

# Challenges in Handling Imprecise Parentage Matters

by  
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I. Introduction .....	139	R
II. Imprecise Parentage Laws .....	141	R
A. Parentage Establishment.....	141	R
B. Contextual Parentage .....	144	R
C. Disestablished Parentage .....	146	R
D. Parentage Laws Interstate .....	148	R
E. Choice of Parentage Laws .....	150	R
III. Investigating Parentage .....	152	R
A. General Norms .....	152	R
B. Special Norms .....	153	R
IV. Failures to Investigate Imprecise Parentage.....	156	R
V. Better Inquiries into Imprecise Parentage .....	160	R
VI. Conclusion .....	161	R

## I. Introduction

Legal parentage under American state laws is significantly and rapidly evolving. Further, it is increasingly imprecise.<sup>1</sup> No longer is legal parentage only defined at precise moments in time or for particular conduct, as by giving birth, having biological ties, marriage to the birth mother at time of conception or birth, name placement on a birth certificate, or formal adoption. Both men and women can now become legal parents, as through de facto parenthood or equitable adoption, where neither the time of the relevant conduct nor the conduct prompting parentage can be precisely determined. Because legal parentage increasingly depends upon fluid and imprecise doctrines, lawyers and judges

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<sup>1</sup> See, e.g., Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003 (2014) (upon reviewing imprecisions, advocating for a reimaged formalism, rather than an expanded functionalism, regarding parentage within nontraditional families).

must be vigilant during legal disputes implicating parentage, including marriage dissolution, paternity, adoption, custody, child support, tort, and probate proceedings.

Together with the growing phenomenon of imprecise legal parentage, lawyers and judges are also challenged because an established legal parentage in one setting often is applicable in other settings. Parentage under law is frequently contextual. Thus, a father for child support purposes often is not a father for childcare purposes.

Lawyers and judges are now challenged in both proceedings first establishing and later overriding legal parentage. Both precise and imprecise forms of established legal parentage increasingly can be overridden via imprecise norms, including standards on waivers, forfeitures, rebuttals, and rescissions. The number of disestablished parents are growing due to reliable and inexpensive genetic testing, births during marriage resulting from adultery, and, greater use of assisted reproduction, especially outside of clinics regulated by government.

Moreover, lawyers and judges investigating both the establishment and disestablishment of legal parentage are challenged due to significant interstate variations. As one distinguished commentator observed: “The relative importance of biology, intent, contract, and parental function varies tremendously by jurisdiction and even by individual case, adding confusion and unpredictability to a determination of critical importance.”<sup>2</sup>

Finally, parentage laws vary widely interstate at a time when parents and their children are quite mobile. Thus in resolving disputes, choices increasingly must be made between competing and quite different imprecise American state parentage laws. Unfortunately, choice of law guidelines generally are not very helpful.

This article will examine the challenges for lawyers and judges investigating parentage laws. First, it will survey varying American state imprecise parentage laws. Then, it will examine the investigative norms guiding inquiries into parentage. In conclusion, it will review the possible results of failed inquiries and offer suggestions to lawyers and judges who must contend with

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<sup>2</sup> Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 703 (2015) (reviewing JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014)).

an array of differing fluid, imprecise, and contextual American state parentage laws.

## II. Imprecise Parentage Laws

### A. Parentage Establishment

The challenges facing lawyers and judges due to imprecise parentage laws are heightened by their current fluidity. On first establishing parentage, for example, the Illinois General Assembly has recently offered quite varied approaches. In 2012, after a four year General Assembly-sponsored study,<sup>3</sup> some of its members suggested that there should be classes of both legal parents and equitable parents.<sup>4</sup> The General Assembly later removed these suggestions.<sup>5</sup> In 2013, arising from the same study, there emerged an expanded parentage presumption suggestion,<sup>6</sup> which was itself removed from proposed legislation by 2015.<sup>7</sup>

Concurrently, the Illinois Supreme Court at one point hinted that the precise parentage attributes of biological ties, marriage, formal adoption, or a voluntary acknowledgment of parentage (VAP) might be unnecessary for a man to be deemed a custodial parent (according to common law principles). All that might be required is that the man acted in a parental way.<sup>8</sup> The high court had earlier ruled that a man, then deceased, who had actually parented a child without such attributes, could nevertheless be deemed a legal parent in a probate proceeding<sup>9</sup> when the child sought to be declared an heir. The high court, however, later deemed this approach inapplicable in the child-care setting, explicitly leaving to the General Assembly the “pol-

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<sup>3</sup> Adam W. Lasker, *Is Family-Law Overhaul on the Way?*, 100 ILL. B.J. 458 (Sept. 2012).

<sup>4</sup> H.B. 6192, at § 600, 97th Gen. Assemb., Reg. Sess. (Ill. 2012).

<sup>5</sup> See, e.g., H.B. 1452, at § 600, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>6</sup> H.B. 1243, at § 204(a)(5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

<sup>7</sup> Proposed Parentage Act, H.B. 1531, at § 204, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

<sup>8</sup> *In re Parentage of Scarlett Z.-D.*, 992 N.E.2d 3 (Ill. 2013) (according to its supervisory authority, the Illinois Supreme Court instructs the appellate court to reconsider its decision denying de facto parentage in a childcare setting given the recent supreme court recognition of the equitable adoption doctrine in a probate setting in *DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013)).

<sup>9</sup> *DeHart*, 986 N.E.2d at 89.

icy debate” on imprecise legal parentage for childcare, if not probate, purposes.<sup>10</sup>

Illinois legislators have yet to determine the contours in childcare settings of any initial parentage establishments founded on imprecise norms. A brief review of some imprecise statutory norms on first establishing parentage in childcare settings elsewhere will illustrate the possible alternatives.<sup>11</sup> Further, it will help lawyers and judges to better understand the increasing import of imprecise parentage laws.

Imprecise parentage establishment laws are challenging because they appear under varying titles, including de facto parenthood, presumed parent, equitable adoption, and parentage by estoppel.<sup>12</sup> At times, in a single state, two or more of these appellations can be used to cover differing forms of imprecise childcare parentage.<sup>13</sup> And at times, the same appellation can have differing meanings in different states.<sup>14</sup> Further, appellations do not always mean what they appear to mean, such as where women are eligible to become presumed fathers under law.<sup>15</sup> And, imprecise parentage establishment can follow the re-

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<sup>10</sup> *Scarlett Z.-D.*, 28 N.E.3d at 795. Elsewhere, imprecise parentage as well as third party (nonparent) visitation norms have been recognized via common law rulings not dependent upon statute. *See, e.g.*, *Pitts v. Moore*, 90 A.3d 1169 (Me. 2014) (nonstatutory de facto parenthood); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *cert. denied sub nom.*, *Knott v. Holtzman*, 516 U.S. 975 (1995) (nonstatutory third party visitation).

<sup>11</sup> More comprehensive reviews appear in Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 498-506 (2014), and Jeffrey A. Parness, *Parental Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 747 (2013).

<sup>12</sup> A comprehensive survey of such laws appears in Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752-763 (2013).

<sup>13</sup> *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (West 2015) (“de facto parent status”); DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2015) (“presumed” parentage).

<sup>14</sup> Consider, for example, de facto parent status. In Delaware there is parentage for a de facto parent, DEL. CODE ANN. tit. 13, § 8-201(c) (West 2015), while in the District of Columbia one can seek “third party custody” as a “de facto parent.” D.C. CODE §§ 16-831.01, 831.03 (West 2015).

<sup>15</sup> *Compare, e.g.*, TEX. FAM. CODE §§160.106, 160.201(b), 160.204 (West 2015) (paternity provisions, as with the law establishing presumed paternity for a man holding out a child as one’s own, apply to maternity determinations); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (former lesbian partner of an

buttal of a precise parentage establishment, such as when the equitable parent doctrine is considered after a marital paternity presumption is rebutted due to lack of biological ties.<sup>16</sup>

Many imprecise parentage laws involving childcare require residence with the child for whom parentage is established (typically leading to a second parent on equal footing with a custodial biological or adoptive parent).<sup>17</sup> While some laws set out a minimum period of residency,<sup>18</sup> others do not.<sup>19</sup>

A second common mandate requires support of the child for whom parentage is to be established. While some laws require the new parent to provide significant support,<sup>20</sup> others do not.<sup>21</sup>

Yet another common element involves whether the alleged new legal parent earlier held himself or herself out in the community as a parent. While some laws require such a holding out as to natural or biological bonds,<sup>22</sup> others do not.<sup>23</sup>

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adoptive mother can be a presumed natural parent under a statute on presuming a “man to be the natural father of a child”); *In re Madelyn B.*, 98 A.3d 494 (N.H. 2014) (presumed “father” statute applied equally to a man or a woman), *with* *Dubose v. North*, 332 P.3d 311 (Okla. Civ. App. 2014) (alleged co-parent, woman who was not the birth mother, could not use Uniform Parentage Act addressing men as presumed fathers).

<sup>16</sup> See, e.g., *Vanderark v. Vanderark*, No. 291212, 2009 WL 2448293 (Mich. Ct. App. Aug. 11, 2009).

<sup>17</sup> See, e.g., DEL. CODE ANN. tit. 13, §§ 8-201, 8-203 (West 2015) (ruling that de facto parentage establishes a parent-child relationship on par with the parent-child relationship of a birth or formal adoptive parent); *Morgan v. Weiser*, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (holding that once established, rights and liabilities arising from in loco parentis relationship are the same as those arising from biological or formal adoptive parenthood).

<sup>18</sup> See, e.g., WYO. STAT. ANN. § 14-2-504(a)(v) (West 2015) (presumed parent resides “in the same household” for first two years of child’s life).

<sup>19</sup> See, e.g., MONT. CODE ANN. § 40-6-105(1)(d) (West 2015) (presumed natural fatherhood for man who “receives” child into his home” while the child is under the age of majority”).

<sup>20</sup> See, e.g., ALA. CODE § 26-17-204(a)(5) (West 2015) (presumed parent where person established “a significant parental relationship with the child by providing emotional and financial support for the child”).

<sup>21</sup> See, e.g., N.J. REV. STAT. § 9:17-43(a) (West 2015) (presumed parentage may be founded, in part, for one who “provides support for the child”).

<sup>22</sup> See, e.g., MINN. STAT. § 257.55(d) (West 2015) (presumed parent “holds out the child as his biological child”); N.J. REV. STAT. § 9:17-43(a) (West 2015) (presumed parent holds the child out as a “natural child”).

144 *Journal of the American Academy of Matrimonial Lawyers*

Broad imprecise parentage laws can lead to surprising, if not shocking, parental interests under law. In one case a couple cared for a child for ten years, since the child was one, after the birth mother left the child with the couple, then strangers, at a gas station after a few minutes of conversation.<sup>24</sup>

B. *Contextual Parentage*

The challenges posed by parentage laws, whether they are precise or imprecise, are also significant because there is usually wide variation by context within a single state. Parentage in one setting does not always carry over to other settings within a single state. Thus, biological fathers often are deemed under state law to be financially responsible for their children born to unwed mothers, though these same fathers are not entitled to seek child-care orders involving these children since their parental rights have been terminated.<sup>25</sup>

Some parentage establishment laws require a subjective intent to adopt in some settings, but not in others.<sup>26</sup> Additional examples of intrastate variations on legal parentage follow, helping lawyers and judges to understand better the contextual variations in American state parentage laws.

Intrastate legal parentage variations were recognized in May, 2006, in a Florida case.<sup>27</sup> The case involved an unwed biological father's parentage claim in an adoption proceeding. At issue was the consistency between the statutes on formal adoptions, especially the provisions on putative father registry filings

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<sup>23</sup> See, e.g., DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2015) (presumed parent "openly held out the child as his own"); WYO. STAT. ANN. § 14-2-504(a)(v) (West 2015) (presumed parent "openly held out child as his own").

<sup>24</sup> *In re M.M.G.*, 287 P.3d 952 (Mont. 2012).

<sup>25</sup> See, e.g., *In Interest of C.N.*, 839 N.W.2d 841 (N.D. 2013).

<sup>26</sup> Compare, e.g., *DeHart*, 986 N.E.2d at 104 ("objective evidence of intent to adopt" by decedent can prompt recognition of an equitable adoption in a probate setting; no recognition if evidence only shows a person (like a foster parent or stepparent) treats a child "lovingly and on equal basis with his or her natural or legally adopted children")., with *Scarlett Z.-D.*, 428 N.E.3d at 792 (subjective intent to adopt that is employed for equitable adoption in probate setting does not apply to "proceedings for parentage, custody, and visitation").

<sup>27</sup> *In re Adoption of Baby A.*, 944 So.2d 380 (Fla. Dist. Ct. App. 2006), whose ruling, but not the above-quoted description, was disapproved in *Heart of Adoptions v. J.A.*, 963 So.2d 189 (Fla. 2007).

(entitling only those biological fathers registering to notice of and participation in later adoption proceedings) and the provisions on child support paternity lawsuits involving unwed biological fathers (allowing support orders founded solely on biological ties). The appeals court observed:

This case demonstrates that Florida has taken substantially different statutory approaches to the rights and responsibilities of biological fathers of children born to unmarried mothers depending upon the issue at stake. In cases of adoption, we wish to minimize unmarried biological fathers' rights. When the state seeks to declare a child dependent, the unmarried biological father's rights are guarded in the hopes the father will fulfill his parental obligations to the child. In cases of child support, especially when the state seeks reimbursement of welfare payments, we attempt to maximize the unmarried biological father's responsibilities. Whether Florida needs a unified policy for the rights of such biological fathers or whether varying policies can coexist is an interesting issue that is raised, but certainly not resolved, in this case.<sup>28</sup>

Some intrastate variations in legal paternity laws are quite reasonable. Sensibly, a biological father may have no participation rights in formal adoption proceedings involving a newborn, but nevertheless be held accountable at times for child support for that same newborn should there be no formal adoption. Further, a biological father may have no custody or visitation rights with his child who resides with the birth mother, but nevertheless be held responsible for child support. As to these latter two settings, the court observed in *N.E. v. Hedges*:

there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring even if unwanted and unacknowledged remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through pater-

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<sup>28</sup> *Baby A.*, 944 So.2d at 395 n.21.

146 *Journal of the American Academy of Matrimonial Lawyers*

nity laws. This responsibility is not growing weaker in our body politic . . . but stronger.<sup>29</sup>

Other intrastate variations in legal paternity seem less reasonable. For example, in Iowa a man can be an established father “for certain purposes” due to a marital paternity presumption, presumably including childcare and child support, but is not a “parent” who is a necessary party when his child is subject to a statutory proceeding involving a child in need of assistance.<sup>30</sup> And in Mississippi, a child, according to the “in loco parentis” doctrine, cannot recover on a parent’s death under the wrongful death statute, but can recover under the workers’ compensation statute.<sup>31</sup>

### C. *Disestablished Parentage*

So, legal parentage no longer is established only at precise moments in time or for reasons that are quite precise. Conduct, like acting in a parent-like way, can prompt legal parenthood, although the necessary acts occurred at no precise point in time and although legal parentage remains very uncertain until judicial adjudication. Further, legal parentage in any given state often varies by context.

Additionally, whether arising at precise or imprecise moments, or under less precise or more precise standards, parentage established under law often can be rebutted, rescinded, or otherwise overridden. Legal professionals handling parentage cases in different settings within a single state must carefully investigate both the laws and the facts underlying the fluid standards on parentage disestablishment. Disestablishment standards often vary by context in a single state. The following brief review of varying parentage disestablishment standards within a single state should

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<sup>29</sup> N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). See also *Ex parte* M.D.C., 39 So.3d 1117 (Ala. 2009). See generally *In re* H.S., 805 N.W.2d 737, 745 n.4 (Iowa 2011); Jason M. Merrill, *Falling Through the Cracks: Distinguishing Parental Rights from Parental Obligations in Cases Involving Termination of the Parent-Child Relationship*, 11 J. L. & FAM. STUD. 203 (2008).

<sup>30</sup> *In re* J.C., 857 N.W.2d 495 (Iowa 2014).

<sup>31</sup> *Smith v. Smith*, 130 So.3d 508 (Miss. 2014) (differentiating due to the express language in the two statutes).

help lawyers and judges better handle disputes where a party seeks to undo an established parentage.<sup>32</sup>

Two common forms of parentage establishment are a voluntary parentage acknowledgment and a marital parentage presumption. Each form usually contemplates at least possible biological ties between the child and a newly-recognized parent who is not the birth mother. Standards for an acknowledgment rescission differ dramatically intrastate from standards for a marital presumption rebuttal. Acknowledgment rescission norms are driven by federal statutes, which generously allow rescissions within sixty days of signing, but bar rescissions after sixty days in the absence of fraud, duress or material mistake of fact.<sup>33</sup> By contrast, marital parentage presumptions often may not be easily rebutted within two months of birth.<sup>34</sup> Yet genetic testing showing, e.g., no ties between a child and the birth mother's husband sometimes prompts a presumption of rebuttal more than two months after birth without a showing of fraud, duress, or mistake.<sup>35</sup>

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<sup>32</sup> Of course, general issue or claim preclusion principles can bar attempts at parentage disestablishment even where the disestablishment standards may have been met. *See, e.g., In re H.L.B.*, 976 N.E. 1186 (Ill. App. Ct. 2012) (res judicata preclusion bars attempt to declare nonexistence of parent-child relationship).

<sup>33</sup> 42 U.S.C. § 666(a)(5)(D)(ii) and (iii) (required of states participating in certain federal welfare programs, 42 U.S.C. § 654(20)). The federal statutes are described in Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 486-88 (2005). The state rescission statutes are listed and described in Paula Roberts, *Truth and Consequences*, 37 FAM. L.Q. 35, 82-90 (2003) (Appendix B).

<sup>34</sup> For example, some states do not allow an unwed biological father the opportunity to rebut a marital paternity presumption as long as the marriage remains intact. *See, e.g., OR. REV. STAT. § 109.070(1)(b) and (2)* (West 2015); UTAH CODE ANN. § 78B-15-607(1), as read in *R.P. v. K.S.W.*, 320 P.3d 1084, 1089, 1099 (Utah Ct. App. 2014) (though noting "no constitutional challenge" had been presented); *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999).

<sup>35</sup> *See, e.g., 750 ILL. COMP. STAT. § 45/8 (a)(3)* (marital paternity presumption may be disestablished by presumed father/husband within two years after he obtained "knowledge of relevant facts"); *In re Parentage of John M.*, 817 N.E.2d 500 (Ill. 2004) (standards on biological father's opportunity to disestablish husband's presumed marital parentage and to establish his own paternity under law are unclear, and involve "public policy" issues better addressed by the General Assembly). The state marital paternity presumption rebuttal

Comparably, standards for an acknowledgment rescission may differ from the standards for rebutting a nonmarital parentage presumption. A parentage acknowledgment by a signatory can be rescinded and thus prompt no parentage for its signor due to a failure to include certain information in the acknowledgment; but the same signor may nevertheless still be a presumed nonmarital parent who may not be entitled to rebut the presumption.<sup>36</sup>

#### D. *Parentage Laws Interstate*

So, imprecise norms can operate in a single American state for both establishing and disestablishing legal parentage. These intrastate norms also often differ depending upon context. But the crazy quilt of parentage laws in a single state itself also differs dramatically from the crazy quilt of parentage laws in many other states. Illustrations of significant interstate parentage law variations in similar contexts follow. They will help to alert lawyers and judges handling parentage issues tied to multiple jurisdictions to the challenges in investigating parentage establishment and disestablishment norms in varying locales.

Consider again voluntary parentage acknowledgments. Notwithstanding the federal statutory norms, there are interstate variations,<sup>37</sup> among other things, regarding: whether acknowledgers must assert beliefs as to the probable biological ties of the male signatories;<sup>38</sup> whether there are time limits beyond which acknowledgements may not be rescinded, even with fraud, du-

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statutes are listed and described in Roberts, *supra* note 33, at 94-95 (Appendix F).

<sup>36</sup> See, e.g., *Mack v. Mack*, No. 2130847, 2015 WL 1877721 (Ala. Civ. App. Apr. 24, 2015) (citing ALA. CODE § 26-17-204(a)(5) (West 2015), presumption can be founded on, e.g., receipt of a child into the home and holding out that child as one's own).

<sup>37</sup> Incidentally, there are sometimes also significant variations in the precedents in a single state, especially where the acknowledgement laws are unclear. See, e.g., Kelly M. Greco & Stephanie R. Hammer, *Challenging Voluntary Acknowledgments of Paternity*, 102 ILL. B.J. 432 (Sept. 2014) ("uncertainty" in Illinois law).

<sup>38</sup> Cacioppo, *supra* note 33, at 489-91; Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 72-73 (2010).

ress, or mistake;<sup>39</sup> whether certain mistakes as to the biological ties between male signors and their acknowledged children can serve to prompt post-sixty day rescissions;<sup>40</sup> and, statutorily, who may challenge a voluntary parentage acknowledgment.<sup>41</sup>

There are also significant interstate variations in the standards for both establishing and rebutting a marital parentage presumption. As to establishment, there are differences on when states assess the timing of the marriage. Some state laws look at marriage at the time of birth or conception<sup>42</sup> while others look only to marriage at the time of birth.<sup>43</sup>

As to rebuttal, in some states only the birth mother or her husband can seek rebuttal so long as the married couple is “committed to remaining married” and to raising “the child as an issue of the marriage.”<sup>44</sup> Elsewhere, an effective rebuttal of a marital paternity presumption can be pursued by an alleged biological

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<sup>39</sup> Compare, e.g., DEL. CODE ANN. tit. 13, § 7-308(a)(2) (West 2015) (two years), with TEX. FAM. CODE § 160.308(1) (West 2015) (four years). Not all time limits are absolute. See, e.g., *In re A.N.F.*, No. W2007—02122—COA—R3—PT, 2008 WL 4334712, at 14 (Tenn. App. Sept. 24, 2008) (statute says five year limit is inapplicable when “the requested relief will not affect the interests of the child, the state, or any Title IV-D agency”).

There can be other limits as well. See, e.g., *In re Paternity of an Unknown Minor*, 951 N.E.2d 1220, 1224 (Ill. App. Ct. 2011) (beyond fraud, duress or material mistake of fact, a male signatory’s challenge “would have to meet the standards of section 2-1401 of the Code of Civil Procedure” [motion for relief from judgment more than thirty days, but less than two years, after judgment]).

<sup>40</sup> Cacioppo, *supra* note 33, at 494-99; Parness & Townsend, *supra* note 38, at 87.

<sup>41</sup> Compare, e.g., ALA. CODE § 26-17-609(b) (West 2015) (“If a child has an acknowledged father, an individual, who is not a signatory to the acknowledgment of paternity and who seeks an adjudication of paternity of the child may maintain a proceeding at any time after the effective date of the acknowledgment if the court determines that it is in the best interest of the child.”); DEL. CODE ANN. tit. 13, § 8-308(a)(1) (West 2015) (“a signatory of an acknowledgment”); MICH. COMP. LAWS § 722.1011(1) (West 2015) (mother, signing man, child, or prosecuting attorney); UTAH CODE ANN. § 78B – 15-307(1) (West 2015) (“signatory” or “a support-enforcement agency”).

<sup>42</sup> See, e.g., 750 ILL. COMP. STAT. 45/5(a)(1) (1984) (“born or conceived”).

<sup>43</sup> CAL. FAM. CODE § 761(a) (West 2015) (“child is born during the marriage”).

<sup>44</sup> UTAH CODE ANN. § 78B-15-607(1) (West 2015), as read in *R.P.*, 320 P.3d at 1087 (assuming “no constitutional challenge”). Similar is OR. REV. STAT. § 109.070(1)(b) and (2) (West 2015).

father via an “action to determine the existence of the father and child relationship whether or not such a relationship is already presumed.”<sup>45</sup>

#### E. *Choice of Parentage Laws*

Finally, when parentage disputes involve conduct in two or more American states (or two or more countries), legal professionals must recognize that the significant interstate (and intercountry) variations in determining established and disestablished parentage in a single context can lead to difficult choice of law issues. The need to choose among competing laws (i.e., where there are “true conflicts”) too often goes unrecognized, resulting in some odd rulings. An illustration follows.

The North Dakota Supreme Court resolved the extreme case of *Johnson v. Johnson* in 2000.<sup>46</sup> In the case, Antonyio sought to divorce Madonna in July 1998. Madonna sought child support for Jessica who Madonna urged had been equitably adopted by Antonyio under North Dakota law.<sup>47</sup>

The Johnsons were married in September 1986, with no child ever born to Madonna during the marriage. But in August 1988 the Johnsons, then living in New Jersey, took custody in Pennsylvania of Jessica, then three months old and the natural granddaughter of Madonna.<sup>48</sup> While Jessica was scheduled to remain with the Johnsons for only a month, ten years later, at the time of the North Dakota divorce, Jessica remained with the Johnsons.<sup>49</sup> During the decade Jessica was raised as the child of the Johnsons. The Johnsons had initiated formal adoption proceedings in New Jersey and in Kentucky, where Jessica’s natural parents lived; but

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<sup>45</sup> 750 ILL. COMP. STAT. § 45/7(a) (1984). The circumstances allowing such a determination remain, however, unclear. *John M.*, 817 N.E.2d at 510 (likely no opportunity for rapist or one who comes in ten years after birth saying “I want a cotton swab, I’m the dad”). *See also* In the Interest of Waites, 152 So.3d 306 (Miss. 2014) (for child born of adultery to wife during marriage, biological father can seek custody as long as there is “no clear and convincing evidence of abandonment, desertion, immoral conduct detrimental to the child, and/or unfitness; husband may not seek custody if there is no such evidence though he has “standing in loco parentis,” which allows him to seek third party visitation).

<sup>46</sup> *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000).

<sup>47</sup> *Id.* at 100.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

neither of those proceedings were completed due to military work transfers.<sup>50</sup> From August 1988 to May 1997 the Johnsons resided in New Jersey and Florida, with Antonyio sometimes deployed overseas. Antonyio was sent to Grand Forks, North Dakota in May 1998.<sup>51</sup> By then Antonyio and Madonna were not living together.

The North Dakota Supreme Court looked to cases on “contract to adopt only in the context of inheritance law.”<sup>52</sup> It determined that the public policy of the state supports application of the doctrine of equitable adoption “to impose a child support obligation under certain circumstances” and that nothing in North Dakota law forbids it.<sup>53</sup> The high court remanded for resolution of the factual question involving the application of the equitable adoption doctrine to Antonyio.<sup>54</sup>

A dissenting justice began: “This is a case of a grandmother and her grandchild who have never lived in North Dakota.”<sup>55</sup> He went on: “it is clear that if an ‘equitable adoption’ took place, it took place in New Jersey or Kentucky and would therefore be governed by the law of one of those states.”<sup>56</sup> In both New Jersey and Kentucky there was no equitable adoption.<sup>57</sup> The dissent deemed New Jersey or Kentucky law appropriate under North Dakota choice of law rules for contract cases.<sup>58</sup>

The North Dakota high court majority did not respond to these dissenting observations. Unfortunately, no opinion in *Johnson* considered utilizing an interest analysis to determine which state’s imprecise parentage law might operate on equitable

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<sup>50</sup> *Id.*

<sup>51</sup> Brief of Antonyio Johnson, *Id.* at 1.

<sup>52</sup> *Johnson*, 617 N.W.2d at 103.

<sup>53</sup> *Id.* at 109. Such an application of the equitable adoption doctrine, however, was “limited” as the court expressed “preference for adherence to statutory procedures” on formal adoptions. *Id.* at 130, n.3.

<sup>54</sup> *Id.* at 109-10.

<sup>55</sup> *Id.* at 112 (Sandstrom, J., dissenting).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 124-25 (“it objectively appears that our precedent would mandate the application of another forum’s law because the alleged contract arose in either Kentucky or New Jersey and was performed in either of those states, the subject matter was in either of those states, and the domicile of all parties was in either of those states at the time the alleged contract was made”).

adoption in the child support context. And no opinion considered whether to decline jurisdiction altogether or least over the parentage, if not the child support, issue as to Antonio.<sup>59</sup> Further, no opinion addressed any difference between Antonio's legal parenthood in the child support and childcare contexts.

### III. Investigating Parentage Norms

The broad array of imprecise parentage laws across the United States present investigative challenges for legal professionals. There are several different investigative norms applicable in parentage matters, some of which are general while others are particular to certain settings.

#### A. General Norms

According to general high court rules or statutes on pleadings, motions, and the like in civil cases, lawyers and parties must usually undertake reasonable inquiry into pertinent facts and applicable laws before and during civil cases. After inquiry, lawyers or parties who present facts during litigation typically must certify their good faith investigative efforts and their support for their factual assertions and legal analyses. At times, the general norms on certifications do differentiate between certain filings, as with the Federal Rules of Civil Procedures which distinguish between nondiscovery<sup>60</sup> and discovery.<sup>61</sup>

According to state Professional Conduct Rules, typically derived from the A.B.A. Model Rules, in most cases lawyers must undertake "preparation reasonably necessary" for client representation,<sup>62</sup> act with "reasonable diligence,"<sup>63</sup> not present "frivo-

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<sup>59</sup> See also N.D. CENT. CODE ANN. § 14-14.1-18 (West 2015) (trial court can decline to exercise its child custody jurisdiction if it provides an "inconvenient forum," measured, e.g., by the nature and location of any evidence; the length of time the child resided outside North Dakota; and, the financial resources of the parties).

<sup>60</sup> FED. R. CIV. P. 11 (where section (d) makes its norms on pleadings, written motions, and papers inapplicable to "disclosures and discovery requests, responses, objections and motions under Rules 26 through 37).

<sup>61</sup> FED. R. CIV. P. 26(g).

<sup>62</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1.

<sup>63</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3.

lous” propositions,<sup>64</sup> and act expeditiously<sup>65</sup> and fairly toward opposing parties and counsel.<sup>66</sup> Further, managerial and supervisory lawyers have oversight responsibilities regarding the investigative work of other lawyers<sup>67</sup> and nonlawyers.<sup>68</sup>

### B. *Special Norms*

Special lawyer investigation norms can operate in particular settings where legal parentage is important. Consider, for example, mandates for inquiries by lawyers (and others) into the identities of as yet unknown male biological parents of children who are placed for formal adoption.<sup>69</sup> The possible variations in such mandates are illustrated by the 2001 and 2003 Florida statutes. The 2001 statute required that those petitioning to terminate parental rights in anticipation of pending adoptions act in “good faith” and undertake “diligent efforts” to locate men identified by mothers as the potential fathers.<sup>70</sup> Under the 2003 statute “diligent” searches<sup>71</sup> are only required for unwed biological fathers who have already affirmatively stepped up to parentage, as

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<sup>64</sup> MODEL RULES OF PROF'L CONDUCT R. 3.1.

<sup>65</sup> MODEL RULES OF PROF'L CONDUCT R. 3.2 (in litigation).

<sup>66</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4.

<sup>67</sup> MODEL RULES OF PROF'L CONDUCT R. 5.1.

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3.

<sup>69</sup> Once the identities become known and those identified as possessing possible parental interests are entitled to notice of proposed, or possible future, adoptions, there are separate mandates on how notice should be conveyed. *See, e.g., In re Adoption of K.P.M.A.*, 341 P.3d 38, 50 (Okla. 2014) (Facebook message by prospective mother to biological father during pregnancy did not satisfy due process notice requirements).

<sup>70</sup> FORMER FLA. STAT. ANN. § 63.062 (West 2015). The 2001 statute was invalidated for reasons unrelated to the search mandates. *G.P. v. State*, 842 So.2d 1059 (Fla. App. 2003) (invalidating former FLA. STAT. ANN. §§ 63.087 and 63.088 (West 2015), commonly known as the Scarlett Letter provisions, requiring notice to possible biological fathers of children placed for adoption via newspaper posts in counties where “conception may have occurred,” the mothers resided, and the possible fathers resided, where the posts contained significant personal information as to the facts underlying conception and birth). The *G.P.* decision is reviewed in Jeffery A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlett Letters, Yes to Good Faith Cooperation*, 36 CUMB. L. REV. 63 (2005) (while finding *G.P.* was correctly decided, opining that the 2003 statute unnecessarily eliminated the “good faith” and “diligent efforts” components of the 2001 statute).

<sup>71</sup> FLA. STAT. ANN. § 63.087(4)(d) (West 2015).

by securing a judicial declaration of paternity;<sup>72</sup> who are officially claiming or acknowledging paternity;<sup>73</sup> who are developing a “substantial relationship with [their] child”;<sup>74</sup> or, who are demonstrating “a full commitment” to parental responsibility.<sup>75</sup>

The 2001 statute follows U.S. Supreme Court Justice Stewart’s remarks in an adoption case, where he observed:

Absent special circumstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father’s rights. Likewise, there is no reason not to require such identification when it is the spouse of the custodial parent who seeks to adopt the child. Indeed, the state now requires the mother to provide the identity of the father if she applies for financial benefits. . . . The state’s obligation to provide notice to persons before their interests are permanently terminated cannot be a lesser concern than its obligation to assure that state funds are not expended when there exists a person upon whom the financial responsibility should fall.<sup>76</sup>

It also follows the Oklahoma approach since the state supreme court there has said “the natural father of a child born out of wedlock is entitled to notice of the existence of the child so that the natural father has a chance to exercise his opportunity interest in developing a relationship with the child.”<sup>77</sup>

The 2003 Florida statute is similar in approach to a Utah statute, which declares:

The Legislature finds that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding and has no obligation to volunteer information to the court with respect to the father.<sup>78</sup>

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<sup>72</sup> FLA. STAT. ANN. § 63.062(1)(b)(3) (West 2015).

<sup>73</sup> FLA. STAT. ANN. § 63.062(1)(b)(4) and (5) (West 2015) (requiring affidavit or acknowledgment).

<sup>74</sup> FLA. STAT. ANN. § 63.062(2)(a) (West 2015) (children over six months old placed for adoption).

<sup>75</sup> FLA. STAT. ANN. § 63.062(2)(b) (West 2015) (children less than six months old placed for adoption). *See also* IND. CODE ANN. § 31-19-5-15(a) (West 2015) (attorney filing adoption petition shall request state agency to investigate possible paternity that is noted in the Putative Father Registry).

<sup>76</sup> *Lehr v. Robertson*, 463 U.S. 248, 273 n.5 (1983) (J. White, dissenting).

<sup>77</sup> *K.P.M.A.*, 341 P.3d at 46 (reiterating that “the initial duty to inform the natural father of the pregnancy rested with the mother”).

<sup>78</sup> UTAH CODE ANN. § 78-30.4.12(4) (West 2015).

The 2003 Florida statute is also comparable to a Texas statute permitting termination of a biological father's rights in an adoption proceeding involving his child under one year of age as long as the father "has not registered with the paternity registry," even where the birth mother prevented the father from learning of the pregnancy.<sup>79</sup>

Of course, these special written laws on inquiries into male biological ties omit many other possible parents when birth mothers place their children in state custody in anticipation of later formal adoptions. Especially when the children are not infants, there may well be additional parents under imprecise parentage laws. Lawyers and judges involved in a parental rights termination, and then a later related formal adoption proceeding should inquire into the possibility that there is an informal adopter who has met the imprecise state parentage standards on residence, holding out, parental-like relationship, and the like.

Consider, as well, inquiries into the unknown parents of children whose mothers apply for certain welfare assistance benefits on behalf of their children. For these inquiries, as noted by Justice White, there are special norms applicable to nonlawyers and lawyers alike. Under the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, unwed mothers seeking certain welfare aid usually must be required to cooperate "in good faith" with governmental officials, who will seek to establish legal paternity in the biological father (so that reimbursement of any governmental aid may be recovered).<sup>80</sup>

Special judicial investigation norms also can operate. Consider, for example, inquiries necessitated because significant interests of children are at stake in pending cases where the children themselves are not parties, and thus have no formal legal representation. Often, party status or separate representation, such as via a guardian, is unnecessary for a child because a

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<sup>79</sup> TEX. FAM. CODE § 161.002(b)(3) (West 2015), as applied in *In Interest of Baby Girl S.*, 407 S.W.3d 904 (Tex. App. 2013).

<sup>80</sup> 42 U.S.C. § 654(29)(A) ("subject to good cause and other exceptions"). While informational privacy interests do not invalidate this "good faith" duty, privacy interests in only reasonable searches can invalidate other requirements involving searches of welfare applicants. *See, e.g.,* *Lebron v. Secretary of Fla. Dep't of Children & Families*, 772 F.3d 1352 (11th Cir. 2014) (no suspicionless drug testing).

parent or the parents, with party status, adequately represent(s) the child. But since federal and state constitutional due process protections on fair procedures apply to all whose “life, liberty, or property” interests may be negatively impacted by judicial proceedings, not just to all named parties,<sup>81</sup> judicial investigations into the adequacy of parental representations of nonparty children often are required.

In one case a man sought a declaration of nonpaternity in a proceeding naming only the birth mother; the man won in 1993 when the mother defaulted.<sup>82</sup> Upon the man’s death in 2008, the child subject to the earlier declaration obtained a court order deeming the 1993 judgment inapplicable to her, presumably opening the door to her possible heirship.<sup>83</sup> The appellate court found the mother’s and child’s interests in the 1993 case were “not aligned” since the mother failed to pursue her daughter’s “statutory right to her putative father’s physical, emotional and financial support.”<sup>84</sup>

In another case, a wife proceeded pro se in a marriage dissolution case wherein her husband sought to rebut the marital paternity presumption. While the court found the wife/mother’s interests seemingly were aligned with the child’s interest, there was “a duty to appoint a guardian ad litem to represent” the child’s interests because those interests “were not adequately represented” by the pro se mother.<sup>85</sup>

#### **IV. Failures to Investigate Imprecise Parentage**

Investigative failures involving imprecise parentage laws, whether they involve general or special investigation norms, can

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<sup>81</sup> Consider, for example, that procedural fairness must be accorded to lawyers who are sanctioned for civil litigation misconduct; to witnesses who are held in contempt; and to those who act in concert with parties to violate court orders of which they are noticed.

<sup>82</sup> *Pavia v. Marshall*, 2012 Ill. App. (1st) 111097-U, at \*1, rev. denied 958 N.E.2d 1067 (Ill. 2012).

<sup>83</sup> *Id.* at \*1.

<sup>84</sup> *Id.* at \*4. In doing so the court observed: “However, our courts have repeatedly held that in the context of paternity actions, where the interests of the parent and the child are not aligned, it is the better practice for the court to appoint a guardian ad litem to ensure that the minor’s interests are protected.”

<sup>85</sup> *In re Marriage of Ostrander*, 27 N.E.3d 698, 704 (Ill. App. Ct. 2015).

lead to varying negative consequences for lawyers, including malpractice and other civil claims, as well as to judicial sanctions. Sometimes civil claims founded on investigative failures can be pursued by nonclients and nonadversaries. Sometimes sanctions can be initiated by judges *sua sponte*. A few illustrative cases follow.

In *Kramer v. Catholic Charities*, a thwarted adoptive couple sued in negligence a not-for-profit organization that had served as the “intermediary” between themselves, a child, and the child’s mother.<sup>86</sup> The adoption failed after the couple had custody since birth and for more than eight months because the unwed biological father appeared and then prevailed on his custody request.<sup>87</sup> At the time custody began for the couple, two days after birth, the father had been registered on the state’s putative father registry—a fact unknown to the couple and the organization for at least a month after the couple took the child home.<sup>88</sup> The couple lost its negligence claim before the Indiana Supreme Court, though a statute permitted the agency to prompt a search of the registry “at any time,” including prebirth.<sup>89</sup> The statute did mandate that the agency prompt a search of the registry thirty-one days after the child’s birth, which it did do.<sup>90</sup>

A negligence claim against a lawyer for the couple (had there been one) could well trigger a different result. The state statute also explicitly recognized an attorney who “arranges” an adoption, or who might arrange an adoption, may prompt a registry search.<sup>91</sup> While no duty was found owed to the couple by the organization, a duty owed to the couple by their lawyer would be easier to find.<sup>92</sup>

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<sup>86</sup> 32 N.E.3d 227, 229 (Ind. 2015).

<sup>87</sup> *Id.* at 230.

<sup>88</sup> *Id.*

<sup>89</sup> IND. CODE ANN. § 31-19-5-15(a) (West 2015).

<sup>90</sup> IND. CODE ANN. §§ 31-19-5-15(b), 31-19-5-12(a)(1) (West 2015).

<sup>91</sup> IND. CODE ANN. § 31-19-5-15(a)(1) (West 2015).

<sup>92</sup> The Indiana high court noted the agency made no promise to conduct a pre-placement check of the putative father registry. *Kramer*, 32 N.E.3d at 231-33. Such a check, however, may be required of an attorney assisting a couple contemplating the adoption of a particular child. *See, e.g.*, IND. R. PROF’L CONDUCT 1.3[1] (“reasonable diligence”), 1.1 (“competence” requires “preparation reasonably necessary”), 3.2 (“reasonable efforts to expedite litigation”). Cer-

In *Hall v. Cavanaugh & Associates*,<sup>93</sup> a law firm was sued by a decedent's alleged biological son who claimed the law firm erroneously disbursed wrongful death settlement proceeds to the decedent's three brothers, even though the wrongful death court had determined the brothers were the decedent's only heirs. A paternity case by the birth mother involving the same alleged offspring and against the decedent had been earlier filed, but was not pursued. The court of appeals approved the denial of the law firm's summary judgment since the court found it possible that the alleged son could prove paternity via biological ties by clear and convincing evidence. The appellate court noted that five years before the settlement, the law firm possessed an affidavit from one of the decedent's brothers simply saying that "upon information and belief," the decedent "had a minor child whose name and address are unknown."<sup>94</sup> Yet, the court also observed that there were affidavits in the record from all three brothers stating "they did not know" of any other children of the decedent.<sup>95</sup> Perhaps the slightest hint of possible additional parentage should always prompt at least some further investigation by lawyers in order to lessen the chances for later malpractice or other civil claims.<sup>96</sup>

The *Hall* case demonstrates that the investigative failures into parentage by lawyers are not always recognized by the judges who first determine parentage, as the probate court failed to urge the lawyers in *Hall* to investigate further. Consider, as well, the case of *In re A.A.*<sup>97</sup> where again there was a lack of judicial recognition, though here there were clearer signs that

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tainly the harm suffered by a prospective adoptive couple when a child in its care for a long time is removed is reasonably foreseeable to the couple's lawyer.

<sup>93</sup> No. 1-13-3535, 2014 Ill. App. (1st) 133535-U (Nov. 10, 2014 Ill. App. Ct.).

<sup>94</sup> *Id.* at ¶4.

<sup>95</sup> *Id.* at ¶11.

<sup>96</sup> In the case, there was more than a slight hint to the three brothers, and their lawyers, that the decedent had a fourth son. *Id.* at ¶34.

Of course, lawyers' tort (and contract) law duties to clients differ from their duties to nonclients. On the scope of attorneys' duties to nonclients, see, e.g., *Estate of Cabatit v. Canders*, 105 A.3d 439 (Me. 2014) (adopting "the multifactor third-party beneficiary test" created by the Supreme Court of Washington in *Trask v. Butler*, 123 Wash. 2d 835 (1994)).

<sup>97</sup> 20 N.E.3d 526 (Ill. App. Ct. 2014).

more inquiries were needed. In the case, the Illinois Department of Children and Family Services (DCFS) petitioned in June, 2013 for an adjudication of wardship of A.A. (and three other children born to one birth mother). A.A. was then about six weeks old. The husband of the birth mother was ruled out as the biological father of A.A. and, in fact, had signed a denial of paternity which then allowed Matthew A. to acknowledge parentage (VAP) because he thought he was the biological father of A.A., though he knew he might not be. In fact, Cort H., who died in August, 2013 was the biological father of A.A. . By November, 2013, Matthew “unfortunately” learned he was not the biological father.<sup>98</sup> In February, 2014, the parents of Cort H. sought to intervene in the wardship proceeding because they wished to adopt A.A.<sup>99</sup> That same month a court order recognized there was a service plan for Matthew A. (and the birth mother) to regain custody.<sup>100</sup> Yet Matthew A. never had a chance to regain custody of A.A. since the guardian ad litem for A.A. successfully sought to vacate the VAP over Matthew A.’s objection. Both a CASA volunteer and a DCFS High Risk Intact Family Worker recommended that Matthew A. not be removed as A.A.’s legal father. Yet in May, 2014 the trial court vacated the VAP and declared a parent-child relationship between the deceased Cort. H. and A.A. The appellate court affirmed in October, 2014, while commending “Matthew A.’s parental instincts and actions regarding A.A.”<sup>101</sup> The appeals court ruled there was no need for an inquiry into the “best interests” of A.A.<sup>102</sup>

The appeals court in *A.A.* never considered whether to reinstate the birth mother’s husband’s as a father via the presumed marital paternity presumption. Further, the court failed to consider expressly the effect of Cort H.’s denial of responsibility for A.A. when confronted by the birth mother, or to consider otherwise the failure of Cort H. to pursue fatherhood affirmatively, which can often lead to nonparentage for an unwed biological father in other contexts, like adoption. The appeals court did note that “A.A. should be able to receive social security survivor

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<sup>98</sup> *Id.* at 528.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 532.

<sup>102</sup> *Id.*

benefits through Cort H.”<sup>103</sup> Biology, and perhaps money, reigned supreme. There was no judicial investigation into either the VAP rescission limits (by federal statute, the limits are fraud, duress, or material mistake of fact)<sup>104</sup> or into the possible revival of the statutory marital paternity presumption applicable to the birth mother’s husband, because the husband’s paternity disestablishment may have been dependent upon Matthew A.’s assumption of parenthood.<sup>105</sup>

Of course, investigative failures by judges involving imprecise parentage laws can also prompt bad consequences besides civil claims or sanctions against lawyers. When trial judges fail to inquire early on, loving families can be torn apart by corrective orders. Earlier parentage determinations can be deemed erroneous due to failures to consider pertinent imprecise parentage laws, resulting in loving and stable families being separated.

Trial judges typically have more significant and independent investigative responsibilities when hearing parentage disputes than when they hear many other disputes. Parentage decisions often significantly impact nonparties with little or no voice in the adjudicatory processes, as with children and grandparents interested in marriage dissolution or adoption cases. Greater judicial vigilance regarding imprecise parentage norms will protect children and their extended families, as well as their parents.

## V. Better Inquiries into Imprecise Parentage

How should lawyers and judges act when imprecise parentage laws might apply? Most importantly, when legal parentage is relevant, lawyers and judges must look beyond the parties and the pleadings to consider who may have biological ties to the child and who may have acted in a parental-like way with the child. Thus, in marriage dissolution proceedings, lawyers and judges must consider, at times, the possibilities for rebuttals of the marital parentage presumptions deeming the divorcing husbands as the fathers of children born into the marriages. When evidence surfaces of possible legal parentage beyond the divorc-

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<sup>103</sup> *Id.*

<sup>104</sup> 42 U.S.C. 666(a)(5)(D)(iii).

<sup>105</sup> The *A.A.* case is now in the Illinois Supreme Court. *In re A.A.*, No. 118605, 23 N.E. 3d 1199 (Ill. Dec. 2014).

ing couple, further inquiries are often warranted. Even after divorce, when evidence only then surfaces of a child's birth as a result of adultery, an alleged biological father may be a necessary party in a child support action against the ex-husband even when the ex-husband cannot challenge his own status as a father under law.<sup>106</sup> For lawyers, the prospects for malpractice claims, as in *Hall v. Cavanaugh*, can be lessened. For judges, the due process interests of nonparties will be protected.

Further, in a marriage dissolution proceeding involving a stepparent, the childcare and child support afforded by the stepparent must often be investigated. While the child of a divorcing parent is not a named party, her interests in continuing stepparent childcare and/or child support are at stake. In some states, a stepparent's imprecise acts can prompt parental status under law, leading to either childcare opportunities or child support duties.<sup>107</sup>

Also, when legal parentage is relevant, lawyers and judges must often look beyond their own state's laws. They regularly do so when precise parentage norms are satisfied elsewhere, as with out-of-state voluntary parentage acknowledgments, marital parentage presumptions, formal adoptions, and paternity court judgments.<sup>108</sup> They less frequently do so, as in the aforescribed *Johnson* case, when imprecise parentage norms may have been met elsewhere, though never subject to judicial consideration there.

## VI. Conclusion

The fluidity of American state laws on imprecise parentage, together with the significant intrastate and interstate variations in

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<sup>106</sup> *State v. Lowrie*, 167 So.3d 573 (La. 2015) (state law recognizes possible "dual paternity" and child, as unnamed party, has a right to support from two men).

<sup>107</sup> See, e.g., Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N. U. L. REV. 811, 835-36 (2014) (reviewing stepparent child support duties); Jeffrey A. Parness, *Survey of Illinois Law: Stepparent Childcare*, 38 S. ILL. U. L.J. 576, 583-89 (2014) (reviewing both general and special stepparent childcare laws).

<sup>108</sup> Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. \_\_\_ (forthcoming 2016), posted at SSRN.com/abstract=2588609.

162 *Journal of the American Academy of Matrimonial Lawyers*

the laws, present significant challenges to lawyers and judges. The same appellation, like “de facto parent,” can have different meanings. Women can be presumed legal fathers, as when the marital paternity presumption applies. Stepparents and grandparents can morph into fathers and mothers at imprecise moments without formal adoptions due to their actions which are not, and cannot be, precisely described. Investigative failures regarding imprecise parentage can prompt civil claims or sanctions against lawyers and prompt judges to cause, however unintentionally, significant distress within loving families later torn apart though earlier judicially recognized.