1-1-2013

Mulligan v. Corbett: The Court's Power to Decide When Your Child Is Not Yours to Keep

Lisa M. Piccinini

MULLIGAN v. CORBETT: THE COURT'S POWER TO DECIDE WHEN YOUR CHILD IS NOT YOURS TO KEEP

LISA M. PICCININI*

In *Mulligan v. Corbett*,[1] the Court of Appeals of Maryland addressed the issue of whether a man claiming to be the biological father of a child conceived during a wedded woman's separation from her husband could require the child to undergo DNA testing.[2] Although the child was born after the divorce was finalized,[3] the ex-husband, Thomas Mulligan, agreed to act as the child's father and bring her into his household.[4] The court held that William Corbett, the man that claimed to be the child's biological father,[5] must rebut the child's presumed legitimacy[6] before using the Family Law Article to establish paternity.[7] In applying that standard, the court concluded

* J.D. Candidate, 2014, University of Maryland Francis King Carey School of Law. I extend my sincere thanks to Professor Karen Czapanskiy for her critiques and contributions, as well as to Jerri C. Shahverdi for her patience and guidance. I am also grateful to Zachary Shultz, David McAloon, Thomas Kolkin, Glenn Gordon, and all the other editors who lent their time and wisdom to improving this Note. I send a special thanks to Emmanuel Fishelman for always supporting and believing in me, and, most importantly, I thank my family for their invaluable love, support, and friendship.

1. 426 Md. 670, 45 A.3d 243 (2012).

2. *Id.* at 672, 45 A.3d at 244.

3. *Id.*

4. *Id.* at 682, 45 A.3d at 250.

5. *Id.* at 683, 45 A.3d at 250–51.

6. A presumption of legitimacy is established in the Maryland code: "A child born or conceived during a marriage is presumed to be the legitimate child of both spouses." MD. CODE ANN., EST. & TRUSTS § 1-206(a) (LexisNexis 2011).

7. *Mulligan*, 426 Md. at 699–700, 45 A.3d at 260–61. The Family Law Article of the Maryland Code provides, in pertinent part:

> (a) Requests and orders for tests.—(1) The Administration may request the mother, child, and alleged father to submit to blood or genetic tests. (2) If the mother, child, or alleged father fails to comply with the request of the Administration, the Administration may apply to the circuit court for an order that directs the individual to submit to the tests.
>
> (b) In general.—On the motion of the Administration, a party to the proceeding, or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child.

MD. CODE ANN., FAM. LAW § 5-1029 (LexisNexis 2012).

that Corbett's paternity claim did not overcome that presumption.[8] Thus, Corbett had to use the more difficult standard in the Estates and Trusts Article to establish his biological link to the child.[9]

The court correctly recognized that a child is presumed legitimate when conceived during marriage[10] or when a man has established paternity by way of the legitimization section of the Estates and Trusts Article.[11] The court, however, incorrectly interpreted that presumption as barring other men claiming paternity from bringing suit under the Family Law Article.[12] At minimum, the court should have allowed Corbett to challenge the child's paternity under the Family Law Article, ordering blood testing upon a showing of reasonable evidence that he was the child's father.[13] Ideally, instead of requiring a man to overcome the child's presumed legitimacy, the court should have allowed the presumption of legitimacy to stand unless and until it was re-established in another man.[14]

---

8. *Mulligan*, 426 Md. at 699–700, 45 A.3d at 260–61.

9. *Id.* Maryland courts have consistently considered a request for blood testing under the Estates and Trusts Article as a physical examination under Rule 2-423 of the Maryland Rules and required a showing of good cause. MD. R. CIV. P. 2-423 (LexisNexis 2013); *see* Turner v. Whisted, 327 Md. 106, 113, 607 A.2d 935, 939 (1992) ("A motion for blood tests made under the Estates & Trusts Article is best analyzed as a request for a physical examination under Maryland Rule 2-423, and the court has discretion to grant or deny the blood tests."); *see also, e.g.*, Monroe v. Monroe, 329 Md. 758, 767, 621 A.2d 898, 902 (1993) (following *Turner*). When applying the good-cause standard in paternity actions pursuant to the Estates and Trusts Article, courts consider whether blood testing is in the best interests of the child. *See* Ashley v. Mattingly, 176 Md. App. 38, 58–63, 932 A.2d 757, 769–772 (2007) (reviewing Maryland precedent and finding that a court must consider the best interests of the child before ordering genetic testing under the Estates and Trusts Article).

10. *See supra* note 6 and accompanying text.

11. *Mulligan*, 426 Md. at 677, 45 A.3d at 247. The legitimization section of the Estates and Trusts Article provides:

> (a) *Child of his mother.*—A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.
>
> (b) *Child of his father.*—A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
>
> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
>
> (2) Has acknowledged himself, in writing, to be the father;
>
> (3) Has openly and notoriously recognized the child to be his child; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

MD. CODE ANN., EST. & TRUSTS § 1-208.

12. *Mulligan*, 426 Md. at 699–700, 45 A.3d at 260.

13. *See infra* Part IV.B.

14. *See infra* Part IV.C.

I. THE CASE

Amy Mulligan divorced her husband, Thomas Mulligan, in September 2009.[15] Earlier that year, during her separation, Amy Mulligan began dating a man named William Corbett.[16] They almost immediately tried to conceive a child, and Amy Mulligan soon informed Corbett that she was pregnant.[17] In August 2009, Amy Mulligan and her three children moved into Corbett's Pennsylvania home; however, after only a month, Corbett demanded that Amy Mulligan and her children leave his home.[18] Amy Mulligan and her children returned to Maryland and soon after moved in with Thomas Mulligan.[19]

On January 3, 2010, Gracelyn was born.[20] Amy Mulligan called Corbett that evening to tell him of Gracelyn's birth.[21] Corbett came to the hospital the next day, at which time Amy Mulligan asked him to sign the affidavit of parentage for Gracelyn's birth certificate.[22] In response, Corbett asked for a paternity test so he could be "100 percent sure" that he was the father.[23] When Amy Mulligan refused, Corbett left the hospital.[24] Thomas Mulligan told Amy Mulligan to put his name down on the affidavit, saying he "would love to be the baby's father" if Corbett was unwilling to sign the certificate.[25]

On February 3, 2010, Corbett informed Amy Mulligan, through counsel, that he wished to have genetic testing to show Gracelyn's parentage.[26] If the child was his, Corbett wanted to be "legally recognized" as Gracelyn's biological father and to "attain some of the

15. Corbett v. Mulligan, 198 Md. App. 38, 42, 16 A.3d 233, 235 (2011), *vacated sub nom.* Mulligan v. Corbett, 426 Md. 670, 45 A.3d 243 (2012). The complaint for divorce, filed May 6, 2009, stated that the Mulligans had "lived separate and apart" since April 4, 2008. *Id.* at 47, 16 A.3d at 237–38. They had three children together (excluding Gracelyn). *Id.* at 42, 16 A.3d at 234.

16. *Id.* at 42, 48, 16 A.3d at 235, 238.

17. *Id.* at 48, 16 A.3d at 238. The Court of Appeals explained in more detail that the pair "discussed their mutual desire" to have a child and timed their sexual intercourse with Amy Mulligan's menstrual cycle in April 2009. *Mulligan*, 426 Md. at 680, 45 A.3d at 249.

18. *Corbett*, 198 Md. App. at 44, 16 A.3d at 236. Their disagreement stemmed at least partially from financial difficulties and how to discipline the children. *Id.* at 45 n.4, 16 A.3d at 236 n.4.

19. *Mulligan*, 426 Md. at 680, 45 A.3d at 249.

20. *Corbett*, 198 Md. App. at 42, 16 A.3d at 235.

21. *Id.* at 46, 16 A.3d at 237. Amy Mulligan contacted Corbett at Thomas Mulligan's urging. *Id.* at 44, 16 A.3d at 236.

22. *Id.* at 46, 16 A.3d at 237.

23. *Id.* at 48, 16 A.3d at 239 (internal quotation marks omitted).

24. *Id.* at 46, 16 A.3d at 237.

25. Mulligan v. Corbett, 426 Md. 670, 682, 45 A.3d 243, 250 (2012) (internal quotation marks omitted).

26. *Id.*

rights, privileges, and obligations of parenthood."[27] Specifically, Corbett noted that if Gracelyn was his child, he wanted to negotiate a visitation schedule and to establish child support.[28] Amy Mulligan did not respond, and Corbett filed a Complaint for Paternity, Child Support, and Visitation Schedule in the Circuit Court for Frederick County.[29]

Amy Mulligan moved to dismiss Corbett's complaint, maintaining that Gracelyn was the legal child of Thomas Mulligan and thus her paternity was not in dispute.[30] Amy Mulligan reasoned that, under the Estates and Trusts Article, the mother's husband at the time of conception *or* birth is the presumed biological father of the child in question.[31] Because Gracelyn was conceived before Amy Mulligan's divorce was finalized, Thomas Mulligan was the child's presumptive father.[32] In response to Amy Mulligan's motion to dismiss, Corbett clarified that he had the right to obtain DNA testing under the Family Law Article's Paternity subtitle because the child was not born during an "intact" marriage.[33] According to Corbett, Gracelyn was born out of wedlock and subject to mandatory blood testing because she was conceived when the Mulligans had separated and ceased sexual relations and, additionally, because she was born after the divorce was finalized.[34]

The circuit court agreed with Amy Mulligan and found that it was inappropriate to apply the Family Law Article's Paternity subtitle, which is reserved for instances when a child's paternity is "void"; in this case Gracelyn's paternity was not void but instead presumed in Thomas Mulligan.[35] Applying the Estates and Trusts Article, the court

---

27. *Id.* (internal quotation marks omitted).

28. *Id.*

29. *Id.* at 682–83, 45 A.3d at 250.

30. Corbett v. Mulligan, 198 Md. App. 38, 42, 16 A.3d 233, 235 (2011), *vacated sub nom.* Mulligan v. Corbett, 426 Md. 670, 45 A.3d 243 (2012).

31. *Id.* at 52, 16 A.3d at 241.

32. *Id.* Gracelyn was conceived while the Mulligans were married but separated. *Id.* at 59, 16 A.3d at 244. Under the Estates and Trusts Article, the presumption of a child's legitimacy can only be overcome by "sufficient persuasive force." *Id.* at 42–43, 16 A.3d at 235 (internal quotation marks omitted).

33. *Id.* at 43, 16 A.3d at 235.

34. *Id.* Interestingly, Thomas Mulligan had a vasectomy in 2005. *Id.* at 44 n.3, 16 A.3d at 236 n.3. Amy Mulligan testified in her divorce action that she and Thomas Mulligan had not had sexual relations since April 4, 2008. Mulligan, 426 Md. at 680–81, 45 A.3d at 249.

35. *Corbett*, 198 Md. App. at 49, 16 A.3d at 239. The circuit court noted the presumption of Gracelyn's legitimacy was not sufficiently overcome by the testimony of Thomas Mulligan, who acknowledged that he might not be the biological father because he had undergone a vasectomy in 2005. The court also noted the testimony of Amy Mulligan,

took into consideration the best interests of the child before ordering any genetic testing.[36] The court determined that Gracelyn was part of "an intact family" and was "'well cared for, well loved, [and] well nourished'" and, therefore, a paternity test, which could possibly separate her from Thomas Mulligan, was not in her best interests and should not be ordered.[37]

Corbett appealed to the Court of Special Appeals of Maryland.[38] The court reversed the circuit court's decision and remanded for further proceedings, concluding that because Gracelyn was conceived while the Mulligans were legally separated and born when they were divorced, she was born out of wedlock and thus subject to mandatory blood testing under the Family Law Article.[39] The Court of Appeals of Maryland granted certiorari to resolve whether the paternity of a child conceived during marriage but born after divorce should be ruled by the Estates and Trusts Article or the Family Law Article.[40]

II. LEGAL BACKGROUND

Any modern paternity case in Maryland draws from the State's long history of protecting the traditional family unit.[41] This history includes a collection of family laws, focused on legitimizing as many children as possible,[42] and inheritance laws, aimed at simplifying the transfer of estates.[43] Although both family and inheritance laws in Maryland may be used to establish paternity, the former require blood testing when requested by the court or any party, while the latter require blood testing only when it is in the best interests of the

who said "the odds were pretty good this man [Corbett] was the father of [her] daughter." *Mulligan*, 426 Md. at 683–84, 45 A.3d at 251.

36. *Corbett*, 198 Md. App. at 49–50, 16 A.3d at 239.

37. *Id.* at 50, 16 A.3d at 239.

38. *Id.*

39. *Id.* at 60, 16 A.3d at 245.

40. *Mulligan*, 426 Md. at 672, 45 A.3d at 244.

41. *See* Eagan v. Ayd, 313 Md. 265, 268–72, 545 A.2d 55, 56–58 (1988) (discussing the history of Maryland paternity laws and their purpose); *see also infra* Part II.A.

42. "The presumption of legitimacy was a fundamental principle of the [English] common law[,]" adopted in full by the Maryland Declaration of Rights. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (plurality opinion); State v. Canova, 278 Md. 483, 486, 365 A.2d 988, 990 (1976).

43. The purpose of the Estates and Trusts Article is "to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing estates of decedents, and to eliminate any provisions of prior law which are archaic, often meaningless under modern procedure and no longer useful." MD. CODE ANN., EST. & TRUSTS § 1-105 (LexisNexis 2011).

child.[44] In other words, when a case is brought under the Family Law Article, the man challenging or asserting paternity is *always* entitled to blood testing; when a case is viewed under the Estates and Trusts Article, however, the man's request for blood testing is only granted if the court finds that it is in the best interests of the child.[45] Accordingly, the decision to apply the Family Law Article or the Estates and Trusts Article is critical to the outcome of a case. This decision often turns on whether the child was born "out of wedlock."[46]

A. Modern Paternity Case Law Is Built on a Foundation of Family and Inheritance Laws

The history of legal paternity mirrors society's evolving views on gender equality.[47] Historically, the man of the house laid claim over a woman and her children.[48] This concept of ownership was rooted in overt sexism, reflecting society's desire for men to protect and guide the more impressionable female sex, and their children, from immorality and temptation.[49] In addition to the State's interest in preserving the traditional family unit, men had the impetus to recognize their children to insure they could inherit.[50] Historical views of women and children are integral to understanding today's paternity proceedings.

1. Maryland Family Law Reflects the Legislature's Focus on Keeping Families Intact to Avoid Financial Burdens on the State and the Social Implications of One-Parent Families

The Maryland legislature historically sought to prevent the birth of illegitimate children by protecting married mothers and punishing

44. *See infra* Part II.B.

45. *See infra* Part II.B.

46. *See infra* Part II.C.

47. *See* Eagan v. Ayd, 313 Md. 265, 272, 545 A.2d 55, 58 (1988) (noting the pro-male tilt of early paternity laws).

48. *See* Rex v. De Manneville, 5 East 221, 223, 102 Eng. Rep. 1054, 1055 (K.B. 1804) ("[The father] is the person entitled by law to the custody of his child.").

49. For a demonstration of this sexism in practice, see *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) ("Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.").

50. *See* Harris v. Brinkley, 33 Md. App. 508, 514–15, 365 A.2d 304, 309 (1976) (noting that the Estates and Trusts Article protects an illegitimate child's right to inherit if the deceased biological father had openly and notoriously recognized the child as his own during his lifetime).

unmarried mothers.[51] An unwed mother's child was considered an illegitimate "bastard."[52] The woman was shamed for the perceived lack of morality and the financial burden her pregnancy imposed on the state.[53] Accordingly, the state implemented criminal penalties for mothers bearing illegitimate children. The penalties eventually became civil,[54] but the underlying purpose of those laws, and their presumption in favor of legitimacy, remain the basis for Maryland's contemporary paternity and inheritance statutes.[55]

Beginning in 1715, Maryland regulations provided corporal punishment for "[w]omen who have Bastards, and do refuse to discover the Father or Begetter of such Children."[56] In 1781, the corporal punishment aspect of the law was replaced with a requirement that unmarried women post security indemnifying the county from supporting the child, name a putative father to post the security, or face jail time.[57] Over a century later, in 1941, the Maryland legislature amended the Bastardy and Fornication Article of the Maryland Code to incorporate the innovation of blood testing.[58] The amendments granted a putative father the right to order a blood test, precluding his designation as the father in a judicial proceeding.[59] This right was solely for exculpatory purposes, providing relief to men who were not the biological father of a child born to an unwed mother; the

51. To achieve that end, the Maryland legislature made it extremely difficult to disprove the presumed legitimacy of a married woman's child. *See* Scanlon v. Walshe, 81 Md. 118, 133, 31 A. 498, 501 (1895) (referring to the presumption of legitimacy of a married couple's child as a "true rule . . . which the experience of many years and the wisdom of eminent judges have sanctioned"), *overruled in part by* Shelley v. Smith, 249 Md. 619, 241 A.2d 682 (1968).

52. *See* Sweet v. Hamilothoris, 258 P. 652, 655 (Cal. Dist. Ct. App. 1927) (equating references to a "child born out of wedlock," an "illegitimate child," and a "bastard").

53. Eagan v. Ayd, 313 Md. 265, 269, 545 A.2d 55, 56 (1988).

54. *Id.* at 271, 545 A.2d at 57.

55. Tyrone W. v. Danielle R., 129 Md. App. 260, 284, 741 A.2d 553, 566 (1999) ("The legal determination of paternity was, and is, a means to confer upon a child whose biological parents were not married the common law and statutory rights that he would have if his biological parents had been married."), *aff'd sub nom.* Langston v. Riffe, 359 Md. 396, 754 A.2d 369 (2000).

56. The regulation provided for "[w]hipping upon . . . their bare Bodies, till the Blood do appear, [by] so many Stripes not exceeding Thirty nine." *Eagan*, 313 Md. at 268–69, 545 A.2d at 56 (citations omitted) (internal quotation marks omitted).

57. *Id.* at 269, 545 A.2d at 56. "Putative father" means the "'alleged biological father of a child born out of wedlock.'" Stubbs v. Colandrea, 154 Md. App. 673, 683, 841 A.2d 361, 367 (2004) (quoting BLACK'S LAW DICTIONARY 623 (7th ed. 1999)).

58. Lowell R. Bowen, *Blood Tests and Disputed Parentage*, 18 MD. L. REV. 111, 114–15 (1958).

59. *Eagan*, 313 Md. at 269–70, 545 A.2d at 56–57.

amendments did not give mothers comparable access to blood testing when attempting to prove a man's paternity.[60]

Maryland fully replaced criminal penalties with civil penalties in 1963 when it enacted the Paternity Proceedings of the Maryland Code.[61] The State had charged a commission to study the problems surrounding illegitimacy.[62] The commission's report recommended an overhaul of Maryland's law to curtail the effects of illegitimacy on children and the state, as well as to rectify "the apparent pro-male tilt [the statutes] seem to suggest (a slant quite consistent with the early history of paternity laws)."[63] The law began to protect unwed mothers by granting them access to the blood-testing technology putative fathers had been able to use for over forty years.[64] As a result, any party to the proceedings, rather than just the alleged father, could seek court-ordered blood tests to exclude a putative father *or* to confirm fatherhood.[65] Additionally, in response to a federal regulatory scheme to prevent out-of-wedlock pregnancies, the new law also provided that "[n]othing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child."[66]

---

60. *See id.* at 270, 545 A.2d at 57 ("This new addition was patently for the benefit of the defendant."); *see also* Bowen, *supra* note 58, at 120 ("[U]nder the Maryland statute blood tests are available only to the defendant to prove exclusion . . . .").

61. *Eagan*, 313 Md. at 271, 545 A.2d at 57.

62. The study was specifically directed towards examining illegitimacy among welfare recipients, reflecting the public concern about the costs of single-mother households. *Id.* at 272, 545 A.2d at 58.

63. *Id.* The commission claimed this "tilt" was a result of the criminal nature of the proceedings, noting that many fathers had been able to "*escape any responsibility for the maintenance of their illegitimate children*" because of the high standard of proof in criminal cases. *Id.* The legislature sought to address that flaw by replacing the criminal standards with a civil law avenue to establishing paternity. *Id.*

64. This was accomplished through an amendment in 1976 and more significant legislation in 1982. *Id.* at 273, 545 A.2d at 58.

65. *Id.* This change allowed blood tests to be received into evidence if they demonstrated at least a 97.3% probability of the putative father's paternity. *Id.* In 1984, another amendment prohibited the court from using its discretion to reject a qualifying blood test. *Id.*

66. Stubbs v. Colandrea, 154 Md. App. 673, 680, 686–89, 841 A.2d 361, 365, 369 (2004) (internal quotation marks omitted). The Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 conditioned federal funds on state implementation of programs to combat out-of-wedlock pregnancies. *Id.* It required states to give "[p]utative fathers . . . a reasonable opportunity to initiate a paternity action." *Id.* at 686, 841 A.2d at 369 (internal quotation marks omitted). This Act was passed following the 1975 Aid to Families with Dependent Children Program, which conditioned assistance to single mothers and their children upon their cooperation in attempting to identify their children's father. *Id.* at 684–85 n.4, 841 A.2d at 368 n.4.

The new paternity law did not, however, entirely replace the old paternity laws—importantly, it incorporated the historical "'rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception.'"[67] The Paternity Proceedings are now encapsulated in the Family Law Article of the Maryland Code.[68]

2. *Maryland Inheritance Law Simplified How an Unmarried or Non-Biological Father May Establish Paternity*

Paternity law necessarily intersects with inheritance law.[69] For example, when a married woman gives birth, the law presumes her husband is the biological father, and thus the child may inherit property even if the father dies without a will.[70] If, however, a woman is unmarried when she gives birth and no man subsequently establishes paternity, the child is not entitled to receive property upon the intestate death of her biological father.[71] Thus, a child's right to inherit hinges on her legitimacy.

---

67. Mulligan v. Corbett, 426 Md. 670, 677, 45 A.3d 243, 247 (2012) (citation omitted). The presumption of legitimacy also extends, through the legitimization section of the Estates and Trusts Article, to an unwed woman whose children are treated as the legitimate issue of a man. *See* Monroe v. Monroe, 329 Md. 758, 768–69, 621 A.2d 898, 903 (1993) (holding that the unwed mother was not entitled to disestablish paternity of a man who was known to the children as their father).

68. MD. CODE ANN., FAM. LAW §§ 5-1001—1048 (LexisNexis 2012).

69. *See* Taxiera v. Malkus, 320 Md. 471, 481, 578 A.2d 761, 765 (1990) (explaining that because the Paternity subtitle and the Estates and Trusts Article "purport to deal with the same subject matter, they must be construed together").

70. *See* Dep't of Human Res. *ex rel.* Duckworth v. Kamp, 180 Md. App. 166, 196–97, 949 A.2d 43, 61 (2008) (citing § 5-1027 of the Paternity Act), *aff'd sub nom.* Kamp v. Dep't of Human Res., 410 Md. 645 980 A2d 448 (2009). When a married man dies without a will, his wife receives his full estate. If the wife is also deceased, however, the estate is "divided equally among the surviving issue." MD. CODE ANN., EST. & TRUSTS § 3-103 (LexisNexis 2011).

71. This rule draws from common law and has been altered by statutes. In 1849, the Court of Appeals of Maryland explained the then-new statutory construction allowing illegitimate children to inherit:

> By the common law, bastards, having no inheritable blood, are incapable of taking as heir either to the putative father, mother or anyone else . . . . [I]t has always been a prominent object to prevent the mischiefs of illicit intercourse . . . . The infamy of the transgression descended to the child, while the estate of the parent passed over to the more distant kindred . . . . The bastard is still *nullius filius*. The sin of the parent still attaches to the child in this respect; but so far as the Legislature could justly temper the severity of the sentence . . . they have done so. The act of 1786 . . . reserves to the guilty parents the *locus penitentiæ*. By marriage and subsequent adoption of the child, the sin is atoned for . . . and the child to all intents and purposes, is here legitimated.

Miller v. Bd. of Comm'rs of Pub. Sch., 8 Gill 128, 130–31 (Md. 1849).

Inheritance itself is recognized as a sacred legal right.[72] In accordance with that sanctity, Maryland courts have held that the Estates and Trusts Article of the Code is not limited to inheritance matters, but can be used to establish other, "ofttimes inferior" rights such as paternity.[73] In *Dawson v. Eversberg*,[74] for example, the Court of Appeals of Maryland held that a man is not required to adopt children for them to inherit his property; rather, a man can use the various channels in section 1-208 of the Estates and Trusts Article to acknowledge them as his own.[75] The court noted that an acknowledgment of paternity under this Article brings with it all the rights and responsibilities of fatherhood, as if he had been married to the mother when the child was born.[76] This process of legitimization, the court explained, is "less traumatic" and thus more preferable than adoption.[77] Since *Dawson*, the Court of Appeals has repeatedly concluded that any of the four methods in section 1-208 of the Estates and Trusts Article suffice to establish paternity.[78] As such, Maryland

---

Today, a child born to unmarried parents may be legitimized, and thus inherit even in the absence of a written will, by means less drastic than adoption. Namely, a father may legitimize his child simply by recognizing him pursuant to section 1-208 of the Estates and Trusts Article. MD. CODE ANN., EST. & TRUSTS § 3-108.

72. *See* Thomas v. Solis, 263 Md. 536, 542, 283 A.2d 777, 780 (1971) ("[N]o right or privilege in the history of the common law, or in statutory law, is accorded greater sanctity than the right of inheritance."); Pell v. Ball's Ex'rs, 18 S.C. Eq. (1 Rich. Eq.) 361, 377,361, 377 (S.C. 1845) ("At law, a man's inheritance is sacred . . . .").

73. *See Thomas*, 263 Md. at 542, 283 A.2d at 780 (noting "[t]he trend of the courts throughout the country . . . to give a liberal interpretation to legitimation statutes or legislation which seeks to achieve that purpose").

74. 257 Md. 308, 262 A.2d 729 (1970).

75. *Id.* at 313–15, 262 A.2d at 732–33.

76. *See id.* (noting that a declared father would give the children inheritance rights and would be responsible for contributing support). Section 1-208 of the Estates and Trusts Article provides four avenues for establishing paternity: (1) a judicial determination "under the statutes relating to paternity proceedings;" (2) the father "acknowledge[s] himself, in writing to be the father;" (3) the father "openly and notoriously recognize[s] the child, in writing, to be his child;" or (4) the father "subsequently marrie[s] the mother and . . . acknowledge[s] himself, orally or in writing, to be the father." MD. CODE ANN., EST. & TRUSTS § 1-208 (LexisNexis 2011); *Dawson*, 257 Md. at 314, 262 A.2d at 732.

77. *Dawson*, 257 Md. at 314, 262 A.2d at 732.

78. *See, e.g.*, Turner v. Whisted, 327 Md. 106, 112, 607 A.2d 935, 938 (1992) (reiterating that the Estates and Trusts Article is an alternative method to seek blood tests for the purpose of establishing paternity); Taxiera v. Malkus, 320 Md. 471, 479, 578 A.2d 761, 765 (1990) ("That § 1-208(b) of the Estates and Trusts Article is a legitimating statute is clear from our cases."); *Thomas,* 263 Md. at 539, 283 A.2d at 779 (recognizing the legitimacy of children when several elements set forth in the Estates and Trusts Article section 1-208 have been met); Shelley v. Smith, 249 Md. 619, 630, 241 A.2d 682, 688 (1968) ("[W]e see no reason why the child's rights to inherit . . . should in any respect depend on whether . . . paternity was established in a paternity proceeding . . . or in an equity proceeding like the case at bar."), *superseded by statute on other grounds.*

law reflects a consistent preference toward fostering legal relationships between an unmarried woman's child and her father.

B. Unlike Mandatory Blood Testing Under the Family Law Article, Maryland Courts Grant Blood Testing Under the Estates and Trusts Article Only If It Is in the Best Interests of the Child

The Family Law Article and the Estates and Trusts Article prescribe different avenues to legitimize a child. The touchstone of paternity cases in Maryland is *Turner v. Whisted*,[79] in which a likely biological father sought to establish paternity of a child born five months into the mother's marriage to another man.[80] Because the child was born during a marriage, and thus legitimate and exempt from mandatory blood testing under the Family Law Article, the court determined that the plaintiff's only option was to petition for blood testing under the Estates and Trusts Article.[81] If the blood tests showed that the husband was not the father, the plaintiff would have sufficiently rebutted the child's presumptive legitimacy, and he could then employ one of the methods under the Estates and Trusts Article to legitimize the child as his own.[82] The court explained that, whereas it must grant blood tests under the Family Law Article, it treats the request for a blood test under the Estates and Trusts Article as a motion for mental or physical examination under Maryland Rule 2-423.[83] Under that rule, the motion is only granted if there is a showing of "good cause," including a judicial determination of the competing interests at hand.[84] That determination, the *Turner* court ruled, necessitates an inquiry into the best interests of the child to determine whether DNA testing should be granted.[85] *Turner* "remains the controlling precedent for cases . . . where two men . . . acknowledge the paternity of a child born during a marriage."[86]

---

79. 327 Md. 106, 607 A.2d 935 (1992).

80. 327 Md. at 109, 607 A.2d at 936–37.

81. *Id.* at 113, 607 A.2d at 938–39.

82. *Id.* at 112–17, 607 A.2d at 938–940; *see supra* note 76.

83. *See Turner*, 327 Md. at 113, 607 A.2d at 939 (referencing MD. R. 2-423).

84. *Id.* at 114, 607 A.2d at 939.

85. *Id.* at 116–17, 607 A.2d at 940. The court provided the following considerations for determining the best interests of the child: "the stability of the child's current home environment, whether there is an ongoing family unit, and the child's physical, mental and emotional needs"; "the child's past relationship with the putative father"; and "the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history." *Id.*

86. Evans v. Wilson, 382 Md. 614, 636, 856 A.2d 679, 692 (2004); *see also, e.g.*, Ashley v. Mattingly, 176 Md. App. 38, 62, 932 A.2d 757, 772 (2007) (allowing discretion in ordering genetic testing to determine paternity because the child was born during the parties' mar-

It is clear that the article under which an alleged father pursues paternity action can greatly impact the outcome of his case. For example, in *Miles v. Stovall*,[87] the appellant's ex-wife had given birth to a child during their marriage, but the child was conceived prior to their vows.[88] The court noted that the Family Law Article only presumes legitimacy for children *conceived during marriage*, and the child at issue was not.[89] The court turned instead to the Estates and Trusts Article, which holds the same presumption for children *born or conceived during marriage*, and ordered the trial court to consider the best interests of the child before granting blood testing.[90] *Miles* demonstrates how the Family Law and Estates and Trusts Articles serve similar purposes but can lead to different results depending on the mother's marital status. For example, consider the following two scenarios. In the first, a child is born to an unwed woman, and no man voluntarily asserts his paternity. The mother's sole option in terms of establishing paternity is through the mandatory blood testing provision of the Family Law Article. The man will be held responsible for the child only if the blood test proves he is the biological father. In the second scenario, a child is born to a married woman, but by a man other than her husband. The husband's only mode of recourse is to use the Estates and Trusts Article to argue that it would be in the best interests of the child for him to usurp his parental responsibilities in light of the child not being his (which, as *Miles* demonstrates, is an unconvincing argument.[91] In sum, the Family Law Article is a surefire form of relief for an unmarried man who is not the biological father of a child, while the Estates and Trusts Article can be used to keep a non-biological father supporting his wife's children.

riage, despite the possibility the husband was not the natural father). Conversely, where no man claims to be the father of the child, Maryland courts order DNA testing without considering the best interests of the child. *See* Langston v. Riffe, 359 Md. 396, 424–25, 754 A.2d 389, 404–05 (2000) (reviewing the mandatory nature of Family Law Article section 5-1029 as evidenced by the plain language of the statute).

87. 132 Md. App. 71, 750 A.2d 729 (2000).

88. *Id* at 81, 750 A.2d at 735.

89. *Id.*

90. *Id.* at 81–83, 750 A.2d at 735–36.

91. *Id.* at 82–33 & n.5, 750 A.2d at 736 & n.5.

C. Maryland Courts Understand the Term "Born out of Wedlock" as Having Two Definitions That Bear Differently on the State's Policy of Legitimizing as Many Children as Possible

A child born out of *wedlock* is *illegitimate* by law. The two terms, however, are not interchangeable.[92] Legitimacy refers to the relationship between a child and his parents, while wedlock refers to the status of the parents' relationship at the time of the child's birth or conception.[93] Accordingly, a child born illegitimate may later become legitimate; a child born out of wedlock will always have been born out of wedlock.

Legitimacy is a fairly straightforward concept, turning upon only whether the child has a legal father.[94] The term "born out of wedlock" is more ambiguous, as it describes two distinct situations.[95] A child is born out of wedlock when she is "[b]orn to an unmarried female," or "born to a married female but begotten during the continuance of the marriage status by one other than her husband."[96] It is simple to identify a child is born out of wedlock when the mother is unmarried at both conception and birth; it is more difficult to label a child born out of wedlock when the mother is married, because the husband is the presumptive father.

Still, Maryland law characterizes a child in either situation as born out of wedlock and thus subject to the Family Law Article.[97] The Family Law Article protects children covered under the first definition (born to an unmarried mother) by allowing the mother to apply for relief from the putative father.[98] In comparison, the Family Law Article does not add any protection to children falling under the second definition (born to a married mother by a man other than her husband), as those children are already presumed legitimate under

92. The U.S. Court of Appeals for the Fifth Circuit noted this distinction between colloquial and legal terminology, explaining that "[i]n common parlance 'illegitimate child', 'natural child', and 'bastard' are interchangeable terms connoting a child born of wedlock. But the law of Louisiana . . . makes a sharp legal [distinction]" between those classes. Lathan v. Edwards, 121 F.2d 183, 185 (5th Cir. 1941). *Cf.* Henderson v. Henderson, 64 Md. 185, 190–91, 1 A. 72, 74 (1885) (suggesting that the terms "out of wedlock," "illegitimate," and "bastards" are synonymous).

93. BLACK'S LAW DICTIONARY 1731 (9th ed. 2009).

94. *Id.* at 984.

95. BALLENTINE'S LAW DICTIONARY 149, 580 (3d ed. 1969).

96. *Id.* at 149; *see also* Lewis v. Schneider, 890 P.2d 148, 149–50 (Colo. App. 1994) (listing nine jurisdictions that construe the phrase to refer to both circumstances).

97. MD. CODE ANN., FAM. LAW § 5-1002 (LexisNexis 2012).

98. *See* Eagan v. Ayd, 313 Md. 265, 275, 545 A.2d 55, 69 (1988) (noting that the 1963 Paternity Proceedings emphasized "easing the task of holding men responsible for support of their illegitimate children").

common law.[99] Precedent has not clearly determined where a child falls in the scheme of legitimacy when she was conceived by extramarital relations during the mother's separation from her husband.[100]

III. THE COURT'S REASONING

In *Mulligan v. Corbett*, the Court of Appeals of Maryland affirmed the judgment of the circuit court, holding that Gracelyn was presumptively legitimate because she was conceived during Amy Mulligan's marriage to Thomas Mulligan.[101] Based on the determination of legitimacy, the court also upheld the circuit court's decision to apply a best interests analysis under the Estates and Trusts Article to determine whether Corbett's request for blood testing should be granted.[102]

The court explained that although the facts of this case were novel, precedent indicated that the Estates and Trusts Article should govern.[103] After exploring eight cases in depth to determine what factual patterns warrant the use of the Family Law Article instead of the Estates and Trusts Article, the court found that each statutory scheme has a distinct use.[104] Specifically, the court determined that the Pater-

99. Although the Family Law Article covers both children born to an unmarried mother and children born to a married woman but conceived by a man other than her husband, courts have not applied the Article to protect a husband under the second factual scenario. *See, e.g.*, Ashley v. Mattingly, 176 Md. App. 38, 42, 62, 932 A.2d 757, 759, 772 (2007) (noting that even though independent testing showed that the mother's husband was not the child's father, he was not entitled to testing under the Family Law Article because the child was born during the parties' marriage).

100. The United States District Court for the District of Maryland has addressed the issue of divorce as it relates to illegitimacy. *See* Metzger v. S.S. Kirsten Torm, 245 F. Supp. 227, 233–34 (D. Md. 1965) (holding that the mother's children from a previous marriage could not recover from her current husband's death because the divorce did not render them illegitimate, nor did the second marriage render them the legitimate issue of her second husband).

101. Mulligan v. Corbett, 426 Md. 670, 700, 45 A.3d 243, 261 (2012).

102. *Id.*

103. *Id.* at 695, 699–700, 45 A.3d at 258, 260.

104. *Id.* at 686–95, 45 A.3d at 252–58. The cases explored include *Kamp v. Dep't of Human Servs.*, 410 Md. 645, 678, 980 A.2d 448, 461–62 (2009) (holding that the circuit court abused its discretion in ordering DNA testing of a child born during marriage without truly considering the child's best interests); *Langston v. Riffe*, 359 Md. 396, 437, 754 A.2d 389, 411 (2000) (enforcing a putative father's absolute right to blood testing under the Family Law Article to disprove paternity); *Sider v. Sider*, 334 Md. 512, 526–27, 639 A.2d 1076, 1083 (1994) (holding that, although the child's biological father was a man other than the woman's husband at the time of birth, a best interests analysis was appropriate to determine paternity); *Monroe v. Monroe*, 329 Md. 758, 771, 621 A.2d 898, 904 (1993) (describing the policies underlying the Estates and Trusts Article and the Family Law Article as indicating that "[t]he best interest of a child born out of wedlock but subsequently treated as if it were the legitimate issue of the man who married its mother is not necessarily served by

nity Proceedings under the Family Law Article provide a "sword"[105] to unmarried mothers by which they may obtain support from the biological father; they also provide a "shield," protecting putative fathers from paternity determinations when they are not in fact the biological father.[106] Alternatively, the court explained that the Estates and Trusts Article is properly used when a man wants to establish paternity of an illegitimate child.[107] Or, the court further noted, if the child is already legally recognized as one man's child, a different man may petition for genetic testing under the Estates and Trusts Article to rebut the child's legitimacy and to establish paternity in himself.[108] The court emphasized that a petition for genetic testing must take into account the best interests of the child. Thus, the petition may be denied if the child is better served by remaining legitimate under his currently recognized father.[109]

The Court of Appeals rejected the rational of the Court of Special Appeals that Gracelyn was born out of wedlock and thus subject to mandatory blood testing under the Paternity Proceedings if requested by either party. Instead, because Gracelyn was conceived before Amy Mulligan's divorce was finalized, she was born *into* wedlock and was therefore presumed the legitimate child of Thomas Mulligan.[110] This strong presumption, the court concluded, put Gracelyn out of reach of the required DNA testing under the Paternity Proceedings of the Family Law Article.[111] Accordingly, the circuit court was correct in applying the Estates and Trusts Article to Corbett's

---

establishing that that man is not the biological father, without a concomitant establishment of paternity in someone else"); *Turner v. Whisted*, 327 Md. 106, 109, 117, 607 A.2d 935, 936, 940 (1992) (requiring use of the Estates and Trusts Article in the paternity case of a child conceived prior to, but born during, marriage); *Evans v. Wilson*, 382 Md. 614, 633, 856 A.2d 679, 690 (2004) (explaining that a man is not entitled under section 5-1002(c) of the Family Law Article to challenge the paternity of a child born during marriage because he cannot be a putative father if the child is already legitimate); *Ashley v. Mattingly*, 176 Md. App. 38, 62, 932 A.2d 757, 772 (2007) (discussing the necessity of a best interests analysis when a child was born into marriage but conceived prior to the marriage); *Stubbs v. Colandrea*, 154 Md. App 673, 689, 841 A.2d 361, 370 (2004) (reserving the use of the Family Law Article for children "born out of wedlock," rather than born during marriage).

105. *Mulligan*, 426 Md. at 698–99, 45 A.3d at 260.

106. *Id.* at 698, 45 A.3d at 260.

107. *Id.* at 678, 45 A.3d at 248. The majority used the terms "illegitimate" and "out-of-wedlock" interchangeably. *Id.* at 696, 45 A.3d at 258.

108. *Id.* at 699–700, 45 A.3d at 260.

109. *Id.* at 672, 45 A.3d at 244. The court relied on the *Turner-Evans* line of cases to determine the "best interests" of a child. *Id.* at 699, 45 A.3d at 260.

110. *Id.* at 700, 45 A.3d at 261.

111. *Id.* at 699, 45 A.3d at 260.

claim and using a best interests analysis to deny his request for blood testing.[112]

Judge Barbera dissented, with Judge Raker joining, to reject the majority's decision that a child conceived during marriage and born after divorce is not born out of wedlock for the purposes of applying the Family Law Article.[113] The dissent argued that a child may be born to a married mother but still qualify as illegitimate if the child was conceived by a man other than her husband.[114] Accordingly, the dissent argued that the determination to use the Family Law Article or the Estates and Trusts Article depends on an evaluation of the child's legitimacy rather than whether she was born into wedlock.[115]

To support her conclusion, Judge Barbera evaluated the Paternity subtitle, which presumes that "the child is the *legitimate* child of the man to whom its mother was married at the time of conception."[116] The dissent asserted that the majority's treatment of "born into wedlock" and "legitimate" as synonymous makes the Paternity subtitle superfluous because there could never be a case where a child conceived in marriage is also illegitimate.[117] Because the majority's interpretation of "legitimate" would render the Paternity subtitle superfluous, violating principles of statutory construction, the legislative intent behind the Family Law Article must require a different interpretation: Although Gracelyn was born into wedlock, she was not legitimate because the parties agreed she was probably not the biological child of Thomas Mulligan.[118] The dissent concluded that this acknowledgment placed Gracelyn's legitimacy into question and made utilization of the Family Law Article—requiring DNA testing upon request—appropriate without judicial consideration of Gracelyn's best interests.[119] Judge Barbera further suggested that the Estates and Trusts Article is only applicable where the identity of the child's biological father is undisputed, while the Family Law Article is appli-

112. *Id.* at 700, 45 A.3d at 261.

113. *Id.* at 700–01, 45 A.3d at 261 (Barbera, J., dissenting).

114. *Id.* at 706–07, 45 A.3d at 265. Specifically, Judge Barbera posited that "'legitimacy' describes the legal status of the parent-child relationship," while "'born out of wedlock' describes the mother's marital status in relation to the child's biological father at the time of the child's birth." *Id.*

115. *Id.* at 707, 709, 45 A.3d at 265–66.

116. *Id.* at 708–09, 45 A.3d at 265–66 (emphasis added) (citation omitted).

117. *Id.* at 709, 45 A.3d at 266.

118. *Id.* at 716–17, 45 A.3d at 270–71.

119. *Id.* at 714, 45 A.3d at 269.

cable where the biological relationship between the father and child is contested.[120]

IV. ANALYSIS

In *Mulligan v. Corbett*, the Court of Appeals of Maryland held that a child, conceived during marriage but born after divorce, is the legitimate child of the ex-husband, whose paternity may not be challenged by another man unless doing so is in the best interests of the child.[121] The court reasoned that the Family Law Article, which mandates blood testing a child upon the request of any party, including a putative father, does not govern when a child is presumed legitimate unless that presumption is rebutted.[122] The court's decision erred in three ways: it failed to follow the plain language and intent of the Family Law Article;[123] it failed to address paternity cases in which two men assert fatherhood;[124] and, importantly, it did not necessarily result in the best outcome for the child.[125] Furthermore, even if the movant must rebut a presumption of legitimacy to establish paternity under the Family Law Article, the burden on plaintiffs is unreasonable.[126] Finally, a more appropriate rule would recognize that a child's presumed legitimacy stands unless and until it is re-established in another man, therefore allowing a man to bring suit under the Family Law Article without fully rebutting the presumption of legitimacy.[127] Such a rule would subject Gracelyn to mandatory blood testing under the Family Law Article but would preserve her legitimacy as Thomas Mulligan's child *unless* the results showed she was in fact Corbett's child.[128]

A. The Majority Rule Has Several Fatal Flaws

Under the *Mulligan* court's ruling, a man claiming paternity of a child already presumed legitimate may petition for relief only under the Estates and Trusts Article.[129] Under that Article, a man asserting

120. *Id.*
121. *Id.* at 700, 45 A.3d at 261 (majority opinion).
122. *Id.* at 699–700, 45 A.3d at 260.
123. *See infra* Part IV.A.1.
124. *See infra* Part IV.A.2.
125. *See infra* Part IV.A.3.
126. *See infra* Part IV.B.
127. *See infra* Part IV.C.
128. *See infra* Part IV.C.
129. Mulligan v. Corbett, 426 Md. 670, 687, 693, 699–700, 45 A.3d 243, 253, 257, 260–61 (2012).

biological paternity is not granted access to blood testing unless the court determines that such testing is in the best interests of the child.[130] The court's rule is misguided in light of the legislative intent of the Family Law Article, the reality of paternity actions, and the inherent difficulty of best interests analysis.

1. The Majority Rule Did Not Align with the Statutory Intent Underlying the Family Law Article

The majority suggested that a strong presumption of legitimacy is instrumental to keep families intact[131] and hold fathers accountable.[132] In accordance with these policy objectives, after characterizing Gracelyn as "legitimate," the majority employed the Estates and Trusts Article instead of the Family Law Article.[133] That decision led to the court's conclusion that Corbett did not convincingly show that it was in Gracelyn's best interests to order blood testing.[134] The court's focus on Gracelyn's legitimacy, however, ignores the legislative intent behind, and plain language of, the Family Law Article.

The Family Law Article's rebuttable presumption of legitimacy demonstrates the legislature's intent to protect the legitimacy of all children when there is no man actively asserting paternity.[135] It is not meant to apply in lawsuits where multiple men claim paternity. Indeed, the legislative findings included in the statute state that "[n]othing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child."[136] Even the Estates and Trusts Article, which does not expressly propose to protect children but is instead concerned with simplifying estates, notes that all presumptions are rebuttable.[137]

The court ignored the plain language of both statutes in two ways: first, by allowing only men who have rebutted the child's presumption of legitimacy to access mandatory blood testing; and second, by setting an unreasonably high hurdle for rebuttal.[138] Indeed, what more could Corbett have done to rebut Gracelyn's presumption

130. *Id.*

131. *Id.* at 689–90, 45 A.3d at 254–55.

132. *Id.* at 676–77, 45 A.3d at 247.

133. *Id.* at 700, 45 A.3d at 261.

134. *Id.*

135. Any party to a proceeding may order DNA testing under the Family Law Article to establish or disestablish paternity. MD. CODE ANN., FAM. LAW § 5-1029. (LexisNexis 2012).

136. *Id.* § 5-1002.

137. MD. CODE ANN., EST. & TRUSTS § 1-105(b) (LexisNexis 2011).

138. *Mulligan*, 426 Md. at 699–700, 45 A.3d at 260–61.

of legitimacy? The facts supporting rebuttal were multiple: Corbett and Amy Mulligan intentionally tried to get pregnant; Amy Mulligan was not having sexual relations with Thomas Mulligan at the time Gracelyn was conceived; even if they had engaged in sexual intercourse, Thomas Mulligan had undergone a vasectomy years prior; and finally, Amy Mulligan asked Corbett to sign the affidavit of parentage to indicate paternity.[139] The court's decision to uphold Gracelyn's presumption of legitimacy despite the above facts indicates that the presumption is not truly rebuttable.

The court's decision also failed to recognize that the legislature's intent in creating a presumption of legitimacy was to protect women and children in cases unlike the one at hand. In Gracelyn's case, a man actively asserted his paternity.[140] There was no concern that she would end up without a legal father.[141] The court's rule restricting contests of paternity to the Estates and Trusts Article, and then to a high standard for ordering blood tests, fails to promote the general welfare and best interests of children;[142] the best interests of a child are not likely jeopardized in a paternity suit like *Mulligan*.

2. *The Majority Rule Does Not Align with the Reality in* Mulligan *and Many Other Paternity Suits*

The majority rule requiring a man to overcome a strong presumption of legitimacy is unnecessary considering the practical realities surrounding paternity suits.[143] In many paternity suits, the familial integrity, which the legislature aimed to protect with a strong presumption of legitimacy, is already broken.[144] The legal system inherently prevents frivolous suits when a family is intact, or when the child

139. *See supra* Part I.

140. *Mulligan*, 426 Md. at 682–83, 45 A.3d at 250–51.

141. *Id.*

142. MD. CODE ANN., FAM. LAW § 5-1002 (LexisNexis 2012).

143. Namely, the need to protect an existing family unit by a strong presumption of legitimacy is missing in many paternity suits. *See, e.g.*, Sider v. Sider, 334 Md. 512, 518–20, 528–29, 639 A.2d 1076, 1079–80, 1084 (1994) (holding that, where a wife's soon-to-be ex-husband was not the biological father of her child, the trial court erred in attempting to protect the "family integrity" because there was no integrity to protect).

144. *See, e.g.*, Turner v. Whisted, 327 Md. 106, 123 n.2, 607 A.2d 935, 943 n.2 (1991) (Eldridge, J., concurring in part and dissenting in part) ("The majority's concern for the integrity of familial relationships already formed ignores the reality of the present case. . . . It is unclear whether it is possible to protect the 'integrity of the familial relationships already formed,' as it is not evident that any such relationship exists."). Indeed, the traditional family structure, which the statutes aim to protect, may be elusive in "a generation in which traditional families are almost as often the exception as the rule." Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 533 (2000).

is the offspring of the mother's husband, because a man has no incentive to petition for paternity unless he is the likely father. Considering the costs of bringing a paternity suit, it would be a rare occurrence for a suit to be initiated simply to annoy or hassle the legitimate parents of a child.[145] Thus, while the presumptive legitimacy of children born into marriage is important,[146] it should not trigger the majority's near impossible standard.[147]

3. The Majority Rule Does Not Necessarily Create the Best Result for the Child

The court's focus on a strong presumption of legitimacy is not necessarily in the best interests of the child, another primary purpose of the Family Law Article's Paternity Proceedings and a consideration in the application of the Estates and Trusts Article.[148] In *Turner v. Whisted*, the dissent argued against the notion that "people's best interests are served by ignorance of the facts, enforced by a governmental entity."[149] Indeed, just the opposite—people's best interests are *never* served by ignorance—should be the rule.[150] In this case, Gracelyn was denied certainty regarding her biological father's identity.[151] But, it is not within the court's expertise[152] to decide when a child's

145. Even an unmarried biological father may not have much incentive to argue paternity since a determination of paternity triggers child support responsibilities. *See, e.g.*, Petrini v. Petrini, 336 Md. 453, 460–61, 648 A.2d 1016, 1019 (1994) (discussing the mandatory increase in child support payment calculations in the 1990s).

146. Note, *Status of Issue of Void Marriages*, 56 HARV. L. REV. 624, 625 (1943) (explaining that while a strong presumption of legitimacy does "much to alleviate the plight of children born out of lawful wedlock," legislation has effectively solved "the predicament of the illegitimate child without actually legitimating him").

147. Mulligan v. Corbett, 426 Md. 670, 710–11, 45 A.3d 243, 267 (2012) (Barbera, J., dissenting) (explaining the procedure by which a putative father may obtain blood testing).

148. *See* Kamp v. Dep't of Human Servs., 410 Md. 645, 678, 980 A.2d 448, 468 (2009) (noting the necessity of considering the best interests of the child before ordering a blood test).

149. Turner v. Whisted, 327 Md. 106, 124, 607 A.2d 935, 944 (1992) (Eldridge, J., concurring in part and dissenting in part).

150. *See* Stephen J. Betchen, *Why Adoptees Need to Find Their Biological Parents*, PSYCHOL. TODAY (Apr. 3, 2011), http://www.psychologytoday.com/blog/magnetic-partners/201104/why-adoptees-need-find-their-biological-parents (describing one adopted man's "lingering fear that [he] might drop dead at any moment" because of a lack of vital health information from his birth parents).

151. *See Mulligan*, 426 Md. at 719–20, 45 A.3d at 273 (Barbera, J., dissenting) (noting that the evidence presented was sufficient to call into question the identity of Gracelyn's biological father).

152. Even with the evidence presented to a court, its ability to rule on the best interests of the child is limited in these cases, as the truth in paternity suits is often obscure "be-

paternity should be determined through DNA testing or resigned to a presumption.[153] This exercise of "big brother"[154] power is inappropriate considering the court's ability to determine custody and inability to predict the future needs of the child.[155]

While the court's expertise is appropriate in custody considerations, the court should not choose whether to reveal a child's biological father in paternity actions.[156] In Gracelyn's situation, the court cannot be confident that it has ruled in Gracelyn's best interests.[157] First, the stigma attached to illegitimacy is lessening in light of society's changing views on single-parent households.[158] A single mother and her child, even if born out of wedlock, do not face the same stigma they once did. Regardless of society's dislike of single-mother households, they are nonetheless increasing in prevalence.[159] Other

---

cause social pressures create a conspiracy of silence, or worse, induce deliberate falsity." Cortese v. Cortese, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950).

153. Professor Dolgin explained this problem as follows:

> [A] number of . . . cases . . . "represent the willingness of courts to predicate particular familial relationships on a judge's sense of what . . . *should have been*, and in doing that, to contravene, or simply to ignore, apparent facts about both biology and behavior. In such cases, the law strives to sustain a traditional image of family, but in doing that, relies on a presumption that can be conclusively disproved by accurate paternity testing."

Dolgin, *supra* note 144, at 531.

154. Turner, 327 Md. at 126, 607 A.2d at 945 (Eldridge, J., concurring in part and dissenting in part).

155. *Id.*

156. For a helpful discussion of the "'right to know one's biological origins'" argument in Canada, see Timothy Caulfield, *Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing*, 26 QUEEN'S L.J. 67, 75–76 (2000) (discussing a cultural phenomenon of perceiving genetics as an important concept of human relations).

157. *See* Mulligan v. Corbett, 426 Md. 670, 714–16, 45 A.3d 243, 269–70 (2012) (Barbera, J., dissenting) (criticizing the arbitrary nature of the procedure established by the majority).

158. *See* Weidenbacher v. Duclos, 661 A.2d 988, 997 (Conn. 1995) (noting that "[t]he social stigma of being branded illegitimate, if indeed it remains at all, no longer carries the same sting that it once did"); Mary R. Anderlik & Mark A. Rothstein, *DNA Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 223–24 (2002) (discussing the historical legal difficulties of illegitimate children and how the law has changed in recent decades); *see also* Heidi Hildebrand, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L.J. 515, 522–23 (2000) (explaining that with the 1970s came a decreased social stigma for single mothers and an increase in "adult adoptees . . . asserting their right to know the truth about their origins").

159. In 2011, seven out of ten Americans, in a survey conducted by Pew Research Center, said that "single women raising a child without the benefit of a male partner was bad for society." Amy Lee, *Single Mothers 'Bad for Society,' Pew Research Center's Latest Poll Finds*, HUFFINGTON POST (Feb. 21, 2011, 3:19 AM), http://www.huffingtonpost.com/2011/02/21/single-mothers-bad-for-so_n_825446.html. The report indicated Americans prefer double-parent households, regardless of the parents' sex, to single-mother homes. *Id.*

non-traditional families are similarly growing in numbers: many men are single parents,[160] and same-sex couples now have the right to marry in Maryland.[161] Many children also maintain relationships with father figures who are not their biological fathers, including stepparents.[162] While financial support for children is still important,[163] the idea that a child must be raised by a married mother or face social stigmatization[164] is no longer the case.[165] The court's focus on protecting the presumption of legitimacy, even when it may not reflect biological fatherhood, is rapidly becoming outdated.

Second, health reasons make it important for Gracelyn to understand her true genealogy.[166] For example, if she needed a bone marrow or kidney transplant, her doctors would look first to blood relatives for potential donors.[167] The court has no divine ability to discern

160. *See* James Bock, *'Traditional' Family Is Fading in Maryland: Two Working Parents Have Become the Norm, Study Finds*, BALT. SUN (Oct. 19, 1992), http://articles.baltimoresun.com/1992-10-19/news/1992293111_1_maryland-children-working-parents-maryland-children (noting that fewer Maryland children live in a home with both parents than ever before); *see also* Yeganeh June Torbati, *Rise in Single Fathers Defies Historic Trend*, BALT. SUN (May 30, 2011), http://articles.baltimoresun.com/2011-05-30/news/bs-md-census-single-fathers-20110530_1_single-fathers-single-dads-single-mothers (noting the rising number of single-father households).

161. In 2010, same-sex couples were raising nearly 5,088 children in Maryland. *Extending Marriage to Same-Sex Couples in Maryland Will Have Positive Effects for 12,500 Couples Raising over 5,000 Children*, WILLIAMS INST. (Feb. 10, 2012), http://williamsinstitute.law.ucla.edu/press/press-release/extending-marriage-same-sex-couples-maryland-feb-2012/.

162. *Cf.* Sandra L. Hofferth & Kermyt G. Anderson, *Biological and Stepfather Investment in Children,* POPULATION STUD. CTR. AT THE INST. FOR SOC. RES., UNIV. OF MICH., 5 (Mar. 8, 2001), http://www.psc.isr.umich.edu/pubs/pdf/rr01-471.pdf (examining the relative level of investment by cohabitating step fathers and father figures).

163. *Cf.* Mark Mather, *U.S. Children in Single-Mother Families,* POPULATION REFERENCE BUREAU 1 (May 2010), http://www.prb.org/pdf10/single-motherfamilies.pdf (stating that in 2010, seven out of ten children living with a single mother were poor or low- income).

164. *See* JOHN WITTE, THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 3 (2009) (explaining the historical stigma and legal problems of illegitimate children).

165. *See* Torbati, *supra* note 160 ("'There's been a slow shift in the way that men view their roles as father, the way that women view men's role as father, and the opportunities for women in the workplace.'"); *see also* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 596 (2000) ("[C]ourts have found that the social stigma and legal disabilities of illegitimacy have diminished dramatically . . . .").

166. The concept of identifying one's "genetic family" for purposes of identifying genetic diseases and propensities has gained traction in recent years. *See* Dolgin, *supra* note 143, at 543 (2000) (acknowledging the growing recognition of the concept of "genetic family," particularly in medical texts).

167. *See* Erica Liepmann & Terry Liepmann, *A Mother-Daughter Donation: How Sharing a Kidney Saved Our Family,* HUFFINGTON POST (Apr. 5, 2011), http://www.huffingtonpost.com/erica-liepmann/mother-daughter-donation_b_844687.html ("Typically, relatives

when a child will suffer from a medical condition where knowledge of her genetic history is paramount. Faced with the impossibility of predicting the future, the court should have heeded Judge Eldridge's warning in *Turner*[168] and given Gracelyn the most valuable paternity information of all—the truth. The outcome of the blood test, and its revelation of the truth, would not necessarily preclude Gracelyn from retaining her current relationship with Thomas Mulligan, and the court would still consider her best interests in determining custody.[169]

Finally, and most importantly, who is to say what Gracelyn wants?[170] Would an adult Gracelyn agree with the court's assessment of her best interests?[171] It is impossible to say, and that is the point. In light of the uncertainty inherent in determining a child's best inter-

---

have the best shot at being a match, it's very rare for biological strangers to be compatible.").

168. *See* Turner v. Whisted, 327 Md. 106, 126, 607 A.2d 935, 945 (1992) (Eldridge, J., concurring in part and dissenting in part) (warning against the "'big brother' approach" of considering the best-interests standard in all cases where a father challenges another man's paternity).

169. *See id.* ("[T]he majority's concern over the consequences [of admitting blood test results] is overstated. The admission of the blood test results would do no more than establish the true paternity of the child. The best interests standard would still control the determination of visitation and custody."). After all, "establishing paternity is not a necessary factor to be considered when addressing the issue of custody," Monroe v. Monroe, 329 Md. 758, 767, 621 A.2d 898, 902 (1993), and thus Thomas Mulligan could ultimately get custody of Gracelyn, even if the test results reveal Corbett to be her biological father. It is important to note, however, that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." *Turner*, 327 Md. at 115, 607 A.2d at 940 (quoting Michael H. v. Gerald D., 491 U.S. 110, 142–43 (1989) (Brennan, J., dissenting)). "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Id.* (quoting *Michael.*, 491 U.S. at 142–43) (Brennan, J., dissenting)).

170. *See* Jennifer Ludden, *Donor-Conceived Children Seek Missing Identities*, NPR (Sept. 18, 2011, 4:01 AM), http://www.npr.org12011/09/18/140477014/donor-conceived-children-seek-missing-identies. Ludden described how one woman conceived from a sperm donation sees hypocrisy when adults determine the best interests of a child: "Couples use donor sperm or egg because they very much want at least some biological connection to their child. And yet . . . by using anonymous donors they cut off that child's other links." *Id.*

171. Research on the desire to find biological parents is lacking in cases where a child's parents are presumed her biological family. Research is available, however, in cases where children know they have been adopted. Lee H. Campbell et al., *Reunions Between Adoptees and Birth Parents: The Adoptee's Experience*, 36 SOC. WORK 329, 329 (1991). In those cases, it appears that more women than men search to find their biological parents, and that those who searched for their biological parents generally knew little about their birth parents and engaged in the search to fulfill "a need to know about their birth origins." *Id.* Sixty-five percent of adoptive respondents in one study indicated they had reached out to their birth parents because they wanted information, such as medical history. *Id.* at 332.

ests, the court should have allowed Corbett to utilize the Family Law Article and order blood testing.

B. Even If a Man Must Rebut a Child's Presumption of Legitimacy, the Majority Should Have Accepted Less Evidence to Overcome That Hurdle

The majority's application of the law makes it nearly impossible to rebut the presumption of paternity, as shown by the amount of evidence pointing to Corbett as the biological father of Gracelyn.[172] For reasons discussed in Part IV.C, a man should not should not be required to overcome a presumption of legitimacy before employing the Family Law Article. Still, if a man must overcome this burden, he should be able to overcome the child's presumption of legitimacy with a showing of any reasonable evidence that he is the biological father.[173]

A lower burden of proof to overcome a presumption of legitimacy is in line with the statutory intent of protecting children's interests, reflects the low likelihood of superficial paternity suits, and avoids the problem of "big brother" decisions shielding children from the truth.[174] A simple showing of any reasonable evidence that the movant is the biological father should trigger the Family Law Article.[175] Under a reasonable evidence standard the plaintiff must demonstrate a real possibility of fatherhood by offering, for example, intimacy, proof of extra-marital dating, or the husband's infertility.[176]

A more easily rebuttable presumption would truly reflect the legislature's concern for child welfare by revealing additional possible sources of emotional and financial care. As discussed above, a man is unlikely to bring suit challenging the child's presumed legitimacy unless he truly believes he is the father.[177] In the rare case a man knows he is not the father but still wants a DNA test, this standard would at least require a showing that his paternity is possible.[178] This standard would also remedy the majority's overly strong presumption of legiti-

---

172. *See* Mulligan v. Corbett, 426 Md. 670, 719, 45 A.3d 243, 272 (2012) (Barbera, J., dissenting) (discussing the various pieces of evidence).

173. In this case, there was more than sufficient evidence to overcome the presumption. *See id.*

174. *See* Turner v. Whisted, 327 Md. 106, 126, 607 A.2d 935, 945 (1992) (Eldridge, J., concurring in part and dissenting in part).

175. *Id.*

176. *Mulligan*, 426 Md. at 719–20, 45 A.3d at 273 (Barbera, J., dissenting) (noting that the evidence presented was sufficient to call Gracelyn's paternity into question).

177. *See supra* note 145 and accompanying text.

178. *See supra* note 146–147 and accompanying text.

macy by increasing the chance that the truth regarding a child's paternity will be revealed.

Applying the lower standard to the case at bar, Corbett's and Amy Mulligan's sexual relationship, combined with Thomas Mulligan's infertility, suffices as reasonable evidence that Corbett is Gracelyn's father.[179] Thus, the court should have granted genetic testing to determine her paternity. As it appears almost certain that genetic testing would establish Corbett as Gracelyn's biological father,[180] he would then be required to pay child support and allowed to establish a visitation schedule.[181] The Mulligans may very well remain living together, as they are engaged to be married again, and thus Thomas Mulligan's status as a father figure to Gracelyn would not necessarily be altered by the paternity determination.[182]

C. A Better Rule Than the Majority's Is One That Allows a Man to Utilize the Family Law Article Without First Rebutting a Child's Legitimacy

The court should have used the Family Law Article to retain a child's presumed legitimacy unless and until that legitimacy is fully rebutted *and* re-established in someone else by determinative methods such as blood testing.[183] A claimant should not have to rebut a child's presumption of legitimacy prior to attempting to re-establish it in another man.[184] For purposes of this Note, this rule is referred to as the "rebut and re-establish" rule.

The *Mulligan* court found that a claimant must rebut the presumption of legitimacy before invoking the Family Law Article because the Article applies to children born out of wedlock.[185] The

179. *Mulligan*, 426 Md. at 719, 45 A.3d at 272 (Barbera, J., dissenting) (weighing the facts of the case and concluding that there was sufficient evidence to prove that Corbett was Gracelyn's putative father and to support a paternity action).

180. *Id.* at 716, 45 A.3d at 270.

181. *Id.* at 677, 45 A.3d at 247.

182. Thomas Mulligan's rights would simply be more akin to the rights of a stepparent. *See* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 365 (1998) (noting the best interests standard used to determine custody rights for step parents in Maryland and Florida).

183. *Mulligan*, 426 Md. at 712, 45 A.3d at 268 (Barbera, J., dissenting). The purpose referred to is, generally, protecting the legitimacy of children to ameliorate the effects of single-parent children on both the children themselves and the state.

184. *See, e.g.*, Monroe v. Monroe, 329 Md. 758, 776–77, 621 A.2d 898, 906–07 (1993) (demonstrating the court's desire to presume legitimacy by holding that the unwed mother was not entitled to disestablish paternity of a man who was known to the children as their father).

185. *Mulligan*, 426 Md. at 699–700, 45 A.3d at 260–61 (majority opinion).

court acknowledged that it treated the terms "illegitimate" and "out of wedlock" interchangeably.[186] The Maryland legislature, however, does not define these terms as equal. While many courts may treat the words synonymously,[187] a rebuttable presumption of legitimacy for a child born into wedlock suggests that the terms are in fact distinguishable. Otherwise, as the dissent noted, the presumption would be superfluous.[188] The court's decision thus improperly assumed that because children born into wedlock are presumed legitimate, the children born out of wedlock are illegitimate, and therefore only the paternity of illegitimate children may be contested under the Family Law Article.[189]

The court should have recognized that a man need not delegitimize a child before asserting paternity under the Family Law Article.[190] The Article should be understood to preserve a child's presumed legitimacy at all times unless and until it is re-established in another man.[191] This "rebut and re-establish" rule protects the child from an ultimate finding that she is not the genetic child of either the husband or the challenger; she retains her legitimacy as the child of her mother's husband unless the challenger proves his paternity.[192] In other words, even if the child is not the *genetic* child of either the husband or the challenger, she is still considered the *legitimate* child of the mother's husband from whom financial support can be ordered.[193]

---

186. *Id.* at 696, 45 A.3d at 258.

187. *See, e.g.*, J.A.S. v. Bushelman, 342 S.W.3d 850, 864 (Ky. 2011) (reviewing bastardy and paternity statutes to determine that in legal parlance, "child born out of wedlock," "bastard child," and "illegitimate child" all mean the same thing). *But see* D.C. CODE § 16-907(b) (2012) (stating that "'born out of wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were not married to each other").

188. *See Mulligan*, 426 Md. at 709, 45 A.3d at 266 (Barbera, J., dissenting) (explaining that if, "as the Majority has decided, a child 'born out of wedlock' is 'illegitimate' and therefore, has no presumed father," a claim could never arise under the Paternity Article, the statutory scheme used to establish the paternity of children "born out of wedlock"); *see also* Daniel v. Daniel, 681 So. 2d 849, 852 (Fla. Dist. Ct. App. 1996) ("Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts.").

189. *See* Evans v. Wilson, 382 Md. 614, 646 n.4, 856 A.2d 679, 698 n.4 (Raker, J., dissenting) (arguing that the legitimacy of a child born out of wedlock could be established by proving the paternity of her biological father or retaining the presumption of legitimacy under her mother's husband).

190. *See Mulligan*, 426 Md. at 712, 45 A.3d at 268 (Barbera, J., dissenting) (noting that presumed legitimacy is not necessarily rebutted by a divorce or by a putative father's filing of a complaint to establish paternity).

191. *Id.*

192. *Id.*

193. *Id.*

The "rebut and re-establish" rule follows the intent of the legislature in enacting both the Family Law Article and the Estates and Trusts Article by preserving a child's presumed legitimacy.[194] The preservation of legitimacy unless and until fully rebutted also reflects the reality of paternity suits by giving biological fathers a real opportunity to assert paternity.[195] It is a fairer rule than the one endorsed by the majority because it prevents a man from using the Estates and Trusts Article to beat another man in a race for paternity.[196] Although it may not have been Thomas Mulligan's intention, the practical effect of the majority's holding was to allow him to assert paternity over Gracelyn by virtue of his relatively early willingness to accept that designation. Corbett, and other men desiring genetic testing, should not be forced to decide between testing and the opportunity to be named father simply because another man is willing to claim paternity without testing. The majority rule resulted in just that: Thomas Mulligan was in the right place at the right time, and unlike Corbett, he did not mind if Gracelyn was not his biological daughter.[197] This willingness to act as father,[198] though admirable, should not trump a man who is also willing to raise a child, but first requires a paternity determination.[199] Fairness demands that such a man have a chance to establish paternity,[200] particularly where the child's mother admits that he is the likely father.[201] Finally, as explored earlier, a child's best interests cannot definitively be served by preventing blood testing.[202] Allowing a party access to blood testing to reveal the true biological father of a child would prevent "big brother" action by the courts.

194. Specifically, the Family Law Article's purpose is "to promote the general welfare and best interests of children . . . ." MD. CODE ANN., FAM. LAW § 5-1002 (LexisNexis 2012). The purpose of the Estates and Trusts Article is "to simplify the administration of estates . . . ." MD. CODE ANN., EST. & TRUSTS § 1-105 (LexisNexis 2011).

195. *See Mulligan*, 426 Md. at 712, 45 A.3d at 268 (Barbera, J., dissenting) (suggesting that an alleged biological father should be able to use genetic testing to help rebut the presumption of legitimacy).

196. *Cf.* MD. CODE ANN., EST. & TRUSTS § 1-208 (allowing four ways for a father who is not married to the mother to establish paternity).

197. *Mulligan*, 426 Md. at 681–82, 45 A.3d at 249–50 (majority opinion).

198. The term "father" here refers to the act of raising a child. Thomas Mulligan never maintained that he is Gracelyn's biological father. *Id.* at 716, 45 A.3d at 271 (Barbera, J., dissenting).

199. *Id.* at 682, 45 A.3d at 250 (majority opinion).

200. Corbett asserted his desire to be Gracelyn's father just twelve days after she was born. *Id.*

201. *Id.* at 684, 45 A.3d at 251.

202. *See supra* Part IV.A.3; *see also* Turner v. Whisted, 327 Md. 106, 126, 607 A.2d 935, 945 (1992) (Eldridge, J., concurring in part and dissenting in part) (warning against the "big brother" approach of considering the best interests standard in all cases where a father challenges another man's paternity).

The *Mulligan* court's application of the law is not completely misplaced: arguably, there are several advantages to its rule, but those advantages remain under the rule this Note suggests. First, by making it difficult for a man to assert paternity, the court protects a child from the risks of custodial insecurity.[203] If it is difficult for a man to bring suit to claim a child, and even harder for him to win, the child will remain with one father rather than experience the potentially traumatic effect of being wrenched between two fathers.[204] In *Mulligan*, however, litigation began when Gracelyn was an infant.[205] Thus, she will not remember this contest. It is true, however, that providing easier access to the Family Law Article could risk custodial insecurity during a much more memorable part of a child's life, perhaps after the child has established a bond with another father figure.[206] To avoid custodial insecurity, any use of the Family Law Article in circumstances similar to Gracelyn's case should be subject to a short statute of limitations.[207] This would protect the child emotionally by preventing suits after a certain early point in the child's life.

A second advantage of the majority decision is that it gives substantial power to the birth mother to recognize the man she would like to raise her child, bringing with that recognition the legal rights of paternity.[208] The idea that a mother knows best for her child, however, reflects an outdated view of families that does not have a place in modern paternity proceedings.[209] It is unfair for the court to continue

---

203. *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 762 (1999) (discussing custodial insecurity as it relates to biological fathers and the adoption process); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 256–57 (2006) (describing the impact of parental instability on children).

204. *Cf.* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 596 (2000) (noting that many courts recognize how a father's abandonment of his child can have a "devastating" impact).

205. *See Mulligan*, 426 Md. at 681–82, 45 A.3d at 249–50 (recognizing that Corbett's attempt to establish paternity began less than two weeks after Gracelyn's birth).

206. In some cases, husbands become suspicious that their wife's child is not theirs years after a child's birth. *See, e.g.*, Dep't of Human Res. *ex rel.* Duckworth v. Kamp, 180 Md. App. 166, 197, 949 A.2d 43, 61 (2008) (noting that a husband sought to stop child support twelve years after the child was born and raised as his own based upon suspicion that the child was not his), *aff'd sub nom.* Kamp v. Dep't of Human Servs., 410 Md. 645, 980 A2d 448 (2009).

207. *Cf.* Glennon, *supra* note 204, at 576, 596 (exploring state laws where "[t]iming . . . affect[s] the right of an alleged biological father to assert paternity").

208. Mary Kay Kisthardt, *Of Fatherhood, Famlies and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 595–96 (1991) (exploring why custody disputes historically tilted in favor of mothers).

209. Joan B. Kelley, *The Determination of Child Custody*, 4 FUTURE CHILD. 121, 122 (1994) (describing how the maternal presumption for custody changed in the mid-1970s as a re-

recognizing the decision-making powers of a mother as entirely superior to those of a father.[210] Even so, the substantial tilt of power towards mothers does not completely disappear with the "rebut and re-establish" rule. Before the statute of limitations expires, the mother has the choice whether to contact the biological father and inform him of the pregnancy. After the statute of limitations runs, the child is insulated from any man's attempt at establishing paternity.[211] The "rebut and re-establish" rule admittedly, and purposefully, does not extend as much decision-making power to the mother as does the majority decision. True equality of the sexes demands neither the mother nor the father, as a result of their sex alone, have complete and unilateral control over an aspect of their child's life as fundamental as paternity.[212]

Overall, the Family Law Article is the more appropriate and equitable article by which to resolve competing claims of paternity because it considers biological factors prior to consideration of the child's best interests.[213] Ultimately, the child may retain whatever "modern family"[214] evolves from her daily atmosphere and support system; the child does not need the court to shield her from the truth of her biological heritage.[215] The court should have endorsed a rule allowing the suit to be heard under the Family Law Article while preserving Gracelyn's

---

sult of "fathers' claims of sex discrimination in custody decisions, constitutional concerns for equal protection, the feminist movement, and the entry of large numbers of women into the workforce").

210. In this case, Corbett was adamant about wanting to be involved with Gracelyn. *See* Corbett v. Mulligan, 198 Md. App. 38, 45 n.5, 16 A.3d 233, 236 n.5 (2011) (citing an e-mail from Corbett to Amy Mulligan, reading "I did nothing wrong and should not have to suffer not knowing about my child!!"), *vacated sub nom.* Mulligan v. Corbett, 426 Md. 670, 45 A.3d 243 (2012).

211. *See* Michael H. v. Gerald D., 491 U.S. 110, 115 (1989) (plurality opinion) (involving a two-year California statute of limitations for suits rebutting presumptions of paternity).

212. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 129 (2004) (noting the paradox of the requirement that a father establish something more than mere financial support to establish himself as a parent when the "opportunity to develop a relationship with his child" has been purposefully "thwarted").

213. *See* Dolgin, *supra* note 144, at 543 ("[S]ociety can safeguard traditional families *or* modern families . . . as units of love grounded in loyalty and solidary commitment.").

214. Professor Dolgin characterized a modern family as a family of choice. *Id.*

215. *See* Lisa Belkin, *I Found My Mom Through Facebook*, N.Y. TIMES, June 26, 2011, at ST1, *available at* http://www.nytimes.com/2011/06/26/fashion/i-found-my-birth-mother-through-facebook.html?pagewanted=all&_r=0 (discussing the modern reality that parents who adopted have less control over contact between birth mothers and adopted children); Hoffman & Anderson, *supra* note 162, at 11–13 (discussing some of the benefits of a child's contact with her biological father).

legitimacy unless and until it was rebutted and re-established in Corbett.

V. CONCLUSION

In light of the legislation and the reality of paternity cases, the *Mulligan* court should have decided the case differently. The court's requirement that a man overcome a presumption of legitimacy to question a child's biological paternity misses the mark in addressing the legislature's concerns about protecting a child's legitimacy, fails to reflect the reality of paternity actions, and does not necessarily benefit the child at the heart of the suit.[216] The court should have only required a reasonable standard of evidence to overcome Gracelyn's presumed legitimacy and allowed Corbett to use the Family Law Article.[217] Alternatively, and preferably, the court should have allowed Corbett to challenge Gracelyn's paternity without disturbing her presumed legitimacy via a "rebut and re-establish" rule.[218] Instead, the court's decision resulted in a child left in the dark as to the identity of her true biological father, and a man left without any hope of raising a child who is, in all likelihood, his daughter.

216. *See supra* Part IV.A.
217. *See supra* Part IV.B.
218. *See supra* Part IV.C.