

MEMORANDUM

TO: Drafting Committee, UPA Revisions
FROM: Courtney Joslin, Reporter
DATE: January 31, 2016
RE: Marital Presumption

INTRODUCTION

I. Issue

Should the marital presumption be made gender neutral?

II. Background about the UPA generally

Our committee has been tasked with, among other things, revising the 2002 UPA to respond to the Supreme Court's decision in *Obergefell* and the fact that same-sex couples can now marry in all fifty states. Amendments are necessary because the UPA is written based on the assumption that married couples consist of one man and one woman. The specific question to be addressed in this call is whether the marital presumption should be made gender neutral.

This Section of the memo provides some background information about how other parts of the UPA will apply to same-sex couples once amended. Articles 7 and 8 of the 2002 UPA address the parentage of children born through assisted reproduction. Article 7 addresses non-surrogacy assisted reproduction. Article 8 addresses children born through surrogacy. Because these provisions assign parentage based on intention/consent/conduct, the provisions will have to be amended to apply equally to same-sex couples.

For example, Section 703 currently provides that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.” To comply with the Supreme Court's decision in *Obergefell*, this provision must be applied equally to woman. Thus, the provision should be amended to state: “a person who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.” Similar amendments will have to be made to Article 8 (the surrogacy provisions).¹ A number of states have already made similar amendments to their assisted reproduction provisions so that they provisions apply equally to same-sex couples.²

If Articles 7 and 8 are amended to apply in a gender neutral manner, when same-sex couples have children through assisted reproduction consistent with the requirements of Articles 7

¹ In our second call, we will also consider whether to make other changes to the substantive requirements of Article 8.

² The states that have made their assisted reproduction provisions gender neutral include: California, the District of Columbia, Maine, Nevada, New Hampshire, New Mexico, and Washington.

or 8, the same-sex spouse or parent will be considered a legal parent of the resulting child as a matter of law.

III. Background about the Marital Presumption

In our first committee drafting call, we are considering the parentage of same-sex spouses when the parties have a child in a manner that is not covered by Articles 7 or 8. This might include a situation where the female spouse becomes pregnant through sexual intercourse with a man not her spouse, or where the parties had a child through assisted reproduction but they did not comply with the requirements of Articles 7 or 8.

All fifty states have some version of a marital presumption pursuant to which a husband is presumed to be the legal parent of a child born to his wife. Under the 2002 UPA, this marital presumption applies in all circumstances, even when the husband is and knows he is impotent or sterile. Section 204(a)(1) of the 2002 UPA provides that “[a] man is presumed to be the father of a child if he and the mother of the child are married to each other and the child is born during the marriage.”³

Thus, under this provision, if a wife becomes pregnant as a result of sexual intercourse with a man not her husband, her husband is presumed to be the legal parent of the resulting child. Under Section 607 of the 2002 UPA, this presumption generally becomes conclusive on the child’s second birthday.⁴

The husband can seek to rebut the presumption of parentage within the first two years of the child’s life. The presumption can be rebutted by evidence that the husband is not the genetic parent. Under Section 608, however, even within the first two years of the child’s life, the court can deny a request for genetic testing if:

- (1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and
- (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.⁵

The 2002 UPA then lists a variety of equitable considerations that the court should consider when deciding whether to deny the request for genetic testing. These factors include: the length of time the man has parented the child, the nature of the relationship between the

³ Section 204(a)(2) also provides that a man is a presumed parent if: “he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation].”

⁴ Section 607(a) provides:

Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.

Section 607(b) provides a limited exception to this rule. Under 607(b), an action to disprove the father-child relationship . . . may be maintained at any time if the court determines that: (1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (2) the presumed father never openly held out the child as his own.

⁵ 2002 UPA, Section 608(a).

man and the child, when the man learned he was not the genetic father, and any other equitable considerations. The full list of factors is included in Appendix B.

Here is a hypothetical to illustrate how the presumption currently works for different-sex spouses. If a woman becomes pregnant through sexual intercourse with a man not her husband, her husband is presumed to be the legal parent of the resulting child under Section 204(a). The husband can seek to rebut the presumption within the first two years of the child's life. If the husband files a motion seeking genetic testing within those first two years, the court must consider his conduct and his wife's conduct when deciding whether to grant the motion. Section 608. So, for example, if the husband knew from the beginning that he was not the genetic parent, but despite this knowledge, he treated the child as his own, the court may deny his request for genetic testing and declare that the husband is the child's legal parent.

To bring us back to the issue on the table, the question is whether these rules should be applied equally to same-sex couples who have children through means not covered by Articles 7 or 8.

IV. Same-Sex Couples and the Marital Presumption: Developments in the States

Most, if not all, of the states that have considered this question in recent years have updated their marital presumption to be at least partially gender neutral. These jurisdictions include: California, the District of Columbia, Illinois, Maine, New Hampshire, and Washington.⁶ All of these provisions are included in Appendix A below.

(A) Making the Marital Presumption Gender Neutral

While all states that have amended their statutes in light of marriage equality have made their marital presumption(s) applicable to same-sex couples, there is a key difference between the approaches these states have taken.

- (i) The spouse of the woman who gave birth

In some jurisdictions, the presumption was made gender neutral, but it *only applies to the spouse of a woman* who has given birth. These jurisdictions include: California, the District of Columbia, Illinois, and Maine.

Here is the California provision:

- “A person is presumed to be the natural parent of a child if ... The presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.”

⁶ These states also made other parts of their parentage provisions, including the provisions related to assisted reproduction, gender neutral.

The idea here is that the presumption and the rebuttal would apply to the female spouse of the woman who gave birth in the same way that it applies to a male spouse of the woman who gave birth. Thus, the female spouse would be presumed to be the parent of the resulting child. The presumption would become conclusive after the child's second birthday. Within the first two years, a party could move to rebut the presumption with evidence that the wife is not the genetic parent of the child. The court, however, could deny the request for genetic testing if the conduct of the party seeking the genetic testing estops that person from denying parentage and if it would be inequitable to disprove the relationships between the wife and the child.

- (ii) The spouse of any parent, male or female

In other states, the presumption was amended so that it is fully gender neutral. In these states, the marital presumption applies to the spouse of either a woman or a man. These states include: New Hampshire and Washington.

Here is the Washington State provision:

- “In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if: The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership.”

As noted above, of the states that have amended their marital presumptions to account for same-sex marriage, most of them have not chosen this route; only a minority of states have chosen to apply the marital presumption to the spouse of the male parent. I believe the concern about having the presumption apply to the spouse of the male man relates primarily to heterosexual husbands. I'll use the following example to highlight a scenario that may be of concern:

A heterosexual married man has an affair with a woman not his wife. The woman becomes pregnant. After the woman gives birth, she and the husband both parent the child, but they do not so as a couple. Instead, the husband parents the child in the home he shares with his wife. The woman parents the child in her own separate home. Because the situation is largely amicable, neither parent initiates litigation. If litigation is not initiated until some time after the child's second birthday, it is possible that a court could conclude under the 2002 UPA that the husband and his wife are the child's legal parents, and that the woman who gave birth has no parental rights. Such a result may be unconstitutional; it may violate the constitutional parental rights of the woman who gave birth.

If the act permitted the possibility of three parents, this constitutional problem might be avoided. Amending the Act to permit the possibility of three legal parents, however, is likely to be considered very controversial.

Prior to the availability of same-sex marriage in California, a California Court of Appeal held that the marital presumption could not be applied to the wife of the father in a scenario similar to the one described above. *Amy G. v. M.W.*, 142 Cal. App. 4th 1 (2006).⁷

(B) Other Options for Protecting Same-Sex Spouses

As mentioned above, to my knowledge, all of the states that have revised their parentage provisions to account for same-sex marriage have made their marital presumption gender neutral. There is an interest, however, in considering ways other than a gender-neutral marital presumption to establish and protect the parentage of same-sex spouses. One suggestion that has been offered is through an amendment to the existing the Voluntary Acknowledgment of Paternity (VAP) procedures, or through the creation of new parallel VAP-like procedure.

First a bit of background about the VAP procedures. Federal law requires all states to have in place “a simple civil process for voluntarily acknowledging paternity.”⁸ Essentially a VAP is a form that the man and the woman sign declaring the man’s parentage. “If such an acknowledgment is validly signed by both parties and the period for rescission has elapsed, the acknowledgment is treated as a judicial adjudication of parentage, and states are required to give full faith and credit to this determination.”⁹

The VAP procedures were created for the purpose of increasing the establishment of parentage and child support collection for nonmarital children. Indeed, today, VAPs are the most common way that parentage is determined for nonmarital children.¹⁰ Consistent with this underlying purpose, in many (although not all) states, VAP procedures are limited to children born to unmarried women.¹¹

The VAP procedures are included in Article 3 of the 2002 UPA. Consistent with the federal requirements, under Article 3, the man and the woman must sign the VAP under penalty of perjury. Article 3 presumes that the man signing the VAP is or thinks he is the genetic father. Thus, Section 301 provides: “The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgement of paternity with intent to establish the

⁷ At the time this case was decided, California did not explicitly provide for the possibility of three legal parents.

⁸ 42 U.S.C. § 666(a)(5)(C)(i).

⁹ Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31, 44 (2010)

¹⁰ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1305 (2013).

¹¹ Cal. Fam. Code § 7571(a) (stating that VAPs shall be provided to “an unmarried mother leaving any hospital”).

The 2002 UPA does *not* limit VAPs to children born to unmarried women. Under the 2002 UPA, a married woman can sign a VAP to establish the parentage of a man not her husband. A VAP signed under these circumstances, however, is valid only if her husband signs a denial of parentage. *See* 2002 UPA, Article 3, Comment (“Because in many respects the federal act is nonspecific, the new UPA contains clear and comprehensive procedures to comply with the federal mandate. Primary among the factual circumstances that Congress did not take into account was that a married woman may consent to an acknowledgement of paternity by a man who may indeed be her child’s genetic father, but is not her husband.”).

man's paternity."¹² The VAP procedures are not intended to establish parentage where there is another party with a claim to parentage. Thus, the parties to the VAP must declare that the child "does not have a presumed father" or another acknowledged or adjudicated father. If the VAP states that another man is a presumed father, the VAP is void "unless a denial of paternity signed or otherwise authenticated" has been filed with the agency. Once properly filed, a VAP is treated as a final adjudication of parentage.¹³ There is a sixty-day period in which to rescind a VAP.¹⁴ After the sixty-day rescission period has expired, the VAP can only be challenged "within two years after the acknowledgement ... is filed" "on the basis of fraud, duress, or material mistake of fact."¹⁵

To date, no state has attempted to amend their VAP procedures to provide a mechanism for same-sex spouses to establish their parentage. Revising the VAP procedures so that they would establish the legal parentage of same-sex spouses would require changes to the requirements for signing a VAP and possibly to the procedures for challenging a VAP.

Finally, if a state declined to make its marital presumption applicable to the female spouses of the woman who gave birth, and instead sought to protect the female spouses of the woman who gave birth through a separate, different VAP-like system, it is possible that such an approach would be held to be unconstitutional as a violation of equal protection.

VI. Potential Suggested Amendments

To help our discussion, below are suggested amendments to the parentage presumptions, including the marital presumption.

SECTION 204. PRESUMPTION OF ~~PATERNITY~~PARENTAGE.

- (a) A ~~man~~person is presumed to be the ~~father~~parent of a child if:
- (1) ~~he~~the person and the mother of the child are married to each other and the child is born during the marriage;
 - (2) ~~he~~the person and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (3) before the birth of the child, ~~he~~the person and the mother of the child 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 the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (4) after the birth of the child, ~~he~~the person and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could

¹² Some states require the parties to swear under penalty of perjury that the man is the child's only possible father. *See, e.g.*, Md. Code Ann., Fam. Law § 5-1028 (c)(1) providing that the affidavit must include attestations, under penalty of perjury, by the mother that "her cosignatory is the only possible father" and by the man that "he is the natural father of the child").

¹³ 2002 UPA § 305(a) ("Except as otherwise provided in Sections 307 and 308, a valid acknowledgment of paternity filed with the [agency maintaining birth records] 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.").

¹⁴ 2002 UPA § 307.

¹⁵ 2002 UPA § 308.

be declared invalid, and ~~he~~the person voluntarily asserted his or her ~~paternity~~parentage of the child, and:

- (A) the assertion is in a record filed with [state agency maintaining birth records];
- (B) ~~he~~the person agreed to be and is named as the child's ~~father~~parent on the child's birth certificate; or
- (C) ~~he~~the person promised in a record to support the child as his or her own;

or

(5) for the first two years of the child's life, ~~he~~the person resided in the same household with the child and openly held out the child as his or her own.

(b) A presumption of ~~paternity~~parentage established under this section may be rebutted only by an adjudication under [Article] 6.

SECTION 607. LIMITATION: CHILD HAVING PRESUMED FATHER/PARENT.

(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed ~~father~~parent, the mother, or another individual to adjudicate the parentage of a child having a presumed ~~father~~parent must be commenced not later than two years after the birth of the child.

(b) A proceeding seeking to disprove the ~~father~~parent-child relationship between a child and the child's presumed ~~father~~parent may be maintained at any time if the court determines that:

- (1) the presumed ~~father~~parent and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and
- (2) the presumed ~~father~~parent never openly held out the child as his or her own.¹⁶

SECTION 608. AUTHORITY TO DENY ~~MOTION FOR~~ CHALLENGE BASED ON GENETIC TESTING.

~~(a) In a proceeding to adjudicate the parentage of a child having a presumed father/parent or to challenge the paternity of a child having an acknowledged father, the court may deny a motion seeking an order for genetic testing of the mother, the child, and the presumed or acknowledged father in which a presumed or acknowledged parent, the mother, or the child seeks to rebut a presumption of parentage or challenge an acknowledgement of parentage~~

¹⁶ The new Maine rebuttal provisions provide as follows:

2. Later than 2 years. A proceeding to challenge the parentage of an individual whose parentage is presumed under section 1881 may be commenced more than 2 years after the birth of the child in the following situations.

A. A presumed parent under section 1881, subsection 1 who is not the genetic parent of a child and who could not reasonably have known about the birth of the child may commence a proceeding under this subsection within 2 years after learning of the child's birth.

B. An alleged genetic parent who did not know of the potential genetic parentage of a child, and who could not reasonably have known on account of material misrepresentation or concealment, may commence a proceeding under this subsection within 2 years after discovering the potential genetic parentage. If the individual is adjudicated to be the genetic parent of the child, the court may not disestablish a presumed parent and, consistent with section 1853, subsection 2, the court shall determine parental rights and responsibilities of the parents in accordance with section 1653.

C. A mother or a presumed parent under section 1881, subsection 3 disputing the validity of the presumption may commence a proceeding under this subsection at any time.

with evidence that the presumed or acknowledged parent is not a genetic parent, the court may deny the motion if the court determines that:

- (1) the conduct of the mother or the presumed or acknowledged fatherparent estops that party from denying parentage; and
- (2) it would be inequitable to disprove the fatherparent-child relationship between the child and the presumed or acknowledged fatherparent.

(b) In determining whether to deny a the motion seeking an order for genetic testing under this section, the court shall consider the best interest of the child, including the following factors:

- (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged fatherparent was placed on notice that he or she might not be the genetic fatherparent;
- (2) the length of time during which the presumed or acknowledged fatherparent has assumed the role of fatherparent of the child;
- (3) the facts surrounding the presumed or acknowledged fatherparent's discovery of his or her possible nonpaternityparentage;
- (4) the nature of the relationship between the child and the presumed or acknowledged fatherparent;
- (5) the age of the child;
- (6) the harm that may result to the child if presumed or acknowledged paternityparentage is successfully disproved;
- (7) the nature of the relationship between the child and any alleged fatherparent;
- (8) the extent to which the passage of time reduces the chances of establishing the paternityparentage of another manperson and a child-support obligation in favor of the child; and
- (9) other factors that may affect the equities arising from the disruption of the fatherparent-child relationship between the child and the presumed or acknowledged fatherparent or the chance of other harm to the child.

(c) In a proceeding involving the application of this section, a minor or incapacitated child must be represented by a guardian ad litem.

(d) Denial of a motion seeking an order for genetic testing to rebut a presumption of parentage or to challenge an acknowledgement of parentage must be based on clear and convincing evidence.

(e) If the court denies a motion seeking to rebut a presumption of parentage or to challenge an acknowledgement of parentage based on an order for genetic testing, it shall issue an order adjudicating the presumed or acknowledged fatherparent to be the fatherparent of the child.

APPENDIX A

California – Cal. Fam. Code § 7611(a) (amended 2013)¹⁷

- A person is presumed to be the natural parent of a child if ... The presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

D.C. – D.C. Code Ann. § 16-909 (West) (amended 2013)¹⁸

- ... There shall be a presumption that a man is the father of a child:
(1) if he and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception and birth, and the child is born during the marriage or domestic partnership, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership pursuant to § 32-702(d); ...
(a-1)(2) There shall be a presumption that a woman is the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership pursuant to § 32-702(d).¹⁹

Illinois – 750 Ill. Comp. Stat. Ann. 46/204 (amended 2015)²⁰

- A person is presumed to be the parent of a child if: (1) the person and the mother of the child have entered into a marriage, civil union, or substantially similar legal relationship, and the child is born to the mother during the marriage, civil union, or

¹⁷ 2013 Cal. Legis. Serv. Ch. 510 (A.B. 1403).

¹⁸ 2012 District of Columbia Laws 19-233 (Act 19-550).

¹⁹ The provision regarding rebuttal of this presumption is as follows:

(b)(1) A presumption created by subsection (a)(1) through (4) of this section may be overcome upon proof by clear and convincing evidence, in a proceeding instituted within the time provided in § 16-2342(c) or (d), that the presumed parent is not the child's genetic parent. The Court shall try the question of parentage, and may determine that the presumed parent is the child's parent, notwithstanding evidence that the presumed parent is not the child's genetic parent, after giving due consideration to:

(A) Whether the conduct of the mother or the presumed parent should preclude that party from denying parentage;

(B) The child's interests; and

(C) The duration and stability of the relationship between the child, the presumed parent, and the genetic parent.

(2) If questioned, the presumption created by subsection (a-1)(2) that a child born to the mother is the child of the mother's female domestic partner or spouse may be overcome pursuant to paragraph (1) of this subsection or upon proof by clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child.

D.C. Code Ann. § 16-909.

²⁰ 2015 Ill. Legis. Serv. P.A. 99-85 (H.B. 1531).

substantially similar legal relationship, except as provided by a valid gestational surrogacy contract, or other law.²¹

Maine – Me. Stat., T. 19-A, § 1881(1) (amended 2015)²²

- A person is presumed to be the parent of a child if: The person and the woman giving birth to the child are married to each other and the child is born during the marriage.

New Hampshire – N.H. Rev. Stat. § 168-B:2(V) (amended 2014)²³

- Notwithstanding any other provision of law, a person is presumed to be the parent of a child if: (a) The child is born to a person’s spouse during the marriage, or within 300 days after the marriage is terminated for any reason, or after a decree of separation is entered by the court.

Washington – Wash. Rev. Code Ann. § 26.26.116 (amended 2011)²⁴

- In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if: The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership.

²¹ Subsection (2) provides that the person is a presumed parent if:

the person and the mother of the child were in a marriage, civil union, or substantially similar legal relationship and the child is born to the mother within 300 days after the marriage, civil union, or substantially similar legal relationship is terminated by death, declaration of invalidity of marriage, judgment for dissolution of marriage, civil union, or substantially similar legal relationship, or after a judgment for legal separation, except as provided by a valid gestational surrogacy contract, or other law;

²² 2015 Me. Legis. Serv. Ch. 296 (S.P. 358) (L.D. 1017).

²³ 2014 N.H. Legis. Serv. Ch. 248 (S.B. 353).

²⁴ 2011 Wash. Legis. Serv. Ch. 283 (S.S.H.B. 1267).

APPENDIX B

2002 UPA, Section 204

SECTION 204. PRESUMPTION OF PATERNITY.

- (a) A man is presumed to be the father of a child if:
- (1) he and the mother of the child are married to each other and the child is born during the marriage;
 - (2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (3) before the birth of the child, he and the mother of the child 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 the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
 - (A) the assertion is in a record filed with [state agency maintaining birth records];
 - (B) he agreed to be 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 as his own; or
 - (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.
- (b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.

2002 UPA, Section 607

SECTION 607. LIMITATION: CHILD HAVING PRESUMED FATHER.

- (a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.
- (b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that:
- (1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and
 - (2) the presumed father never openly held out the child as his own.

2002 UPA, Section 608

SECTION 608. AUTHORITY TO DENY MOTION FOR GENETIC TESTING.

- (a) In a proceeding to adjudicate the parentage of a child having a presumed father or to challenge the paternity of a child having an acknowledged father, the court may deny a motion seeking an order for genetic testing of the mother, the child, and the presumed or acknowledged father if the court determines that:
- (1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and

- (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.
- (b) In determining whether to deny a motion seeking an order for genetic testing under this section, the court shall consider the best interest of the child, including the following factors:
- (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
 - (2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
 - (3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
 - (4) the nature of the relationship between the child and the presumed or acknowledged father;
 - (5) the age of the child;
 - (6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
 - (7) the nature of the relationship between the child and any alleged father;
 - (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
 - (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.
- (c) In a proceeding involving the application of this section, a minor or incapacitated child must be represented by a guardian ad litem.
- (d) Denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence.
- (e) If the court denies a motion seeking an order for genetic testing, it shall issue an order adjudicating the presumed or acknowledged father to be the father of the child.