

# FAMILY LAW BULLETIN

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## WHO'S YOUR DADDY? COMPARING NORTH CAROLINA'S PATERNITY LAW AND THE UNIFORM PARENTAGE ACT

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Because the parent-child relationship is a legal, as well as a genetic and social, relationship, state law has dealt with issues involving the determination of parentage, the rights and obligations of parents with respect to their children, and the rights of children with respect to their parents for more than two hundred years. But recent social, scientific, and legal developments—including the higher prevalence of nonmarital births,<sup>1</sup> the ability to determine parentage through genetic testing,<sup>2</sup> the recognition of legal rights of nonmarital children and their fathers,<sup>3</sup> new techniques for assisted reproduction, and the visibility of same-sex couples who are or want to be parents—have forced legislators and courts to reexamine how the law determines whether an individual is the parent of a child and what legal rights and obligations arise as the result of the parent-child relationship.

This *Family Law Bulletin* describes how North Carolina's statutory and case law addresses legal issues regarding parentage in light of these recent social, scientific, and legal developments and compares North Carolina's law regarding parentage with the recently revised Uniform Parentage Act.



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## Historical Overview of North Carolina Law Regarding Parentage

North Carolina's first parentage statute, the "bastardy law," was enacted in 1741.<sup>4</sup> Under this law, a man who the court determined to be the father of a child born to an unmarried woman could be "charged with the maintenance" of his child in an amount determined by the county court, required to post a secured bond to prevent the child from becoming a public charge, and imprisoned if he failed to support the child as required by the court.<sup>5</sup>

Legislation allowing the putative father of an illegitimate child to legitimate the child through a legal proceeding was first enacted in 1829 and, with minor amendments over the years, remains a part of North Carolina's paternity law.<sup>6</sup>

In 1933, the General Assembly repealed the 1741 bastardy law and replaced it with a statute (now codified as Article 1 of Chapter 49 of the General Statutes) making a father's or mother's failure to support his or her illegitimate child a misdemeanor and allowing a court to determine the paternity of an illegitimate child in connection with criminal nonsupport proceedings.<sup>7</sup>

In 1945 the General Assembly enacted legislation allowing a court, on motion of the defendant in a criminal nonsupport proceeding involving an illegitimate child, to order blood grouping tests of a child, the child's mother, and the defendant putative father.<sup>8</sup> At first, the results of blood grouping tests were admissible as evidence that a putative father was not the biological father of a child, but could not conclusively exclude his paternity, much less establish, either genetically or legally, that he was the child's father.<sup>9</sup> The law was amended in 1975 to provide that the results of a blood grouping test excluding paternity, if consistent with other blood grouping tests, were conclusive evidence that the alleged father was not the child's father.<sup>10</sup> In 1979, G.S. 8-50.1 was amended to allow the introduction of blood grouping tests to establish or disprove parentage in any civil action in which the question of parentage arises.<sup>11</sup> The statute was last amended in 1993 and 1994 to implement federal requirements regarding genetic paternity testing and establish a rebuttable presumption of paternity when genetic marker tests indicate a probability of paternity of at least 97 percent.<sup>12</sup>

Legislation creating a civil action to establish the paternity of children born out of wedlock was enacted in 1967 and, as amended, is now codified as Article 3 of Chapter 49 of the General Statutes.<sup>13</sup> North Carolina's court of appeals and supreme court

subsequently held that this statute and the statute authorizing legal proceedings to legitimate an illegitimate child could be used by a putative father to establish that he, rather than the mother's husband, is the biological father of a child whose mother was married at the time the child was conceived or born.<sup>14</sup>

In 1975 the General Assembly enacted legislation (G.S. 110-132) allowing a judicial determination of the paternity of an illegitimate child based on a voluntary acknowledgement of parentage by the child's parents.<sup>15</sup> That law was amended in 1997 and 1999 in response to federal paternity and child support requirements enacted as part of the 1996 federal welfare reform law.<sup>16</sup>

Before 1981, the father of a legitimate child was primarily responsible for the child's support and the child's mother was secondarily, or conditionally, responsible for supporting the child.<sup>17</sup> Under a 1981 amendment to G.S. 50-13.4, a child's father and mother are now jointly and primarily responsible for the child's support.<sup>18</sup>

In June, 2003, the North Carolina Supreme Court held that the common law presumption favoring the mother of an illegitimate child over the child's father with respect to the child's custody was abrogated by the 1977 amendment to G.S. 50-13.2(a).<sup>19</sup>

Today many, but not all, of North Carolina's statutes governing parentage are codified in Chapter 49 of the General Statutes (which still carries the title "Bastardy"). Statutes related to paternity, parental rights and obligations, and the rights of children vis a vis their parents, however, also are found in other parts of the General Statutes, including:

- G.S. 8-50.1 (genetic testing to determine parentage);
- G.S. 110-132 and G.S. 130A-101 (voluntary acknowledgement of parentage);
- G.S. 7B-506 (locating unknown or missing parents in juvenile proceedings);
- G.S. Ch. 7B, Art. 11 (termination of parental rights);
- G.S. Ch. 48 (adoption);
- G.S. Ch. 52C (interstate proceedings to determine parentage);
- G.S. Ch. 50 (child custody, visitation, and support);
- G.S. 49A-1 (parentage of children born as a result of artificial insemination);
- G.S. Ch. 29, Art. 4 through 6 (intestate succession by, through, and from adopted, legitimate, and illegitimate children).

And some aspects of state law regarding parentage (for example, the presumption that a child conceived by or

born to a married woman is the legitimate child of the woman's husband) are addressed by case law, rather than by statute.

In short, North Carolina's current law regarding parentage is a hodge-podge of case law and statutes enacted and amended piece-meal over a period of more than one hundred years, rather than a modern, comprehensive, uniform approach to legal issues regarding parentage.

## The Uniform Parentage Act

The Uniform Parentage Act (UPA) was first adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1973. As of December, 2000, nineteen states had enacted the 1973 UPA and several other states had enacted significant portions of the 1973 UPA.<sup>20</sup>

In 1997 NCCUSL established a drafting committee to revise the 1973 UPA. NCCUSL approved a revised version of the UPA in 2000 and, in response to objections raised at the 2001 meeting of the American Bar Association, amended the 2000 UPA in November, 2002.<sup>21</sup>

As of October 1, 2003, this latest version of the UPA had been enacted in four states (Delaware, Texas, Washington, and Wyoming) and legislation to enact the UPA was being considered by the state legislatures in Minnesota and New Jersey.<sup>22</sup>

In brief, the UPA

- addresses the determination of a child's maternity as well as the child's paternity;
- addresses the determination of parentage with respect to both marital and nonmarital children;
- treats marital and nonmarital children equally with respect to their legal status and rights;
- presumes that a mother's husband is the father of her child when the child is conceived or born during the parties' marriage;
- recognizes the availability of state-of-the-art genetic testing to determine parentage;
- contains detailed provisions related to voluntary acknowledgment of parentage;
- limits the time within which an established parent-child relationship may be contested;
- adopts a "preponderance of the evidence" standard in civil actions to determine parentage;
- is consistent with paternity requirements included in the federal child support enforcement law;

- is consistent with the principles and requirements of the Uniform Interstate Family Support Act (UIFSA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);
- includes provisions governing parentage of children born as the result of assisted reproduction; and
- includes optional provisions allowing the judicial approval of gestational (surrogate parent) agreements.

## Parentage, Maternity, and Paternity

### Parentage Under North Carolina Law and the UPA

The term "parentage" encompasses both the father-child relationship (paternity) and the mother-child relationship (maternity).<sup>23</sup>

Unlike North Carolina law, the UPA provides a comprehensive "one-stop menu" describing all of the ways in which the parent-child relationship may be established.<sup>24</sup> The UPA also expressly provides that, unless parental rights are terminated, a parent-child relationship established under the act applies for all purposes, except as otherwise specifically provided by other state laws.<sup>25</sup>

Neither North Carolina law nor the UPA currently recognizes a parent-child relationship in which two women, or two men, assume shared responsibility as the parents of a child. Unmarried (heterosexual or homosexual) couples cannot adopt a child in North Carolina, and the state's statute governing the status of children born as a result of artificial insemination applies only to married heterosexual couples.<sup>26</sup> Similarly, references to "parents" in the UPA are to "a man and a woman" only and issues "relating to same-sex couples were left to another day."<sup>27</sup>

### Maternity Under North Carolina Law and the UPA

Historically, state laws regarding parentage have focused almost exclusively on the issue of paternity (whether a particular man is the father of a child) while ignoring the question of maternity (whether a woman is the mother of a child). The reason for this is simple: except in the case of adopted children, the law implicitly considered a child's mother to be the woman who gave birth to the child and, with rare exceptions, the identity of the woman who gave birth to a child

was known at the time of the child's birth. The child's "birth mother" was also the child's "genetic or biological mother" and usually was the child's "social mother."

In cases involving infants abandoned at birth, however, identity of the child's birth mother may not be known unless the child's "putative mother" can be identified and her maternity of the child established through genetic testing or other competent evidence. Moreover, recent social and scientific developments have required legislators and courts to pay attention to other issues involving the maternity of children. For example, when a child is born to a woman as a result of implanting a fertilized egg donated by another woman in her uterus, the child's birth mother is not the child's genetic mother. Similarly, a "surrogate mother" who gives birth to a child pursuant to a surrogacy or gestational agreement is the child's birth mother but may not be the child's genetic mother and, unless the agreement is breached or voided, will not be the child's social mother.

Like those of most states, North Carolina's parentage laws fail to address maternity explicitly and only rarely are phrased in terms of parentage generally (paternity and maternity) rather than paternity exclusively.

By contrast, the UPA

1. expressly provides that its provisions regarding determination of paternity also govern, to the extent applicable, determinations of maternity;<sup>28</sup>
2. expressly provides that the mother-child relationship may be established between a woman and a child by the woman's giving birth to the child (except in cases involving valid surrogacy or gestational agreements), through an adjudication of the woman's maternity, or by the woman's adoption of the child;<sup>29</sup>
3. includes provisions governing the determination of maternity as well as paternity for children born as a result of assisted reproduction;<sup>30</sup> and
4. includes optional provisions governing the determination of maternity and paternity for children born pursuant to surrogacy or gestational agreements.<sup>31</sup>

The UPA is thus a "true" parentage law in the sense that it expressly and comprehensively addresses issues involving maternity as well as paternity.<sup>32</sup>

### **Paternity Under North Carolina Law and the UPA**

Most cases involving disputed parentage involve disputes regarding paternity, not maternity.

"Paternal ambiguity," however, is a relatively recent legal problem.

Until recently, the overwhelming majority of children were born to married couples within the context of a "traditional" family. A woman's husband was presumed by law to be the father of the children born to her during the course of their marriage, and there were valid factual and social bases justifying this presumption. In almost all cases, the mother's husband was, in fact, the child's genetic father.<sup>33</sup> And perhaps more importantly, the mother's husband was almost always the child's social, as well as genetic, father—that is, a man who held himself out as the child's father, lived with the child and the child's mother, provided a significant portion of the child's financial support, provided at least some direct care for the child, and shared with the child's mother responsibility for making major decisions regarding the child's care.<sup>34</sup> The legal paternity of legitimate children therefore usually was consistent with their social and (presumed) biological paternity.

By contrast, illegitimate children (that is, children born to unmarried women), usually had no social father and, before recent advances in genetic paternity testing, conclusively identifying their genetic fathers in a legal proceeding was often problematic.<sup>35</sup> As a result, illegitimate children often had no "legal father" despite the law's attempt to provide mechanisms for determining the paternity of illegitimate children. This situation was certainly a significant problem for illegitimate children and their mothers. But it was not a significant legal problem as long as the prevalence of out-of-wedlock births remained relatively low and scientific tools to determine a child's biological father were unavailable.

Today, genetic paternity testing makes it possible to determine whether the putative father of a child born out of wedlock (or, indeed, the presumed father of a child born in wedlock)<sup>36</sup> is or is not the child's biological father. At the same time, changing social conditions (including increased number of divorces and out-of-wedlock births) and scientific developments (specifically, assisted reproduction) have increased the number of instances in which a child's biological father is not his or her social father. And other social and scientific developments (nonmarital cohabitation, remarriage and blending of families after divorce, kinship care, and assisted reproduction) increased the possibility that a man may be a child's social father regardless of whether he is the child's biological father.

State paternity laws, therefore, have been pulled in two directions: determining legal paternity based primarily on biological paternity through genetic

testing versus determining legal paternity based on social, rather than biological, relationships. The first direction is evidenced by state laws allowing the establishment (or disestablishment) of paternity through genetic paternity testing and the creation of state child support enforcement programs whose missions include establishing the paternity of children born out of wedlock.<sup>37</sup> The second direction is evidenced by state statutes and case law that, on the one hand, limit the parental rights of biological fathers who fail to establish an ongoing social, familial, or parental relationship with their children, or, on the other hand, limit an individual's right to contest paternity when a man is a child's social father but may not be the child's biological father.<sup>38</sup>

As discussed in more detail below, both North Carolina law and the UPA attempt, in different ways, to chart a path for determining the legal paternity of children that lies somewhere between the poles of genetic and social paternity.

## Legitimate and Illegitimate Children

Historically, the law classified children as either "legitimate" or "illegitimate" based on their parentage and imposed significant legal disabilities on "illegitimate" children.

### Legitimacy and Illegitimacy Under North Carolina Law

North Carolina law still retains the legal classifications of legitimate and illegitimate children, but changing social mores and recent legal developments have removed most (though not all) of the legal disabilities based on illegitimacy and blurred the legal distinctions between legitimate and illegitimate children.<sup>39</sup>

Under North Carolina law, a child who is born to a married woman is presumed to be born in wedlock and is presumed to be the legitimate natural child of the mother and her husband.<sup>40</sup> An adopted child has the same legal status as if he or she were the legitimate natural child of his or her adoptive parents.<sup>41</sup>

Under North Carolina law, a child who is born out of wedlock is considered illegitimate. A child is born out of wedlock if (a) his or her mother was not married at the time the child was conceived or born, or (b) his or her mother was married at the time the child was conceived or born but the mother's husband at the time the child was conceived or born is not the child's biological father.<sup>42</sup>

An illegitimate child, however, may be "legitimated" through a legal proceeding initiated by the child's putative father or through the reputed father's marriage to the child's mother after the child's birth.<sup>43</sup> When an illegitimated child is legitimated, the child has the same legal rights and status as a legitimate child.<sup>44</sup>

Establishing the paternity of an illegitimate child in a civil action brought pursuant to G.S. 49-14 does not, strictly speaking, legitimate the child.<sup>45</sup> But when a judgment of paternity is entered, the legal rights and duties of the child's mother and father with respect to custody and support are the same as if the child were their legitimate child and the child has a qualified right to inherit property from and through his or her father as well as being treated as a legitimate child with respect to intestate succession from and through his or her mother.<sup>46</sup>

### Treatment of Marital and Nonmarital Children Under The UPA

In contrast to North Carolina law, the UPA provides:

A child born to parents who are not married to each other has the same rights under law as a child born to parents who are married to each other.<sup>47</sup>

The UPA, therefore, effectively abolishes the legal distinction between legitimate and illegitimate, or marital and nonmarital, children.

From a legal and social policy perspective, this is "one of the most significant substantive provisions of the Act, reaffirming the principle that regardless of the marital status of the parents, children and parents have equal rights with respect to each other."<sup>48</sup>

### Legal Presumptions Regarding Parentage

#### Presumption of Paternity of Child Born During Marriage

##### *North Carolina Law*

Case law in North Carolina provides that the husband of a woman who conceives or gives birth to a child during her marriage is presumed to be the child's father.<sup>49</sup> Case law also establishes a rebuttable presumption that a child's conception occurs ten lunar months (280 days) before the child's birth.<sup>50</sup>

The presumption of paternity arising from the conception or birth of a child to a married woman also applies with respect to children conceived or born

during a bigamous or voidable marriage, regardless of whether the marriage is subsequently annulled.<sup>51</sup>

Although the law presumes that a mother's husband is the father of a child conceived or born during marriage, the presumption may be rebutted by evidence proving that the mother's husband is not the child's biological father. Unlike the UPA, however, North Carolina law allows the presumption to be rebutted by testimony or other evidence regarding the husband's sterility, impotence, or lack of sexual access to his wife at the time of the child's conception, as well as genetic test results proving that he could not be the child's father.<sup>52</sup>

And unlike the UPA, North Carolina law does not limit the time within which a child, mother, putative father, or presumed father may bring a legal action seeking to rebut the presumption of paternity arising from the conception or birth of a child during marriage.<sup>53</sup>

North Carolina law generally recognizes a putative father's standing to bring an action seeking a determination that he is the biological father of a child born to a married woman.<sup>54</sup> Case and statutory law, however, may preclude him from obtaining an order for genetic testing to determine whether he is the child's biological father.<sup>55</sup> And case law prevents a child's mother from claiming, in a child custody proceeding, that her husband or former husband is not the father of a child born while she was married to him unless another man has formally acknowledged that he is the child's biological father or has been adjudicated to be the child's biological father.<sup>56</sup>

### ***The UPA***

Section 201(b)(1) of the UPA provides that an un rebutted presumption of a man's paternity of a child establishes the legal relationship of father-child between the man and the child.

Section 204 of the UPA provides that a man is presumed to be the father of a child if

1. he and the child's mother are married to each other and the child is born during their marriage;
2. he and the child's mother were married to each other and the child is born within 300 days after their marriage is terminated by death, annulment, declaration of invalidity, or divorce,<sup>57</sup> or
3. before the child's birth, he and the child's mother married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during their marriage or

within 300 days of its termination by death, annulment, declaration of invalidity, or divorce.<sup>58</sup>

Under the UPA, legal presumptions regarding the paternity of children born or conceived during marriage may be rebutted only by an adjudication of the child's paternity in a proceeding brought under section 601 of the UPA.<sup>59</sup>

A proceeding brought by a presumed father, a child's mother, or another individual to adjudicate the paternity of a child who has a presumed father must be commenced within two years of the child's birth unless a court determines that

1. the presumed father and the child's mother did not cohabit or engage in sexual intercourse with each other during the probable time of conception, *and*
2. the presumed father never openly treated the child as his own.<sup>60</sup>

In order to rebut a presumption of paternity established under UPA § 204, a party must "disprove" the presumed father's paternity through admissible results of genetic testing excluding the presumed father as the child's biological father or identifying another man as the child's probable biological father.<sup>61</sup> A court, however, may deny a motion seeking an order for genetic paternity testing if, considering the child's best interests, the court determines that

1. the presumed father's or mother's conduct estops him or her from denying the presumed father's paternity; *and*
2. it would be inequitable to disprove the father-child relationship between the child and the presumed father.<sup>62</sup>

### **Presumption of Paternity of Child Born Out of Wedlock**

#### ***North Carolina Law***

North Carolina law establishes two legal presumptions regarding the paternity of an illegitimate child.<sup>63</sup>

First, G.S. 49-12 provides that when the mother and reputed father of an illegitimate child marry after the child's birth, the child will be deemed to be the legitimate child of the mother and her husband to the same extent as if the child had been born during their marriage. A man is the "reputed" father of a child if he and the child's mother consider or regard themselves to be the child's biological parents regardless of whether they hold themselves out as such to the community, their families, or the child.<sup>64</sup> When a child is legitimated under G.S. 49-12, the state's vital

statistics office is required, upon presentation of the marriage certificate, to issue a new birth certificate showing the mother's husband as the child's father.<sup>65</sup>

G.S. 49-12, therefore, not only deems a child to be legitimate when the child's mother and reputed father marry but also creates a legal presumption that the child's reputed father is her biological father, just as a mother's husband is presumed to be the biological father of a child born to his wife during their marriage. In fact, the presumption of paternity under G.S. 49-12 appears to be even stronger than the common law presumption of paternity and legitimacy regarding children born during marriage. As discussed above, the presumption that a mother's husband is the biological father of a child born to his wife during their marriage may be rebutted by clear and convincing evidence that he is not the child's biological father.<sup>66</sup> By contrast, a man who is the reputed father of a child and who marries the child's mother *and* applies for a new birth certificate under G.S. 49-13 identifying him as the child's father may be estopped from denying his paternity of the child.<sup>67</sup>

Second, G.S. 130A-101(f) provides that a man who executes an affidavit acknowledging that he is, or swearing that he believes he is, the biological father of a child conceived by and born to an unmarried woman will be presumed to be the child's biological father if

1. the child's mother executes an affidavit stating that the man is the child's biological father and consenting to his assertion of paternity; and
2. neither the mother nor the putative father rescind his or her acknowledgment in the manner provided under G.S. 110-132.<sup>68</sup>

When the mother and putative father of an illegitimate child execute an acknowledgment of paternity under G.S. 130A-101(f) before an original birth certificate has been issued, the paternity acknowledgment may be filed with the state's vital statistics office and the child's birth certificate will identify the man who executed the acknowledgment as the child's father.<sup>69</sup> A certified copy of the paternity acknowledgment is admissible in any action to establish the child's paternity.<sup>70</sup>

### ***The UPA***

The UPA establishes two legal presumptions<sup>71</sup> that apply with respect to the paternity of a child whose mother is not married when the child is conceived or born.<sup>72</sup>

First, section 204(a)(4) of the UPA<sup>73</sup> provides that a man is presumed to be the father of a child if

1. he and the child's mother marry each other in apparent compliance with law *after* the child's birth;

2. he voluntarily asserts his paternity of the child; *and*
3. (a) his assertion of paternity is included in a record filed in the state agency that maintains birth records; or (b) he agreed to be named, and is named, as the child's father on the child's birth certificate; or (c) he promised in a record to support the child.<sup>74</sup>

Second, section 204(a)(5) of the UPA provides that a man is presumed to be the father of a child if, for the first two years of the child's life, he resides in the same household with the child and openly holds out the child as his own child.

Under the UPA, these legal presumptions of paternity, like those arising with respect to children conceived or born during marriage, may be rebutted only by an adjudication of the child's paternity in a proceeding brought under section 601 of the UPA.<sup>75</sup> Similarly, legal presumptions regarding the paternity of a nonmarital child may be rebutted only through admissible results of genetic testing excluding the presumed father as the child's biological father or identifying another man as the child's biological father.<sup>76</sup>

If a presumed father has "openly treated the child as his own," an action to adjudicate the child's paternity must be commenced within two years of the child's birth.<sup>77</sup>

The presumption established under section 204(a)(5) of the UPA, however, does not arise until two years after the child's birth and is dependent on the presumed father's openly holding the child out as his own child. Similarly, the presumption under section 204(a)(4) arising from the presumed father's marriage to the child's mother after the child's birth requires that he voluntarily assert his paternity of the child and could arise *more than two years after the child's birth* (for example, when his marriage to the child's mother occurs more than two years after the child's birth).

In these particular instances, the UPA apparently would *not* allow a presumed father's paternity to be rebutted through a legal proceeding to adjudicate the child's paternity, because the presumed father would have "openly treated the child as his own" and the action *could not* be commenced within two years of the child's birth as required under section 607.

### **Presumption of Parentage Based on Genetic Testing**

#### ***Federal Law***

Title IV-D of the Social Security Act requires North Carolina as a condition of receiving federal funding for

temporary assistance to needy families and child support enforcement, to establish legal procedures that create a rebuttable or conclusive presumption of paternity based on genetic testing results that indicate a threshold probability that an alleged father is the child's biological father.<sup>78</sup>

### **North Carolina Law**

When a court has ordered genetic testing in a civil action involving the issue of parentage pursuant to G.S. 8-50.1(b1) and the genetic test results have been properly admitted as evidence, North Carolina law establishes a rebuttable presumption that an individual is the child's biological parent if the genetic test results

1. do not exclude the individual as the child's biological parent; and
2. indicate at least a 97 percent probability that the individual is the child's parent.<sup>79</sup>

When genetic test results indicate that the probability of an individual's parentage is less than 85 percent, the individual is presumed not to be the child's parent.<sup>80</sup>

No presumption regarding parentage arises when genetic test results are inconsistent or do not exclude the individual's parentage but indicate that there is an 85 to 97 percent probability of parentage.<sup>81</sup>

The presumptions of paternity arising from genetic testing under G.S. 8-50.1(b1) are evidentiary presumptions that apply only within the context of a civil action in which the issue of a child's parentage arises and are not binding on the trier of fact if rebutted by clear, cogent, and convincing evidence.<sup>82</sup> They do not apply if genetic paternity testing was performed without a court order issued pursuant to G.S. 8-50.1(b1).<sup>83</sup>

### **The UPA**

Section 505 of the UPA provides that an individual is "rebuttably identified" as the parent of a child if genetic testing has been conducted in compliance with the act's requirements and the genetic test results indicate

1. at least a 99 percent probability of parentage, using a prior probability index of 0.50, as calculated by using the combined parentage index obtained in the testing, and
2. a combined parentage index of at least 100 to 1.<sup>84</sup>

Like the presumptions established under G.S. 8-50.1(b1), this presumption is an evidentiary presumption and, standing alone, does not establish a legal parent-child relationship with respect to the "presumed" parent.

And like the evidentiary presumptions established under G.S. 8-50.1(b1), the presumption established under section 505 is rebuttable. A presumption of parentage arising from genetic test results, however, may be rebutted only by other competent genetic test results that exclude the individual as the child's biological parent or identify another person as the child's father or mother, as applicable.<sup>85</sup>

Although not phrased as an evidentiary presumption, section 631(4) of the UPA provides that if the results of genetic paternity testing are admissible to adjudicate a man's paternity, a man whom valid genetic testing excludes as the biological father of a child may not be adjudicated to be the child's father.

## **Voluntary Paternity Acknowledgement**

### **Federal Law**

Title IV-D of the Social Security Act requires North Carolina as a condition of receiving federal funding for temporary assistance for needy families and child support enforcement, to establish a "simple civil process" through which a child's mother and putative father may voluntarily acknowledge the child's paternity.<sup>86</sup>

Federal law also requires that states consider a signed voluntary paternity acknowledgment (VPA) as a "legal finding of paternity" subject to the right of an individual who has signed a VPA to rescind his or her acknowledgment within sixty days or before the date of a legal proceeding relating to the child in which the individual is a party, whichever is earlier.<sup>87</sup> After the expiration of this sixty-day period, a state may allow a VPA to be challenged in court only on the basis of fraud, duress, or material mistake of fact.<sup>88</sup> States are prohibited from requiring or allowing approval or ratification of an unchallenged VPA through judicial or administrative proceedings.<sup>89</sup>

### **North Carolina Law**

North Carolina has two statutes relating to voluntary acknowledgment of paternity.

G.S. 110-132(a) was first enacted in 1975 and was amended in 1997 and 1999 in response to federal child support funding requirements.

G.S. 110-132(a) provides that an affidavit of parentage executed by the mother and putative father of a dependent child constitutes an admission of paternity and, unless rescinded or successfully challenged, has the "same legal effect as a judgment of paternity for the purpose of establishing a child



*support obligation*” only.<sup>90</sup> The child’s mother or putative father may bring a legal action in district court to rescind his or her acknowledgment within 60 days of the date the VPA was executed or before the date of entry of an order establishing paternity or requiring the payment of child support, whichever is earlier.<sup>91</sup> After this 60 day period has expired, a VPA may be challenged in court only on the basis of “fraud, duress, mistake, or excusable neglect.”<sup>92</sup>

The second statute, G.S. 130A-101(f), was amended in 1993 and 1996 in response to the federal VPA requirements discussed above.<sup>93</sup>

The VPA procedure established under G.S. 130A-101(f) may be used only if the child’s mother is unmarried at all times from the date of the child’s conception through the date of the child’s birth.

A VPA executed pursuant to G.S. 130A-101(f) must include the putative father’s sworn statement declaring that he believes that he is the child’s natural father and the mother’s sworn statement that the putative father is the child’s natural father and her consent to his assertion of paternity.

A copy of the VPA must be filed with the state vital statistics office along with the child’s birth certificate. Upon execution of the VPA, the putative father is identified as the child’s father on the child’s birth certificate and is *presumed* to be the child’s natural father.<sup>94</sup>

A VPA executed pursuant to G.S. 130A-101(f) may be rescinded within the time allowed by, and pursuant to the procedure set forth in, G.S. 110-132(a).<sup>95</sup>

## The UPA

Section 201(b)(2) of the UPA provides that the father-child relationship is established between a man and a child by the man’s acknowledgment of paternity under Article 3 of the UPA unless the acknowledgment is rescinded or successfully challenged.

The paternity acknowledgment procedures established under Article 3 of the UPA were drafted to comply with and supplement the paternity acknowledgment requirements contained in federal law.<sup>96</sup>

Section 301 of the UPA, as amended, allows a child’s mother and a man claiming to be the child’s genetic father<sup>97</sup> to sign or authenticate, under penalty of perjury, a voluntary acknowledgment of paternity (VPA) to establish the man’s paternity of the child.<sup>98</sup>

A VPA must state whether the child’s paternity has been determined through genetic testing and, if so, the results of the genetic paternity testing.<sup>99</sup>

A VPA, or a denial of paternity by a presumed father, may be signed before or after the child’s birth and is effective upon the child’s birth or when it is filed with the designated state agency, whichever occurs later.<sup>100</sup>

A VPA is not valid if the child for whom paternity is being acknowledged already has another acknowledged or adjudicated father or has a presumed father who has not signed or otherwise authenticated a denial of paternity that is filed with the state birth records agency.<sup>101</sup>

Unless rescinded or successfully challenged, a valid VPA that is filed with the designated state agency “is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.”<sup>102</sup> Approval or ratification of an unchallenged VPA by a court or administrative agency is not required or allowed.<sup>103</sup>

A person who has signed a VPA may rescind his or her acknowledgment by commencing a judicial proceeding for rescission within 60 days of the date the VPA became effective or before the date of the first hearing in a legal proceeding involving the child to which the individual is a party, whichever is earlier.<sup>104</sup>

After the time for rescinding a VPA has expired, an individual who has signed a VPA may commence a legal proceeding to challenge the VPA within two years of the date it was filed and only on the basis of fraud, duress, or material mistake of fact.<sup>105</sup>

## Genetic Testing

### North Carolina Law

G.S. 49-14(d) provides that if a civil action to establish the paternity of an illegitimate child is brought more than three years after the child’s birth or after the putative father’s death, the child’s paternity, if contested, may not be established without genetic test results.

G.S. 8-50.1(b1) requires a court, upon motion of a party in a civil action in which the question of parentage arises,<sup>106</sup> to order the child, the child’s mother, and the “alleged father-defendant” to submit to one or more “blood or genetic marker tests” to be performed by a duly certified physician or other expert.<sup>107</sup> A court also may have the authority pursuant to G.S. 1A-1, Rule 35 to order genetic paternity testing in a civil action involving paternity.<sup>108</sup> A separate provision, G.S. 8-50.1(a), governs genetic paternity testing in criminal cases.<sup>109</sup>

G.S. 8-50.1(b1), as currently written, does not authorize a court to order genetic paternity testing of a

man who is presumed to be the father of a child born in wedlock and who does not deny or contest his paternity of the child.<sup>110</sup>

If genetic paternity testing is conducted pursuant to a court order issued under G.S. 8-50.1(b1), verified documentary evidence establishing a chain of custody of the genetic samples is admissible and competent, without further testimony, to establish the evidentiary chain of custody.<sup>111</sup> And absent a timely written objection contesting the genetic test results or procedures, the genetic test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy.<sup>112</sup> As discussed above, genetic paternity tests that indicate at least a 97 percent probability of paternity establish a rebuttable evidentiary presumption of paternity.<sup>113</sup>

North Carolina law also authorizes a state or local child support enforcement (IV-D) agency to issue a subpoena, without first obtaining a court order, requiring the child, the child's mother, the child's putative father, and the mother's husband or ex-husband (if he is the child's presumed father) to appear and submit to genetic testing in connection with a pending legal proceeding involving paternity or child support.<sup>114</sup>

## The UPA

Article 5 of the UPA governs genetic testing of an individual to determine parentage when the individual voluntarily submits to testing or when testing is ordered by a court or child support agency.<sup>115</sup>

Section 502 of the UPA generally requires a court to order the child and other designated individuals<sup>116</sup> to submit to genetic testing to determine the child's parentage if a party to a legal proceeding involving parentage

1. alleges, under oath, a party's parentage and states facts establishing a reasonable probability of the requisite sexual contact between the relevant individuals; or
2. denies, under oath, a party's parentage and states facts establishing a possibility that sexual contact between the individuals, if any, did not result in the child's conception.

In a legal proceeding to adjudicate the parentage of a presumed father, the court may deny a party's request for genetic testing if, considering the child's best interests, the court determines, based on clear and convincing evidence,

1. that the mother's or presumed father's conduct estops her or him from denying the presumed father's paternity; *and*

2. it would be inequitable to disprove the father-child relationship between the child and the presumed father.<sup>117</sup>

A child support enforcement agency may not order genetic paternity testing if the child has a presumed, acknowledged, or adjudicated father.<sup>118</sup>

If two or more men are subject to court-ordered genetic testing, the court may order that testing be conducted concurrently or consecutively.<sup>119</sup> If genetic testing identifies more than one man (other than identical brothers) as the possible father of a child, the court must order further genetic testing to identify the genetic father.<sup>120</sup>

The UPA recognizes that while genetic paternity testing generally involves three individuals—the child, the child's mother, and the child's alleged father—scientific advances now allow the genetic determination of paternity without testing the child's mother or, if the alleged father cannot be tested, by testing the alleged father's relatives.<sup>121</sup> Section 622(c) of the UPA, therefore, provides that genetic testing of a child's mother is not a condition precedent to testing the child and a man whose paternity is being determined. And section 508 of the UPA allows a court to order genetic testing of an alleged father's parents, brothers and sisters, other children and their mothers, or other relatives if a genetic specimen cannot be obtained from the alleged father.<sup>122</sup> The UPA also addresses expressly the genetic testing of a deceased individual<sup>123</sup> as well as the brother of an alleged father if the brother is commonly believed to be the alleged father's identical brother and evidence suggests that the other brother may be the child's father.<sup>124</sup>

The initial cost of genetic testing must be advanced by a child support enforcement agency in proceedings in which the agency is providing services, by the individual who requests testing, as agreed by the parties, or as ordered by the court.<sup>125</sup>

Section 622 of the UPA provides that an order for genetic paternity testing is enforceable by contempt and allows a court to adjudicate parentage contrary to the position of an individual who refuses to submit to genetic testing as ordered.

Section 503 of the UPA expressly requires that genetic paternity testing be of a type reasonably relied upon by experts in the field of genetic testing and performed in an accredited laboratory. Section 503 also addresses the resolution of disputes regarding the appropriate ethnic or racial databases a laboratory will use to calculate the probability that an individual is a child's father. Section 504 of the UPA provides that

1. genetic paternity test reports must be in a record signed under penalty of perjury by a designee of the testing laboratory;

2. reports made under the requirements of the UPA are self-authenticating; and
3. documentation from the testing laboratory is sufficient to establish a reliable chain of custody supporting the admission of the genetic test results without further testimony if it includes (a) the names and photographs of the individuals from whom specimens were taken, (b) the names of the individuals who took the specimens, (c) the places and dates the specimens were collected, (d) the names of the individuals who received the specimens at the laboratory, and (e) the dates the specimens were received by the laboratory.

Section 621 of the UPA provides that, absent a timely and specific objection, a record of an expert in genetic testing is admissible as evidence of the truth of the facts asserted in the report.<sup>126</sup> Genetic test results, however, are inadmissible to adjudicate the parentage of a child who has a presumed, acknowledged, or adjudicated father unless performed

1. pursuant to a court order issued under section 502; or
2. with the consent of the child's mother and the presumed, acknowledged, or adjudicated father.<sup>127</sup>

As discussed above, section 505 establishes an evidentiary presumption of paternity when genetic testing indicates at least a 99 percent probability of paternity and allows this presumption to be rebutted only through other genetic testing that excludes the man as the child's genetic father or identifies another man as a possible father.<sup>128</sup> A valid genetic test that excludes a man as a child's biological father generally precludes a court from adjudicating that he is the child's father.<sup>129</sup>

## Legal Proceedings to Determine Parentage

As discussed above, Article 3 of Chapter 49 of the North Carolina General Statutes establishes a civil action to determine the paternity of an illegitimate child. North Carolina law, however, also authorizes the adjudication of a child's paternity through special proceedings to legitimate an illegitimate child,<sup>130</sup> through criminal proceedings involving a putative father's failure to support his illegitimate child,<sup>131</sup> in legal proceedings under the Uniform Interstate Family Support Act,<sup>132</sup> and in connection with other civil and criminal proceedings in which paternity is an issue.<sup>133</sup>

Similarly, the UPA authorizes a civil proceeding to adjudicate the parentage of a child<sup>134</sup> but provides that a civil action to adjudicate parentage may be joined with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, divorce, probate or administration of a decedent's estate, or other legal proceedings in which paternity is at issue.<sup>135</sup> The UPA, however, also expressly provides that its provisions govern every determination of parentage in the state, regardless of the type of legal proceeding in which the issue of parentage arises.<sup>136</sup>

## Subject Matter Jurisdiction

### *North Carolina Law*

Although superior courts and district courts share concurrent original jurisdiction over civil actions brought under G.S. 49-14 to determine the paternity of an illegitimate child, the district court is generally considered to be the proper trial division to hear these civil actions.<sup>137</sup> The superior court, however, is the proper division for special proceedings to legitimate an illegitimate child.<sup>138</sup>

### *The UPA*

Section 104 of the UPA allows the state legislature to designate the court that will have subject matter jurisdiction to adjudicate parentage.<sup>139</sup>

## Venue

### *North Carolina Law*

A civil action to determine the paternity of an illegitimate child may be filed in the county in which

1. the child's mother resides or is found;
2. the child resides or is found; or
3. the child's putative father resides or is found.<sup>140</sup>

### *The UPA*

Section 605 of the UPA requires that a proceeding to adjudicate parentage be filed in the county in which

1. the child resides or is found;
2. the respondent resides or is found if the child does not reside in the state; or

3. a proceeding for probate or administration of the presumed or alleged father's estate has been commenced.

## Parties and Standing

### *North Carolina Law*

A civil action to establish the paternity of an illegitimate child may be brought by

1. the child;
2. the child's personal representative;
3. the child's mother;
4. the personal representative of the child's mother;
5. the child's putative father;
6. a county director of social services if the child or the child's mother is likely to become a public charge; or
7. a child support enforcement agency on behalf of the child, the child's mother, or the putative father.<sup>141</sup>

The man whose paternity is being adjudicated is a necessary party in a civil action to determine the paternity of an illegitimate child. If the putative father is deceased, the putative father's personal representative is a necessary and proper party.

If the proceeding involves an allegedly illegitimate child who was born or conceived in wedlock, the mother's husband is a necessary party unless he has already been adjudicated not to be the child's father.<sup>142</sup>

The child whose paternity is being adjudicated is not a necessary party in a civil paternity action brought under G.S. 49-14, but is a necessary party in a special proceeding to legitimate the child.<sup>143</sup>

### *The UPA*

Section 602 of the UPA provides that a civil proceeding to adjudicate a child's parentage may be maintained by

1. the child;
2. the child's mother;
3. a man whose paternity of the child is to be adjudicated;
4. a child support enforcement agency or other legally-authorized government agency;
5. an authorized adoption agency or licensed child-placing agency; or
6. a representative authorized by law to act for an individual who would otherwise be entitled to maintain a civil paternity proceeding but who is deceased, incapacitated, or a minor.

Section 603 of the UPA requires that a child's mother and any man whose paternity is to be adjudicated must be joined as parties in a proceeding to adjudicate the child's parentage. The child whose parentage is being adjudicated is not a necessary party in a civil parentage proceeding under the UPA.<sup>144</sup> The child, however, may be joined as a proper party in a civil parentage proceeding.<sup>145</sup> The court is required to appoint a guardian ad litem to represent a minor or incapacitated child in a civil parentage proceeding if

1. the child is a party, *or*
2. the court finds the child's interests are not adequately represented.<sup>146</sup>

## Personal Jurisdiction

### *North Carolina Law*

A North Carolina court may not enter a judgment in a civil paternity action determining that a man is the father of an illegitimate child unless the court has personal jurisdiction over the man.<sup>147</sup> Subject to the requirements of due process,<sup>148</sup> a North Carolina court may assert personal jurisdiction over a nonresident putative father in a civil paternity action if

1. the putative father is served with the summons and complaint within North Carolina;<sup>149</sup>
2. the putative father submits to the court's jurisdiction by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;<sup>150</sup>
3. the putative father engaged in sexual intercourse in North Carolina and the child may have been conceived by that act of intercourse;<sup>151</sup>
4. the putative father resided in North Carolina and provided prenatal expenses or support for the child;<sup>152</sup>
5. the putative father resided with the child in North Carolina;<sup>153</sup>
6. the putative father asserted paternity of the child in an affidavit filed with a clerk of superior court;<sup>154</sup>
7. the child lives in North Carolina as a result of the putative father's acts or directives,<sup>155</sup> or
8. there is any other contact between the putative father and North Carolina that would be minimally sufficient to warrant the exercise of jurisdiction consistent with the due process clauses of the federal and state constitutions.<sup>156</sup>

### *The UPA*

Section 604 of the UPA provides that an individual may not be adjudicated to be the parent of a child unless the court has personal jurisdiction over the individual.<sup>157</sup>

The UPA incorporates by reference the “long arm” jurisdiction provisions of the Uniform Interstate Family Support Act, making the grounds for exercising personal jurisdiction over nonresidents in civil parentage actions under the UPA coextensive with those under North Carolina’s current paternity law.<sup>158</sup>

### **Statute of Limitations**

#### *North Carolina Law*

A civil action to establish the paternity of an illegitimate child pursuant to G.S. 49-14 must be commenced before the child’s eighteenth birthday.<sup>159</sup> If the child’s putative father is deceased, the action must be commenced

1. within one year of the putative father’s death if a proceeding for administration of the putative father’s estate has not been commenced; or
2. within the period of time allowed by law for the presentation of claims against the putative father’s estate if a proceeding for administration of the putative father’s estate has been commenced.<sup>160</sup>

### *The UPA*

Under the UPA, a civil proceeding to adjudicate the parentage of a child who has no presumed, acknowledged, or adjudicated father may be commenced at any time, even after the child becomes an adult or after an earlier proceeding to adjudicate parentage has been dismissed based on application of a statute of limitation then in effect.<sup>161</sup>

If a child has a presumed father, a proceeding brought by the presumed father, the child’s mother, or another individual to adjudicate the child’s parentage must be commenced within two years of the child’s birth unless a court determines that

1. the child’s mother and presumed father did not cohabit or engage in sexual intercourse with each other during the probable time of the child’s conception; *and*
2. the presumed father never openly treated the child as his own.<sup>162</sup>

If a court makes those findings, a civil proceeding to adjudicate the parentage of a child who has a presumed father may be commenced at any time.<sup>163</sup>

An individual who has signed an unrescinded acknowledgment or denial of paternity may commence an action challenging the child’s acknowledged paternity on the basis of fraud, duress, or material mistake of fact within two years after the acknowledgment or denial of paternity is filed with the state’s birth records agency.<sup>164</sup>

If a child has an acknowledged or adjudicated father, an individual, other than the child, who was not a signatory to the acknowledgment of paternity or a party to the adjudication must commence a proceeding seeking adjudication of the child’s paternity within two years after the effective date of the acknowledgment or adjudication.<sup>165</sup>

### **Procedure**

#### *North Carolina Law*

The rules of civil procedure apply in (a) civil actions to determine the paternity of an illegitimate child and (b) special proceedings to legitimate an illegitimate child.<sup>166</sup>

In civil actions brought pursuant to G.S. 49-14, a certified copy of the child’s birth certificate must be attached to the complaint.<sup>167</sup> If known, the social security numbers of the child’s parents must be included in the record.<sup>168</sup> If the defendant fails to appear, the judge is required to enter default judgment in favor of the plaintiff.<sup>169</sup> Either party may request that the case be tried at the first session of court after the case is docketed.<sup>170</sup>

If the action is brought after the putative father’s death or more than three years after the child’s birth and the issue of paternity is contested, paternity may not be adjudicated without evidence from a genetic paternity test.<sup>171</sup> An indigent putative father who is the defendant in a civil paternity action is not entitled to court-appointed counsel.<sup>172</sup> Paternity may be determined by a jury if either party makes a timely request for a jury trial.<sup>173</sup>

In a child support proceeding brought by a child support enforcement agency, the court, upon motion, must enter a temporary order for child support if there is clear, cogent, and convincing evidence of the defendant’s paternity.<sup>174</sup> Genetic test results indicating at least a 97 percent probability of paternity constitute clear, cogent, and convincing evidence.<sup>175</sup>

### ***The UPA***

Except as otherwise provided, the rules of procedure that apply to civil actions apply to civil proceedings to adjudicate parentage under the UPA.

Section 611 of the UPA allows a civil paternity proceeding to be commenced before the birth of the child whose paternity is at issue.<sup>176</sup> An adjudication of paternity, however, may not be entered before the child's birth.<sup>177</sup>

Section 634 of the UPA requires a court to enter an order adjudicating the parentage of an individual if

1. after service of process the individual is in default; *and*
2. the court finds that the individual is the child's parent.

Section 635 of the UPA provides that an order dismissing a civil paternity proceeding for want of prosecution is without prejudice and does not preclude the commencement of a subsequent action to adjudicate the child's paternity.<sup>178</sup>

Section 624 of the UPA authorizes a court to enter a temporary order for child support in connection with a civil proceeding to adjudicate paternity if the individual ordered to pay child support is

1. the child's mother;
2. the child's presumed father;
3. a man who is petitioning to establish his paternity of the child;
4. a man who has been identified as the child's father through genetic testing pursuant to section 505;
5. an alleged father who has declined to submit to genetic testing; or
6. a man who is shown by clear and convincing evidence to be the child's father.<sup>179</sup>

Section 633 of the UPA allows a court to close a civil paternity proceeding to the public upon request of a party and for good cause shown. Pleadings, papers, and records filed in a civil paternity proceeding, other than a final order, are not public records and are available only with the consent of the parties or by order of the court for good cause shown.<sup>180</sup>

Section 623 of the UPA authorizes the respondent in a civil paternity proceeding to admit the child's paternity by filing a pleading admitting the child's paternity or by admitting paternity under penalty of perjury when making an appearance or during a hearing. If there is no reason to question the admission, the court must enter an order adjudicating the child's paternity consistent with the admission.<sup>181</sup>

Section 632 of the UPA requires that paternity be adjudicated by a judge without a jury.<sup>182</sup>

### **Burden of Proof**

#### ***North Carolina Law***

Proof of paternity in civil actions brought pursuant to G.S. 49-14 must be by clear, cogent, and convincing evidence.<sup>183</sup>

#### ***The UPA***

In a civil proceeding under the UPA, paternity must be proved by a preponderance of the evidence.<sup>184</sup>

### **Choice of Law**

#### ***North Carolina Law***

Issues regarding choice of law in legal proceedings involving paternity have not been expressly addressed by statutory or case law in North Carolina.<sup>185</sup>

#### ***The UPA***

Section 103(b) of the UPA requires a court to apply the substantive law of the forum state to determine the parentage of a child and expressly states that the applicable law governing parentage does not depend on the child's place of birth or the child's present or past place of residence.<sup>186</sup>

As noted above, section 601 of the UPA provides that the UPA governs every determination of parentage in the state, regardless of the type of legal proceeding in which the issue of parentage arises.<sup>187</sup>

### **Orders Adjudicating Parentage**

#### ***North Carolina Law***

An order establishing the paternity of an illegitimate child pursuant to G.S. 49-14 does not legitimate the child.<sup>188</sup> Nonetheless, when an order establishing the paternity of an illegitimate child is entered pursuant to G.S. 49-14, the rights, duties, and obligations of the child's father and mother with respect to custody and support of the child are the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of the father and mother.<sup>189</sup> An illegitimate child whose paternity is adjudicated pursuant to G.S. 49-14 also may inherit property by, through, and from his or her father to the same extent as a legitimate child *if* the child gives written notice of the basis of his or her claim to the

personal representative of the decedent's estate within six months of the first publication or posting of the general notice to creditors.<sup>190</sup>

If the court determines pursuant to G.S. 49-14 that a decedent is the father of an illegitimate child, the order must be entered *nunc pro tunc* to the day preceding the father's death.<sup>191</sup>

A man whose paternity is adjudicated pursuant to G.S. 49-14 is responsible for medical expenses incident to the pregnancy and birth of the child.<sup>192</sup> Reasonable attorneys fees may be taxed as costs against either party or apportioned between the parties.<sup>193</sup>

Upon entry of a judgment determining the paternity of an illegitimate child pursuant to G.S. 49-14, the clerk of superior court must provide written notice of the judgment to the state's vital statistics office and the state registrar must amend the child's birth certificate with respect to the child's paternity.<sup>194</sup>

A valid order determining that a man is the father of an illegitimate child pursuant to G.S. 49-14 is *res judicata* with respect to the issue of the child's paternity and is binding against the adjudicated father and parties in privity with him unless the order is set aside pursuant to G.S. 1A-1, Rule 60.<sup>195</sup> A final order entered in a civil action pursuant to G.S. 49-14 that does *not* establish a man's paternity of an illegitimate child, however, may not be legally binding against a nominally different plaintiff (for example, the child or a different child support enforcement agency) on the issue of the child's paternity in subsequent civil paternity proceedings.<sup>196</sup>

A divorce decree that finds that a child was born during the parties' marriage is not *res judicata* and binding with respect to the child's paternity unless the issue of paternity was actually litigated in connection with the divorce action or a related claim involving custody or support of the child.<sup>197</sup>

### **The UPA**

An order in a civil paternity proceeding must adjudicate whether a man claiming or alleged to be a child's father is the child's father.<sup>198</sup> An order adjudicating paternity must identify the child whose paternity is determined by name and date of birth.<sup>199</sup> If the court's order is at variance with the child's birth certificate, the court must order the state's birth records agency to issue an amended birth certificate.<sup>200</sup>

An order in a civil paternity proceeding may assess reasonable attorneys fees, the cost of genetic testing, necessary travel and other reasonable expenses incurred by a party, filing fees, and costs against a party.<sup>201</sup>

A valid order adjudicating a child's parentage is binding on all parties to the litigation, but is not binding on the child whose parentage is adjudicated unless

1. the child was a party or represented by a guardian ad litem, or
2. the adjudication was consistent with the results of genetic testing.<sup>202</sup>

A party to an adjudication of paternity may challenge the adjudication only by appeal, a timely motion for relief from the judgment, or other appropriate procedure for judicial review.<sup>203</sup>

A divorce decree that expressly identifies a child as a child of the parties' marriage *or* that requires the husband to pay child support (unless the husband's liability for child support is not based on his paternity of the child) constitutes a binding adjudication of the husband's paternity of the child if the court that enters the divorce decree has personal jurisdiction over the husband under the Uniform Interstate Family Support Act.<sup>204</sup>

## **Paternity Registry**

### ***Lehr v. Robertson***

In *Stanley v. Illinois*, the United States Supreme Court held that the U.S. Constitution's due process clause requires a state to give the father of an illegitimate child notice and an opportunity to be heard regarding his fitness as a parent before the state removes the child from his custody through a juvenile dependency proceeding.<sup>205</sup>

A decade later in *Lehr v. Robertson*, the Supreme Court upheld the constitutionality of a New York statute that allowed the parental rights of certain putative fathers to be terminated without notice through juvenile or adoption proceedings if they failed to file a notice of their alleged parental interest with a state-maintained "putative father registry."<sup>206</sup>

By May, 2000, at least 28 states had enacted legislation creating state paternity registries.<sup>207</sup>

### **North Carolina Law**

North Carolina's adoption statute was amended in 1977 to require that consent for adoption of an illegitimate child be obtained from the child's father if, before an adoption petition was filed, the father's paternity had been judicially established or the father had legitimated the child, supported the child, or

signed an affidavit acknowledging his paternity of the child.<sup>208</sup>

In 1980, the General Assembly amended the adoption law

1. to require what is now the state Department of Health and Human Services to maintain a central paternity registry;
2. to provide that a putative father's acknowledgment of paternity of an illegitimate child would not preserve his parental rights with respect to the child's adoption unless the affidavit was filed in the state's central paternity registry; and
3. to require the state registry to search its records upon request in adoption (and termination of parental rights) proceedings and certify whether a particular man has or has not acknowledged his paternity of a child by filing an affidavit of paternity with the central registry.<sup>209</sup>

The requirement that an affidavit of paternity be filed with the state paternity registry in order to protect a putative father's rights with respect to adoption of his illegitimate child was repealed in 1995 when North Carolina's adoption statutes were revised.<sup>210</sup> North Carolina's Juvenile Code, however, still allows termination of parental rights if the putative father of an illegitimate child (a) has not legitimated child, (b) has not been judicially determined to be the child's father, (c) has not provided substantial financial support or consistent care with respect to the child or the child's mother, *and* (d) has not acknowledged his paternity of the child by filing an affidavit with the state's central paternity registry.<sup>211</sup>

The state Department of Health and Human Services' Division of Social Services, therefore, still maintains a central paternity registry.<sup>212</sup> The continued usefulness of the registry, however, is questionable because

1. failure to file an affidavit of paternity with the registry no longer negates a putative father's rights regarding the adoption of his illegitimate child;
2. failure to file an affidavit of paternity with the registry, in and of itself, usually is not a sufficient basis for terminating a putative father's parental rights with respect to an illegitimate child;
3. filing an affidavit of paternity with the registry does not necessarily prevent termination of a putative father's rights with respect to an illegitimate child; and
4. state law has established other procedures that could be used by a putative father to

acknowledge his paternity of, and protect his parental rights with respect to, an illegitimate child.

## The UPA

Article 4 of the UPA requires the establishment of a state-maintained paternity registry. The purpose of the state paternity registry is to facilitate infant adoptions (that is, adoption proceedings in which the child is less than one year old at the time of the hearing).<sup>213</sup> Section 404 of the UPA allows the parental rights of a man who may be the father of a child to be terminated without notice if

1. he fails to register with the state paternity registry before or within 30 days after the child's birth,<sup>214</sup>
2. his parental relationship with the child has been not established under the act or other law and he has not commenced a proceeding to adjudicate his paternity of the child,<sup>215</sup> and
3. the child is less than one year old at the time of the termination of parental rights or adoption hearing.

Conversely, if a child is at least one year old, notice of a proceeding for adoption of, or termination of parental rights regarding, the child generally must be given to an alleged father of the child even if he has not registered with the state paternity registry.<sup>216</sup>

By registering his paternity with the central registry, a putative father is assured that he will receive notice of any termination of parental rights or adoption proceeding involving his child if the proceeding is filed in the state in which he registers.<sup>217</sup> If a father-child relationship has not been established for a child under the age of one, a petitioner in a proceeding involving the adoption of, or termination of parental rights regarding, the child must obtain a certificate from the state paternity registry indicating whether a paternity registration with respect to the child has been found.<sup>218</sup> Information from the state paternity registry may be released on request only to

1. a court or a person designated by the court;
2. the mother of a child who is the subject of a registration;
3. a licensed child-placing agency;
4. a child support enforcement agency;
5. a party, or the party's attorney, in a paternity, termination of parental rights, or adoption proceeding regarding a child who is the subject of a registration;
6. the paternity registry of another state; or



7. an agency authorized by law to receive the information.<sup>219</sup>

## Assisted Reproduction

### North Carolina Law

North Carolina's only statute regarding the parentage of children conceived through assisted reproduction, G.S. 49A-1, was enacted in 1971.

G.S. 49A-1 applies only with respect to children born as the result of "heterologous artificial insemination," that is, the artificial insemination<sup>220</sup> of a married woman with sperm donated by a man who is not her husband.<sup>221</sup> Under G.S. 49A-1, a child born as the result of heterologous artificial insemination is legally deemed to be the legitimate natural child of the woman who is artificially inseminated and her husband if they consent in writing to the procedure.

### The UPA

Article 7 of the UPA addresses the parentage of children born through the use of assisted reproduction.<sup>222</sup> Section 102(4) of the UPA defines "assisted reproduction" as any method of causing pregnancy other than sexual intercourse, including:

1. intrauterine insemination (also known as artificial insemination);
2. donation of eggs;
3. donation of embryos;
4. in-vitro fertilization and transfer of embryos; and
5. intracytoplasmic sperm injection.<sup>223</sup>

Assisted reproduction involves, at a minimum, two parties: a man and a woman<sup>224</sup> who (a) are the genetic parents of the child conceived through assisted reproduction and (b) will be the child's social parents.<sup>225</sup> Assisted reproduction, however, often involves three or four parties:

1. a woman (the child's birth mother) who may or may not be the child's genetic mother, whose pregnancy results from assisted reproduction, who gives birth to the child, and who will be the child's social mother;
2. the birth mother's husband (or the mother's boyfriend or male partner) who may or may not be the child's genetic father but consents to assisted reproduction and intends to be the child's social father; and
3. if the child's birth mother or intended father will not be the child's genetic parent, one or

more other men or women (donors) who donate the eggs or sperm that will be used in connection with the assisted reproduction.<sup>226</sup>

Section 702 of the UPA provides that a donor<sup>227</sup> is not the parent of a child conceived by means of assisted reproduction.

... a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.<sup>228</sup>

Thus, a woman who donates her eggs for in-vitro fertilization and embryo transfer to another woman is not the mother of the child born to the other woman.<sup>229</sup> Similarly, a man who donates sperm used for the assisted reproduction of a woman is not the father of the child born to that woman unless he consents to the procedure with the intent of becoming the child's parent.<sup>230</sup>

Section 703 of the UPA provides that a man<sup>231</sup> who provides sperm for, or consents to, assisted reproduction of a woman *with the intent to be the child's parent*, is the father of the child born as a result thereof (and, under section 102(8), is *not* a mere donor even if he provides the sperm for the assisted reproduction). Consent to assisted reproduction by a woman and a man who intends to be the father of a child born to the woman (that is, a man who is not a mere "donor") must be contained in a record signed by the man and woman.<sup>232</sup> The failure of a man to sign a consent to assisted reproduction before or after the birth of a child through assisted reproduction, however, does not preclude a finding that he is the child's father if he and the child's mother, during the first two years of the child's life, reside together in the same household with the child and openly hold out the child as their own.<sup>233</sup>

A man who has consented to assisted reproduction may withdraw his consent at any time before placement of eggs, sperm, or embryos and, if consent is withdrawn in a timely manner, he will not become the father of the resulting child under section 703.<sup>234</sup>

If a man who has consented to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the decedent is not the father of the resulting child unless he expressly consented in a record to be the child's parent notwithstanding the fact that assisted reproduction might occur after his death.<sup>235</sup>

Section 705 of the UPA precludes the husband of a woman who gives birth to a child by means of assisted reproduction from challenging his paternity of the child unless

1. he commences a proceeding to adjudicate his paternity within two years of the child's birth; *and*
2. he did not consent, before or after the child's birth, to the assisted reproduction that resulted in the child's birth.

This limitation, however, does not apply if

1. the husband did not provide sperm for the assisted reproduction that resulted in the child's birth or consent, before or after the child's birth, to the assisted reproduction;
2. the husband and the child's mother have not cohabited since the probable time of assisted reproduction; *and*
3. the husband has never openly held out the child as his own.<sup>236</sup>

If a marriage is dissolved before placement of eggs or sperm and a woman proceeds with assisted reproduction after the divorce, the woman's former husband is not the legal father of the resulting child unless he has expressly consented in a record to post-divorce assisted reproduction.<sup>237</sup>

## Gestational Agreements

### North Carolina Law

North Carolina's statutory and case law does not expressly address the validity of gestational or "surrogate parent" agreements or the parentage of children born as the result of such agreements.<sup>238</sup>

### The UPA

Article 8 of the UPA includes *optional* provisions governing the enforceability of gestational agreements and the parentage of children born pursuant to gestational agreements.

A gestational agreement is an agreement<sup>239</sup> between a couple (the intended parents)<sup>240</sup> and a woman (the gestational mother)<sup>241</sup> under which the gestational mother will give birth to a child through assisted reproduction<sup>242</sup> and relinquish the child and her parental rights with respect to the child to the intended parents following the child's birth. A gestational (or surrogacy) agreement always . . . involves at least three parties: the couple who wish to become parents (the intended mother and father), and a woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother). Additional persons may be involved. For example, if the proposed gestational mother is married, her husband

must be included in the agreement to dispense with his presumptive paternity of a child born to his wife. An egg or sperm donor, or both, may be involved . . .

Thus, by definition, a child born pursuant to a gestational agreement needs to have his or her *maternity* as well as *paternity* clarified.<sup>243</sup>

Approximately fourteen states currently recognize the legal validity of gestational agreements; five states and the District of Columbia have enacted statutes making gestational agreements void; eight states have barred the payment of compensation under gestational agreements; and three states have expressly refused, judicially or statutorily, to recognize gestational agreements.<sup>244</sup> The remaining states, including North Carolina, have not expressly addressed the legality of gestational agreements.

Reasonable persons, of course, may disagree with respect to whether, as a matter of public policy, gestational agreements should be recognized, regulated, enforced, prohibited, or criminalized. The reality, though, is that thousands of children are born each year pursuant to gestational agreements.<sup>245</sup>

Although legal recognition of gestational agreements is undoubtedly controversial, the plain fact is that medical science has raced ahead of the law without heed to the views of the general public—or legislators.<sup>246</sup>

Thus, even if a state outlaws gestational agreements, its courts may still be called upon to determine the parentage of children born within the state pursuant to outlawed gestational agreements or born in other states that, contrary to the public policy of the forum state, have recognized the legality of gestational agreements.<sup>247</sup> The drafters of the UPA therefore concluded that

[o]ne thing ought to be clear: a child born [pursuant to a gestational agreement] is entitled to have its status clarified.<sup>248</sup>

To accomplish this, the drafters of the UPA took a "cautious, middle ground approach" to the issue of gestational agreements.<sup>249</sup> The UPA gives states two options with respect to the validity of gestational agreements and determining the parentage of children born pursuant to gestational agreements:

1. A state may enact Article 8 of the UPA, recognizing the validity of, but also regulating, gestational agreements and providing clear rules for determining the parentage of children born pursuant to gestational agreements.
2. A state may enact the UPA omitting the optional provisions contained in Article 8.<sup>250</sup>

If a state adopts Article 8 of the UPA, section 801 authorizes a gestational agreement between a prospective gestational mother, her husband if she is

married, a donor or donors, and the intended parents of a child who will be born through assisted reproduction pursuant to the agreement, but provides that a gestational agreement is enforceable only if it is validated by a court pursuant to section 803.

A gestational agreement may provide for the payment of consideration to the gestational mother but may not limit the gestational mother's right to make decisions to safeguard her health or the health of the embryos or fetus.<sup>251</sup>

A gestational agreement is not valid or enforceable unless it is validated by a court.<sup>252</sup> If a child is born pursuant to an unvalidated gestational agreement, the child's parentage is determined under Articles 2 and 7 of the UPA.<sup>253</sup> Intended parents who are parties to an unvalidated gestational agreement, however, may be held liable for the support of a child born pursuant to the agreement, regardless of whether they are the child's parents and regardless of the fact that the agreement is otherwise unenforceable.<sup>254</sup>

Section 802 of the UPA authorizes the intended parents and gestational mother to commence a legal proceeding seeking judicial review and approval of the agreement.<sup>255</sup> Section 803 of the UPA authorizes a court to validate a gestational agreement if it finds that

1. the intended parents or gestational mother have lived in the forum state for at least 90 days and all parties are subject to the court's jurisdiction;
2. a child welfare agency has made a home study of the intended parents, unless a home study is waived by the court, and the intended parents meet the standards of suitability applicable to adoptive parents;
3. all parties have voluntarily entered into the agreement and understand its terms;
4. adequate provision has been made for all reasonable health care expenses associated with the gestational agreement until the birth of the child, including responsibility for these expenses if the agreement is terminated; and
5. the consideration, if any, paid to the prospective gestational mother is reasonable.<sup>256</sup>

After a gestational agreement is validated, the validating court may, for good cause shown, terminate the agreement.<sup>257</sup> If a gestational agreement has been validated but the gestational mother has not become pregnant by means of assisted reproduction pursuant to the agreement, the prospective gestational mother, the prospective gestational mother's husband,<sup>258</sup> or either of the intended parents may terminate the agreement, with or without good cause, by giving written notice of termination to all other parties.<sup>259</sup> After a copy of the

termination notice is filed with the court that validated the agreement, the court must enter an order vacating its validation of the agreement.<sup>260</sup>

After the birth of a child within 300 days of assisted reproduction pursuant to a validated gestational agreement, the intended parents must file a notice of the child's birth with the court that validated the agreement.<sup>261</sup> After this notice is filed, the court must enter an order

1. confirming that the intended parents are the child's parents;<sup>262</sup>
2. if necessary, ordering that the child be surrendered to the intended parents; and
3. directing the state's birth records agency to issue a birth certificate naming the intended parents as the child's parents.<sup>263</sup>

## Conclusion

North Carolina, prodded by federal requirements attached to funding for the state's child support enforcement program, has revised many of its laws governing parentage in response to the social, scientific, and legal developments discussed above. But despite these changes, the new Uniform Parentage Act almost certainly provides a clearer, more comprehensive, more uniform, and more modern approach to the law of parentage than the state's existing paternity laws. For that reason, legislators, judges, attorneys, and government agencies in North Carolina may be interested in considering the UPA as a possible model for the state's paternity law, keeping in mind that lawmakers may revise the UPA as necessary to reflect the views, values, and needs of North Carolinians.

## Notes

<sup>1</sup> As recently as 1970, about 90% of all children born in the United States were born to married mothers. Since then, out-of-wedlock births have increased in absolute numbers and as a percentage of all births. In 2000, 1,347,043 children (about one-third of all children born in the United States) were born to unmarried mothers. Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics Report, Vol. 50, No. 5, Feb. 12, 2002, Table D, p. 19 ([http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf)). The increased birth rate for unmarried women may be due to an increased

number of nonmarital pregnancies, an increased proportion of nonmarital pregnancies that continue to term, a reduced number of nonmarital pregnancies resulting in pre-birth “shotgun” marriages, or a combination of these or other factors. Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. LAW Q. 49, 65-66 (2002).

<sup>2</sup> See Sergio D.J. Pena and Ranajit Chakraborty, *Paternity Testing in the DNA Era*, 10 TRENDS IN GENETICS 204 (1994).

<sup>3</sup> See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Pickett v. Brown*, 462 U.S. 1 (1983); *Reed v. Campbell*, 476 U.S. 852 (1986).

<sup>4</sup> R.S., c. 12, §1. Historically, North Carolina law used the terms “bastards” or “illegitimate children” to refer to children born out of wedlock. When referring to these children, this bulletin generally will use the terms “nonmarital” children, children “born out of wedlock,” or “illegitimate” children.

<sup>5</sup> The child’s mother could be fined and required to post a secured bond if she failed to identify the child’s father when required to do so by the court.

<sup>6</sup> R.S., c. 12, §§8, 9; G.S. 49-10 and 49-11. In 1917 the General Assembly enacted legislation recognizing as legitimate a child born out of wedlock when the child’s mother and reputed father marry after the child’s birth. Pub. Laws 1917, c. 219; G.S. 49-12.

<sup>7</sup> Pub. Laws 1933, c. 228.

<sup>8</sup> S.L. 1945, c. 40; G.S. 49-7. See also S.L. 1949, c. 51; G.S. 8-50.1. In 1965 the law was amended to allow a court to consider the results of a blood grouping test excluding paternity in a criminal nonsupport proceeding involving the presumed father of a legitimate child. S.L. 1965, c. 618; G.S. 8-50.1.

<sup>9</sup> See *State v. Fowler*, 277 N.C. 305, 177 S.E.2d 385 (1970).

<sup>10</sup> S.L. 1975, c. 449; G.S. 8-50.1. At that time, however, a falsely accused putative father had only a 50% to 55% chance of being excluded as a possible genetic father of the child based on available blood grouping tests. See *State v. Fowler*, 277 N.C. 305, 177 S.E.2d 385 (1970).

<sup>11</sup> S.L. 1979, c. 576; G.S. 8-50.1(b).

<sup>12</sup> S.L. 1993, c. 333; S.L. 1993, c. 733; G.S. 8-50.1(b1). See also *Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997) (provisions regarding admission of genetic paternity test results without testimony regarding chain of custody apply only to genetic paternity tests ordered under G.S. 8-50.1(b1)); *Rockingham County*

*Department of Social Services ex rel. Shaffer v. Shaffer*, 126 N.C. App. 197, 484 S.E.2d 415 (1997) (documentary evidence regarding chain of custody for genetic paternity test results must be verified); *Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000) (genetic paternity test results may assume prior probability of paternity equal to 0.5 based on nongenetic factors); *Columbus County v. Davis*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2004).

<sup>13</sup> S.L. 1967, c. 993; G.S. 49-14 through 49-17.

The three-year statute of limitation imposed by the 1967 law was held unconstitutional in 1980. *Lenoir County ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980). The standard of proof in civil paternity actions was changed from “beyond a reasonable doubt” to “clear, cogent, and convincing evidence” in 1993. S.L. 1993, c. 333.

<sup>14</sup> *Wright v. Gann*, 27 N.C. App. 45, 217 S.E.2d 761 (1975); *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

<sup>15</sup> S.L. 1975, c. 827. Legislation creating a second, nonjudicial procedure for voluntary acknowledgement of paternity was enacted in 1993. S.L. 1993, c. 333; G.S. 130A-101(f).

<sup>16</sup> S.L. 1997-433, § 4.7; S.L. 1999-293, § 1; G.S. 110-132. See 42 U.S. Code §666(a)(5)(C).

<sup>17</sup> See *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

<sup>18</sup> S.L. 1981, c. 613; *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985).

<sup>19</sup> *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003). The 1977 amendment to G.S. 50-13.2(a) provided that there is no presumption in legal proceedings regarding child custody as between the natural or adoptive mother and father of a child regarding which parent will better promote the child’s interest and welfare.

<sup>20</sup> Uniform Parentage Act (2000), Prefatory Note, 35 FAM. L. Q. 83, 92 (2001).

<sup>21</sup> John J. Sampson, Preface to the Amendments to the Uniform Parentage Act (2002), 37 FAM. L. Q. 1, 1-4 (2003). The American Bar Association’s House of Delegates unanimously approved the amended UPA on February 10, 2003. Unless otherwise noted, all references to the Uniform Parentage Act in this article are to the amended 2002 UPA. The full text of and official comments to the UPA are available on the web: <http://www.law.upenn.edu/bll/ulc/upa/final2002.pdf>.

<sup>22</sup> NCCUSL web site ([http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-upa.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa.asp)).

<sup>23</sup> UPA § 102(15).

<sup>24</sup> UPA § 201.

<sup>25</sup> UPA §§ 202, 203. Section 103(c) of the UPA, however, provides that the UPA itself does not create, enlarge, or diminish parental rights or duties created under other state laws.

<sup>26</sup> See G.S. 48-2-301(c); G.S. 48-4-101; G.S. 48-1-106(c), (d); G.S. 49A-1.

<sup>27</sup> Sampson, Preface to the Amendments to the Uniform Parentage Act (2002), 37 FAM. L. Q. 1, 2-3. In response to objections that the UPA treated unmarried couples differently from married couples with respect to parentage, the 2002 amendments to the UPA eliminated language that allowed married couples, but not unmarried couples, to establish parentage through assisted reproduction techniques and gestational agreements. As amended, the UPA provides that a child born to an unmarried *man and woman*, including a child born through assisted reproduction or in the context of a gestational agreement, has the same relationship with his or her parents or intended parents as a child born to a married couple.

<sup>28</sup> UPA § 106.

<sup>29</sup> UPA § 201(a).

<sup>30</sup> UPA, Art. 7.

<sup>31</sup> UPA, Art. 8.

<sup>32</sup> The UPA, however, is not a truly comprehensive parentage law in the sense that it intentionally does not address parenting by same-sex couples.

<sup>33</sup> Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 FAM. LAW Q. 49, 56-57.

<sup>34</sup> Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 FAM. LAW Q. 49, 51.

<sup>35</sup> Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 FAM. LAW Q. 49, 52-53.

<sup>36</sup> Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 FAM. LAW Q. 49, 56-57 (estimating that at least 10 percent of the children born to married women are not genetically the children of the mothers' husbands).

<sup>37</sup> See G.S. 8-50.1(b1); G.S. Ch. 110, Art. 9. See also Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Wright v. Gann, 27 N.C. App. 45, 293 S.E.2d 95 (1982); Ambrose v. Ambrose, 140 N.C. App. 545, 536 S.E.2d 855 (2000); Jeffries v. Moore, 148 N.C. App. 364, 559 S.E.2d 217 (2002); cf. Johnson v. Johnson, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev'd*, 343 N.C. 114, 468 S.E.2d 59 (1996).

<sup>38</sup> See Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41 (2001); Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 FAM. LAW Q. 49 (arguing that "social paternity, once established over time, should prevail over biological paternity"). In both of the instances cited in the text, the law is recognizing that there is more to fatherhood than biology or that biology, alone, is insufficient to establish fatherhood; in the second instance, the law is recognizing that biology is neither sufficient nor required to establish fatherhood. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("the mere existence of a biological link [between a man and a child] does not merit . . . constitutional protection" of his "parental" rights); *Monroe v. Monroe*, 621 A.2d 898 (Md. 1993) and *W. v. W.*, 728 A.2d 1076 (Conn. 1999) (recognizing "equitable parenthood" or "paternity by estoppel"); UPA §§ 607(a), 609(b) (limiting the time within which a presumed or acknowledged father's paternity of a child may be challenged).

<sup>39</sup> See, for example, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003).

<sup>40</sup> *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968). The presumption of legitimacy also applies to a child born within 280 days of the termination of the mother's marriage and to children born or conceived during voidable or bigamous marriage that are subsequently annulled. *Lenoir County ex rel. Dudley v. Dawson*, 60 N.C. App. 122, 298 S.E.2d 418 (1982); G.S. 50-11.1. See also G.S. 49A-1 (child born to a woman and her husband as a result of heterologous artificial insemination is considered the legitimate child of the mother and her husband if husband has consented to artificial insemination of his wife).

<sup>41</sup> G.S. 48-1-106(b).

<sup>42</sup> *Wright v. Gann*, 27 N.C. App. 45, 293 S.E.2d 95 (1982). See note 40 regarding North Carolina's presumption regarding the time of a child's conception.

<sup>43</sup> G.S. Ch. 49, Art. 2.

<sup>44</sup> G.S. 49-11.

<sup>45</sup> G.S. 49-14(a).

<sup>46</sup> G.S. 49-15; G.S. 29-19.

<sup>47</sup> UPA § 202.

<sup>48</sup> The drafters of the UPA, however, state that the section's mandate of equal treatment as between

marital and nonmarital children does not necessarily eliminate “all possible distinctions in all aspects of the lives of the nonmarital child and parents.” UPA § 202, Comment.

<sup>49</sup> *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972). When a child’s mother is married at the time the child is conceived or born, G.S. 130A-101(e) requires that the mother’s husband be identified as the child’s father on the child’s birth certificate unless paternity has been determined otherwise by a court of competent jurisdiction.

<sup>50</sup> *Lenoir County ex rel. Dudley v. Dawson*, 60 N.C. App. 122, 298 S.E.2d 418 (1982).

<sup>51</sup> G.S. 50-11.1.

<sup>52</sup> *Ray v. Ray*, 219 N.C. 217, 13 S.E.2d 224 (1941); *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972); *Wake County ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981); *Cole v. Cole*, 74 N.C. App. 247, 328 S.E.2d 446 (1985), *aff’d*, 314 N.C. 660, 335 S.E.2d 897 (1985); *Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000). *Cf.* UPA § 631(1) (discussed in note 76 and accompanying text).

<sup>53</sup> *See*, for example, *Batcheldor v. Boyd*, 119 N.C. App. 204, 458 S.E.2d 1 (1995). In *Batcheldor* an adult child successfully rebutted, in the context of a legal proceeding involving the estate of his biological father more than 50 years after his birth, the presumption that his father was another man to whom his mother was married at the time of his birth. *Cf.* UPA § 607 (discussed in note 162 and accompanying text).

<sup>54</sup> *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985). *Cf.* *Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev’d. on other grounds* 343 NC. 114, 468 S.E.2d 59 (1996).

<sup>55</sup> G.S. 8-50.1(b1); *Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996). *Cf.* *Jeffries v. Moore*, 148 N.C. App. 364, 559 S.E.2d 217 (2002).

<sup>56</sup> *Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

<sup>57</sup> States have the option of making this subsection applicable to children who are born within 300 days of a decree of separation between the child’s mother and her husband. UPA § 204(b)(2).

<sup>58</sup> States have the option of making this subsection applicable to children who are born within 300 days of a decree of separation between the child’s mother and her husband. UPA § 204(b)(3).

<sup>59</sup> UPA § 204(b).

<sup>60</sup> UPA § 607.

<sup>61</sup> UPA § 631(1).

<sup>62</sup> UPA § 608.

<sup>63</sup> A child is illegitimate if (a) his or her mother was not married at the time the child was conceived or born, or (b) his or her mother was married at the time the child was conceived or born but the mother’s husband at the time the child was conceived or born is not the child’s biological father. *Wright v. Gann*, 27 N.C. App. 45, 293 S.E.2d 95 (1982). *See* note 40 regarding North Carolina’s presumption regarding the time of a child’s conception.

<sup>64</sup> *Chambers v. Chambers*, 43 N.C. App. 361, 364, 258 S.E.2d 822, 824 (1979).

<sup>65</sup> G.S. 49-13.

<sup>66</sup> *See* note 52 and accompanying text.

<sup>67</sup> *Meyers v. Meyers*, 39 N.C. App. 201, 249 S.E.2d 853 (1978); *Chambers v. Chambers*, 43 N.C. App. 361, 258 S.E.2d 822 (1979). Both *Meyers* and *Chambers* simply conclude that the reputed father was estopped from denying his paternity without expressly analyzing whether or how his actions satisfied the elements necessary to establish the defense of equitable estoppel. *See Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-629 (1990) (party against whom estoppel is asserted must have engaged in conduct that amounts to false representation despite party’s knowledge of the real facts with the intention that other party rely on such conduct; party asserting equitable estoppel must have relied on such conduct to his or her prejudice and lacked knowledge or means to know real facts).

<sup>68</sup> To rescind an acknowledgment of paternity executed under G.S. 130A-101(f), the parent must file a request for rescission with the clerk of court within 60 days of execution of the acknowledgment or before entry of an order establishing paternity or requiring the payment of support for the child, whichever is earlier. G.S. 110-132(a). If a voluntary acknowledgment of paternity is not rescinded within these time limits, it cannot be challenged thereafter except on the basis of “fraud, duress, mistake, or excusable neglect.” G.S. 110-132.

<sup>69</sup> G.S. 130A-101(f).

<sup>70</sup> G.S. 130A-101(f). Acknowledgment of paternity under G.S. 130A-101(f) does not legitimate the child. Nor does it affect the child’s inheritance rights unless it is filed with the clerk of court pursuant to G.S. 29-19(b)(2). G.S. 130A-101(f).

<sup>71</sup> As noted above, UPA § 201(b)(1) provides that an un rebutted presumption of a man’s paternity of a child establishes the legal relationship of father-child between the man and the child.

<sup>72</sup> *See* notes 40 through 48 and accompanying text regarding children born in or out of wedlock.

<sup>73</sup> UPA § 204(a)(4) resembles, but is not identical to, North Carolina's statute (G.S. 49-12) regarding legitimation of an illegitimate child when the child's mother and reputed father marry after the child's birth. *See* note 54 and accompanying text.

<sup>74</sup> The UPA defines "record" as information inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. UPA § 102(19).

<sup>75</sup> UPA § 204(b).

<sup>76</sup> UPA § 631(1).

<sup>77</sup> UPA § 607.

<sup>78</sup> 42 U.S. Code § 666(a)(5)(G) (enacted in 1993).

<sup>79</sup> G.S. 8-50.1(b1) (amended in 1993 to comply with federal child support funding requirements); *Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000).

<sup>80</sup> G.S. 8-50.1(b1).

<sup>81</sup> G.S. 8-50.1(b1).

<sup>82</sup> G.S. 8-50.1(b1); *Nash County ex rel. Williams v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851 (1997).

<sup>83</sup> *Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997).

<sup>84</sup> The UPA does not establish a presumption with respect to genetic tests that do not exclude an individual as a child's biological parent but indicate a probability of parentage that is less than 99 percent. UPA § 505, Comment.

<sup>85</sup> UPA § 505(b).

<sup>86</sup> 42 U.S. Code § 666(a)(5)(C)(i). The state's procedures for voluntary paternity acknowledgment (VPA) must include a hospital-based VPA program that focuses on the period immediately before or after a child's birth. Federal VPA requirements were first enacted in 1993 and were amended in 1996.

<sup>87</sup> 42 U.S. Code § 666(a)(5)(D)(ii).

<sup>88</sup> 42 U.S. Code § 666(a)(5)(D)(iii).

<sup>89</sup> 42 U.S. Code § 666(a)(5)(E).

<sup>90</sup> A VPA must be sworn to before a notary public or other certifying officer and is binding on the child's mother and putative father regardless of whether he or she is an adult or minor. G.S. 110-132(a). A VPA must be filed with a clerk of superior court. G.S. 110-134.

<sup>91</sup> G.S. 110-132(a).

<sup>92</sup> G.S. 110-132(a); *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002).

<sup>93</sup> Although not expressly limited with respect to the timing of the child's birth, the VPA procedure established under G.S. 130A-101(f) apparently was intended to apply to a hospital-based VPA program focusing on the time just before or after a child's birth.

Although G.S. 130A-101(f) was amended in response to federal VPA requirements, it does not fully comply with those requirements. *See* notes 86 through 89 and accompanying text.

<sup>94</sup> G.S. 130A-101(f). A certified copy of the VPA is admissible in any legal action to establish the child's paternity. A VPA executed pursuant to G.S. 130A-101(f), however, is not in and of itself equivalent to a legal finding of paternity as required by federal law. *See* note 87 and accompanying text.

<sup>95</sup> G.S. 130A-101(f). *See* note 91 and accompanying text.

<sup>96</sup> UPA Art. 3, Prefatory Note.

<sup>97</sup> A "presumed" father who claims to be the child's genetic father may sign a VPA, thereby becoming the "acknowledged" as well as "presumed" father of the child. UPA § 302(c). A "would-be father" whose paternity has been excluded through genetic testing may not validly sign a VPA. UPA § 302, Comment. A VPA, or denial of paternity, signed by a minor is valid if it is otherwise in compliance with the UPA's requirements. UPA § 304(d).

<sup>98</sup> The VPA process established by the UPA may not be used by an "acknowledging" father who is not, in fact, the child's genetic father to circumvent a state's adoption law. UPA § 301, Comment.

<sup>99</sup> UPA § 302(a)(4).

<sup>100</sup> UPA § 304(b), (c).

<sup>101</sup> UPA § 302(b); UPA § 303. A presumed father may not sign a denial of paternity in connection with another man's acknowledgment of paternity if the presumed father has signed a VPA that has not been rescinded or successfully challenged or if the presumed father has been adjudicated to be the child's father. UPA § 303.

<sup>102</sup> UPA § 305(a); 42 U.S. Code § 666(a)(5)(D)(ii).

<sup>103</sup> UPA § 310; 42 U.S. Code § 666(a)(5)(E).

<sup>104</sup> UPA § 307; 42 U.S. Code § 666(a)(5)(D)(ii).

<sup>105</sup> UPA § 308(a); UPA § 309.

<sup>106</sup> Parentage is not an issue if it has been previously adjudicated and the principles of *res judicata* or collateral estoppel preclude a party from relitigating the issue. *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981); *State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993). Paternity is not an issue in a child custody proceeding if the child's mother is estopped from contesting her husband's, or ex-husband's, paternity of a child born during their marriage. *Patience v. Jones*, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

<sup>107</sup> The court must require the person requesting the genetic test to pay for the cost of testing but may

tax the expense of genetic testing as part of the costs of the action. G.S. 8-50.1(b1). An indigent putative father who requests genetic paternity testing may have a constitutional right to obtain genetic testing at the state's expense without having to pay the cost of the testing in advance. *See Little v. Streater*, 452 U.S. 1 (1981).

<sup>108</sup> *Jeffries v. Moore*, 148 N.C. App. 364, 559 S.E.2d 217 (2002).

<sup>109</sup> In criminal cases in which the issue of parentage arises, genetic test results may be admissible to exclude, but not to establish, the putative father's paternity.

<sup>110</sup> *Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996).

<sup>111</sup> G.S. 8-50.1(b1); *Rockingham County ex rel. Shaffer v. Shaffer*, 126 N.C. App. 197, 484 S.E.2d 415 (1997). *Cf. Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

<sup>112</sup> G.S. 8-50.1(b1). The special evidentiary rules regarding genetic paternity testing ordered pursuant to G.S. 8-50.1(b1) do not apply to genetic paternity tests that are conducted by the parties' agreement without a court order. *Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 479 S.E.2d 270 (1997).

<sup>113</sup> G.S. 8-50.1(b1). *See note 79 and accompanying text.*

<sup>114</sup> G.S. 110-132.2.

<sup>115</sup> UPA § 501. Section 511 of the UPA makes the unauthorized release of genetic specimens collected in connection with paternity testing a misdemeanor.

<sup>116</sup> *See notes 121 through 122 and accompanying text.*

<sup>117</sup> UPA § 608. Section 608(b) lists some of the factors that a court must consider in determining the child's best interests. Section 608(c) requires that a guardian ad litem be appointed to represent the interest of a minor or incapacitated child.

<sup>118</sup> UPA § 502(b). Neither a court nor a child support enforcement agency may order in utero testing of a child. UPA § 502(c).

<sup>119</sup> UPA § 502(d).

<sup>120</sup> UPA § 505(c).

<sup>121</sup> UPA § 502, Comment.

<sup>122</sup> An order requiring the genetic testing of a relative of an alleged father must be supported by a finding that the need for genetic testing outweighs the legitimate interests of the relative and may be issued only for good cause under such circumstances as the court determines to be just. UPA § 508.

<sup>123</sup> UPA § 509. *See Batcheldor v. Boyd*, 108 N.C. App. 275, 423 S.E.2d 810 (1992).

<sup>124</sup> UPA § 510.

<sup>125</sup> UPA § 506(a). If a child support enforcement agency advances the costs, it may seek reimbursement from a man who is identified as the child's father through genetic testing. UPA § 506(b). Expenses related to genetic paternity testing may be taxed as costs pursuant to UPA § 636(c).

<sup>126</sup> When a party contests the results of genetic paternity testing, the court must order additional genetic testing upon that party's request. UPA § 507. If the previous genetic test identified a man as the child's father, additional testing may be ordered only upon advance payment of the cost of testing by the requesting party. UPA § 507.

<sup>127</sup> UPA § 621(c).

<sup>128</sup> *See notes 84 through 85 and accompanying text. See also UPA § 505(c).*

<sup>129</sup> UPA § 631(4).

<sup>130</sup> G.S. 49-10; G.S. 49-12.1.

<sup>131</sup> G.S. Ch. 49, Art. 1.

<sup>132</sup> G.S. 52C-7-701.

<sup>133</sup> *See G.S. 14-322(d)* (criminal prosecution for failure to support child); *Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (child support); *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003) (child custody); *Batcheldor v. Boyd*, 119 N.C. App. 204, 458 S.E.2d 1 (1995) (decedent's estate); *Carpenter v. Hawley*, 52 N.C. App. 715, 281 S.E.2d 783 (1981) (workers compensation).

<sup>134</sup> UPA § 601.

<sup>135</sup> UPA § 610.

<sup>136</sup> UPA § 103(a).

<sup>137</sup> *See G.S. 7A-242 and G.S. 7A-244.* Failure to attach a certified copy of a child's birth certificate to a complaint in a civil paternity action as required by G.S. 49-14(a), however, may deprive the court of subject matter jurisdiction to enter an order determining the child's paternity. *Reynolds v. Motley*, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

<sup>138</sup> G.S. 7A-246; G.S. 49-10; G.S. 49-12.1; *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

<sup>139</sup> Granting one particular court *exclusive* original jurisdiction with respect to adjudicating parentage, however, could be problematic when some other court has exclusive jurisdiction over a different type of proceeding (for example, probate or administration of decedents' estates or workers compensation) in which the issue of parentage might arise.

<sup>140</sup> G.S. 49-16. *See G.S. 1-82; Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

<sup>141</sup> G.S. 49-16; G.S. 110-130. If any of the parties are minors or incapacitated, the court must appoint a



guardian ad litem for each of the minor or incapacitated parties. G.S. 1A-1, Rule 17. A special proceeding to legitimate an illegitimate child may be brought only by the child's putative father. G.S. 49-10; G.S. 49-12.1.

<sup>142</sup> *In re Locklear*, 314 N.C. 412, 334 S.E.2d 48 (1985); G.S. 49-12.1; *Johnson v. Johnson*, 120 N.C. 1, 461 S.E.2d 369 (1995), *rev'd*. 343 N.C. 114, 468 S.E.2d 59 (1996).

<sup>143</sup> *Smith v. Bumgarner*, 115 N.C. App. 149, 443 S.E.2d 744 (1994); G.S. 49-10; G.S. 49-12.1. If a minor child is joined as a party to a paternity or legitimation proceeding, the court must appoint a guardian ad litem for the child pursuant to G.S. 1A-1, Rule 17.

<sup>144</sup> UPA §§ 603, 612.

<sup>145</sup> UPA § 612.

<sup>146</sup> UPA § 612.

<sup>147</sup> G.S. 1-75.3; *Bronnum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).

<sup>148</sup> A North Carolina court may not assert personal jurisdiction over a nonresident defendant in a civil proceeding unless there is a statutory basis for asserting "long arm" jurisdiction *and* the contact between the nonresident defendant and North Carolina is at least minimally sufficient to warrant exercise of "long arm" jurisdiction consistent with the requirements of due process. *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985); *Cochran v. Wallace*, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

<sup>149</sup> G.S. 52C-2-201(1); G.S. 1-75.4(1).

<sup>150</sup> G.S. 52C-2-201(2).

<sup>151</sup> G.S. 52C-2-201(6); G.S. 49-17(a).

<sup>152</sup> G.S. 52C-2-201(4).

<sup>153</sup> G.S. 52C-2-201(5).

<sup>154</sup> G.S. 52C-2-201(7).

<sup>155</sup> G.S. 52C-2-201(5).

<sup>156</sup> G.S. 52C-2-201(8); G.S. 1-75.4; *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985); *Cochran v. Wallace*, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

<sup>157</sup> Lack of jurisdiction over one individual does not preclude a court from making a binding adjudication of parentage with respect to another individual over whom the court has personal jurisdiction. UPA § 604(c).

<sup>158</sup> UPA § 604(b). *See* notes 148 through 156 and accompanying text.

<sup>159</sup> G.S. 49-14(a).

<sup>160</sup> G.S. 49-14(c).

<sup>161</sup> UPA § 606.

<sup>162</sup> UPA § 607(a). *See* text following note 77.

<sup>163</sup> UPA § 607(b). *See* text following note 77.

<sup>164</sup> UPA §§ 609(a), 308(a).

<sup>165</sup> UPA § 609(b).

<sup>166</sup> *See Searcy v. Justice*, 20 N.C. App. 559, 202 S.E.2d 314 (1974); G.S. 1-393.

<sup>167</sup> G.S. 49-14(a). Failure to attach a certified copy of the child's birth certificate may result in the court's lacking subject matter jurisdiction to adjudicate the child's paternity. *Reynolds v. Motley*, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

<sup>168</sup> G.S. 49-14(a).

<sup>169</sup> G.S. 1A-1, Rule 55(b)(2).

<sup>170</sup> G.S. 49-14(e).

<sup>171</sup> G.S. 49-14(d).

<sup>172</sup> *But see Wake County ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982).

<sup>173</sup> *See Searcy v. Justice*, 20 N.C. App. 599, 202 S.E.2d 314 (1974); *State v. Robinson*, 245 N.C. 1, 95 S.E.2d 126 (1956); *Rev. Stat. (1837)*, Ch. 12, § 4; N.C. Constitution, Art. I, § 25.

<sup>174</sup> G.S. 49-14(f).

<sup>175</sup> G.S. 49-14(f). If the putative father's paternity is not established, he must be reimbursed the full amount of support paid under the temporary order.

<sup>176</sup> The following actions may be taken before the child's birth: service of process; discovery; collection of genetic specimens from individuals other than the child. UPA §§ 611, 502.

<sup>177</sup> UPA § 611.

<sup>178</sup> An order dismissing a civil paternity proceeding with prejudice for want of prosecution is void. UPA § 635.

<sup>179</sup> The temporary order may include provisions related to child custody and visitation if authorized by other state law. UPA § 624(b).

<sup>180</sup> UPA § 633.

<sup>181</sup> UPA § 623.

<sup>182</sup> *See* 42 U.S. Code § 666(a)(5)(I).

<sup>183</sup> G.S. 49-14(b). Until October 1, 1993, G.S. 49-14 required that paternity be proved beyond a reasonable doubt. 1993 N.C. Sess. Laws, Ch. 333.

<sup>184</sup> UPA § 505, Comment.

<sup>185</sup> *See Hermanson v. Hermanson*, 887 P.2d 1241 (Nev. 1994); *Restatement of the Law: Conflict of Laws 2d*, §§ 6, 287.

<sup>186</sup> UPA § 103(b), Comment.

<sup>187</sup> As promulgated, the UPA does not govern proceedings to adjudicate parentage that are commenced before the UPA becomes effective. UPA § 905. Nor does the UPA affect the validity of judgments regarding parentage that were entered before the UPA is enacted and takes effect.

<sup>188</sup> G.S. 49-14(a).

<sup>189</sup> G.S. 49-15.

<sup>190</sup> G.S. 29-19(b). The child's father and his lineal and collateral kin are entitled to inherit property by, through, and from an illegitimate child whose paternity has been adjudicated pursuant to G.S. 49-14. G.S. 29-19(c). For purposes of intestate succession, an illegitimate child is treated as a legitimate child with respect to the child's mother and her relatives. G.S. 29-19(a). *Cf.* G.S. 29-18; G.S. 49-10; G.S. 49-11 (intestate succession by and with respect to an illegitimate child who has been legitimated). *Cf.* G.S. 30-17.

<sup>191</sup> G.S. 49-14(c).

<sup>192</sup> G.S. 49-15.

<sup>193</sup> G.S. 6-21(10).

<sup>194</sup> G.S. 130A-119; G.S. 130A-118(b)(2). *Cf.* 49-13 (amended birth certificate when an illegitimate child is legitimated).

<sup>195</sup> *Durham County v. Riggsbee*, 56 N.C. App. 744, 289 S.E.2d 579 (1982); *State ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002); *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002).

<sup>196</sup> *Settle ex rel. Sullivan v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983); *Devane v. Chancellor*, 120 N.C. App. 636, 463 S.E.2d 293 (1995); *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 474 S.E.2d 127 (1996).

<sup>197</sup> *Guilford County ex rel. Gardner v. Davis*, 123 N.C. App. 527, 473 S.E.2d 640 (1996).

<sup>198</sup> UPA § 636(a).

<sup>199</sup> UPA § 636(b).

<sup>200</sup> UPA § 636(f). On request of a party and for good cause shown, the court may order that the child's name be changed. UPA § 636(e).

<sup>201</sup> UPA § 636(c). Fees, costs, or expenses may not be assessed against a child support enforcement agency except as specifically allowed by law. UPA § 636(d). Attorney fee awards may be paid directly to, and be enforced by, a party's attorney. UPA § 636(c).

<sup>202</sup> UPA §§ 637(b) and 637(d).

<sup>203</sup> UPA § 637(e).

<sup>204</sup> UPA § 637(c).

<sup>205</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972). The *Stanley* decision, however, also recognized that, in the case of an "unknown" father, published, rather than personal, notice would be sufficient to satisfy due process requirements. *Stanley v. Illinois*, 405 U.S. 645, 657, n. 9 (1972).

<sup>206</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>207</sup> Sampson, *The Uniform Parentage Act* (2000), 35 FAM. L. Q. 83, 119-120, nn. 25-26 (2001).

<sup>208</sup> N.C. Sess. Laws 1977, c. 879, amending former G.S. 48-6(a)(3) (repealed 1995). The same

legislation also amended the state's revised law governing termination of parental rights to allow the termination of a putative father's rights with respect to an illegitimate child if, before a termination of parental rights proceeding was filed, the father's paternity had not been established judicially or by affidavit or the father had failed to legitimate or support the child. N.C. Sess. Laws 1979, c. 879, §8 enacting former G.S. 7A-289.32(6) (now reenacted and codified as G.S. 7B-1111(a)(5)). The adoption statute (G.S. 48-6) had been amended in 1975 to require that consent for adoption of an illegitimate child be obtained from the child's father if, before the mother's consent for adoption was obtained, the father's paternity had been judicially established or the father had legitimated the child or signed an affidavit acknowledging his paternity of the child. N.C. Sess. Laws 1975, c. 714 amending former G.S. 48-6.

<sup>209</sup> N.C. Sess. Laws 1979 (1980), c. 1088, amending former G.S. 7A-289.32(6) and former G.S. 48-6(a)(3).

<sup>210</sup> Under North Carolina's current adoption law, a putative father's consent for adoption of an illegitimate child is required if, before the date an adoption petition is filed or the date of a hearing regarding pre-birth determination regarding consent is held, he has acknowledged his paternity of the child *and* (a) is obligated to support the child under a written agreement or by court order, or (b) has provided reasonable and consistent financial support for the child or the child's mother, or (c) married or attempted to marry the child's mother after the child's birth but before the mother's relinquishment of the child for adoption or placement of the child for adoption. G.S. 48-3-601(2)b.4.

<sup>211</sup> G.S. 7B-1111(a)(5).

<sup>212</sup> According to staff with the state Division of Social Services, the registry's existence is not widely publicized: only a handful of paternity affidavits have been filed with the registry since the state's adoption law was amended in 1995 and fewer than fifty paternity affidavits have been filed with the registry since it was established almost 25 years ago.

<sup>213</sup> UPA Art. 4, Prefatory Note.

<sup>214</sup> UPA § 402(a). UPA § 411 specifies the information that must be included on the registration form. There is no fee for registering with the state paternity registry. UPA § 416(a). A purported registration that is submitted more than 30 days after the child's birth is untimely and, apparently, ineffective. UPA § 415.

<sup>215</sup> UPA § 402(b).

<sup>216</sup> UPA § 405.

<sup>217</sup> UPA § 403; UPA § 402, Comment. By registering, the putative father also submits himself to the state's jurisdiction with respect to legal proceedings involving the child's paternity and support. Uniform Interstate Family Support Act (UIFSA) § 201(7).

<sup>218</sup> UPA §§ 421, 422. If the petitioner has reason to believe that the child was conceived or born in another state, the petitioner must obtain a certificate from the paternity registry in the other state. UPA § 421(b).

<sup>219</sup> UPA § 412.

<sup>220</sup> Artificial insemination refers to the introduction of sperm into a woman's vagina or uterus by medical means (usually a catheter) rather than through sexual intercourse. G.S. 49A-1 apparently does not apply to children born as a result of assisted reproductive techniques other than artificial insemination (for example, in vitro fertilization).

<sup>221</sup> The artificial insemination of a married woman with sperm donated by her husband is referred to as "homologous artificial insemination."

<sup>222</sup> Article 7 of the UPA is based primarily on provisions contained in the 1988 Uniform Status of Children of Assisted Conception Act (USCACA). As of 2001, only two states (Virginia and North Dakota) had adopted the USCACA. The UPA only addresses the parentage of children born through assisted reproduction. It does not address the regulation of medical procedures involving assisted reproduction, the ownership or disposition of embryos created through assisted reproduction, or other legal issues related to assisted reproduction.

<sup>223</sup> If a state enacts Article 8 of the UPA, Article 7 of the UPA will not govern the determination of parentage of children born pursuant to validated gestational agreements. UPA § 701. *See* notes 239 through 263 and accompanying text.

<sup>224</sup> Under the UPA, the marital status of the intended parents is irrelevant.

<sup>225</sup> In cases involving homologous artificial insemination, the woman is genetically and gestationally the child's mother, while her husband (or boyfriend or partner) supplies the sperm, is the genetic father of the resulting child, and will be the child's legal father if he consents to assisted reproduction and intends to be the child's father.

<sup>226</sup> The donors' identities may be known or unknown.

<sup>227</sup> Section 102(8) of the UPA defines "donor" as a person who produces the eggs or sperm used for

assisted reproduction, but does not treat a birth mother or intended father as a donor if they donate the eggs or sperm used in assisted reproduction.

<sup>228</sup> UPA § 702, Comment.

<sup>229</sup> Except as otherwise provided in cases involving gestational agreements, the woman who gives birth to the child would be the child's mother. UPA § 201(a)(1).

<sup>230</sup> In the case of assisted reproduction by an unmarried woman, the child born to the woman would have a mother but no legal father. UPA § 702, Comment.

<sup>231</sup> This section would prevent two women in a same-sex relationship from becoming the parents of a child born as a result of in-vitro fertilization in which eggs donated by one woman and fertilized by a male sperm donor are implanted in the other woman. In this situation, the woman who gives birth to the resulting child will be the child's mother under section 201(a)(1), but sections 102(8), 702, and 704, read together, prevent her partner (the egg donor) from becoming the child's parent even if she consents, in writing, to the assisted reproduction. While the pros and cons of this restriction can be debated as a matter of public policy, it does reflect the drafters' decision to avoid issues relating to same-sex couples. The UPA, however, might not preclude two men in a same-sex relationship from becoming the parents of a child born as a result of in-vitro fertilization in which one man provides sperm for the assisted reproduction *with the intent of being the parent of the resulting child* and the other man, also with the intent of being the child's parent, signs a written consent with the birth mother for the assisted reproduction. UPA §§ 703 and 704. They could not, however, enter into a valid gestational agreement with the woman under Article 8 of the UPA. UPA § 803(b). The child's birth mother, therefore, would be the child's mother, and third parent, unless or until her parental rights are terminated. UPA § 201(a)(1).

<sup>232</sup> UPA § 704(a).

<sup>233</sup> UPA § 704(b).

<sup>234</sup> UPA § 706(b).

<sup>235</sup> UPA § 707.

<sup>236</sup> UPA § 705(b).

<sup>237</sup> UPA § 706(a).

<sup>238</sup> *See* Katharine T. Bartlett, *Surrogate Parenthood: Finding a North Carolina Solution*, 18 N.C. CENT. L.J. 1 (1989).

<sup>239</sup> Most gestational agreements provide for the payment of compensation by the intended parents to the gestational mother or, at a minimum, payment by

the intended parents of medical and other expenses related to the pregnancy and birth. Section 801(e) of the UPA specifically authorizes the payment of consideration in connection with gestational agreements.

<sup>240</sup> The intended parents are the individuals who will be the parents of a child born pursuant to a gestational agreement, regardless of whether either one is a genetic parent of the child. Section 801(b) of the UPA makes it clear that, although the marital status of the intended parents is irrelevant, the intended parents must be a man and woman rather than two men or two women in a same-sex relationship.

<sup>241</sup> Section 102(11) of the UPA defines “gestational mother” as an adult who gives birth to a child under a gestational agreement. Although a gestational mother who supplies her own eggs for assisted reproduction is the child’s genetic, as well as gestational, mother, the “practice of having a woman perform both functions is generally strongly disfavored by the assisted reproduction community” because in these situations “the gestational mother’s genetic link to the child sometimes creates additional emotional and psychological problems in enforcing a gestational agreement.” UPA, Art. 8, Prefatory Note. Section 801 of the UPA implicitly requires that if the gestational mother is married at the time a gestational agreement is executed, her husband must be a party to the agreement.

<sup>242</sup> “Assisted reproduction” is defined in section 102(4) of the UPA. *See* note 223 and accompanying text. The UPA’s provisions regarding gestational agreements do not apply to a child conceived by means of sexual intercourse. UPA § 801(d).

<sup>243</sup> UPA Art. 8, Prefatory Note.

<sup>244</sup> Sampson, *The Uniform Parentage Act (2000)*, 35 FAM. L. Q. 83, 169, 201-202; Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L. Q. 1, 4. The 1988 Uniform Status of Children of Assisted Conception Act (USCACA) offered states two options with respect to gestational agreements: providing that gestational agreements are void or regulating gestational agreements through judicial review. Only two states enacted the USCACA: North Dakota chose to prohibit gestational agreements while Virginia chose to recognize and regulate these agreements.

<sup>245</sup> Sampson, *The Uniform Parentage Act (2000)*, 35 FAM. L. Q. 83, 167.

<sup>246</sup> Sampson, *The Uniform Parentage Act (2000)*, 35 FAM. L. Q. 83, 169.

<sup>247</sup> Sampson, *The Uniform Parentage Act (2000)*, 35 FAM. L. Q. 83, 169; Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41, 78.

<sup>248</sup> UPA Art. 8, Prefatory Note.

<sup>249</sup> Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41, 79.

<sup>250</sup> Two of the first three states to enact the UPA, Washington and Wyoming, omitted Article 8. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L. Q. 1, 4. If a state chooses not to enact the UPA without Article 8, the parentage of a child born pursuant to an unauthorized gestational agreement would be determined pursuant to Articles 2 and 7 of the UPA rather than the parentage rules contained in Article 8.

<sup>251</sup> UPA § 801(e), (f).

<sup>252</sup> UPA §§ 803, 809(a).

<sup>253</sup> UPA § 809(b).

<sup>254</sup> UPA § 809(c).

<sup>255</sup> In order to commence the proceeding, the intended parents or the gestational mother must have been residents of the state in which the proceeding is commenced for at least 90 days. UPA § 802(b)(1). If the prospective gestational mother is married, her husband must be joined in the proceeding. UPA § 802(b)(2). A copy of the gestational agreement must be attached to the petition. UPA § 802(b)(3). Information and records related to proceedings to validate gestational agreements may be disclosed only to the same extent as information and records related to adoption proceedings. UPA § 804. Subject to the jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act, a court that reviews a gestational agreement retains continuing, exclusive jurisdiction over all matters arising out of the agreement until a child born to the gestational mother during the term of the agreement is 180 days old. UPA § 805.

<sup>256</sup> The 2002 amendments to the UPA deleted two additional requirements with respect to the validation of gestational agreements: (a) that medical evidence show that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child; and (b) that the prospective gestational mother has had at least one pregnancy and delivery and her bearing another child will not pose an unreasonable health risk to the unborn child or to the prospective gestational mother’s physical or mental health. The 2002 amendments also deleted a provision that expressly

recognized the court's exercise of discretion with respect to validating a gestational agreement and providing that a court's decision regarding validation of a gestational agreement is reviewable only for abuse of discretion. The Comment to section 803, however, indicates that this section permits, but does not require, a court to validate a gestational agreement that meets the requirements set forth in this section.

<sup>257</sup> UPA § 806(b). It is unclear whether the court's authority extends to cases in which the gestational mother is or has become pregnant by means of assisted reproduction pursuant to the agreement.

<sup>258</sup> Section 806(a) refers only to a man who is married to the prospective gestational mother at the time a gestational agreement is validated. The gestational mother's marriage after a gestational agreement is validated does not affect the agreement's validity. UPA § 808. If the prospective gestational mother marries after a gestational order is validated, her husband's consent to the agreement is not required and he is not the presumed father of the resulting child. UPA § 808.

<sup>259</sup> UPA § 806(a). A prospective gestational mother or her husband may not be held liable for terminating a gestational agreement before the gestational mother becomes pregnant by means of assisted reproduction pursuant to the agreement. UPA § 806(d). The UPA does not expressly address termination of a gestational agreement by the parties after a gestational mother becomes pregnant by assisted reproduction pursuant to the agreement. UPA § 806, Comment. Section 801(f), however, implicitly recognizes that a gestational mother has the right to terminate a pregnancy pursuant to a gestational agreement or terminate the agreement itself if continuing the pregnancy or agreement would jeopardize her health or the health of the fetus. On the other hand, if an agreement is not terminated by court order and the gestational mother gives birth pursuant to the agreement, sections 803(a) and 807(a) give the intended parents an enforceable right to custody of the child and recognize them as the child's parents, apparently without regard to the purported termination of the agreement by one or more of the parties. UPA § 806, Comment.

<sup>260</sup> UPA § 806(c).

<sup>261</sup> UPA § 807(a). If the intended parents fail to file the notice, the gestational mother or an appropriate state agency may do so. UPA § 807(c). If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction pursuant to the agreement, the court must order that the child's

parentage be determined through genetic testing. UPA § 807(b).

<sup>262</sup> Although the gestational mother is the child's birth mother, she is not the child's legal mother. UPA §§ 201(a)(1), 801(a)(2). If the gestational mother is married, her husband is not the child's presumed father. UPA §§ 801(a)(2), 808.

<sup>263</sup> UPA § 807(a).

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