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Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood

*By Steven N. Peskind**

I. INTRODUCTION

Should genetic considerations trump all other considerations in determining parentage? Except in very few instances, Illinois' parentage law answers yes to this question, despite a dramatic sociological and technological revolution marginalizing traditional biology-based notions of parentage. In an era where science allows the creation of children using the eggs of an intended mother combined with the sperm of a stranger implanted into the uterus of another woman, a new paradigm is necessary. This paradigm is not limited to the unique set of circumstances presented above; instead, it has a more universal application across the entire spectrum of parentage law in Illinois. The notion of mandating parentage on biology is based upon an antiquated family law model that views children as property. Contrary to the ubiquitous notions of a "best interest of the children" standard in family law, this biological parentage model disregards any considerations of a child's best interest.

In such a complex era, it is simply wrong for a court to be divested of the opportunity to determine parentage without considering a child's interests. As the renowned ethicist and social scholar Thomas Murray succinctly noted:

Emphasizing biological parenthood undervalues all other forms of parenthood—the many adults, related or unrelated, who raise children. It gives inadequate acknowledgement to the love and loyalty that can develop between rearing adults and the children who flourish under their care. It reflects and reinforces old models of the child-parent relationship that we would otherwise firmly reject—models like the child as property. It has thoroughly repugnant implications, for

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example, that a rapist has rights with respect to the child created as a result of his assault: the right to block an adoption, to rear the child, or to profit should the child later have good fortune.¹

Parentage law should reject this worn model, in which biology exclusively determines parentage, in favor of a model that focuses instead on children's interests. While considerations of biological connection should not be disregarded completely, they likewise should not be absolute. This Article will commence with an examination of the current Illinois statutory model of determining parentage of both children born into intact marriages and children born to unmarried parents and additionally will cover the disestablishment of parentage.² This Article will then explore the possible constitutional³ and public policy problems engendered by the current statutes⁴ and will conclude with specific concrete recommendations as to how Illinois' statutory law can more accurately address the needs of Illinois children and families in this twenty-first century.⁵

II. ILLINOIS STATUTORY BASIS OF PARENTAGE

A. Married Parents

Pursuant to the Illinois Parentage Act of 1984 (as amended, the "Illinois Parentage Act"),⁶ a parent-child relationship is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship."⁷ From the language of the statute, it is clear that the parent-child relationship is not dependent upon the marriage of the parents, and children born to married versus unmarried parents should be treated equally.⁸ Noticeably absent from

1. THOMAS H. MURRAY, *THE WORTH OF A CHILD* 45 (1996).

2. See *infra* Part II (discussing the Illinois Parentage Act of 1984 and Illinois case law relating to the determination of parentage).

3. See *infra* Part III (discussing the constitutional issues affecting parents and their rights to parent their children).

4. See *infra* Part IV (discussing changes in Illinois adoption laws as a result of the Baby Richard case).

5. See *infra* Parts V-VI (examining the problems posed by modern methods of paternity testing and suggesting changes to the Illinois statutes).

6. 750 ILL. COMP. STAT. 45/1-45/27 (2002).

7. *Id.* § 45/2.

8. *Id.* § 45/3 ("The parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents."); see also *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (maintaining that discrimination against illegitimate children is constitutionally impermissible pursuant to the Equal Protection Clause of

this definition of a parent-child relationship is any reference to the genetic connection between a parent and a child.

1. Presumptions of Parentage

The provisions pertaining to the presumptions of the parenthood of a child born into an intact marriage are found in section 5 of the Illinois Parentage Act.⁹ If a child is born to an intact marriage, the husband is presumed to be the father of the child.¹⁰ If, subsequent to the child's birth, the mother marries a man who was listed on the child's birth certificate, he likewise would be presumed the father of the child.¹¹ The aforesaid presumptions are rebuttable upon a showing by clear and convincing evidence that another man is the biological father.¹² If the presumption is in fact rebutted, paternity of the biological father may be established through an action to determine parentage.¹³ Accordingly, once displaced by the biological father, the husband and presumed father no longer would have any parentage rights independent of those possessed by his wife, the child's mother.¹⁴

While a presumed father may not have any rights to secure the permanence of his relationship with the child under the statutory scheme, the statute does provide certain rights of notice separate from those rights independently possessed by the mother and child. Specifically, the statute requires that notice be provided to the presumed father in the same manner that summons are served in other proceedings, or in lieu of personal service, specific notice as proscribed in the Notice to Presumed Father statute.¹⁵ The purpose of the notice is to advise the presumed father of the pendency of the parentage action of another seeking to be declared the father of his child.¹⁶ The notice requirement also allows the presumed father to participate in DNA testing to determine the biological father of the child.¹⁷ While a

the Fourteenth Amendment); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 483-89 (1967) (discussing the Equal Protection Clause and its relationship to legitimate children).

9. 750 ILL. COMP. STAT. 45/5.

10. *Id.* § 45/5(a)(1).

11. *Id.* § 45/5(a)(2).

12. *Id.* § 45/5(b).

13. *Id.* § 45/7(b) ("After the presumption that a man presumed to be the father under subdivision (a)(1) or (a)(2) of Section 5 has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.").

14. *Id.*

15. *Id.* § 45/9.1.

16. *Id.* § 45/9.1(b).

17. *Id.*

presumed father must be notified of the action and its ramifications, his rights are still limited to his biological connection (or lack thereof), regardless of the length of time he has spent raising the child, or his emotional and psychological bond with the child.¹⁸

Significantly, under the Illinois statutory scheme, inasmuch as no parentage order would be acquired by a typical married couple, both because of the legal presumption and the lack of necessity, the husband in an intact marital relationship is the individual most at risk for an involuntary deprivation of parental rights.¹⁹ If a parentage action is brought by another man seeking to be declared the father, the husband has no standing to challenge the marital interloper, absent any biological connection. This statutory framework is ironic in that public policy and constitutional considerations would seem to favor raising a child in an intact family, by married parents who jointly desire to raise the child. Yet, if another man who happens to be the "DNA dad" wants to assert his rights, the husband and social father is deprived *automatically* of his role as parent without any defense.²⁰ This problem will be discussed below in greater detail.²¹

B. Unmarried Parents

1. Involuntary Determination of Parentage

If the mother is not married to the biological father at the time of the child's birth, the Parentage Act allows the father's parentage to be determined through a number of means.²² First, parentage can be determined involuntarily through a petition to declare a father-child relationship.²³ The putative father, the mother, the child, and the Illinois Department of Public Aid, if it is providing support for the child, all have standing to bring a petition for determination of a father-child relationship pursuant to chapter 750, act 45, section 7 of the Illinois Compiled Statutes.²⁴ The child, if a minor, can only bring the

18. *See id.* § 45/7(b).

19. *See id.*

20. *See id.* § 45/7.

21. *See infra* Part II.B.1 (noting that regardless of any other considerations, the Illinois Parentage Act declares the biological father the legal father of a child, disallowing any considerations of the best interest of children in determining parentage).

22. *See* 750 ILL. COMP. STAT. 45/7.

23. *Id.*

24. *Id.*

action through a guardian ad litem.²⁵ The action is barred if brought more than two years after the child reaches the age of majority.²⁶

The court is prohibited statutorily from conducting a best interest hearing to determine whether the adjudication of parentage is in the child's best interest.²⁷ The statute provides for a determination of parentage exclusively in the context of biology.²⁸ In *J.S.A. v. M.H.*, an Illinois Appellate Court decision from the Third District, the court confirmed the notion that a trial court is statutorily prohibited from conducting a best interest hearing prior to adjudicating parentage.²⁹ Justice Lytton, writing for the majority, asserted that "paternity determinations should turn on the best interest of the child."³⁰ However, the court continued by commenting on the constraints the legislature regrettably placed upon it:

The Act itself does not explicitly provide for a best interest hearing at any time during the proceedings. If parentage determinations are to be made under the best interest standard, the legislature must amend the Act to provide for a best interest hearing. The law, as it exists today, fails to protect the child's best interests in parentage determinations.³¹

A close reading of *J.S.A.* reflects the court's frustration, if not outright anger, with the current statutory scheme. The special concurrences by both Justice McDade and Justice Barry emphasize the importance of considering children's best interests.³² Yet, while the court may lament the legislature's disregard of children's interests, the statute does not afford a trial court the opportunity to qualitatively examine whether a finding of parentage furthers those interests.³³ Pervasive notions of children's interests that permeate the Illinois Marriage and Dissolution of Marriage Act³⁴ and the Adoption Act³⁵ are

25. *Klak v. Skellion*, 741 N.E.2d 288, 290 (Ill. App. Ct. 1st Dist. 2000) (indicating that a minor child seeking to initiate a parentage action must be represented by a guardian ad litem, as a duly appointed legal representative, in order to prosecute the action).

26. 750 ILL. COMP. STAT. 45/8.

27. *J.S.A. v. M.H.*, 797 N.E.2d 705, 708-09 (Ill. App. Ct. 3d Dist. 2003).

28. 750 ILL. COMP. STAT. 45/11.

29. *J.S.A.*, 797 N.E.2d at 708-09. *But see In re Marriage of Slayton*, 685 N.E.2d 1038, 1044 (Ill. App. Ct. 4th Dist. 1997) (using the best interest standard in concluding that an ex-husband could have reasonable visitation rights).

30. *J.S.A.*, 797 N.E.2d at 709 (citing *In re Custody of D.A.*, 558 N.E.2d 1355 (Ill. App. Ct. 1st Dist. 1990)).

31. *See id.*

32. *See id.* at 710 (McDade, J., concurring); *id.* at 710-11 (Barry, J., concurring).

33. 750 ILL. COMP. STAT. 45/7.

34. *Id.* §§ 5/101-5/802 (2002 & West Supp. 2003).

35. *Id.* §§ 50/0.01-50/24 (2002).

conspicuously absent from statutory provisions that determine who should be afforded the opportunity to parent a child.

2. Determination of Paternity by Consent

The Parentage Act also allows for the establishment of a parent-child relationship by consent, through an administrative proceeding in accordance with the Vital Records Act (“VRA”) or the Illinois Public Aid Code.³⁶ Procedurally, a voluntary acknowledgment of paternity is signed at the time of the child’s birth.³⁷ Section 12(5) of the VRA provides specific requirements for a determination of parentage in accordance with the VRA.³⁸ The VRA permits the administrative determination of parentage where the mother is unmarried, or where the mother is married at conception or at the time of the child’s birth and the husband is not the biological father of the child.³⁹ The written acknowledgment of parentage at the birth of the child has the same effect as a judgment for paternity.⁴⁰ The VRA also allows for the execution of a denial of parentage if a presumed father is not the biological father.⁴¹

Also, the Parentage Act provides that a parent-child relationship may be established by consent in the event of a surrogacy relationship if the following conditions are met:

1. The surrogate mother certifies she is not the biological mother and that she is carrying the child of the biological father and biological mother;
2. The husband, if any, of the surrogate certifies that he is not the biological father;
3. The biological mother certifies she donated the egg to be carried by the surrogate;
4. The biological father certifies that he donated the sperm from which the child being carried was conceived;

36. *Id.* § 45/6. *See generally* 410 ILL. COMP. STAT. 535/12 (2002) (setting forth the VRA’s provisions for determining parentage); 305 ILL. COMP. STAT. 5/10-17.7 (2002) (providing Illinois Public Aid Code requirements concerning administrative determinations of paternity). The Parentage Act states, “A parent and child relationship may be established voluntarily by the signing and witnessing of a voluntary acknowledgment of parentage in accordance with Section 12 of the Vital Records Act or Section 10-17.7 of the Illinois Public Aid Code.” 750 ILL. COMP. STAT. 45/6(a).

37. *See* 750 ILL. COMP. STAT. 45/6(a).

38. 410 ILL. COMP. STAT. 535/12(5).

39. *Id.* § 535/12(4).

40. 750 ILL. COMP. STAT. 45/6.

41. 410 ILL. COMP. STAT. 535/12(5).

5. A licensed physician certifies all of the information in paragraphs (1)–(4) above is accurate; and

6. All of the certifications are to be in writing on forms proscribed by the Department of Public Health and executed prior to the birth of the child.⁴²

In the event that the aforesaid consents are not executed properly, the surrogate and her husband are presumed to be the parents; however, the presumption can be rebutted.⁴³ Ironically, this statute, which creates a presumption in favor of the surrogate as opposed to the biological parents, is an exception to the exclusive reliance on biology found in the Illinois Parentage Act.⁴⁴ Accordingly, a wife's egg fertilized by her husband's sperm and implanted in the surrogate presumptively would be recognized as the child of the surrogate and her husband.⁴⁵ This statutory presumption is in favor of the surrogate and her husband despite the fact that they have no biological connection to the child. Why the legislature inconsistently emphasizes biology in ordinary parentage situations and de-emphasizes it in surrogacy relationships is a curious irony.

The proper execution of an acknowledgment or denial of parentage conclusively establishes the parent-child relationship except under two circumstances. The acknowledgment of parentage may be rescinded upon the earlier of (1) sixty days after the date that the acknowledgment of parentage is signed or (2) the date of an administrative or judicial proceeding relating to the child in which the signatory is a party.⁴⁶ Additionally, pursuant to the statute, the acknowledgment can be challenged in court "only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenging party."⁴⁷

3. Disestablishment of Paternity

It would appear from the direct language of the statute that an acknowledgement, even if it names the incorrect biological father, would not be subject to attack except within the parameters set forth therein (i.e., a showing of fraud, duress, or material mistake of fact). However, a recently decided appellate court case from the Second District held that the acknowledgment can be vacated pursuant to a petition to disestablish the parent-child relationship brought pursuant to

42. 750 ILL. COMP. STAT. 45/6(a)(1).

43. *Id.* § 45/6 (a)(2).

44. *See id.* § 45/7.

45. *See id.* § 45/6(a)(2).

46. *Id.* § 45/5(b).

47. *Id.* § 45/6(d).

chapter 750, act 45, section 7(b-5) of the Illinois Compiled Statutes without such a showing.⁴⁸ In *People v. Smith*, the court reversed a trial court's dismissal of a petition to declare the non-existence of the parent-child relationship brought after a voluntary acknowledgment established the relationship.⁴⁹ In this case of first impression, the court held that the disestablishment provision applied to voluntary acknowledgments as well as court-decreed paternity judgments.⁵⁰

Pursuant to both the Parentage Act and case law interpreting the Act, all determinations of parentage are subject to attack and vacation if biology belies the actual parentage order.⁵¹ Accordingly, both the administrative consent and judicial decree of parentage or divorce, incorporating findings of parentage, are subject to attack. Courts struggled with the issues of relitigation of prior paternity judgments before 1991, when the Parentage Act was amended to allow disestablishment of parentage based upon a DNA-based identity test showing no biological connection.⁵² This struggle reflects the problem of a court-decreed parent varying from the actual biological parent.

In *Simcox v. Simcox*, the Illinois Supreme Court addressed the issue of the finality of a paternity judgment.⁵³ In that case, a divorce proceeding provided that the mother's husband was the father of her minor child.⁵⁴ The mother then remarried.⁵⁵ Pursuant to Illinois parentage laws, the child then brought an action to declare the mother's second husband his father.⁵⁶ The mother's first husband filed a motion to dismiss the action, arguing that it was barred by principles of res judicata and collateral estoppel, as he was declared the father in the dissolution proceeding.⁵⁷ The Illinois Supreme Court ruled that children are not legal extensions of their parents and have independent legal rights.⁵⁸ Accordingly, since the child was not a party to the divorce, the preclusive effects of collateral estoppel and res judicata did

48. *People v. Smith*, 797 N.E.2d 172, 177 (Ill. App. Ct. 2d Dist. 2003).

49. *Id.* at 179.

50. *Id.* at 178.

51. 750 ILL. COMP. STAT. 45/7(b-5); *Smith*, 797 N.E.2d at 177 (allowing party to bring cause of action to declare non-existence of parentage that was supported by DNA evidence).

52. Act of Sept. 7, 1990, Pub. Act No. 86-1339, § 1, 1990 Ill. Laws 2648, 2648-52 (amending 750 ILL. COMP. STAT. 45/11).

53. *Simcox v. Simcox*, 546 N.E.2d 609, 611 (Ill. 1989).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 612.

not apply.⁵⁹ Yet, the court was unclear whether, if the child were represented by a guardian ad litem in the dissolution proceeding, the child would have been bound by the parentage finding in the divorce judgment.⁶⁰ In Justice Ryan's concurrence, he addressed this ambiguity:

I do not intend to convey the impression that I would have favored a similar holding had an attorney or guardian ad litem been appointed for the child in the dissolution proceeding. Such a case, in my mind, would have presented a different question, the resolution of which must be reserved for another day.⁶¹

While the Illinois Supreme Court has not spoken to the issue of the binding effect of a guardian ad litem's presence in a proceeding where a paternity order is rendered, the First District Appellate Court in *In re Griesmeyer* did in fact address the issue of the preclusive effects that may arise when the child is represented in a dissolution of marriage action.⁶² In *Griesmeyer*, a mother on behalf of her minor child filed a paternity action against both her former husband and current husband.⁶³ The mother argued that a child has "an unqualified statutory entitlement to determine the identity of her biological father under the Illinois Parentage Act of 1984."⁶⁴ The question of law presented for review was

whether or not the fact that a minor child was represented by an attorney and guardian ad litem in an ultimately uncontested dissolution proceeding in which the wife had originally disputed the husband's paternity, precludes the relitigation of the issue of parentage

59. *Id.*

60. *Id.* at 612. The presence of a guardian ad litem, the legal representative for the child, would have theoretically made the paternity order binding upon the child, thus strengthening the argument that the prior judgment should have been recognized under the theories of res judicata and collateral estoppel. *Id.*

61. *Id.* (Ryan, J., concurring).

62. *In re Griesmeyer*, 707 N.E.2d 72, 73 (Ill. App. Ct. 1st Dist. 1998).

63. *Id.* at 72. The child had been born during the first marriage. *Id.* At the time she divorced her first husband, the mother denied that the husband was the father of her child. *Id.* at 73. The court appointed a guardian ad litem to represent the child. *Id.* Ultimately, an uncontested judgment for dissolution of marriage was entered declaring that the child was "born as a result of the marriage." *Id.*

More than a year later, the mother filed a parentage petition against her second husband, claiming he was the biological father of the child. *Id.* at 74. The first husband and declared father filed a motion to dismiss based upon the doctrine of collateral estoppel. *Id.* In response, the mother argued that since the child was neither in privity with the mother nor a party to the divorce case, the principle of collateral estoppel does not apply. *Id.* The trial court denied the motion to dismiss and an appeal ensued. *Id.*

64. *Id.* at 74.

in a subsequent action brought by the wife on behalf of said minor child.⁶⁵

The appellate court in *Griesmeyer* commenced its analysis by distinguishing the case from *Simcox*.⁶⁶ The appellate court noted that a public guardian had been appointed to represent the child in the divorce case.⁶⁷ The court continued by reviewing other post-*Simcox* decisions for guidance.⁶⁸ The court paid particular attention to Justice Cook's reasoning in a dissent from the Fourth District Appellate Court in *In re A.K.*⁶⁹ and Justice Cook's majority decision in *In re Marriage of Mesecher*.⁷⁰ In both decisions, Justice Cook invoked the doctrine that legal representation of a person establishes that person as a party or in privity for the purposes of *res judicata*.⁷¹

In *Griesmeyer*, since the appointment of a guardian ad litem introduced the child as a party to the action, the court held that "relitigation of the minor's paternity in this parentage petition is barred by the prior, uncontested judgment of dissolution where the minor was represented by a guardian ad litem during the dispute over the minor's paternity."⁷² The *Griesmeyer* court reasoned that the appointment of the guardian ad litem as the child's representative would be a

65. *Id.* at 73.

66. *Id.* at 75.

67. *Id.* at 76-77.

68. *Id.* at 73 (citing *In re Rodgers*, 665 N.E.2d 36, 39 (Ill. App. Ct. 5th Dist. 1996), in which the court held that a subsequent paternity action was not barred where a child did not have a guardian ad litem in the first action; *Draper v. Truitt*, 621 N.E.2d 202, 206 (Ill. App. Ct. 1st Dist. 1993), in which the court held that a second paternity petition brought against the same man was barred when it was adjudicated on its merits and dismissed in the first proceeding; *In re Parentage of Mayberry*, 584 N.E.2d 533, 536 (Ill. App. Ct. 2d Dist. 1991), where the court found that a minor child's parentage action was not barred by the mother's and putative father's cash settlement without acknowledgement of paternity; *Department of Public Aid ex rel. Skelton v. Liesman*, 578 N.E.2d 310, 310 (Ill. App. Ct. 4th Dist. 1991), in which the court held that the Illinois Department of Public Aid should not be barred from pursuing the putative father despite a prior action against a different alleged father where the child was not joined in the first action; and *In re Marriage of Klebs*, 554 N.E.2d 298, 300 (Ill. App. Ct. 1st Dist. 1990), where the court barred a mother from bringing a later parentage case when an adjudication of parentage was made in the divorce).

69. *In re A.K.*, 620 N.E.2d 572, 579 (Ill. App. Ct. 4th Dist. 1993) (Cook, J., dissenting) (noting that when a child is represented by a guardian ad litem, the child is a party to the dissolution).

70. *In re Marriage of Mesecher*, 650 N.E.2d 294, 297 (Ill. App. Ct. 4th Dist. 1995) (holding that *res judicata* will not bar an action against a person who was not a party to the first action).

71. *In re A.K.*, 620 N.E.2d at 579 (Cook, J., dissenting); *In re Marriage of Mesecher*, 650 N.E.2d at 297.

72. *In re Griesmeyer*, 707 N.E.2d at 79.

meaningless appointment if the guardian did not serve as the voice of the child in the proceeding.⁷³

The applicability of *Griesmeyer* was limited by the subsequent disestablishment amendment⁷⁴ as well as the limited occasions in which the particular facts presented in the case arise.⁷⁵ In its amended form, chapter 750, act 45, section 7(b-5) of the Illinois Compiled Statutes allows an action to avoid a prior adjudication of paternity (regardless of the presence of a guardian ad litem) under certain circumstances.⁷⁶ Nevertheless, the court's analysis is important in its reaffirmation of the concept that the child's best interests should be considered in determining parentage.⁷⁷ The court, in dicta, discussed how the child's best interest might impact parentage, stating that "[a] paternity determination is not *always* in the best interest of the child. Such [a] decision necessarily must rest on myriad factors that cannot be encompassed in one per se rule of law."⁷⁸ Both common sense and constitutional principles⁷⁹ support the court's comments despite the fact that the Parentage Act refuses to recognize these principles. The decision also reemphasizes that children are not legal extensions of their parents and that their independent legal rights should be recognized.⁸⁰

The Parentage Act, amended in 1991 to allow for the disestablishment of the parent-child relationship, has been interpreted to *require* a DNA test as a prerequisite to the filing of such an action.⁸¹ In *Lubbs*, the Third District Appellate Court held that the procurement of a DNA test in advance of the filing of the petition for adjudication was necessary to sustain the petition.⁸² The court based its determination upon a plain reading of the statute and the legislative intent.⁸³ In 2001,

73. *Id.*

74. 750 ILL. COMP. STAT. 45/7(b-5) (2002).

75. See *supra* note 63 (discussing the facts of *Griesmeyer*).

76. 750 ILL. COMP. STAT. 45/7(b-5).

An action to declare the non-existence of the parent and child relationship may be brought subsequent to an adjudication of paternity in any judgment by the man adjudicated to be the father pursuant to the presumptions in Section 5 of this Act, if, as a result of deoxyribonucleic acid (DNA) tests, it is discovered that the man adjudicated to be the father is not the natural father of the child.

Id.

77. See *Griesmeyer*, 707 N.E.2d at 79.

78. *Id.* at 78.

79. See *infra* Part III (discussing the constitutional underpinnings of the rights of parents to raise children).

80. See *Griesmeyer*, 707 N.E.2d at 78.

81. See *In re Marriage of Lubbs*, 730 N.E. 2d 1139, 1142 (Ill. App. Ct. 3d Dist. 2000).

82. *Id.* at 1142-43.

83. *Id.*

the Illinois Supreme Court in *In re Marriage of Kates* reaffirmed this principle.⁸⁴

In *Kates*, the high court adopted the reasoning of the Third District Appellate Court in *In re Marriage of Lubbs*.⁸⁵ The father litigants in both *Lubbs* and *Kates* argued that it was unfair to require in advance the presentation of a DNA test without allowing an order compelling cooperation of the mother and the child.⁸⁶ In rejecting those pleas, the court found the requirement not unreasonable.⁸⁷ “Given that section 7(b-5) creates a new cause of action that jeopardizes the finality of paternity adjudications, it is not unreasonable that the legislature chose to limit such an action to only those adjudicated fathers who first obtained DNA tests disproving paternity.”⁸⁸

Specifically, the court asserted policy considerations in favor of the strict construction of the language in the statute.⁸⁹ The court, quoting from the Massachusetts case of *Paternity of Cheryl*, commented on the deleterious policy considerations of reopening judgments:⁹⁰ “[A]n attempt to undo a determination of paternity is potentially devastating to a child who has considered the man to be the father.”⁹¹

While the Illinois Supreme Court acknowledged the legislature’s prerogative within constitutional confines to allow reopening paternity judgments, the court found that the legislature intended to allow reopening of only those cases in which the DNA tests were done in advance.⁹² Justice McMorrow, writing for the majority, clearly was uncomfortable with the notion of vacating prior paternity judgments.⁹³ Her decision strains to validate the legislative intent and highlights the special problems inherent in vacating paternity judgments.⁹⁴ While Justice McMorrow rationalized her decision upon the fact that DNA

84. *In re Marriage of Kates*, 761 N.E.2d 153, 163 (Ill. 2001).

85. *Id.* at 157.

86. *Id.* at 158.

87. *Id.* at 163.

88. *Id.* at 162.

89. *Id.* at 157.

90. *Id.* at 161 (citing *Paternity of Cheryl*, 746 N.E.2d 488, 495–96 (Mass. 2001)).

91. *Paternity of Cheryl*, 746 N.E.2d 488, 495–96 (Mass. 2001) (internal quotations omitted) (maintaining that the legislature did not intend the law to allow a father to decide at any time convenient to him whether to enter or dissolve a paternity agreement).

92. *Kates*, 761 N.E.2d at 157.

93. *See id.* at 161 (stating that “section 7(b-5) essentially runs counter to the strong judicial policy favoring finality of judgments, a policy that applies with special force to adjudication of paternity, given the impact of such adjudications on the interest of children”).

94. *See id.*

tests are required in advance of the petition,⁹⁵ thus presumably limiting the circumstances in which paternity could be disestablished, because of scientific advancements in DNA this limitation is actually illusory:

In the last five years, however, much has changed. Testing can now be done by simple cheek swab (rather than drawing blood), only the man and the child need be tested (eliminating the need for the mother's cooperation), and test results are highly dispositive. Moreover, testing kits are now available on the Internet, eliminating the need for any medical or court intervention. As a result, more paternity disestablishment actions are being brought⁹⁶

Not only is it troubling that courts cannot consider children's interests in determining parentage but to take an existing relationship between a father and a child and sever it without considering the impact is unconscionable. In *Kates*, the Illinois Supreme Court tried to fashion remedies consistent with the statute to ameliorate the harshness of disestablishment,⁹⁷ but the fact remains that the legislature has deemed it advisable public policy to allow an automatic reconsideration of paternity if a parent's DNA does not match the child's. The fundamental issue was summarized by Professor Paula Roberts in her article for the Center for Law and Social Policy: "At what point should the truth about genetic parentage outweigh the consequences of leaving a child fatherless?"⁹⁸

III. CONSTITUTIONALITY OF THE PARENTAGE ACT

It is clear that the legislature has adopted the cult of science as its ultimate standard in determining who should be a parent in Illinois. It is questionable, however, whether that scheme is constitutional. Arguably, the answer is no. Specifically, section 7 of the Illinois Parentage Act allows an individual alleging that he is the father of a child to assert parental rights regardless of any competing interests by a presumed or social father who may have parented a child for a period of time.⁹⁹ One legitimately could assert that this statute is abhorrent to fundamental values that underlie our society inasmuch as it allows the automatic invasion of an intact family by a stranger. The statute also discriminates against illegitimate children raised by a father only to be deprived of that father-child relationship if subsequently it is determined

95. *Id.* at 161–62.

96. Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-marital Children*, 37 FAM. L.Q. 35, 37–38 (2003) (citations omitted).

97. See *Kates*, 761 N.E.2d at 157–58.

98. Roberts, *supra* note 96, at 38.

99. 750 ILL. COMP. STAT. 45/7 (2002).

that the man they considered their father is not connected biologically to them.

The effect of section 7 is to place a judge's robe on the DNA lab technician, thus depriving courts of the ability to determine parentage in accordance with the best interests of a child. Take, for example, a situation in which a presumed father has raised and supported a child he thought was his for ten years. Another individual claiming to be the father can file a petition under this statute and displace the presumed father as the legal father if his DNA proves he is the biological father. Such a zero-sum situation is intolerable.

This statute thus allows an interloper to invade the marital relationship and impugn its integrity. Such a fundamental cornerstone of our society should not be subject to attack automatically because of nothing more than a stranger's mere biological connection to a child. While the United States Supreme Court recognizes the right of a biological parent to a relationship with a child,¹⁰⁰ that right is not absolute and should not inevitably trump those of the family and deprive the child of a relationship with a father who raised him.

A. *Law Regarding Family Right of Privacy*

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of the life, liberty, or property without due process of law."¹⁰¹ The Due Process Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental liberty interests."¹⁰²

It is indisputable that families enjoy a constitutionally protected right against untoward state interference. Specifically, the United States Supreme Court has recognized that families enjoy a right of privacy and liberty.¹⁰³ The Fourteenth Amendment provides restraints on a state's ability to legislate untoward invasions on personal liberty:

Without doubt [the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful

100. *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972).

101. U.S. CONST. amend. XIV, § 1.

102. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)). The Court held that "the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a better decision could be made." *Id.* at 71-72.

103. *Stanley*, 405 U.S. at 651; *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).

knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁰⁴

Unlike the protections afforded to the family, individuals engaged in extramarital relationships have not been afforded constitutional protections. In *Hollenbaugh v. Carnegie Free Library*, the United States Supreme Court refused to grant certiorari and review a decision sustaining the termination of employees of a public library for living together in an adulterous relationship.¹⁰⁵

In *Michael H. v. Gerald D.*, the United States Supreme Court held that a biological father does not have an absolute right to establish paternity if the child was the result of an adulterous relationship.¹⁰⁶ In *Michael H.*, a biological father challenged a California statute that irrebutably presumed that a child born during an intact marriage was the child of the husband.¹⁰⁷ The biological father in the case argued that his rights of due process were violated so far as the statute denied him a relationship with his biological progeny.¹⁰⁸

Justice Scalia, writing for the plurality, held that the California statute, which irrebutably presumed the paternity of a husband regardless of a biological connection, did not violate the Constitution:

[The biological father] reads the landmark case of *Stanley v. Illinois* and the subsequent cases . . . as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. . . . As we view them, they rest not upon such isolated factors but upon the historic respect—indeed sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family. . . . “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”¹⁰⁹

The Court thus specifically found that the liberty interest, or due process protection of the family, trumped the interests of the biological father in maintaining a relationship with the child.¹¹⁰ Specifically, the right of the family to avoid rupture in these circumstances is a

104. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

105. *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1052 (1978) (denying certiorari).

106. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (plurality opinion).

107. *Id.* at 115 (plurality opinion).

108. *Id.* at 115–16 (plurality opinion).

109. *Id.* at 123–24 (plurality opinion) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).

110. *Id.* (plurality opinion).

constitutionally protected right pursuant to the Fourteenth Amendment to the United States Constitution.¹¹¹

In final support of its holding, the plurality dramatically commented on the zero-sum nature of these types of proceedings, in which the success of the biological father in establishing parentage automatically excludes the marital father.¹¹² In noting this consequence, the Court pointedly commented:

Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa One of them will pay a price . . . Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established.¹¹³

Clearly, the Court was not sympathetic to the claims of the adulterer displacing those of the innocent husband.

More recently, the United States Supreme Court addressed the notion of family rights of privacy in its landmark decision of *Troxel v. Granville*.¹¹⁴ In that case, the Court struck down a Washington State statute that permitted visitation rights to persons other than parents.¹¹⁵ The specific litigants in *Troxel* were grandparents who petitioned the children's mother for visitation of their grandchildren.¹¹⁶

Justice O'Connor, writing for the majority, affirmed the lower court's decision.¹¹⁷ She commenced her analysis by noting that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by the Court."¹¹⁸ The Washington statute, which afforded no consideration of the parent's preference concerning the child's associations, allowed a court to overturn any parental decision by a fit

111. *Id.* at 128 (plurality opinion) (citations omitted).

112. *See id.* at 130 (plurality opinion).

113. *Id.* (plurality opinion).

114. *Troxel v. Granville*, 530 U.S. 57 (2000). When the grandparents' son, the father of their grandchildren, died, and the grandchildren's mother wished to restrict the grandparents' visitation with their grandchildren, the grandparents filed suit under a Washington state statute that permitted visitation rights to persons other than parents. *Id.* at 60–61. Consequently, the mother challenged the statute as an unconstitutional interference with her parental decision-making rights. *Id.* at 63. The Washington State Supreme Court agreed and held that the statute unconstitutionally infringed on parents' fundamental right to rear their children. *Id.* The Court reasoned that the U.S. Constitution permits a state to interfere with this right only to prevent harm or potential harm to a child. *Id.*

115. *Id.* at 61.

116. *Id.* at 60.

117. *Id.* at 75.

118. *Id.* at 65.

custodian concerning visitation.¹¹⁹ Accordingly, the statute impermissibly invaded the parent's natural and constitutionally protected right of decision-making.¹²⁰ The Court held that

[s]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.¹²¹

Similarly, in *Wickham v. Byrne*, the Illinois Supreme Court held that chapter 750, act 5, section 607(b)(1) of the Illinois Compiled Statutes was unconstitutional, as it infringed on parents' rights to make decisions regarding their children's best interests.¹²² The *Wickham* decision consisted of a consolidated appeal of two cases in which a single surviving parent sought to bar the parents of a deceased spouse from obtaining visitation rights pursuant to section 607(b)(1).¹²³ Previously, in *Lulay v. Lulay*, the court held that the statute was unconstitutional as applied where both parents sought to bar the visitation.¹²⁴

Specifically, in *Wickham*, the Illinois Supreme Court concluded that the right of a custodial parent to make decisions involving the best interests of her child without undue state interference is constitutionally mandated.¹²⁵ In doing so, the court relied on the United States Supreme Court's pronouncement of policy concerning presumptions in favor of the decision-making rights of parents set forth in *Troxel*.¹²⁶ Accordingly, the court invalidated section 607(b)(1) as unconstitutional on its face, as it violated a parent's right to determine who his or her child would visit:

119. *Id.* at 67.

120. *Id.* at 67-68.

121. *Id.* at 68-69.

122. *Wickham v. Byrne*, 769 N.E.2d 1, 8 (Ill. 2002). In the *Wickham* petition, which was consolidated with *Langham v. Langham*, 757 N.E.2d 505 (Ill. App. Ct. 3d Dist. 2001), upon appeal to the Illinois Supreme Court, the maternal grandmother sought visitation rights with her granddaughter after her daughter had died. *Id.* at 2. The father objected and sought to dismiss the petition, challenging the constitutionality of the Illinois grandparent visitation statute, relying on the United States Supreme Court decision of *Troxel* and the Illinois Supreme Court decision of *Lulay v. Lulay*. *Id.* (citing *Troxel*, 530 U.S. at 57; *Lulay v. Lulay*, 739 N.E.2d 521, 534 (Ill. 2000)). The trial court denied the father's motion to dismiss and a hearing ensued. *Id.* at 3.

In *Langham*, the paternal grandparents sought visitation of their grandchildren from their daughter-in-law after the death of their son. *Id.* After a full hearing, the trial court allowed grandparent visitation. *Id.* at 4. The appellate court reversed, holding that the statute was unconstitutional as applied. *Id.*

123. *Id.* at 2.

124. *Lulay v. Lulay*, 739 N.E.2d 521, 534 (Ill. 2000).

125. *Wickham*, 769 N.E.2d at 6-7.

126. *Id.* at 7.

Section 607(b)(1) contains a similar flaw to the statute at issue in *Troxel*. Section 607(b)(1) permits grandparents, great-grandparents, or the sibling of any minor child visitation if "the court determines that it is in the best interests and welfare of the child." Like the statute in *Troxel*, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in *Troxel*, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows the "State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Section 607(b)(1) exposes the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micro managing of the state.¹²⁷

B. Constitutional Protections for Children

Children are persons with their own individual liberty and privacy interests within the meaning of the Fourteenth Amendment.¹²⁸ As the United States Supreme Court held in *Levy v. Louisiana*, in addition to being afforded due process protection pursuant to the Fourteenth Amendment of the Constitution, children are also "persons" within the Equal Protection Clause of the Constitution.¹²⁹

In *Weber v. Aetna Casualty*, the Court struck down a Louisiana statute based upon the Equal Protection Clause.¹³⁰ In *Weber*, illegitimate children were again being treated differently than legitimate children in a workmen's compensation benefit scheme.¹³¹ Legitimate children of a deceased parent received benefits from a deceased parent as a priority, and illegitimate children only received benefits if any benefits were left after distributions were made to the legitimate children.¹³² The Louisiana appellate and supreme courts affirmed the

127. *Id.* at 8 (citations omitted).

128. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that students in school as well as out of school are "persons" under the United States Constitution). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976); see also *In re Gault*, 387 U.S. 1, 12-13 (1967) (ruling that neither the Fourteenth Amendment nor the Bill of Rights protect adults alone).

129. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). In *Levy*, the United States Supreme Court struck down a Louisiana statute that denied wrongful death benefits to illegitimate children. *Id.* at 72. In doing so, the Court held that the Louisiana statute, which classified illegitimate children as ineligible to receive death benefits, discriminated against the children and the statute did not have a rational relation to a legitimate state end. *Id.*

130. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972).

131. *Id.* at 167.

132. *Id.*

legality of the statute, attempting to distinguish the *Weber* facts from the facts in *Levy*, noting that illegitimate children were not denied benefits as in *Levy*.¹³³ The United States Supreme Court reversed, indicating that illegitimate as well as legitimate children suffer equal economic loss from the death of a parent.¹³⁴ Since the state had no legitimate interest in classifying the children differently, the statute impermissibly discriminated against the illegitimate children.¹³⁵ The Court cogently noted that "the status of illegitimacy has expressed throughout the ages, society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."¹³⁶

C. Constitutional Analysis of the Illinois Parentage Act

The fundamental constitutional question is whether a biological parent is *entitled* to a relationship with his offspring when the establishment of the relationship may harm the best interest of the child and an intact family that has raised the child. Section 7 of the Illinois Parentage Act, by allowing an automatic preference in favor of the interloper, improperly and unconstitutionally chooses biology over all other considerations.¹³⁷ As Justice Stewart wrote in his dissent in *Caban v. Mohammed*:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. . . . In some circumstances, the actual relationship between father and child may suffice to create in the . . . father parental interests¹³⁸

A careful review of constitutional law at the federal and state levels establishes that while biological parents have rights, those rights are not absolute. In *Michael H.*, the United States Supreme Court indicated an unequivocal preference for protection of the nuclear family over the rights of a biological parent.¹³⁹ Also, in the United States Supreme

133. *Id.*

134. *Id.* at 169.

135. *Id.* at 173-174.

136. *Id.* at 175.

137. See 750 ILL. COMP. STAT. 45/7 (2002).

138. *Caban v. Mohammed*, 441 U.S. 380, 395 (1979) (Stewart, J., dissenting).

139. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (plurality opinion).

Court's decision in *Troxel* and the Illinois Supreme Court's decision in *Wickham*, both courts indicated a preference for parental and familial privacy over any rights of a biologically connected grandparent to pursue a relationship with his or her progeny.¹⁴⁰ It is the family that is the cornerstone of society, not the adulterer. In the zero-sum scheme created by section 7, the legislature improperly has chosen the rights of the adulterer over those of the family.

Not only is the statutory scheme here arguably unconstitutional, but it also is no longer appropriate sociologically and scientifically. Ironically, as the ability to prove a biological connection with a child scientifically improves, case law is evolving in a direction that is less concerned with the biological preference. For example, in *In re Parentage of M.J.*, the Illinois Supreme Court held that an individual who intended to father the children born to his former girlfriend via artificial insemination may have a duty to support those children regardless of any biological connection.¹⁴¹ That individual was not the sperm donor, yet the court determined, as a matter of policy, that he should not be excluded automatically from having a duty to support the children.¹⁴² The supreme court determined "that the best interests of children and society are served by recognizing that parental responsibility may be imposed on conduct evidencing actual consent to the artificial insemination procedure."¹⁴³

As Professor Elizabeth Bartholet, an expert on civil rights and family law at Harvard University Law School, stated in a paper presented at a conference on Genetic Bonds and Family Law in New Orleans on March 28, 2003:

Today the law appears to be moving in the direction of paying less and less attention to biology as a key factor in defining parentage. There has been increasing recognition in the law of existing social parenting relationships and, alternatively, of intended future parenting relationships, as important factors in determining parentage, factors which may weigh equally with biology or may even outweigh biology, depending on the situation.¹⁴⁴

140. *Troxel v. Granville*, 530 U.S. 57,68–69 (2000); *Wickham v. Byrne*, 769 N.E.2d 1, 6–7 (Ill. 2002).

141. *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (2003).

142. *Id.*

143. *Id.*

144. Elizabeth Bartholet, Guiding Principles for Picking Parents 2–3 (Mar. 28, 2003) (unpublished manuscript presented at the conference on Genetic Bonds and Family Law at the University of Louisville Institute for Bioethics, Health Policy and Law, New Orleans, La., Mar. 28, 2003) (copy on file with author).

In an era of increasing moral and legal complexity as a result of technological advances in reproduction, biology is relatively inconsequential. Intended parentage, not biology, is the predominant determinant of parentage.¹⁴⁵ Individuals contract to obtain sperm, eggs, the use of another's uterus, and so forth. It is not these biological donors who are thought of as parents, but the contracting parties *intending* to be recognized as parents. Again, Professor Bartholet commented on the significance of these developments:

[I]n the reproductive technology world there is almost no public law forbidding the sale of genetic material, pregnancy services and, after the baby's birth, parental rights. There could be few stronger statements as to the *unimportance* of biology to parenting in this modern world of child production.¹⁴⁶

In such a complex era, it is simply wrong for a court to be divested of the opportunity to determine parentage as a result of this statute, which relies exclusively on biology as the sole determinant. In the words attributed to Albert Einstein, "not everything that can be counted counts, and not everything that counts can be counted."¹⁴⁷

IV. EMERGING TRENDS AWAY FROM THE CULT OF BIOLOGY

Encouragingly, there has been a relatively recent exception made to the legislature's absolutist notion that biology invariably determines parentage. This exception is a practical resolution to real life considerations and virtually was mandated by circumstances. The exception involves the development of laws in response to a catastrophic Illinois adoption case commonly known as the Baby Richard case.¹⁴⁸ It took a screaming little boy to get lawmakers to

145. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2405 (1995).

Legal deference to the claims of biological parents recently has come under attack in the courts, in the academic literature, and in the popular media. Cases such as the highly publicized dispute between the DeBoers and Daniel Schmidt over the custody of 'Baby Jessica' contribute to a view that the law, frozen in ancient doctrine, accords unwarranted legal protection to biological parents in ways that are both directly harmful and symbolically corrosive to the interests of children.

Id.

146. Bartholet, *supra* note 144, at 3.

147. QUOTATIONS PAGE.COM, QUOTATIONS BY ALBERT EINSTEIN, at http://www.quotationspage.com/quotes/Albert_Einstein/31 (last visited Feb. 22, 2004).

148. *See In re* Petition of Doe, 638 N.E.2d 181 (Ill. 1994). In *Doe*, the Illinois Supreme Court infamously returned a child to birth parents after being raised for four years by his adoptive parents. *See infra* notes 151–59 and accompanying text (discussing the Baby Richard case).

rethink their policies on parentage.¹⁴⁹ The amendments to the Illinois Adoption Act were a practical response to public outcry demanding that biological absolutism be tempered by commonsense.¹⁵⁰

The Putative Father Registry is a statutory amendment to the Illinois Adoption Act in response to the Baby Richard litigation in 1994.¹⁵¹ The Baby Richard case involved a disastrous adoption proceeding that became a prominent national news story and emphasized the traumatic events of an adoption gone awry.¹⁵² The matter resulted in the Illinois Supreme Court invalidating an adoption and requiring a child who had lived with adoptive parents his entire four years of life to be returned to his biological father.¹⁵³

Both the trial court and appellate court in the Baby Richard case denied the biological father's petition to vacate the adoption on the basis that he had not shown a reasonable amount of interest in the child during the first thirty days of the child's life.¹⁵⁴ The Illinois Supreme Court reversed the trial court, holding that the father had possessed no knowledge of the child and therefore could not have exercised his parental rights.¹⁵⁵ The high court returned Richard at age four to his

149. The public furor over the results of the Baby Richard case included a public outcry for the impeachment of Justice Heiple, the author of the decision. Jerome B. Meites & Steven F. Pflaum, Commentary, *Should Justice Heiple Be Impeached?*, CHI. TRIB., May 12, 1997, at 13, available at 1997 WL 3547371.

150. Andrew Fegelman, "Baby Richard" Law Is Put to Unexpected Use, CHI. TRIB., Feb. 25, 1996, at 1, available at 1996 WL 2646821.

151. *DCFS Establishes Paternity Registry*, CHI. TRIB., Oct. 5, 1994, at 3, available at 1994 WL 6560227; see 750 ILL. COMP. STAT. 50/12.1 (2002) (providing for the Putative Father Registry). See generally *Petition of Doe*, 638 N.E.2d 181 (comprising of the Illinois Supreme Court decision in the Baby Richard case).

152. *Petition of Doe*, 638 N.E.2d at 181-82.

153. *Id.* at 182-83. Richard lived with his adoptive parents from shortly after his birth until the final resolution of the case. *Id.* at 181-82. The basic facts of the Baby Richard case were that the child's mother told the father that the child had died at birth. *Id.* The mother had the child placed for adoption. *Id.* at 181. Fifty-seven days after the child was born, the father discovered that the child was in fact alive and petitioned the court for custody. *Id.* at 181-82.

154. *Id.* at 181; see 750 ILL. COMP. STAT. 50/1.D(1) (including in the definition of an "unfit person" one who fails to maintain "a reasonable degree of interest" in his or her child in the immediate thirty days following the child's birth); *id.* § 50/8 (providing for an adoption without the consent of the biological father where he is deemed an unfit person).

155. *Petition of Doe*, 638 N.E.2d at 181.

[T]o the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a

birth parents because of the biological relationship he shared with his father, and because his mother had duped his father by convincing his father that their child had died at birth.¹⁵⁶ Thus, the court removed the child from the care of the only parents he had ever known.¹⁵⁷

Few who saw it will ever forget the indelible five o'clock news image of Richard clutching his adoptive mother and then being carried away from her, to be raised by strangers.¹⁵⁸ Clearly this was a troubling and complex case with competing legal interests that deserved attention. However, it was a terrorized little boy that grabbed the public's attention.¹⁵⁹

As a result of the Baby Richard case, the public and the legislature witnessed the horrific consequences of a statutory scheme that failed to allow any considerations for the best interest of the child.¹⁶⁰ In response, the legislature and then-governor Jim Edgar took action to avoid this type of problem in the future. A series of legislative amendments were added to the Adoption Act that were designed to avoid confusion and to expedite resolution of problems when they are discovered.¹⁶¹

A "Putative Father Registry" was developed and is administered by the Illinois Department of Children and Family Services.¹⁶² The statute requires any putative or possible father to register with the Illinois Department of Children and Family Services no later than thirty days after the birth of a child.¹⁶³ All registrations are to be in writing and

father, the petitioners should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal.

Id. at 182.

156. In an interesting twist, the mother who tricked the father later reconciled with the father and actually got to raise Richard when he was returned to his biological father, despite the fact that she started the tragic sequence of events. *Id.* at 188.

157. *Id.* at 182–83; see also *In re Ashley K.*, 571 N.E.2d 905, 930–31 (Ill. App. Ct. 1st Dist. 1991) (finding that the trial court erred by returning a six-year-old to her birth parents more than five years after residing with foster parents, without considering her best interests).

158. See Charles M. Madigan, "Richard" Case Reads Like a Novel, but for Those Involved—Especially One Small Boy—It's Very Real, CHI. TRIB., Jan. 29, 1995, at 1, available at 1995 WL 6160832.

159. Bob Greene, *Supreme Injustice for a Little Boy*, CHI. TRIB., June 19, 1994, at 1, available at 1994 WL 6169185.

160. See Gregory Kelson, *In the Best Interest of the Child: What We Have Learned from Baby Jessica and Baby Richard*, 33 J. MARSHALL L. REV. 353, 372 (2000) (discussing the need to use the "best interests" standard).

161. See *infra* notes 162–78 and accompanying (discussing the changes to the Illinois Adoption Act as a result of the Baby Richard case).

162. 750 ILL. COMP. STAT. 50/12.1 (2002).

163. *Id.* § 50/12.1(b).

signed by the putative father.¹⁶⁴ If a putative father fails to register, he is barred from bringing any action to assert any interest in the child.¹⁶⁵ Of significance, section 12.1(g) provides that "a lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register."¹⁶⁶ Therefore, despite a biological connection, if a father does not register, the child can be placed for adoption by the mother, and the father has no claim to notice or any right to object or claim paternity rights. While one could argue the harshness of the provisions regarding the registry, the registry is the legislature's attempt to ensure that the best interests of children take priority over biological connections and hopefully avoid future trauma to other children.¹⁶⁷

Additionally, as a result of the Baby Richard case, the legislature amended sections 20 and 20a of the Adoption Act to address and respond to the disaster.¹⁶⁸ Section 20b was added July 3, 1994, to provide that in the event that an adoption judgment is vacated, the court is to conduct a best interest hearing to determine temporary and permanent custody of the child.¹⁶⁹ The parties to the proceeding would include the adoptive parents, biological parents whose parental rights have not been terminated, and other parties being granted leave to intervene.¹⁷⁰

While the goal of the statute is to avoid Baby Richard-type problems, section 20 has been construed to provide that the best interest hearing should consider and apply the "superior rights doctrine,"¹⁷¹ which is a legal presumption in favor of the biological parent.¹⁷² In a rare turn of events, it is the court and not the legislature that more strongly advocates for biological parents' rights. Also, if the trial court were to determine that a judgment for adoption is void ab initio because of lack of jurisdiction or fraud, section 20 does not apply, and the child should

164. *Id.*

165. *Id.* § 50/12.1(g). An exception exists if a putative father can prove by clear and convincing evidence that (1) it was not possible for him to register within the period of time specified in subsection (b) of section 12.1, (2) his failure to register was through no fault of his own, and (3) he registered within ten days after it became possible for him to file. *Id.*

166. *Id.*

167. See Act of July 3, 1994, Pub. Act No. 88-550, 1994 Ill. Laws 369.

168. See Mahrukh S. Hussaini, *Incorporating Thwarted Putative Fathers into the Adoption Scheme: Illinois Proposes a Solution After the "Baby Richard Case,"* 1996 U. ILL. L. REV. 189, 193, 211-12.

169. Act of July 3, 1994, § 20b, 1994 Ill. Laws at 411 (codified as amended at 750 ILL. COMP. STAT. 50/20).

170. 750 ILL. COMP. STAT. 50/20.

171. *In re Adoption of E.L.*, 733 N.E.2d 846, 863 (Ill. App. Ct. 1st Dist. 2000).

172. *Id.* at 862-63.

be returned automatically to the biological parent.¹⁷³ Accordingly, at least one case has interpreted the statute to not permit the best interest hearing if a biological father's interests, like those of Richard's biological father, have been compromised through fraud.¹⁷⁴

Sections 20a and 20b are designed to emphatically direct courts to construe the statute in favor of children: "The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act."¹⁷⁵ Section 20a discourages continuances and directs that the Act be interpreted "so as not to result in extending time limits beyond those set forth herein,"¹⁷⁶ while section 20b limits the time period in which to challenge an adoption.¹⁷⁷

The development of the registry and the other post-Richard laws are an implicit acknowledgment that biology cannot always be the sole determinant of parentage. It was in response to the crisis of Baby Richard that the Illinois legislature started to recognize that the old DNA-based formula of determining parentage, exclusive of any competing interests, does not always work in our modern society.¹⁷⁸ It is a complex time, with society and science redefining themselves at warp speed. The simple black and white notion of biology determining parentage simply does not make sense in our modern world. A new model is necessary and desirable.

V. THE BRAVE NEW WORLD OF PARENTAGE

Two very distinct periods have preceded the present era regarding the determination of parentage. The first era was the age of the presumption.¹⁷⁹ The presumption was created as a practical formula to determine paternity in an era that had no absolute means of establishing parental identity.¹⁸⁰ Because of a lack of any alternative, parentage law

173. *Id.* at 861.

174. *Id.*

175. 750 ILL. COMP. STAT. 50/20a.

176. *Id.*

177. *Id.* § 50/20b.

A petition for relief from a final order or judgment entered in a proceeding under this Act, after 30 days from the entry thereof under the provisions of Section 2-1401 of the Code of Civil Procedure or otherwise must be filed no later than one year after the entry of the order or judgment.

Id.

178. *Id.* § 50/20a.

179. *See supra* Part II.A (examining statutory presumptions of parentage).

180. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (plurality opinion).

The presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was

has used presumptions to determine parentage by default in favor of the husband of a married woman.¹⁸¹ As aptly noted by Professors Mary Anderlik and Mark Rothstein, “historically, the law has favored stability over accuracy in attribution of paternity, but only in circumstances where definitive proof of paternity or non-paternity was not possible.”¹⁸²

The history of the use of presumptions in favor of husbands against claims of paternity of other men extends to England, where the presumption was developed in the eighteenth century.¹⁸³ Lord Mansfield’s Rule, or the four-seas doctrine, thus provided that “if a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity.”¹⁸⁴ The insignificance of biology in a pre-scientific era lacking the ability to prove paternity paralleled history’s treatment of children as the property of their father (or their mother’s husband, as the case may have been).¹⁸⁵

incapable of procreation or had had no access to his wife during the relevant period. As explained by Blackstone, nonaccess could only be proved “if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months. . . .” And, under the common law both in England and here, “neither husband nor wife [could] be a witness to prove access or nonaccess.” The primary policy rationale underlying the common law’s severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state. A secondary policy concern was the interest in promoting the “peace and tranquility of States and families,” a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate. Even though, as bastardy laws became less harsh, “[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the ‘four seas rule’ . . . [.] the law retained a strong bias against ruling the children of married women illegitimate.”

Id. (plurality opinion) (citations omitted).

181. *Id.* at 124 (plurality opinion) (stating that “[o]ur traditions have protected the marital family”).

182. Mary R. Anderlik & Mark A. Rothstein, *DNA-based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 222 (2002).

183. *Id.*

184. *In re Findlay*, 170 N.E. 471, 472 (N.Y. 1930).

185. See MURRAY, *supra* note 1, at 53.

If contemporary adoption laws tend to treat children as if they were the property of their biological parents, Roman law was unabashedly straightforward about it. The male Roman citizen was head of the family, the *paterfamilias*, and held near-absolute authority over his children. The power of the patriarch was profound. All the property of everyone in his power, which included his slaves as well as his children and the

The era of the presumption was succeeded by the era of science, which allowed courts the ability to determine paternity with virtual certainty.¹⁸⁶ The traditional presumption of legitimacy, while for the most part a historical remnant of an earlier time, has remained in the statute presumably because of the significant role it played formerly in determining parentage. In reality, it has become irrelevant with the advent of DNA-based paternity testing.

While the law has evolved in the sense that the “real” father can now be determined through scientific means, it has remained consistent in its treatment of children as property of their parents, as evidenced by the absence of any considerations of their best interest in determining parentage. Again, under the current Illinois scheme, if the DNA indicates parentage, regardless of any competing interests, including the child’s interests, the claim to parentage is absolute.¹⁸⁷ The use of DNA-based identity testing has become as oppressive in its absolutist reliance on science as was the law’s former reliance on presumptions.

Certain trends have developed with regard to identity testing using DNA. While initially a costly and uncertain process, DNA testing today has become sophisticated, accurate, and inexpensive.¹⁸⁸ Anderlik and Rothstein have identified four social developments that have combined to broaden the use of DNA testing, resulting in complications to parentage determination.¹⁸⁹ Those developments include the Human Genome Project, federal welfare policy, the father’s rights movement, and media interest in domestic drama.¹⁹⁰

The Human Genome Project has spun off technologies that allow for inexpensive means to analyze DNA data.¹⁹¹ Formerly, a blood draw was required to analyze DNA.¹⁹² Now, laboratories market themselves

children of his sons, legally belonged to him. He held the power of life and death over his offspring no matter how old.

Id.

186. See *Michael H.*, 491 U.S. at 155 (Brennan, J., dissenting) (“In this day and age, however, proving paternity by asking intimate and detailed questions about a couple’s relationship would be anachronistic. Who on earth would choose this method of establishing fatherhood when blood tests prove it with far more certainty and far less fuss?”).

187. See *supra* Part II (examining the Illinois Parentage Act, the use of DNA-based identity testing, and cases addressing parentage).

188. Anderlik & Rothstein, *supra* note 182, at 216.

189. *Id.* at 215–32.

190. *Id.* at 216–21.

191. *Id.* at 216.

192. See *id.* (“While testing at one time involved a blood draw, many laboratories that offer testing by mail now use cheek swabs.”).

over the Internet as an inexpensive means to determine parentage.¹⁹³ These laboratories offer testing of hair without requiring the consent of the person being tested.¹⁹⁴ Testing also can be performed without the knowledge or cooperation of the mother.¹⁹⁵ Accordingly, as a result of the easy accessibility to testing, it has become common to determine parentage through testing, where formerly, as a result of the exclusivity of testing, many people otherwise would have neither the money nor the inclination to use it.¹⁹⁶

The next factor identified by Anderlik and Rothstein as contributing to the expansion of DNA-based identity testing is federal welfare policy.¹⁹⁷ Federal child support enforcement laws were created to establish paternity and collect child support from putative fathers, thus minimizing dependent mothers' reliance on welfare and state aid.¹⁹⁸ Anderlik and Rothstein noted that the Family Support Act of 1988 required all parties in a contested paternity case to take a genetic test and further obligated the federal government to pay ninety percent of the testing costs.¹⁹⁹ They also noted that this federal emphasis on genetic testing has made reliance on testing more acceptable in general:

[A]lthough the expansion of testing was initially in the service of the mission of finding legal fathers for children who had none, the technology is in no way restricted to that mission. The tests used to prove genetic paternity can also be used to disprove genetic paternity. Current law sends the message that genetic contribution to the creation of a child through sexual intercourse, without any other kind of connection to the child or the mother, is a sufficient basis for legal fatherhood, with the attendant duty to provide financial support to the child up to the age of eighteen and possibly beyond. With genetic essentialism part of the cultural atmosphere, it is easy to slide into the view that the genetic contribution is the essence of fatherhood.²⁰⁰

The third contributing factor to the increased reliance on DNA-based paternity testing is, according to Anderlik and Rothstein, the fathers' rights movement.²⁰¹ Largely in response to a perceived bias against

193. *Id.* at 221 n.28.

194. *Id.* at 216.

195. *Id.* ("The testing of hair and other materials easily collected without the knowledge or cooperation of the subject is also becoming more common.").

196. *See id.* (citing lower costs for DNA testing and increased media exposure).

197. *See id.* at 217.

198. *Id.* at 217-19.

199. *Id.* at 217-18; *see* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.).

200. Anderlik & Rothstein, *supra* note 182, at 218.

201. *Id.* at 219.

fathers in contested custody cases, fathers' rights groups emerged in the 1970s, ostensibly to promote fathers' rights to parent.²⁰² Their agenda has broadened and morphed into one of proclaiming male victimization.²⁰³ Many of the groups now lobby and advocate use of genetic testing to disestablish paternity so that men may avoid raising and supporting children who are not their biological progeny.²⁰⁴ Clearly, if DNA can be used to establish paternity, logically, it could be used to disestablish paternity.²⁰⁵ Illinois' reliance on DNA testing is so profound that the state even requires that a party disestablish paternity through a DNA test prior to the filing of the petition to disestablish paternity.²⁰⁶

The final factor Anderlik and Rothstein point to in promulgating reliance on DNA identity testing is the media interest in domestic drama.²⁰⁷ “[M]edia attention, in conjunction with the marketing efforts of laboratories, has contributed to the increasing demand for testing sowing suspicion about paternity and fidelity and suggesting that testing is a natural and acceptable response to suspicion.”²⁰⁸ Our society has become titillated by talk show themes of parentage and non-parentage, and it stands to reason that when the American public is fed stories of DNA defining parentage, that definition will seep into the national consciousness.

While a DNA-based definition of parentage is a logical attempt to define parentage scientifically, it is flawed when it is used as an unqualified definition of paternity. As indicated above, no consideration is made for the best interest of children.²⁰⁹ Interestingly, and contradictorily, while no best interest hearing is allowed for either the establishment or disestablishment of paternity, one is mandated for support of terminating a natural parent's rights, even after a court has found that the biological parents were guilty of abuse and/or neglect.²¹⁰ Further, the Illinois Marriage and Dissolution of Marriage Act is replete

202. *See id.*

203. *See id.*

204. *Id.*

205. *Id.*

206. *See supra* notes 81–84 and accompanying text (noting two cases in which Illinois courts determined that DNA testing was required prior to filing a petition to disestablish paternity).

207. Anderlik & Rothstein, *supra* note 182, at 221.

208. *Id.*

209. *See supra* note 187 and accompanying text (discussing the inability of the court to determine the best interests of the child when DNA proves the biological parentage of the child).

210. *In re Adoption of Syck*, 562 N.E.2d 174, 183–84 (Ill. 1990).

with considerations of the best interests of children in virtually all disputes concerning children.²¹¹

Exclusive reliance on science in paternity actions almost appears to be akin to a child playing with a new toy to the exclusion of all of the old toys, unconcerned with their former value. After centuries of reliance on presumptive parentage, science has created an actual, concrete means to ascertain paternity. Combining a culture that values immediacy and certainty with the means of procuring that immediacy and certainty has created a statutory scenario that needs to be reexamined in light of both the current state of constitutional law and sociological and commonsense considerations.

VI. A BETTER MODEL

In light of the aforesaid, what type of statutory model would appropriately address the various competing interests in determining parentage in this twenty-first century? In addressing this issue, guidance can be had from antiquity. Aristotle, addressing human excellence in *Nicomachaen Ethics*, defined “the ideal” as being a mean point of excellence lying between two extremes.²¹² Our legislature must heed this wise proponent of equilibrium and draft legislation that balances the rights inherent in biological relationships with those of the family, ultimately culminating in considerations enhancing the best interests of children.

Specifically, courts should be allowed to conduct a best interest hearing to establish or disestablish paternity. Craig O. Weber, in his Comment, advocates a preliminary evidentiary hearing on whether the paternity action is in the best interest of a child before allowing the action to proceed.²¹³ Weber argues,

Requiring a preliminary hearing regarding the best interest of the child prior to allowing a paternity action to proceed is the approach which best balances all relevant considerations. Obviously, the paramount consideration should be the child since it is his or her life which will be impacted the most by a paternity action First, this hearing will protect the child from unnecessary “bastardization” by preventing a finding of illegitimacy unless it will result in a beneficial change in the status quo to the child. Second, it will protect a natural father’s rights in raising his child if he is able to prove he is worthy of those rights.

211. See generally 750 ILL. COMP. STAT. 5/101–5/802 (2002 & West Supp. 2003).

212. 2 ARISTOTLE, NICOMACHAEN ETHICS, <http://classics.mit.edu/Aristotle/nicomachaen.2.ii.html> (W.D. Ross trans., last modified Sept. 29, 2000).

213. Craig O. Weber, Comment, *Paternity Actions in Illinois: Why Not Consider What Is in the Best Interest of the Child?*, 21 S. ILL. U. L.J. 613, 628 (1997).

Third, the hearing will protect the state's interest in assuring adequate financial support for the child by not relieving the statutorily presumed father of his obligations to the child by finding the child illegitimate unless the alleged natural father can support the child. Finally, it will protect the existing family unit from harmful disruptions by nixing fruitless paternity actions before they seriously damage existing relationships.²¹⁴

There is no logical or constitutional reason why a court cannot conduct a best interest hearing prior to adjudicating parentage. While a biological parent will assert an absolute right to a relationship, it should be the court that acts as a gatekeeper for the child's interests, a role it has assumed in virtually all other family law contests.²¹⁵

Further, a statute could proscribe a statute of limitations to protect a family from claims of biological fathers. To exclude a social father who has raised a child for an extended period of time because of a lack of a biological connection is an obscene disservice to both the child and the man who has raised a child from birth. Goldstein, Freud, and Solnit, in their landmark study that served as the basis for substantial court consideration of custody issues,²¹⁶ commented on the irrelevance of biological connection for children:

Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered, borne, or given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of the events leading to their births. What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.²¹⁷

Disestablishment of paternity poses a more complex circumstance than a non-biological parent seeking to raise a child. While one can impugn the integrity of an individual who raises a child for a decade and then decides to disown the child because of a lack of a blood tie, this is a circumstance that can and will exist in this era of cheap and easy DNA testing. Accordingly, a more moderate approach, rejecting the current

214. *Id.*

215. *See, e.g.*, Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/101-5/802; Illinois Adoption Act, 750 ILL. COMP. STAT. 50/0.01-50/24 (2002).

216. Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950-2000*, in *CROSS CURRENTS: ANGLO-AMERICAN FAMILY LAW 1950-2000*, at 1-29 (Sanford N. Katz et al. eds., 2001).

217. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 12 (1973).

model of absolute reliance on biology and adoption of an absolute denial of disestablishment, is to allow disestablishment under certain circumstances, which again would be focused largely on the best interest of the child.

Also, in contrast to the current statute, a court decree or acknowledgment of paternity should not be disregarded based upon a DNA test disproving actual paternity. There simply do not seem to be any adequate policy considerations for disregarding fundamental notions of *res judicata* in circumstances of parentage. While a court cannot force a relationship of love and affection, the court certainly can enforce support orders if they are in the best interest of a child. This scenario undoubtedly will seem unfair to the cuckolded husband who raised a child only to discover later that the child is not his. However, in an era in which a DNA test can be conducted quickly and inexpensively,²¹⁸ one must question whether it is unfair that any doubts be resolved sooner rather than later. Arguably, the historical presumption of legitimacy should be irrebuttable in a disestablishment context if it is not asserted prior to the development of a relationship with a child.

VII. CONCLUSION

In relying on science to be the exclusive determinant of parentage, our legislature has adhered to a false and misleading notion that defines a parent by his bloodline. Such a notion is antiquated and dangerously disregards children's interests. Principles such as these have to be abandoned when they become irrelevant. Changing times require a new philosophy reflective of society's development. In addition, the statutory scheme arguably is unconstitutional in that it denies the family due process rights of protection from undue state interference. By utilizing a moderate approach of balancing the interests of the biological versus social parent, the legislature could effectively promote and enhance protection of children, which should be the predominant goal of Illinois law. Virtually all family law statutes, except the current Paternity Act, allow a trial court latitude to consider the best interests of children.²¹⁹

While a biological connection to a child certainly is an important factor in determining parentage, it should not be the sole determinant.

218. It is a whole other policy question whether DNA tests should be regulated and allowed only under certain circumstances.

219. See *supra* note 215 (citing to examples of current Illinois statutes that allow courts to consider a child's best interest).

A parent-child relationship involves so much more than shared genes. The bond of the parent and child is built on love, patience, nurturing, and the time spent helping a child develop and thrive. A policy that ignores this reality in favor of a sterile scientific certainty weakens this sacred and permanent bond and devalues our society, which is based upon these relationships. It is time for the legislature to recognize this priority and act accordingly.