

1-1-2017

Reforming the Processes for Challenging Voluntary Acknowledgements of Paternity

Jeffrey A. Parness
r0100837@mail.niu.edu

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Original Citation

Jeffrey A. Parness, Reforming the Processes for Challenging Voluntary Acknowledgements of Paternity, 92 Chicago-Kent L. Rev. 177 (2017) (with David A. Saxe).

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REFORMING THE PROCESSES FOR CHALLENGING VOLUNTARY
ACKNOWLEDGMENTS OF PATERNITY

JEFFREY A. PARNES AND DAVID A. SAXE

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I. INTRODUCTION

Voluntary acknowledgements of paternity (VAPs) chiefly determine legal parentage at birth for many children born of sex (and for some children born of assisted reproduction¹) to unwed mothers in the United States. VAP processes are significantly dictated by the federal Social Security Act (hereinafter “the Act”), which places certain mandates on states choosing to participate in federally-subsidized welfare programs. These processes include norms on effective VAP establishments and disestablishments either via early rescissions (within sixty days) by signatories or via later contests (after sixty days) by challengers, including signatories. The norms are driven by one of the Act’s major purposes, to increase reimbursements of state child welfare payments from unwed fathers regardless of whether these fathers help raise their children.

These VAP processes are significantly employed by states for all children of unwed parents, whether or not welfare assistance is or may be in play.² Thus, these federal welfare-driven VAP processes are used in parental childcare, as well as child support settings. This often creates tensions when VAP parentage establishments or disestablishments are pursued, since many legal parentage matters have nothing to do with welfare reimbursements and much to do with parental childcare. Unwed biological fathers who may be pursued for welfare aid reimbursement may not be interested in, or deserving of or eligible for, childcare opportunities.

As to VAP challenges, notwithstanding the mandates of the Act geared to maintaining VAP parents available for welfare reimbursements, there are significant variations in American state laws, especially where concerns for childcare rather than for child support dictate policies. State law differences on VAP challenges arise regarding who may challenge; what initial proof is required for an effective challenge;

* Jeffrey A. Parness, B.A. Colby College; J.D. The University of Chicago. David A. Saxe, B.A., Illinois Wesleyan University; Ed. D., Loyola University of Chicago; J.D., Northern Illinois University. Thanks to Alex Yorke for his research assistance.¹ While VAPs may be used by men for children born of assisted reproduction to wed and unwed women, seemingly—given equality mandates—VAPs (voluntary acknowledgments of parentage, not just paternity) may also be used by women whose genetic material helped prompt birth to a wed or unwed woman. See, e.g., *Allen v. Adams*, 2016 WL 929439, at 10 (S.D. Ind. 2016) (same rights to same-sex couples as to opposite-sex couples regarding birth certificate registrations).

2. One state’s employment of VAPs outside of welfare assistance sometimes is deemed to require respect in a second state. See, e.g., *In re Adoption of Jaelyn B.*, 883 N.W.2d 22, 25 (Neb. 2016) (per Nebraska statute 43-1406(1), Nebraska adoption court must respect an Ohio VAP father’s right to veto an adoption under Ohio law).

what time limits exist for any challenge; and what might preclude a VAP challenge even when the required burden of proof is met. These variations can prompt troubling results which should be mitigated through reforms of VAP challenge processes, undertaken at both the federal and state level.³

Because many challenges to paternity should be undertaken with less focus on welfare reimbursement and more focus on the childcare interests of parents and children, American states should create parental acknowledgment processes that operate outside the Social Security Act. Such processes should, at a minimum, allow acknowledgments by alleged parents who claim to have met state de facto (and comparable) parent standards. Deemphasizing welfare reimbursements, and emphasizing existing childcare realities, will better ensure that beneficial (if not constitutionally protected) parent-child relations will continue.

II. FEDERAL SOCIAL SECURITY MANDATES

According to a National Vital Statistics Report, more than 1.6 million children were born in 2014 to unwed mothers in the United States.⁴ Given public policy interests in determining legal parentage at birth so that nonmarital children may be well-supported—if not cared for and loved—in 1993 Congress enacted the Omnibus Budget Reconciliation Act. The act requires states, as condition of receiving federal welfare IV-D funds, to implement certain programs, including hospital-based and other voluntary acknowledgment of paternity procedures.⁵

3. This paper addresses state VAP challenge processes, and thus not VAP establishment or rescission processes. For suggestions on reforming VAP establishment processes, see, e.g., Jeffrey A. Parness and Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 92–105 (2010) [hereinafter *For Those Not John Edwards*]. There is little dispute on VAP rescission norms, as they simply allow, shortly after birth, parentage disestablishments involving men with no biological ties to the children (and with no formal adoptive ties or contractual ties [as with assisted reproduction pacts]). Any possible de facto [or presumed or equitable] parent status for the male VAP signatories typically will not have been attained within sixty days after birth, the time within which VAP rescissions can be executed. See, e.g., Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743 (2013) [hereinafter *Parentage (R)Evolution*] on how de facto male or female parent status can arise more than sixty days after birth with no biological ties (and with no formal adoptive ties or contractual ties).

4. BRADY E. HAMILTON ET AL., CTR. FOR DISEASE CONTROL, NATIONAL VITAL STATISTICS REPORTS BIRTHS: FINAL DATA FOR 2014 2 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf.

5. Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, 107 Stat 312 (1993). In particular, see 42 U.S.C. § 666(a)(5)(C) (2012) (paternity procedures required of states plans for child support 42 U.S.C. § 654(20), within Title VI-D of Chapter 7 (Social Security) of Title 42 (The Public Health and Welfare)).

The mandates were expanded three years later under the Personal Responsibility and Work Opportunity Reconciliation Act.⁶

Compliance oversight lies with the Secretary of the Department of Health and Human Services (HHS) and a “separate organizational unit” within the Department established by the Secretary.⁷ Mandates include establishment within each participating state of a “data processing and information retrieval system . . . designed . . . to control . . . and monitor all the factors in the support enforcement collection and paternity determination process.”⁸ This system must transmit annually to HHS “such information as may be necessary to measure state compliance with Federal requirements for expedited procedures, including “level of accomplishment” on “paternity establishment.”⁹

The federal laws compel certain state governmental actions on VAPs to improve child support enforcement involving noncustodial parents.¹⁰ The federal laws apply to only those children whose “paternity has not been established” and when there are or have been applications for federally subsidized state services.¹¹ While federal welfare law “child support” mandates initially prompt states to initiate VAP procedures in child-support settings, the federally-directed VAP procedures generally are used by the states not only in all child support cases,¹² but also in other parent-child settings, like for “the establishment of an order for child custody” or visitation,¹³ or for a paternity establishment necessary for inclusion on the birth certificates of children born to unwed mothers regardless of any welfare status.¹⁴

6. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

7. 42 U.S.C. § 652(a) (2012).

8. 42 U.S.C. § 654(16) (2012) (the system must comply with the requirements of 42 U.S.C. § 654a. Per 42 U.S.C. § 654a(a), the system must be “a single statewide automated data processing and information retrieval system.”).

9. 42 U.S.C. § 654(15) (2012). Failures of compliance can lead, for example, to monetary penalty. 42 U.S.C. § 655 (a)(4)(A) (2012).

10. 42 U.S.C. § 651 (2012).

11. 45 C.F.R. § 303.5(a) (2016) (“cases referred to the IV-D agency or applying for services under § 302.23” of the C.F.R.). *But see* 45 C.F.R. § 303.5(b) (2016) (“IV-D agency need not attempt to establish paternity in any cases involving incest or forcible rape,” or where an adoption proceeding is pending, if paternity establishment “would not be in the best interests of the child. . .”).

12. *See, e.g.*, CAL. FAM. CODE § 7570(a) (2011) (“child support award”); *id.* at (b) (“greater access to child support and other benefits”, including, per 7570(a), “social security, health insurance, survivors’ benefits, and inheritance rights”). *But see id.* at (a) (VAP promotes “knowledge of family medical history . . . often necessary for correct medical diagnosis and treatment,” as well as knowledge “important to a child’s development”).

13. *See, e.g.*, CAL. FAM. CODE § 7573 (2011).

14. *See, e.g.*, 410 ILL. COMP. STAT. 535/12(4) (2016) (unless otherwise provided in the Vital Records Act, the name of the father of a child born to an unwed mother “shall be entered on the

Extensive reliance by states on federal VAP mandates in all parentage settings—whether or not state welfare or other child support is involved—thwarts development of state law VAP norms which would specially operate outside of welfare reimbursement (or other outside child support) settings, as with childcare. Thus, while a few states permit postconception, prebirth VAPs, many do not. Prebirth VAPs quite reasonably may be desired by future biological fathers seeking to secure childcare opportunities.¹⁵ As well, future paternal grandparents, for the same reasons, may desire pre-birth VAP opportunities on behalf of biological fathers who die before their children are born.¹⁶ VAP laws geared toward child support are often unsuited to utilizing VAPs in nonsupport settings such as childcare.

Per the Social Security Act, birth mothers and putative fathers may sign VAPs.¹⁷ States must provide both with oral and written notices of the rights, responsibilities, and legal consequences attending voluntary acknowledgments.¹⁸ States also must comply with certain procedures underlying VAP services, including procedures for hospital-based programs, birth record agencies, and other entities.¹⁹ Thus,

child's birth certificate" only if there is a VAP). *See also* *Hussey v. Woods*, 2015 WL 5601777 at 2 (Tenn. Ct. App. 2015) (birth mother, on behalf of child, seeks to employ in Tennessee a VAP executed in Mississippi in a wrongful death lawsuit first pursued by the deceased male signor's mother).

15. Consider a male military service member subject to deployment during the pregnancy of his unwed girlfriend. Before development, he may wish to secure parental status in case the unwed mother chooses to place the child for adoption, where the man's participation (and veto) in the adoption process can be foreclosed easily, per *Lehr v. Robertson*, 463 U.S. 248 (1983), by his failure to seize in a timely manner his federal constitutional parental opportunity interests. Before deployment, he may desire to secure parental status in case the unwed mother dies during childbirth. VAPs are easier to pursue pre-birth than are paternity cases post-birth. And consider pregnant female military service members subject to deployment where the prospective biological fathers wish to secure parental status under law in case birth mothers die during child birth.

16. *Compare, e.g.,* *Estate of Swift ex rel. Swift v. Bullington*, 309 P. 3d 102, 103 (N.M. Ct. App. 2013) (after son's death, parent brought a paternity action in his name as a means of enhancing the chance for grandparent visitation) with *Bullock v. J.B.*, 725 N.W.2d 401, 403 (Neb. 2006) (unwed father's paternity case abated upon his death and could not be revived by his mother whose "motivation in seeking to revive the action" was "her belief that a paternity determination is necessary in order for her to be awarded grandparent visitation.").

17. *But see* 15 R.I. GEN. LAWS § 15-8-3(a)(4) (2016) (presumed natural fatherhood for man who acknowledges his paternity in writing where the mother "does not dispute the acknowledgment . . . within a reasonable time after being informed.").

18. 42 U.S.C. § 666(a)(5)(C)(i) (2012).

19. 42 U.S.C. §§ 666(a)(5)(C)(iii)(II)(aa), (bb) (2012). *See also* 45 C.F.R. § 303.5(g)(1) (2016) ("hospitals, state birth record agencies, and other entities . . . participating in" the state's VAP program). These federally-driven VAP procedures may be accompanied by an American jurisdiction's recognition of parentage arising from a differing form of paternity acknowledgment. *See, e.g.,* D.C. CODE § 16-909(a)(4) (2016) (creating a presumption of fatherhood when the purported father "acknowledged paternity in writing."); *id.* § 16-909(b-1)(2) (a father who "acknowledged paternity in writing as provided in section 16-909.09(a)(1)," though he is not a presumed father);

completed VAPs must be gathered in a statewide database accessible by IV-D agencies in order to better secure child support.²⁰

Federal VAP mandates also require states to “develop and use an affidavit” that includes certain minimum requirements.²¹ A state must “give full faith and credit to such an affidavit signed in any other State according to its procedures.”²² VAP-required elements, as specified by the Office of Child Support Enforcement and approved by the Office of Management and Budget, include certain information like the current full names of the mother, father, and child; the social security numbers of the mother and father; the birth dates of the mother, father, and child; the address(es) of the mother and father; the birthplace of the child; a brief explanation of rights and responsibilities; a statement that each parent has sixty days to rescind the VAP; and, signature lines for witnesses or notaries.²³ Noteworthy is the absence of any explicit requirement that the female and male signatories expressly acknowledge that the signing man is, or that there is a reasonable belief that he is, the child’s biological father.²⁴ Optional VAP elements

COLO. REV. STAT. ANN. § 19-4-105(1)(e) (West 2016) (a “man is presumed to be the natural father of a child if . . . [h]e acknowledges his paternity . . . in a writing filed with the court . . . which shall promptly inform the mother . . . and she does dispute the acknowledgment within a reasonable time after being informed . . . in a writing filed with the court . . .”); ARIZ. REV. STAT. §§ 25-814(A)(3)-(4) (2007) (man is “presumed” father if a witnessed statement is signed by both parents, even though he is not named on the birth certificate); *Kamp v. Dep’t. of Human Resources*, 980 A.2d 448, 454 (Md. 2009) (no indication of Social Security Act VAP when employing Maryland Code, Estates and Trust 1-208(b)(2) (whereby man “acknowledged himself, in writing, to be the father.”)).

20. 45 C.F.R. § 303.5(g)(8) (2016).

21. 42 U.S.C. § 666(a)(5)(C)(iv) (2012) (requirements are specified by Secretary of the Department of Health, and Human Services and must include parents’ social security numbers per 42 U.S.C. § 652(a)(7)).

22. *Id.*

23. OFFICE OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, OMB CONTROL NO. 0970-0717, ACTION TRANSMITTAL: REQUIRED DATA ELEMENTS FOR PATERNITY AFFIDAVITS (2014) [hereinafter REQUIRED DATA ELEMENTS FOR PATERNITY AFFIDAVITS], <http://www.acf.hhs.gov/css/resource/required-data-elements-for-paternity-affidavits-expires-may-31-2017> (follow “Required and Optional Data Elements for Paternity Affidavits” hyperlink) (last visited Oct. 11, 2016).

24. This is noted in the Uniform Parentage Act (“UPA”), as amended in 2002, at section 301, Comment, promulgated by The National Conference of Commissioners on Uniform State Laws. The UPA, via a 2002 amendment, now says that a VAP should be signed by the “mother of the child and a man claiming to be the genetic father” in “order to prevent circumvention of adoption laws.” UNIF. PARENTAGE ACT § 301. Curiously, since 1973 the UPA has recognized a paternity presumption for a man who receives a child into his home and openly holds out the child as his own, and mentions no adoption law circumvention. UNIF. PARENTAGE ACT § 204(a)(5), cmt. ¶¶ 1, 4 (in 1973, hold out had no required time period, but demanded hold out as “his natural child”; since 2002, a man’s residence in household “for the first two years of the child’s life” is required, but the man’s hold-out only goes to a “child as his own.”). Not all American states require VAP signers to know or reasonably believe there are genetic ties between male signatories and children. *See, e.g.,*

include parental phone numbers, birth hospital, “an advisory to parents that they may wish to seek legal counsel or obtain a genetic test before signing,” and a statement as to current “custody status.”²⁵

Effective VAPs result in legal findings of paternity that can be subject to either rescission or contest by challenge.²⁶ Any VAP signatory may rescind his or her acknowledgment within the earlier of sixty days of signing or the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.²⁷ VAP rescission procedures are not otherwise prescribed by the Social Security Act. Some states require a judicial proceeding, as recommended in the Uniform Parentage Act,²⁸ but others do not.²⁹ Some states allow a signatory to rescind after sixty days, while others do not.³⁰

Standing to contest a VAP more than sixty days after acknowledgment seems broader than standing to rescind a VAP within sixty days.³¹ After sixty days, generally, “a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the

In re E.R. Moiles, 843 N.W.2d 220, 220 (Mich. 2014) (reviewing Michigan Acknowledgment of Parentage Act, MICH. COMP. LAWS §§ 722.1001 to .1013 (2016)).

25. REQUIRED DATA ELEMENTS FOR PATERNITY AFFIDAVITS, *supra* note 23.

26. 42 U.S.C. § 666(a)(5)(D)(ii), (iii) (2012). The state laws on VAP rescissions and contests are briefly reviewed and cited in Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, app. B at 82–90 (2003).

27. 42 U.S.C. § 666(a)(5)(D)(ii)(I-II) (2012).

28. UNIF. PARENTAGE ACT § 309 (recognizing that not all states in 2000 followed this recommendation). *See, e.g.*, ME. STAT. tit. 19-A, § 1867 (2015); MASS. GEN. LAWS ch. 209C, § 11(a) (1998) (“file a petition in the probate and family court.”).

29. *See, e.g.*, OR. REV. STAT. § 109.070(4)(b) (2007) (to “rescind,” the “party [to a VAP] shall sign and file with the state registrar of the Center for Health Statistics a written document declaring the rescission.”).

30. State VAP rescission laws may be preempted by the federal statute on post-sixty-day VAP challenges. *See, e.g.*, MISS. CODE ANN. § 93-9-9(4)(a) (2011) (a VAP signatory often has a “right” to rescind within one year); *Id.* § 93-9-28(2)(a) (similar). *But see* 15-5-85 MISS CODE R. § 3.18.2 (2016) (rescission of a VAP must be signed “within [sixty] days of the date of the signature” on the VAP filed with the office of vital records). *See also* WASH. REV. CODE § 26.26.330(b)(2) (2011) (if a VAP signatory was a minor when signing, “the signatory may rescind” by commencing a lawsuit “on or before the signatory’s nineteenth birthday.”); N.Y. PUB. HEALTH LAW § 4135-b(2)(d) (McKinney 2013) (a VAP signatory who is not eighteen years old when signing can rescind at any time within sixty days after his eighteenth birthday); and KAN. STAT. ANN. § 23-2209(e) (2014) (a male or female VAP signatory can “bring action to revoke” a VAP “at any time until one year after the child’s date of birth.”).

31. Post-sixty-day rescissions of, rather than contests challenging, VAPs are sometimes recognized by state statutes. *See, e.g.*, CAL. FAM. CODE § 7577(b) (1996) (signing minor may rescind “at any time up to [sixty] days after the parent reaches the age of [eighteen] or becomes emancipated whichever first occurs.”).

challenger.”³² Given an absence of federal statutory or regulatory definitions of what constitutes fraud, duress or mistake, states have broad interpretive authority regarding who may contest VAPs after sixty days. State legislatures sometimes conflate VAP rescissions and VAP contests via challenges. For example, in New Jersey, a VAP may be challenged in court within sixty days of signing (if there is no child support order), but only on the basis of “fraud, duress or material mistake of fact.”³³ Even where state legislatures expressly distinguish between rescissions and challenge contests, state courts sometimes conflate the two.³⁴

VAPs establishing parentage “must be filed with the state registry of birth records” so that there is “a statewide database” to which a IV-D agency has “timely access.”³⁵ There is no federally mandated record keeping on VAP rescissions or on VAP challenges.³⁶ Records on VAP challenges are often not maintained by state governments.³⁷

The Federal Social Security Act has prompted states to develop VAPs as a means of securing paternity to be used in some later child support settings. While the Act has some mandates on such VAPs, these mandates are not comprehensive, leaving states with broad discretion on VAP norms, including norms on VAP challenges. The states have established quite different VAP norms.

32. 42 U.S.C. § 666(a)(5)(D)(iii) (2012). Some states have additional bases for challenge. *See, e.g.*, MICH. COMP. LAWS § 722.1443(12)(d) (2012) (“misrepresentation or misconduct.”).

33. N.J. REV. STAT. § 26:8-30 (1998).

34. *See, e.g.*, C.A.R. v. R.E.M., No. 1976 WDA 2014, 2015 WL 7019025, at *5 n.3 (Pa. Super. Ct. June 5, 2015) (“rescission” on grounds of fraud).

35. 45 C.F.R. § 303.5(g)(8).

36. The authors surveyed by mail and email state vital record offices to obtain data on VAP rescissions and VAP challenges. Only some states collect information on rescissions, and no states responded with data on the numbers of VAP challenges.

37. In the spring of 2016, the authors surveyed American state vital records (and other birth information) officers. Survey results reveal that these officers frequently have, at best, incomplete information on post-sixty-day VAP rescissions. *See, e.g.*, E-mail from E. Nicholl Marshall, New Hampshire Div. of Vital Records Admin., to authors (Apr. 6, 2016) (on file with authors) (“We also do not keep track of how many . . . rescissions of paternity were made, although we promptly update the birth record when a rescission of paternity is made,” and presumably prompts a request for birth record change); e-mail from Greg Crawford, Kansas Vital Statistics Data Analysis, to authors (Apr. 11, 2016) (on file with authors) (“we do not have any information”); letter from John R. Mier, Missouri Dep’t. of Soc. Services, to authors (Apr. 18, 2016) (on file with authors) (“we do not generally track the VAP submitter’s follow-up actions”); e-mail from Carmell R. Barth, North Dakota Dep’t of Health, to authors (“unfortunately, we don’t have information available on rescissions.”).

III. VARYING STATE LAWS ON VAP CHALLENGES

The Social Security Act VAP provisions leave much discretion to American state lawmakers on many substantive and procedural law issues relevant to VAP contests. Today, state laws enacted to challenge VAPs vary widely,³⁸ as only some follow the recommendations within the Uniform Parentage Act.³⁹ On interstate variation, some VAP fathers, for example, are generally denied or immunized from challenge opportunities so that they remain available for welfare reimbursement suits, while other VAP fathers can more easily challenge or be challenged.

Besides differing goals, at times state VAP laws go by different names. Not all state legislatures and courts utilize the terms employed in the federal Social Security Act. For example, in Minnesota, rather than a VAP, there is a “recognition of parentage” which can be “revoked” within sixty days or vacated thereafter.⁴⁰ In Michigan, there is a statute guiding “an action for revocation” of a VAP.⁴¹ Louisiana had a VAP by an “acknowledgement by authentic act,” which, when prompting a child support judgment, could be annulled under the circumstances for annulling court judgments. Such a VAP and differed from a paternity “acknowledgment by registry.”⁴² And in Maryland, there is “an executed affidavit of parentage.”⁴³ State laws employing terms dif-

38. Within a single state the VAP statutory provisions may vary for VAPs signed before and after a certain date. *See, e.g.*, CAL. FAM. CODE § 7576 (2011) (applying statute only to VAPs signed on or before December 31, 1996).

39. UNIF. PARENTAGE ACT §§ 307–309 (amended 2002). *See* Unif. L. Comm’n, at www.uniformlaws.org/Act/apx?title=ParentageAct.

40. MINN. STAT. § 257.75(1), (2), (4) (2015). In Iowa there is “an affidavit of paternity,” IOWA CODE § 252A.3A(1) (1997). In Maryland, there is an “affidavit of parentage,” though it “constitutes a legal finding of paternity,” MD. CODE ANN., FAM. LAW § 5-1028(a), (c)(1)(i) (West 1997).

41. MICH. COMP. LAWS § 722.1437 (2014).

42. *Rousseve v. Jones*, 704 So. 2d 229, 232 (La. 1997) (referencing former LA. CIV. CODE art. 203B(2) (1993) (registry) and LA. CIV. CODE ANN. art. 203B(1) (1993) (authentic act) subject to annulment under LA. CODE CIV. PROC. ANN. art. 2004 (2001) when it results in a child support judgment). *See* LA. CIV. CODE ANN. art. 196 (2016) (acknowledged father per “authentic act.”). When an acknowledgment by authentic act establishing a federally-driven VAP does not also prompt a court judgment, the acknowledgment may be contested at any time, as “there is no prescriptive period for filing an action to rescind an acknowledgment,” at least where there are allegations of “fraud and duress.” *Faucheux v. Faucheux*, 772 So. 2d 237, 239 (La. Ct. App. 2000) (contest “by those who have any interest” in claims involving nonmarital children, per former LA. CIV. CODE ANN. art. 207 (1993)). *See also* State, Dep’t of Soc. Services, *ex rel.* K.B.D. v. Drew, 70 So. 3d 1011, 1014 (La. Ct. App. 2011) (signature of husband, who is also a presumed father, on a child’s birth certificate is not “an authentic act of acknowledgement.”). On signing by a birth mother alone in Louisiana of “a paternity information form issued by the Vital Records Registry,” per Louisiana Stat. 40:34(E)(1), *see* State *ex rel.* DCFs v. Price, 174 So. 3d 732 (La. App. 2015) (if named father does not contest within ninety days of notice, he can be pursued for child support).

43. MD. CODE ANN. FAM. LAW § 5-1028(d) (1997), reviewed in *Davis v. Wicomico Cty. Bureau of Support Enf’t*, 112 A.3d 1024, 1030–33 (Md. Ct. Spec. App. 2015).

ferent from those used in the federal Social Security Act cause confusion. For example, they may be seen as implying that state laws vary from federal laws on VAP norms, when, in fact, they do not. When they do vary, there is little express indication the state lawmakers have expanded their VAPs beyond the norms dictated by the federal Social Security Act due to state involvement in IV-D programs.

At times, state VAP laws prompt false impressions. For example, in Montana, a VAP establishes an “irrebuttable presumption of paternity,” which nevertheless can be rebutted, as it can be “set aside for fraud, duress or material mistake of fact.”⁴⁴ False impressions arising from confusing language lead family lawyers and interested family members astray when the same terms in and outside of parentage laws have different meanings.

Sometimes, state VAP laws interact differently with other parentage establishment laws. In some locations, VAPs do not create parentage presumptions.⁴⁵ In other locations, VAPs driven by federal Social Security Act norms are not the only method for acknowledging parentage.⁴⁶ So, even within family laws, identical terms can have different meanings.

A. Challengers

Under the Social Security Act, a VAP is subject to “contest” when challenged in court more than sixty days after signing.⁴⁷ During a challenge, child support obligations and other “legal responsibilities of any signatory arising from the acknowledgment may not be suspended . . . except for good cause shown.”⁴⁸ Federal statutes imply signatories may make such challenges.⁴⁹ Following the language of the UPA,⁵⁰ some states expressly recognize that only VAP signatories have standing to

44. MONT. CODE ANN. § 40-6-105(5)(c) (1997).

45. See, e.g., 750 ILL. COMP. STAT. 46/204 (2016) (prior to 2016 there was a presumption).

46. See, e.g., FLA. STAT. §§ 742.18(3)(b) (2016) (acknowledge paternity “in a sworn statement”), (f) (per FLA. STAT. § 742.10(1), sign “a voluntary acknowledgment of paternity . . .”).

47. 42 U.S.C. § 666(a)(5)(D)(iii) (2012). Before sixty days, or “the date of an administrative or judicial proceeding relating to the child . . . in which the signatory is a party,” a signatory has a “right . . . to rescind.” 42 U.S.C. § 666(a)(5)(D)(ii) (2012).

48. 42 U.S.C. § 666(a)(5)(D)(iii) (2012).

49. *Id.* (noting that post-sixty-day contests of VAPs cannot prompt suspensions of child support obligations by signatories).

50. UNIF. PARENTAGE ACT § 308(a) (2002) (though it does also say a “party” challenging a VAP (not a “signatory”) has the burden of proof, *id.* at (b)).

contest.⁵¹ Male VAP signatories often would contest to avoid future child support, while female VAP signatories often would contest in order to become single parents. Yet, nonsignatories in those same states may have standing to seek an adjudication of paternity, which could effectively override the VAP and thus liken to a successful VAP contest.⁵² Elsewhere, other possible VAP challengers are expressly recognized. In Arkansas, a “person” is authorized to challenge a VAP.⁵³ Both signatory and nonsignatory challengers may be foreclosed from contesting VAPs, however, due to state statutory time constraints, laches or estoppel, or state judgment modification standards.⁵⁴

As noted, federal statutes recognize that post-sixty-day VAP contests are subject to challenges in court on the grounds of fraud, duress or material mistake of fact.⁵⁵ The “challenger,” who bears “the burden of proof,” is not defined. Some state statutes simply follow the federal legislation by recognizing that a VAP contest may be initiated by a “challenger.”⁵⁶ This could mean either that any⁵⁷ nonsignatory may contest a VAP, or it could mean that only a signatory may contest a VAP. As a VAP challenger seeks to undo what is deemed a paternity judgment, in some states, the courts utilize the standing requisites for those seeking to modify paternity case judgments through VAP contests, even though there were no earlier paternity cases. Elsewhere, state statutes expressly recognize certain nonsignatory challengers, although other nonsignatories might be given standing via judicial precedents. Diversity in state approaches to VAP challengers is authorized by federal law, which recognizes that states can create rebuttable or conclusive parentage presumptions from VAPS.⁵⁸ Illustrative state

51. See, e.g., DEL. CODE ANN. tit. 13, § 8-308(a) (2016); N.M. STAT. ANN. § 40-11A-308 (2010); N.D. CENT. CODE § 14-20-18(1) (2015); TEX. FAM. CODE ANN. tit. 5, § 160.308 (West 2001) (disallowing a VAP challenge after a court order “affecting the child”); S.C. CODE ANN. § 63-17-50(B) (2015) (burden of proof on “challenger”); UTAH CODE ANN. § 78B-15-307(1) (West 2008).

52. See, e.g., DEL. CODE ANN. tit. 13, § 8-308(a) (2016) (only expressly recognizes that a signatory may contest); *id.* at 609(b) (non-signatory can seek an adjudication of paternity).

53. ARK. CODE ANN. § 9-10-115(d)(1) (2007).

54. Arkansas Office of Child Support Enf’t v. Willis, 59 S.W.3d 438, 444 (Ark. 2001) (collateral estoppel can bar attack on earlier paternity judgment).

55. 42 U.S.C. § 666(a)(5)(D)(iii).

56. See, e.g., MISS. CODE ANN. § 93-9-28(2)(b) (2011) (“challenger”); HAW. REV. STAT. § 584-3.5(f) (2001) (“challenger”); S.C. CODE ANN. § 63-17-50(B) (2015) (“challenger”). See also D.C. CODE § 16-909 (c-1) (2016) (VAP may be “challenged” in court “through the same procedures as are applicable to a final judgment.”).

57. MICH. COMP. LAWS § 722.1437(1) (2014).

58. 45 C.F.R. § 302.70(a)(5)(iv) (2016) (state VAP plan can allow VAP to create “a rebuttable or . . . conclusive presumption of paternity.”). Incidentally, “conclusive” parentage designations, including these arising from statutory presumptions, are not always irrebuttable, in the practical

statutory variations on nonsignatory VAP challengers, and a few cases, follow. Thereafter, VAP fraud (and the like), time and other constraints on VAP contests, and VAP challenge processes are reviewed.

1. Alleged Biological Fathers

Nonsignatories who can contest VAPs often include alleged biological fathers. In Michigan, “an alleged father . . . may file an action for revocation” of a VAP within three years of the birth or one year of the date the VAP is signed.⁵⁹ Elsewhere, VAPs can effectively be challenged by nonsignatory, alleged biological fathers via such means as paternity proceedings. For example, in Louisiana, while in a “strictly personal” action, a man may sue to “establish his paternity of a child at any time,”⁶⁰ even where the child has a presumed legal father, as by marriage, a child acknowledgment “by authentic act,” or a birth certificate signature.⁶¹ Here, the man has only one year to sue from the date of the birth of the child, assuming no “bad faith” deception of the man regarding his paternity.⁶² In Florida as well, an alleged biological parent can challenge in a paternity suit the VAP signed by another man, the birth mother’s then husband, more than three years after the signing where the VAP signatories knew their filing was “fraudulent.”⁶³

2. Governmental Offices and Officers

Nonsignatories who can contest VAPs also occasionally include governmental offices and officers. In Michigan, “a prosecuting attorney may file an action for revocation” of a VAP within three years of birth or one year of VAP signatures.⁶⁴ In Minnesota, “the public authority”

sense at least. *See, e.g.*, D.C. CODE §§ 16-909(c)(2), (c-1) (un-rescinded VAP “conclusively establishes” parent-child relationship, but VAP may be challenged after rescission period); 23 PA. CONS. STAT. §§ 5103(d), (g) (1993) (“acknowledgment of paternity shall constitute conclusive evidence,” though it can be rescinded within sixty days and challenged thereafter). A VAP creates a “conclusive” presumption of parentage in Rhode Island, 15 R.I. GEN. LAWS § 15-8-3(a)(6) (2016), whereas a VAP in Illinois does not create any presumption at all, 750 ILL. COMP. STAT. 46/204(a) (2016). Under the UPA, a VAP without a marriage (or marriage attempt) does not prompt a presumption. UNIF. PARENTAGE ACT § 204. Incidentally, as in Rhode Island, there can be a parentage presumption arising from an acknowledgment which does not follow the VAP requisites within the Social Security Act. 15 R.I. GEN. LAWS § 15-8-3(a)(4) (2016) (acknowledgment filed by man alone, effective where mother does not dispute).

59. MICH. COMP. LAWS § 722.1437(1) (2014).

60. LA. CIV. CODE ANN. art. 198 (2005).

61. *Id.* art. 195.

62. *Id.* art. 198.

63. A.D.A. v. D.M.F., Nos. 4D15-575, 4D15-874, 2016 WL 3176957, at *4 (Fla. Dist. Ct. App. June 8, 2016) (distinguishing a case where nonbiological father signed a VAP in “good faith”).

64. MICH. COMP. LAWS § 722.1437(1) (2014).

may bring an action “to vacate a recognition of parentage.”⁶⁵ Governmental VAP challenges may be motivated by state desires for welfare reimbursements from soon-to-be adjudicated parents⁶⁶ or initiated for child protection purposes.⁶⁷

Sometimes governmental offices or officers can challenge VAPs only indirectly. One exemplary case is *In re N.C.*, where the Illinois Supreme Court found the special VAP challenge statute could be employed by signatories only.⁶⁸ Yet, an action for a declaration of the nonexistence of a father-child relationship could be employed to contest a VAP, but only by those recognized as having statutory standing, which included “the child, the natural mother,” or a presumed marital father.⁶⁹ As the state lacked standing, it could only pursue VAP disestablishment by way of helping the child’s guardian with the guardian’s disestablishment request.⁷⁰ Had the state sought the same declaration, but added the “name” of the any person “alleged to be the father of the child,” the state could have sought to disestablish the VAP without joining the child’s guardian.⁷¹

Sometimes governmental offices or officers conceivably could request to continue a VAP over the objections of a female signatory in order to preserve the opportunity for child support reimbursement from the other signatory. At least in Maine, though, such a governmental request seemingly would fail if a female signatory sought to end the parental rights of both signatories and then sought to adopt her own child.⁷²

3. Children

Under state laws, children may contest VAPs and be necessary parties to certain VAP contests initiated by others. In Minnesota, a

65. MINN. STAT. § 257.75(4) (2015) (“the mother, father, husband or former husband who executed” a recognition of paternity may bring an “action to vacate a recognition of paternity.”).

66. Of course, VAP rescissions are unnecessary where state laws allow two men (a VAP dad and a biological dad), as well as the birth mother, to all be responsible for child support.

67. For children in harm’s way, the burden of proof on governments in VAP contests seems easier than the burden of proof in termination of parental right proceedings. Only in the former setting may a lack of genetic ties prompt a parentage disestablishment, and only in the latter setting will clear and convincing evidence be needed, per *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

68. 12 N.E.3d 23, 34–35 (Ill. 2014).

69. *Id.* at 36 (under former 750 ILL. COMP. STAT. 45/7(b)).

70. *Id.* at 37.

71. *Id.* at 36 (under former 750 ILL. COMP. STAT. 45/5 (repealed 2016)).

72. *In re Adoption of Liam O.*, 138 A.3d 485, 488 (Me. 2016) (noting this unusual process originates in the Probate Code).

child can seek to vacate a “recognition of paternity.”⁷³ And in Washington, a child is generally “not bound by a determination of parentage” founded on a VAP.⁷⁴ Further, in Washington, “a signatory” who challenges a VAP, after the sixty-day rescission period ended, has four years to act; but when actions are commenced more than two years after birth, “the child must be made a party.”⁷⁵

The Social Security Act requires participating IV-D states to allow children to contest their VAPs. Under the Act, participating states must make a paternity establishment process “available from birth until age 18.”⁷⁶ This opens the door to paternity establishment in one man only after a child successfully undoes a VAP signed by another man, in settings where others may have no standing to contest VAPs. Thus, while a female VAP signatory cannot contest on her own, she may pursue a VAP challenge on behalf of her child, who can later seek to establish paternity in a nonsignatory.

Such a paternity establishment preceded by a successful VAP challenge occurred in *In re A.A.*,⁷⁷ a case decided by the Illinois Supreme Court in 2015. The case began in June 2013 when the Illinois Department of Children and Family Services (“DCFS”) petitioned for an adjudication of wardship of A.A., who was born in 2013, and three other children, all born to Caitlin.⁷⁸ Caitlin’s husband signed a denial of paternity, thereby allowing Matthew A. to acknowledge parentage shortly after A.A.’s birth. Matthew acted in belief that he was the biological father, though he knew he might not be. Caitlin had reason to know that Matthew was not the biological father. When Caitlin informed Cort H. that he likely was A.A.’s father, he denied it and ended their romantic relationship. In August 2010, Cort died. By November, 2013, Matthew “unfortunately” learned he was not A.A.’s biological father.⁷⁹ In February, 2014, the parents of Cort sought to intervene in the wardship proceeding because they wished to adopt A.A.⁸⁰ That same month, the trial court recognized a service plan for Matthew (and Caitlin) to regain

73. MINN. STAT. § 257.75(4) (2015).

74. WASH. REV. CODE § 26.26.630(2) (2011) (though a child is bound where the male signatory has “genetic” ties and where the child was a party or represented by a guardian ad litem in a “proceeding determining parentage” that was founded on a VAP).

75. *Id.* at § 26.26.335(1)(b).

76. 42 U.S.C. § 666(a)(5)(A) (2012).

77. 43 N.E.3d 947, 948 (Ill. 2015).

78. *In re A.A.*, 20 N.E.3d 526, 527 (Ill. App. Ct. 2014).

79. *Id.* at 527–28.

80. *Id.*

custody of A.A.⁸¹ However, Matthew never had a chance to regain custody since the guardian ad litem (GAL) for A.A. successfully challenged the VAP over Matthew's objection.

Both a court appointed special advocate ("CASA") volunteer (whose responsibility was to pursue the child's best interests) and a DCFS High Risk Intact Family Worker recommended Matthew not be removed as A.A.'s legal father. Yet, in May 2014, the trial court vacated the VAP and declared a parent-child relationship between A.A. and the deceased Cort. The Appellate Court affirmed, while commending Mathew A.'s "parental instincts and actions regarding A.A."⁸² The court ruled there was no need for an inquiry into the A.A.'s best interests.⁸³ The Appellate Court opinion did not consider the effect of Cort's denial of responsibility for A.A. when confronted by Caitlin, or the failure of Cort to pursue fatherhood affirmatively, as via a paternity suit, such denials and failures often can lead to nonparentage of an unwed biological father in other contexts, like adoption, so that there is no participation (and veto) right. The Appellate Court noted that "A.A. should be able to receive social security survivor benefits through Cort H."⁸⁴ Biology, and perhaps money, reigned supreme. There was no judicial investigation into fraud, duress, or material mistake of fact. There was no inquiry into the possible revival of the statutory marital parentage presumption applicable to Caitlin's husband since his paternity disestablishment depended upon Matthew's legal parentage.

The Supreme Court of Illinois unanimously affirmed.⁸⁵ The high court recognized that Matthew had visited A.A. and P.S., a child born to Caitlin and Matthew, who was placed in the same foster home as A.A.⁸⁶ But it determined the Parentage Act of 1984 allowed GAL action on behalf of a child to declare the nonexistence of a parent-child relationship under a VAP due to the lack of biological ties without first inquiring into the child's best interest. The Court chiefly relied on an earlier decision wherein a biological father rebutted a husband's marital parentage presumption without inquiry into best interests.⁸⁷ Under the

81. *Id.*

82. *Id.* at 532.

83. *Id.*

84. *In re A.A.*, 43 N.E.3d 947, 952 (Ill. 2015).

85. *Id.* 948.

86. *Id.* at 950.

87. *Id.* at 953 (employed *In re Parentage of John M.*, 817 N.E.2d 500 (Ill. 2004)).

1984 Parentage Act, parent-child relationships established by a VAP and by a marital parentage presumption were deemed comparable.⁸⁸

Since the A.A. decision, there is in Illinois both a new Marriage and Dissolution of Marriage Act (IMDMA) and the Parentage Act of 2015, each effective January 1, 2016.⁸⁹ Yet these laws do not undercut the A.A. precedent. Earlier, a proposed IMDMA included significant alterations in parentage establishment norms.⁹⁰

The Parentage Act of 2015 does alter both parentage establishment and disestablishment norms. As to parentage establishment, the Act expands those eligible to become presumptive parents to individuals who can now arise from a “a marriage, civil union, or substantially similar legal relationship.”⁹¹ Thus, women can be presumed parents under the new Act. Yet, the Act also newly limits presumptive parents by not including VAP signatories⁹² who had earlier been included.⁹³

As to parentage disestablishment, the 2015 Parentage Act no longer combines marital parentage presumption rebuttals and VAP challenges within the same statutory section. One provision recognizes “an action to declare the non-existence of the parent-child relationship may be brought by the child, the birth mother, or a person presumed to be a parent” under the marital parentage presumption statute.⁹⁴ Another provision allows a VAP “signatory” to rescind the VAP within sixty days of signing, assuming no earlier “judicial or administrative proceeding.”⁹⁵ After sixty days, VAP challenges must be based on “fraud, duress or material mistake of fact,” and usually must be presented within two years of the VAP.⁹⁶

Whether in a marital parentage presumption rebuttal or a VAP challenge, the 2015 Parentage Act comparably allows access to genetic testing, but only where there is no estoppel from denying parentage;

88. See, e.g., 750 ILL. COMP. STAT. 45/5(a)(1), 45/5(a)(4) (presumption of male paternity), repealed by Ill. Pub. Act. No. 99-85 (2016) (new statute no longer presumes parentage via VAPs, see 750 ILL. COMP. STAT. 46/204(a) (2016)).

89. See Ill. Pub. Act. No. 99-90 (2016) (chiefly found at 750 ILL. COMP. STAT. 5/101-802 (2016)), Ill. Pub. Act. No. 99-85 (2016) (Parentage Act) (found at 750 ILL. COMP. STAT. 46/101905 (2016)).

90. See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Interests and Superior Parental Rights in Illinois*, 33 N. ILL. U. L. REV. 305, 351-52 (2013).

91. 750 ILL. COMP. STAT. 46/204 (2016).

92. *Id.*

93. 750 ILL. COMP. STAT. 45/5(a) (repealed 2016), as reviewed in *In re Paternity of an Unknown Minor*, 951 N.E.2d 1220, 1221 (Ill. App. Ct. 2011).

94. 750 ILL. COMP. STAT. 46/205(a) (2016).

95. *Id.* at 46/307.

96. *Id.* at 46/309(a).

where there is no inequity in disproving “the parent-child relationship between the child and the presumed, acknowledged or adjudicated parent”; and, where the “child’s best interests” will be served.⁹⁷ Yet, the prerequisites to court-ordered genetic testing only apply to initiatives pursued by “a parent, presumed parent, acknowledged parent, adjudicated parent, or alleged parent.”⁹⁸ In *A.A.*, the GAL for the child requested genetic testing and so did not need to meet the prerequisites, including a child’s best interests.⁹⁹

4. Others

Family members of male VAP signatories who are not biological fathers sometimes could challenge VAPs in order to sever familial relationships, which can benefit them, as during the probating of the estate of a deceased VAP signatory. The lack of a child via a VAP would allow other family members of the decedent to inherit more.

Moreover, family members of non-signatory biological fathers sometimes challenge VAPs in order to establish familial relationships, which can benefit them by providing access to childcare opportunities and which can benefit the children by allowing them access to governmental benefits and/or probate court distributions of a deceased biological father’s assets. This occurred in the earlier-noted *A.A.* case.¹⁰⁰

Challengers beyond signatories, alleged biological fathers, governments, and children are seemingly recognized in Illinois, where “an individual” who is not a VAP signatory can seek an adjudication of parentage.¹⁰¹ A broad array of challengers seemingly also are recognized in Arkansas where a VAP contest can be initiated by “a person.”¹⁰² And in Alabama, “an individual who is not a signatory to the acknowledgement of paternity and who seeks an adjudication of paternity of the child may maintain a proceeding at any time after the effective date of the acknowledgement,” but only “if the court determines that it is in

97. *Id.* at 46/610(a).

98. *Id.*

99. Since the Illinois Supreme Court decided *In re A.A.* in 2015, the 2015 Parentage Act has been amended by the General Assembly, but still treats GALs a bit differently from others seeking genetic testing. *See* 750 ILL. COMP. STAT. 46/610(b) (2016).

100. *In re A.A.*, 43 N.E.3d 947, 949 (Ill. 2015) (grandparents wished to adopt child of their deceased son); *id.* at 950 (social security benefits for individual VAP successfully challenged).

101. 750 ILL. COMP. STAT. 46/609(b) (2016). Similar is WYO. STAT. ANN. § 14-2-809(2016) (providing two years to file where child is excluded; seemingly excluded from challenging is a nonsignatory who was a party, to an earlier parentage adjudication).

102. ARK. CODE ANN. § 9-10-115(d)(1) (2007).

the best interests of the child.”¹⁰³ Of course, where a state law allows a “challenger” to contest a VAP, a broad array of people may have standing if an interpreting court reads the statute as not limiting the parties who may challenge.¹⁰⁴

B. Fraud, Duress or Material Mistake of Fact

Per federal statute, post-sixty-day VAP contests by signatories seemingly can only be based on fraud, duress, or material mistake of fact.¹⁰⁵ Notwithstanding these limits, some state statutes recognize further signatory challenges.¹⁰⁶ The “burden of proof” is always “upon the challenger,” per the federal Social Security Act.¹⁰⁷ Frequently, this burden may only be successfully carried with clear and convincing evidence,¹⁰⁸ with the evidence as to fraud, duress, or material mistake usually limited to what happened “at the time” the VAP was “executed.”¹⁰⁹

The interpretations and implementations of these federal statutory limits on signatory challenges vary by state.¹¹⁰ Additionally, state laws vary on whether these limits apply to post-sixty-day VAP challenges by nonsignatories.¹¹¹ In some states, these important legal issues remain unresolved.¹¹²

103. ALA. CODE § 26-17-60(b) (2008); See also *Ex parte* S.T., 149 So. 3d 1089, 1093 (Ala. Civ. App. 2014) (not ruling on whether an adjudication can be maintained in a dependency hearing, but ruling that the birth mother must always be a party in any VAP challenge proceeding).

104. See, e.g., *Hussey v. Woods*, 2015 WL 5601777, at *11 n.2 (Tenn. Ct. App. 2015) (construing TENN. CODE ANN. § 24-7-113(e) (2016)).

105. 42 U.S.C. § 666(a)(5)(D)(iii) (2012).

106. MICH. COMP. LAWS § 722.1437(4) (in a post-sixty-day revocation challenge to a VAP, the mother or acknowledged father can succeed by showing “mistake of fact” (i.e., not a material mistake), newly discovered evidence, or misconduct). An earlier statute allowed a post-sixty-day judicial revocation of a VAP based on “the equities of the case.” *Sinicropi v. Mazurek*, 760 N.W. 2d 520, 524 (Mich. Ct. App. 2008) (former MICH. COMP. LAWS § 722.1011(3) (repealed 2012)).

107. 42 U.S.C. § 666(a)(5)(D)(iii) (2012).

108. See, e.g., *Gordon v. Hedrick*, 364 P.3d 951, 958 (Idaho 2015).

109. *Id.* at 961.

110. *For Those Not John Edwards*, *supra* note 3, at 82–87 (reviewing different state laws on VAP rescissions and interests).

111. As noted, certain nonsignatories may be recognized in statutes on VAPs as having standing to challenge VAPs after sixty days alongside challenges by signatories. Nonsignatories may also gain standing through statutes which do not specifically address just VAPs. See, e.g., 750 ILL. COMP. STAT. 46/610(a) (2016) (addressing when a “parent, presumed parent, acknowledged parent, adjudicated parent, or alleged parent” can obtain a court order for genetic testing in “a proceeding to adjudicate the parentage of a child having a presumed, acknowledged, or adjudicated parent . . .”); DEL. CODE ANN. tit. 13, §§ 8-608, 8-609(b) (2016) (proceeding by “an individual” who is not a VAP signatory seeking “an adjudication of paternity.”).

112. See, e.g., *Franceschi v. Pernia*, No. 63655, 2015 WL 6447510, at *2 (Nev. 2015) (where a man sought paternity order though another man signed a VAP; majority left issues unresolved

As to fraud in signatory challenges, consider *Rousseve v. Jones*,¹¹³ wherein the Louisiana Supreme Court recognized a male VAP father could seek to “annul” the VAP “within a year of discovery of the fraud or ill practice.”¹¹⁴ The court opined that a VAP annulment would be granted if there were no biological ties, “absent some overriding concern of public policy.”¹¹⁵ By contrast, in 2015 the Idaho Supreme Court, in *Gordon v. Hedrick*, ruled that “fraud” in a VAP challenge by a birth mother requires proof that fraud was committed as to her at the time the VAP was executed; thus, a mutual mistake of fact by the signatories was an insufficient basis for a successful VAP challenge.¹¹⁶ In Florida, precedents hold that birth mothers cannot contest VAPs even if there was fraud as long as the mothers were “complicit in the alleged fraud.”¹¹⁷ And in Arizona, after six months, VAP challenges must be founded on fraud upon the court.¹¹⁸

With respect to duress in signatory challenges, consider that in Colorado, duress may not be available as a ground to a challenging signatory father, as he cannot “set aside” a “duly executed acknowledgment of paternity” where “he knew he was not the father of the child.”¹¹⁹

As to material mistake of fact in signatory challenges, consider *Chaplen v. Doyle*.¹²⁰ There, a Connecticut trial court found that although its state statute recognizes that the lack of biological ties is a “material

while two dissenters opine “a valid genetic test . . . is grounds for invalidating a VAP.” However, a court is “still free to consider . . . the best interest of the child.”).

113. *Rousseve v. Jones*, 704 So. 2d 229, 233 (La. 1997).

114. *Id.* at 23233 (utilizing LA. CODE CIV. PROC. ANN. art. 2004 (2001), which speaks to how judgment modification as the male signatory’s “acknowledgment by authentic act” statutorily operates to establish a child support duty without the need for an earlier “judgment in a paternity action.”).

115. *Id.* at 233, 234 n. 10 (while not clarifying the “public policy” criteria, the court recognized the “current state of the art in blood testing” and opined “fair play and substantial justice clearly mandate that deceived” male VAP signors “should not be compelled to pay child support.”).

116. *Gordon v. Hedrick*, 364 P.3d 951, 958 (Idaho 2015).

117. *Flores v. Sanchez*, 137 So. 3d 1104, 1109–10 (Fla. Dist. Ct. App. 2014). Of course, fraud perpetrated by the mother alone on the nonbiological VAP father can foreclose her from contesting the VAP. *Choate v. Cochran*, 2015 WL 8917491, at *3 (Ariz. Ct. App. 2015) (male VAP signatory can pursue paternity and childcare over mother’s objection).

118. *Alvarado v. Thomson*, 375 P.3d 77, 79 (Ariz. Ct. App. 2016) (holding there was fraud—as the VAP was signed by a nonbiological father to avoid the biological father’s participation in the adoption process—the court relied on ARIZ. REV. STAT. § 25-812(E) (2009) and ARIZ. R. FAM. LAW P. 85(C)(2)).

119. COLO. REV. STAT. § 19-4-105(2)(b) (2013) (a VAP is “a legal finding of paternity”); *id.* at 19-4-105(2)(c) (“legal finding of paternity may be challenged only under 19-4-107.3”); *id.* at 107.3(3)(a) (no “set aside” where male signatory knew he was not the biological father).

120. No. LLIFA144014478S, 2015 WL 2166134 (Conn. Super. Ct. Apr. 6, 2015).

mistake of fact,” the statute did not always require judicial consideration of evidence on the lack of ties when the birth mother challenges the VAP.¹²¹ In *Joshua A.A. v. Jessica B.B.*,¹²² a New York court found there could be no “material mistake of fact” where the male VAP signatory knew he had no biological ties.

When VAPs are contested by nonsignatories, state statutes and precedents sometimes do not require the challengers to demonstrate fraud, duress or material mistake of fact. Beginning with fraud, in Arkansas, “a person may challenge a paternity establishment pursuant to” a VAP or “an order based on” a VAP, but “only upon an allegation of fraud, duress or material mistake of fact.”¹²³ Similarly, in *R.W.E. v. A.B.K.*,¹²⁴ a Pennsylvania trial court required a biological father to prove fraud when challenging a VAP. It found sufficient evidence of “fraud by omission” on the birth mother’s part as she waited until after the birth and the VAP to inform the biological father. By contrast, in Alabama a nonsignatory can seek a paternity adjudication “if the court determines that it is in the best interests of the child.”¹²⁵

As to mistake, in *J.A.I. v. B.R.*,¹²⁶ a Florida appeals court required a biological father to prove mistake, which was not shown as the male VAP signatory was “aware” that he may not be the biological father when signing the VAP before the biological father sued in paternity. Yet, per precedent, it opined that the biological father’s challenge may have been treated differently if his paternity action preceded the VAP.¹²⁷

C. Time Constraints

State laws also vary on the timing of VAP contests, whether presented by signatory or non-signatory challengers. At least one state,

121. In a later proceeding in the same trial court, and upon examining the child’s best interests as well as laches and equitable estoppel, the court allowed the birth mother to open and vacate an earlier child support order against the male VAP signatory. See *Chaplen v. Doyle*, No. LLIFA144014478S, 2015 WL 9595149 (Conn. Super. Ct. Nov. 25, 2015). Compare to *Colonghi v. Arcarese*, No. FA134016846S, 2014 WL 341888, at *5 (Conn. Super. Ct. Jan. 10, 2014) (no mistake by birth mother as she is in “a situation she herself has brought about.”).

122. 19 N.Y.S.3d 116 (N.Y. App. Div. 2015).

123. ARK. CODE ANN. § 9-10-115(d)(1) (2007). See also *Paul v. Williamson*, 332 P.3d 1070, 1075 (Okla. Civ. App. 2014) (suggesting alleged natural father must prove fraud by male signatory).

124. 961 A.2d 161, 169 (Pa. Super. Ct. 2008).

125. ALA. CODE § 26-17-609(b) (2008).

126. 160 So. 3d 473–74 (Fla. Dist. Ct. App. 2015).

127. *Id.* at 475 (hesitant to give a birth mother via the VAP process a right to block a man who had earlier pursued paternity).

Alabama, has incompletely written laws on the subject.¹²⁸ Other states have statutes with varying constraints operating like limitations or repose periods. There can be differing time constraints for different challengers. Illustrative interstate variations follow.

1. Limitations Periods

Some statutory time constraints on VAP contests operate like limitations periods wherein the running of time depends upon certain conduct, like operating under a disability, knowing of the harm, or recognizing a breach of duty or fraud. Thus in Tennessee, a “challenger” must proceed “within five (5) years of the execution of the acknowledgment,” though a later challenge is allowed where there is “fraud in the procurement of the acknowledgment by the mother of the child” and “the requested relief will not affect the interests of the child, the state, or any Title IV-D agency.”¹²⁹

In Illinois, post-sixty-day challengers must sue within two years of the acknowledgment, though the time for challenging (at least by a signatory) is stayed while the challenger “is under legal disability or duress.”¹³⁰ Additionally, in Illinois, post-sixty-day nonsignatory VAP challengers must also sue within two years of the effective date of the VAP, though “estoppel” principles can effectively shorten this period.¹³¹

In Maine, a non-signatory other than the child has two years to contest a VAP, “unless the individual did not know and could not reasonably have known of the individual’s potential genetic parentage on account of material misrepresentation or concealment in which case the proceeding must be commenced no later than two years after discovery.”¹³² Colorado has a two-year limit with no explicit statutory exceptions on tolling.¹³³ In Minnesota, “the mother, father, husband or former husband” who undertook a “recognition of paternity” must “bring the action within one year of the execution . . . or within six

128. See ALA. CODE § 26-17-609 (2008) (time limit is established for signatory challengers; nonsignatory seeking adjudication of paternity can proceed “if the court determines that it is in the best interests of the child.”).

129. TENN. CODE ANN. § 24-7-113(e)(2) (2016).

130. 750 ILL. COMP. STAT. 46/309(a) (2016) (time also tolled when “ground for relief is fraudulently concealed.”).

131. 750 ILL. COMP. STAT. 46/609(b), 46/610(a) (2016) (estoppel can foreclose court order on genetic testing, essential to any successful VAP challenge).

132. ME. STAT. tit. 19-A, § 1868(2) (2015).

133. COLO. REV. STAT. §§ 19-4-105(b)-(c) (2016); *id.* at 19-4-107.3(2)(a).

months after the person bringing the action obtains” test results showing the man executing his recognition as a father “is not the father of the child.”¹³⁴ In Washington, a signatory may only challenge within four years after the VAP is filed.¹³⁵

In Mississippi, there is a different type of tolling provision on VAP challenges. There, a right to “rescind” by a signatory exists for one year (assuming no judicial proceeding), though this time is tolled for “an alleged father to rescind . . . from the date the alleged father files his formal application for genetic testing.”¹³⁶

Notwithstanding language that VAP challenges be pursued within a certain statutory limitations period beginning at the time of signing, there is precedent allowing a later challenge.¹³⁷ Forgiveness here, like tolling of limitation periods applicable outside of VAP contests, results from judicial recognitions that fairness compels sometimes that there be no harsh results precluding certain claims by those whose conduct did not cause the statutory time constraint to expire.

2. Repose Periods

Some statutory time constraints on VAP contests seemingly operate like repose periods, in that the time begins to run at a precise moment independent from when the challenger knew (or reasonably should have known) of the fraud, duress, or material mistake of fact. For example, in North Dakota, a VAP “signatory” may challenge after sixty days, but only “within two years” after the VAP “is filed with the state department of health.”¹³⁸ In Massachusetts, VAPs seemingly may be challenged only “within one year” of signing.¹³⁹ In California, a motion to “set aside” a VAP¹⁴⁰ may be filed “not later than two years from

134. MINN. STAT. § 257.75(4)(a) (2015) (child can seek to vacate within six months of obtaining test results indicating no biological ties or within a year of reaching the age of majority, whichever is later).

135. WASH. REV. CODE § 26.26.335(1)(b) (2011).

136. MISS. CODE ANN. §§ 93-9-9(4)(a), (d) (2011). *See also* MISS. CODE ANN. §§ 93-9-28(2)(a), (d) (2011).

137. *Louisiana v. Price*, 174 So. 3d 732 (La. Ct. App. 2015) (while male VAP signor has, per LA. STAT. ANN. 9:406 (B)(2), two years from the date of signing to revoke, here the VAP was deemed “absolutely null” as the man was incarcerated at the time of the signing and there was a “forgery”).

138. N.D. CENT. CODE § 14-20-18.1(b) (2016). *See also* WYO. STAT. ANN. § 14-2-608(a)(2) (2016) (similar); OKLA. STAT. tit. 10, § 7700-308(A)(2) (2014) (similar).

139. MASS. GEN. LAWS ch. 209C, § 11(a) (VAP subject “to challenge within one year”).

140. CAL. FAM. CODE § 7575(b)(1) (2011) (no set aside where it is not “in the best interest of the child”).

the date of child's birth."¹⁴¹ And in Michigan, a challenge by "a non-signatory" of a VAP "shall be filed within three years after the child's birth or within one year after the date" the VAP was signed.¹⁴²

The statutory time constraints will not necessarily operate for all challengers. Thus in Oklahoma, a nonsignatory "other than the child" usually must commence a VAP contest within two years of the acknowledgment.¹⁴³ Children are seemingly excluded in Oklahoma because, under federal law, state VAP programs must provide a "procedure for the establishment of paternity for any child at least to the child's 18th birthday."¹⁴⁴ Outside of Oklahoma, children may not be barred by repose periods from contesting VAPs, though the children are not expressly exempted by the repose statute.

D. Laches, Estoppel and the Like

Even when challengers pursue VAP contests within statutory time constraints by showing fraud, duress, or material mistake of fact, they may still be barred. Doctrines like laches or estoppel¹⁴⁵ can operate, grounded on certain earlier conduct by the challengers. Here again, the doctrines operate differently interstate and vary in their application by who challenges.

Certain successful VAP contests require an easily verifiable mistake. That is, a VAP typically cannot be successfully challenged when the male signatory is, in fact, the biological father of a child born of consensual sex.¹⁴⁶ Even when a male VAP signatory has no biological ties, laches, estoppel and the like may preclude his challenge, as when his continuing familial relationships and/or financial support is judicially determined to be in the child's best interests.¹⁴⁷

141. *Id.* at § 7575(b)(3)(A). *But see id.* at § 7612(e) (a presumed parent may seek a VAP set aside "within two years of the execution" of the VAP).

142. MICH. COMP. LAWS § 722.1437(1) (only applicable to VAPs filed after June 12, 2013). *See also* S.D. CODIFIED LAWS § 25-8-59 (2016) (three years after paternity presumption created).

143. OKLA. STAT. tit. 10, § 7700-609(B). *See also* N.M. STAT. ANN. § 40-11A-609(B) (2009) (similar).

144. 45 C.F.R. § 302.70(a)(5)(i) (2016).

145. On the difference, see, for example, *Colonghi v. Arcarese*, No. FA134016846S, 2014 West 341888, (Conn. Super. Ct. Jan. 10, 2014) (better argument is that birth mother is equitably estopped from asserting male signatory's paternity, rather than laches).

146. Where a child is born of assisted reproduction, the signing sperm donor may more easily be challenged successfully because there is far more likely an earlier, enforceable, written waiver of future parental rights, which often will not be susceptible to override by a later VAP signature.

147. *See, e.g.*, N.Y. FAM. CT. ACT § 516-a(b)(iv) (Mckinney 2014) (after sixty days no signatory challenge if not in the child's best interests on the basis of "equitable estoppel"); 750 ILL. COMP. STAT. 46/610(a) (2016) (acknowledged male parent cannot obtain genetic testing order in "a

Signing birth mothers are also sometimes barred from similar VAP contests because their earlier conduct led to familial reliance on continuing healthy VAP father-child relationships and/or on continuing financial support deemed to serve their children's best interests.¹⁴⁸

Biological fathers also may be barred from contesting VAPs for failing to act, thereby allowing loving familial relationships to develop between the male VAP signors and the children.¹⁴⁹ The best interests of children might even bar VAP contests by biological fathers who stepped forward to claim parentage at the earliest possible time, where the evidence shows any successful VAP challenge would harm the child.¹⁵⁰

E. Judgment Modification Standards

Per federal statute, a VAP has the effect of a "legal finding of paternity".¹⁵¹ This has led some legislators and judges to utilize generally

proceeding to adjudicate parentage" where his own conduct estops him, because it would be inequitable "to disprove the parent-child relationship," and the "child's best interest" would be served by denying a genetic testing order); WYO. STAT. ANN. § 14-2-808(a) (similar, though no express mention of the child's best interests). C.A.R. v. R.E.M., No. 1976 WDA 2014, 2015 WL 7019025, at *1 (Pa. Super. Ct. June 5, 2015) (male signatory's challenge barred as there is "paternity by estoppel").

148. See, e.g., 750 ILL. COMP. STAT. 46/610(a) (2016) ("parent" cannot obtain genetic testing of acknowledged father to disprove paternity where her own conduct estops her from denying parentage, it would be inequitable, and the "child's best interests" will be served); WYO. STAT. ANN. § 14-2-808(a) (2016) (similar, though no express mention of the child's best interests).

149. See, e.g., ALA. CODE § 26-17-609(b) (2008) (nonsignatory can only challenge VAP if court determines "it is in the best interests of the child.").

150. See, e.g., N.D. CENT. CODE §§ 14-20-43-44 (nonsignatory, including alleged biological father, can be estopped [and no genetic tests ordered by the court] where it would be "inequitable to disprove the father-child relationship" involving a VAP father). Some such biological fathers may have claims against those who caused their losses of what the U.S. Supreme Court has recognized as federal constitutional paternity opportunity interests. The interests are recognized in *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may also enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."). But see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (no such opportunity for natural father if the state chooses, where the birth mother is married to another). The possibility of claims is discussed in Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345 (2000).

151. 42 U.S.C. § 666(a)(5)(D)(ii) (2012). But see *Ramsey County v. X.L.*, 853 N.W.2d 813, 816-18 (Minn. Ct. App. 2014) (while per MINN. STAT. § 257.75(3), a signed and filed "recognition of parentage" has the force and effect of a judgment, one exception under § 257.55(1)(h) is when one or both VAP signatories are less than eighteen years of age; thus, county providing public aid could sue to establish father-child relationship in male VAP signatory (a biological dad).).

prevailing judgment modification standards during VAP contests.¹⁵² These standards, which again differ interstate, may contain requirements resembling the federal Social Security Act's fraud, duress or mistake norms. And, they often contain timing mandates similar to the limitations or repose standards specially operating for VAP contests.

For example, VAP challenges under Vermont law are statutorily guided by the civil procedure rule on motions for relief from court judgments.¹⁵³ That rule recognizes that relief can arise from not only "fraud" or "mistake," but also "inadvertence;" "surprise;" "excusable neglect;" certain "newly discovered evidence;" and, "any other reason justifying relief."¹⁵⁴ For certain motions, including those founded on fraud and mistake, there is a one-year time limit.¹⁵⁵ For other motions, including those founded on "any" reason justifying relief, filing must only occur "within a reasonable time."¹⁵⁶ In *McGee v. Gonyo*, the Vermont Supreme Court in 2016 allowed a birth mother and the state's Office of Child Support to successfully challenge a male VAP signatory's parentage over the man's objection and more than two years after signing.¹⁵⁷ There, both signatories knew at signing that the signing man was not the biological father. The court reasoned that any parentage recognition for the man would allow the signatories to "employ the VAP as a de facto adoption process, side-stepping the requirements" of the Adoption Act.¹⁵⁸

VAP challenges in Arizona are statutorily guided by a rule of family law procedure, as well as by "fraud, duress or material mistake of fact."¹⁵⁹ Under that rule, challenges must be pursued "within a reason-

152. Special judgment modification norms applicable to just VAP contests could be devised. But such special state laws are not in vogue. Practically speaking, the afore-noted laws on limitation and repose periods for VAP challenges serve as special judgment modification standards though they are not expressly designated as such. Compare 750 ILL. COMP. STAT. 5/610.5 (2016) (special standards for orders allocating parental responsibilities) with IOWA CODE § 598.21C (2009) (special standards for child, spousal and medical support orders), with N.C. GEN. STAT. § 50-16.9 (1995) (special standards for alimony and post-separation support orders), and with MO. REV. STAT. § 452.370 (2014) (special standards for judgments involving maintenance).

153. VT. STAT. ANN. tit. 15, § 307(f) (1998).

154. VT. R. CIV. P. 60(b).

155. *Id.* (even if within one year, a motion must also be presented "within a reasonable time").

156. *Id.*

157. *McGee v. Gonyo*, 140 A.3d 162, 167-168 (Vt. 2016) (fraud on the court).

158. *Id.* at 166-167. In concurring, Justice Dooley strongly urged state legislators "to enact a real parentage act" modeled on the UPA. *Id.* at 169. In dissent, Justice Robinson said the ruling is "squarely contrary to the best interests of Vermont's children" and also called for a "new legislation." *Id.* at 169, 179.

159. ARIZ. REV. STAT. § 25-812(E) (2009) (noting ARIZ. R. FAM. P. 85(c)).

able time” and, for a challenge based on “fraud, misrepresentation or other misconduct of an adverse party,” no more than six months after entry.¹⁶⁰

In the District of Columbia, a VAP “may be challenged” in court after the rescission period “through the same procedures as are applicable to a final judgment of the Superior Court, but only on the basis of fraud, duress or material mistake of fact.”¹⁶¹

Though not referenced specially in written VAP contest laws, general state court judgment modification standards sometimes are used in VAP challenges, as will be seen. General state court judgment modification standards often follow the Federal Rules of Civil Procedure norms that allow relief from judgments on such grounds as “mistake, inadvertence, surprise or excusable neglect;” “newly discovered evidence;” “fraud;” judgment satisfaction; and “any other reason that justifies relief.”¹⁶² One court found no fraud on the part of a male VAP signatory where the birth mother failed to reveal to him that he was not the biological father because there was no “fraud on the court.”¹⁶³

Judgment modification time periods do not operate when special time constraints, be they limitations or repose periods, operate for VAP challenges. Comparably, general state court judgment modification standards would not operate if the special VAP contest norms on fraud, duress, and material mistake of fact were deemed to be preemptive of other judgment modification laws. While a federal statute says VAP contests by challenge may be founded “only on the basis of fraud, duress or material mistake of fact,” some state courts have entertained VAP challengers founded on additional grounds, as will be shown.¹⁶⁴ Thus, while either fraud, duress, or mistake is a necessary condition of a successful VAP challenge, any one by itself may be insufficient to undo a VAP. For example, a Connecticut trial court explored whether laches or equitable estoppel barred a birth mother’s VAP challenge, as

160. ARIZ. R. FAM. P. 85(c)(2) (noted in ARIZ. REV. STAT. § 25-812(E)).

161. D.C. CODE § 16-909(c-1) (2016).

162. FED. R. CIV. P. 60(b). Comparable state laws include W.VA. R. CIV. P. 60(b), COLO. R. CIV. P. 60(b), ME. R. CIV. P. 60(b), NEV. R. CIV. P. 60(b), KAN. STAT. ANN. § 60-260(b) (2011), UTAH R. CIV. P. 60(b), and WIS. STAT. § 906.07 (2016).

163. *In re Paternity of Cheryl*, 746 N.E.2d 488, 498 (Mass. 2001). There has been recognized in Massachusetts “a garden-variety claim for negligent or intentional misrepresentation” by the male VAP signatory with no biological ties against the birth mother. *Mansfield v. Neff*, No. MICV2013-03346-D, 2014 WL 458207, at *2 (Mass. Super. Ct. Jan. 23, 2014).

164. 42 U.S.C. § 666(a)(5)(D)(iii) (2012).

well whether the child's best interest would serve as a bar.¹⁶⁵ And in the District of Columbia, even where the male VAP signatory "is not the child's genetic parent," creating at least some mistake, the VAP may not be undone without the court's "due consideration" of any preclusive conduct by the mother or male signatory, the child's best interest, and "the duration and stability" of the familial relationships involving the child and the two VAP signatories.¹⁶⁶

All state judgment modification standards applicable to VAP contests, whether general or special, should require the joinder of all interested parties, including both signatories, any known alleged biological father or de facto parent,¹⁶⁷ and the child via a representative with no possible parentage. Joinder failures have led to later VAP challenges where principles of *res judicata* or collateral estoppel did not operate due to the absence of parties deemed "necessary" to earlier court jurisdiction in VAP proceedings.¹⁶⁸

IV. THE CONSEQUENCES OF VARIED STATE LAWS ON VAP CHALLENGES

The varied state laws on VAP challenges prompt significant choice-of-law issues where VAPs are signed in one state and contested in another.¹⁶⁹ While most VAPs have the force and effect of a judgment,¹⁷⁰ the challenge/judgment modification standards vary significantly interstate, prompting difficult choices. Consider, for example, a challenge in State B to a VAP signed in State A where there is a year to challenge in State B, but five years to challenge in State A. Or, consider

165. *Chaplen v. Doyle*, No. LLIFA144014478S, 2015 WL 9595149, at *4 (Conn. Super. Ct. Nov. 25, 2015).

166. D.C. CODE § 16-909 (b)(1) (2016).

167. Such a person includes anyone who has made known to either of the signatories, or to the state, beliefs as to biological ties to the child or as to de facto (or presumed or equitable) parent status under relevant state law, as well as desire to be recognized as the child's parent.

168. *See, e.g., Jamie M. v. Kenneth M.*, 867 N.W.2d 290, 299 (Neb. Ct. App. 2015) (birth mother could sue to challenge a VAP and sue the nonsignatory biological father in paternity though earlier suits had been pursued against the same man by the mother and by the state; no claim or issue preclusion as the male VAP signatory had not been joined in the earlier suits).

169. There can be intrastate choice of law issues even where both VAP establishment and challenge occur in a single state, as when the standards on challenge change. *See, e.g., State of Nebraska v. B.M.*, 846 N.W.2d 257, 265 (Neb. 2014) (VAP challenge is determined by the VAP statute in effect when the VAP was signed, not the statute in effect when the VAP was challenged.).

170. *See, e.g., CONN. GEN. STAT. § 46B-172(a)(1)* ("same force and effect as a judgment of the Superior Court"). As noted, there are some voluntary paternity acknowledgments around the time of birth for children born of sex to unwed mothers that do not meet the establishment norms of the federal Social Security Act, as when a natural father alone acknowledges his paternity, as in *R.I. GEN. LAWS § 15-8-3(a)(4)* (2016). This follows the 1973 UPA. These acknowledgments certainly do not amount to effective judgments binding upon those named, but not signatories.

a VAP challenge in State B to a VAP signed in State A by one who has standing to challenge in State B, but who has no standing to challenge the VAP signed in State A under the laws of State A.

Choice of law norms could provide relative certainty, as by always favoring the law of the state where the challenge is presented or the VAP was signed.¹⁷¹ Yet such certainty would come, at times, with the price of undercutting legitimate state interests. Thus, for example, alleged fraud in the execution of a VAP may occur in the signing state if the fraud of the signatories in indicating likely male biological ties is at issue. But fraud in the execution of a VAP may occur outside the signing state if the fraud involves preventing the nonsignatory male biological parent from learning of his child is at issue.

Often unnoticed in choice-of-law settings are the varied state laws on de facto (or presumed or equitable) parenthood that can (and often should¹⁷²) modify the VAP challenge laws. Consider a challenge in State B to a VAP signed in State A where the VAP-challenge laws of both State A and State B allow a challenge, but where the de facto parent doctrines of only one state recognize the male VAP signatory as a childcare parent, often with federal constitutional interests. Or consider a challenge in State B to a VAP signed in State A where only one of the two states recognizes a parental presumption arising from a VAP.¹⁷³

Further, as noted, states utilize VAPs to establish both child support and childcare parentage in male signatories for all children born of sex to unwed mothers, and not just for children involved in state welfare programs. And, as noted, state VAP challenge norms for these children tend to follow the mandates on VAP challenges for children receiving public assistance. The result is that the norms are chiefly geared to welfare reimbursement policies, or perhaps child support duties in and outside of welfare. These challenge norms then are employed to guide childcare opportunities as well as child support duties.

171. Some state laws do recognize expressly the initial import of a VAP signed in another state. *See, e.g.*, OR. REV. STAT. § 109.070(1)(f) (2007).

172. *See, e.g.*, Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481 (2015) (de facto and comparable childcare parentage-without biological, formal adoptive, or contractual ties prompt federal constitutional rights which cannot be easily overridden by the state, though overrides are, at the least, possible via, parental rights termination proceedings).

173. Presumptive parenthood, for example, is sometimes distinguished from nonpresumptive parenthood where, in each setting, men with no biological ties are recognized as parents. Only presumptions are subject to presumption rebuttal norms, which, for finality purposes for instance, may vary from VAP challenge norms.

Thus, where a male signatory with no money has been a terrific parent and where a biological father has money, but has been absent from the child's life, a successful challenge can unreasonably interfere with a loving parent-child relationship simply because of the potential for the enhancement of state treasuries. Courts should consider, given the child's best interest (if not the child's, and VAP parent's, constitutional rights in the established parent-child relationship), whether the biological father should be found responsible for child support without undoing the VAP parent's childcare rights and child support duties. Emerging precedents—founded on growing recognition of de facto and similar childcare parents—have recognized there can be three child support parents, but only two childcare parents.¹⁷⁴

V. REFORMING VAP CHALLENGE PROCESSES

A. Federal Law Reforms

Some have suggested there be “mandatory genetic testing at birth” to determine all legal paternity.¹⁷⁵ Others may simply support testing before and Social Security Act VAPs are signed. We do not agree with either position, in part, because such compelled tests often would undo existing de facto (and other) parentage doctrines thereby upsetting long-settled marital parent presumptions and, more importantly, disserving the best interests of children and their loving families for little or no reason.

But we do support amendments to the federal Social Security Act that explicitly require that VAP signatories each have, at least, a good faith belief that there exist biological ties between the child and the

174. See, e.g., *Alaska Dep't. of Revenue v. Button*, 7 P.3d 74, 77–78 (Alaska 2000) (state can seek welfare reimbursement from biological father, at times, though there remain a VAP father and a birth mother as parents). There are also emerging precedents and statutes on the circumstances permitting three parents for both child support and childcare purposes. See, e.g., CAL. FAM. CODE § 7612 (c) (2016) (more than two parents may be recognized to avoid “detriment to the child”); *T.D. v. M.M.M.*, 730 So. 2d 873, 877 (La. 1999) (“best interests” of child can support order allowing birth mother, her current or former husband, and biological father to participate in child's life). Yet the recognition of a third childcare parent cannot unduly infringe upon the federal (and any broader state) constitutional childcare interests of two existing childcare parents. See, e.g., *Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. Ct. 2010). Compare with D. C. CODE § 16-909(b)(3) (2016) (where a child has both a VAP father and another presumed parent [as by marriage], parentage determined “after due consideration to the child's best interests and the duration and stability of the relationship between the child, the presumed parent, and the acknowledged parent”).

175. See, e.g., Vanessa S. Brown-Barbour, *Mama's Baby, Papa's Maybe: Disestablishment of Paternity*, 48 AKRON L. REV. 263, 313 (2015).

male signatory.¹⁷⁶ Such beliefs should necessarily be acknowledged on all VAPs guided by the federal Social Security Act.¹⁷⁷ Such an amendment generally ensures at least a nine-month relationship between the acknowledging parents who, at birth, choose to raise a child together, thereby prompting a greater chance for a stable, if not loving, familial relationship over the child's life.

We also support either federal statutory or regulatory reforms that would clarify the Social Security Act requirements of fraud, mistake, or duress for successful VAP contests. In our view, not every demonstration of a lack of biological ties between a male VAP signatory and a child should constitute a mistake. Though lacking in biological ties, sometimes VAP fathers are important to children, and the children are important to the VAP fathers, where continuing the parent-child relationships improve family lives with no significant, if any, downside.

Further, we support federal law changes that would clarify who has standing to contest a VAP via a court challenge and whether fraud, mistake, or duress must be shown by each challenger.

B. State Law Reforms

The procedures governing post-sixty-day contests challenging VAPs are largely left to the states. State laws addressing *res judicata* and collateral estoppel guide the effects of such contests in later judicial proceedings. To facilitate finality in Social Security Act VAP contests, and to meet constitutional procedural due process demands, state laws should generally require the joinder of all interested parties in any VAP contest. Such parties should usually include the signatories, an alleged nonsignatory biological father or mother,¹⁷⁸ and the child via a representative than having no possible parental status.¹⁷⁹

176. Earlier one of the authors made a similar recommendation. *For Those Not John Edwards*, *supra* note 3, at 98–99.

177. Some state VAP forms now say nothing about the possible genetic ties between child and male signatory. *For Those Not John Edwards*, *supra* note 3, at 72 (citing Alaska and Nevada forms).

178. An alleged nonsignatory biological male parent need not be joined if earlier convicted of nonconsensual rape leading to the pregnancy, while an alleged nonsignatory biological female parent need not be joined if her parental rights were earlier waived—as via a contract in an assisted reproduction setting.

179. The failure to join the child can later allow a VAP contest by the child where the child is found not in privity with any parties to an earlier contest. *See, e.g.,* *Simcox v. Simcox*, 546 N.E. 2d 609, 611 (Ill. 1989) (failure to join child in earlier dissolution proceeding allows child to later challenge paternity established therein); *In re M.M.*, 928 N.E.2d 1281 (Ill. App. Ct. 2010) (child can challenge VAP despite its conclusive presumption of parentage, since child was neither a party to the VAP signing, nor was in privity with the signing putative father or birth mother at the time they each signed).

Parentage contest procedures should be tied to VAP establishment procedures. There is good reason to broaden VAP establishment opportunities. VAPs are used for parentage issues extending far beyond paternal reimbursement of federal child support subsidies, and far beyond child support in nonwelfare settings. VAP establishments can prompt parental childcare opportunities, redistribution of the assets of a deceased parent's estate, and grandparent visitation opportunities. With the expansion of parentage acknowledgments to, e.g., same-sex female couples where both women have some biological or genetic ties and have a shared interest in coparenting at birth, VAP challenge processes may need alteration. That is, different VAP establishment settings may require different VAP challenge procedures

To avoid confusion, state statutes should explicitly differentiate between voluntary paternity acknowledgments guided by federal statutes (due to the Social Security Act and state acquiescence in its norms) and any other comparable voluntary parentage acknowledgments, as with same-sex female couples, who each share some physical ties to the child (i.e., one woman donates ova and another bears the child).

Further, going well beyond the VAP settings contemplated by the federal Social Security Act, and beyond other fairly comparable settings—as with lesbian couples and paternal grandparents where a prospective biological father dies before a live childbirth and could not have executed a VAP—states should make intended parentage declarations available to others, especially to *de facto* (or comparable) nonbiological parents. The need for intended parentage declarations in states recognizing *de facto* parentage is compelling.

Consider, for example, a state law (whether or not founded on the Union Parentage Act) that recognizes legal parentage arising from childcare and child support for these who have resided with a child, perhaps for at least two years beginning at birth, while holding out the child as one's own and acting as a parent. Without a new intended parent declaration process available to aver present and future compliance with the *de facto* parent norms, judicial inquiry into compliance normally only comes after a split of the two one-time parenting adults, where only one already had parental status under law, and often where both adults only learned of a relevant *de facto* parent doctrine after the split and a denial of custody/visitation to the ex-partner by the legal parent. A presplit intended parentage declaration would make a later judicial inquiry into whether *de facto* parenthood had

been established much easier, as it is very relevant evidence in such an inquiry.

State statutes guiding both VAPs and other voluntary parentage acknowledgements should expressly indicate the purpose or purposes permitted for any acknowledgments. Paternity or parentage acknowledgements can be deemed to establish, *inter alia*, child support responsibilities; childcare opportunities; probate court standing; and, wrongful death standing

VI. CONCLUSION

Though driven initially by concerns in the federal Social Security Act about welfare reimbursements by unwed biological fathers, modern American state voluntary parentage acknowledgment processes are used widely in both parentage establishment and disestablishment contexts in nonwelfare settings, including childcare. State laws should more directly address the role of VAPs outside of welfare reimbursement. Congress should unify the standards on post-sixty-day challenges to VAPs in welfare reimbursement settings.