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## Who's My Real Daddy? Reducing the Prevalence of False Paternity in Texas

Elan Renee-Guerin Longstreet

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# WHO'S MY *REAL* DADDY? REDUCING THE PREVALENCE OF FALSE PATERNITY IN TEXAS

By: *Elan Renee-Guerin Longstreet*<sup>†</sup>

## ABSTRACT

*False paternity occurs when a man is incorrectly presumed, acknowledged, or adjudicated to be the father of a child even though, contrary to his own belief, he has no biological relationship to the child. In Texas, over 85% of cases of false paternity result when paternity is initially established by a legal presumption or voluntary acknowledgement. However, instead of amending the laws on how paternity is initially established, Texas attempts to remedy false paternity merely by determining the situations in which paternity may be disestablished. The effects of disestablishing paternity vary wildly and can be devastating to the child, the alleged father, and the biological father.*

*In Part II, this Comment will examine the prevalence of false paternity in Texas, the causes of false paternity, and the consequences of false paternity. In Part III, this Comment will propose proactive solutions that aim to deter incidents of false paternity while balancing the interests of the child against the interests of alleged fathers, biological fathers, and the state. Finally, in Part IV, this Comment proposes a solution that aims to remedy specific incidents of false paternity without destroying nurtured father-child relationships.*

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### I. INTRODUCTION

One year after Sharon Harrington divorced Robert Harrington, Robert discovered through a paternity test that Blake, his two-year-old son, was not his biological child. Robert's discovery was contrary to his own belief. Almost three years ago, when Sharon happily informed Robert that he was going to be a father, he had no reason to suspect that she meant he was going to be the father of someone else's child—after all, she was his wife. Robert petitioned the court to set aside his divorce decree that ordered him to pay child support and provide health insurance for Blake. However, the court denied Robert's petition on a technicality. It held that even though Sharon's fraudulent representations led him to believe that he was Blake's father, he had no legal basis on which to set aside his previous divorce decree. To make matters worse, Sharon, deciding that she did not want to be a mother anymore, left Blake to be raised by his biological father, Seth Robertson. Sharon then motioned the court to redirect Robert's child support payments directly to Seth. Sharon's motion was ultimately granted, and Robert was somehow left paying child support to Seth so that Seth could take care of his own child. This story of the Harringtons demonstrates the dangers and inequitable effects of false paternity.<sup>1</sup>

False paternity is a problem that has always existed,<sup>2</sup> but due to the scientific developments of the past quarter of a century, it is now a problem that can also be detected.<sup>3</sup> Thus, the need to find ways to remedy incidents of false paternity has been an ongoing struggle in recent years. States have yet to find a creative remedy that effectively balances the best interests of innocent children, the rights of alleged and biological fathers, and other public-policy concerns.

The laws that address the establishment and disestablishment of paternity vary across the nation. Therefore, this Comment will only specifically address the phenomena of false paternity in Texas. In Part II,

1. See Douglas M. Richardson, *Man Forced to Pay Child Support to Biological Father of His Wife's Child*, EQUAL JUSTICE FOUNDATION, <http://www.ejfi.org/family/family-84.htm> (last visited July 31, 2013) (Author's story is loosely based on the story of Douglas M. Richardson.).

2. See Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 51, 52 (2006) ("The subject of paternity fraud is not new.").

3. See Mark A. Bellis et al., *Measuring Paternal Discrepancy and Its Public Health Consequences*, 59 J. EPIDEMIOLOGY & COMMUNITY HEALTH 749, 750–52 (2005) ("[A]dvances in genetic techniques allow paternal discrepancy to be identified . . . ."); see also JOSEPH WAMBAUGH, *THE BLOODING 80*, 156 (Perigord Press Book 1991) (1989) (stating that DNA profiling techniques were first reported in 1984 and made commercially available in 1987).

this Comment will examine the prevalence of false paternity in Texas, the causes of false paternity, and the consequences of false paternity. In Part III, this Comment will propose proactive solutions that aim to deter incidents of false paternity while at the same time balancing the interests of the child, the interests of alleged fathers, the interests of biological fathers, and the interests of the state. Finally, in Part IV, this Comment will propose a solution that aims to remedy specific incidents of false paternity without destroying nurtured father-child relationships.

## II. AN OVERVIEW OF FALSE PATERNITY IN TEXAS

### A. *False Paternity and Its Prevalence*

False paternity occurs when a man is incorrectly presumed, acknowledged, or adjudicated to be the father of a child even though, contrary to his belief, he has no biological relationship to the child.<sup>4</sup> A rebuttable presumption of paternity can arise in three situations.<sup>5</sup> First, a rebuttable presumption of paternity will arise if a man was married to the mother of a child when the child was born or during the probable time of conception.<sup>6</sup> A rebuttable presumption of paternity will also arise if a man married the mother of a child after the birth of the child, voluntarily asserted his paternity, and voluntarily named himself on the child's birth certificate or promised to support the child as his own.<sup>7</sup> Finally, a rebuttable presumption of paternity will arise if a man cohabited with a child during the first two years of the child's life and represented to others that the child was his own.<sup>8</sup> If a rebuttable presumption of paternity does not arise, a man may also voluntarily execute an Acknowledgement of Paternity based on the mother's representations that he is the biological father.<sup>9</sup> Lastly, paternity may be established by the adjudication of any legal issue affecting the parent-child relationship.<sup>10</sup> Aside from the method of adjudication, it is almost effortless to establish paternity by presump-

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4. Bellis et al., *supra* note 3, at 749; *see also* TEX. FAM. CODE ANN. § 160.201(b)(1)–(3) (West 2008) (stating that the father-child relationship is established by an un rebutted presumption of paternity, an effective acknowledgement of paternity, or an adjudication of paternity).

5. TEX. FAM. CODE ANN. § 160.204(a) (West 2008).

6. *Id.*

7. *Id.*

8. *Id.*

9. TEX. FAM. CODE ANN. § 160.301 (West 2008); *see also* TEX. DEP'T OF STATE HEALTH SERVS., TEXAS DEPARTMENT OF STATE HEALTH SERVICES VITAL STATISTICS FORM VS-159.1M (2011), *available at* <http://www.co.cameron.tx.us/countyclerk/docs/paternity.pdf> [hereinafter VAOP] (requiring both the mother and the alleged father to declare under penalty of perjury that the alleged father is the biological father of the mother's child).

10. TEX. FAM. CODE ANN. § 160.201(b)(3) (West 2008).

tion or voluntary acknowledgement. This often leads to incidents of false paternity.

In Texas, false paternity is a problem on the rise that affects a large number of children born in the state each year. Texas's statistics from the year 2010 provide a good case study. In 2010, married women gave birth to 228,582 children.<sup>11</sup> Therefore, in 2010, 228,582 husbands were statutorily presumed to be the fathers of those children.<sup>12</sup> However, a study by anthropologist Kermyt G. Anderson shows that up to 3.3% of births to married women are the result of an extra-marital affair.<sup>13</sup> This means that in 2010, 7,543 husbands, by virtue of marriage alone, could have been incorrectly presumed to be the biological father of their wife's child.<sup>14</sup> In 2010, unmarried women in Texas gave birth to 157,536 children.<sup>15</sup> The Office of Child Support Enforcement reported that for approximately 64.70% of births to unwed mothers, paternity is established by voluntary acknowledgement.<sup>16</sup> Therefore, in 2010, paternity was established by voluntary acknowledgement for approximately 101,925 of the births to unwed mothers.<sup>17</sup> Further, studies show that there is a 3.7% rate of false paternity among births to unwed mothers.<sup>18</sup> This means that in 2010, of the 101,925 voluntary acknowledgements, 3,771 men could have been incorrectly identified as the father of a child born to an unwed mother.<sup>19</sup> Lastly, the Office of Child Support Enforcement reported that paternity is established by adjudication for 29.99% of births to unwed mothers.<sup>20</sup> This means that in 2010, paternity was established by adjudication for 47,245 births.<sup>21</sup> Thus, considering the 3.7% rate of false paternity, up to

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11. See JOYCE A. MARTIN ET AL., BIRTHS: FINAL DATA FOR 2010, NATIONAL VITAL STATISTICS REPORTS 1, 8, 40 (2012).

12. TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2008). Author bases this conclusion on each mother having one child each year and does not account for rare anomalies such as multi-births.

13. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 514–16 (2006).

14. See *supra* text accompanying notes 11–13.

15. See Martin et al., *supra* note 11, at 8, 40.

16. See OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2010 PRELIMINARY REPORT (2010), available at <http://www.acf.hhs.gov/programs/css/resource/fy2010-preliminary-report#boxscores> [hereinafter FY 2010 REPORTS] (last visited Feb. 15, 2013) (stating that in 2010, 1.1 million of 1.7 million paternities were established by voluntary acknowledgement).

17. See *supra* text accompanying notes 15–16.

18. Bellis et al., *supra* note 3, at 749.

19. See *supra* text accompanying notes 15–18.

20. See FY 2010 REPORTS, *supra* note 16, at TABLE P-35 (stating that Texas has a 94.69% statewide PEP rate); see also *supra* text accompanying notes 11–15 (stating that for 228,582 births out of 386,118 births, 228,582 men (or 59.20%) were presumed to be fathers); *supra* notes 15–16 and accompanying text (stating that for 64.70% of births to unwed mothers paternity was established by voluntary acknowledgement).

21. See *supra* text accompanying notes 15, 20.

1,748 men could have been incorrectly adjudicated as the father.<sup>22</sup> In sum, in 2010 alone, there were an estimated 13,062 cases of false paternity in Texas.<sup>23</sup> Furthermore, 86.61% of those cases resulted when paternity was established by presumption or voluntary acknowledgement.<sup>24</sup>

### B. *Consequences of False Paternity*

False paternity can have devastating effects on a family when the revelation of the truth is delayed. It also often results in many legal and social consequences that can affect the child, the mother, the alleged father, and the biological father. Any viable solution to false paternity must first consider the legal and social consequences of false paternity in order to abstain from agitating them.

#### 1. Consequences Affecting the Child

False paternity can cause many legal issues for children. It can possibly leave a child fatherless<sup>25</sup> and consequently put at risk a child's eligibility to collect inheritance, medical benefits, social security benefits, veteran benefits, and child support.<sup>26</sup> False paternity can also cause many social issues for children. For example, false paternity is often the result of undisclosed incidents of infidelity<sup>27</sup> which is one of the most destructive types of familial secrets a child can encounter.<sup>28</sup> It undermines a child's familial support system by causing children to lose the only father they have known and permanently estranging children from their natural parents.<sup>29</sup> Secrets of false paternity can also hinder the development of a child's identity and sense of trust.<sup>30</sup> Furthermore, it can cause children to suffer from self-defeating behaviors such as tension, anxiety, loneliness, and low self-esteem.<sup>31</sup>

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22. *See supra* text accompanying notes 15, 18, 20.

23. *See supra* text accompanying notes 14, 19, 22.

24. *See supra* text accompanying notes 14, 19, 22–23.

25. *In re A.L.J.*, 929 S.W.2d 467, 469 (Tex. App.—Tyler 1996, writ denied).

26. GREG ABBOTT, ATT'Y GEN. OF TEX., PATERNITY, CHILD SUPPORT, AND YOU: A PARENT'S GUIDE TO THE LEGAL SIDE OF FATHERHOOD AND FINANCIAL SUPPORT 2–3 (2011).

27. Bellis et al., *supra* note 3, at 749.

28. *See* Evan Imber-Black, *The Power of Secrets*, PSYCHOLOGY TODAY (July 1, 1998), <http://www.psychologytoday.com/articles/200909/the-power-secrets> (stating that family secrets are destructive).

29. *Id.*

30. *Id.*; Peter Rober et al., “*In Search of a Tale They Can Live With*”: *About Loss, Family Secrets, and Selective Disclosure*, 38 J. MARITAL & FAM. THERAPY 529, 531 (2012).

31. Rober et al., *supra* note 30, at 531; Bellis et al., *supra* note 3, at 727.

## 2. Consequences Affecting the Alleged Father<sup>32</sup>

The legal plights of alleged fathers who are victims of false paternity can be extremely devastating. One consequence an alleged father has faced in the recent past<sup>33</sup> is the inability to disestablish paternity if he discovered, subsequent to the adjudication of the parent-child relationship, that he was not the biological father of the child.<sup>34</sup> In *In re Office of Attorney General of Texas (Cain)*, a writ of mandamus action, Katherine Owens gave birth to K.H.<sup>35</sup> In 2002, the Texas Attorney General filed a suit affecting the parent-child relationship against Robert Hale, seeking to establish Hale's paternity of K.H. and obtain a judgment for child support.<sup>36</sup> Hale believed Owens's representations that he was the father of K.H. and did not contest the issue of paternity.<sup>37</sup> Thus, the trial court ordered Hale to pay child support and provide health insurance for K.H.<sup>38</sup> Within two months of the court's ruling, K.H.'s maternal grandmother informed Hale that he was *not* K.H.'s biological father.<sup>39</sup> Armed with this new information, Hale sought a bill of review in order to re-litigate the issue of paternity.<sup>40</sup> The trial court granted Hale's bill of review, and the Texas Attorney General filed a writ of mandamus, seeking to overturn the grant.<sup>41</sup>

The Court of Appeals in Beaumont held that the alleged fraudulent representations made by Owens about Hale's paternity did not satisfy the required element of extrinsic fraud.<sup>42</sup> The Court of Appeals found that Owens's fraudulent representations were related to the merits of the issue that was presented and settled in the original proceeding.<sup>43</sup> Since Owens's fraudulent representations did not deny Hale the opportunity to fully litigate his rights or defenses in the original proceeding, the Court of Appeals held that Hale's bill of review could not be granted.<sup>44</sup> Hale was denied the ability to disestablish paternity.<sup>45</sup>

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32. For purposes of this Comment, an "alleged father" is a man who has been incorrectly presumed, acknowledged, or adjudicated to be the father of a child even though, contrary to his belief, he has no biological relationship to this child.

33. *But see* TEX. FAM. CODE ANN. § 160.607 (West 2008) (stating that effective 2011, alleged fathers are able to bring suit at any time).

34. *See In re Office of Att'y Gen. of Tex. (Cain)*, 193 S.W.3d 690, 691 (Tex. App.—Beaumont 2006, no pet.).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 692.

42. *Id.* at 692–93.

43. *Id.*

44. *Id.*

45. *Id.*

Alleged fathers may also face devastating legal consequences even when the parent-child relationship has not been previously adjudicated. In Texas, a presumed father generally cannot commence a proceeding to disestablish paternity after the child's fourth birthday.<sup>46</sup> However, there are two exceptions to this rule.<sup>47</sup> Under the first exception, the presumed father must prove that he did not engage in sexual intercourse with the mother during the probable time of conception.<sup>48</sup> Alternatively, the second exception requires the presumed father to prove that he was precluded from adjudicating parentage because of the mother's misrepresentation that he was the father.<sup>49</sup> Similarly, a man who voluntarily acknowledges paternity cannot commence a proceeding to disestablish paternity unless he can prove fraud, duress, or material mistake of fact.<sup>50</sup> The inability of an alleged father<sup>51</sup> to meet one of the aforementioned statutory prerequisites will prevent him from disestablishing paternity even if he is not the biological father of the child.<sup>52</sup>

If an alleged father (or specifically, a presumed father) is allowed to commence a proceeding to disestablish paternity, the court can still deny him the opportunity to present DNA evidence that proves that he is not the biological father of a child.<sup>53</sup> The court is allowed to do this if it determines that the conduct of the presumed father estops him from denying parentage, and it would be inequitable to disprove the father-child relationship.<sup>54</sup> Ultimately, the only evidence a court must consider is evidence that affects "the best interest of the child."<sup>55</sup> In many circumstances, courts are under no obligation to grant an order for paternity testing<sup>56</sup> even though a paternity test would reliably and scientifically prove the precise issue being contested.<sup>57</sup>

In addition to the aforementioned legal consequences, there are also many social consequences that affect alleged fathers that have fallen victim to false paternity. For example, an alleged father's discovery that he is not the biological father of a child is often coupled

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46. TEX. FAM. CODE ANN. § 160.607(a) (West 2008).

47. *Id.* § 160.607(b)(1)–(2).

48. *Id.*

49. *Id.*

50. TEX. FAM. CODE ANN. § 160.308(a) (West 2008).

51. *See supra* note 32.

52. *See* Kristen K. Jacobs, Comment, *If the Genes Don't Fit: An Overview of Paternity Disestablishment Statutes*, 24 J. AM. ACAD. MATRIM. LAW. 249, 250 (2011).

53. TEX. FAM. CODE ANN. § 160.608 (West 2008).

54. *Id.*; *but see* TEX. FAM. CODE ANN. § 161.005(c)–(f) (West 2008) (This statute states that "[i]f a meritorious prima facie claim is established, the court shall order the petitioner and child to submit to genetic testing." This section, however, does not apply to all presumed fathers; it only applies to acknowledged fathers or previously adjudicated fathers.).

55. TEX. FAM. CODE ANN. § 160.608.

56. *Id.*

57. Anderson, *supra* note 13, at 513.



with a discovery of his significant other's infidelity.<sup>58</sup> A consequence of discovering infidelity in a marriage or committed relationship is the eventual breakdown of that partnership.<sup>59</sup> This can result in increased mental health problems for both partners.<sup>60</sup> Additionally, even when the disclosure of infidelity does not result in the dissolution of the relationship, the parties involved must learn how to cope with a child in the family structure who is only related to one parent and who is the result of infidelity.<sup>61</sup> Despite many mixed family structures working well, fathers in this situation tend to spend less of their time and resources on the child to whom they are not biologically related, and they may subconsciously feel anger and resentment towards the child and the mother.<sup>62</sup> Unfortunately, this can increase the risk of, and criminal liability for, family violence.<sup>63</sup>

### 3. Consequences Affecting the Biological Father

Incidents of false paternity may also cause many legal issues for the biological father of a child. In cases where a biological father has standing to commence a proceeding to establish his paternal interest in a child, he could possibly still be barred from commencing his claim if his child has a presumed father and is more than four years old.<sup>64</sup> He may also be barred from commencing his claim if another man acknowledged paternity more than four years ago, or the issue of the child's parentage was adjudicated more than four years before the commencement of the biological father's lawsuit.<sup>65</sup> Even if a biological father is able to successfully commence and litigate his claim of paternity, the court's final holding still may not be favorable towards him. Ultimately, courts feel that the rights of the natural parents are not absolute.<sup>66</sup> Rather, the protection of the child, not the protection of the biological parents' rights, is the paramount concern of the court.<sup>67</sup>

There are also many social consequences that can affect a biological father who discovers false paternity. First, he may experience a breakdown in his own long-term relationships with his significant other and

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58. Bellis et al., *supra* note 3, at 749.

59. *Id.* at 749, 752.

60. *Id.* at 752; Megan M. Sweeney & Allan V. Horwitz, *Infidelity, Initiation, and the Emotional Climate of Divorce: Are There Implications for Mental Health?*, 42 J. HEALTH & SOC. BEHAV. 295, 295-96 (2001).

61. Bellis et al., *supra* note 3, at 752.

62. *Id.*

63. *Id.*

64. TEX. FAM. CODE ANN. § 160.607 (West 2008).

65. TEX. FAM. CODE ANN. § 160.609(b) (West 2008).

66. *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994) (stating that a biological father's standing is not constitutionally mandated unless he acknowledges responsibility for child support or other care and maintenance, and makes a serious and continuous effort to establish a relationship with the child).

67. *Id.*

his other children.<sup>68</sup> He may also be angry for not being given the opportunity to establish a relationship with his child.<sup>69</sup> Lastly, he may feel guilty for not being there for his biological child, and he may have feelings of anger and resentment towards the mother.<sup>70</sup>

#### 4. Consequences Affecting the Mother

Mothers who are involved in incidents of false paternity can be subjected to numerous legal consequences. One such consequence may be the mother's inability to hold her child's biological father liable for child support.<sup>71</sup> In *In Re A.L.J.*, Melinda Dillingham gave birth to A.L.J.<sup>72</sup> Although Dillingham was married to Robbie Jacobs, A.L.J.'s biological father was Ross Hicks.<sup>73</sup> After A.L.J.'s birth, Dillingham filed for divorce from Jacobs.<sup>74</sup> Her petition alleged that Jacobs was the "parent" of A.L.J. and sought to terminate the father-child relationship between Jacobs and A.L.J.<sup>75</sup> Jacobs failed to appear before the court, and a divorce decree was granted by default to Dillingham.<sup>76</sup> Dillingham's allegations of paternity were incorporated into the divorce decree and accepted as true.<sup>77</sup> Dillingham, believing that she had effectively taken care of any concerns that Jacobs was A.L.J.'s father, commenced a lawsuit to establish Hicks's paternity.<sup>78</sup> In response, Hicks alleged that Jacobs had already been adjudicated as the biological father of A.L.J.; therefore, Dillingham's claim was barred by *res judicata*.<sup>79</sup> The trial court accepted Hicks's argument and dismissed Dillingham's lawsuit.<sup>80</sup>

On appeal, the Court of Appeals in Tyler affirmed the trial court's ruling.<sup>81</sup> Dillingham was estopped from establishing that Hicks was the biological father of A.L.J., and she was prevented from holding Hicks liable to fulfill his parental obligations.<sup>82</sup>

Another legal consequence that mothers who are involved in incidents of false paternity may face is their exposure, albeit unlikely ex-

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68. Bellis et al., *supra* note 3, at 752.

69. Eliza Newlin Carney, *Birthfathers: The Forgotten Half of the Story*, ADOPTIVE FAMILIES (2001), <http://www.adoptivefamilies.com/articles.php?aid=9> (stating that birthfathers, who were initially unaware that they had a child who had been adopted, are angry for being treated as if they do not exist).

70. *Id.*

71. *See In re A.L.J.*, 929 S.W.2d 467, 469–70 (Tex. App.—Tyler 1996, writ denied).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 471.

posure,<sup>83</sup> to criminal prosecution.<sup>84</sup> A mother who signs Texas's Acknowledgement of Paternity form is alleging, *under penalty of perjury*, that the man listed on the form is the biological father of her child.<sup>85</sup> Under § 37.10(c)(1) of the Texas Penal Code, which addresses the penalties for perjury, a mother is guilty of a state jail felony if she alleges the wrong man as the biological father of her child with the intent to defraud or harm another person.<sup>86</sup>

Mothers who are involved in incidents of false paternity may also face numerous social consequences. These consequences can include an erosion of trust in her relationship with her child and her significant other,<sup>87</sup> psychological ailments (such as depression, anxiety, stress, anger, and fear of social disapproval),<sup>88</sup> and physical health issues.<sup>89</sup>

### C. *Establishing and Disestablishing Paternity—A Brief History*

#### 1. Presumptions and Voluntary Acknowledgements

Despite the fact that over 85% of the time false paternity results when paternity is established by a presumption or voluntary acknowledgement,<sup>90</sup> Texas has failed to limit the use of presumptions or voluntary acknowledgements.<sup>91</sup> Since its adoption of the Uniform Parentage Act (UPA) in 2001, Texas has made relatively few changes to the facts by which presumptions of paternity can arise.<sup>92</sup> When Texas initially adopted the UPA, a presumption of paternity only arose in two scenarios.<sup>93</sup> First, a man would be presumed to be the father of a child if he was married to the mother (1) when the child

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83. Author finds no reported cases in Texas of criminal prosecutions for falsely identifying a man as the biological father of a child on Texas's Acknowledgement of Paternity form.

84. See *infra* text accompanying notes 85–86.

85. VAOP, *supra* note 9.

86. TEX. PENAL CODE ANN. §§ 12.35(a)–(b), 37.10(c)(1) (West 2011 & Supp. 2012).

87. Bellis et al., *supra* note 3, at 752; Sweeney & Horwitz, *supra* note 60, at 296–97.

88. Sweeney & Horwitz, *supra* note 60, at 296–97.

89. See D.N.K. Sharma et al., *Effect of Stress on Immunity*, 16 ANCIENT SCIENCE OF LIFE 227, 227–29 (1996) (discussing the effects of stress on the immune system's ability to fight disease).

90. See *supra* text accompanying notes 11–24.

91. See *infra* text accompanying notes 92–96.

92. Compare Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011), with Act of June 20, 2003, 78th Leg., R.S., ch. 610, § 10, 2003 Tex. Sess. Law Serv. H.B. 1878 (West) (amended 2011), and Act of June 20, 2003, 78th Leg., R.S., ch. 1248, § 1, 2003 Tex. Sess. Law Serv. S.B. 1807 (West) (current version at TEX. FAM. CODE ANN. §§ 160.001–160.763 (West 2008 & Supp. 2012)) (showing that after the adoption of the UPA, Texas only made one amendment affecting the establishment of paternity by presumptions).

93. Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011).

was born or (2) during the probable time of conception.<sup>94</sup> Second, a man could also be presumed to be the father of a child if he married the mother after the birth of the child, voluntarily asserted his paternity, and voluntarily named himself on the child's birth certificate or promised to support the child as his own.<sup>95</sup> In 2003, instead of limiting the use of presumptions, the Texas Legislature added a provision for presumptions to arise in cases where the man cohabited with the child during the first two years of the child's life and represented to others that the child was his own.<sup>96</sup>

Since its adoption of the UPA in 2001, Texas has also made relatively few changes to the facts under which a presumption of paternity can be rebutted.<sup>97</sup> Initially, in 2001, Texas only allowed a presumption of paternity to be rebutted by adjudication.<sup>98</sup> This could be a very costly option for alleged fathers.<sup>99</sup> Presumably, this may have prevented many statutorily presumed fathers from litigating the issue of paternity even if they doubted their biological connection to the child. In 2003, the Texas Legislature amended this provision to also allow presumed fathers to rebut the presumption of paternity by filing a Denial of Paternity.<sup>100</sup> However, the Denial of Paternity operates as a valid rebuttal *only if* the presumed father can find another man that is willing to claim that he is the biological father of the child.<sup>101</sup>

Lastly, since Texas's adoption of the UPA in 2001, Texas has not made any changes to the method by which a voluntary acknowledgement of paternity can arise or be rescinded.<sup>102</sup> A man, based on the allegations of paternity made by the child's mother, can voluntarily establish his paternity by signing and filing the applicable form.<sup>103</sup> Afterwards, he has up to sixty days to rescind his voluntary acknowl-

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94. *Id.*

95. *Id.*

96. Act of June 20, 2003, 78th Leg., R.S., ch. 1248, § 1, 2003 Tex. Sess. Law Serv. S.B. 1807 (West) (current version at TEX. FAM. CODE ANN. §§ 160.001–160.763 (West 2008 & Supp. 2012)).

97. *See supra* note 92 (showing that after the adoption of the UPA, Texas only made one amendment affecting the ability to rebut a presumption of paternity).

98. Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011).

99. *See* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 90 (1983) (stating that on average, lawyers work 30.4 hours on each case); *see also* STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, 2009 HOURLY FACT SHEET 6 (2009) (stating that on average Texas lawyers charge \$203/hr. in family law cases).

100. Act of June 20, 2003, 78th Leg., R.S., ch. 1248, § 1, 2003 Tex. Sess. Law Serv. S.B. 1807 (West).

101. *Id.*

102. *See supra* note 92 (showing that after the adoption of the UPA, Texas never amended the laws affecting the establishment of paternity by voluntary acknowledgement or the rescission of the voluntary acknowledgement of paternity).

103. TEX. FAM. CODE ANN. § 160.301 (West 2008).

edgement if he so chooses.<sup>104</sup> Otherwise, he will be limited to adjudicating paternity if he wishes to disestablish his paternity.<sup>105</sup>

## 2. Statutes of Limitations

Texas has historically tried to remedy false paternity by statutorily limiting the period of time during which paternity can be disestablished,<sup>106</sup> which altogether ignores the root cause of the problem of false paternity.<sup>107</sup> Texas's statute of limitations to commence a proceeding to rebut a presumption of paternity has varied considerably over the past decades.<sup>108</sup> From 1983 until 2001, an alleged father could commence a proceeding to contest paternity at any time before the second anniversary of the child becoming an adult—or put more simply, before the child's twentieth birthday.<sup>109</sup> However, this had devastating emotional effects on children.<sup>110</sup> A father-child relationship that had been nurtured for up to twenty years could suddenly be destroyed, causing children to lose emotional contact and financial support from the only father they knew.<sup>111</sup>

Texas repealed the 1983 laws, partially in response to their devastating emotional effects, and replaced them with the UPA in 2001.<sup>112</sup> The UPA prohibited the commencement of a proceeding to contest the paternity of a child over four years of age if the child had a presumed father.<sup>113</sup> Similarly, the UPA prohibited the commencement of a proceeding to contest the paternity of a child with an acknowledged father if more than four years had passed since the filing of the acknowledgement.<sup>114</sup> Presumably, these amendments, simply by virtue

104. *Id.* § 160.307(a)(1) (Supp. 2012).

105. *Id.* § 160.308(a) (Supp. 2012).

106. *See infra* text accompanying notes 106–20.

107. *See supra* text accompanying note 90.

108. *See infra* text accompanying notes 109–20.

109. *See* Act of May 30, 1983, 68th Leg., R.S., ch. 424, § 7, 1983 Tex. Gen. Laws 2346, 2355 (allowing presumed father to bring suit denying paternity), *repealed by* Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011); *see also* Act of May 28, 1987, 70th Leg., R.S., ch. 689, § 5, 1987 Tex. Gen. Laws 2546, 2548 (allowing mother to bring suit denying paternity of presumed father), *repealed by* Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011); *see also* Act of May 24, 1983, 68th Leg., R.S., ch. 744, § 1, 1983 Tex. Gen. Laws 4530, 4531 (providing that suit to determine parentage barred after second anniversary of day child becomes adult), *repealed by* Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011).

110. *See supra* text accompanying notes 25–31.

111. *See supra* text accompanying notes 25–31.

112. *See* CHARLES G. CHILDRESS, THE UNIFORM PARENTAGE ACT: 85% LAW; 15% ALLIGATOR 4 (2001) (stating that the Uniform Parentage Act provides some additional protections for children).

113. Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Sess. Law Serv. H.B. 920 (West) (amended 2003, 2011) (codified at TEX. FAM. CODE ANN. § 160.607 (West 2008)).

114. *Id.*

of their short statutes of limitations, resulted in many men being held liable, and possibly even subjected to criminal penalties, for failing to support children that were not their biological descendants.<sup>115</sup>

In response to the concerns surrounding the adoption of the UPA, the Texas Legislature amended the statutes in 2011.<sup>116</sup> The 2011 amendments kept the four-year statute of limitations.<sup>117</sup> However, they allowed a presumed father to commence a proceeding to adjudicate the parentage of a child *at any time* if (1) he was precluded from commencing a proceeding because of a mistaken belief that he was the child's father based on misrepresentations that led him to that conclusion, or (2) he did not live with the mother or engage in sexual intercourse with the mother during the probable time of conception.<sup>118</sup> Similarly, the 2011 amendments provided that an acknowledged father could commence a proceeding to challenge the father-child relationship *at any time* if (1) his challenge was based on fraud, duress, or material mistake of fact, and (2) the issue of parentage had not already been adjudicated.<sup>119</sup> The 2011 amendments are not only similar to the 1983 version of the law, but they expanded the devastating effects of false paternity by allowing the father-child relationship to be destroyed *at any time*—not merely within the first twenty years of the child's life.<sup>120</sup> For example, under the 2011 amendments, a forty-year-old child, who requires continuing support due to a birth defect, could lose his rights to that continuing support. The child's loss of support would be due to the destruction of a forty-year father-child relationship that was terminated on the basis of recently discovered false paternity.

### III. DETERRING INCIDENTS OF FALSE PATERNITY IN TEXAS

False paternity is a devastating situation for all parties involved<sup>121</sup> and is ultimately caused by the minimal amount of information needed initially to establish paternity by presumption or voluntary acknowledgement. Are you married to the mother of a child? Or alternatively, did you believe your girlfriend when she told you that she was pregnant and that the baby was yours? If so, then you are essen-

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115. See GREG ABBOTT, TEX. ATT'Y GEN., PAY YOUR CHILD SUPPORT TO AVOID PENALTIES 1 (2006) (stating that a court can order parents to provide financial support for their child and that the penalties for failing to follow the court order can include wage garnishment, liens against real property and personal property, suspension of a driver's license, and incarceration).

116. Act of June 17, 2011, 82nd Leg., R.S., ch. 1221 §§ 1–12, 2011 Tex. Sess. Law Serv. S.B. 502 (West) (current version at TEX. FAM. CODE ANN. §§ 160.302–160.609 (West 2008 & Supp. 2012)).

117. TEX. FAM. CODE ANN. § 160.607 (West Supp. 2012).

118. *Id.* § 160.607.

119. TEX. FAM. CODE ANN. § 160.308(a) (West Supp. 2012).

120. Compare *supra* text accompanying note 109, with *supra* text accompanying notes 117–19.

121. See *supra* Part II.B.

tially the child's father under the current laws of Texas—even if you are not. Approximately 85% of false paternity cases arise when paternity is established by a presumption or a voluntary acknowledgment.<sup>122</sup> Texas should seek to reduce the prevalence of false paternity by amending the laws surrounding the establishment of paternity—not simply by amending the laws surrounding the disestablishment of paternity. Focusing on the laws surrounding the establishment of paternity will allow Texas to effectively balance the interests of the children, the interests of the alleged and biological fathers, and the public-policy interests of the state.

#### A. *Confidential Request for Paternity Testing*

One solution that will help to reduce the prevalence of false paternity is to grant alleged fathers the right to confidentially obtain a paternity test (which matches the child's D.N.A. to the genetic markers of the alleged father and the mother) before paternity is legally established by presumption or voluntary acknowledgement. Generally, mothers have all of the relevant information regarding the *probability* of an alleged father's biological relationship to her child.<sup>123</sup> Mothers are able to estimate the probability of paternity based on their knowledge of the number of men with whom they engaged in sexual intercourse during the probable time of conception.<sup>124</sup> On the other hand, alleged fathers generally only have relevant information about the mere *possibility* of their biological relationship to a child. Alleged fathers generally only know whether or not *they* engaged in sexual intercourse with a mother during the probable time of conception.

Despite having all of the relevant information, mothers often will not disclose that information to alleged fathers<sup>125</sup> because, with disclosure, mothers would be revealing their secret of infidelity.<sup>126</sup> For example, in a 66,597-person survey, 80.26% of the women who admitted to infidelity stated that they never disclosed their infidelity to their significant other.<sup>127</sup> Thus, if a child was the product of an affair, up to 80.26% of alleged fathers may not have a reason to doubt their biological relationship to the child.<sup>128</sup>

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122. See *supra* text accompanying notes 11–24.

123. Martin Kasindorf, *Men Wage Battle on 'Paternity Fraud,'* USA TODAY (Dec. 2, 2002), [http://usatoday30.usatoday.com/news/nation/2002-12-02-paternity-usat\\_x.htm](http://usatoday30.usatoday.com/news/nation/2002-12-02-paternity-usat_x.htm) (stating that a woman generally knows who the father of her child is).

124. See *id.*

125. See *infra* text accompanying note 127.

126. See Bellis et. al, *supra* note 3, at 749.

127. See TRUTH ABOUT DECEPTION, [http://www.truthaboutdeception.com/surveys/4-cheating-spouse-survey/view\\_result.html](http://www.truthaboutdeception.com/surveys/4-cheating-spouse-survey/view_result.html) (last visited Feb. 18, 2013) (stating that 58% of spouses never learn of their significant other's infidelity, and of the 42% of spouses who did learn of their significant other's infidelity, 21% had to do their own investigation, 12% were informed by a third party, and 20% accidentally discovered the infidelity).

128. See *id.*

To make matters worse, mothers currently have the power to prevent an alleged father from obtaining the relevant information regarding his biological relationship to her child.<sup>129</sup> Under the laws of Texas, only a “parent” has the right to consent to his or her child’s medical care.<sup>130</sup> More importantly, only a “parent” has the right to withhold consent for his or her child’s medical care.<sup>131</sup> An alleged father is not legally a “parent” if no presumption of paternity has arisen, or he has not signed a voluntary acknowledgement of paternity.<sup>132</sup> Thus, a mother, alleging a man to be the biological father of her child, could refuse that man (absent a court order<sup>133</sup>) the opportunity to obtain a paternity test.<sup>134</sup> This is true even though a paternity test would reveal the precise information that an alleged father needs in order to determine if he is in fact the biological father of a child. Allowing alleged fathers to obtain a paternity test would be an equitable solution to reducing the prevalence of false paternity. It would give alleged fathers, in addition to mothers, access to vital information about paternity. This information would allow alleged fathers to make an informed decision that could ultimately prevent false paternity from ever occurring.

Allowing alleged fathers to confidentially request a paternity test would not violate a mother’s constitutionally protected interest in her right to withhold consent for the medical treatment of her child.<sup>135</sup> A mother’s constitutional interest in controlling the care and management of her children is guaranteed to her by the Due Process Clause of the Fourteenth Amendment,<sup>136</sup> but that right is not absolute.<sup>137</sup> It must be balanced against the competing legitimate interests of the state<sup>138</sup> and the best interest of the child.<sup>139</sup> Texas has a legitimate interest in the prevention of false paternity due to the devastating ef-

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129. See *infra* text accompanying notes 130–34.

130. *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003).

131. *Id.*

132. See TEX. FAM. CODE ANN. § 160.201(b) (West 2008) (stating that the father-child relationship can only be created by presumption, acknowledgement, adjudication, adoption, or consent to assisted reproduction).

133. TEX. FAM. CODE ANN. § 160.502(a) (West 2008).

134. TEX. FAM. CODE ANN. § 160.201(a) (stating that the parent-child relationship is created for mothers when they give birth to the child); see also *Miller*, 118 S.W.3d at 766 (stating that parents have the right to withhold consent for medical treatment).

135. See *infra* text accompanying notes 136–41.

136. Jason M. Merrill, Note, *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, 204 (2008); see also *Wright v. Alexandria Div. of Soc. Servs.*, 433 S.E.2d 500, 505 (Va. Ct. App. 1993) (citing *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972)).

137. *Wright*, 433 S.E.2d at 505 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26 (1981)).

138. *Id.*

139. *Id.*; see also *Holley v. Adams*, 544 S.W.2d 367, 371–73 (Tex. 1976).



fects false paternity can have on a family.<sup>140</sup> Additionally, the prevention of false paternity is in the best interest of the child because it helps to create a stable home for the child, and it helps to prevent the mental and emotional deterioration that children who are products of false paternity may face (such as depression, anxiety, and low self-esteem).<sup>141</sup> For these reasons, it is well within the powers of the State of Texas to terminate a mother's right to withhold her consent to a paternity test that has been requested by the man that she alleged to be the father.

In addition to being able to obtain a paternity test, the alleged father should be able to obtain the test *confidentially*. The confidentiality requirement will preserve the health of an alleged father's relationship with the mother in the event that he is in fact the biological father of her child.<sup>142</sup> Many men who may doubt that they are the biological father of a child will not contest paternity until their relationship with the mother fails.<sup>143</sup> Men do this in the interest of preserving the family unit, which will almost surely destruct if they contest paternity (and hence allege infidelity) upfront.<sup>144</sup> Attacks on the mother's character, especially if the claims turn out to be false, can take a toll on any serious relationship.<sup>145</sup> Texas should not force men to risk the destruction of a serious relationship in order to protect themselves from legal liability. Per the American Association of Blood Banks, approximately 25% of paternity tests reveal that the alleged father of a child *is not* the biological father.<sup>146</sup> The corollary of this is that 75% of paternity tests reveal that the alleged father of a child *is* the biological father.<sup>147</sup> Thus, if the state forces men to confront their wives or significant others with their doubts of paternity, 75% of otherwise stable relationships could be put at risk due to an unnecessary accusation of infidelity.<sup>148</sup> In one of hundreds of real-life examples, an online blogger asked his internet audience for advice on how to ask his pregnant wife for a paternity test after she gave birth

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140. *See supra* Part II.B.

141. *See supra* Part II.B.1; *see also* *Holley*, 544 S.W.2d at 371–72 (declaring that factors affecting the best interest of the child include the emotional and physical needs of the child now and in the future, the emotional and physical danger to the child now and in the future, and the stability of the home).

142. *See infra* text accompanying notes 143–53.

143. *See infra* text accompanying notes 144–53.

144. *See infra* text accompanying notes 145–53.

145. *Making Matters Worse*, TRUTH ABOUT DECEPTION, <http://www.truthaboutdeception.com/lying-and-deception/confronting-a-partner/making-matters-worse.html> (last visited Feb. 18, 2013) (stating that accusing a significant other of lying and deception can lead to negative, frustrating, and confrontational interactions that can take their toll on a relationship or marriage).

146. RELATIONSHIP TESTING PROGRAM UNIT, AM. ASS'N OF BLOOD BANKS, ANNUAL REPORT SUMMARY FOR TESTING IN 2010 3 (2010) (stating that in 2010, 24.87% of paternity tests excluded the alleged father as the biological father).

147. *See id.*

148. *See id.*; *see also supra* note 145.

without offending her.<sup>149</sup> The online blogger received the following comments:

I personally don't think there is a way [to ask for a paternity test without being offensive], because I find it offensive. . . . If [my husband] ask[ed] me for a paternity test I would have been very offended and angry . . . . [Y]ou can't accuse her of cheating and then expect her to smile and thank you. . . . [This accusation is] surely going to be painful and, regardless the results of the test, is likely to cause some long term resentment.<sup>150</sup>

This example demonstrates the discord that can occur in a relationship by asking for a paternity test. This is the exact type of discord that alleged fathers attempt to prevent by casting away doubts about paternity in the interest of preserving the relationship. Texas should not require alleged fathers to put an otherwise stable relationship at risk. Doing so could negatively affect the best interest of the child<sup>151</sup> and would go against the State's public policies of "securing stable homes"<sup>152</sup> and "preserving intact families."<sup>153</sup> The laws of Texas should be amended not only to allow alleged fathers the right to obtain a paternity test, but the right to obtain a paternity test *confidentially*.

#### B. Notification to Paternal Candidates

Another solution that will assist with reducing the prevalence of false paternity is to encourage a mother, soon after the birth of her child, to make a good faith effort to notify all paternal candidates of the possibility of paternity. A paternal candidate would include any man that the mother engaged in sexual intercourse with during the probable time of conception. This notice should afford paternal candidates a limited timeframe during which they can request a paternity test and, in the event of a positive test result, commence a legal proceeding to establish paternity. This process will help ensure that any claims of biological paternity are addressed early in the child's life and will have a minimal negative impact on the child's best interest.<sup>154</sup>

Similar to the confidentiality requirement discussed in Part III.A, a mother should also be provided a method of notifying paternal candidates in as confidential a manner as possible. The confidentiality requirement is especially beneficial if the mother is in a long-term

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149. *How to Bring Up a Paternity Test Without Offending My Wife?*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20120430071713AAmEmyt> (last visited Apr. 30, 2012).

150. *Id.*

151. Ronald R. Rindfuss & Jo Ann Jones, *One Parent or Two? The Intertwining of American Marriage and Fertility Patterns*, 6 SOC. FORUM 311, 312 (1991) (stating that single-parent households have fewer resources, which can negatively affect children).

152. *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994).

153. *Hodge v. Craig*, 382 S.W.3d 325, 344 (Tenn. 2012).

154. *See supra* Part II.B.I.

relationship with one of the paternal candidates.<sup>155</sup> Allowing mothers an option of confidentiality will help to preserve the state's interests in "securing stable homes"<sup>156</sup> and "preserving intact families."<sup>157</sup> Approximately 80% of mothers, when faced with uncertainty regarding the identity of the biological father of their child, will refrain from disclosing their doubts in the interest of concealing their infidelity and preserving the family unit.<sup>158</sup> While it may seem unjust for the state to assist a mother in concealing her acts of infidelity, it is important to weigh the rate of false paternity in committed relationships against the rate at which relationships dissolve due to infidelity. The rate of false paternity in committed relationships is approximately 3.3%.<sup>159</sup> However, the leading reason relationships fail is infidelity.<sup>160</sup> Over 50% of couples who discover infidelity in their relationships will eventually separate.<sup>161</sup> To put these statistics in perspective, assume that there are 100 women who are married, pregnant, and unsure of the identity of their unborn child's father. If the state were to force each of these women to disclose their doubts (and hence their infidelity) in a manner that was not confidential, over fifty of them could eventually become single mothers. However, false paternity will turn out *not* to be an issue for forty-seven of them thus making their disclosure and the subsequent destruction of their relationship unnecessary. Alternatively, if the state helps to prevent disclosure until after there has been a positive determination of false paternity, then only three women will be at risk of becoming a single parent. Studies show that children raised in two-parent households fare better than children raised in single-parent households.<sup>162</sup> Thus, the State's public policies of securing stable homes and preserving intact families are well served by allowing women the option of confidentiality while they try to ascertain the identity of their child's father.

To implement the confidentiality component, the law should refrain from requiring mothers to inform their significant other about the no-

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155. Bellis et al., *supra* note 3, at 752 (stating that false paternity, which is typically associated with covert infidelity, can lead to the breakdown of the relationship between the mother and the alleged father).

156. See *In re J.W.T.*, 872 S.W.2d at 191-92.

157. See *Hodge*, 382 S.W.3d at 344.

158. See *supra* text accompanying note 127; see also Laura Betzig, *Causes of Conjugal Dissolution: A Cross-Cultural Study*, 30 CURRENT ANTHROPOLOGY 654, 659-61 (1989).

159. Anderson, *supra* note 13, at 514, 516.

160. Betzig, *supra* note 158, at 659-61.

161. Robert J. Hughes, Jr., *Does Extramarital Sex Cause Divorce?*, HUFFINGTON POST (June 9, 2012, 4:40 AM), [http://www.huffingtonpost.com/robert-hughes/does-extramarital-sex-cau\\_b\\_1567507.html](http://www.huffingtonpost.com/robert-hughes/does-extramarital-sex-cau_b_1567507.html).

162. See generally Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 876 (2003) (stating that teenagers living with cohabiting stepparents often fare worse than teens living with two biological married parents and that teenagers living with single unmarried mothers are similar to teenagers living with cohabiting stepparents).

tifications they send to other paternal candidates. In addition, mothers should be given a viable method to send the notification to paternal candidates anonymously through a professional organization or a government agency. If the mother opts to remain anonymous, the notice should simply inform the paternal candidate about (1) the possibility of paternity and (2) how to obtain a paternity test. Lastly, the law should require these paternal candidates to obtain a paternity test *before* they attempt to legally assert their paternity.

In order to allow the paternal candidates to obtain a paternity test, the mother should be required to leave a sample of her child's genetic material at a laboratory for testing. If the paternal candidate opts to conduct a paternity test, the laboratory should then match his notification letter with the child's genetic material and perform the paternity test. The identity of the mother and her child should be revealed *only* if there is a genetic match between the paternal candidate and the child. The revelation of identity at this time will allow the biological father either to commence a lawsuit to legally establish paternity or to forever hold his peace.

### C. *Limiting the Use of Presumptions*

A final solution to reducing the prevalence of false paternity would be for Texas to limit the practice of using presumptions to establish paternity. The practice of using presumptions should be replaced with an enhanced system of voluntary acknowledgement. Incorporating the solutions discussed in Part III.A and Part III.B, the Voluntary Acknowledgement of Paternity form should be amended to establish the following: (1) the alleged father is aware of his right to request a confidential paternity test; (2) the alleged father is signing the form either with full knowledge of the paternity test results or with the intent to establish paternity regardless of the test results; and (3) the mother asserts that *if* there is more than one paternal candidate, she has made a good faith effort to notify them of the possibility of paternity. The practice of using presumptions to establish paternity should then be limited to two groups of men. The first group would include men who were married to the mother of the child during the probable time of conception, but died, became mentally incapacitated, or were otherwise unavailable before the birth of the child. The second group would include men who did not intentionally refuse to sign a voluntary acknowledgement of paternity, who cohabited with the child for the first two years of the child's life, and who represented to others that the child was his own. Limiting the use of presumptions to establish paternity, and replacing that practice with mechanisms that more accurately identify paternity, will help to reduce the prevalence of false paternity.

Furthermore, limiting the use of presumptions is warranted for many reasons. First, limiting the use of presumptions to establish pa-

ternity is a proactive solution to reducing the prevalence of false paternity. As this Comment has discussed, over 85% of cases of false paternity result when paternity is established by a presumption.<sup>163</sup> The effects of false paternity can be devastating to a family.<sup>164</sup> However, instead of focusing on remedying the cause of false paternity in order to prevent its subsequent effects, Texas law continually attempts to remedy the effects of false paternity by allowing for the disestablishment of paternity<sup>165</sup>—a *reactive* remedy that can devastate a family.<sup>166</sup> By limiting the use of presumptions to establish paternity, Texas would be taking a *proactive* approach that serves to prevent incidents of false paternity from ever arising.

Limiting the use of presumptions to establish paternity is also warranted by the advancement, availability, and viability of DNA testing over the past twenty-five years.<sup>167</sup> Pre-1987, the practice of using presumptions to establish paternity was logical because paternity testing during that time was wholly unreliable; paternity tests would return positive matches with the wide range of only 18% to 97% accuracy.<sup>168</sup> This means that in a city with a population of 100,000 men, a pre-1987 paternity test would identify anywhere from 2,857 to 82,000 of those men as the father of a single child. Thus, a mother that was guilty of infidelity could not scientifically confirm, with almost 100% certainty, the identity of the biological father of her child.<sup>169</sup> Similarly, a man that had doubts about his biological relationship to a child also had no way to confirm, with certainty, his paternity.<sup>170</sup> Therefore, during this period in history, it was necessary to make reasonable inferences regarding paternity; it was necessary to make *presumptions*. However, science and technology have evolved,<sup>171</sup> and an advanced form of paternity testing was made commercially available to the public in

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163. *See supra* Part II.A.

164. *See supra* Part II.C.

165. *See supra* Part II.C.

166. *See supra* Part II.B.

167. *See infra* text accompanying notes 168–74.

168. Anderson, *supra* note 13, at 513 (stating that the recent science surrounding paternity testing is able to determine paternity with 99.99% accuracy, whereas pre-1985 paternity tests could determine paternity with only 18% accuracy if based solely on HLA testing (i.e., blood type testing)); *see also* Richard Lane Schnake, *Blood Test Evidence in Disputed Paternity Cases: Unjustified Adherence to the Exclusionary Rule*, 59 WASH. U. L. REV. 977, 986 (1981) (stating that in 1981, HLA or enzyme-protein testing combined with accepted red cell antigen testing can establish paternity with 97% accuracy); Elizabeth S. Panke, *DNA Paternity Tests: Technology is Outpacing the Law*, FAM. L. NEWSL. 10–11, available at <http://www.genetica.com/GeneticaWebV2.nsf/article.pdf> (stating that in the 1980s and 1990s paternity tests were limited to confirming paternity with 95% to 99% certainty, but today's DNA technology allows for genetic testing to be accurate to levels significantly above 99%).

169. *See supra* note 168.

170. *Id.*

171. *Id.*

1987.<sup>172</sup> Post-1987 paternity testing has become more reliable and more affordable as the years have progressed.<sup>173</sup> Paternity tests currently cost less than \$100 and return positive matches with 99.999% accuracy.<sup>174</sup> Using the above example, this means that in the same city with a population of 100,000 men, a post-1987 paternity test would identify only one of those men as the father of a single child. Thus, paternity testing is now a viable method of confirming or negating paternity and a method that can quickly eviscerate any issues of doubt about paternity. The advancement, availability, and viability of paternity testing over the past quarter of a century nearly eliminates the need to establish paternity by presumptions.

Limiting the use of presumptions to establish paternity is also warranted because of society's movement away from the taboo of illegitimacy.<sup>175</sup> Texas's practice of using presumptions to establish paternity is based on an English law that aimed to prevent children from being labeled as "illegitimate."<sup>176</sup> The label of illegitimacy could negatively affect society's perceptions of a child and the child's legal rights (such as the right to inherit from his or her father).<sup>177</sup> However, society has progressed,<sup>178</sup> and the label of illegitimacy no longer carries with it the stigmatizing effects that it once used to.<sup>179</sup> This is demonstrated by Texas's discontinuance of the term "illegitimate" in the Texas Family Code.<sup>180</sup> Also, the Texas Family Code now affords children born out of wedlock the same securities that it affords children that are born into a marital union.<sup>181</sup> Limiting the practice of using presumptions to establish paternity is warranted when the public policies that supported the creation and use of presumptions are now nearly moot.

Lastly, limiting the use of presumptions to establish paternity will not hinder Texas from achieving its economic policy objectives. Texas has a strong economic interest in obtaining a Paternity Establishment Performance (PEP) rate for births to unwed mothers that is greater than 90%. A PEP rate of 90% or greater is required in order for Texas to ensure that it will receive the maximum amount of federal funding for its Temporary Assistance for Needy Families ("TANF")

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172. See WAMBAUGH, *supra* note 3, at 83, 202.

173. See *supra* note 168; see also Alberto Cremonesi, *DNA Tests Prove Justice Has Failed*, COMMON DREAMS (Sept. 21, 2006), <http://www.commondreams.org/headlines/06/0921-08.htm> (stating that "[u]ntil the late 1990s, DNA testing . . . ran into the thousands of dollars"); see also Henry, *supra* note 2, at 52 (explaining that paternity tests can currently be obtained for less than \$100).

174. See *supra* note 173.

175. See *infra* text accompanying notes 176–81.

176. *In re J.W.T.*, 872 S.W.2d 189, 191–92 (Tex. 1994).

177. *Id.* at 191, 193.

178. *Id.* at 193–94.

179. *Id.*

180. *Id.*

181. See *id.* (stating that an illegitimate child is now able to obtain support from its biological father and is able to seek recovery for the loss of its biological father).

program.<sup>182</sup> Additionally, state and federal laws require TANF recipients to assign their child-support benefits, whether realized or not, to the state in order to provide additional funding for the TANF program.<sup>183</sup> In order for Texas to obtain and enforce a judgment for the child-support benefits that have been assigned to it, it must first legally establish the paternity of the fathers it wants to collect from.<sup>184</sup> Limiting the practice of establishing paternity by presumptions will not hinder Texas's ability to achieve a 90% PEP rate for births to unwed mothers. Thus, Texas will still be able to obtain the maximum amount of federal funding for its TANF program. Texas's current PEP rate for births to unwed mothers is 94.69%.<sup>185</sup> Approximately 64.70% of paternities are established by voluntary acknowledgement.<sup>186</sup> Considering that the solutions presented in this Comment further protect the rights of alleged fathers,<sup>187</sup> Texas could possibly experience an increase in the percentage of paternities that are established by voluntary acknowledgement. The remaining 29.99% of paternities are established by adjudication.<sup>188</sup> The use of presumptions to establish paternities for births to unwed mothers is virtually nonexistent.<sup>189</sup> Therefore, limiting the practice of establishing paternity by presumptions will not affect Texas's ability to maintain a 90% PEP rate.

#### IV. REMEDYING INCIDENTS OF FALSE PATERNITY IN TEXAS

Thus far, this Comment has presented proactive solutions that significantly help to reduce incidents of false paternity from ever arising. However, it is inevitable that, in some cases, issues of false paternity will still arise. Under the solutions proposed in this Comment, false paternity may still arise when a man is either (1) presumed to be the father of a child or (2) presumed and subsequently adjudicated to be the father of a child. The question that remains is how Texas should remedy specific incidents of false paternity after-the-fact. In develop-

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182. ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., FY 2005 ANNUAL PERFORMANCE PLAN, REVISED FY 2004 PERFORMANCE PLAN, AND FY 2003 ANNUAL PERFORMANCE REPORT FOR THE GOVERNMENT PERFORMANCE AND RESULTS ACT OF 1993 M-54 (2004) ("Legislation requires states to establish paternity for 90% of children born out-of-wedlock, an ambitious goal that stretches states to perform at the highest possible level."); *see also* 42 U.S.C. § 652(g) (2006) (stating that a state substantially complies with the requirements needed to obtain a TANF grant from the federal government if the state's paternity establishment percentage for children born out-of-wedlock equals or exceeds 90%).

183. 42 U.S.C. § 608(a)(3) (2012).

184. *See* TEX. FAM. CODE ANN. § 154.001(a) (West 2008) (stating that a court may order either or both parents to support a child).

185. FY 2010 REPORTS, *supra* note 16, at TABLE P-35.

186. *Id.*

187. *See supra* Part III.A.

188. *See* FY 2010 REPORTS, *supra* note 16.

189. *Id.*

ing a solution, it is important to consider the numerous consequences of false paternity<sup>190</sup> and ensure that no individual person is left to shoulder the consequences on his or her own.

While this Comment advocates against the disestablishment of a nurtured father-child relationship, it also advocates against requiring falsely presumed or falsely adjudicated fathers to shoulder the financial obligation of supporting a child that is not their biological descendant (contrary to their original belief). Any viable solution to remedying false paternity after-the-fact must equally balance the child's best interest with the rights of the presumed father.

In order to ensure that nurtured father-child relationships are not destroyed in an untimely fashion, falsely presumed and falsely adjudicated fathers should have four years from the child's date of birth to bring a suit to terminate the father-child relationship. After the four-year statute of limitations has expired, falsely presumed and falsely adjudicated fathers should have a remedy available to them if they subsequently discover that they were defrauded into believing that they were the biological father of the child. However, this remedy should not destroy the father-child relationship. An example of an appropriate remedy was recently presented in *Hodge v. Craig*, a Tennessee case decided in October 2012.<sup>191</sup>

In *Hodge v. Craig*, Chadwick Craig discovered seven years after his divorce from Tina Hodge that Kyle Craig was not his biological son.<sup>192</sup> When Hodge first informed Craig that she was pregnant, he asked her if she was sure that he was the child's father.<sup>193</sup> Hodge responded that the child could not have been fathered by anyone else.<sup>194</sup> Relying on this information, Craig married Hodge.<sup>195</sup> Craig and Hodge also decided that they did not want to have any more children, causing Craig to undergo a vasectomy.<sup>196</sup> After nine years of marriage, Hodge filed for divorce due to irreconcilable differences.<sup>197</sup> The divorce decree incorporated the couple's marital dissolution agreement and adjudicated Craig as the father of Kyle.<sup>198</sup> Seven years later, Craig discovered that he was not Kyle's biological father.<sup>199</sup> Craig sued Hodge for \$150,000 in compensatory damages and \$150,000 in punitive damages.<sup>200</sup> The trial court held that Hodge had "purposefully defrauded [Craig] into believing Kyle was his child" and that her conduct

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190. *See supra* Part II.B.

191. *Hodge v. Craig*, 382 S.W.3d 325, 330–32 (Tenn. 2012).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*



amounted to “fraud” and “intentional misrepresentation.”<sup>201</sup> The trial court awarded Craig \$134,877.90.<sup>202</sup>

After a series of appeals, the Supreme Court of Tennessee held that a former spouse of a child’s mother should not be prevented from pursuing common-law claims against the child’s mother if she intentionally misrepresented the identity of the child’s biological father.<sup>203</sup> The Supreme Court of Tennessee also explained that its decision did not result in an impermissible retroactive modification of a child support obligation because (1) Craig did not have a legally enforceable obligation to pay child support at the time of the judgment, (2) Craig did not have any child-support arrearages, and (3) Craig was never delinquent in paying child support during the time when he was obligated to do so.<sup>204</sup> The Supreme Court of Tennessee essentially held that instead of a retroactive modification of child support, the relief granted was actually an award for damages in an intentional misrepresentation action, and it merely considered the amount of child support paid in calculating damages.<sup>205</sup> Therefore, the Supreme Court of Tennessee remanded the case back to the trial court with directions to award damages to Craig based on child support, medical expenses, and insurance premiums.<sup>206</sup>

Similar to Tennessee, Texas should allow falsely presumed and falsely adjudicated fathers to pursue independent common law claims against a child’s mother if (1) the mother intentionally misrepresented to him that he was her child’s biological father, and (2) the falsely presumed or falsely adjudicated father is no longer under a duty to pay child support. By allowing a falsely alleged father to pursue an independent common law claim, Texas would effectively balance the interests of the child, the interests of the falsely alleged father, and the public policies of the state. The father-child relationship would be preserved (which serves the best interest of the child), the falsely alleged father would be compensated for the mother’s fraudulent representations, and Texas would not go against TANF regulations by permitting an impermissible retroactive modification of child support.

## V. CONCLUSION

In Texas, false paternity affects thousands of children born in the state each year and often has devastating legal and social effects on the child, the alleged father, the biological father, and the mother. Texas should seek to reduce the prevalence of false paternity by

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201. *Id.*

202. *Id.*

203. *Id.* at 346.

204. *Id.* at 348.

205. *In re Christopher A.D.*, M2010-01385-COA-R3JV, 2012 WL 5873571 (Tenn. Ct. App. Nov. 20, 2012).

206. *Hodge*, 382 S.W.3d at 348.

amending the laws surrounding the *establishment* of paternity; not simply by amending the laws surrounding the *disestablishment* of paternity. Focusing on the laws surrounding the establishment of paternity would allow Texas to effectively balance the interests of the child with the interests of the alleged father, the biological father, and the public policy interests of the state.

There are many changes Texas should make to the laws surrounding the establishment of paternity. First, Texas should limit the use of presumptions to two groups of men. The first group would be men who were married to the mother of the child during the probable time of conception, but died, became mentally incapacitated, or were otherwise unavailable before the birth of the child. The second group would include men who did not intentionally refuse to sign a voluntary acknowledgement of paternity, who cohabited with the child during the first two years of the child's life, and who represented to others that the child was his own. Second, Texas should allow alleged fathers, who do not currently have the legal rights of a parent, to confidentially obtain a paternity test. Additionally, if alleged fathers decline their right to request a confidential paternity test, then they should be estopped in the future from either trying to disestablish paternity or from trying to hold the mother liable under a common law claim. Third, Texas should encourage mothers to make a good-faith effort to notify all paternal candidates of their possibility of paternity. Lastly, Texas should permit falsely presumed and falsely adjudicated fathers to pursue a common law claim against the mother in limited circumstances.

The overall combined effects of the solutions proposed by this Comment serve to greatly reduce the prevalence of false paternity. Furthermore, when incidents of false paternity do arise, the solutions proposed in this Comment serve to protect the best interest of the child, prevent injustices against alleged and biological fathers, and uphold the public policies of the state.