) require the [state agency maintaining birth records] to amend the birth certificate if requested by the woman and the court determines that the amendment is in the best interest of the child; and (3) require the man pay to child support, birth-related costs, or both, unless the woman requests otherwise and the court determines that granting the request is in the best interest of the child. UNIF. PARENTAGE ACT, *supra* note 2, at §§ 614.

⁷³ 34 U.S.C.A. §§ 21301-08 (West 2017); *See also* UNIF. PARENTAGE ACT, *supra* note 2; *See* UNIFORM LAW COMMISSION, *Why Your State Should Adopt the Uniform Parentage Act* (2017), <http://www.uniformlaws.org/Shared/Docs/Parentage/WhyStatesUPA%20final.pdf> (last visited Oct. 28, 2018). *See* H.R. 1257, *supra* note 36.

⁷⁴ 34 U.S.C.A. § 21303 (West 2017).

⁷⁵ *See* MISSOURI APPROVED INSTRUCTIONS, CRIMINAL 302.04 (3d ed. 2016).

to a lesser charge, most rape victims were at the mercy of the criminal court system. By lowering the standard in the family court system, the federal government is attempting to make it more feasible for the rape victim to be able to live her life without the probability of co-parenting a child with her rapist.

Prior to the enactment of the RSCCA, only six states had statutes allowing victims to petition for the termination of parental rights of their rapists.⁷⁶ State legislation often reflected the incorrect assumption that rape victims would prefer to terminate their pregnancies or desire adoption and provided more protections for the women who chose those alternatives versus those who chose to raise their children. In *In re: the Adoption of C.A.T.*, a woman was raped, by the same man, on two separate occasions, while under the influence of alcohol.⁷⁷ A child was conceived as a result in both situations.⁷⁸ The mother of the children eventually married and in a proceeding for the step-parent to adopt the children, the termination of parental rights was challenged by the biological father.⁷⁹ Under Kansas law, a consent to termination was not warranted for adoption if it was found by clear and convincing evidence that the child was conceived from rape.⁸⁰ The court reasoned that there was sufficient evidence in the case of only one of the children that conception was the result of rape, but as to both of the children, the biological father failed to provide adequate support.⁸¹ Based on the best interest of the child standard, the court held that the biological father's consent was not needed to terminate his parental rights.⁸² Although the legislative intent was to make it easier for a child conceived through rape to be put up for adoption, in this particular situation, the law also worked in favor of a mother who chose to keep and raise her children.

As of the writing of this comment, there are now thirty-six states, as well as the District of Columbia, that allow the victim to petition for the termination of parental rights of the perpetrator

⁷⁶ H.R. 1257, *supra* note 36.

⁷⁷ *See In re Adoption of C.A.T.*, 273 P. 3d 813, 816 (Kan. Ct. App. 2012).

⁷⁸ *See id.*

⁷⁹ *See id.* at 817.

⁸⁰ *See id.* at 818, *See* KAN. STAT. ANN. § 59-2136(h)(1)(f) (2010 Supp.).

⁸¹ *See id.* at 821.

⁸² *See id.*

if the child is conceived as a result of a sexual assault.⁸³ Most states now incorporate the use of the clear and convincing standard in a termination hearing.⁸⁴ Furthermore, in accordance with the holding in *Santosky v. Kramer*, this standard does not violate a parent's due process rights.⁸⁵ Because the RSCCA was not established until 2015, however, several of these state laws are considerably new.⁸⁶

In the past eighteen months alone, Maryland, Mississippi, Missouri, and New Mexico have all enacted statutes to follow suit with the RSCCA.⁸⁷ Supporters of the bill in Maryland, in fact, worked tirelessly for nearly a decade prior to its passage.⁸⁸ Moreover, Maryland and New Mexico were two of seven states

⁸³ See Meghan McCann, *Parental Rights and Sexual Assault*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 17, 2017), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx> (listing the states that allow termination of parental rights as of April 17, 2017, which include: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin).

⁸⁴ See *id.*; See, e.g., IDAHO CODE ANN. § 16-2005(2)(a) (2015) (allowing courts to terminate the parental rights of rapists without a conviction).

⁸⁵ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that the state must support allegations to terminate parental rights by at least clear and convincing evidence).

⁸⁶ See McCann. *supra* note 83 (where at least sixteen states have passed laws within the 2016-2017-time span); See, e.g., MO. REV. STAT. § 211.444.11 (2018) ("A biological father's parental rights may be terminated if: (1) there is clear and convincing evidence the biological father committed the act of forcible rape or rape in the first degree against biological mother, (2) there is clear and convincing evidence the child was conceived as a result of forcible rape or rape in the first degree, and (3) there is a preponderance of evidence the termination of parental rights is in the best interests of the child").

⁸⁷ See H.B. 1, 438th Gen. Assemb., Reg. Session (Md. 2018) (crafted as an emergency bill). See also MISS. CODE § 93-15-119 (2017) (as amended), See S.B. 2342, 100th Gen. Assemb., Reg. Sess. (Miss. 2017); See also N.M. STAT. § 40-16-1 (2017) (allowing termination of parental rights where criminal sexual penetration resulted in the birth of the child, using the clear and convincing evidentiary standard); See *id.*

⁸⁸ See Associated Press, *Maryland Ending Parental Rights of Rapists Who Impregnate*, WASHINGTON'S TOP NEWS (Feb. 7, 2018, 7:50 PM), <https://wtop.com/maryland/2018/02/maryland-ending-parental-rights-of-rapists-who-impregnate/>.

that previously allowed rapists to retain parental rights.⁸⁹ It is obvious that the enactment of the RSCCA has indeed caused profound changes and greater uniformity.

Missouri, as well as several other states, have taken this change one step further. Missouri's statute states: "In any action to terminate parental rights of the biological father, the court may order the biological mother and child are entitled to certain financial benefits. The court shall issue such order if the biological mother consents."⁹⁰ This exception to the general rule of terminating a rapist's parental rights provides an additional layer of protection for the victim. Moreover, statutes such as this exemplify the overall purpose of providing financial support—the child support *belongs to the child*. Furthermore, if the victim mother is going to apply for assistance, it would be more beneficial for the state to obtain support from the rapist father regardless of his ability to exercise his parental rights. In the area of family law, child support and custodial or visitation rights are always separate and distinct issues; one is never contingent upon the other.

Some states still require a rape conviction in the criminal court prior to a petition for termination of the parental rights of the rapist.⁹¹ One of the biggest challenges involved in the termination of the parental rights of rapists is that judges continue to have a great deal of discretion in the proceedings. In the state of Michigan, for example, a judge granted parental rights to a convicted sex offender after a DNA test confirmed that he was the biological father of the boy.⁹² The judge later stayed his own order upon finding out that the child was indeed conceived through

⁸⁹ See McCann, *supra* note 83.

⁹⁰ See MO. REV. STAT. § 211.444.12 (2018). See also OR. REV. STAT. § 419B.510(2) (2016) (denoting how Oregon made an exception to the general rule by requiring a rapist father to pay child support even after a termination of his parental rights).

⁹¹ See McCann, *supra* note 83.

⁹² See Tim Stelloh, *Michigan Judge Gives Convicted Rapist Parental Rights for Victim's Son*, NBC U.S. NEWS (Oct. 9, 2017, 6:17 PM), <https://www.nbcnews.com/news/us-news/michigan-judge-gives-convicted-rapist-parental-rights-victim-s-son-n809196>.

rape.⁹³ It is of no surprise that a tremendous amount of miscommunication could potentially cause this situation to occur.

Minnesota remains one of four states that still does not have legislation designed to restrict or terminate the parental rights of rapists.⁹⁴ In *Hilliker v. Miller*, the victim mother sought to block the father of her child from receiving parenting time because their child was “conceived through a nonconsensual sexual act.”⁹⁵ The mother asserted that the “child’s best interests are not served by granting parenting time to appellant because of the circumstances of the conception and the risks to the child’s identity, stability, and development.”⁹⁶ Despite this, the court held that “[e]ven given the circumstances surrounding the child’s conception, there is adequate evidence . . . that liberal visitation is in the best interests of the child.”⁹⁷ Subsequently, the mother was forced to drop off and pick up her child from her attacker several times a week, continually experiencing the destructive effects of prolonged contact with her rapist.⁹⁸ In cases such as this, victims who suffer from PTSD could be permanently hindered from ever making a full recovery from their affliction.⁹⁹

⁹³ See Associated Press, *Michigan Judge Stays Order Granting Rapist Parental Rights for Victim’s Son*, NBC U.S. NEWS (Oct. 10, 2017, 5:11 PM), <https://www.nbcnews.com/news/us-news/michigan-judge-stays-order-granting-rapist-parental-rights-victim-s-n809621>.

⁹⁴ See, e.g., Jada Meyers, *Minnesota Rapist Rights: Rapist Wants Termination of Rights but Judge Refuses*, CHOICES FOR LIFE (Nov. 20, 2015), <http://choices4life.org/minnesota-rapist-rights-rapist-wants-termination-of-rights-but-judge-refuses/>.

⁹⁵ No. A05-1538, 2006 WL 1229633, at *3 (Minn. Ct. App. May 9, 2006).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Shauna R. Prewitt, *Giving Birth to a “Rapist’s Child”: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 833 (2010) (“forcing a woman to repeatedly face her rapist, or reminders of him, is likely to impede her recovery process. Moreover, raped women who are required to share custody and visitation privileges may be unable to undertake some of the steps raped women have found necessary to move forward and heal.”).

⁹⁹ See *id.* at 834; See also NAT’L CTR. FOR VICTIMS OF CRIME, RAPE-RELATED POSTTRAUMATIC STRESS DISORDER (1992). Women with PTSD and RR-PTSD who cannot effectively treat their illness are likely to abuse drugs and alcohol in an attempt to cope with these symptoms. Lack of effective treatment also “can often lead to . . . diagnoses such as anxiety attacks, social phobias, depression, obsessive-compulsive disorders, suicidal ideation, self-

IV. Conclusion

All states have successfully used the UPA to craft their own legislation or have adopted the UPA in part or in whole.¹⁰⁰ In 1973, the original intent of the UPA was to remove the legal status of illegitimacy and to ensure the equal rights of all parents and children.¹⁰¹ In 2017, the main goal of the UPA was to establish fair and equal treatment of children born to same-sex couples and respond to other changes such as advancement in medical procedures and social changes. Due to several controversial subjects such as surrogacy, reproductive technology, and LGBTQ rights, it can be challenging for all states to adequately address all parentage issues. However, the 2017 UPA continues to be a legal framework that provides a highly inclusive summary of parentage issues and truly reflects the best interest of the child standard.

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mutilation, . . . manic activity bouts, chronic fatigue syndrome and personality disorders.” *Id.* at 21.

¹⁰⁰ See UNIF. PARENTAGE ACT, *supra* note 2. Eleven states adopted versions of the 2002 UPA. The eleven states are Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.

¹⁰¹ See *id.*