

DNA and Paternity Testing

Overview: Illinois law for unwed parents isn't covered in the divorce law¹ – there is a separate law that covers cases where the parents never married.² Still in many ways, Illinois law treats unwed parents just like divorcing parents – in other ways, however, the law is applied differently to parents who were never married. If you're an unwed parent facing a custody, visitation, child support, or other issue before the paternity courts, you should work with an attorney who has experience in both arenas – divorce and paternity – to ensure you maximize your results.

Illinois law recognizes that many of today's parents never marry. Although adultery and fornication are still crimes in Illinois, those laws are not enforced and the primary concern of the court is the well-being of the child. Indeed, Illinois law specifically "recognizes the right of every child to the physical, mental, emotional and monetary support of his or her parents... ."³ Those rights extend to kids of unwed parents as well as kids in homes with married, divorce, separated, or adoptive parents.

Parentage (paternity) of a child may be established in one of three ways under Illinois law: by presumption,⁴ by consent,⁵ and by judicial determination.⁶ Each of these three methods of establishing parentage is addressed below.

Establishing Parentage by Presumption: In Illinois, when a married woman gives birth, the husband is presumed to be the father of the child.⁷ This is true even if the marriage is invalid. Likewise, when a child is conceived at a time when the mother is married, the husband at the time of conception is presumed to be the father⁸ – even if the marriage was invalid or is dissolved prior to the birth of the child.

When an unmarried woman gives birth and later marries, the new husband will be presumed to be the child's father if he is named – with his **written** consent – as the child's father on the child's birth certificate.⁹

Finally, a man who, along with the child's mother, voluntarily signs a Voluntary Acknowledgment of Paternity (V.A.P.) will be presumed to be the father of the child.¹⁰ If the mother is married – thereby creating another presumptive father (her husband) -- the husband and wife must sign a Voluntary Denial of Paternity (V.D.P.) and the wife and biological father must sign a Voluntary Acknowledgment of Paternity.¹¹ Unless both the V.A.P. and the V.D.P. are signed, the husband will still be presumed to be the father.

Establishing Parentage by Consent – The Voluntary Acknowledgment of Paternity (V.A.P.): When a child is born the hospital administrative staff, a physician, nurse, or midwife is supposed to present to the parents fill-in-the-blank forms (created by the Illinois Department of Public Aid) that will establish paternity. The law requires medical facilities the birth children to have the forms available. A father's name is not supposed to be put on a child's birth certificate unless both parents sign the form.

The forms carry a warning to the effect that "once you sign this form you will become the legal father of the child for all purposes." The forms warn would-be fathers that they could be on the hook for child support, medical expenses and insurance for the child and that, by signing the form, the "father" waives his right to an attorney, a hearing, and DNA testing. Here's the warning:

NOTICE OF RIGHTS AND RESPONSIBILITIES

1. When the mother and alleged biological father properly sign the Voluntary Acknowledgment of Paternity form and, if required, the husband / ex-husband and mother sign the Voluntary Denial of Paternity form, the alleged biological father becomes the legal father of the child for all purposes. The biological father and / or mother may be ordered to pay child support until the child is at least 18 years old, including retroactive child support from the date of the child's birth, reimbursement of public assistance paid to the custodial parent for the child, medical costs and medical insurance for the child until the child is at least 18 years old.
2. You have the right to an attorney, a hearing and a right to have genetic testing. When the alleged biological father and the mother sign the Voluntary Acknowledgment of Paternity they are waiving those rights. Custody of the child is presumed to be with the mother. The alleged biological father may petition the courts for

custody and visitation rights.

3. You should have a genetic test if you are not sure who is the biological father of the child. If the results of the genetic testing show that the man is the biological father of the child you can sign the Voluntary Acknowledgment of Paternity form and the mother and husband / ex-husband may sign the voluntary Denial of Paternity form.
4. If you want legal advice you should talk to an attorney. If you would like to establish paternity without going to court or need other child support services, you may call the Illinois Department of Public Aid at 1-800-447-4278. Persons using a teletypewriter (TTY) may call 1-800-526-5812.

The V.A.P. forms include court papers (essentially, the same kind an attorney would prepare) and a court order that says who is the father and who is the mother. The forms are to be completed **only if both parents agree**.

If the parents agree and cooperate, the completed forms are processed and – POOF! – just like that, paternity has been established. Custody automatically goes to the mother and in a few weeks or months, the new father can expect to receive court papers compelling him to begin paying child support.

Note that under the V.A.P. procedure, custody automatically goes to the mother (that's not joint custody, that's sole custody goes to the mother automatically). **Issues of joint custody, visitation, child support, payment of medical expenses, etc. are not automatically decided by the V.A.P.**¹² Unmarried parents should not expect the Illinois Department of Public Aid to address these issues. The better course is to **not sign** the V.A.P. and instead go to court and address all issues and process them through the court system. By doing so, they will also have the opportunity to address issues of joint custody, visitation, child support, medical insurance coverage, and other issues.

Rescinding and Challenging a V.A.P.: Once the V.A.P. has been signed, it can quickly become difficult to undo. There are only two ways to undo a V.A.P.: "rescission" and "challenge." Illinois law¹³ says that a V.A.P. may be rescinded, but the time frame for doing so is quite short.¹⁴

A V.A.P. may also be challenged. The only permissible arguments are fraud, duress, or mistake. Again, the challenge must be brought within a very tight time frame.¹⁵ A father who signs a V.A.P. must file his case using a specific part of Illinois law.¹⁶ Failure to refer to the correct part of the law can prove disastrous. Consider the case of Romel Smith:¹⁷ his girlfriend gave birth, lied when she told him he was the father, he signed the V.A.P. and then went off to the military. He later had his doubts as the child bore little resemblance to him. A DNA test later revealed that he was not the father and he immediately filed (on his own – not with an attorney) a court case. Unfortunately, Romel's case didn't refer to the right subsection of Illinois law. Even though he had a DNA test PROVING he was not the father, the court refused to undo the V.A.P. and he's now paying child support for a child that isn't his (he'll keep paying, too, until at least October, 2015). Because poor Romel Smith used the wrong section of the law, in his case, DNA stands for "Does Not Apply."

It has been said that the V.A.P should really be called the "Father Forever Form."¹⁸ This is not true. There are ways to challenge a V.A.P. If you signed a V.A.P. but now think maybe you were lied to or that you're really not the father, call one of our attorneys to discuss how we can help right the wrong. Act quickly – there is a time limit. Delay can only bring disaster.

Establishing Paternity by Judicial Determination: Traditionally, parents of children born out of wedlock go to court to establish a child's paternity and to address matters of custody, child support, and visitation. In cases where unwed parties don't sign the V.A.P. at the hospital, the only way a parent (either a mother or father) can legally establish the identity of the father is by going to court.¹⁹ These types of cases can be filed by just about anyone connected with the child – the mother (even when she's still pregnant – before the child is born)²⁰, a man claiming to be the father²¹ or a man presumed to be the father²², any person who has custody of the child and is financially supporting the child²³, and even the child can file such a suit.²⁴ Papers have to be prepared and filed, the other parent has to have notice of the court case – everything happens very much like in a divorce case. The papers can be filed at any time up to two years after the child attains the age of majority.²⁵

In paternity cases, either parent can demand a DNA test to prove whether the alleged father is really the biological father. In many cases, the state will pay for the testing. In some cases, however, the party demanding the DNA test is required to pay for the testing or the parties may even have to share the cost of the testing. If the father refuses to submit to the test, the court has the power to conclude that he is the father. Be careful, though, because the law

is very technical in this area and failure to follow all of the detailed requirements may invalidate the paternity order.²⁶

Of special importance is the way the papers are delivered to the other parties in the case. Failure to follow the detailed, technical requirements can invalidate a case and make worthless all the work put into it – and can have drastic effects on later things like estate inheritances and liability issues.²⁷

Voluntary Denials of Paternity: Married women sometimes give birth to a child conceived by a man other than their husband. There are also situations where a married woman becomes pregnant by a man outside the marriage while her divorce case is still going through the court system. For example, where a wife had an adulterous affair that led to her giving birth to a child, her husband may want to establish that he is not the father. The wife herself may want to establish that her husband is not the father of the child. In some divorce cases, the wife becomes pregnant by her new boyfriend / fiancé before the divorce is final and wants to make sure that her soon-to-be-former husband will not be involved in raising the new child.

In nearly all of these cases, the husband will want to prove that he is not the father – doing so will relieve him of any possible future liability (if the couple later divorces he won't have to pay child support) and the real father will have to pay support. In each of these cases, however, the husband (or very recent ex-husband) will, under Illinois law, be **presumed** to be the father.²⁸ That's right: when a child is born or conceived at a time when the mother is married, the husband is **presumed** to be the father – and either he or the mother must take legal action in order to avoid a hefty child support obligation, years of co-parenting involvement, and other responsibilities and infringements.

One option – almost never used – is to sign a Voluntary Denial of Paternity form at the hospital when the child is born. It works very much like the V.A.P. (see above): the mother and father sign the form – the Voluntary Denial of Paternity – that says they both agree that the husband is not the father. If either the mother or the father refuse or fail to sign the form, the matter must be brought before a judge. Until that happens, the husband (or recent ex-husband) will be presumed to be the father and will have all the rights and responsibilities (including child support) of parenthood.

Our lawyers recommend that couples – and other parties – finding themselves in these situations forget about the forms at the hospital and instead immediately hire an attorney and go to court to sort things out. If you sign the wrong form, if something goes wrong with the form, if some bureaucrat somewhere misplaces or misfiles the form, you, your former spouse, and the child will all be in for some very difficult and costly years. Remember: you'll be depending solely on the employees and policies of the Illinois Department of Human Services to protect your rights. The minimal amount you may spend on legal representation to know with certainty your rights and obligations will be well worth it.

Proving Non-Paternity: Short of getting the mother to sign a V.D.P., the only recourse alleged father's have is to go to court and prove that they are not, in fact the father. Be sure to work with a good lawyer. Cases where a presumed father denies paternity can result in severe sanctions if not done properly.²⁹

Court-Established Paternity and Proving Paternity: Traditionally, parents of children born out of wedlock go to court to establish a child's paternity and to address matters of custody, child support, and visitation. In cases where unwed parties don't sign the V.A.P. papers at the hospital, the only way a parent (either a mother or father) can legally establish the identity of the father is by going to court.³⁰ These types of cases can be filed by just about anyone connected with the child – the mother (even when she's still pregnant – before the child is born)³¹, a man claiming to be the father³² or a man presumed to be the father³³, any person who has custody of the child and is financially supporting the child³⁴, and even the child can file such a suit.³⁵ Papers have to be prepared and filed, the other parent has to have notice of the court case – everything happens very much like in a divorce case.

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The "Putative Father Registry:" Illinois' Putative Father Registry applies to adoptions and has nothing to do with establishing paternity. In the infamous "Baby Richard Case,"³⁷ an unwed mother lied to the father and told him that the child had died prior to birth. The father, who had been out of the country at the time, returned to America to

discover that, in fact, the mother had given birth and given the child up for adoption. The father sued the adoptive parents to obtain custody of his biological son. The case played out in the media and, eventually, the child was removed from his adoptive parents – the only family he had known – and turned over to the father, a relative stranger, as the news cameras rolled.

Reacting to the tragic scene, Illinois' legislature created the "Putative Father Registry."³⁸ Under the law, a man who claims to be the father, and who wants to protect his rights to a child, must register with a State agency³⁹ at anytime prior to the birth, or within 30 days of a child's birth (there is a way to extend the time limit).⁴⁰ Once he's registered, a "putative father" must be given notice of any adoption and have an opportunity to be heard if he wishes to object to the proposed adoption. If, however, a father fails to properly sign up with the Putative Father Registry, then an adoption can go forward without notifying the father.

An exception may possibly exist if the father's name appears on the birth certificate. Illinois law says that a father's name is only supposed to be placed on the birth certificate if he and the mother sign a VAP.⁴¹ If either parent refuses to sign the VAP, the father's name is not supposed to be put on the birth certificate. In one, odd case⁴² the father's name appeared on the birth certificate, but the VAP was nowhere to be found. To make matters worse, the father failed to register with the Putative Father Registry. The trial court held that, where the father was present at the child's birth and he was listed as the child's father on the birth certificate – even though he (apparently) failed to sign a VAP – there was enough evidence of the mother's acknowledgment that he was, indeed, the father to warrant a fitness hearing before terminating his parental rights to allow an adoption. The mother and biological father had never married, he was present at the birth and signed the birth certificate but either did not sign a VAP or, if he did, it was lost. The mother later married another man and her new husband, the child's step-father, sought to adopt the child. The biological father objected. The trial court allowed the fitness hearing in the paternity case and the adoption was temporarily suspended. The mother and step-father appealed and, as of the latest update of our website, the matter is before the Illinois Supreme Court and we await their decision.

No Connection Between Putative Father Registry and Paternity: A father seeking to establish that he is the parent of a child need not first register with the Putative Father Registry. The law creating the Putative Father Registry is part of Illinois' adoption laws, not the paternity and custody laws.⁴³ In *JSA v. MH*, JSA and MH were attorneys working in the same office from 1993 to 1998. Each was married, though not to each other. They had an affair and she became pregnant. When the baby boy was born (in 1996), MH's husband (WCH) was listed as the father on the birth certificate. In February, 1999, at the request of JSA, the parties took a DNA test and learned that JSA was the father. In September of that year, JSA filed a Petition under the Parentage Act. Shortly thereafter, MH and WCH filed a petition under the Adoption Act. They had a strong case for adoption as WCH was presumed by law to be the child's father because he was married to MH at the time of the birth. JSA, the biological father, objected to the adoption. JSA and WCH succeeded in having JSA dismissed as a party from the adoption action. They also sought to dismiss JSA's paternity case arguing that he failed to register with the Putative Father Registry. They lost that argument but the court agreed that a "best interest" hearing should be had before the paternity case continued and, on that point, the court concluded that it would not be in the best interest of the child to allow a court-authorized DNA test. JSA's paternity case was dismissed. He appealed.

JSA won his appeal. It was wrong for the trial court to conduct a "best interest" hearing before establishing paternity. The paternity case was consolidated into the adoption case. On a second appeal, however, the appellate court ruled that because JSA failed to register with the Putative Father Registry, he was prohibited from intervening in the adoption action and also from even filing a paternity case.

JSA appealed that ruling to the Illinois Supreme Court. The Illinois Supreme Court ruled in favor of the biological father, JSA. The two laws have distinct purposes and they do not overlap. When the legislature passed the Putative Father Registry law, it was augmenting the adoptions laws, not adding additional requirements to the paternity laws. The purpose of the Putative Father Registry law is to ensure that fathers are given notice prior to the adoption of their children. The Putative Father Registry requirements only apply in case where an adoption is pending or likely. In the *JSA v. MH*, they both knew he was the father and they knew how to contact each other (they worked in the same office). The purpose of the paternity laws is to "further the public policy of Illinois to recognize the right of every child to the physical, mental, emotional and monetary support of his or her parents." Neither purpose would be served by denying JSA's efforts to be found to be the father.

Establishing Maternity: In very rare cases, the identity of the mother may be in question. This usually happens when the mother is deceased and a dispute arises over the inheritance of the estate. Illinois law⁴⁴ offers a way for affected parties to conclusively determine whether a particular child is, in fact, the biological offspring of a mother.

Attorneys and Attorneys' Fees: Most people facing court hire an attorney – paternity court is no different. Whether you wish to establish or challenge an initial paternity order, or seek to modify an existing (custody,

visitation, child support, etc.) order, it almost always pays to hire a good lawyer. Paternity court can impact your life for decades to come. Don't risk your future – or your child's future – by trying to go it alone. Talk with the attorneys at our office about your case and how we can help.

Although Illinois paternity law does not specifically permit the court to order one side to pay the other side's attorneys' fees in a paternity case, there have been recent developments in Illinois law⁴⁵ that can be used as a backdoor way to help finance your case. In other words, although not specifically authorized in the law, there is a sort of loophole that says that a party to a parentage case may be able to have the other side pay for all – or at least part of – their attorneys' fees and legal expenses.

Custody, Visitation, Child Support and College Expenses: Issues of custody, visitation, child support and college expenses are determined using the laws and cases as if the parents had been married. Read our other articles on custody, visitation, and child support.

This article was written by the law office of Cowell Taradash, P.C., whose attorneys are familiar with the latest court decisions, recent changes in the law and even the tendencies of many judges. We can help. Contact us at 866.987.6723 or info@illinoisdivorce.com.