

QUASI-MARITAL CHILDREN: THE COMMON LAW'S FAILURE IN *PRIVETTE* AND *DANIEL* CALLS FOR STATUTORY REFORM

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I.	INTRODUCTION.....	220
II.	NEUTRAL TERMINOLOGY.....	221
	A. <i>The Legal Lexicon of Fatherhood</i>	222
	B. <i>Three Types of Quasi-Marital Children</i>	227
	1. <i>Type I</i>	228
	2. <i>Type II</i>	229
	3. <i>Type III</i>	230
III.	THE EMERGENCE OF LEGAL ISSUES CONCERNING QUASI-MARITAL CHILDREN.....	231
	A. <i>The Social, Economic, and Scientific Emergence of Quasi-Marital Children</i>	232
	B. <i>The Natural Law's Tension Between Biology and Marriage</i>	233
	C. <i>The Presumption of Legitimacy: Quietly Upholding the Family Unit Over Biology</i>	236
	D. <i>Bastardy and Paternity: Support Rather than Parentage</i>	237
IV.	<i>PRIVETTE V. DEPARTMENT OF HRS: AN EXPANSIVE READING OF CHAPTER 742, FLORIDA STATUTES, IN THE BEST INTERESTS OF CHILDREN</i>	239
	A. <i>Procedural Problems</i>	243
	1. <i>Guardian Ad Litem</i>	244
	2. <i>Personal Jurisdiction</i>	245
	B. <i>Substantive Problems</i>	246
V.	<i>DANIEL V. DANIEL: A RETREAT TO TRADITIONAL RULES THAT MAY DISADVANTAGE EVEN MARITAL CHILDREN</i>	248
	A. <i>Confusion of Legitimacy and Paternity</i>	249
	B. <i>Daniel's Other Problems</i>	256
VI.	A STATUTORY PROPOSAL TO ADDRESS THE NEEDS OF QUASI-MARITAL CHILDREN.....	258
	A. <i>Assumptions</i>	258
	B. <i>Basic Framework</i>	260
	C. <i>A Simpler Statute Based on Other Assumptions</i>	261
	D. <i>Addressing Quasi-Marital Children</i>	262
	1. <i>Type I Quasi-Marital Children</i>	262
	2. <i>Type III Quasi-Marital Children</i>	266
	3. <i>Type II Quasi-Marital Children</i>	269
	E. <i>Biological Fathers</i>	272
VII.	CONCLUSION.....	273

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I. INTRODUCTION

For over two hundred years, the common law divided children into two categories—marital and nonmarital.¹ The mother's husband was automatically, and almost conclusively, the father of a marital child. The biological father of a nonmarital child was determined, when necessary, by bastardy or paternity proceedings. As recently demonstrated by two Florida Supreme Court cases,² a third category of children has emerged—children who appear to be marital children but whose biological fathers are not their mothers' husbands. Now that genetic testing can accurately, rapidly, and inexpensively determine paternity, this third category, "quasi-marital children," presents distinct and complex legal issues regarding fatherhood.

The disparate treatment of quasi-marital children in *Department of Health and Rehabilitative Services v. Privette*³ and *Daniel v. Daniel*⁴ illustrates the need for substantive and procedural clarification. In both cases, mothers seeking support for their children were unsuccessful due to inadequate legal rules. In *Privette*, the Florida Supreme Court provided a complex procedure for shifting the status of "legal father" from the marital father to the biological father if, in the court's view, such action would be in the child's best interests.⁵ The opinion left many issues open for redress including jurisdictional questions,⁶ issues regarding guardians ad litem,⁷ and questions as to when the standards set forth in *Privette* should apply.⁸ Four years later, in *Daniel*, the court complicated jurisdictional issues further and ultimately fictionalized the right to legitimacy recognized in *Privette*.⁹

New statutory rules for determining paternity and parental rights and responsibilities for quasi-marital children must supplant the common law. Both the courts and the Florida Legislature must ad-

1. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 434-37 (Univ. of Chicago Press 1979) (1765). Under strict English common law, parents had to be married prior to the child's birth for the child to be legitimate. See *id.* at 434. In comparison, a bastard was a child born out of lawful matrimony, even if his parents married subsequent to his birth. See *id.* at 442.

2. See *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997) (holding that in a dissolution of marriage, a husband has no legal duty to support a child who is not his natural or adopted child); *Department of HRS v. Privette*, 617 So. 2d 305 (Fla. 1993) (holding that the law presumes a child's best interest is served by upholding legitimacy in a paternity action).

3. 617 So. 2d 305 (Fla. 1993).

4. 695 So. 2d 1253 (Fla. 1997).

5. See *Privette*, 617 So. 2d at 308.

6. See *id.* (requiring a showing of good faith and the likelihood of a favorable outcome as a prerequisite to bringing a suit).

7. See *id.* (suggesting the appointment of a guardian ad litem to ensure the child's best interests).

8. See *id.* at 309-10 (pointing to a lack of factual development in the record).

9. See *infra* Part IV.A.

dress the conflict between two opposing ideologies: one that gives deference to biology and the other, deference to the family unit. As a general rule, this conflict must be resolved in the best interests of the child.

Part II of this Article provides a more precise, less judgmental vocabulary with which to analyze and define the issues surrounding quasi-marital children. Part III then provides a historical overview explaining how and why these issues have recently emerged and how the common law used the presumption of legitimacy as a procedural tool to conceal an unresolved substantive conflict within natural law theory. This procedural mechanism allowed the common law to favor marital fathers and family interests while purporting to favor biological fathers. Next, Parts IV and V examine two recent Florida Supreme Court decisions that demonstrate how the common law is inadequate to protect quasi-marital children in a legal world where genetic testing weakens the presumption of legitimacy's substantive function.

Finally, Part VI introduces a proposed statutory revision to chapter 742, *Florida Statutes*. The proposal is based in part on the California parentage statute¹⁰ but is refined to address the issues identified in *Privette*, *Daniel*, and other recent cases. The proposal aims to provide quasi-marital children with family units and economic support whenever possible, while also providing reasonable remedies for biological fathers, marital fathers, and biological mothers. The proposal does not resolve the inherent conflict within natural law theory because it does not exclusively implement either the family ideology or the biological ideology. The proposal, however, exposes the conflict and attempts to select family interests over biological interests. The proposed statutory revision is designed to stimulate debate in the hopes that a final version can be submitted to the Florida Legislature for enactment in the near future.

II. NEUTRAL TERMINOLOGY

Initially, a more precise, less judgmental vocabulary should be used in analyzing the legal issues surrounding quasi-marital children. Common law concepts of paternity, parentage, and legitimacy, created to address two categories of children—marital and nonmarital—prove inadequate when used in reference to the third category, quasi-marital children.

10. CAL. FAM. CODE § 7540 (West 1997). The United States Supreme Court upheld the constitutionality of the California parentage statute in 1989. See *Michael H. v. Gerald D.*, 491 U.S. 110, 131-32 (1989).

A. *The Legal Lexicon of Fatherhood*

Existing legal terms are often too vague and ambiguous to sufficiently describe the legal complexities of children born to married women when the biological father is not the woman's lawful husband at the time of the child's birth. The current vocabulary uses old terms, such as "natural father"¹¹ and "legitimacy,"¹² which are either legally undefined or have inconsistent definitions in current law. New terms, such as "legal father,"¹³ have no established definition in

11. The evolution of the modern concept of "natural father" could be the subject of a lengthy article. It is undefined in BLACK'S LAW DICTIONARY (6th ed. 1990). The term is used in the Uniform Parentage Act to designate the biological father based on five situations giving rise to the presumption of natural lineage. See UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298-99 (1987).

The term "natural father" has not always been limited to situations where a genetic test has been performed or where it is otherwise virtually certain that the putative father is the biological father. It is often used to describe the marital father after the family unit has been altered in some manner. See, e.g., Department of HRS v. Dougherty, 700 So. 2d 77, 78 (Fla. 2d DCA 1997) (using the term "natural father" to indicate that the biological father was divorced from the mother); Fitts v. Poes, 699 So. 2d 348, 348 (Fla. 5th DCA 1997) (concerning a biological father, referred to as the "natural father," who, after the death of the biological mother, married a woman who is now the adoptive stepmother).

Earlier courts tended to use the term only in reference to the presumed biological father of a bastard child. See, e.g., *In re Cotton*, 6 F. Cas. 617, 618 (D. Conn. 1843) (holding that a "child born in lawful wedlock has a right to claim of its father protection, support, and education; and these are all duties, in their nature and essence, similar to the duty which the natural father owes his illegitimate child").

12. Legitimacy, as a legal concept, was initially more important for determining the child's rights of inheritance than the father's parental rights. See 2 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 260 (Cambridge Univ. Press 2d ed. 1898). Some states attempt to carefully distinguish between legitimacy in the context of inheritance and in the context of paternity. See *Denbow v. Harris*, 583 A.2d 205, 207 n.1 (Me. 1990) (stating that paternity is a question of biology while legitimacy is relevant to inheritance law). Nonmarital and quasi-marital children present difficulties in the law of inheritance that are not always well addressed by the concept of legitimacy. See, e.g., Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94.

13. The use of the term "legal father" could also warrant discussion in a separate article. The term is used extensively in law review articles and in the case law of other states, which usually employ a meaning comparable with the use in this Article—the individual legally recognized as having all rights, responsibilities, and obligations of fatherhood with respect to the specific child or children. Prior to *Privette*, the word had no definition in Florida case law, and it still has no definition in *Florida Statutes*. See *Privette*, 617 So. 2d at 307 (defining "legal father" as the father named on the birth certificate).

The Florida Supreme Court used the term "legal father" on only two occasions prior to *Privette*. See *In re Brown*, 85 So. 2d 617, 619 (Fla. 1956) (regarding an adoption proceeding in which "legal father" was used in quotation marks to describe a putative or biological father—not a marital father); *Theis v. City of Miami*, 564 So. 2d 117, 119 (Fla. 1990) (using the term "legal father" to describe the marital father of a quasi-marital child who sought workers' compensation death benefits).

In the Florida District Courts of Appeal, the term "legal father" was first used to describe the marital father of a quasi-marital child born after 40 weeks of marriage but before permanent separation. See *In re J.P.*, 220 So. 2d 665, 666 (Fla. 3d DCA 1969). Ironically, the Third District Court of Appeal held that the term be stricken from the trial court's order on

either case law or statutes. "Father" is ambiguous because the term may include several different men or functions. A child whose biological mother had an affair, divorced, remarried, and then separated, for example, could have a biological father, a marital father, and an adoptive stepfather, and still fail to have a man to provide emotional support as a functional father or economic support as a support father. Because marital children, especially infants, have only a presumptive legal father under the common law, there is an inherent ambiguity in the term "father."¹⁴

Following the Florida Supreme Court's decision in *Privette*, "paternity" and "parentage" have been used to describe either a determination of biological fatherhood or a determination of parental rights unrelated to biology.¹⁵ Finally, our lexicon is cluttered with

the assumption that the term implied that the marital father was the biological father. See *id.* In *Randolph v. McCullough*, 342 So. 2d 129 (Fla. 1st DCA 1977), the West Publishing Company used the term in its synopsis to describe a marital father of a quasi-marital child that was born after 40 weeks of marriage but before permanent separation. See *id.* at 129. In *In re Baby Boy S.*, 349 So. 2d 774 (Fla. 2d DCA 1977), the court described the marital father, who had consented to an adoption of a quasi-marital child born after 40 weeks of marriage but before permanent separation, as a "legal father." See *id.* at 775. In *Perez v. Stevens*, 362 So. 2d 998 (Fla. 3d DCA 1978), the term describes the father of a nonmarital child as established by a paternity order. See *id.* at 999. This use is compatible with *Privette* in the sense that this father's name will be placed upon the birth certificate. See *Privette*, 617 So. 2d at 307.

In *In re Estate of Broxton*, 425 So. 2d 23 (Fla. 4th DCA 1982), a marital father of a possible quasi-marital child was described as "the natural as well as the legal father." *Id.* at 24. In *Hess v. Hess*, 466 So. 2d 1179 (Fla. 3d DCA 1985), a post-dissolution marital father of quasi-marital children born 40 weeks after marriage, but before permanent separation, described himself as the "spiritual and legal father," although it was unclear whether he was the legal father. *Id.* at 1180. *Erwin v. Everard*, 561 So. 2d 445 (Fla. 5th DCA 1990), is similar to *Privette* because the mother sued the biological father for support of a quasi-marital child without joining the marital father. The terse opinion strangely describes the biological father as the "natural biological father." *Id.* at 445. The court later describes the marital father as a "legal father," meaning that he would be required to pay support under the trial court's erroneous ruling. See *id.* at 446.

In *Kalbach v. Department of HRS*, 563 So. 2d 809 (Fla. 2d DCA 1990), and *Walden v. Munson*, 593 So. 2d 1215 (Fla. 2d DCA 1992), the term "legal father" describes the father of a nonmarital child whose fatherhood had been established by a final judgment of paternity. See *Kalbach*, 563 So. 2d at 809-10; *Walden*, 593 So. 2d at 1215. Finally, in *E.V. v. Department of HRS*, 615 So. 2d 251 (Fla. 3d DCA 1993), E.V. is described as the "legal father" of A.L.M., whose mother is C.M. See *id.* It is unclear whether the court relied upon marriage or some other basis to describe E.V. as the legal father.

In *Long v. Long*, 716 So. 2d 329, 329 (Fla. 2d DCA 1998), the Second District Court of Appeal removed the word "legal" from the final judgment, which described the marital father as the legal father. The court apparently thought that "legal" suggested that the trial court had determined that the marital father was the biological father.

14. See *Eldridge v. Eldridge*, 16 So. 2d 163, 163-64 (Fla. 1944) (recognizing the common law's strong presumption of legitimacy).

15. Although chapter 742, *Florida Statutes*, is entitled "Determination of Parentage," the chapter determines "paternity" as a biological fact. See FLA. STAT. ch. 742 (1997 & Supp. 1998).

terms like “bastard,”¹⁶ “illegitimate,”¹⁷ and even “out-of-wedlock,”¹⁸ which have strong religious and moral overtones that tend, at least subconsciously, to interfere with objective, rational analysis.

Because the present dialogue lacks objective terminology, this Article employs the following terms: marital child, nonmarital child, and quasi-marital child. “Marital child” refers to a child conceived by or born to a married woman when the biological father was the woman’s husband at the time of conception or birth.¹⁹ A “nonmarital child” refers to a child born to an unmarried woman. This is the antiquated bastard or spurious child, which *Florida Statutes* now typically describe as a child “out-of-wedlock.”²⁰ This more neutral term is used in other states.²¹ “Quasi-marital child” describes a child born to a married woman when the biological father is not the woman’s lawful husband. This term is an appropriate, neutral term because only the husband, or the marital father, is identified on the child’s Florida birth certificate,²² and the child often appears to be a “marital child.”²³

16. Florida’s Bastardy Act was renamed the Paternity Act in 1975. *See* Act effective Oct. 1, 1975, ch. 75-166, § 10, 1975 Fla. Laws 298, 302. All references to bastardy proceedings and the term “bastard” were removed from the entire Act. *See id.*

17. The word “illegitimate” was also removed from the Bastardy Act in 1975. *See id.* However, “illegitimate” was featured prominently in *Privette* and was used as a factor in the supreme court’s analysis concerning the steps necessary to support an order requiring genetic testing. *See Privette*, 617 So. 2d at 308.

18. “Out-of-wedlock” replaced the term “illegitimate” in the Parentage Act in 1975. *See* Act effective Oct. 1, 1975, ch. 75-166, 1975 Fla. Laws 298. The term is sometimes used to describe both nonmarital and quasi-marital children. *See, e.g.*, 14 C.J.S. *Children Out-of-Wedlock* § 1 (1991). This loose clumping resulted from the fact that both nonmarital and quasi-marital children were historically deemed “illegitimate” under the common law of some states. *See, e.g.*, *State v. Palmer*, 439 So. 2d 174, 175 (Ala. Civ. App. 1983) (noting that an illegitimate child can be born in or out of wedlock); *see also* MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 200-07 (1985) (highlighting the post-Revolutionary trend toward expanding the legal notion of legitimacy).

19. The common law legitimized, or at least presumptively legitimized, any child born in lawful wedlock or within a competent time afterwards. *See* BLACKSTONE, *supra* note 1, at 434; *see also* *Dennis v. Department of HRS*, 566 So. 2d 1374, 1376 (Fla. 5th DCA 1990). By statute, Florida now allows a nonmarital child to become a marital child by virtue of a marriage between the biological parents following the birth of the child. *See* FLA. STAT. § 742.091 (1997). This Article’s statutory proposal does not affect this rule, which presumably would remain in Part II of the proposed act.

20. *See* FLA. STAT. § 742.10 (1997) (establishing paternity for children born out of wedlock).

21. *See In re Estate of Sekanic*, 653 N.Y.S.2d 449 (N.Y. App. Div. 1997) (using the term “out-of-wedlock” exclusively in an action to determine paternity for inheritance purposes); *see also* Brashier, *supra* note 12 at 93.

22. *See* FLA. STAT. § 382.013(2) (1997).

23. Although the term “quasi-marital child” is used extensively in this Article, it is not used in the proposed statute, which addresses three distinct types of quasi-marital children.

A father is described as a biological father, a marital father, a legal father, a functional father, or a support father. Any one father may occupy one or several of these definitions simultaneously. A biological father is the man whose sperm fertilized the mother's egg, usually through an act of sexual intercourse.²⁴ The term is used on three occasions in *Florida Statutes* and frequently in case law.²⁵ Although the term "genetic father" is sometimes used as an equivalent for biological father,²⁶ this Article will reserve genetic father for the limited purpose of describing a sperm donor's role in an artificial insemination.²⁷

The "marital father" is the mother's husband on the day the child is born. Except in very rare cases involving a judicial determination of paternity prior to the child's birth, this is the father whose name appears on the birth certificate for each child born to a married woman in Florida.²⁸ In the proposed statute, the term "husband" is used to describe the marital father.²⁹ However, in cases involving

24. See generally Tracy Cashman, *When Is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959 (1997) (explaining the benefits to the child if biological fathers are prevented from asserting rights long after birth).

25. See FLA. STAT. § 63.212(1)(i)(2)(d) (1997) (concerning contracts to transfer parental rights); *id.* § 742.12(4) (1997) (concerning scientific testing for paternity); *id.* § 751.011(2) (defining "putative father"). Based on a Westlaw search on November 11, 1998, "biological father" has been used over 100 times in Florida case law and was first used in 1973. See *Taylor v. Taylor*, 279 So. 2d 364, 369 (Fla. 4th DCA 1973) (relieving the marital father of child support obligations, over Judge Walden's strong dissent, because the marital father was not the child's biological father).

26. See Brashier, *supra* note 12, at 134-37.

27. The scope of this Article does not include the complex issues of surrogacy. There is a considerable body of literature discussing artificial insemination, surrogate mothers, gay parenting, and other contemporary issues. See generally Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995); David L. Chambers, *What If: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996); Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996); Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and The New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473 (1996); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329 (1995); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951 (1996); Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform."* 15 LAW & INEQ. J. 215 (1997). The legal issues surrounding these matters are complex and fascinating.

In the artificial insemination scenario, the legal father is often the marital father, and in the surrogate motherhood scenario, the legal father is often the biological father or the receiving mother's husband. See, e.g., FLA. STAT. § 742.16 (1997). In this way, the legislative policies for these rare children are compatible with the approach this Article suggests for quasi-marital children.

28. See FLA. STAT. § 382.013(2)(a) (1997); *cf.* UNIF. PARENTAGE ACT §4, 9B U.L.A. 298-99 (1987).

29. See *infra* Appendix, § 742.301.

mothers who have been married multiple times, “husband” is not always accurate.

In this Article and in the proposed statute, the term “legal father” means the man who is legally identified as the person with all the rights, privileges, duties, and obligations of fatherhood for a specific child.³⁰ The man who actually raises the child is referred to as the “functional father.” More traditionally, this is “dad”: the man who provides both economic and emotional support for the child,³¹ and with whom the child develops a lasting emotional bond. Two or more men (or arguably women) can perform these functions. In the setting of a divorced family, it may now be common for a child to have two functional fathers—a stepfather and a marital father.³²

A “support father” describes a man who only is expected to provide economic support for a child, and either has no visitation or custody rights or is not expected to fulfill these nurturing functions for personal reasons. Until recently, a bastardy or paternity action was designed primarily to identify a support father for a nonmarital child.³³ The “putative father” is a man who is merely alleged to be the

30. As discussed later, the term “legal father” does not have this meaning in *Daniel* and has not been consistently defined in the case law. See *Daniel v. Daniel*, 695 So. 2d 1253, 1254 (Fla. 1997) (holding that a husband who is not the biological father and not an adoptive parent does not have a legal obligation to support the child, despite the child’s legitimate status). The term “legal father” had little legal significance in Florida until the supreme court used the term in *Privette*. That decision rather casually defined the term parenthetically as “the one listed on the birth certificate.” *Department of HRS v. Privette*, 617 So. 2d 305, 307 (Fla. 1993).

31. See Nancy E. Dowd, *Rethinking Fatherhood*, 48 U. FLA. L. REV. 523, 527 (1996) (discussing gender biases and the father’s nurturing role). This Article uses the term “functional father” because it is more neutral, although this man may be someone who nurtures the child. Because a functional father can be a surrogate of many varieties, the term includes psychological fathers and others who willingly perform the functions of fatherhood. See generally CHRISTOPHER P. ANDERSEN, *FATHER: THE FIGURE & THE FORCE* (1983).

32. There is an ongoing debate concerning the need for fathers in the family and the role that fathers should play within that structure. The author believes functional fathers are needed, and the state should strongly promote the existence of such fathers for children. Further discussion of this policy may be found elsewhere. See generally DAVID BLANKENSHIP, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1 (1996); Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 392 (1996) (having a functional father helps to ensure that the reality of the family structure will not be destroyed in the child’s mind); Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 533 (1996) (stating that the presence of a functional father in the family increases the chances of raising a law-abiding citizen, thereby imposing fewer costs on society).

33. Even today, chapter 742, *Florida Statutes*, contains no express provisions for visitation or other parental rights for fathers determined in paternity actions. To avoid constitutional issues, the Determination of Parentage Act was construed in 1974 as giving the biological father parentage rights comparable to the rights of a father in a divorce proceeding. See *Brown v. Bray*, 300 So. 2d 668, 670 (Fla. 1974). Until 1951, the biological fa-

father, usually the biological father. The allegation is normally made in a lawsuit in which the putative father may or may not be a party.³⁴ "Putative father" is defined in *Florida Statutes*, but only in the context of a putative father seeking to obtain temporary custody of a child.³⁵

The term "paternity" should only refer to *biological* fatherhood. Once paternity is determined, the law decides what rights and responsibilities, if any, to give the biological father. Allocating these rights and responsibilities is not a paternity decision, but a parentage decision. Accordingly, "parentage" should only be used to refer to *legal* fatherhood. Parentage determination places the rights and responsibilities of a legal guardian for a specific child in one man (or perhaps two or more persons). Parentage may or may not be based on paternity. The presumption of legitimacy, for example, is actually a rule of parentage *not* based on paternity.

While this Article attempts to use the terms parentage and paternity as consistently and carefully as possible, the use of these terms in existing law may make this effort difficult.³⁶ Not all of these terms and definitions are used, or used consistently, in *Florida Statutes* and case law.

B. Three Types of Quasi-Marital Children

Quasi-marital children, children who appear to be marital children but whose fathers are not their mothers' husbands, have existed in society since very early times.³⁷ Accurate information on the numbers of these children is virtually impossible to obtain. However, one report suggests that as many as ten percent of all children born to

ther was "condemned by the judgment" to pay the incidental expenses of the birth and up to \$50 annually to the mother. FLA. STAT. § 742.03 (1941) (*repealed by* Act effective June 9, 1951, ch. 26949, § 9, 1951 Fla. Laws 1185, 1187). After 1951, the statute contained modest child support provisions, which often discriminated against nonmarital children. See FLA. STAT. § 742.041 (1961) (*repealed by* Act effective October 1, 1986, ch. 86-220, § 157, 1986 Fla. Laws 1603, 1726). Occasionally, this Article and the proposed statute refer to a "putative biological father" to avoid any possible confusion.

34. For example, the putative father was not a true party in *Daniel*; he was merely deposed in the action as a witness. See *Daniel*, 695 So. 2d at 1254 n.1.

35. See FLA. STAT. § 751.011(2) (1997) (stating that a putative father is "a man who reasonably believes himself to be the biological father of the minor child, but who is unable to prove his paternity due to the absence of the mother of the child").

36. One of the reasons that the Florida Supreme Court had difficulties determining parentage in *Privette* is that the Legislature had entitled chapter 742, "Determination of Parentage," but the provisions therein, for all issues other than surrogate parentage, are designed to determine paternity, not parentage.

37. The possible magnitude of this problem is reflected in the fact that 2000 years ago, the Ten Commandments contained not one, but two provisions related to the subject: "thou shalt not commit adultery," and "thou shalt not covet thy neighbor's wife." *Exodus* 20:14, 17.

married women in the 1940s were quasi-marital children.³⁸ Quasi-marital children comprise a group that can be divided into at least three separate categories based on the timing of the child's birth in relation to the status of the marriage. This Article defines these categories simply as Type I, Type II, and Type III quasi-marital children.³⁹ Each category presents distinct issues requiring potentially different solutions. Existing law, however, does not recognize this categorical distinction. There are many different sets of circumstances resulting in quasi-marital children within each category, but the children present legal issues allowing similar analysis and solutions.

1. *Type I*

Type I quasi-marital children are conceived prior to marriage but born during the marriage. The woman is impregnated by the *biological* father, then marries the *marital* father during the pregnancy. The child in these cases is the product of premarital sex, not an act of adultery.

In Type I cases the parties can have varying degrees of knowledge regarding the circumstances of the pregnancy. The biological father may be aware of the child before the marriage, or he may never know of the child. At the time of the marriage, the marrying couple may have complete knowledge of the circumstances, or they may discover these circumstances a few months later. The marital father may have engaged in premarital sex with the mother and believes he is the biological father. The mother may know the marital father is not the biological father, may be uncertain, or may mistakenly believe the marital father is the biological father. The mother may be unaware of the pregnancy at the time of the marriage. Finally, there are instances when the marital father knows the biological father abandoned the mother, but he chooses to marry her regardless.

The marital father of a Type I child is similar in some respects to a stepfather. If the mother had married the biological father, divorced him (even prior to the birth), and then re-married, the new husband would be the marital father and the stepfather. Regardless of the mother's marriage to another man, the biological father has a reasonable basis to request a relationship with a Type I quasi-marital child. In addition, the marital father may reasonably believe

38. JARED DIAMOND, *THE THIRD CHIMPANZEE* 85-87 (1992). Given the extensive testing of families for donor organ purposes, it is likely that more recent information is available, but the author has not located such data.

39. In the proposed statutory revision, Type I is described as children born within 40 weeks of marriage, Type III as children born after permanent separation, and Type II as all children born between these two periods. See *infra* Appendix.

that he should not be forced to support the child, even if he does not want to divorce his wife. However, both men could conceivably want nothing to do with the child.⁴⁰

2. Type II

Type II quasi-marital children are conceived when the mother is lawfully married and living with her husband. The biological father, however, is not the marital father. These children are conceived through an act of adultery.⁴¹ Normally, these children are born during the marriage, although sometimes birth occurs after a marital separation.

As with Type I quasi-marital children, there can be varying levels of knowledge in Type II cases. The biological father may not know of the child's existence. He may not realize that he is the father of his lover's child. The mother may not know for certain which man is the biological father. The marital father may be aware of the adultery, or he may be ignorant of the relationship and believe that he is the biological father. The biological father may not know that his lover is married.

Unlike Type I children, these children are more likely to have older siblings. The fact that the child is a Type II child often may be concealed from the child, his or her siblings, and from the community. Type II children are the ones who, in many cases, are raised "as if" they are marital children. The biological father will have a more difficult time establishing a reasonable basis to claim an interest in a Type II child. The marital father, however, may still wish to avoid

40. This Article does not discuss the type of child that exists between nonmarital and Type I. If a child is conceived and delivered before marriage, and the mother marries shortly after the birth, it is likely that her new husband will be the functional father even if he is not the biological father. Section 742.091, *Florida Statutes*, allows a "reputed" father to become the legal father by such a marriage. See FLA. STAT. § 742.091 (1997). In light of recent amendments, a declaration of paternity becomes an establishment of paternity after 60 days, subject to challenge for fraud, duress, or material mistake of fact. See Act effective July 1, 1997, ch. 97-170, § 70, 1997 Fla. Laws 3202, 3255 (amending FLA. STAT. § 742.10(1) (1995)). In a statutory revision, any refinements addressing these children should occur in a provision dealing with nonmarital children. See *L.A. v. H.H.*, 710 So. 2d 162 (Fla. 2d DCA 1998).

41. Adultery is arguably more of a religious, moral, or ethical factor than a legal factor. Historically, adultery of any variety was a capital offense in the colonies. See *THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1641-1691*, at 12 (Scholarly Resources, Inc. 1976) (1648). Today, open adultery, or adulterous cohabitation, is a crime in Florida, but private extramarital sexual activity is legal. See FLA. STAT. § 798.01 (1997). Although the open adultery law is rarely enforced, adultery, nevertheless, remains a factor that may be considered in determining financial issues in dissolution of marriage proceedings. See *id.* § 61.08(1). Thus, while we no longer tend to criminalize adultery, legal and social policies still discourage such conduct.

paying support for the child if he is obviously not the child's biological father.

3. *Type III*

A Type III quasi-marital child is conceived and born after a married couple has permanently separated but prior to their divorce. With a Type III quasi-marital child, it is often clear that the marital father is not the biological father. It is also possible that the mother cannot identify the biological father and that the biological father is unaware of the child's existence. On the other hand, the mother and the biological father may have a stable marriage-like relationship. Finally, the marital father may be so estranged that he is unaware of the child's existence.

If the separation has been lengthy, the marital father will likely have little interest in serving as either a functional or a support father. If Florida recognized some concept of *de facto* divorce,⁴² the marital father would not be a father at all, but he is nevertheless the legal father on the child's birth certificate—"stuck" with a support obligation for the child because he failed to divorce the child's mother.

From the child's perspective, these three situations may present somewhat different needs and interests. A Type I child may have a meaningful, functional relationship with his or her biological father, just like many children in divorced families have good relationships with their divorced marital fathers.⁴³ A Type II child may want to fit quietly into his or her present, stable family. A Type III child may simply have no connection to his or her marital father. All three types of quasi-marital children, however, share a need for adequate food, shelter, clothing, and adult affection. As a matter of public policy, all of these children need a functional father, or at least a support father.⁴⁴

Controversies surrounding the category of quasi-marital children can arise in several different fora. Several different parties can raise paternity issues at various times in the child's life. Either the husband or the wife can raise the issue in a divorce. Determination of paternity, pursuant to chapter 742, *Florida Statutes*, can be filed by any man, woman, or child, and the chapter does not contain a specific

42. Florida has not recognized common law marriages since January 1, 1968. *See id.* § 741.211. Common law marriages created too many ambiguities and confusions. Ironically, as divorce has become more complex and expensive, there seems to be a growing group in Florida who obtain legal marriages but do not obtain a divorce upon permanent separation.

43. The phrase "divorced marital father" is used because there is no guarantee that the ex-husband is the biological father.

44. *See discussion supra* note 32.

statute of limitations.⁴⁵ Moreover, it is somewhat unclear who has standing to file the paternity action on behalf of the child. The action can be maintained by the marital or putative biological grandparents, other relatives, a guardian ad litem, or, as *Privette* demonstrates, even by the state if welfare benefits are at stake.⁴⁶ Paternity can also be raised in a probate action;⁴⁷ in a proceeding to terminate parental rights; in an adoption; or, in a temporary custody proceeding filed by a putative father or other members of the extended family, including grandparents.⁴⁸ Because paternity can be raised in so many contexts, it is difficult to know who has standing to raise the issue and when it may be raised.

The proposed statute in the Appendix of this Article would limit the parties, fora, and time for filing such an action. Legal parentage would generally need to be resolved in the first two years of the child's life in a chapter 742 proceeding in which the biological mother, marital father, and putative father were parties. The child could be represented by a guardian ad litem, but no provisions are included for suits filed by or on behalf of the child by such a guardian.

III. THE EMERGENCE OF LEGAL ISSUES CONCERNING QUASI-MARITAL CHILDREN

If the two categories described by Blackstone, "legitimate" and "spurious or bastards,"⁴⁹ were adequate for two hundred years, why has a third category, containing at least three types of children, emerged since the mid-1970s? Some religious and political commentators suggest that these children are simply a manifestation of society's collapsing morals.⁵⁰ Although there may be some truth in this argument, courts and legislators have limited ability to address such moral issues directly. This Article suggests that it is more productive for legislators to look at changes in our socio-economic structure, the recent development of genetic testing, and the common law's long-term failure when deciding whether the law should base paternal rights and responsibilities primarily on biology or marriage—nature or nurture.

45. See FLA. STAT. § 742.011 (1997).

46. See *Department of HRS v. Privette*, 617 So. 2d 305 (Fla. 1993).

47. See generally Brashier, *supra* note 12, at 93 (discussing children's inheritance rights outside the traditional nuclear family).

48. See FLA. STAT. § 751.02 (1997).

49. See BLACKSTONE, *supra* note 1, at 434.

50. This moral argument also affects some scholarly presentations. See, e.g., David V. Hadek, *Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die*, 26 SW. U. L. REV. 359, 395 (1997) (stating that society's growing concern for individuals' rights has been a detriment to the marital family).

A. *The Social, Economic, and Scientific Emergence of Quasi-Marital Children*

Socio-economic changes resulting in increased controversy concerning quasi-marital children can be broadly described as a shift from an agrarian society, in which the family unit was also the most common business entity, to an urban society where the family is rarely an important economic unit.⁵¹ Even at the beginning of this century, before mechanized farming, divorce was rare. This was partly true for moral and religious reasons, but also because the family unit was essential to the survival of the farm and the small business. The family business fed, housed, and clothed the children and adults, and children were useful workers and an asset essentially belonging to the marital father.⁵² A legal forum rarely existed in which to litigate issues surrounding quasi-marital children, except in the occasional divorce.⁵³

As our country urbanized and our economy shifted away from the family farm and small family business toward large corporations with massive capital investments, the family unit was no longer as essential for basic survival. In turn, children were more likely to be seen as an economic liability.⁵⁴ This shift contributed to a sizeable in-

51. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 292-93 (1989) (describing the shift as one from an economic family unit to an emotional support group for individuals).

52. A father's claim to a child is often expressly or implicitly described as a property right. As recently as 1952, the Florida Supreme Court stated that a father had a "legal property interest in the services of his child." *Ripley v. Ewell*, 61 So. 2d 420, 422 (Fla. 1952). The influence of this property concept is most obvious in tort law. See *United States v. Dempsey*, 635 So. 2d 961, 965 (Fla. 1994) (holding that a parent of a negligently injured child has a right to recovery for the loss of filial consortium, including day-to-day services); see also GROSSBERG, *supra* note 18, at 234-37; Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1036-50 (1992) (presenting an overview of the historical notion of children as property).

The shift in our view of children can also be seen in the evolution of the school year. Historically, schools started late enough each day to allow chores to be completed on the farm and scheduled vacations to accommodate local agricultural needs. As children ceased to be workers on the family farms and in the family businesses, the schools could develop far more flexible schedules.

53. Florida has not retained official statistics on divorce prior to 1927. The rate per 1000 adults in the 1930s was between one and three. The rate went up dramatically during the late 1930s and the years surrounding World War II. The rate stabilized at about four per 1000 in the mid-1950s, and jumped to approximately seven per 1000 when no-fault divorce became available in 1971. Interestingly, the rate has been relatively stable at seven per 1000 since the mid-1970s. See INSTITUTE OF SCIENCE OF PUB. AFFAIRS, *ATLAS OF FLORIDA* 151 (Edward A. Fernald & Elizabeth D. Purdum eds., 1992).

54. See generally CARL ABBOTT, *THE NEW URBAN AMERICA: GROWTH AND POLITICS IN THE SUNBELT CITIES* (rev. ed. 1987) (discussing the overall social and economic changes of urbanization in the southern United States).

crease in divorce and "illegitimacy."⁵⁵ Child support became a major national concern.⁵⁶ Both dissolution and paternity proceedings created legal fora in which parties had economic and emotional reasons to litigate paternal rights and responsibilities for quasi-marital children.

These socio-economic changes alone, however, would not have resulted in the failure of the common law's two-category system. Prior to 1975, genetic science was in its infancy. Blood tests could exclude the possibility of paternity in some instances, but they rarely could identify the biological father. After some controversy, human leukocyte antigen testing (HLA) became admissible evidence in paternity actions in the mid-1970s.⁵⁷ Suddenly, a court could identify biological fathers with high statistical probability. Over the last twenty years, improved genetic testing has permitted even more exact tissue typing. Any layperson who watches television knows that a simple test of blood, saliva, or other human tissue can pinpoint a criminal or a biological father.

B. *The Natural Law's Tension Between Biology and Marriage*

Improvements in genetic testing were the straw that broke the back of the common law's two-category system for classifying children. The common law approach failed because of an unresolved tension between natural law rules favoring biology and similar rules favoring the family unit as the source of paternal rights and responsi-

55. The rate of nonmarital births per 1000 is commonly reported as increasing from about seven in 1940 to 45 in 1993. VENTURA ET AL., *THE DEMOGRAPHY OF OUT-OF-WEDLOCK CHILDBEARING*, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING (U.S. Dep't of Health & Human Servs. 1995).

56. See BLANKENSHIP, *supra* note 32, at 124-47; Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 520 (1996); W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 261-62 (1997).

57. HLA testing was not permitted in *Simons v. Jorg*, 375 So. 2d 288 (Fla. 2d DCA 1979). Shortly thereafter, the author represented the biological father in a case in which the HLA test was admitted. See *Stratton v. McQueen*, 389 So. 2d 1190 (Fla. 2d DCA 1980). There was considerable debate over the admissibility of genetic testing at that time. See generally Jack P. Abbott et al., *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976-77); Leonard R. Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki*, 17 J. FAM. L. 457 (1978-79); Mark Edward Larson, Jr., *Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. FAM. L. 713 (1973-74); Paul I. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1977-78); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); A.S. Wiener & W.W. Socha, *Methods Available for Solving Medicolegal Problems of Disputed Parentage*, 21 J. FORENSIC SCI. 42 (1976). For a discussion of HLA testing after these decisions, see Jean E. Maess, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R. 4th 167 (1985).

bilities. This conflict arose because the natural law theories at and before Blackstone's time viewed both procreation and marriage as "natural."⁵⁸

Common law judges in the Blackstone era almost certainly wanted to provide families for quasi-marital children because they saw families as desirable for such children and for the kingdom as a whole.⁵⁹ They were confronted, however, with long-standing social, religious, and legal traditions granting fathers property rights to children based, at least rhetorically, on biology. This conflict between policies—those favoring families for children and those favoring the "natural" or property rights of men—was not resolved during the early common law era. Instead, it was avoided by a rigorous application of the presumption of legitimacy⁶⁰ and by the passage of bastardy statutes. With the advent of admissible genetic testing, however, lawmakers can no longer avoid these two competing policies. Courts and legislatures must now directly confront the unresolved tension between biology and family in the field of paternal rights and responsibilities.

On the biological side, natural law theory viewed paternal rights as prepolitical, arising from a relationship that was entirely separate from the power of the state but deserving of the state's protection.⁶¹ The source of these rights was often expressed in biological terms. Blackstone, for example, explained that a father's willingness to sup-

58. The tension is expressed in the writings of Samuel von Pufendorf. He explained:

1. From the marriage spring children, over whom parental authority has been established,—the most ancient and at the same time the most sacred kind of rule, under which children are bound to respect the commands and recognize the superiority of parents.

2. The authority of parents over their children arises from two main causes: first, because the natural law itself, in commanding man to be social, enjoined upon parents the care of their children; and that this might not be neglected, Nature at the same time implanted in them the tenderest affection for their offspring. . . . And then that authority rests upon the tacit consent also of the offspring. . . . Actually, however, the parents' authority over their offspring is established when they take up the child and nurture it, and undertake to form it, to the best of their ability, into a fit member of human society.

SAMUEL VON PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 97 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682).

59. In 1829 Florida adopted the common law as it existed in England on July 4, 1776. See Act effective Nov. 6, 1829, § 1, 1829 Fla. Laws 8, 8-9. This patriotic date is convenient because it roughly aligns with the publication of Blackstone's *Commentaries on the Laws of England* in 1765.

60. The presumption was apparently created before this era. See BLACKSTONE, *supra* note 1, at 445 (presuming that a child born to a married couple was legitimate); POLLOCK & MAITLAND, *supra* note 12, at 398-99.

61. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 886-90 (1984) (discussing the traditional parental rights doctrine and its relationship to natural law).

port a child was because "providence" had provided for this by "implanting in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind . . . can totally suppress or extinguish."⁶² He argued that a man had an obligation to provide for those "descended from his loins."⁶³

The concept of a "natural father" evolved from this biological influence. Although this term was used with relative infrequency prior to 1950, judicial opinions and statutes now commonly refer to the biological father or even the putative father as a "natural father."⁶⁴ This warm and fuzzy term is never defined,⁶⁵ but it now provides significant constitutional due process rights to biological or putative fathers.⁶⁶

Natural law theory viewed marriage as the source of paternal rights. Both Blackstone and Pufendorf, an earlier natural law theorist, assumed that a man would "naturally" marry the woman who carried or would carry his child.⁶⁷ The father's rights and responsibilities for the child arose from the contract of marriage or the natural family unit.

The natural law theory, however, was confronted by inexplicable realities. For example, the natural law argument in favor of marital fathers and their biological ties could not justify an obligation on the part of the marital father to support a child who was clearly not the

62. BLACKSTONE, *supra* note 1, at 435.

63. *Id.* at 436.

64. See discussion *supra* note 11.

65. The term "natural father" is not even defined in *Black's Law Dictionary*. See discussion *supra* note 11. Perhaps it is obvious that the term intends to identify the biological father. On the other hand, natural law theory clearly wavered on whether the rights possessed by this man, as a member of a prepolitical human institution, were given to him based on the act of sexual intercourse or the process of nurturing children within the family unit. Given the use of this term in a constitutional context, the legal community should pin down which act makes a natural father "natural."

66. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (recognizing that a father's due process rights are afforded substantial protection when he demonstrates "full commitment" to active participation in parenting); *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (holding that the "fair preponderance of the evidence" standard in a parental rights termination proceeding violated the parent's due process rights); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (stating that a New York statute allowing unwed mothers, but not unwed fathers, to block adoption by withholding consent violated the Equal Protection Clause); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (noting that the due process rights of an unwed father were not violated by the child's adoption by a stepfather when the unwed father never had, nor sought, actual custody of the child); *Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (holding that the Due Process Clause requires a parent, even an unwed father, to be granted a hearing before terminating parental rights); see also Hadek, *supra* note 50, at 363-74 (discussing the legal history and cases from *Stanley to Lehr*); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-07 (1995) (examining various legal theories concerning the parent-child relationship).

67. See *supra* note 58. Relying on Montesquieu, Blackstone saw the "establishment of marriage in all civilized states" as "built on this natural obligation of the father to provide for his children." BLACKSTONE, *supra* note 1, at 435.

biological product of the marriage. This problem was avoided, but not solved, by the presumption of legitimacy, which gave families to children (or children to marital fathers) without regard to biology. The natural law argument in favor of biological fathers also failed to explain why so many nonmarital children could not rely on their biological fathers for support. This problem was partly ameliorated by bastardy statutes providing support for nonmarital children.

C. The Presumption of Legitimacy: Quietly Upholding the Family Unit Over Biology

The presumption of legitimacy presumes that a child of a marriage is a marital child.⁶⁸ At common law, this presumption was aided by Lord Mansfield's Rule, which prohibited either a husband or a wife from testifying that a child born during the marriage was not the marital father's child.⁶⁹ These rules appear to be, and arguably are, procedural or evidentiary rules. In a court of law, the husband may overcome this presumption, but only with satisfactory evidence before he can divest himself of the duty to maintain a child.⁷⁰ The level of proof required to overcome this presumption was extremely high,⁷¹ especially since the wife and husband were prohibited from testifying and the biological father's testimony would have been a confession of a serious criminal offense.⁷² In these instances, the presumption was effectively substantive law, requiring a husband to raise all children born to a marriage. The common law indirectly announced and implemented a policy that children need families, homes, heritage, and inheritance more than biological fathers need rights or even responsibilities.⁷³

68. See *Eldridge v. Eldridge*, 16 So. 2d 163, 163-64 (Fla. 1944) (stating that if the child is born during a marriage, the husband must overcome a presumption of legitimacy in order for the child to be "bastardized").

69. Lord Mansfield's Rule stated, "[I]t is a rule, founded in decency, morality and policy, that [the father or mother] shall not be permitted to say after marriage, that . . . [their] offspring is spurious." *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (1777).

70. See *Eldridge*, 16 So. 2d at 163-64 (stating that a husband may overcome the presumption of legitimacy, but only with "sufficiently strong" testimony).

71. See *id.* The standard was less than the criminal "reasonable doubt" standard but similar to the modern "clear and convincing" standard. Indeed, in *Privette*, the court translated the older concept that the presumption "will not fail unless common sense and reason are outraged" into a standard requiring proof by clear and convincing evidence. Department of HRS v. *Privette*, 617 So. 2d 305, 309 (Fla. 1993).

72. See discussion *supra* note 41.

73. The author does not necessarily maintain that the common law's creators expressly intended to create laws establishing families for children. Perhaps the male judges who announced these rules simply saw the husband's "possession" of the child as nine-tenths of the law justifying rights and responsibilities. The effect, however, was a body of law that gave virtually all children born into a marriage a definite family from birth.

This indirect approach to establishing paternity allowed the marital rights prong of the natural law to prevail without discussing and eliminating the rhetoric of biology or the concepts of natural fathers and legitimacy. We often become trapped by our own rhetoric, and the presumption of legitimacy proved to create such a trap. This presumption demonstrates the danger of disguising substantive law as procedural law.

After genetic testing developed, any interested party could overcome the presumption of legitimacy. Suddenly, legitimacy yielded to genetics and thus biology. One suspects that neither Blackstone nor Pufendorf would “naturally” have given substantive or procedural due process rights to a father who was no more than a momentary participant in a casual act of sexual intercourse. Nevertheless, without actually intending to select biological fathers over marital fathers to serve either as functional or support fathers for quasi-marital children, the common law was logically postured to give rights and impose responsibilities upon biological fathers.

Although this “ancient” history may seem irrelevant to today’s policy-makers, it is important to understand that the judiciary is bound by its common law roots. The common law never abandoned natural rights concepts for biological fathers of quasi-marital children, even long after the presumption had accomplished that practical effect. As a result, especially in a technological society with a high rate of divorce, it will now be very difficult for the judiciary, relying upon the common law, to return to the substantive law concealed within the historic presumption of legitimacy, a law providing family units for children. The judiciary can no longer consistently select marital fathers as legal fathers, now that the presumption of legitimacy can be regularly overcome by scientific testing. If we wish to further the real policies promoted by the presumption of legitimacy, in whole or in part, we must create new substantive law either judicially, on a case-by-case basis, or legislatively in a more structured format.

D. Bastardy and Paternity: Support Rather than Parentage

At common law, a biological father had no legal obligation to support a nonmarital child. Bastardy statutes were enacted to require biological fathers to support nonmarital children if they did not do so “naturally.”⁷⁴ These statutes were not formally adopted as part of

74. See Bartlett, *supra* note 61, at 963 n.196. This is interesting in light of the common law’s reliance on natural law theory. Instead of having an obligation to support his biological children, a man had an obligation to support his marital children. This is another example of the extent to which the common law used natural law terminology but did not implement its biological theory. If it is “natural” for biological fathers to support their

Florida's common law,⁷⁵ but Florida created its own comparable quasi-criminal bastardy act prior to statehood in 1828.⁷⁶ These statutes, however, have complicated the judiciary's effort to preserve the substantive policies of the presumption of legitimacy.

Bastardy statutes were designed to obtain support for nonmarital children from men who were violating the laws of nature; however, they were not designed to resolve the problems of marital or quasi-marital children. Nevertheless, the Legislature made cosmetic amendments to these statutes that attempted to transform them into statutes addressing the needs of quasi-marital children.

In 1975 the words "bastard" and "illegitimate" were removed from chapter 742, *Florida Statutes*, and the Legislature changed the chapter's title to "Determination of Paternity."⁷⁷ In 1983 the Legislature amended this statute again to permit a married woman to bring an action for determination of paternity.⁷⁸ In 1986 the Legislature first allowed an action to be filed by a putative father.⁷⁹ Thus, it is only recently that the statute has become a tool for examining situations involving quasi-marital children.

An overall examination of the parentage chapter reveals that it has retained its bastardy heritage, and it is not well designed to resolve the current issues involving quasi-marital children. The chapter does not recognize quasi-marital children as a distinct third category. To the extent that it recognizes these children, chapter 742 treats them as if they were nonmarital children. As the examination of *Privette* will reveal, it is simply impossible to resolve parentage issues by relying on the judicial concept of "legal father" under statutory provisions designed to find only a biological father as a matter of paternity. Chapter 742 currently provides no foundation or procedures to select a marital father over a biological father in the case of a quasi-marital child.

children, then bastardy statutes were quasi-criminal statutes to punish what were considered "unnatural" acts.

75. The specific English statutes in 1776 that concerned bastardy were not adopted under section 2.01, *Florida Statutes*. See Report of Leslie A. Thompson under Act of December 27, 1845, in Volume 1 of the *Florida Statutes Annotated*.

76. See Act effective Jan. 5, 1828, § 1, 1828 Fla. Laws 32, 32.

77. See Act effective Oct. 1, 1975, ch. 75-166, § 5, 1975 Fla. Laws 298, 301 (codified at FLA. STAT. § 742.011 (1975)). In 1993 the Florida Legislature changed the chapter's title back to "Determination of Parentage," but the statutes within the chapter still concern "determination of paternity." Compare FLA. STAT. ch. 742 (Supp. 1992) with FLA. STAT. ch. 742 (1993).

78. See Act effective June 24, 1983, ch. 83-214, § 13, 1983 Fla. Laws 845, 849 (codified at FLA. STAT. § 742.011 (1983)).

79. See Act effective Oct. 1, 1986, ch. 86-220, §§ 150-54, 1986 Fla. Laws 1603, 1723-27 (codified at FLA. STAT. §§ 742.011-.12 (Supp. 1986)).

After 1975 the remnants of the presumption of legitimacy encouraged judges to grant rights and responsibilities to the marital father. However, when biological fatherhood was established as a scientific fact, neither the common law nor chapter 742 gave the judiciary an adequate means of replacing the biological father with the marital father. As a result, post-1975 case law addressing quasi-marital children is inconsistent and confusing. Without a third category of children, recognized either by statute or case law, one would expect courts to treat quasi-marital children like marital children and, on other occasions, like nonmarital children without a set of controlling rules. Despite the Florida Supreme Court's best intentions, *Privette* and *Daniel* fulfill these expectations.

Both *Privette* and *Daniel* involved mothers seeking support for their quasi-marital children. In both cases, neither the biological fathers nor the marital fathers were likely to serve as functional fathers. In *Privette*, the mother filed a chapter 742 paternity proceeding seeking child support from the marital father without joining the biological father.⁸⁰ In *Daniel*, the mother sought support from the marital father in a divorce proceeding, in which the biological father was not a true party.⁸¹ The court's heavy reliance upon the presumption of legitimacy in *Privette* did not promote the selection of a stable family unit or locate a source of support. Moreover, in *Daniel*, the court's reliance on paternity concepts not only failed to provide a source of support but also neglected to consider the child's need for a family unit. Each case creates serious procedural and substantive problems that call out for major legislative or judicial reform.

IV. *PRIVETTE v. DEPARTMENT OF HRS*: AN EXPANSIVE READING OF CHAPTER 742, *FLORIDA STATUTES*, IN THE BEST INTERESTS OF CHILDREN

In *Privette v. Department of HRS*,⁸² the State filed a paternity action against Mr. Privette on behalf of Mrs. Sease and her child.⁸³ While Mrs. Sease sought paternity determination, the award of child support, and other costs, the form complaint contained no allegations specific to the case except for Mrs. Sease's name, Mr. Privette's name, and limited information about the child.⁸⁴ The standard form

80. See *Privette v. Department of HRS*, 585 So. 2d 364, 365 (Fla. 2d DCA 1991), *aff'd and remanded for further proceedings*, 617 So. 2d 305 (Fla. 1993).

81. See *Daniel v. Daniel*, 681 So. 2d 849, 849 (Fla. 2d DCA 1996), *aff'd*, 695 So. 2d 1253 (Fla. 1997).

82. 585 So. 2d 364 (Fla. 2d DCA 1991).

83. See *id.* at 365.

84. See *id.*

incorrectly stated that the child was born out-of-wedlock.⁸⁵ Mrs. Sease apparently filed a motion to obtain HLA testing from Mr. Privette, and he objected. To aid in resolving the objection, the parties filed a short stipulation containing all of the facts known in the case.⁸⁶

Mrs. Sease gave birth to the child in October 1989.⁸⁷ She conceived and delivered the child during her marriage to Mr. Sease, making the child a Type II or III quasi-marital child.⁸⁸ Surprisingly, the record contains no factual information describing the marital relationship between Mr. and Mrs. Sease.⁸⁹ One assumes from reading the briefs that the couple had been separated when she filed this petition, but no record information to support that assumption exists.⁹⁰ Further, no birth certificate is in the record, but the parties stipulated that Mr. Sease is shown as the father on the birth certificate.

At the trial court hearing, no one argued that the State should be suing Mr. Sease, the marital father, for child support. The parties merely argued the propriety of a blood test.⁹¹ The court ordered Mr. Privette to submit to a blood test, and he petitioned the Second District Court of Appeal for certiorari review of that order.⁹² The narrow issue before the Second District was whether a putative father had standing to raise the presumption of legitimacy in a paternity proceeding to delay or prevent a compulsory HLA blood test.⁹³ The Second District announced conflict with the First District Court of Ap-

85. See *id.* The author sat on the panel of judges deciding this case in the Second District Court of Appeal. The record is still intact at the court.

86. The stipulations are not reported in the opinions. See Stipulated Facts, Department of HRS v. Privette, No. 90-1521 (Fla. 12th Cir. Ct. 1991).

87. In both *Privette* and *Daniel*, the name of the child is contained in the record. This Article will not disclose the children's names. See Fla. R. App. P. 9.146(e) (stating that children are referred to by initials in traditional termination proceedings).

88. Mrs. Sease was still married to Mr. Sease at the time of the discovery hearing. See Stipulated Facts ¶ 1, HRS v. Privette, No. 90-1521 (Fla. 12th Cir. Ct. 1991).

89. The facts as reported in *Privette* are extremely limited because the case came to the Second District Court of Appeal in 1991 as a certiorari petition involving a discovery dispute and contained no depositions or evidentiary hearings.

90. Even at the time the Florida Supreme Court gave its opinion, Mr. Privette's attorney, Daniel A. David, knew little about Mr. Sease. Mr. David closed his practice shortly thereafter and relocated to Tallahassee. Stephen F. Ellis undertook Mr. Privette's representation. On remand, the State amended the complaint to include Mr. Sease as a party but never served him. Mrs. Sease may have moved from the state. The action was never resolved. Interview with Daniel A. David, Att'y, and Stephen F. Ellis, Att'y (Oct. 1997).

91. See *Privette*, 585 So. 2d at 365.

92. See *id.*

93. See *id.*

peal in *Pitcairn v. Vowell*⁹⁴ and held that the putative father could raise the presumption.⁹⁵

In an effort to balance the putative father's rights of privacy and the best interests of the child, the Second District Court of Appeal required a "threshold showing that the complaint is brought in good faith and is likely to be supported by reliable evidence," prior to entering an order compelling a genetic test in any paternity proceeding filed pursuant to chapter 742.⁹⁶ If a case involved a child whose marital father was listed on the birth certificate, the court additionally required a determination of whether "the child's interests [would] be adversely affected by allowing a party to circumvent that presumption."⁹⁷ Specific trial procedures were not discussed in any great detail; instead, the court simply quashed the order compelling a blood test and remanded the case for further proceedings.⁹⁸ Significantly, the court did not use the phrase "legal father" in its opinion, nor did it use the phrase "natural father."

The Florida Supreme Court accepted jurisdiction in *Privette* to resolve the express conflict between *Privette* and *Pitcairn*⁹⁹ and approved the Second District's decision.¹⁰⁰ The court's decision, however, went far beyond *Privette*'s narrow discovery issue. In dicta, which was written as the holding, the court announced the concept of a "legal father" and provided a complex procedure by which the marital father's status as legal father could be terminated, shifting the mantle of legal father to the biological father.¹⁰¹ The court clearly contemplated situations in which the marital father would remain the legal father if in the best interests of the child, even after litigation determined paternity in another man.¹⁰²

The complex two-phase procedure for shifting legal father status from the marital father to the biological father requires some explanation. The Florida Supreme Court held that before ordering a blood test, the trial court must hear arguments from "the parties, including the legal father if he wishes to appear and a guardian ad litem appointed to represent the child."¹⁰³ This hearing, however, is not

94. 580 So. 2d 219, 222 (Fla. 1st DCA 1991) (holding that the "putative father does not have standing to raise the presumption of legitimacy in avoidance of the potential ordering of support for the child").

95. See *Privette*, 585 So. 2d at 366.

96. *Id.*

97. *Id.*

98. See *id.*

99. See Fla. R. App. P. 9.030(a)(2)(A)(iv) (stating that the Florida Supreme Court can accept jurisdiction when a conflict exists between two or more district courts of appeal).

100. See *Department of HRS v. Privette*, 617 So. 2d 305, 309 (Fla. 1993).

101. *Id.* at 307.

102. See *id.* at 308.

103. *Id.*

merely a time for legal argument. The party seeking the HLA test is required to prove the following: (1) the complaint is apparently factually accurate; (2) the complaint is "brought in good faith and is likely to be supported by reliable evidence; and (3) the child's best interests will be better served even if the test later proves the child's factual illegitimacy."¹⁰⁴ Even if the putative father in the paternity proceeding admits he is the biological father, the opinion implies that a blood test could be denied. Thus, if the party fails to establish this initial burden, a paternity action could be dismissed without an adjudication of paternity on the merits. The court states that "in a real sense, the trial court ordering the blood test must decide one of the ultimate issues: whether the child's best interests will be served by being declared illegitimate and having parental rights transferred to the biological father."¹⁰⁵

Following this hearing on the discovery issue, if the trial court orders a genetic test and it shows that the putative father is the biological father, *Privette* provides for another hearing. The opinion states that "if a test shows that [the] Respondent is the child's biological father, this fact *without more* does not constitute grounds to grant a paternity petition."¹⁰⁶ In a footnote, the court states that "the mere fact of a blood test establishing the putative natural father's paternity does not in itself result in a legal declaration of illegitimacy or a legal termination of the legal father's parental rights."¹⁰⁷ *Privette* contemplates that at the final hearing, the trial court will decide, based upon an ad hoc best interests analysis,¹⁰⁸ whether or not to terminate the current legal father's parental rights and shift those rights and responsibilities to the biological father. The court provides no structured guidelines or set of factors for this determination, and none exists in chapter 742 or elsewhere in the *Florida Statutes*.

The concept of a legal father, when used as a method to select functional or support fathers for quasi-marital children, has enormous potential. Furthermore, the notion that legal father status could be shifted from one man to another is an exciting idea. However, the *Privette* opinion rapidly proved unsatisfactory, both for practical procedural reasons and because its substantive concepts had so little support in existing law.¹⁰⁹

104. *Id.*

105. *Id.* at 309.

106. *Id.*

107. *Id.* at 307 n.2.

108. *See id.* at 309.

109. *See* Kimberly G. Montanari, *Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child?*, 24 STETSON L. REV. 809, 842 (1995) (arguing that *Privette* should only apply in contested paternity cases that implicate the presumption of legitimacy).

A. Procedural Problems

The practical procedural problems after *Privette* centered on three broad issues. First, it was unclear whether *Privette* procedures applied only in paternity actions or also in divorce proceedings. Second, there were few guardians available and willing to accept these cases in many circuits, and no one knew what the scope of their work should entail. Finally, jurisdictional issues arose because the marital father was not a party in *Privette*.¹¹⁰

While *Privette* adopted the two-part procedure for use "in cases of this type,"¹¹¹ disputes quickly arose concerning the range of cases within the category.¹¹² Did the procedure apply only in paternity actions filed under chapter 742, or did it apply in divorce actions filed under chapter 61 as well? District courts of appeal applied the procedure in divorce proceedings, but not without considerable uncertainty.¹¹³ Many, if not most, circuit court judges assumed that *Privette* must be followed in any divorce in which a quasi-marital child was revealed in the pleadings.

Interestingly, an argument could have been made that *Privette* only applied to paternity actions filed by the State seeking reim-

110. These problems are not discussed to any extent in published documents. In 1996 and 1997, The author participated in continuing judicial education programs with Florida circuit court judges who must address *Privette* issues at trial. These judges commonly voiced concerns regarding these issues.

111. *Privette*, 617 So. 2d at 308 (referring to "quasi-marital children").

112. See Montanari, *supra* note 109, at 835.

113. For example, in one Florida case, the court required a guardian to represent a "Type II quasi-marital child" in a divorce. See *Alchin v. Alchin*, 667 So. 2d 477, 479 (Fla. 2d DCA 1996). In *Alchin*, the boyfriend intervened in the divorce after he and the mother had obtained a blood test without the marital father's knowledge. The marital father sought to remain the legal father. See *id.* By invoking *Privette*, the district court recognized the possibility that the status of legal father could be shifted to another man. See *id.* at 479-80. In *Ownby v. Ownby*, 639 So. 2d 135 (Fla. 5th DCA 1994), the court reached a similar result in a divorce where the husband sought custody of all six of the couple's children, the youngest being a possible "quasi-marital child." Judge Griffin's separate opinion voices concerns as to joining putative fathers in divorce actions. See *id.* at 139 (concurring in part; dissenting in part). In *White v. White*, 661 So. 2d 940 (Fla. 5th DCA 1995), the court reviewed on certiorari a nonfinal order in a divorce proceeding. The marital father, who had proof that he was not the biological father of a "Type I quasi-marital child," sought a determination of paternity in the divorce. See *id.* The trial court denied his request without appointing a guardian. See *id.* The district court remanded, requiring that appointment of a guardian and, apparently, a determination of paternity and parentage be made. See *id.* at 940-41. Note that *White* is identical to *Daniel*, except that the mother in *White* did not concede the accuracy of the 0% blood test. Finally, in *Robinson v. State*, 661 So. 2d 363 (Fla. 1st DCA 1995), the district court declined to require a guardian in a paternity action because the marital father had been determined not to be the biological father in a pre-*Privette* divorce. The putative father was not allowed to challenge the elimination of the child's legal father even though the legal father had been eliminated in a proceeding to which he was not a party and in which it did not appear that the child had a guardian. See *id.* Under *White*, a guardian would have been necessary in the *Robinson* divorce proceeding if the divorce had occurred just a few months later.

bursement of welfare benefits. In the opening paragraphs of the *Privette* opinion, the court emphasizes the impropriety of the State interfering in the family unit and “impugning the legitimacy of a child for the sake of money allegedly owed to the State of Florida.”¹¹⁴ Although the court was clearly influenced by this factor, it is doubtful that *Privette’s* holding could have been limited to Title IV-D actions, or that those actions are primarily to benefit the State.¹¹⁵

1. *Guardian Ad Litem*

The circuit courts’ broad interpretation of *Privette* compounded problems concerning guardians ad litem. If the child must be represented by a guardian ad litem, and the child or the guardian is “an indispensable party” to the *Privette* proceeding,¹¹⁶ then the courts need a larger supply of guardians. Chapter 742 contains no statutory provisions for guardians and, unlike chapter 61, contains no express immunity for their activities.¹¹⁷ Guardians ad litem are generally volunteers and, even prior to *Privette*, were already in scarce supply to perform their statutorily mandated tasks.¹¹⁸ After *Privette*, divorce and paternity cases involving quasi-marital children languished in some circuits because of the requirement that a guardian be appointed.¹¹⁹

Even when guardians were available, volunteers were hesitant to serve without immunity when it was unclear what the guardian should determine or evaluate prior to the first or second hearing. For example, if one of the goals of the first hearing was to protect the putative father’s privacy rights, it was questionable whether the guardian should interview his family, friends, and employer. On the other hand, these interviews may be essential to resolving the merits of the issues under the heightened burden of proof used at the hearing on the discovery issue. Chapter 742 was designed to place a name on the child’s birth certificate, not to shift names on a birth certificate. It provided no guidelines to the guardians. As a result, some circuit judges decided that the risks and problems associated with

114. *Privette*, 617 So. 2d at 307.

115. See FLA. STAT. § 409.2561(1) (1997) (giving priority to the state for the establishment of support even in public assistance cases).

116. *Privette*, 617 So. 2d at 308 n.5.

117. See FLA. STAT. § 61.405 (1997).

118. See *In re E.F.*, 639 So. 2d 639, 640 (Fla. 2d DCA 1994) (noting that the trial court did not “fundamentally” err when it attempted to locate a guardian ad litem but was unable to do so because of the inadequate supply of volunteers).

119. See *White v. White*, 661 So. 2d 940, 941 (Fla. 5th DCA 1995) (stating that the trial court was in no position to rule on the paternity issue absent a guardian ad litem to protect the child’s best interests).

these cases required that the guardians be lawyers.¹²⁰ In larger jurisdictions, it quickly became apparent that *Privette* could not be effectively administered without at least a few trained professional guardians ad litem paid by the state.

It is important to realize that the procedures in *Privette* might be workable but not in the existing statutory framework. These procedures need funded, professional guardians with specific "best interests" guidelines. The guardians should be used conservatively and sparingly as needed, not as an essential participant in every case.

2. Personal Jurisdiction

Privette also raised personal jurisdiction issues. In *Privette*, Mr. Sease, the marital, legal father, was not a party to the lawsuit. The record does not reflect where he lived or whether the court had a basis to exercise jurisdiction over his person. It seems odd that the court discussed terminating a man's status as a "legal father" when he was not a true party to the proceeding. Yet, the court stated, "The legal father must be given notice of the hearing either actually if he is available or constructively if otherwise; and he must be heard if he wishes to argue personally or through counsel."¹²¹ The court suggests that this proceeding could result in "a legal termination of the legal father's parental rights."¹²²

Parental rights are usually terminated in a chapter 39 "Termination of Parental Rights" proceeding¹²³ or occasionally in a chapter 63 adoption proceeding.¹²⁴ Termination requires that the legal father be a named party in the action. In a chapter 39 proceeding, the legal father is entitled to free legal representation if he is indigent, and he is given many opportunities to preserve his rights to his children.¹²⁵ It seems inconceivable that a court could remove a person's name from a child's birth certificate and thereby terminate parental rights in a proceeding in which the parent is not a party. Likewise, it seems inconceivable that the biological father could be designated the legal

120. The author has encouraged this precaution at continuing judicial education seminars.

121. *Privette*, 617 So. 2d at 308 n.4.

122. *Id.* at 307.

123. See FLA. STAT. §§ 39.46, 63.072(1) (1997). Technically, a parent who has abandoned a child waives the right to consent to the adoption, but the judgment has the effect of relieving this parent of all parental rights and responsibilities. See *id.* § 63.172.

124. See *id.* § 63.172.

125. See *In re D.B.*, 385 So. 2d 83, 91 (Fla. 1980) (holding that the Due Process and Equal Protection Clauses of the Federal and the Florida Constitutions require the court to appoint counsel to an indigent parent in termination proceedings).

father unless he was personally served and became subject to the court's jurisdiction.¹²⁶

Rules for personal and constructive service of process need to be established with clear requirements as to the parties who must participate in the proceeding. The parentage proceeding under the second prong of *Privette* must be separate and distinct from a biological determination of paternity. Also, the proceeding must be separate from any related dissolution proceeding to prevent divorces from stalling because of an inadequate supply of guardians or a lack of jurisdiction over putative fathers.

B. Substantive Problems

The assumption that a legal father was intended to be at least a support father was buttressed by the Florida Supreme Court's striking decision to categorize as a constitutional right, the child's right to legitimacy and, thus, to a marital father as a legal father.¹²⁷ The *Privette* court stated, "Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests."¹²⁸

One wonders whether the court intended this right to be a substantive or a procedural due process right. Presumably, the court did not base this right on a deprivation of life. Is it based on a property right or a liberty right? The court does not enlighten its reader. Even for those who believe children should have greater rights independent of their parents, it is difficult to argue that these rights emanate from the due process provision of the 1968 Florida Constitution.

The substantive problems with *Privette* demonstrate the courts' struggle to uphold the "best interests" function of the presumption of legitimacy in a world of genetic testing. The supreme court's concern with "legitimacy" and the "stigma of illegitimacy" can hardly be overstated, as those ideas are discussed repeatedly throughout the opinion.¹²⁹ However, rather than focus on the presumption of legitimacy as a tool to provide the child with a stable family unit, as argued in

126. Constructive service of process is not authorized in Florida for use in a paternity action. See FLA. STAT. § 48.011 (1997); *Drucker v. Fernandez*, 288 So. 2d 283, 283 (Fla. 3d DCA 1974). Constructive service in parental terminations was first authorized as recently as 1994. See Act effective Oct. 1, 1994, ch. 94-164, § 45, 1994 Fla. Laws 963, 1015 (amending FLA. STAT. § 49.011(13) (1993)).

127. See *Privette*, 617 So. 2d at 307.

128. *Id.* (citing FLA. CONST. art. I, § 9). Article I, section 9 of the Florida Constitution is the state counterpart to the Federal Due Process Clause. See U.S. Const. amend. XIV, §1. The U.S. Supreme Court has not decided whether a child has such a liberty interest. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.")

129. *Privette*, 617 So. 2d at 307.

this Article, *Privette* describes the presumption as a “policy of protecting the welfare of the child.”¹³⁰ Admittedly, a stable family unit is good for a child’s welfare, but the presumption was designed to select a family for a child, not to give the court leeway to do whatever is “best” for a child. Once the court transforms the presumption of legitimacy into a process of doing what is best for a child, genetics can no longer overcome the presumption.

On the other hand, legitimacy has little or no definition once this occurs. The court had to create the concept of a legal father because it was no longer presuming that the marital father was the biological father. Florida law, however, does not provide any clear definition of the rights and responsibilities of a “legal father,” nor does it contain any statutory basis to place permanent obligations on the man listed on a birth certificate. Furthermore, Florida law does not provide any adequate constitutional theory to support the *Privette* court’s claim that a child has a constitutional right to legitimacy and thus a legal father.

In Florida, the concept of legal father had a very limited history prior to *Privette*.¹³¹ “Legal father” is not a statutory term and was not used for any specific purpose in earlier case law. The *Privette* opinion defines a legal father as “the one listed on the birth certificate.”¹³² The father on a birth certificate is established as a matter of vital statistics pursuant to section 382.013(2), *Florida Statutes*.¹³³ Under this statute, the name of the marital father is automatically placed on the birth certificate, absent a rare prior judicial determination that some other man is the father.¹³⁴

Because this procedure is automatic, the marital father does not consent to his name being placed on the certificate. Any obligation that results from this process is imposed on him by case law and not by any voluntary act. At least in the absence of a statute making legal fatherhood a consequence of the marital contract, this obligation cannot be viewed as contractual, quasi-contractual, or a product of estoppel, and is certainly not “natural.”

The presumption of legitimacy under the common law never made the marital father a legal father. It made him a presumptive father. Prior to *Privette*, most children, including marital children, had no legally established father. On its face, *Privette* appears to treat a birth certificate, which is prepared with little judicial or administrative oversight, similar to an order of adoption, an order of surrogate

130. *Id.*

131. *See supra* note 13.

132. *Privette*, 617 So. 2d at 307.

133. *See* FLA. STAT. § 382.013(2) (Supp. 1998).

134. *See id.*

parentage, or an order of paternity.¹³⁵ Perhaps this is too literal a reading of *Privette*, and the supreme court intended the marital father to be only a presumptive legal father.¹³⁶

If the marital father is the automatic legal father, what rights and responsibilities did the *Privette* court intend to place upon this father? Because the court started “from the premise that the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child,”¹³⁷ many lawyers and judges assumed that “legitimacy” entitled the child to a “legal father” having all the rights and responsibilities traditionally vested in a legal guardian.

When *Privette* returned to the trial court, it withered on the vine. Ultimately, the State did not obtain reimbursements from either father, and the child obtained neither a family unit nor a future right of support.¹³⁸ Applying a best interest test to establish a legal father, at least as a support father, was a failure for the child. The court’s reasoning pushed the common law rules beyond logic where genetic evidence would likely overcome the traditional presumption of legitimacy. The supreme court clearly struggled for a fair outcome and a reasonable rule, but the common law provided no foundation on which to base a satisfactory opinion.

V. DANIEL V. DANIEL: A RETREAT TO TRADITIONAL RULES THAT MAY DISADVANTAGE EVEN MARITAL CHILDREN

Four years after *Privette*, the Florida Supreme Court was given the opportunity to clarify some of the problems *Privette* created and to explain the type of cases in which *Privette*’s procedures should be applied.¹³⁹ In *Daniel*, the supreme court limited *Privette*’s procedures by holding that *Privette* does not apply in divorces where the issue of

135. If the birth certificate actually made the marital father the legal father, the doctrine of fatherhood by estoppel would not be necessary. See *Wade v. Wade*, 536 So. 2d 1158, 1159-60 (Fla. 1st DCA 1988) (estopping a former husband from “disavowing [a] child as his own for purposes of parental support”); *Marshall v. Marshall*, 386 So. 2d 11, 12 (Fla. 5th DCA 1980) (stating that the child’s best interests would not be served by allowing the husband to disavow his prior recognition of paternity). There would be no need to estop the marital father from denying his biological fatherhood if his status as legal father were fixed and permanent by virtue of the birth certificate.

136. The author is indebted to Professor Iris Burke of the University of Florida, College of Law, who provided many constructive suggestions during the writing of this Article. She first suggested this very reasonable interpretation of *Privette*. The supreme court probably views the legal father as a presumptive category, allowing the doctrine of fatherhood by estoppel to continue to exist. It also makes the result in *Daniel* more compatible with *Privette*.

137. *Privette*, 617 So. 2d at 307.

138. Interview with Daniel A David, Att’y, and Stephen F. Ellis, Att’y (Oct. 1997).

139. See *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997).

paternity is uncontested,¹⁴⁰ and thereby reduced the demand for guardians ad litem. However, *Daniel* did not clarify the other procedural problems that *Privette* created. By treating the putative biological father as if he were a party to the action when he was not, *Daniel* muddied the issues surrounding personal jurisdiction even further. More importantly, *Daniel* made a paper fiction out of the child's constitutional right to legitimacy—to a legal father. Ironically, by relying on the concept of paternity, which was created to provide support for nonmarital children, *Daniel* gave a child both a legal, marital father and a putative, biological father, but no meaningful right of support from either. The outcome in *Daniel* may be entirely fair for Mr. Daniel, but the analysis will place the best interests of children at risk.

A. Confusion of Legitimacy and Paternity

Prior to *Daniel*, many lawyers and judges believed that a child could be deprived of the legitimacy right announced in *Privette* only after the court, with a guardian's help, decided that the child would be better off if the paternal rights and responsibilities were shifted to the biological father. If legitimacy was the child's constitutional right as the *Privette* court decided, then the marital father should not be able to voluntarily relinquish his status as legal father, unless that decision benefited the child.¹⁴¹ Otherwise, the child's due process right to a marital father would compete in some unspecified fashion with the biological father's due process rights.¹⁴²

In 1992 Mrs. Daniel became pregnant at nineteen years old.¹⁴³ The day after Christmas, she married Mr. Daniel, whom she had met while working at a drugstore. Mr. Daniel knew his wife was pregnant at the time he married her. He also knew he was not the child's biological father. Mr. Daniel consulted an attorney prior to the marriage, but the record does not reflect what, if any, advice the attorney provided. The couple did not execute a prenuptial agreement. The Daniels' baby was born in March 1993 and, therefore, fell into the

140. See *id.* at 1255.

141. Neither parent may voluntarily abandon a child in a state-initiated parental termination proceeding unless termination is in the child's manifest best interests. See FLA. STAT. § 39.4611(1)(c) (1997). Thus, it is logical that a parent cannot relinquish rights in a *Privette* hearing without consideration of the child's interests.

142. See generally *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that parents who are party to a state-initiated termination of parental rights proceeding are entitled to due process).

143. See Petitioner's Initial Brief app. at 2, *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997) (No. 89, 363). The facts in *Daniel* are not described in detail in the published opinions. The statement of the facts in this section is derived from the appellate briefs and from the guardian ad litem's written report to the trial court.

Type I quasi-marital child category. Mr. Daniel fully participated in the pregnancy and birth and allowed his name to be placed on the birth certificate.¹⁴⁴

Less than six months from the child's birth, the couple developed marital difficulties and separated in November 1993. In the divorce proceeding, Mrs. Daniel admitted that Mr. Daniel was not the biological father of her daughter. The trial court assumed that it was bound to follow *Privette*.¹⁴⁵ Accordingly, the court appointed a guardian ad litem, an attorney skilled in marital law.

The guardian ad litem interviewed the Daniels and their respective parents, and also deposed the putative father, Mr. Staggers.¹⁴⁶ From the guardian ad litem's investigation, it appeared that Mr. Daniel had a good job with a regional drugstore chain and had a net monthly income of approximately \$1500. He bonded with his legal daughter during the six- to eight-month period in which he lived with her, and loved and supported her like any good marital father.¹⁴⁷

The investigation further revealed that the putative father lived approximately fifty miles away and that he was on probation for minor felony offenses.¹⁴⁸ Mr. Staggers was living with a woman and was the admitted biological father of her four-month-old daughter. He was also supporting her older daughter from a prior relationship. He lived in a trailer and made about \$7.25 per hour as a cook. He had no contact with the Daniels' little girl, did not formally admit that the child was biologically his, and had no interest in supporting the child either emotionally or monetarily.¹⁴⁹

The guardian ad litem filed a report recommending that Mr. Daniel remain the girl's legal father.¹⁵⁰ In November 1995 the trial

144. See *id.* app. at 3.

145. The trial judge was following a procedure that the author recommended to the trial bench in a continuing judicial education program in May 1996. See Chris W. Altenbernd, *Privette's Puzzle: The Shifting Legal Father*, Advanced Judicial Studies (May 1996) (on file with Office of the State Courts Adm'r, Tallahassee, Fla.).

146. Although Mr. and Mrs. Daniel agreed that Mr. Staggers was the biological father, no testing was done. Thus, he cannot be accurately described as a biological father.

The putative biological father, Mr. Staggers, was never a true party to this divorce proceeding. Third parties are a rarity in divorce. Although both the Second District and the Florida Supreme Court referred to Mr. Staggers as a party, he participated only to the extent that he honored the guardian ad litem's witness subpoena.

The Second District Court of Appeal's opinion states that "the trial court . . . made the biological father a party to the proceedings." *Daniel v. Daniel*, 681 So. 2d 849, 850 (Fla. 2d DCA 1996). The court then explains in a footnote that he only participated to the extent that his deposition was taken. See *id.* at n.1. In fact, he was never shown in the style of the case as a party nor were pleadings filed that described him as a party. See *id.* The supreme court describes him similarly. See *Daniel*, 695 So. 2d at 1254.

147. See Petitioner's Initial Brief app. at 1, *Daniel* (No. 89, 363).

148. See *id.* app. at 4.

149. See *id.* app. at 5.

150. See *id.* app. at 1.

court determined that it was not in the child's best interests for the court to shift the legal father status from Mr. Daniel to Mr. Stagers.¹⁵¹ Accordingly, the court did not enter an order requiring a blood test and ordered Mr. Daniel to pay child support of \$520 per month.¹⁵² Mr. Daniel, of course, could establish visitation and expanded custody rights if he desired.

At the intermediate appellate stage, Mr. Daniel challenged his obligation to provide support.¹⁵³ The Second District struggled with this case because the rules announced in *Privette*, with an emphasis on legitimacy, were not easily reconciled with earlier cases. Previous cases held that a husband in a divorce could not be ordered to pay child support for a child "who is neither his natural nor his adopted child and for whose care and support he has not contracted."¹⁵⁴ Following the First District in *Robinson v. State*,¹⁵⁵ the court severed legitimacy from paternity.¹⁵⁶ Thus, the court held that the *Privette* best interests analysis applied only when three conditions existed: (1) a child faces the threat of being deemed illegitimate; (2) a legal father faces the risk of losing his parental rights; and (3) "the matter involves contested *paternity* with the request for blood tests or similar genetic testing."¹⁵⁷

Because the Daniels' daughter was born during a lawful marriage, the Second District held that she was legitimate and that Mr. Daniel was the legal father for purposes of legitimacy.¹⁵⁸ The court emphasized that his name would remain on the birth certificate.¹⁵⁹ By reversing the trial court, the Second District effectively relieved Mr. Daniel of any obligation to support the child after the judgment of dissolution.

The Second District's decision may seem "fair" from Mr. Daniel's perspective. From his point of view, he was trying to help out a friend in trouble. The marriage did not work out, so he should not be stuck paying child support to someone else's child for the next seventeen years. In its simplest terms, the Second District merely held that *Privette* did not overrule the earlier cases relieving marital fathers of their obligation to support quasi-marital children after a divorce. The

151. See *id.* app. at 9.

152. See *id.*

153. See *Daniel v. Daniel*, 681 So. 2d 849, 850 (Fla. 2d DCA 1996).

154. *Albert v. Albert*, 415 So. 2d 818, 820 (Fla. 2d DCA 1982); *accord* *Portuondo v. Portuondo*, 570 So. 2d 1338, 1342 (Fla. 3d DCA 1990); *Bostwick v. Bostwick*, 346 So. 2d 150, 151 (Fla. 1st DCA 1977); *Taylor v. Taylor*, 279 So. 2d 364, 366 (Fla. 4th DCA 1973).

155. 661 So. 2d 363 (Fla. 1st DCA 1995).

156. See *Daniel*, 681 So. 2d at 851 (discussing and agreeing with the *Robinson* court).

157. *Id.* (emphasis added).

158. See *id.*

159. See *id.*

court followed that case law and certified the following question to the Florida Supreme Court: "Is the presumption of legitimacy overcome when a married husband and wife stipulated that the child's father is not the husband but do not challenge the child's legitimacy, and the birth certificate remains unchanged?"¹⁶⁰

The question reveals the difficulties that modern courts are having with the common law theories when confronted with genetic evidence. First, a husband and wife in Lord Mansfield's day would not have been permitted to enter into this stipulation because they were not allowed to testify to its content.¹⁶¹ Second, a couple cannot stipulate that a child is not the husband's biological child without challenging its legitimacy under any traditional definition of "legitimate." Ultimately, the Florida Supreme Court agreed with the Second District's conclusion that the *Privette* best interests standard was limited "to those instances where a child faces the threat of being declared illegitimate and the 'legal father' also faces the threat of losing parental rights which he seeks to maintain."¹⁶² Thus, *Privette* was inapplicable to the issues in *Daniel*.

In a short opinion with little new analysis, the Florida Supreme Court answered the Second District's certified question in the negative and approved the three conditions that the Second District required for use of the *Privette* best interests analysis.¹⁶³ The supreme court's opinion, however, is notable for its discussion of both legitimacy and paternity in terms that are hard to reconcile with *Privette*.

Concerning legitimacy, the court recognized that Mr. Daniel did not dispute that he was not "asserting any rights he might have had as [the child's] 'legal father' during the time of the couple's marriage."¹⁶⁴ In addition, the parties did not dispute the child's status as legitimate.¹⁶⁵ The court concluded that the child's legitimacy "will not be affected by a determination of paternity or any orders of support that may follow such a determination."¹⁶⁶ It is clear that the supreme court saw Mr. Daniel as merely a paper legal father, who no longer had any rights or responsibilities for his legal daughter.¹⁶⁷ Gone is

160. *Daniel*, 681 So. 2d at 852.

161. See *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (K.B. 1777).

162. *Daniel*, 695 So. 2d at 1253.

163. See *id.* at 1254.

164. *Id.* at 1255.

165. See *id.*

166. *Id.*

167. Because Mr. Daniel remains on the birth certificate as the legal father, if Mrs. Daniel and Mr. Staggers both die in accidents, does Mr. Daniel have any responsibility to support his legal daughter? Does he have some backup or inchoate obligation even if he has no support obligation at this time? The court in *Daniel* did not directly address this scenario. However, by approving the *Albert* line of cases, the opinion strongly suggested that Mr. Daniel would have no obligation to support the child even if she were orphaned by

the discussion in *Privette* that the presumption of legitimacy exists to protect the best interests of the child. *Daniel* reduces legitimacy to nothing more than a name on a publicly recorded birth certificate.¹⁶⁸

Near the end of its opinion in *Daniel*, the supreme court stated, "Just as [the daughter's] natural lineage was unaffected by her mother's marriage, [the daughter's] legitimacy will not be affected by a determination of paternity or any orders of support that may follow such a determination."¹⁶⁹ This assertion may be legally incorrect if the biological father's paternity is ever declared in a standard chapter 742 paternity action.¹⁷⁰ Moreover, the statement demonstrates the muddle that has become of the older common law concepts. The daughter has "natural lineage" to her biological mother; there is apparently no dispute that she does not have "natural lineage" to Mr. Daniels. If legitimacy has anything to do with the marriage of biological parents, a determination of paternity will affect her "legitimacy." In fact, the court's own opinion, identifying this child by name,¹⁷¹ is a public disclosure that her mother was unmarried at the time of her conception and that the mother's husband at the time of

her biological parents. If that is true, legitimacy now has little more practical value than the buttonhole on a suit's lapel.

168. The opinion does not discuss fatherhood by estoppel, an issue that the parties did not address. Nevertheless, Mr. Daniel entered into this marriage with full disclosure. The law of fatherhood by estoppel is not well developed in Florida, but Mr. Daniel would have remained the legal father, essentially by estoppel, in some other jurisdictions because he married a pregnant woman. See *Wade v. Wade*, 536 So. 2d 1158 (Fla. 1st DCA 1988); *Marshall v. Marshall*, 386 So. 2d 11, 12 (Fla. 5th DCA 1980). Florida clearly recognizes that both the husband and the wife can be estopped to deny the husband's paternity of a child. However, the case law does not establish what actions for what period of time are necessary to create an estoppel. It is a theory without any established parameters. See, e.g., *L... v. L...*, 497 S.W.2d 840, 842 (Mo. Ct. App. 1973) (finding that a husband must pay child support in a divorce because he married the wife knowing she was pregnant); *Hartford v. Hartford*, 371 N.E.2d 591, 596 (Ohio Ct. App. 1977) (requiring that a husband pay support for a Type II quasi-marital child conceived during a temporary separation). In *Daniel*, a good argument can be made that Mr. Daniel's marriage vows created a contract that should have estopped him from denying parentage in this case. The proposed statute would leave Mr. Daniel as the legal father unless he had a written agreement with the mother to determine paternity following the birth of the child. If a similar statute had been in effect when Mr. Daniel visited his attorney prior to the marriage, it is likely that he would have had such a prenuptial agreement.

169. See *Daniel*, 695 So. 2d at 1255.

170. A judgment of paternity invokes the provisions of sections 382.013(2)(c) and 382.015 of the *Florida Statutes*. See FLA. STAT. § 382.013(2)(c) (Supp. 1998); *id.* § 382.015 (1997). If a paternity determination showed Mr. Staggars as the biological father, the birth certificate would normally be amended to show Mr. Staggars as the father on the birth certificate. Mr. Daniel would no longer be the legal father and his role to protect some concept of legitimacy would be over. The only reason the birth certificate would not be amended is because of the supreme court's specific ruling that the child's legitimacy "will not be affected by a determination of paternity." *Daniel*, 695 So. 2d at 1255. The trial court might feel compelled to ignore the statute requiring this change and obey the supreme court's mandate.

171. See *id.* at 1254.

her birth was not her biological father. Under any reasonable definition, the supreme court itself has declared this child "illegitimate."

Just as *Privette* demonstrates the difficulty of relying on the presumption of legitimacy to resolve quasi-marital children's issues after the advent of genetic testing, both *Daniel* opinions demonstrate a similar difficulty with the concept of paternity. The Second District concluded that when all parties to a divorce agree that the husband is not the "natural father," then the presumption of legitimacy is not at issue and that a separate "presumption of paternity" applies.¹⁷² The supreme court agreed that "paternity and legitimacy are related, but nevertheless separate and distinct concepts."¹⁷³

The Second District's "presumption of paternity" has, at best, a very recent and limited legal history.¹⁷⁴ On prior occasions and in other states, the presumption of paternity seems to have been used as the equivalent of the presumption of legitimacy¹⁷⁵ or as a presumption used in the context of scientific testing resulting in a high probability of paternity,¹⁷⁶ or in the context of a voluntary acknow-

172. See *Daniel v. Daniel*, 681 So. 2d 849, 851 (Fla. 2d DCA 1996).

173. *Daniel*, 695 So. 2d at 1254.

174. The "presumption of paternity" concept was borrowed from *Prater v. Prater*, 491 So. 2d 1280, 1281 (Fla. 5th DCA 1986) (holding that a Florida court has no jurisdiction to determine paternity of a child in an ex parte dissolution case where one party lives outside of Florida and does not appear in the suit). It is not obvious that Judge Dauksch intended to create a new presumption in that case, and he may have merely used substitute words to describe the presumption of legitimacy.

The phrase "presumption of paternity" was also used in *Hall v. Hall*, 672 So. 2d 60, 62 (Fla. 1st DCA 1996). In *Hall*, a divorce proceeding, an adoptive father of an infant born in the Philippines claimed that he was also the biological father. See *id.* at 61 n.1. The First District Court of Appeal rejected the trial court's use of a "presumption of paternity" by remanding the case with orders to reinstate temporary, shared custody and visitation rights to the adoptive mother. See *id.* at 62. This was somewhat different from the presumption in *Daniel*.

175. California's irrebuttable presumption of paternity is clearly the same as the presumption of legitimacy. See Hadek, *supra* note 50, at 374-86 (asserting that California's "conclusive presumption of paternity . . . has been a mainstay in California law for well over a century" resulting from a "deep disdain for illegitimate children and an interest in preserving the peace and tranquility of the family"). Alabama has a statutory presumption of paternity that appears comparable to the common law presumption of legitimacy. See ALA. CODE § 27-17-1 (1975); *Ex parte Presse*, 554 So. 2d 406, 408 (Ala. 1989). The terms also seem equivalent in Illinois and Oregon. See, e.g., *In re Marriage of Klebs*, 554 N.E.2d 298, 304 (Ill. App. Ct. 1990); *In re Matter of the Marriage of A.*, 598 P.2d 1258 (Or. Ct. App. 1979). Also, the Uniform Parentage Act contains a presumption of parentage that appears to be comparable to the common law's presumption of legitimacy. See UNIF. PARENTAGE ACT § 9B, U.L.A. 287 (1973); see also POLLOCK AND MAITLAND, *supra* note 12, at 398.

176. Section 742.12, *Florida Statutes*, creates a presumption of paternity when an HLA test or other scientific test establishes a 95% or greater probability of paternity. See FLA. STAT. § 742.12(4) (1997). The phrase has been used in earlier cases discussing this statute. See, e.g., *Ferguson v. Williams*, 566 So. 2d 9, 11 (Fla. 3d DCA 1990); *Vidal v. Rivas*, 556 So. 2d 1150, 1152 (Fla. 3d DCA 1990); *Jones v. Crawford*, 552 So. 2d 926, 927 (Fla. 1st DCA 1989); *Schatz v. Wenaas*, 510 So. 2d 1125, 1126 (Fla. 2d DCA 1987). This presumption is more typically an evidentiary presumption used in the context of a paternity action nam-

ledgement of paternity.¹⁷⁷ What the *Daniel* “presumption of paternity” is or how it effects decision making on parentage issues in Florida remains unclear.

Some states, such as Maine, attempt to restrict the concept of legitimacy so that it has different meanings for the law of inheritance and the law of paternity.¹⁷⁸ This restriction effectively allows for a presumption of paternity. Whether Florida could make such a distinction is questionable because the courts have used the presumption of legitimacy too often in the context of child support.¹⁷⁹ Nevertheless, Florida needs to decide what “paternity” and “legitimacy” mean and to clearly use these terms only for their intended purposes. Furthermore, the author would probably prefer to eliminate all usage of “legitimacy” in both paternity and probate actions because the term’s moral and religious overtones interfere with policy-making in a pluralistic society. Legitimacy tends to stigmatize the child when it is the parents’ behavior that society wishes to discourage. If we are to use judgmental words, they should be directed at the parents—not the innocent children.

If the primary policy behind paternity is to provide child support and the primary policy behind the presumption of legitimacy is to provide stable family units for children, then a presumption of paternity should be used to select the father who pays support when the presumption of legitimacy fails to establish a family. Because the child in *Daniel* had little or no prospect of a family unit that included either potential father, it is arguable that the duty to support the

ing the putative biological father of a nonmarital child. It may also have use in the quasi-marital children context, but, clearly, it is not the presumption of paternity discussed in *Daniel*.

177. Section 742.10(1), *Florida Statutes*, allows for a voluntary acknowledgment of paternity that creates a rebuttable presumption of paternity. See FLA. STAT. § 742.10(1) (1997); see also *Campo v. Tafur*, 704 So. 2d 730, 733 n.1 (Fla. 4th DCA 1998) (noting that an admission of paternity, absent an affidavit, merely creates a rebuttable presumption of paternity); *Womack v. Cook*, 634 So. 2d 322, 323 (Fla. 5th DCA 1994) (Harris, C.J., dissenting) (opining that until the presumption of paternity is rebutted, the paternity action cannot proceed). Like the presumption for scientific testing, this is an evidentiary presumption for use in a typical paternity action. It is similar to the concept employed in *Daniel* because the presumption arises from a voluntary admission and not from any biological evidence.

178. See, e.g., *Denbow v. Harris*, 583 A.2d 205, 207 n.1 (Me. 1990) (stating that the court has “long recognized the distinctions between the meanings of ‘legitimacy’ as used in the different contexts of inheritance and paternity”).

179. Indeed, Florida’s leading case on the presumption of legitimacy is a divorce case similar to *Daniel* involving a Type I quasi-marital child. See *Eldridge v. Eldridge*, 16 So. 2d 163 (Fla. 1944). The marital husband in *Eldridge* was allowed to challenge the presumption, but failed to overcome the difficult burden of proof, as the wife would not concede the issue. See *id.* at 163-64. In this way, the presumption of legitimacy simply turns into the “presumption of paternity” if the wife concedes that the marital father is not the biological father. Why a presumption of paternity applies when no one claims that a party is a biological father is unclear.

child should fall upon the biological father, at least when the marital father had such a brief involvement with the child. To that extent, the ruling in *Daniel* is defensible.

Because Florida does not limit the concept of legitimacy to inheritance issues, these two presumptions can result in two "legal" fathers. In theory, Mrs. Daniel's daughter could eventually have a legal father for legitimacy, Mr. Daniel, and another legal father who paid support, Mr. Staggers. The sad truth is that she is unlikely to ever have a "functional father." Even if Mrs. Daniel pursues a paternity action against Mr. Staggers and wins, Mr. Staggers is unlikely to provide any meaningful monetary support. Thus, in reaching their decisions, both the Second District and the Florida Supreme Court relied on paternity to locate a support father; however, both courts failed to locate any true support for this child.¹⁸⁰

B. Daniel's Other Problems

Two final observations regarding *Daniel* should be made. First, the court announced a rule that would probably cause the *Privette* procedures to be inapplicable even in the actual *Privette* case. The *Daniel* court stated:

Unlike the circumstances before us here, our decision in *Privette* addressed a case of contested paternity involving blood tests, and its application is limited to those instances where a child faces the threat of being declared illegitimate, and the "legal father" also faces the threat of losing parental rights which he seeks to maintain.¹⁸¹

In *Privette*, the legal father did *not* face the threat of losing the parental rights he sought to maintain. He was not a party to the action and could not lose those rights *in absentia*. Even if he had been notified, he probably would not have wished to maintain these rights. If the rule announced in *Daniel* applies to paternity actions where the husband stipulates that he is not the biological father, it is arguable that *Privette* will rarely apply even in chapter 742 proceedings filed by married women against putative fathers. Simply put, the child may have no meaningful constitutional right to maintain legitimacy after *Daniel*.

180. The impact of *Daniel* on a child's right to support and legitimacy is highlighted in *DeRico v. Wilson*, 714 So. 2d 623 (Fla. 5th DCA 1998), in which a Type II child, identified by name, is effectively declared illegitimate in the opinion. Her mother is ordered to repay child support that was previously provided by the marital father after he petitioned to determine paternity, but while he was still legally married to the mother!

181. *Daniel v. Daniel*, 695 So. 2d 1253, 1255 (Fla. 1997).

Second, *Daniel* permits typical parents of marital children to divest their children of support in a dissolution proceeding with no clear ability on the part of the trial judge to intercede on behalf of the children. Just because the Daniels were probably telling the truth does not mean that all married couples will tell the truth.¹⁸² If the putative father is not required to be an actual party to the divorce, a married couple could stipulate that the husband is not the father of the marital children and, accordingly, he would be relieved of all support obligations. Furthermore, there would be no guardian ad litem appointed and no need for judicial review of the accuracy of the stipulation.¹⁸³ In many circumstances, adults might defraud the court to eliminate the husband's child support obligation, especially given the high number of cases in which parties are not represented by counsel in divorce.¹⁸⁴ At a minimum, courts confronted with a situation similar to *Daniel*, should require the parents and the child(ren) to undergo genetic testing.¹⁸⁵ This would support the stipulation that the marital father was not the biological father and, thereby, exclude the possibility of Mr. Daniel's paternity.

There is a certain upside-down perspective in *Daniel* and *Privette*. In *Daniel*, a divorce proceeding, the court acts as if the child was a nonmarital child and implicitly takes a quasi-criminal bastardy or paternity approach to the problem, examining the case from Mr. Daniel's perspective (as a charged defendant). In *Privette*, a paternity action, the court uses the presumption of legitimacy to examine the case from the "best interests" perspective of the child, as if the child were a marital child seeking support in a divorce proceeding! Neither perspective is particularly satisfying, and neither comes to terms with the fact that quasi-marital children are simply a new, third category of children that can no longer be analyzed using the existing common law tools.

182. For a post-*Daniel* example of a case in which the wife did not take a consistent position on the paternity of her children, see *Gantt v. Gantt*, 716 So. 2d 846 (Fla. 4th DCA 1998).

183. Voluntary terminations of parental rights in chapter 39 proceedings require a judicial determination of the child's manifest best interests. See FLA. STAT. § 39.4612 (1997).

184. For example, the husband may threaten the wife to evade child support, and she may prefer to have him out of her life even if that means she will not receive child support. The wife may wish to be rid of her husband forever, and she may threaten to reveal tax fraud, for example, unless he relinquishes the child.

185. Genetic testing now includes methods other than HLA testing. See *State Dep't of Revenue v. Aguirre*, 705 So. 2d 990 (Fla. 3d DCA 1998). See generally *Brim v. State*, 695 So. 2d 268 (Fla. 1997) (discussing the admissibility of DNA testing in criminal cases).

VI. A STATUTORY PROPOSAL TO ADDRESS THE NEEDS OF QUASI-MARITAL CHILDREN

If one accepts the proposition that quasi-marital children are a sizable third category of children whose parentage cannot be adequately resolved under the common law in an era of genetic testing, then a statutory solution is necessary. This Article's Appendix presents a working draft of a proposed revision of chapter 742, *Florida Statutes*, designed to address the needs of quasi-marital children and their marital and biological fathers, as well as their mothers. This draft is intended as a proposal for discussion and is intentionally not in final form. Given the differing circumstances of the three types of children delineated previously, the solutions for parentage issues involving Type I,¹⁸⁶ Type II,¹⁸⁷ and Type III¹⁸⁸ quasi-marital children require separate statutory provisions.

A. Assumptions

The statutory proposal rests on many assumptions, which should be expressly stated. First, the presumption of legitimacy, which attempts to place children in stable permanent family units, should be promoted in most cases, even at the expense of biological accuracy. Second, the basic purpose of paternity, which attempts to provide paternal economic support for all children, should also be achieved whenever feasible. However, support from the biological father is not always the most sensible route for quasi-marital children if it conflicts with the goal of providing a family unit. Nevertheless, when the marital father is not likely to function well in either capacity, the child should have the option of receiving support from the biological father.

Third, *Privette's* reasoning is correct when it prefers a procedure shifting legal fatherhood from the marital to the biological father. This approach is preferable to a *Daniel* style procedure, which eliminates the marital father's responsibilities without locating another legal father. *Privette's* policy is reasonable, especially concerning Type II quasi-marital children and all older children.

Fourth, *Daniel* is correct in arguing that in some cases the marital father should be relieved of his obligations without shifting those ob-

186. In the proposed statute, these children are referred to as children born within 40 weeks of marriage. See *supra* Part II.B.1. for a description of Type I quasi-marital children.

187. In the proposed statute, these children are referred to as children born after a permanent separation. For a description of Type II quasi-marital children, see *supra* Part II.B.2.

188. In the proposed statute, these children are referred to as children born after 40 weeks of marriage, but prior to a permanent separation. For a description of Type III quasi-marital children, see *supra* Part II.B.3.

ligations to the biological father. However, these exceptional cases involve quasi-marital children conceived before marriage or after the marriage has deteriorated, not children conceived from an adulterous relationship. Especially in a Type I situation, there is a strong policy argument that a husband and wife should be able to eliminate the husband's status as a legal father without obtaining a divorce. Under this assumption, family unity may be preserved, but the mother may be entitled to seek support from the biological father.

Fifth, in Type I and Type III situations, the marital couple should be encouraged to resolve the issue of paternity through a premarital agreement or a separation agreement. Sixth, the "best interests" framework is a reasonable one to determine whether to shift a legal father's obligations, but the factors considered in the analysis should be legislatively described in an effort to obtain more consistent rulings statewide.

Seventh, the statute of limitations in these cases should be relatively short, yet not so short as to force potential litigants to make rapid and possibly irrational decisions. Any change in legal parents after the first two years of a child's life should be treated as parental terminations or adoptions rather than as initial determinations of parentage. No special statute of limitations has been created, for the state in Title IV-D cases. Although an argument can be made for such a statute, the circumstances of these cases do not warrant any special rules.

Eighth, biological fathers should have the right to seek legal father status in most situations but should be expected to make timely and serious requests.¹⁸⁹ To this end, the proposed statute contains provisions designed to prevent spiteful claims or frivolous lawsuits. Existing case law on this point is correct: A stable family unit with a child conceived from an adulterous affair but born during the marriage should never be forced to accept the claim of a biological father.¹⁹⁰

Finally, in an era where medical treatment is affected and often dictated by the patient's genetic background and many children live in adequate but nontraditional family structures, the public should be encouraged not to think in terms of the "stigma of illegitimacy." Although children need stable family units, the stigma tends to deny

189. Although the statute gives a right of action to a biological father, it gives no rights to the child. The Uniform Parentage Act provides for an action by a child. See UNIF. PARENTAGE ACT, § 4, 9B U.L.A. 287 (1973). Who would actually bring this action for a quasi-marital child is still unclear. The author is not convinced that such an action is warranted for quasi-marital children, even if it is warranted for nonmarital children.

190. See *G.F.C. v. S.G.*, 686 So. 2d 1382, 1383 (Fla. 5th DCA 1997) (holding that a biological father may not pursue a paternity action for rights to a "Type II quasi-marital child" when the couple objects).

children adequate information about their true genetic background. Thus, although we should be conservative about preserving families for children, we should be more open about providing them with facts regarding their biological parents. A child may be entitled to know who her biological father is, even if he does not receive any of the rights or responsibilities of legal fatherhood. Likewise, the privacy rights of putative fathers should be respected, but not at the expense of children needing genetic information for valid medical reasons.

B. Basic Framework

The proposal in the Appendix contains only Part III of a revised chapter 742. Under the proposed statutory scheme, chapter 742 would have four parts: Part I would be a general part; Part II would consist of paternity and parentage statutes for nonmarital children; Part III would contain paternity and parentage statutes for quasi-marital children; and Part IV would deal with surrogacy.

This proposal is strongly influenced by California's experience under its statutory scheme, which provides for a conclusive presumption of legitimacy.¹⁹¹ Section 7540 of the California Family Code, which initially referred to the "presumption of legitimacy," now provides the following: "Except as provided in [s]ection 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."¹⁹²

The exceptions in section 7541 allow for determinations based on scientific testing during the first two years of the child's life. The procedures for these exceptions are not explained in detail in the California statutes, and the proposed Florida statutory revision contains more specific exceptions and procedures. If the Florida Legislature were to decline a no-exception presumption of legitimacy, then any exceptions would need to be described with greater specificity than those in California's statutes.¹⁹³

The biggest advantage of relying upon the California statute is that its constitutionality was upheld in *Michael H. v. Gerald P.*¹⁹⁴ There, the U.S. Supreme Court held that the statute's conclusive presumption of fatherhood was actually a substantive rule of law

191. See CAL. FAM. CODE § 7540 (West 1997).

192. *Id.*

193. See Hadek, *supra* note 50, at 82-82 (stating that California's exceptions have effectively "eaten up the rule"); William P. Hoffman, Jr., *Recent Developments—California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 761-65 (1968) (discussing the conflicting goals of nuclear family preservation and individual rights in relation to California's section 7540).

194. 491 U.S. 110 (1989) (upholding CAL. EVID. CODE § 621 (West 1984) (repealed 1994)).

supported by social policy concerns.¹⁹⁵ The statute was found constitutional under the rational relation test despite a due process challenge.¹⁹⁶ Likewise, the basic provision in the proposed Florida statute would be substantive. Except as provided in sections 742.302 through 742.305, a husband shall be the legal father and shall have all of the rights and responsibilities of a legal (natural) guardian, pursuant to section 744.301, *Florida Statutes*, for all children conceived by or born to his wife during the term of their marriage.¹⁹⁷

The vagueness of "cohabiting" in the California statute is eliminated, and the issues of "cohabitation" are addressed in sections dealing with Type I and Type III quasi-marital children. Impotency and sterility are not listed as exceptions in the initial section of the proposal. The retention of these provisions in the California statute is questionable, especially in an era of surrogacy. Under the Florida proposal, however, a husband would be able to challenge his status as legal father for these reasons, subject to the limitations in sections 742.302 to 742.305.

The proposal expressly gives the husband the status of legal guardian by referring to him as the "legal father."¹⁹⁸ The author contemplates that Part I of chapter 742 would contain a definition of "legal father," which would define the term as the man who is the father for purposes of section 744.301, the natural guardian statute, and who is shown as legal father on the child's birth certificate. Thus, in a final version of section 742.301 of the proposal, it would be sufficient to simply refer to the husband as the legal father.

It is worth emphasizing that "legal father" is not a presumptive category. Unlike the current common law, this statute establishes a legal father for virtually every child born to a marriage, either at birth or shortly thereafter. Thus, the unpredictable doctrine of fatherhood by estoppel, which allows a man to become the legal father based on his actions over time, should have little, if any, application under this statutory proposal. This is true because the basic provision in Part I of the proposal will apply to both marital and quasi-marital children.

C. A Simpler Statute Based on Other Assumptions

Before discussing the exceptions and limitations created in sections 742.302 through 742.305 of the proposal, note that the basic

195. See *id.* at 119-20.

196. See *id.* at 131.

197. See *infra* Appendix, § 742.301.

198. See *infra* Appendix, § 742.301. There are two exceptions to this rule. If a prenuptial or separation agreement exists, the husband is not automatically the legal father at the child's birth.

provision, section 742.301, could serve as the entire statute. The longer proposal is based on the assumption that such a rigid rule, always making the husband the legal father, would not necessarily be in the best interests of children and that the exceptions in sections 742.302 through 742.305 will not create undue litigation. In a society with a high rate of divorce and a significant number of quasi-marital children, the author accepts *Privette's* basic premise—a child's best interests may sometimes warrant procedures to identify the best functional father, or at least a support father, when it is highly unlikely that the husband will perform these functions.¹⁹⁹ Unquestionably, this assumption adds considerable complexity to the statutory proposal.

If the Legislature were to conclude that a husband should always be the legal father of a child born during the marriage and coerce that man to support all children of the marriage, the statute could be far simpler. Given that there is merit in simplified laws, this option should be debated. However, in light of our difficulties in obtaining compliance with child support orders and the value of a truly functional father, a more complex proposal is presented.

As a middle ground, the Legislature could choose to provide no right for either the husband or wife to shift legal fatherhood for Type I and II children. This would eliminate the provisions in sections 742.302 and 742.304 of the draft but retain the right for permanently separated couples to identify the biological father. Also, the right of the biological father to become the legal father could be retained under section 742.305.²⁰⁰

D. Addressing Quasi-Marital Children

1. Type I Quasi-Marital Children

The issues raised by Type I children²⁰¹ are resolved under section 742.302 of the proposal.²⁰² The proposed statute defines these children as born within forty weeks of marriage.²⁰³ This period, of course, is based on the standard term of human gestation. A different time span could be specified in the statute, but gestation seems to be the easiest period to use. The time span could be further limited. For example, one might wish to exempt premature children whose estimated date of conception was subsequent to the date of the marriage;

199. See Brashier, *supra* note 12, at 134-36 (concluding that an irrebuttable presumption that the husband is the legal father is not always in the child's best interest).

200. See *infra* Appendix, § 742.305.

201. Type I children are conceived prior to marriage but born after marriage.

202. See *infra* Appendix, § 742.302.

203. See *infra* Appendix, § 742.302.

however, the confusion created and the resulting costs would outweigh the further benefit of this complexity.

Two statutory approaches are provided for Type I children: private agreement and litigation. If the marital couple is aware of the pregnancy prior to the marriage or if they simply wish to protect against this contingency, they may enter into a prenuptial agreement allowing for a future determination of paternity for any child born during the first forty weeks of the marriage.²⁰⁴ The agreement would allow the parties to obtain scientific testing without any court order. Within ninety days of the child's birth, the couple would either need to file a stipulation of paternity or an action to determine paternity.²⁰⁵ "Paternity" is used in the proposal to describe the procedures normally used for nonmarital children under Part II of chapter 742. If no action is taken, the husband automatically becomes the legal father on the ninety-first day.²⁰⁶ Thus, even if he is not the biological father, he can become the legal father simply by taking no action. Under this default rule, only the mother is a legal guardian of the child during the first ninety days.²⁰⁷

If testing determines that the husband is not the biological father, the paternity action will declare that he is not the legal father.²⁰⁸ As long as the couple lives together, the husband will have an obligation to support the child under *Daniel and Albert v. Albert*,²⁰⁹ however, the mother will have the right to file a paternity action against another man to obtain support. Thus, this statute allows the couple to remain married and provide a family unit for the child, while also allowing pursuit of a child support claim against another man. In essence, the husband becomes the stepfather and the mother seeks support from the biological father as she would from a prior husband. Whether the biological father would be entitled to visitation or other rights would be matters resolved in the paternity action under the provisions of Part II of chapter 742, which would consider both paternity and parentage issues that arise by virtue of a declaration of paternity.²¹⁰

204. See *infra* Appendix, § 742.302(1).

205. See *infra* Appendix, § 742.302(1)(b).

206. See *infra* Appendix, § 742.302(1)(b).

207. See *infra* Appendix, § 742.302(1)(c).

208. The couple, however, may choose not to file the paternity action after receiving the genetic testing. The couple may, however, allow the marital father to become the legal father by stipulation or by taking no action.

209. 415 So. 2d 818 (Fla. 2d DCA 1982) (holding that a husband could be ordered to support a child regardless of whether the child is his natural child, adopted child, or whether the husband contracted to support the child).

210. This assumes that, unlike the existing statutes, Part II would have specific provisions dealing with support and visitation similar to the provisions in chapter 61, *Florida Statutes*.

If the couple does not enter into an agreement, the husband becomes the child's legal father at birth.²¹¹ Either the husband or the wife may file an action to eliminate the husband's status as legal father within one year or to shift that status to another man within two years.²¹²

The action to eliminate the husband's status as legal father requires proof that he is not the biological father and that he was either unaware of his wife's pregnancy at the time of their marriage or that he thought he was the child's biological father. Thus, under the proposed statute, Mr. Daniel would not have been allowed to file such an action because he knew about the pregnancy. Because Mr. Daniel consulted an attorney, he would have likely resolved this situation through a written agreement. The knowledge limitation on an action to eliminate the status of legal father essentially expands the existing theory of fatherhood by estoppel. If the groom knows about the pregnancy at the time of the marriage and does not arrange for a private written agreement, he is estopped from denying that he is the child's legal father.²¹³ He will have the option to shift legal father status to the biological father, but *not* to leave the child unsupported.

The statutory proposal retains the *Privette* requirement that actions under Part III (the proposed statute) be filed under oath. Requiring fact-specific, sworn pleadings should ensure that suits are filed in good faith. While the statute does not retain the concept of "good faith" discussed in *Privette*,²¹⁴ the time limitations and other restrictions of this statute are assumed to be sufficient to protect against bad faith filings.

The proposal requires a "greater weight of the evidence" burden of proof in litigation involving children born in the first few months of the marriage because a clear and convincing standard, as required by *Privette*, is not probably constitutionally essential in Type I cases.²¹⁵ Given that scientific testing can now exclude the possibility of biological fatherhood at very high probability levels, it may be simpler to rely upon a clear and convincing standard for all final hearings.

211. See *infra* Appendix, § 742.302(1)(b).

212. See *infra* Appendix, § 742.302(2)(a). The action to shift status is identical to an action for Type II children and will not be discussed further in the context of a Type I child.

213. See *infra* Appendix, § 742.302(2)(b).

214. Department of HRS v. *Privette*, 617 So. 2d 305, 308 (Fla. 1993).

215. See *infra* Appendix, § 742.302(2)(b)(2). The clear and convincing standard in *Privette* is primarily a modernized expression of the strength of the presumption of legitimacy. When a full-term child is born within 40 weeks of the marriage, it is obvious that the child was not conceived within the marriage. No obvious reason exists as to why constitutional due process should compel a high burden of proof when selecting a legal father under these circumstances. See *supra* note 71 and accompanying text.

Keep in mind, however, that genetic testing results will not always be available from all relevant adults at the final hearing. The greater weight burden is preferable because it is the standard burden of proof in a typical paternity action. Justifying a higher burden of proof for Type I and Type III children, under this proposal, is difficult. If the right to retain one's legitimacy in *Privette* has any meaning after *Daniel*, the child's claim to parentage rights and the responsibilities that flow from a marital father and a family should be preserved and protected.

If the court determines that the husband may be relieved of his status as legal father, that change is effective on the date of the judgment.²¹⁶ The mother, therefore, becomes the sole guardian.²¹⁷ In the case of a written agreement, the wife is then free to pursue a paternity action against another man. Indeed, the proposal encourages the initial lawsuit to name the putative father as a party so that the child can have support from the biological father as soon as possible. Again, this should encourage the husband and wife to provide a family unit for the child, while increasing the chances that the biological father will at least provide economic, if not emotional, support.

If the husband objects to the elimination of his legal father status in an action filed by the wife, the statutory proposal allows him to remain the legal father unless his rights are terminated in a chapter 39 proceeding²¹⁸ or unless a transfer of rights to the biological father is an option that is in the best interests of the child.²¹⁹ This provision essentially recognizes that fatherhood by estoppel may affect the mother as well as the father. Without a prior written agreement, however, she should not be allowed to terminate the husband's status, as compared to shifting the status to the biological father.²²⁰ In such circumstances, the statute should expressly provide for a guardian ad litem.

216. See *infra* Appendix, § 742.302(2)(c)(1).

217. See *infra* Appendix, § 742.302(2)(c)(1). Note that no guardian ad litem is required in this action. If the husband is entitled to be relieved of the status of legal father without shifting that status to another man based upon specific factual findings, there is little or no function for a guardian ad litem in such an action.

218. See FLA. STAT. § 39.4611 (1997).

219. See *infra* Appendix, § 742.302(2)(c)(2). This refinement addresses another concern raised by Professor Burke. Given that either the husband or wife can seek fatherhood by estoppel, this provision would estop the wife from eliminating a viable functional father when no other man is available to fill that slot. It seems unlikely that a mother would make this request in many cases, but it could occur in the context of a divorce.

220. The proposal may contain an estoppel that is too rigid. Since the mother may not have known that she needed a prenuptial agreement if she was only a few days pregnant, it is possible that "unfit" is too strong and that "best interests" should be the test for both transfer and elimination of paternal rights in these cases.

Two procedural provisions warrant comment. First, the statute prohibits reference to scientific testing in all initial complaints filed to resolve disputes involving quasi-marital children.²²¹ This prohibition is included because, in some cases, the mother and the biological father secretly obtain genetic testing without the consent of a husband who wanted to remain the legal father. Although this restriction may be more important in cases involving Type II children, it is placed in all provisions permitting lawsuits.²²²

Second, the proposal permits constructive service of the husband or wife.²²³ Chapter 48, *Florida Statutes*, would need to be modified to allow for the service described in this proposal. Constructive service allows a court to adjudge a child's best interest, even if a parent is unavailable for service.²²⁴ The proposal, however, intentionally makes no provision for constructive service on a putative father.²²⁵ As a practical matter, the parent with custody of the child will almost always need to be served and participate in this action.²²⁶ If parties are constructively served, genetic testing will be difficult or impossible. Thus, although lack of personal service will not bar the action, it will present significant problems in meeting burdens of proof.

2. Type III Quasi-Marital Children

The issues raised by Type III children²²⁷ are resolved under section 742.303 of the proposal.²²⁸ Like the provisions for Type I children, these cases can be controlled by a private separation agreement or resolved in litigation.²²⁹ The husband can eliminate his status as

221. See *infra* Appendix, § 742.302(2)(b)(1). This provision addresses procedural issues and, therefore, would probably require adoption by the supreme court as a rule of procedure. See FLA. CONST. art. V, § 2(a).

222. As an alternative, it might be sensible for the Florida Legislature to prohibit genetic testing of a child without the consent of both legal parents, if both exist, in the absence of a court order. This would not regulate out-of-state testing. Recently, in *Lefler v. Lefler*, 24 Fla. L. Weekly D114, D115 (Fla. 5th DCA Dec. 30, 1998), a father, suspicious of the paternity of his ex-wife's child, had blood tests performed during visitation with the child. The testing was conducted without the knowledge or consent of the child's mother. See *id.*

223. See *infra* Appendix, § 742.302(2)(e).

224. See *Rich v. Rich*, 214 So. 2d 777, 779 (Fla. 4th DCA 1968) (holding that constructive service on a nonresident parent is adequate for purposes of due process with regards to trying custody issues).

225. See *id.* at 779 (noting that child custody is *in rem* and must be filed where the children are located); *Drucker v. Fernandez*, 288 So. 2d 283, 283 (Fla. 3d DCA 1974) (indicating that no constructive service is authorized in paternity—apparently due to statutory omission).

226. See *infra* Appendix, § 742.302(2)(e).

227. Type III children are conceived and born after a married couple has permanently separated.

228. See *infra* Appendix, § 742.303.

229. See *infra* Appendix, § 742.303(1).

legal father in some instances, or he can shift the status to the biological father under provisions comparable to those for a Type II child.

Type III children are defined in the proposed statute as children born after a permanent separation.²³⁰ For purposes of the separation agreement, the proposal includes children born six months (180 days) after the execution of that agreement.²³¹ Arguably, the statute could also include children born at any time after the execution of the agreement, but concern may arise as to whether agreements signed shortly before the child's delivery are made under duress. By treating late term pregnancies as Type II children, some risks of abuse are therefore eliminated.

Separation agreements are already contemplated in the statutes regulating divorce.²³² The proposed separation agreement would allow testing to determine the paternity of any child born to a permanently separated couple.²³³ Such an agreement might help avoid divorce between a couple that was experiencing difficulties but was not certain their differences were irreconcilable.

The effect of a separation agreement is not identical to that of the prenuptial agreement. As in the case of a prenuptial agreement, the husband is not the legal father at the time of the child's birth unless he is subsequently determined as such.²³⁴ The husband cannot automatically become the legal father after six months because he may not even be aware of the child's existence during the first six months of its life. Instead, the statute creates a modest civil penalty for failing to comply with the agreement and indicates that such failure is evidence of "neglect," which could allow for a dependency proceeding.²³⁵ Hopefully, these provisions would give the mother an adequate incentive to take the steps necessary to resolve this paternity issue shortly after the child's birth.

It should be noted that the failure of the mother to act in this period effectively transforms the child into a nonmarital child. She still may file a paternity action against her husband or any other putative father, but presumably, after the six-month period, the birth certificate would issue without naming any father.

As an alternative, the statute could provide that the husband be the legal father for any child born during the first forty weeks of the

230. See *infra* Appendix, § 742.303.

231. See *infra* Appendix, § 742.303(1).

232. See FLA. STAT. § 61.075(6) (1997) (providing that "[t]he cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement").

233. See *infra* Appendix, § 742.303(1)(a).

234. See *infra* Appendix, § 742.303(1)(c).

235. See *infra* Appendix, § 742.303(1)(b).

agreement, but not for children born thereafter. This would more closely align with the treatment of Type I children. One way or another, this statute would effectively resolve the legal father issue for many of these children in the first six months of their lives.

If no separation agreement exists, the husband or wife may file an action to terminate the husband's status as legal father.²³⁶ Like a Type I action, an action to eliminate the status of legal father must be filed within one year of the child's birth, but an action to transfer the status to the biological father can be filed within two years.²³⁷

In such an action, the definition of "permanent separation" requires proof that the parties neither resided together nor engaged in intercourse for the thirty-day period prior to conception.²³⁸ This period is admittedly somewhat arbitrary. It will be established by the testimony of the parties, which may not always be accurate. If the statute required a longer period of separation, fewer children would lose marital fathers as legal fathers and more children would be involved in *Privette* style cases to shift legal fathers. Thirty days has been proposed in this statute because it seems to be the shortest workable period.

The sworn allegations of the lawsuit and the procedures in the Type III lawsuit are similar to those for Type I children. There is no "knowledge of pregnancy" issue in a Type III case because concepts of fatherhood by estoppel seem inapplicable in a Type III case. Instead, the parties must prove separation to remove themselves from the Type II scenario.²³⁹

If the court determines that the husband may be relieved of his legal father status, the date of the judgment ends the husband's period as legal father and the mother becomes the sole guardian.²⁴⁰ The mother is then free to file a paternity action against any other man. As with Type I proceedings, a guardian ad litem would serve no useful function in this lawsuit.

This action also allows for constructive service of process.²⁴¹ *Privette* demonstrates that constructive service on the husband in Type III cases may be necessary because his whereabouts may be completely unknown after a few years of separation.²⁴² Again, constructive service may lead to incomplete genetic testing.

236. See *infra* Appendix, § 742.303(2).

237. See *infra* Appendix, § 742.303(2)(a).

238. See *infra* Appendix, § 742.303(2)(b).

239. See *infra* Appendix, § 742.303(2)(b).

240. See *infra* Appendix, § 742.303(2)(c).

241. See *infra* Appendix, § 742.303(2)(e).

242. See *Department of HRS v. Privette*, 617 So. 2d 305, 308 n.4 (Fla. 1993).

3. Type II Quasi-Marital Children

Issues involving Type II children,²⁴³ the children born into an established, functioning marriage, are resolved under section 742.304 of the proposed statute.²⁴⁴ Unlike the provisions for Type I and Type III children, section 742.304 makes no provision for private agreements and provides no option to eliminate a legal father for these children.²⁴⁵ For these children, the statute honors the old presumption of legitimacy to the extent that the marital father will be the legal father unless it is in a child's best interests to shift that status to the biological father. No valid policy reason exists to create circumstances allowing married couples to eliminate a legal father for such a child through litigation even if the couple is in the midst of a divorce.²⁴⁶ Such an option would encourage divorce and breakup of family units with little to be gained in the process.²⁴⁷

Section 742.304 largely codifies the procedures suggested in *Privette*²⁴⁸ by allowing an action to be filed to shift the status of legal father from the marital father to the biological father. Normally, an action must be filed by the husband or wife within two years of the child's birth.²⁴⁹ If the putative biological father is a willing participant, the action may be filed within five years.²⁵⁰

A guardian ad litem would serve a useful purpose in these proceedings. The statute does not automatically mandate a guardian, but requires the court to explain the reasons for dispensing with the services of a guardian.²⁵¹ To control the activities of the guardian, the

243. Type II children are conceived when the mother is lawfully married and living with the husband.

244. See *infra* Appendix, § 742.304.

245. See *infra* Appendix, § 742.304.

246. This proposal assumes that these statutory provisions would be the *only* method to resolve paternity and parentage. Such an action might be consolidated with a divorce, but these issues would not be resolved within a dissolution proceeding. If probate statutes allowed for inheritance only from a legal father, there would be little, if any, need to resolve paternity issues in probate proceedings.

247. Admittedly, one can imagine cases that encourage such an elimination of status for the legal father of a Type II quasi-marital child. For example, if the wife delivered a child with severe birth defects and the child was obviously not the marital father's, the resulting medical bills could bankrupt the marital father. Some might argue that the marital father should be able to free himself of such a child, but such hard cases will likely be rare. Any exception would be hard to tailor so that it only applied in such extreme cases.

248. See *Department of HRS v. Privette*, 617 So. 2d 305, 308 (Fla. 1993) (requiring a showing of good faith and that the child's best interest will not be adversely affected before allowing someone to challenge the presumption of legitimacy of a child born in wedlock).

249. See *infra* Appendix, § 742.304(1).

250. Actions after five years would be possible if the mother married the biological father. Then, even if the child were a teenager, the marital father could permit a voluntary termination of his parental rights, and the biological father could adopt the child in a step-parent adoption. See FLA. STAT. § 63.042 (1997).

251. See *infra* Appendix, § 742.304(2)(b).

statute also states that the order appointing the guardian shall specify the scope and method of the guardian's investigation.²⁵² Thus, the guardian may be limited to standard discovery procedures or instructed to perform or not to perform certain interviews. This will protect privacy and also help to make the process more cost effective.

The statutory criteria for shifting fathers varies from *Privette* in two respects. First, rather than following *Privette* by alleging that a blood test is warranted because it would serve the child's best interests, even if it proved "illegitimacy,"²⁵³ the statute requires a determination that the child's best interests would be served by a transfer of the status of legal father from the marital father to the biological father.²⁵⁴ This change is largely, if not entirely, semantic and avoids the "stigma" approach encouraged by *Privette*.²⁵⁵

Second, the statute contains six factors and a seventh catch-all factor, which the trial court must consider in making a decision regarding a child's best interest.²⁵⁶ These factors are borrowed, to a large extent, from the statutes regulating custody decisions in divorce.²⁵⁷ Section 742.304(3)(a) emphasizes the family unit, a method incorporating the basic policy underlying the presumption of legitimacy. Section 742.304(3)(b) emphasizes support to incorporate the policies underlying the law of paternity.

The proposed statute expressly allows the court to emphasize economic support issues if neither father is likely to provide emotional support as a functional father within the family unit. This provision essentially overrules the line of cases that resulted in the *Daniel* decision.²⁵⁸ If a couple with a quasi-marital child more than one year old is divorced or divorcing, this statute does not allow the marital father to evade a support obligation. This will discourage divorce as a means to avoid support for quasi-marital children.²⁵⁹

As mentioned earlier, the proposed statute uses a lower burden of proof for the paternity issue than for the transfer of parentage issue. As written, this proposal is still cumbersome, largely because it attempts to parallel the procedure announced in *Privette*. With all due respect to the supreme court, it is doubtful whether the clear and convincing standard of proof is constitutionally necessary or even

252. See *infra* Appendix, § 742.304(2)(b).

253. See *Privette*, 617 So. 2d at 308.

254. See *infra* Appendix, § 742.304(2)(c).

255. See *Privette*, 617 So. 2d at 308.

256. See *infra* Appendix, § 742.304(3)(a)(1)-(7).

257. See FLA. STAT. § 61.13(3) (1997).

258. See *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997).

259. Logically, the marital father who is left supporting the child after a divorce might have some right of contribution from the biological father. Such a right, however, would be difficult to implement in the real world.

warranted in the discovery phase.²⁶⁰ This discovery should be permitted based on a lesser burden of proof and persuasion, especially given the need for accurate genetic information for medical purposes. Thus, a statute in which the decision to obtain scientific testing was made by the greater weight of the evidence is preferable. The proposal places the two questionable uses of the clear and convincing standard in bracketed italics.²⁶¹ Maintaining the clear and convincing standard for the final shift of legal fatherhood is probably warranted and easily implemented.

This statute further permits the court to grant the marital father visitation if the status of legal father is shifted to the biological father or to grant similar visitation to the biological father if no shift occurs.²⁶² Visitation only occurs if it is in the child's best interests.²⁶³ These provisions may be invoked rarely, but children have received similar visitation rights in other states.²⁶⁴ Temporary visitation as a method to slowly transfer the child from one man to the other may occasionally be useful, especially when custody of a child is shifted from a marital father to a biological father. The Florida Legislature may wish to emphasize that such visitation is more the exception than the rule.

Finally, if the marital father retains legal father status at the end of the lawsuit, the statute gives the trial court discretion to retain jurisdiction to shift legal father status to the putative, biological father should the marital father die or become totally disabled.²⁶⁵ Therefore, the child would have a "backup" father, as a variety of paternal life and disability insurance. It makes little sense for a child to be at risk or for taxpayers to support a child when a biological father is available to provide some support. This provision may be rarely used, but it would occasionally have value.

260. See *supra* note 71.

261. See *infra* Appendix, § 742.304(2)(c).

262. See *infra* Appendix, § 742.304(4)(a).

263. See *infra* Appendix, § 742.304(4)(b).

264. See, e.g., *In re Marriage of Dureno*, 854 P.2d 1352, 1355 (Colo. Ct. App. 1992) (visitation of a marital father of "Type II quasi-marital child"); *Francis v. Francis*, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995) (visitation to a marital father of "Type II quasi-marital children"); *Finnerty v. Boyett*, 469 So. 2d 287, 296-97 (La. Ct. App. 1985) (possible visitation for a biological father of a "Type I quasi-marital child" despite a stable marriage); *Seger v. Seger*, 547 A.2d 424, 427 (Pa. Super. Ct. 1988) (visitation of a marital father of a "Type I quasi-marital child").

265. See *infra* Appendix, § 742.304(5)(c).

E. Biological Fathers

Putative biological fathers have no right of action under sections 742.302 to 742.304 of this proposal.²⁶⁶ Their rights are separately provided in section 742.305 because their actions create additional issues.²⁶⁷ Although most of the provisions are similar to a section 742.304 action, including the best interest analysis, there are several significant differences.

First, to avoid frivolous or spiteful suits, the putative father must obligate himself to child support prior to litigating the paternity and parentage issues.²⁶⁸ Any man who really wants to be the legal father of a child ought to be willing to pay support for the child from the initiation of his lawsuit. The author suspects that this provision would cause these lawsuits to be relatively rare.

The statute of limitations uses a one-year period, rather than a two-year period, as the basic provision. It also establishes a two-year period of repose in the event that the petitioner did not or could not have known of the child's birth within the first year.²⁶⁹ If the biological father discovers his claim between the first and second year, he must bring the action within ninety days of discovery. Arguably, it would be simpler to use a two-year limitations period. Given the rapidity with which infants bond with parents in a family setting, an action by an outsider should be filed in a manner that would allow the issues to be resolved, rather than initiated, within two years.

Second, a couple in a stable marriage can block such a lawsuit when it is filed concerning a Type II quasi-marital child.²⁷⁰ This is consistent with existing law.²⁷¹ This provision does not apply to Type I or III children. In a Type III situation, a separation exists and the couple cannot claim to have a stable family unit. If they have recon-

266. The only exception to this statement is the right of the biological father, in conjunction with the husband and wife, to file a section 742.304 action involving "Type II quasi-marital children," after the statute of limitations would normally expire. See *infra* Appendix, § 742.304 (1).

267. See *infra* Appendix, § 742.305.

268. See *infra* Appendix, § 742.305(2).

269. See *infra* Appendix, § 742.305(1).

270. See *infra* Appendix, § 742.305(4).

271. See *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (finding, at the time of decision, no state cases awarding substantive parental rights to a biological father of a child born into wedlock); *G.F.C. v. S.G.*, 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997) (reading *Privette* to hold that the goal of paternity determination is to protect a child's legitimacy and the legal father's relationship with his child); *K.S. v. R.S.*, 657 N.E.2d 157, 161 (Ind. Ct. App. 1995), *vacated*, 669 N.E.2d 399 (Ind. 1996) (asserting that no cause of action exists to determine paternity by a putative father when the mother conceived the child while married); *Girard v. Wagenmaker*, 470 N.W.2d 372, 380-81 (Mich. 1991) (holding that a putative father does not have standing to bring an action to determine the paternity of a child in wedlock).

ciled, the statute still allows the marital father to remain the legal father;²⁷² that outcome is simply not compulsory.

In a Type I situation, the biological father may have attempted unsuccessfully to marry the mother. The marriage to the marital father may have occurred to block his claim. This proposal does not allow a marriage to block the putative biological father's claim to a Type I child if he can prove that he offered to marry the mother or that she knowingly concealed the pregnancy from him. Again, the biological father may not prevail on the best interests test, but the scientific testing will take place. If the marital father prevails in such a lawsuit, this Type I scenario could be one in which visitation rights for a biological father might occasionally make sense.²⁷³

Finally, there is a risk that the husband and wife will not object to the biological father's claim when an objection would be in the child's best interests. This proposal requires service on the custodial parent and it gives the trial court discretion to treat the petition as contested even when it is not.²⁷⁴ A default judgment will not be possible under this proposal.

The proposed statute is complex, but no more complex than dissolution statutes. The complexity is necessary because there are no simple solutions to these parental rights issues. The proposal is reasonably designed to give the maximum number of quasi-marital children an adequate home and a meaningful right to support. Thus, only in rare cases, when it is probably more sensible to treat the child as a nonmarital child, the proposal will relieve the marital father of his obligations as legal father without locating the biological father as a substitute. Instead, the proposal provides a workable forum for *Privette*-style transfers and gives a forum to a biological father, if he is willing to establish that his claim is factually accurate and his interests are sufficiently sincere to be backed by a voluntary support obligation at the inception of the lawsuit. This structure maintains the longstanding policies behind the presumption of legitimacy and paternity, while offering a new approach compatible with genetic testing.

VII. CONCLUSION

The children of our marriages are no longer adequately served by a legal system that gives them only presumptive fathers. These children need legal fathers with clearly designated rights and responsi-

272. See *infra* Appendix, § 742.305(4)(b).

273. See *infra* Appendix, § 742.305(7)(b).

274. See *infra* Appendix, § 742.305(3).

bilities. These legal fathers should be established at birth or as soon thereafter as is feasible.

We should recognize that the presumption of legitimacy primarily protected a child's need for a family unit. That need has little to do with biology. The judges who created this presumption never expected that medical science would undermine this presumption to protect families. Now that the presumption can be readily overcome, we must reestablish laws that give children families.

The common law has failed us in our effort to protect the children of families—especially quasi-marital children. Courts are now issuing result-oriented decisions that cannot be easily reconciled because the common law gives judges no fair alternatives. We need to reassess our social policies concerning children and families, using neutral terminology, to establish contemporary laws that maximize the number of children with functional family units and also maximize the number of children receiving financial support from some “father” when no family unit exists. A child losing his or her only legal father in a court proceeding should be the rare exception. A court should occasionally be allowed to shift the mantle of legal father from one man to another, but only with reliance on clear standards promoting the best interests of the child. This task is too complex for evolution by the case method of the common law and must be performed by the legislature.

APPENDIX

This proposal assumes that chapter 742 would be divided into three or four parts. Part I would contain definitions, general policy statements, and statutory provisions common to all parts, such as venue and the admissibility of scientific or genetic testing. Part II would be entitled "Determination of Parentage for Children Born Out of Wedlock" or "Determination of Parentage for Nonmarital Children." It would contain provisions comparable to the current law of paternity for nonmarital children, but it would clearly provide for a paternity determination as a matter of biology. This would be followed by a determination of child support obligations and visitation rights as a matter of parentage. Although the proposal refers to children born in wedlock, Part III would resolve issues involving quasi-marital children. Significantly, this part also establishes a statutory "legal father" for all marital children. If a Part IV were to be implemented, it should contain the current statutes on surrogacy.

This proposal makes a few assumptions. It assumes that the legislature would establish a few guardians ad litem as salaried employees in each circuit, and that chapter 49, concerning constructive service of process, would be amended as necessary.²⁷⁵ Finally, the provisions governing birth certificates in chapter 382 would probably need to be slightly modified to accommodate this proposal.

CHAPTER 742: PROPOSED PART III

DETERMINATION OF PARENTAGE FOR CHILDREN BORN IN WEDLOCK

742.301 Husband as legal father.—Except as provided in ss. 742.302-.305, a husband shall be the legal father, and he shall have all of the rights and responsibilities of a legal (natural) guardian pursuant to s. 744.301, for all children conceived by or born to his wife during the term of their marriage.

742.302 Children born within 40 weeks from the date of marriage.—A husband's rights and responsibilities as legal father for a child born within 40 weeks from the date of the marriage may be eliminated without the establishment of another legal father under the following circumstances:

(1) Prior to marriage, the couple may enter into a written agreement providing that the husband will not be the legal father of any child born during the first forty weeks of the marriage unless he is

275. See FLA. STAT. § 49.011 (1997).

later determined to be the biological father under the procedures used to determine paternity of a nonmarital child.

(a) By signing such an agreement, the parties agree to permit scientific testing to be performed to determine paternity without the need of a petition pursuant to this chapter.

(b) Within 90 days of the child's date of birth, the husband and wife shall either file a stipulation of paternity pursuant to s. 742.10(1), or the husband shall file an action to determine paternity under the provisions of Part II of this section. Failure to file either the stipulation or the paternity action within ninety days shall act as a determination that the husband is the child's legal father.

(c) Unless and until the husband is determined to be the legal father, the mother will be the sole legal (natural) guardian pursuant to s. 744.301.

(2) Under the provisions of this subsection, if no written agreement is signed prior to the marriage, the husband or wife may file a petition to determine paternity and establish parentage of any child born during the first forty weeks of the marriage.

(a) The petition must be filed within one year of the child's birth. Both the husband and wife must be parties to the action, and the petition may include a putative biological father as a party. An action which is untimely under this section, but would be timely under s. 742.304, may be litigated pursuant to that section.

(b) The petition must allege under oath a reasonable factual basis to support the petitioner's claim that the husband is not the biological father of the child and that he either was unaware of his wife's pregnancy on the date of the marriage, or that he reasonably believed he was the biological father at the time of marriage.

1. The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

2. If the court determines by the greater weight of the evidence that the sworn allegations, if true, would be sufficient to relieve the husband of his rights and responsibilities as legal father, it shall order scientific testing and determine whether the husband is the biological father. If the putative biological father is a party to the action, the court may order scientific testing of this party at the same time as the husband, wife, and child. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(c) If the court determines that the husband is not the biological father and that he either was unaware of his wife's pregnancy on the date of the marriage or that he reasonably believed he was the biological father at the time of marriage, the court:

1. Shall enter an order, on the husband's motion, relieving the husband of his rights and responsibilities as legal father. As a result of this order, the mother will be the sole legal (natural) guardian pursuant to section 744.301. If the putative biological father is a party to the action, the court may then proceed to determine paternity under the procedures of Part II of this chapter; or,

2. Shall enter an order, on the wife's motion, unless the husband objects, relieving the husband of his rights and responsibilities as legal father. If the husband objects, the court may not relieve the husband of his status as legal father unless his rights could be terminated under the grounds specified in s. 39.464, but the court may transfer that status to the biological father under the procedures of s. 742.304.

(d) If the court determines that the husband is not the biological father and that he was either aware of his wife's pregnancy on the date of the marriage or that he had no reasonable belief that he was the biological father at the time of the marriage, the court shall not relieve the husband of his status as legal father. However, the court may transfer the status of legal father to the biological father under the procedures of s. 742.304.

(e) Either the husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031.

742.303 Children born after a permanent separation.—A husband's rights and responsibilities as legal father for a child conceived or born after a permanent separation, but prior to a judgment dissolving the marriage, may be eliminated without the establishment of another legal father under the following circumstances:

(1) If the husband and wife enter into a valid separation agreement, it may provide that the husband will not be the legal father of any child born more than 180 days after the date of the separation agreement unless he is later determined to be the biological father under the procedures used to determine paternity of a nonmarital child.

(a) By signing such an agreement, the parties agree to permit scientific testing to determine paternity without the need of a petition pursuant to this chapter. They further agree to provide each other with an adequate mailing address at all times during the term of the agreement.

(b) Within six months of the child's date of birth, the husband and wife shall either file a stipulation of paternity pursuant to s. 742.10(1), or either party shall file an action to determine paternity under the provisions of Part II. Failure to file either the stipulation

or the paternity action within six months shall be evidence of neglect, as defined in s. 39.01(36). Failure to act under this section, shall not prejudice any party's right to file a subsequent action to determine paternity pursuant to s. 742.302, but willful failure to comply with s. 742.303(1)(a) shall subject a party to a civil penalty not exceeding \$1000 in any subsequent paternity proceeding.

(c) By virtue of such an agreement, unless and until the husband is determined to be the legal father, the mother is the sole legal (natural) guardian pursuant to s. 744.301.

(2) If no valid separation agreement is signed, the husband or wife may file a petition to determine paternity and establish parentage of any child born more than forty weeks after a permanent separation.

(a) The petition must be filed within 1 year of the child's birth. Both the husband and wife must be parties to the action, and the petition may include a putative biological father as a party. An action which is untimely under this section, but would be timely under s. 742.304, may be litigated pursuant to that section.

(b) The petition must be under oath and must allege a reasonable factual basis to support the petitioner's claim that the husband is not the biological father and that the parties had permanently separated prior to the child's conception. Permanent separation shall require proof that the parties had not resided together and had not engaged in sexual intercourse within 30 days of the estimated date of the child's conception.

1. The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

2. If the court determines by the greater weight of the evidence that the sworn allegations, if true, would be sufficient to relieve the husband of his rights and responsibilities as legal father, it shall order scientific testing and determine whether the husband is the biological father. If the putative biological father is a party to the action, the court may order scientific testing of this party at the same time as the husband, wife, and child. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(c) If the court determines by the greater weight of the evidence that the husband is not the biological father and that the couple had permanently separated, the court shall enter an order relieving the husband of his rights and responsibilities as legal father, and the mother is thereafter the sole legal (natural) guardian pursuant to section 744.301. If the putative biological father is a party to the ac-

tion, the court may proceed to determine paternity under the procedures of Part II.

(d) If the court determines by the greater weight of the evidence that the husband is not the biological father and that the couple was not permanently separated at the time of conception, the court shall not relieve the husband of his status as legal father but may transfer that status to the biological father under the procedures of s. 742.304.

(e) The husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031.

742.304 Children born more than 40 weeks from the date of marriage but prior to a permanent separation.—A husband's rights and responsibilities as legal father for a child born more than 40 weeks from the date of the marriage and prior to a permanent separation may not be eliminated except in a circuit court action which declares the biological father to be the child's legal father. The husband or wife may file a petition to determine paternity and establish parentage of any such child only if the petition requests that a putative biological father be declared the child's legal father.

(1) The petition must be filed within two years of the child's birth unless the husband, wife, and putative biological father all sign the petition, in which case it may be filed within five years of the child's birth.

(2) The petition must allege under oath a reasonable factual basis to support the petitioner's claim that the husband is not and that the putative biological father is the biological father, and that the best interests of the child would be served by transferring the status of legal father to the biological father. The petition must name the putative biological father as a respondent.

(a) The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

(b) Prior to any scientific testing, the court shall appoint a guardian ad litem to represent the child, unless it enters an order stating specific reasons why a guardian is unnecessary. The scope and method of the guardian's investigation shall be specified in the order of appointment and the guardian shall have immunity pursuant to s. 61.405.

(c) If the court determines by the greater weight of the evidence that the sworn allegations of paternity are accurate, and [*by clear and convincing evidence*] that the best interests of the child would be

served by transferring the status of legal father to the putative biological father, it shall order scientific testing of the husband, wife, child, and putative biological father and determine the issue of paternity. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(3) If the court determines by the greater weight of the evidence that the putative biological father is the child's biological father, it shall then determine by clear and convincing evidence whether the child's best interests would be served by transferring the status of legal father to the biological father.

(a) In determining whether the child's best interests would be served by shifting the status of legal father to the biological father, the court shall consider the following factors comparing the benefit and detriment of selecting one man or the other as legal father:

1. The permanence and stability of the child's family unit, including the length of time the child has lived in a satisfactory environment and the desirability of maintaining continuity or creating stability;

2. The capacity and disposition of each man to provide the child either with statutory child support or with food, clothing, medical care or other remedial care recognized and permitted under the law of this state in lieu of medical care, and other material needs;

3. The love, affection, and other emotional ties existing between the child and each man;

4. The moral fitness of each man;

5. The mental and physical health of each man;

6. The home, school, and community record of the child; and

7. Any other fact considered by the court to be relevant.

(b) If it does not appear probable that either man will consistently participate as an active member of the child's family, either by residency in the home or by visitation, then the best interests analysis may place great emphasis upon the financial needs of the child and the ability of each man to provide adequate and consistent financial support.

(4) If the court determines that the husband shall be relieved of his status as legal father:

(a) It shall enter an order requiring the husband's name to be removed from the birth certificate, and the biological father's name to be substituted therein; and, unless not required by the circumstances, the court shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II.

(b) If such visitation is in the best interests of the child, the court may authorize that the husband receive temporary or permanent visitation rights.

(5) If the court determines that the husband shall remain as the legal father:

(a) It shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II, if required by the circumstances.

(b) It may authorize that the biological father receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(c) It may reserve jurisdiction to enter an order shifting the status of legal father to the biological father, only in the event that the husband dies or becomes totally disabled prior to the child's majority and the child is in need of support.

(6) Either the husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031. A putative biological father may not be served by constructive notice, and scientific testing may not be ordered until this party has been served and given an opportunity to respond.

742.305 Biological father's rights to petition to become legal father.—Any man who alleges under oath that he is the biological father may file a petition to determine paternity and establish parentage of any child conceived or born during the mother's marriage to another man.

(1) The petition must be filed either within one year of the child's birth, or within 90 days of when the petitioner knew or should have known that the child had been born, whichever period is longer. In no case shall a petition be filed more than two years from the child's birth.

(2) The petitioner must allege under oath a reasonable factual basis to support his claim that he is the biological father of the child. The petitioner must allege that he is willing and fit to assume all of the rights and responsibilities of a legal father. The petition shall be filed with a financial affidavit sufficient to permit the entry of a temporary child support order.

(a) If the court determines that the sworn allegations, if true, would be sufficient to declare the petitioner the child's biological father, the court shall issue summons. However, the court shall not resolve the issue of paternity or permit the petitioner to engage in any discovery until a temporary child support order is entered and the first month's payment has been paid to the depository as defined in s. 61.046(3). Child support paid under this subsection shall not be refunded in the event that the petitioner fails to establish that he is the biological father unless the husband and wife raise the defense contained in s. 742.305.

(b) The petition must name both the husband and wife as respondents and shall be dismissed unless the court obtains personal jurisdiction over at least one party who is a custodial parent of the child by service under s. 48.031.

(3) If neither the husband nor wife contests the petition, the court shall conduct a hearing to determine whether there is any reason that the court should treat the petition as contested. Unless the court decides to treat the petition as contested, it shall enter an order requiring scientific testing and shall proceed to determine whether the petitioner is the child's biological father.

(4) If either the husband or wife contests the petition or the court determines that the petition should be treated as contested, the court shall determine by the greater weight of the evidence whether the sworn allegations of paternity are accurate, and [*by clear and convincing evidence*] whether the best interests of the child would be served by transferring the status of legal father to the putative biological father. If so, it shall order scientific testing of the husband, wife, child, and putative biological father and determine the issue of paternity. At any party's request, the testing of the husband shall be delayed until the results of the initial tests of the other parties have been reviewed. If the court determines that the petitioner is not the biological father, no testing of the husband shall be required.

(a) Prior to this determination, the court shall appoint a guardian ad litem to represent the child unless it enters an order stating specific reasons why a guardian is unnecessary. The scope and method of the guardian's investigation shall be specified in the order of appointment and the guardian shall have immunity pursuant to s. 61.405.

(b) For any child born more than 40 weeks after the date of the marriage and prior to a permanent separation, proof by the greater weight of the evidence that the husband and wife have an adequate family relationship, no present intention to divorce, and a desire to raise the child as their own shall be sufficient to prevent scientific testing and to require the dismissal of the action.

(c) For any child born within 40 weeks of the date of the marriage, proof by clear and convincing evidence that the petitioner offered to marry the wife prior to the marriage to the husband or that she knowingly concealed the pregnancy from him shall be sufficient to authorize scientific testing and a determination of whether the petitioner is the biological father.

(5) If the court determines by the greater weight of the evidence that the petitioner is the child's biological father, it shall determine by clear and convincing evidence whether the child's best interests would be served by transferring the status of legal father to the bio-

logical father using the same procedures and factors as prescribed in 742.304(c).

(6) If the court determines that the husband shall be relieved of his status as legal father:

(a) It shall enter an order requiring the husband's name to be removed from the birth certificate and the biological father's name to be substituted therein; and, unless not required by the circumstances, the court shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II.

(b) It may authorize that the husband receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(7) If the court determines that the husband shall remain as the legal father:

(a) It shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II, if required by the circumstances.

(b) It may authorize that the biological father receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(c) It may reserve jurisdiction to enter an order shifting the status of legal father to the biological father, but the court may do so only in the event that the husband dies or becomes totally disabled prior to the child's majority and the child is in need of support.