

Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process

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Across the country, state legislatures have created out-of-court, form-based processes that replace the adjudicative process in traditional courts. In the family law context, these out-of-court forms allocate fundamental parental rights, principally for unmarried and single parents, who disproportionately have low incomes and are people of color. In most states, instead of presenting their requests to a judge in a courtroom, parents can sign legal forms in a hospital room to establish paternity or at their kitchen table to assign their custodial rights to a third party. When a child is born to an unmarried mother, as 40% of children are, the man in a different-sex couple can sign a voluntary acknowledgement of paternity form (VAP) to establish that he is the child's father. When a single parent experiences a destabilizing life event, such as eviction or incarceration, the parent can delegate parental rights to a non-parent by executing a custodial power of attorney form. And when a single parent suffers from a debilitating illness, the parent can sign a form to designate a standby guardian to take care of the child when the parent is no longer able to fulfill caretaking duties. In each context, there is no court filing, no judge, no lawyer, and no courtroom. Signatures on a form carry the same weight as adjudication in court, conferring the legal right and responsibility to care for a child on an individual.

This Article calls these out-of-court, form-based processes “paper courts,” and argues that, in the family law context, they play a critical but unappreciated role in determining parental rights. While paper courts can be a welcome addition to family law—increasing access to justice and parental agency—paper courts also raise serious concerns about informed consent and procedural due process. This Article discusses the challenges of balancing the often-competing interests in access, agency, and due process in the designation of parental rights in paper courts. To balance these concerns, this Article proposes solutions that strengthen informed consent and procedural due process protections while preserving accessibility and parental agency.

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Much of family law scholarship addresses the allocation of parental rights in the context of court procedures and court-adjacent processes such as settlement negotiations and mediation. But this scholarship overlooks the form-based processes taking place completely out of court that structure the lives of families with the same legal authority as adjudication in court. By surfacing and analyzing this practice, this Article fills a significant gap in the account of family law and makes both a descriptive and normative contribution to the family law literature.

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INTRODUCTION

A putative father stands in a hospital room holding a voluntary acknowledgment of paternity form. A single mother facing eviction sits at her kitchen table reading a custodial power of attorney form. A single mother with a debilitating chronic illness lies in her bed while signing a form to designate a standby guardian for her child. Each person is in court—a paper court. There is no court filing, no judge, no lawyer, and no courtroom. Each person’s signature on a form will establish or assign parental rights, with the same legal weight as a final court order.

Across the country, state legislatures have created out-of-court, form-based processes that replace adjudication in court proceedings. This Article calls these processes “paper courts.” Although paper courts can exist in any area of the law, this Article focuses on the proliferation of paper courts in the family law context, namely use of the voluntary acknowledgment of paternity (VAP), custodial power of attorney, and standby guardianship designation.

Legal scholarship draws a dichotomy between private ordering and adjudication in court.¹ Paper courts exist as a hybrid, similar to but distinct from these categories. Private ordering involves regulation by private actors, rather than public actors, that the state enforces.² In the family law context, private ordering occurs when “the parties set the terms of their relationship rather than the terms being set by the government (or some other external source).”³ Like private ordering and in contrast to court adjudication, paper courts allow participants to chart their own course about significant legal matters such as the allocation of parental rights. Rather than resolving disputes like traditional courts, paper courts document, ratify, and legitimize the consent of signatories of forms. Conversely, similar to court adjudication but unlike private ordering, paper courts issue determinations that have the same legal consequence as a final order entered by a judge after a trial on the merits.

In the family law arena, paper courts allocate parental rights. A VAP designates a child’s legal parents and a custodial power of attorney or standby guardianship designation permits parents to delegate their authority

¹ See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 973–79 (1979) (examining the impact of court adjudication on negotiations in divorce cases); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards A Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2338–48 (2004) (examining the use of public versus private ordering for the enforcement of commercial agreements); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 40–41 (2005) (arguing that court adjudication guides private ordering for workplace dispute resolution).

² Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 250–51 (2010).

³ Brian H. Bix, *Private Ordering in Family Law*, in PHILOSOPHICAL FOUNDATIONS OF CHILDREN’S AND FAMILY LAW 257 (Elizabeth Brake & Lucinda Ferguson eds., 2018).

to non-parents. Additionally, paper courts are mechanisms for managing familial diversity that rely on traditional rules about parental rights while creating new rules about the allocation of parental recognition and authority.⁴ The traditional parental rights doctrine has struggled to keep up with the increasingly diverse array of family structures, particularly the rise of nonmarital families and single parents.⁵ The parental recognition doctrine has been particularly intransigent in the face of changing family structure.⁶ As a result, the rules about who can be recognized as a child's legal parent are unequally applied based on marital status and gender,⁷ and they confine parental recognition to a finite "rule of two."⁸ Although it is well established that the legal right to parental authority is a fundamental right,⁹ the doctrine has failed to consider the interdependent nature of parental authority.¹⁰ Paper courts attempt to allocate parental rights in a manner that accommodates familial diversity. However, application of the traditional parental rights rules in paper courts often thwart this goal.

The primary users of paper courts in the family law context are unmarried and single parents,¹¹ who are disproportionately low-income,¹² racial

⁴ See *infra* Part III (describing the historical shift from adjudication in court to paper courts for each example of paper courts provided).

⁵ CARMEN SOLOMON-FEARS, CONG. REVIEW SERV., NONMARITAL BIRTHS: AN OVERVIEW, at Summary (2014), <https://fas.org/sgp/crs/misc/R43667.pdf>, archived at <https://perma.cc/7Y2A-23KR>. ("For the past six years (2008-2013), the percentage of all U.S. births that were nonmarital births remained unchanged at about 41% (1.6 million births per year), compared with 28% of all births in 1990 and about 11% of all births in 1970."); Clare Huntington, *Postmarital Family Law*, 67 STAN. L. REV. 167, 202-12 (2015) (examining the mismatch between traditional parental rights doctrine and the increase of unmarried parents).

⁶ See *infra* Part II.A.1 and II.A.2.

⁷ See *infra* Part II.A.1.

⁸ See *infra* Part II.A.2.

⁹ See *infra* Part II.A.3.

¹⁰ See *infra* Part II.A.4.

¹¹ In 2016, 39.8% (about 1.6 million) of all births nationally were to unmarried mothers. JOYCE MARTIN ET AL., BIRTHS: FINAL DATA FOR 2016, NAT'L VITAL STAT. REP. 6, 31 (2018). About 16% of parents with children under age 18 in their home (roughly 10.3 million) are single parents. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2017, TABLE A3 PARENTS WITH CORESIDENT CHILDREN UNDER 18, BY LIVING ARRANGEMENT, SEX, AND SELECTED CHARACTERISTICS: 2017 (2018), <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html>, archived at <https://perma.cc/YEG5-UK5B>. Roughly 24 million children younger than 18 (32%) live with an unmarried parent. Gretchen Livingston, *About One-Third of U.S. Children are Living with an Unmarried Parent*, PEW RES. CTR. (Apr. 27, 2018), <http://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/>, archived at <https://perma.cc/JFH6-NCJN>.

¹² In a nationally representative survey of unmarried women who gave birth in the last year, the percentage of unmarried births decreased sequentially as income increased. Births to women with a household income of less than \$10,000 were considerably more likely to be nonmarital (69%) than births to women with a household income of at least \$200,000 (9%). RACHEL M. SHATTUCK & ROSE M. KREIDER, SOCIAL AND ECONOMIC CHARACTERISTICS OF CURRENTLY UNMARRIED WOMEN WITH A RECENT BIRTH: 2011, AMERICAN COMMUNITY SURVEY REPORTS PUBLICATION SERIES 4-5 (2013).

More than one-fourth of households headed by single parents (27%) live below the federal poverty line, including 30% of households headed by single mothers and 17% headed by single fathers. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RES.

and ethnic minorities,¹³ and have low levels of education.¹⁴ The rights of these parents and the well-being of their children hang in the balance of the outcomes of out-of-court, form-based processes.

The parental rights of unmarried fathers¹⁵ are uniquely at stake in paper courts. Given the demographic makeup of unmarried and single parents, paper courts disproportionately impact the parental rights of low-income African American and Latino unmarried fathers.¹⁶ The voluntary acknowledgment of paternity form is the most commonly used paper court. Pursuant to federal law, parents who are not married to each other¹⁷ must either sign a VAP or obtain an order from a court or administrative agency to legally

CTR. (Apr. 25, 2018), <http://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/#fn-24392-2>, archived at <https://perma.cc/RK2C-4A3F>.

¹³ Women of color disproportionately have children outside of marriage. In 2016, 70% of African American births and 53% of Hispanic births were nonmarital, compared to 29% of non-Hispanic white births. MARTIN, *supra* note 1112, at 31. Nearly six in ten black children (58%) live with an unmarried parent. Livingston, *supra* note 12.

Roughly 30% of single parents are non-Hispanic white, 30% are black, 25% are Hispanic, 3% are Asian, and 5% are of other races or a combination of races. U.S. CENSUS BUREAU, *supra* note 11.

¹⁴ In a survey of unmarried women, those with more education had fewer nonmarital births. Fifty-seven percent of births to women who did not have a high school diploma occurred outside of marriage, compared to 49% for women with a high school diploma, 40% for women who had completed some college, and 9% for women with a college degree. SHATTUCK & KREIDER, *supra* note 12, at 4. About 45% of single parents have a high school diploma or less, 35% have some college, and 20% have a bachelor's degree, compared with 31%, 25%, and 43%, respectively, for married parents. Livingston, *supra* note 12.

¹⁵ This Article uses "unmarried fathers" as shorthand for men who are not married to their child's mother. Some men who sign a voluntary acknowledgment of paternity are married to someone other than their child's mother at the time of signing.

¹⁶ Unmarried fathers are disproportionately racial and ethnic minorities. Between 2000 and 2009, 66% of non-Hispanic black fathers had nonmarital first births and 54% of Hispanic fathers had nonmarital first births, compared to 24% for non-Hispanic white fathers. Gladys M. Martinez, *Three Decades of Nonmarital First Births Among Fathers Aged 15-44 in the United States*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 2015), <https://www.cdc.gov/nchs/data/databriefs/db204.pdf>, archived at <https://perma.cc/NN96-UKVP>.

Unmarried fathers also disproportionately have lower levels of education, which correlates to lower income levels. See KAYLA FONTENOT ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017 11-12 (2017) (data indicates that individuals with at least a bachelor's degree have a much lower poverty rate than individuals with less educational attainment). According to data from the Fragile Families and Child Wellbeing Study (which is following a cohort of nearly 5,000 children born in large U.S. cities between 1998 and 2000), at the time of their first child's birth, 37% of unwed fathers did not have a high school diploma, 39% graduated from high school, 20% had completed some college, and 4% had at least a bachelor's degree. SOLOMON-FEARS, *supra* note 5.

¹⁷ In some states, a woman who is married to a man who is not the biological father of her child can sign a VAP form to establish the father's paternity if her husband signs a form to deny paternity. See, e.g., ILLINOIS DEP'T OF HEALTHCARE AND FAMILY SERVS., FORM NO. HFS 3416B, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, <https://www.illinois.gov/hfs/SiteCollectionDocuments/hfs3416b.pdf>, archived at <https://perma.cc/E6EP-PUP2> [hereinafter ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY]; MAINE DEP'T OF HEALTH AND HUMAN SERVICES, MAINE CTR. FOR DISEASE CONTROL & PREVENTION, FORM NO. VS27-A, ACKNOWLEDGMENT OF PATERNITY, <https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS27-A.pdf>, archived at <https://perma.cc/UC2K-PGCC> [hereinafter MAINE ACKNOWLEDGMENT OF PATERNITY]. A man can sign a VAP form

establish the man's parentage.¹⁸ A VAP thus establishes the parental identity of unmarried men, and imposes legal obligations for up to twenty-one years on the man who signs the form.¹⁹ Because the VAP is the most commonly used paper court in the family law context, the descriptive and normative discussion in this Article primarily focuses on this example of paper courts.

Two other commonly used paper courts are the custodial power of attorney and standby guardianship designation. Single parents use these forms to assign their parental rights to a non-parent.²⁰ In many states, one parent can unilaterally assign parental rights to a non-parent without notice to the other parent.²¹ Because the vast majority of single-parent households are headed by women,²² they are the primary delegators of parental rights to third parties. Paper courts allow mothers to delegate their parental rights to third parties without notifying fathers.

even if he is married to a woman who is not the biological mother of the child at issue, without any action from him or his wife to document their marital status.

¹⁸ See 42 U.S.C. § 666(a)(5)(D)(i) (2018). While most states require paternity to be established through a judicial process, some states allow an administrative agency to establish paternity in limited circumstances. See, e.g., FLA. STAT. § 409.256 (2018).

In some states, an unmarried man's paternity can be established by conduct. See, e.g., 23 PA. CONS. STAT. § 5102(b)(2) (1990). Genetic tests are permitted, but not required, by federal law to establish paternity. See 42 U.S.C. § 666(a)(5)(B)(i) (2018) (genetic testing may be required in some contested paternity cases, but only if one party to the court action requests it).

The woman's parentage is established by giving birth to the child, unless the woman is a surrogate. See, e.g., D.C. CODE § 16-909(a-1)(1) (2016); D.C. CODE § 16-407(b)(3) (2017). Unmarried same-sex couples use other acknowledgement processes to establish parentage. See, e.g., D.C. CODE § 16-909(e)(1) (2016).

In most states, different-sex married parents are not required to take any action to establish parentage because there is a presumption that a child born to a married woman is the child of the woman's husband. See, e.g., D.C. CODE § 16-909(a)(1) (2016). The marital presumption also applies to married same-sex couples. See, e.g., D.C. CODE § 16-909(a-1)(2) (2016).

¹⁹ The state child support office must seek a child support order based on voluntary acknowledgement of paternity if the child at issue receives government cash assistance or Medicaid, or if the child's custodian requests the agency's assistance with establishing a child support order. 45 C.F.R. § 303.4(f) (2017). Although the age of emancipation for child support purposes in most states is 18 years old, it is 21 years old in the District of Columbia. *Termination of Child Support—Age of Majority*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 6, 2015), <http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx>, archived at <https://perma.cc/JP2P-GPKX>; *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985).

²⁰ Because assignment of parental rights in this manner occurs outside of court with no cataloguing by a central administrative agency (unlike VAPs), it is difficult to quantify the occurrence. The only measurement that may suggest the frequency is the number of children who live in households without a parent. See *infra* note 26 and accompanying text.

²¹ See *infra* Part III.B and C.

²² In 2017, there were 12 million single-parent families with children under age 18. More than 80% of single-parent families were headed by single mothers. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2017, TABLE FG10 FAMILY GROUPS: 2017 (2017), <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html>, archived at <https://perma.cc/JAJ9-2FY4>.

Paper courts are in widespread use. In 2016, about 1.6 million, or 40%, of the 3.9 million births were to unmarried mothers.²³ The same year, paternity was acknowledged for about 1.1 million children (almost 70% of births to unmarried mothers),²⁴ mostly in the hospital.²⁵ The frequency with which parents use the custodial power of attorney and standby guardianship designation is unknown because parents execute these instruments entirely outside of the judicial and administrative systems. Nonetheless, the large numbers of children who do not live with either parent suggests that there is high demand for these out-of-court delegations of parental authority. In 2017, nearly 3 million children nationwide lived in a household without a parent present.²⁶ Presumably, many of these non-parent caregivers exercise parental authority pursuant to a custodial power of attorney, standby guardianship, or court order. Indeed, without this formal delegation of parental rights, third party custodians often have considerable difficulty accessing educational and medical services for the children in their care.²⁷

There are significant trade-offs to using paper courts. On the one hand, paper courts serve an important function in family law by promoting access to justice and maximizing parental agency in ways traditional court processes do not. The forms request basic identifying information, require minimal or no fees, take a relatively short time to complete, and can be completed in convenient locations such as at the hospital soon after a child's birth or in someone's home.²⁸ This Article identifies these advantages as "procedural access to justice."²⁹ Paper courts also maximize parental agency because they allow parents to make significant decisions about how to order their family life without court intervention.³⁰

²³ JOYCE A. MARTIN ET AL., BIRTHS: FINAL DATA FOR 2016, NAT'L VITAL STAT. REP. 1, 19–20, 31 (2018). This Article uses "unmarried mothers" as shorthand for women who are not married to the biological father of their child.

²⁴ U.S. DEP'T HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENF'T, PRELIMINARY REPORT FY 2016 (2016), https://www.acf.hhs.gov/sites/default/files/programs/css/2016_preliminary_report.pdf, archived at <https://perma.cc/WBG4-BHGB>.

²⁵ See Cynthia Osborne & Daniel Dillon, *Dads on the Dotted Line: A Look at the In-Hospital Paternity Establishment Process*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 1 (2014).

²⁶ U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2017, TABLE C2 HOUSEHOLD RELATIONSHIP AND LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS, BY AGE AND SEX: 2017, TABLE C3 LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS AND MARITAL STATUS OF PARENTS, BY AGE, SEX, RACE, AND HISPANIC ORIGIN AND SELECTED CHARACTERISTICS OF THE CHILD FOR ALL CHILDREN: 2017 (2017), <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html>, archived at <https://perma.cc/4SND-RAPE> (about 56% of children under 18 years old who live in a home without a parent live with a grandparent, 25% with another relative, 11% with a non-relative, and 8% in foster care).

²⁷ See Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 46 (2008).

²⁸ See *infra* Part IV.A and Appendices A, B, and C.

²⁹ See *infra* Part IV.A.

³⁰ See *infra* Part IV.B.

Despite these important advantages, the use of paper courts is a cause for concern. Paper courts fail to ensure that participants understand the legal consequences of executing forms that allocate parental rights—what this Article terms “substantive access to justice.”³¹ Because of the context and manner in which VAPs are executed, there is a high likelihood that signatories execute them without informed consent.³² Additionally, sufficient mechanisms are not in place to inform parents about the consequences of delegating their rights to a third party through a custodial power of attorney or standby guardianship designation.³³

Paper courts also lack sufficient procedural due process. These due process concerns stem from the potential error rate, lack of notice, and limits on the opportunity to be heard. In the VAP process, the risk of error is high due to the ease with which a man who is not the child’s biological father can sign the form—whether or not he knows he is not the father.³⁴ The result is constructive termination of the biological father’s parental rights and deprivation of property for the unknowing acknowledged father who has a legal duty to financially support the child after signing the form.³⁵

The VAP process also implicates rights to notice and an opportunity to be heard. There is no mechanism for informing putative biological fathers that another man has acknowledged paternity for a child.³⁶ Thus, putative fathers may not know they have a legal right that has been terminated. Furthermore, if error occurs, there are significant limits on the opportunity to be heard. If the child’s biological father or the man who unknowingly acknowledged paternity for a child to whom he is not biologically related attempts to challenge the VAP, there will likely be significant barriers due to strict time limits and restrictions on the permissible legal grounds for the claim.³⁷

With the custodial power of attorney and standby guardianship designation, lack of notice and an opportunity to be heard are the primary due process concerns. In most states, a parent, usually the child’s primary caregiver mother, can unilaterally delegate parental rights to a non-parent without notifying the other parent, usually the noncustodial father.³⁸ This practice dilutes

³¹ See *infra* Part IV.A.

³² *Id.* In the author’s almost decade of practice experience as a legal services attorney in the District of Columbia, she and her colleagues represented several unmarried fathers who signed VAPs without understanding the legal consequences. Many of the men believed the only consequence was that they would be listed as the child’s father on the birth certificate. See Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 115–17 (2014) (discussing the lack of informed consent in the VAP process).

³³ See *infra* Part IV.A.

³⁴ See *infra* Part IV.C; Susan Ayres, *Paternity Un(Certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women’s Sexuality*, 20 J. GENDER RACE & JUST. 237, 240–41 (2017) (noting the popular belief that false paternity rates are 10–30%).

³⁵ See *infra* Parts III.A and IV.C.

³⁶ See *infra* Part IV.C.

³⁷ See *infra* Parts III.A and IV.C.

³⁸ See *infra* Parts III.B and C.

the constitutionally protected right of the noncustodial parent to care for the child and direct the child's upbringing because the noncustodial parent now has to share custodial rights with a third party without the opportunity to object before the assignment is made.³⁹

Because the primary users of paper courts are disproportionately low-income families and families of color, in many respects, paper courts are another manifestation of the disparate treatment and outcomes in the family law system based on race and class.⁴⁰

Much of family law scholarship addresses the allocation of parental rights in the context of court procedures and court-adjacent processes such as settlement negotiations and mediation.⁴¹ This scholarship overlooks the form-based processes that allocate parental rights wholly outside of and in the shadow of traditional courts, through paper courts. Many family law scholars thus have failed to assess the impact of a primary method of conferring parental rights in many families—especially low-income families and families of color. By surfacing and analyzing paper courts, this Article fills a significant gap in the account of family law, making both a descriptive and normative contribution to the family law literature.⁴²

Even family law scholars who identify the particular conflict-resolution needs of low-income families and families of color largely focus on courts and court-adjacent processes. For example, some scholars critique the invention of problem-solving family courts, arguing that the move away from the adversarial system has harmed low-income families because the relaxed procedural safeguards, compulsory mediation, and dependence on nonlegal staff characteristic of family courts infringe on familial privacy and autonomy, and increase the risk that parents will unknowingly forfeit important legal rights.⁴³

³⁹ See *infra* Parts II.A.4, III.B, and III.C.

⁴⁰ See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 258 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 2), 16 STAN. L. REV. 900 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 3), 17 STAN. L. REV. 614 (1965) (identifying and examining two systems of family law in California: one for wealthy people and one for poor people); see also June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1186 (2013) (arguing that there are now three layers of "class-based disconnect between [family] law and family norms": one layer each for wealthy people, middle-class people, and marginalized people).

⁴¹ See, e.g., Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647–54 (2002); Ben Barlow, *Divorce Child Custody Mediation: In Order to Form A More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499 (2004); JANE C. MURPHY & ROBERT RUBINSON, FAMILY MEDIATION: THEORY AND PRACTICE 55–74 (2009); Jane Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 910, 914 (2010); Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. L. & GENDER 119 (2018).

⁴² Although there is a sizeable amount of scholarship about VAPs, this Article is the first to examine the larger phenomenon of out-of-court, form-based processes that carry the same weight as court orders ("paper courts") in the family law context.

⁴³ See, e.g., Murphy, *Revitalizing the Adversary System in Family Law*, *supra* note 41. Murphy argues that family courts surrender fact-finding and decision-making to nonlawyers,

Few scholars focus on out-of-court conflict resolution mechanisms for unmarried and single parents. Clare Huntington argues that family courts are designed for dissolving married families, and application of marital family law rules to nonmarital families harms unmarried families.⁴⁴ Huntington recommends the adoption of alternative dispute resolution centers as a legal institution to help nonmarital families co-parent after separation.⁴⁵ This Article adds to Huntington's work by similarly examining out-of-court processes that impact the rights of unmarried and single parents, and proposing recommendations for improving these processes.

The Article proceeds in five parts. Part I defines the concept of "paper courts" in further detail. Part II reviews the parental rights doctrine to inform the discussion about how paper courts in the family law context allocate parental rights. Part III describes how paper courts function in family law, particularly the legal consequences of using them. Part IV assesses the often-competing interests inherent in using paper courts—access to justice, parental agency, and due process. Part V prescribes a path forward for protecting the rights and interests of unmarried and single parents that balances the competing interests in access, agency, and due process. The Article proposes additional procedural safeguards for paper courts that enhance informed consent, notice, and the opportunity to be heard without compromising access to justice and parental agency.

I. PAPER COURTS DEFINED

Paper courts are out-of-court, form-based processes that serve as alternatives to adjudication in the traditional court process. They can exist in any area of the law. In family law, paper courts allocate parental rights. Families use paper courts routinely, especially low-income families and families of color.⁴⁶ This Article examines three examples of paper courts: voluntary acknowledgement of paternity, custodial power of attorney, and standby guardianship designation.

Paper courts are both similar to and distinct from private ordering, which abounds in family law.⁴⁷ Through private ordering, couples execute

who have an expanded role in these courts. *Id.* at 900. Family courts also strongly encourage or require mediation, which is detached from legal norms and presents the risk of participants inadvertently losing rights, particularly those who are unrepresented. *Id.* at 905–06. Judges do not provide the ostensible check on the dangers of mediation because most rubber-stamp agreements. *Id.* at 907.

⁴⁴ Huntington, *supra* note 5.

⁴⁵ *Id.* Huntington proposes the development of family relationship centers (FRC)—a solution wholly outside the court system. *Id.* at 231–33. "FRCs . . . are a community-based approach to family conflicts, not a court-based approach, and are designed to forestall court involvement." *Id.* at 233. However, unlike paper courts, the parenting plans that families create in FRCs are not legally binding. *Id.* at 232.

⁴⁶ See *supra* notes 11–27.

⁴⁷ See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992); Bix, *supra* note 2; Bix, *supra* note 3.

prenuptial agreements before they marry,⁴⁸ and enter into separation agreements when they divorce.⁴⁹ Parents settle child custody and child support disputes.⁵⁰ And property owners draft wills to contract around the intestate succession rules.

Both paper courts and private ordering allow participants to chart their own course about significant legal matters outside of court. When an ill parent signs a standby guardianship designation, the parent nominates her guardian of choice.⁵¹ Similarly, when parents enter into a settlement agreement in a child custody case, they can choose terms that serve the best interests of their child.⁵²

The main differences between paper courts and private ordering relate to judicial oversight and the authoritativeness of the outcome. In many paper courts, there is no judicial oversight unless an interested party initiates a court action to challenge the allocation of parental rights.⁵³ In contrast, although prenuptial agreements are legally binding, they must be presented to a court for enforcement,⁵⁴ and a judge has the final say about whether a custody or child support agreement serves the best interests of the child.⁵⁵ Additionally, in contrast to private ordering, the product of paper courts is a document that carries the same legal weight as a court order. A judge does not need to review, approve, or sign a paper court form to give it the full force and effect of a court order.⁵⁶ For example, in many states, a grandparent can take a signed custodial power of attorney to a school and enroll the child.⁵⁷ In addition, by executing a custodial power of attorney, a parent can grant the grandparent the right to make educational and medical decisions for the child, such as whether the child will receive counseling services that the school offers.⁵⁸ In contrast, a will must be probated in court to have legal

⁴⁸ Bix, *supra* note 2, at 264–66; *see, e.g.*, D.C. CODE ANN. § 14-501 *et seq.* (West 2019).

⁴⁹ Bix, *supra* note 2, at 261–63.

⁵⁰ *See* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 83–85 (2014).

⁵¹ Tiffany Buban, *Protecting Children: Using Guardianships As an Alternatives to Foster Care and Adoptions*, 19 J. AM. ACAD. MATRIM. LAW. 389, 393–96 (2005); *see also* Deborah Weimer, *Implementation of Standby Guardianship: Respect for Family Autonomy*, 100 DICK. L. REV. 65, 69–71 (1995).

⁵² *See* Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 624 (2004); Abramowicz, *supra* note 50, at 67.

⁵³ *See infra* Parts III.A & B.

⁵⁴ Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998).

⁵⁵ *See* Jellum, *supra* note 52, at 624; Abramowicz, *supra* note 50, at 67. *See, e.g.*, D.C. CODE ANN. § 16-914(h) (West 2019) (court can override custody agreement of parents if finds by clear and convincing evidence that agreement is not in best interest of child).

⁵⁶ *See, e.g.*, 42 U.S.C. §§ 666(a)(5)(D)(ii) (2018) (voluntary acknowledgment of paternity is a “legal finding of paternity”) and (a)(5)(E) (2018) (“judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity”).

⁵⁷ *See, e.g.*, App’x B, ALASKA STAT. ANN. § 13.26.066 (West 2019); D.C. CODE § 21-2301 (2016); MISS. CODE ANN. § 93-31-5 (West 2019); TENN. CODE ANN. § 34-6-302 (2019).

⁵⁸ *See id.*

effect.⁵⁹ Paper courts are distinct in their ability to determine rights and issue judgments without judicial approval.

Paper courts are also both similar to and distinct from adjudication in court. Signed forms in paper courts possess the same degree of legal significance and finality as a final court order issued by a judge after a trial on the merits. However, unlike traditional courts, paper courts do not resolve disputes. Instead, paper courts document, ratify, and legitimize the consent of the participants—another attribute that they share with private ordering.

Because paper courts allocate parental rights, an understanding of how paper courts operate requires an understanding of parental rights doctrine. Part II provides this background.

II. PARENTAL RIGHTS REVIEWED

Under the federal Constitution as well as state constitutions and both federal and state statutory law, parents enjoy broad rights to the care, custody, and control of their children.⁶⁰ Both constitutional and statutory law establish rules for the conferral of parental rights. These rules dictate what constitutes parental rights, who can assume parental rights, and how parental rights can be exercised. The exercise of parental rights significantly affects the well-being of children. This Part reviews the parental rights doctrine and the relationship between parental rights, responsibilities, and children's well-being in order to provide the framework for examining how paper courts allocate parental rights.

A. *Parental Recognition and Parental Authority*

Parental rights fall into two categories: rights of parental recognition and rights of parental authority.⁶¹ Parental recognition is the conferral of status as a child's legal parent.⁶² Parental authority is the power of a legal parent to direct the upbringing of a child.⁶³ Implicit in parental authority is the right to spend time with the child and the right to make decisions about the child's health, education, religious training, and general well-being. The concepts are inextricably linked—parental recognition is a prerequisite for parental authority. This section examines the central principles of parental recognition and parental authority doctrine.

⁵⁹ UNIF. PROBATE CODE § 3-102 (2012) (“[T]o be effective to prove the transfer of any property . . . , a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the court.”).

⁶⁰ The three main legal sources of parental rights are common law, state statutes, and the federal Constitution.

⁶¹ Emily Buss, “*Parental*” Rights, 88 VA. L. REV. 635, 647–54 (2002).

⁶² See *id.*

⁶³ See *id.*

1. *Unequal Parental Recognition*

The legal rules that govern who can attain parental status impose a hierarchical framework based on marriage and gender. Married couples have the least cumbersome path to attaining parental status and its attendant authority. Married men in different-sex couples become parents by presumption. In every state and the District of Columbia, there is a statutory presumption, known as a “marital presumption,” that a child born to a married woman in a different-sex couple is her husband’s child.⁶⁴ This marital presumption, which the United States Supreme Court has affirmed,⁶⁵ ensures that married men in different-sex couples have automatic parental rights to a child born during their marriage,⁶⁶ even if the husband is not biologically related to the child.⁶⁷ The law recognizes most married women as parents by virtue of having a genetic or gestational connection to a child,⁶⁸ or, for those in same-sex couples, being married to the child’s biological mother.⁶⁹

For unmarried women, a biological connection to the child is the primary means of becoming the child’s legal parent.⁷⁰ Since the 1970s, with the invalidation of statutory distinctions based on illegitimacy, most unmarried women with a biological connection to the child have enjoyed full parental

⁶⁴ Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 76 (2017) (“The marital presumption . . . still exists in some form in every state.”); see, e.g., D.C. CODE § 16-909(a)(1) (2016) (establishing a marital presumption).

⁶⁵ *Michael H. v. Gerald D.*, 491 U.S. 110, 119–30 (1989) (holding that a California statute that prohibits the putative biological father from rebutting the marital presumption does not violate the procedural or substantive due process rights of the putative biological father).

⁶⁶ See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2312–14 (2017) (discussing the denial of parental recognition to married men in same-sex couples who do not have a biological connection to the child).

⁶⁷ See *Michael H.*, 491 U.S. at 119–32 (upholding presumption that mother’s husband was child’s father even though genetic testing demonstrated that another man was the child’s biological father).

⁶⁸ See NeJaime, *supra* note 66, at 2285–91 and 2309–11 (discussing the doctrine that governs parental recognition based on marriage and denial of parental recognition to married women who have no genetic or gestational connection to the biological child of their husband who is conceived through assisted reproductive technology).

⁶⁹ See, e.g., D.C. CODE § 16-909(a-1)(2) (2016) (outlining presumption of parentage for woman married to child’s mother).

⁷⁰ In some states, unmarried persons can become legal parents of a child by conduct, including allowing the child to live with them and holding out the child as their child. See, e.g., CAL. FAM. CODE § 7611(d) (2014) (“A person is presumed to be the natural parent of a child if . . . [t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.”).

rights to their children beginning at birth.⁷¹ Biology alone is sufficient for most unmarried women to attain parental rights.⁷²

In contrast, unmarried men continue to have precarious parental rights.⁷³ In a series of cases involving the parental rights of unmarried men decided during the 1970s and 1980s,⁷⁴ the United States Supreme Court made clear that a biological connection to the child is insufficient for unmarried men to attain parental recognition.⁷⁵ From *Stanley v. Illinois*,⁷⁶ to *Lehr v. Robinson*,⁷⁷ the Supreme Court repeatedly required unmarried men to prove

⁷¹ See generally Melissa Murray, *What's So New about the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 388 (2012) (providing a re-reading of the two main cases credited with dismantling distinctions based on legitimacy); NeJaime, *supra* note 66, at 2275–76.

⁷² Joanna Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 314 (2017) (“The most powerful rights-holder is the biological mother . . . A woman who gives birth is a mother unless and until her rights are surrendered or involuntarily terminated due to abuse or neglect.”).

⁷³ Until the 1970s when the United States Supreme Court decided *Stanley v. Illinois*, 405 U.S. 645 (1972), unmarried biological fathers were denied the same custodial rights available to married biological mothers, the biological mother’s husband, and unmarried biological mothers. See *id.* at 650; see also *id.* at 658. Unmarried biological fathers were considered legal strangers to their children under state law. *Id.* at 647–48. They had no parental rights, which meant the government could remove their children from their care without a court hearing. *Id.* at 646. These state laws, which existed in Illinois and other states, even applied to unmarried biological fathers who had been primary caretakers of their children. See *id.* at n.4; Note, *Constitutional Law — Stanley v. Illinois: New Rights for Putative Fathers*, 21 DEPAUL L. REV. 1036, 1041–42 (1972).

⁷⁴ *Stanley*, 405 U.S. at 645, 656 (holding that unmarried biological fathers are parents that are entitled to the fundamental right to parent guaranteed by the Due Process Clause of the 14th Amendment and must receive the same process that is due other parents before their children are removed from their care); *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (upholding trial court decision to grant adoption over the objection of the biological father because he had not legally established paternity for the 11-year-old child and had never lived with the child or the child’s mother); *Caban v. Mohammed*, 441 U.S. 380, 381 (1979) (striking down the sex-based distinction in a state statute under the Equal Protection Clause of the 14th Amendment, noting that the unwed father was listed on the children’s birth certificate, had lived with the children and their mother, frequently visited with and contacted the children after they no longer lived together, and paid child support); *Lehr v. Robertson*, 463 U.S. 248, 264–68 (1983) (holding that a state statute did not violate a father’s rights under the Due Process Clause by requiring him to legally establish paternity in order to receive notice of a petition to adopt his biological child nor did it violate the father’s rights under the Equal Protection Clause by giving him less rights than the mother to control the outcome of the adoption where he made few prior attempts to maintain a relationship with the child); *Michael H. v. Gerald D.*, 491 U.S. 110, 125–27 (1989) (upholding the marital presumption, effectively denying an unmarried father’s request to establish paternity even though he was biologically related to the child and had performed caretaking duties, because history and tradition had protected the sanctity of the marriage relationship and not the relationship between an unmarried father and his biological child).

⁷⁵ See Murray, *supra* note 71, at 400–12 (arguing that the caretaking relationship requirement that was established in *Lehr* is really a requirement for unmarried fathers to act like husbands to the child’s biological mother and like married fathers to their biological children by living with them and providing for them financially).

⁷⁶ 405 U.S. at 651–58 (holding that an unmarried father had a constitutional right to the same procedural and substantive protections as all other parents before the state could remove his children from his care because he had “sired” the children).

⁷⁷ 463 U.S. 248 (1983).

both a biological connection and caretaking to attain parental recognition. The plurality opinion in *Michael H. v. Gerald D.*⁷⁸ affirmed that unmarried biological fathers also have to contend with the marital presumption.⁷⁹ Accordingly, when there is a dispute about parental recognition, unmarried men are not automatically entitled to parental status,⁸⁰ even if they are the biological father and have developed a relationship with the child.

Unmarried fathers are ancillary rightsholders. They have to fight an uphill battle to acquire the same parental recognition as married parents and unmarried mothers. In essence, they have to prove that they are capable of acting as husbands and married fathers by spending time with and providing financial support for the child.⁸¹ The inequality inherent in the parental recognition doctrine makes it clear that notions of parenthood are deeply rooted in a preference for the marital relationship and the nuclear family.⁸²

⁷⁸ 419 U.S. at 119–32.

⁷⁹ *Id.* When ostensibly asked to choose between preserving the marital relationship and preserving the relationship of an unmarried father and his biological child (the product of an extramarital affair) for whom he had cared, the Court chose the former, asserting that history and tradition did not recognize and protect the latter, thereby foreclosing extension of the substantive and procedural safeguards guaranteed by the Due Process Clause to this parent-child relationship. *Id.* The California statute was an outlier. Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 373–74 (1988) (“Approximately two-thirds of the states have adopted ‘inclusive statutes’ that either explicitly or through judicial interpretation give putative fathers a right of action to rebut the marital presumption.”). After the decision in *Michael H.*, California and other states legally established or recognized the right of unmarried biological fathers to challenge the marital presumption. Batya F. Smernoff, *California’s Conclusive Presumption of Paternity and the Expansion of Unwed Fathers’ Rights*, 26 GOLDEN GATE U. L. REV. 337, 350 (1996) (“After *Michael H.*, the California Legislature amended the [marital presumption statute] to allow the presumed father and the child to rebut the presumption with blood test evidence.”); In re J.W.T., 872 S.W.2d 189, 198 (Tex. 1993) (declaring that statutory provisions that prohibited a putative father from bringing a paternity action in cases where the child had a presumed father violated the state’s constitution); *Johnson v. Studley-Preston*, 812 P.2d 1216, 1219–21 (Idaho 1991); HAW. REV. STAT. § 31-584-6(a) (1991). However, because children can only legally have two parents in most states, judges must choose between the presumed father (usually the mother’s husband) and the biological father. Ann E. Kinsey, Comment, *A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion to Find That A Child Has More Than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 297 (2014) (discussing the “rule of two” parents in most states); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 399–405 (2007) (discussing court cases that involve the determination of legal parentage for children born as a result of an extramarital affair); see, e.g., D.C. CODE § 16-909(b)(1) (outlining the analysis for a court to determine whether a presumed parent who is not a child’s biological parent should remain the child’s legal parent).

⁸⁰ See *infra* Part III.A.3 for discussion of the fundamental right to parental authority.

⁸¹ See Murray, *supra* note 71.

⁸² The appropriate legal basis of parental recognition is one of the most hotly debated issues in family law. Some scholars argue that biology should be paramount, while others contend that intent and function should be grounds to attain parental recognition. See, e.g., Dara Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 222–30 (2012). This Article does not take a position in this debate, but rather outlines and examines the current state of parentage law and the out-of-court processes that apply the existing legal rules.

2. *Finite Parental Recognition*

Under most state parentage statutes, a child can have no more than two legal parents.⁸³ Accordingly, parental rights are finite. In order for a third person to attain parental status, they must adopt the child, which requires termination of parental rights of one or both legal parents.⁸⁴ The Supreme Court applied this rule in the unwed fathers cases. In *Quilloin v. Walcott*,⁸⁵ *Caban v. Mohammed*,⁸⁶ *Lehr*, and *Michael H.*, the biological father contended with the husband of the child's biological mother to determine which man was the child's legal father.⁸⁷ These cases made it clear that there is not enough room for two legally recognized fathers and a mother in a child's life. Justice Scalia, writing for the plurality in *Michael H.*, noted: "California law, like nature itself, makes no provision for dual fatherhood."⁸⁸

When an individual seeks to attain parental recognition after parentage has been legally established for two other people, the state statutory "rule of two"⁸⁹ makes allocation of parental rights a zero-sum game. One person's parental rights must be severed to establish legal parentage for another person because only two people can be legal parents at one time. Under parentage law, two is company, and more than two is a crowd.

The rule of two raises the stakes for establishing legal parentage. Error in the parentage establishment process risks stripping a person of rights to which the person is legally entitled. Thus, if a man who is not a child's biological father voluntarily acknowledges paternity, the child's biological father may be unable to obtain parental status and the rights that accompany it. Because of the finite nature of parental recognition, the legal allocation of parental rights is particularly momentous.

⁸³ Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 324 (2007) (arguing that courts construe legal doctrines of parentage "to ensure that a child has two, and only two, legal parents"); Kinsey, *supra* note 79, at 310. *But see* CAL. FAM. CODE § 7612(c) (West 2018) (allowing court to find that a child has more than two legal parents "if . . . recognizing only two parents would be detrimental to the child"); DEL. CODE ANN. tit. 13, § 8-201(2009) (creating de facto parent status); D.C. CODE §16-831.01 (2012) (creating de facto parent status).

⁸⁴ *See, e.g.*, 23 PA. CODE § 2501 *et seq.* (2019) (outlining proceedings prior to filing an adoption petition, including voluntary and involuntary termination of parental rights).

⁸⁵ 434 U.S. 246, 247 (1978).

⁸⁶ 441 U.S. 380, 381–82 (1979).

⁸⁷ *Quilloin*, 434 U.S. at 247; *Caban*, 441 U.S. at 381–82; *Lehr v. Robertson*, 463 U.S. 248, 249–50 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 113–17 (1989).

⁸⁸ *Michael H.*, 434 U.S. at 118. In 2013, California enacted a statute that allows courts to find, in limited circumstances, that a child has more than two legal parents; *see supra* note 8383.

⁸⁹ Sacha M. Coupet, "Ain't I A Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 595 n.2 (2010) (explaining the origins of the phrase "rule of two"); Ann E. Kinsey, *supra* note 79, at 304–05.

3. *Fundamental Parental Authority*

Parental authority is a fundamental right. Since the 1920s, the United States Supreme Court has recognized that parents have a liberty interest in the care, custody, and control of their children that flows from the Due Process Clause of the Fourteenth Amendment.⁹⁰ “[This] liberty interest . . . is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court.”⁹¹ The Supreme Court has vindicated the legal rights of parents to decide where their children live,⁹² how they are educated,⁹³ with whom they associate,⁹⁴ the medical treatment they receive,⁹⁵ and their religious training.⁹⁶ Parents have special rights to exercise parental authority over their

⁹⁰ See U.S. CONST. amend. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .”). In *Meyer v. Nebraska*, the Court proclaimed that the liberty interest in the Due Process Clause “denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” 262 U.S. 390, 399 (1923). In *Pierce v. Society of the Sisters of the Holy Names of James and Mary*, the Court highlighted the role of the parent vis-à-vis the state to control childrearing: “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” 268 U.S. 510, 535 (1925). In *Prince v. Massachusetts*, the Court again articulated the primacy of parents: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” 321 U.S. 158, 166 (1944). Courts must give “special weight” to a fit parent’s assessment of what is in her child’s best interest. *Troxel v. Granville*, 530 U.S. 57, 58 (2000).

⁹¹ *Troxel*, 530 U.S. at 65.

⁹² See, e.g., *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 504–06 (1977) (striking down a housing ordinance that made it a crime for certain individuals to live in the same home—in this instance, a grandson with his grandmother, who was his legal custodian—on the grounds that the government’s intrusion on choices concerning family living arrangements was not justified by an important government interest).

⁹³ See, e.g., *Meyer*, 262 U.S. at 403 (striking down a state law banning instruction in a foreign language before ninth grade on the grounds that it interfered with parents’ liberty interest in controlling their children’s education); *Pierce*, 268 U.S. at 534–35 (holding that a parent’s right to control her child’s upbringing includes the right to send the child to a private school rather than a public school); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that a state statute that required children to attend school until they were 16 years old violated the fundamental right of Amish parents to direct the education of their children).

⁹⁴ See *Troxel*, 530 U.S. at 72–75 (holding that a state third party visitation statute, as applied to this case, unconstitutionally infringed on the parent’s due process right to make childrearing decisions for her children, namely whether to limit visits with the children’s grandparents); see also *id.* at 78–79 (Souter, J., concurring) (arguing that the state statute should be invalidated solely on the grounds that it is overbroad because it authorizes a judge to award visitation rights to any person at any time, subject only to a determination of the best interests of the child); see also Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 650 (2014) (“A key element of the care, custody, and control of one’s children is the ability to exclude—a parent may choose [which] people are not allowed around their children.”).

⁹⁵ *Parham v. J.R.*, 442 U.S. 584, 601–07 (1979) (upholding the right of parents to voluntarily admit their children to a mental hospital).

⁹⁶ *Yoder*, 406 U.S. at 234; but see *Prince*, 321 U.S. at 166 (upholding criminal conviction of a Jehovah’s Witness who allowed her nine-year-old niece, for whom she was the legal

children that routinely trump the interests of the state or a third party.⁹⁷ Under the substantive and procedural components of the Due Process Clause, the state cannot deprive a parent of “freedom of personal choice”⁹⁸ without at least a rational basis⁹⁹ and fair procedures.¹⁰⁰

4. *Interdependent Parental Authority*

Traditionally, parents’ liberty interest in the care, custody, and control of their children has been framed as an individual right. Parental rights emanate from the same liberty interest that underlies the constitutional privacy cases,¹⁰¹ which reinforces the notion that independence and autonomy are intrinsic to the right to parental authority. Nonetheless, in practice, the exercise of parental authority is interdependent, particularly for separated parents.

Parental rights doctrine is rooted in the conception of the nuclear family: a married man and woman exercise exclusive parental authority over their children.¹⁰² With the rise of divorce and development of divorce law, courts had to determine how to divide the once exclusive and indivisible rights of parenthood between the child’s two parents.¹⁰³ The standards that courts used to make these decisions evolved over time. The paternal preference¹⁰⁴ gave way to the tender years doctrine,¹⁰⁵ then the best interest of the

custodian, to sell religious magazines on the street, even though the aunt claimed the act was an exercise of her parental right to provide her niece with religious training).

⁹⁷ See *supra* notes 90–94.

⁹⁸ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974).

⁹⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); *Pierce v. Society of the Sisters of the Holy Names of James and Mary*, 268 U.S. 510, 534–35 (1925). The Supreme Court generally applies strict scrutiny to state regulation of fundamental rights. However, in a relatively recent parental authority case, the Court applied intermediate scrutiny. *Troxel*, 530 U.S. at 65; see *id.* at 80 (Thomas, J., concurring) (arguing that the Court should have applied strict scrutiny to the infringement of fundamental parental rights).

¹⁰⁰ See *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982) (holding that clear and convincing evidence was necessary to terminate parental rights).

¹⁰¹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (citing *Meyer*, 262 U.S. at 399, and *Pierce*, 268 U.S. at 534–35, the Court concluded: “The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”); see also Purvis, *supra* note 94, at 649 (“Vindication of the rights of parents to decide how to raise their children, even if their decisions ran counter to community preferences, formed the first seeds of the fundamental rights later explicitly protected in the Court’s right-to-privacy jurisprudence.”).

¹⁰² *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2052–53 (2003).

¹⁰³ *Id.* at 2053.

¹⁰⁴ When courts exercised the “paternal preference,” in effect until the late eighteenth century, fathers had almost an absolute legal right to custody of their children, which were considered the father’s property, during marriage and after divorce. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

¹⁰⁵ Under the tender years doctrine, which governed custody decisions from the late eighteenth century until the 1970s, courts granted custody of small children to their mother after legal separation or divorce because the mother was viewed as the child’s “instinctive custo-

child standard,¹⁰⁶ and finally joint custody¹⁰⁷ presumptions and preferences.¹⁰⁸ The paternal preference and tender years doctrine transferred the nuclear family conception that parental rights are exclusive and indivisible by awarding only one parent custody—almost always the father under the former standard and the mother under the latter.¹⁰⁹ By awarding only one parent custody, courts sought to ensure that the child maintained “the stability of a single home run by only one parent.”¹¹⁰ Today, many state custody statutes include a rebuttable presumption of joint custody or give preference to shared custody arrangements.¹¹¹ Thus, separated parents are expected to co-parent.

Sharing is implicit in co-parenting. And when separated or divorced parents engage in co-parenting, the exercise of one parent’s authority necessarily shapes and limits the authority of the other parent. For example, one parent’s right to have access to a child during a certain time period precludes the other parent from having access to the child during that time.¹¹² If the parents have joint legal custody and one parent disagrees with the other parent’s decision about the child’s education or medical care, the disgruntled parent can block the decision by withholding consent, unless the parent who proposes the decision has court-ordered final decision-making authority.¹¹³ Thus, for separated parents, parental prerogative is not autonomous, but rather is dependent on the co-parent’s exercise of legal rights.

dian.” *Id.* at 214. Some states replaced the tender years doctrine with the primary caretaker presumption, which is widely viewed as a gender-neutral standard that produces the same outcome as the tender years doctrine—mothers are granted custody of small children. *Id.* at 214–15.

¹⁰⁶ Family law scholars have critiqued the indeterminacy of the best interests of the child standard, arguing that it gives judges too much discretion to decide which custodial arrangement is in the best interests of the child. See Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975). This indeterminacy makes it difficult for parents to resolve custody disputes through settlement negotiation. See Mnookin & Kornhauser, *supra* note 1.

¹⁰⁷ Joint custody involves parents sharing parenting time and/or decision-making authority. See Abramowicz, *supra* note 50, at 90.

¹⁰⁸ DiFonzo, *supra* note 104, at 214–21; see also Abramowicz, *supra* note 50, at 89–91 (discussing joint custody preferences).

¹⁰⁹ DiFonzo, *supra* note 104, at 214–15.

¹¹⁰ *Id.* at 215.

¹¹¹ By 2012, forty-seven states and the District of Columbia had enacted joint custody statutes, and New York case law permitted joint custody. Only North Dakota and Rhode Island had not adopted a statute or established precedent for joint custody. Dorothy R. Fait et al., *The Merits and Problems with Presumptions for Joint Custody*, 45 MD. BAR J. 12, 14 (2012); see also Abramowicz, *supra* note 50, at 89–91; DiFonzo, *supra* note 104, at 215–21.

¹¹² See *The Law of Marriage and Family*, *supra* note 102, at 2053 (“When one [divorcing] parent is accorded custodial rights, for example, his or her otherwise exclusive rights may be limited in light of visitation privileges conferred on the other parent. The custodial parent’s ability to move and control the child, and to make similarly influential childrearing decisions, may be significantly constrained.”).

¹¹³ See Abramowicz, *supra* note 50, at 90.

B. Parental Rights, Parental Responsibilities, and Children's Interests

Parental rights implicate parental responsibilities. The right to be recognized as a child's parent and exercise broad parental authority requires parents to assume responsibilities to care for their children. Some of the primary parental responsibilities include the duty of financial support, to provide for the child's education, and to safeguard the welfare of the child.

The parental rights doctrine decouples rights and responsibilities in occasionally nonsensical ways. The duty of financial support provides the most apparent example. For unmarried fathers, biology alone is sufficient to establish a financial obligation for a child, but not a custodial relationship, at least as a constitutional matter.¹¹⁴ The state wants unmarried fathers to act like husbands by "privatizing the household's dependency by providing economic support."¹¹⁵ Like married fathers, when unmarried fathers fail to take on the role of financial provider, they risk significant penalties.¹¹⁶ Unlike married fathers, however, unmarried fathers face an uphill battle to attain custodial rights.

The rules that govern parental recognition, parental authority, and the attendant parental responsibilities substantially impact children's interests. Determinations about who can assume the special status of parent, which confers both authority and responsibility on the designated individual, directly affect children's quality of life and general well-being. Although the voice of children is absent from many of these determinations,¹¹⁷ their physical, emotional, and psychological health are at stake with each adjudication of parental rights and responsibilities.

In the family law context, paper courts allocate parental rights. Part III describes how paper courts function in family law.

¹¹⁴ Both biological parents have a legal duty to provide financial support for the child. *See, e.g.*, D.C. CODE ANN. § 16-916.01(c)(1) (West 2019). When parents do not share custody, the noncustodial parent pays child support to the custodial parent. *See, e.g.*, D.C. CODE ANN. § 16-916.01(f)(1)(D) (West 2019). The child's custodial parent is presumed to fulfill the duty of financial support to the child. *See, e.g., id.*

In fifteen states, biological mothers are automatically granted sole legal custody of the child at birth. Huntington, *supra* note 5, at 204. For unmarried men, they often have to petition a court for custodial rights even after they voluntarily acknowledge paternity and become the child's legal parent. *See id.* The United States Supreme Court's unmarried father cases indicate that biology alone is insufficient to establish a custodial relationship. *See supra* note 74.

¹¹⁵ Murray, *supra* note 71, at 405.

¹¹⁶ Penalties for failing to pay child support include driver's license suspension, seizing income tax refunds, negative credit reporting, and incarceration for civil or criminal contempt. *See, e.g.*, D.C. CODE ANN. § 46-224 *et. seq.* (West 2019).

¹¹⁷ Courtney Trimacco, Note, K.M. v. E.G., *My Two Moms: California Courts Hold That a Child Can Have Two Natural Mothers*, 38 U. TOL. L. REV. 1065, 1084 (2007). When children do express their views about their relationship with their parents, they may be ignored. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (Scalia, J.) (plurality opinion) (dismissing the child's arguments about her right to maintain a relationship with her biological father as "weaker" than the father's claims to parental recognition, which were denied); *see also* Troxel v. Granville, 530 U.S. 57, 86-91 (2000) (Stevens, J., dissenting) (arguing that children's voices are largely absent from parentage determinations).

III. PAPER COURTS IN PRACTICE

Fifty years ago, a parent had to initiate a traditional court process to establish the paternity of an unmarried man or assign parental authority to a third party. The court process involved paying a fee to file a petition or complaint, properly notifying all interested parties of the initiation of the case, engaging in discovery, resolving pretrial motions, and, if the case did not settle, presenting facts and legal arguments to a judge at trial.¹¹⁸

In sharp contrast, today, parents can sign legal forms in a hospital room to establish paternity and sign forms at their kitchen table to assign their custodial rights to a third party. These forms carry the same weight as an adjudication in court. Out-of-court, form-based processes to establish paternity for unmarried men and delegate parental authority to a non-parent are now an established—albeit overlooked—feature of the family law system. As this Part argues, these processes are best understood as paper courts. This Part analyzes and examines the paper courts phenomenon, thereby filling a critical gap in the family law literature, which has not examined this phenomenon or its consequences closely.

To illuminate the concept of paper courts further, this section describes three examples of paper courts, with a focus on the procedures in the District of Columbia.¹¹⁹ Stories of fictional characters¹²⁰ illustrate the out-of-court, form-based processes that unmarried parents can use to establish paternity, and single parents can use to assign their custodial rights to a third party. This section also provides a brief historical overview of the move from the traditional court process to out-of-court forms for each example.

A. *Voluntary Acknowledgment of Paternity*

Peter Johnson and Jane Smith date. Jane becomes pregnant. Jane tells Peter that he is the child's biological father. Peter and Jane move in together. They attend prenatal care appointments and childbirth classes together. The child is born at a local hospital. Peter is present during the child's birth.

When Jane and Peter arrive to the postpartum recovery room, a hospital staff person gives them a packet of paperwork to fill out. One document in the packet is called an Acknowledgement of Paternity. A hospital staff person tells them that they need to fill out this form if they want Peter listed as the father on the child's birth

¹¹⁸ See Rogus, *supra* note 32 (noting that voluntary acknowledgments of paternity were created “to replace ‘time-consuming and expensive procedures’ used to adjudicate paternity, which included service of process, discovery, pretrial hearings, and trials”).

¹¹⁹ The District of Columbia's use of paper courts is in line with that of many states. See *infra* Part III.

¹²⁰ These stories are loosely based on family law cases the author handled while working in legal services for almost a decade in the District of Columbia.

certificate because they are not married. Neither of them has seen this document before, and neither of them knew they would be asked to complete it. The hospital staff person explains the form to them. Jane and Peter read and sign the Acknowledgement of Paternity at the hospital the same day the child is born. A notary witnesses their signatures.

When the child is one year old, Jane and Peter argue and Jane tells Peter that he is not the child's biological father.¹²¹ A few days later, Peter buys a genetic test at a local pharmacy. The results confirm that he is indeed not the child's biological father.

The news is very upsetting to Peter because he had developed a close bond with the child, told his family and friends that he is the child's father, and the child calls him "Daddy." Peter and Jane break up, and Peter moves out of the apartment the couple shared with the child. Peter also ends his relationship with the child.

Jane fosters a relationship between the child and the child's biological father, David Wilson. The child eventually refers to David as "Daddy."

When the child is three years old, Jane begins receiving government cash assistance. As required under federal law, the state government files a petition to establish child support, naming Peter as the respondent and stating that paternity has already been established because Jane and Peter signed the Acknowledgement of Paternity in the hospital. David is not a party to the lawsuit.¹²²

¹²¹ Regardless of whether Jane knew that Peter was not the father or was not sure, the result is the same as it relates to the acknowledgment of paternity—Jane and Peter acknowledged that Peter was the child's biological father, which they could not attest to definitively or at all. Consequently, Peter became the child's legal father. In some states and the District of Columbia, Jane would have had to acknowledge that Peter was the only possible biological father. *See, e.g., infra*, App'x A; ARK. DEP'T OF HEALTH, DIV. OF VITAL RECORDS, ACKNOWLEDGMENT OF PATERNITY (2009), <https://www.dfa.arkansas.gov/images/uploads/childSupportOffice/AOPSampleEnglish.pdf>, archived at <https://perma.cc/7GR2-2QBB>; CAL. DEP'T OF CHILD SUPPORT SERVS., HEALTH & HUMAN SERVS. AGENCY, FORM NO. CS 909, DECLARATION OF PATERNITY (2008), http://www.childsup.ca.gov/portals/0/cp/docs/cs909_english.pdf, archived at <https://perma.cc/2BX4-6QFK> [hereinafter CALIFORNIA DECLARATION OF PATERNITY]; STATE OF MONT. DEP'T OF PUB. HEALTH & HUMAN SERVS., OFFICE OF VITAL STATISTICS, PATERNITY ACKNOWLEDGEMENT, <https://dphhs.mt.gov/Portals/85/Statistics/documents/VitalStats/ack-withdrawalpaternity.pdf>, archived at <https://perma.cc/FN7S-EZAM>; N.Y. STATE DEP'T OF HEALTH, OFFICE OF TEMP. & DISABILITY ASSISTANCE, FORM NO. LDSS-4418, ACKNOWLEDGMENT OF PATERNITY (2014), <https://www.childsupport.ny.gov/dcese/pdfs/4418.pdf>, archived at <https://perma.cc/4R9Q-AK3F> [hereinafter NEW YORK ACKNOWLEDGMENT OF PATERNITY]; *see also* WASH. STATE DEP'T OF HEALTH, CTR. FOR HEALTH STATISTICS, FORM NO. DOH 422-159, ACKNOWLEDGEMENT OF PARENTAGE (2019), <https://www.doh.wa.gov/Portals/1/Documents/5640/422-159-AcknowledgmentOfParentage.pdf>, archived at <https://perma.cc/V4P8-BGF8> (signatories must affirm that "no other individual can legally claim parentage of the child").

¹²² Stories like this one occur regularly. In the author's over ten years of experience handling family law cases, she has learned about dozens of cases like this one.

In every state and the District of Columbia, when a child is born to a woman who is not married to the child's biological father, the woman and man can establish the man's paternity by signing a form to voluntarily acknowledge that the man is the child's biological father.¹²³ This form is commonly referred to as a voluntary acknowledgment of paternity (VAP).¹²⁴

Legally establishing the paternity of unmarried fathers creates a parent-child relationship from which important legal rights and responsibilities arise.¹²⁵ When paternity is legally established, the father's name is listed as a parent on the child's birth certificate, thereby conferring him with parental recognition.¹²⁶ The father gains the right to petition a court for custodial rights¹²⁷ to spend time with the child and participate in important decisions

¹²³ Rogus, *supra* note 32, at 69.

¹²⁴ The name and length of the form to voluntarily acknowledge paternity differs across states. Some forms are called "Acknowledgment of Paternity," while others are called "Affidavit" and "Declaration of Parentage." The forms are typically one to three pages in length. See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 70–71 (2010); see also, e.g., *infra* App'x A.

The most recent Uniform Parentage Act (2017) permits presumed parents and intended parents to sign an acknowledgment of parentage, which expands this form of establishing parentage to same-sex couples and couples who conceive using artificial reproductive technology. UNIF. PARENTAGE ACT § 301 (2017).

¹²⁵ For most women, the parent-child relationship begins when they give birth to the child. Unlike unmarried fathers, they do not have to take any additional action to establish parentage. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (citing *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) ("The mother carries and bears the child, and in this sense her parental relationship is clear.")).

¹²⁶ See 42 U.S.C. § 666(a)(5)(D)(i) (2018) (providing that, for unmarried different-sex couples, the father's name can only be listed on the child's birth certificate if the mother and father sign a VAP or paternity is adjudicated by a court or administrative agency); see also CHILD & FAMILY RESEARCH P'SHIP, CFRP POLICY BRIEF: WHY PARENTS ESTABLISH PATERNITY: A STUDY OF UNMARRIED PARENTS 2 (2014), https://childandfamilyresearch.utexas.edu/sites/default/files/CFRPPolicyBrief_B0040114_WhyParents-EstablishPaternity.pdf, archived at <https://perma.cc/88B3-J4AP>.

¹²⁷ *Id.*; see, e.g., ARIZ. DEP'T OF ECON. SEC., DIV. OF CHILD SUPPORT ENFORCEMENT, FORM NO. CS-127, ACKNOWLEDGMENT OF PATERNITY (2013), https://www.cochise.az.gov/sites/default/files/health_and_social_services/AcknowledgementOfPaternity-CS-127-F.pdf, archived at <https://perma.cc/7BJK-39AZ> [hereinafter ARIZONA ACKNOWLEDGMENT OF PATERNITY]; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; COLO. DEP'T OF PUB. HEALTH & ENV'T, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, FORM NO. VR12 (2018), <https://drive.google.com/file/d/1xRcwKTTcT-VB-c-jpywvXlCuSoUak4ye/view>, archived at <https://perma.cc/8UJH-3VAZ> [hereinafter COLORADO VOLUNTARY ACKNOWLEDGMENT OF PATERNITY]; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17. In some states, signing a VAP confers custodial rights on the father and mother without the need to adjudicate these issues in court, absent a dispute. See IND. STATE DEP'T OF HEALTH—VITAL RECORDS, FORM NO. 44780, PATERNITY AFFIDAVIT (2017), <https://forms.in.gov/Download.aspx?id=9989>, archived at <https://perma.cc/U6CW-C3L5> [hereinafter INDIANA PATERNITY AFFIDAVIT] (allowing parents to elect whether they will share legal custody, and states that as a consequence of signing the form, "[t]he father will have parenting time as outlined by the Indiana Parenting Time Guidelines, unless a court rules differently"); KANSAS DEP'T OF HEALTH AND ENV'T, OFFICE OF VITAL STATISTICS, FORM NO. VS211, PATERNITY CONSENT FORM FOR BIRTH REGISTRATION (2016), http://www.kdheks.gov/vital/download/vs211_court_paternity_consent.pdf, archived at <https://perma.cc/6PTQ-LWDR> [hereinafter KANSAS PATERNITY CONSENT FORM] (providing, in the basic rights and responsibilities section, that: "Both

about the child's health, education, religious training, and general well-being. The child gains the right to inherit from the father and receive benefits based on the parent-child relationship such as Social Security survivor benefits.¹²⁸ Legally establishing paternity obligates the father to provide financial support for the child.¹²⁹ When a VAP is properly executed, there is no need for any additional legal determination of paternity to establish a child support order.¹³⁰

VAPs are in widespread use, especially in hospitals. In 2016, about 1.6 million children were born to unmarried mothers.¹³¹ The same year, paternity was acknowledged for about 1.1 million children.¹³² Although a VAP can be completed at a designated state agency, the form is most commonly executed at the hospital within 72 hours of the child's birth.¹³³ The hospital staff file executed VAPs with the state agency that registers births,¹³⁴ and the man is listed as the child's father on the child's birth certificate.¹³⁵ A recent study of in-hospital paternity establishment found that when unmarried fathers are present during the child's birth, more than 90% sign a VAP in the hospital to establish paternity.¹³⁶

Federal law requires states to develop pre-signature procedures that provide both parties with written and oral notice of "the alternatives to,¹³⁷ legal consequences of, and the rights . . . and responsibilities that arise from,

the father and the mother have rights of custody and visitation with the child unless a court order changes their rights. If necessary, custody and visitation rights may be spelled out in a court order and enforced.").

¹²⁸ CHILD & FAMILY RESEARCH P'SHIP, *supra* note 126, at 2.

¹²⁹ *Id.*

¹³⁰ 42 U.S.C. § 666(a)(5)(D)(ii) (2018); *see also id.* § 666(a)(5)(E). The titles of this section of the United States Code and subsection (a) make the link between paternity establishment and child support clear. The section is titled "Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement." Subsection (a) is titled "Types of Required Procedures." Subsection (a)(5) is titled "Procedures Concerning Paternity Establishment."

¹³¹ MARTIN ET AL., *supra* note 23.

¹³² U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 24.

¹³³ Voluntary acknowledgement of paternity in the hospital is the leading method of paternity establishment for unmarried couples. As many as six out of seven paternities are established in the hospital for nonmarital births (about 85%). Ronald Mincy et al., *In-Hospital Paternity Establishment And Father Involvement In Fragile Families*, 67 J. MARRIAGE & FAM. 611–26 (2005); *see* Osborne & Dillon, *supra* note 25 ("[T]he vast majority of unmarried parents are now establishing paternity in the hospital voluntarily."); *see also* CYNTHIA OSBORNE ET AL., CHILD & FAMILY RESEARCH P'SHIP, IN-HOSPITAL PATERNITY ESTABLISHMENT: A STUDY OF STAFF, PARENTS, AND POLICY 6 (2014) (noting that in Texas about 7 in 10 fathers sign a VAP in the hospital).

¹³⁴ 45 C.F.R. § 303.5(g)(2)(iv) (2019) (requiring hospitals to "[f]ile signed original of voluntary acknowledgments or adjudications of paternity with the State registry of birth records").

¹³⁵ 42 U.S.C. § 666(a)(5)(D)(i) (2018).

¹³⁶ CYNTHIA OSBORNE ET AL., *supra* note 133, at 6.

¹³⁷ The alternatives to signing a VAP are to voluntarily acknowledge paternity at a judicial or administrative proceeding or proceed with a contested paternity case, which usually involves genetic testing and is time-consuming as well as financially costly. *See* 45 CFR § 303.5 (outlines procedure for establishing paternity). *See also, e.g.*, D.C. CODE ANN. § 16-909.01(a)(2) (West 2019) (permitting establishment of paternity by genetic testing).

signing the acknowledgment.”¹³⁸ In the hospital, a staff person, almost always a nonlawyer, provides the oral notice to the signatories.¹³⁹ Most of the forms include instructions, an explanation of rights and responsibilities, or both, which serves as the written notice.¹⁴⁰

The VAP process developed in response to changes in the social landscape that precipitated changes in the law. Beginning in the 1960s, the number of children born to unmarried mothers increased remarkably. The percentage of unmarried births more than doubled from 1960 to 1970 (from 5% to 11%) and tripled from 1970 to 2000 (from 11% to 33%).¹⁴¹ By 2008, the national rate of unmarried births reached 40%.¹⁴² Today, Mississippi (53.2%), Louisiana (52%), and New Mexico (51.1%) have the highest rates of births to unmarried women, while Utah (18.6%), Colorado (22.5%), and Idaho (27.6%) have the lowest rates.¹⁴³

The ease and widespread use of VAPs today stand in stark contrast to the historical processes for establishing paternity. Before the creation of the VAP, unmarried fathers had to undergo a lengthy legal proceeding to establish paternity.¹⁴⁴ In some states, putative fathers had the right to a jury trial.¹⁴⁵ As a result, multiple barriers—principally funds to pay for counsel and court fees—prevented many unmarried fathers from establishing paternity, and their biological children were considered “fatherless.”¹⁴⁶ Unmarried fathers had difficulty obtaining custodial rights to their minor children, and many did not have a legal duty to financially support their minor children.¹⁴⁷

While this problem was unfolding, another phenomenon emerged that impacted how the government responded. From 1965 to 1995, there was a massive increase in the number of mothers receiving welfare benefits for

¹³⁸ 42 U.S.C. § 666(a)(5)(C)(i) (2018); *see also* 45 C.F.R. § 303.5(g)(2)(i)(C).

¹³⁹ Osborne & Dillon, *supra* note 25, at 6 (“Birth registrars are typically not attorneys”).

¹⁴⁰ *See, e.g., infra* App’x A.

¹⁴¹ STEPHANIE J. VENTURA ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940–99, NATIONAL VITAL STATISTICS REPORTS 1 (Table 1) (2000).

¹⁴² JOYCE MARTIN ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, BIRTHS: FINAL DATA FOR 2018, NATIONAL VITAL STATISTICS REPORTS 10 (Table C) (2010).

¹⁴³ JOYCE MARTIN ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, BIRTHS: FINAL DATA FOR 2016 12–13 (supplemental Table I-7) (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_01_tables.pdf#I32, archived at <https://perma.cc/JAN7-AGQA>.

¹⁴⁴ *See* Carbone & Cahn, *supra* note 40, at 1185, 1216 (In the 1960s, “[f]or a child born outside of marriage, establishing paternity typically required a civil action.”).

¹⁴⁵ *See, e.g.,* Judge Marvin C. Holz, *The Trial of a Paternity Case*, 50 MARQ. L. REV. 450, 454 (1967).

¹⁴⁶ *See* Murray, *supra* note 71, at 390 (“At common law, children born out of wedlock were legally disfavored—*filii nullius*, the child of no one . . . Vestigial aspects of this common law tradition persisted, even on this side of the Atlantic, well into the twentieth century.”); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003).

¹⁴⁷ *See* Murray, *supra* note 71, at 390 (“Parents had no obligation to recognize their illegitimate offspring or to provide for their upkeep.”); *see also* Davis, *supra* note 146, at 81–82.

their children.¹⁴⁸ The majority of these mothers were unmarried and a disproportionate number of them were African American.¹⁴⁹ Consequently, the government was tasked with supporting more and more “fatherless” children, many of them children of color.

In response to this changing social landscape, from 1975 to 1996, the United States Congress passed a series of statutes that moved the paternity establishment process from the courtroom to the hospital room, replacing lengthy legal proceedings with signatures on a form.¹⁵⁰ These federal laws gave states funding to create child support agencies tasked with establishing paternity and obtaining child support orders. They required states to create a

¹⁴⁸ About 1 million families were receiving government cash assistance in the mid-1960s. GENE FALK, CONG. REVIEW SERV., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): SIZE AND CHARACTERISTICS OF THE CASH ASSISTANCE CASELOAD 4 (2016). By the mid-1970s, this number ballooned to about 3.5 million families, and grew to about 5.1 million families by 1994. *Id.* To put these figures into perspective, the United States population increased by 45% from 1960 to 1995, and the welfare rolls increased by 400% during this period. U.S. CENSUS BUREAU, POPULATION ESTIMATES PROGRAM, POPULATION DIVISION, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (2000), <https://www.census.gov/population/estimates/nation/popclockest.txt>, archived at <https://perma.cc/S3AC-RVUS>.

¹⁴⁹ The primary reason for the increase in receipt of government cash assistance was changes to the regulations that governed the program. Aid for Families with Dependent Children (AFDC), the predecessor to the current government cash assistance program—Temporary Assistance for Needy Families (TANF)—was created to support widows and their children because single mothers were not expected to work outside the home and take care of their children. The states enacted “morals” restrictions that excluded unmarried mothers and imposed other requirements that made agricultural and domestic service workers ineligible, which disproportionately excluded African Americans. Carbone & Cahn, *supra* note 40, at 1215. However, during the 1960s, many of these restrictions were eliminated, including racially motivated exclusions. By 1967, 46% of AFDC recipients were African American. The AFDC benefit amounts also increased, which made it easier for single mothers to support themselves and their children. *Id.* at 1215–16.

¹⁵⁰ With the passage of each federal law, voluntary acknowledgment of paternity went from an optional to a required component of state paternity establishment, and the requirements for undoing the acknowledgement became stricter. See Rogus, *supra* note 32, at 74–78. The Family Support Act of 1988 “encouraged” states “to establish and implement a simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases.” See Family Support Act of 1988, Pub. L. No. 100-485, § 111, 102 Stat. 2343, 2348–50. This statute also established performance measures for paternity establishment. If states failed to meet them, they would risk losing funding for their welfare programs. Rogus, *supra* note 32, at 74–78.

The Omnibus Budget Reconciliation Act of 1993 mandated that states develop “a simple civil process for voluntarily acknowledging paternity under which the State must provide that the rights and responsibilities of acknowledging paternity are explained and ensure that due process safeguards are afforded.” Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13721(b)(2)(C), 107 Stat. 312, 659. The Act also allowed states to choose whether voluntarily acknowledging paternity would create a rebuttable or conclusive presumption of paternity. *Id.*

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which aimed to “greatly increase paternity establishment,” had the most substantial impact on state paternity establishment procedures. *Oversight of the Child Support Enft Program: Hearing Before the Subcomm. on Human Res. of the H.R. Comm. on Ways & Means*, 106th Cong. 3 (1999) (statement of Rep. Nancy L. Johnson, Chairman, Subcomm. on Human Res.).

“simple civil process”¹⁵¹ for voluntarily acknowledging paternity that, when completed, had the same weight as a court order¹⁵² and was difficult to undo.¹⁵³ Congress required states to implement these procedures as a condition of receiving federal funding for their public assistance program.¹⁵⁴ The main goal of this effort was to find the fathers of children who received government benefits and require them to pay child support.¹⁵⁵ The government used the father’s child support payments to reimburse itself for the government benefits paid for the child.¹⁵⁶ The government’s hope was that receipt of child support would eliminate the mother and child’s reliance on government benefits and replace public support with private support.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which overhauled the federal welfare program, required states to make establishing paternity easier and undoing the determination more difficult. PRWORA made three significant changes to the process to voluntarily acknowledge paternity. First, the statute mandated that unmarried parents either sign a VAP form or obtain a court order to include the father’s name on the child’s birth certificate.¹⁵⁷ Second, PRWORA required states to create a hospital-based program for voluntary acknowledgment of paternity “immediately before or after the birth of a child.”¹⁵⁸ Finally, the statute limited the bases for challenging a VAP to fraud, duress, or material mistake of fact.¹⁵⁹ To retain federal funding for welfare programs, states implemented these federal mandates.¹⁶⁰

¹⁵¹ See Family Support Act of 1988, Pub. L. No. 100-485, § 111(c), 102 Stat. 2343, 2350 (codified as amended at 42 U.S.C. § 668 (2018)); 42 U.S.C. § 666(a)(5)(C)(ii) (2018).

¹⁵² See 42 U.S.C. § 666(a)(5)(D)(ii) (requiring states to develop “[p]rocedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity”).

¹⁵³ See *id.* § 666(a)(5)(D)(iii) (requiring states to develop “[p]rocedures under which . . . a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact” after the 60-day rescission period has lapsed).

¹⁵⁴ See *id.* §§ 652(g), 654(4)(A). This funding is referred to as IV-D funding, named after the section of the Social Security Act that sets forth the requirements for states to establish paternity and child support. *Id.* § 651. Federal law requires states and the District of Columbia to provide paternity and child support services to any individual, regardless of receipt of public benefits. See *id.* at § 654(4)(A)(ii), (B).

¹⁵⁵ See Rogus, *supra* note 32, at 74–78.

¹⁵⁶ 42 U.S.C. §§ 654(5), 657 (2018). Custodial parents who receive government cash assistance must assign their right to child support to the government as a condition of receiving benefits. *Id.* at § 608(a)(3).

¹⁵⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter PRWORA of 1996], Pub. L. No. 104-193, § 331(a)(5)(D)(i), 110 Stat. 2105, 2228. States also have an incentive to increase their paternity establishment rate because this metric is critical in the determination of which states receive federal incentive funds. Osborne & Dillon, *supra* note 25, at 5.

¹⁵⁸ PRWORA of 1996, Pub. L. No. 104-193, § 331(a)(5)(C)(ii), 110 Stat. 2105, 2228.

¹⁵⁹ *Id.* § 331(a)(5)(D)(iii).

¹⁶⁰ Rogus, *supra* note 32, at 75.

The introduction of the VAP process considerably increased the rate of paternity establishment for children born to unmarried women.¹⁶¹ However, the ease of the process is counterbalanced by its susceptibility to error. For the VAP process to produce the intended result—legally establish parentage for the child’s *biological* father—the signatories’ acknowledgments must be true, knowing, and voluntary like a contract.¹⁶² When any of these characteristics are absent, the VAP process breaks down. The VAP process is susceptible to four possible errors. A VAP acknowledgment is not knowing if the man and/or the child’s mother sign it without fully understanding the legal consequences of this act. A VAP lacks voluntariness if the man and/or the child’s mother are coerced into signing it. A VAP is not true if the man and the child’s mother sign it even though they both know that the man is not the child’s biological father.¹⁶³ And a VAP lacks truthfulness if the man and the child’s mother sign it even though the woman or both knows that the man is not the child’s only possible biological father, and the man is indeed not the child’s biological father, as in the story of Peter Johnson and Jane Smith that opened this section.

More often than not, the VAP process produces the intended result—the child’s biological father signs the VAP and becomes the child’s legal father. However, the story of Peter and Jane occurs regularly.¹⁶⁴

If the VAP process goes wrong, it is very difficult to undo. A man who signs a VAP and later wants to challenge paternity encounters a convoluted patchwork of laws that includes strict legal standards and short time limits.¹⁶⁵

¹⁶¹ Osborne & Dillon, *supra* note 25, at 1 (“From 1988 to 2013, the proportion of nonmarital births with paternity established . . . rose from 31 percent to 94 percent.”).

¹⁶² A difference between executing a VAP and a standard contract is that, when signing a VAP, the child’s mother has more information about the issue of paternity than the putative father. The man signing a VAP does not know for certain if his acknowledgement is true, unless genetic testing is done before he signs the VAP. See Rogus, *supra* note 25, at 97–98.

¹⁶³ See DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GEN., PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS, OEI-06-98-00053, at 11 (2000) (noting that in a study about the perceptions of state and local child support staff about the VAP process, some staff indicated concern that “some men may sign the affidavit knowing they are not the father, as one local office manager describes ‘out of kindness, pity or foolishness.’”)

¹⁶⁴ Scholars disagree about the error rate in the VAP process. See Ayres, *supra* note 34, at 240–41 (noting that popular opinion is that the rate of false paternity ranges from about 10% to 30%). In 2010, the paternity exclusion rate was about 25% for laboratories affiliated with the American Association of Blood Banks (about 91,000 exclusions in a batch of roughly 365,000 paternity tests). See AM. ASS’N OF BLOOD BANKS RELATIONSHIP PROGRAM TESTING UNIT, 2010 ANNUAL REPORT SUMMARY FOR TESTING 1, 3 (2010). Although this figure is instructive, it does not represent the percentage of men who were told they were a child’s father and later found out they were not. This figure includes tests of multiple men for a single family when, for example, the identity of the father is unknown because the woman had or is alleged to have had multiple sexual partners, or the woman knows that her husband is not the child’s biological father, but he and the biological father are tested to confirm this fact. *Id.* at 3–4.

¹⁶⁵ Pursuant to federal law, either signatory can rescind the voluntary acknowledgment within the earlier of 60 days, or the date of a judicial or administrative proceeding relating to the child in which the signatory is a party, whichever is earlier. See 42 U.S.C. § 666 (a)(5)(D)(ii) (2018); see also, e.g., D.C. CODE § 16-909.01(a-1) (2019). If the VAP is not

VAP signatories typically have 60 days to rescind the acknowledgement. The rescission process varies by state, and is not clearly outlined in many state's laws.¹⁶⁶ The rescission process is not commonly used given the low probability that an event would occur in this short period of time that prompts a signatory to seek to rescind the VAP, such as the filing of a child support case.¹⁶⁷ In some states and the District of Columbia, when a VAP form is validly executed and not rescinded within the prescribed time period, a conclusive presumption of paternity results.¹⁶⁸ If action is not taken quickly enough, it may be impossible to set aside a VAP, even if genetic testing confirms that the man who signed the VAP is not the child's biological father.

After the 60-day rescission period lapses, there are two main legal arguments to challenge a VAP. Either signatory can contest the procedures used to execute the acknowledgment by arguing that the signatory was not given proper oral and/or written notice.¹⁶⁹ Either signatory can also argue that the

rescinded, it becomes a legal finding of paternity. 42 U.S.C. § 666 (a)(5)(D)(ii) (2018). After 60 days, the VAP can only be rescinded by a court. The challenging party has the burden of proof. *Id.* at § 666 (a)(5)(D)(iii); *see, e.g.*, D.C. CODE § 16-909(c-1). Mississippi law provides that the signatories have one year to rescind a VAP. MISS. CODE ANN. § 93-9-9(4)(a) (2019).

¹⁶⁶ In some states and the District of Columbia, the law is silent about how to rescind a VAP. *See* Rogus, *supra* note 32, at 3281-82. In other states, the process is clearly outlined. *See, e.g.*, LA. STAT. ANN. § 9:406(A)(1)(a) (2018) (requires the appropriate state agency to develop a form and process to revoke a VAP); IOWA CODE ANN. § 252A.3A(12)(a) (West 2019) (rescission form requires signatory to attest that the man who signed the VAP is not the biological father); MASS. GEN. LAWS ANN. ch. 209C § 11(a) (West 2018) (requires court to order genetic testing if either party rescinds in the prescribed time period); W. VA. CODE ANN. § 16-5-10(h)(5)(A)-(D) (West 2018) (either signatory can file a complaint in court requesting rescission of a VAP within 60 days of execution, which the court must grant without any showing of fraud, duress, or material mistake of fact).

¹⁶⁷ Rogus, *supra* note 32, at 83 ("If there is no immediate consequence for the putative father following the signing of an acknowledgement, it is unlikely that he will take advantage of the rescission period because he has no reason to scrutinize the accuracy of the representations regarding his paternity.").

¹⁶⁸ *See* D.C. CODE §§ 16-909(b-1)(2) (2019), 16-2342.01(a)(1); *see also* R.I. GEN. LAWS § 15-8-3(a)(6) (2019); VA. CODE ANN. § 20-49.1(B)(2) (2018); 23 PA. CONS. STAT. ANN. § 5103(d) (2018); WIS. STAT. ANN. § 767.805(1) (West 2018). Some states have justified this strict standard by pointing to the voluntariness of the VAP process. *See, e.g.*, Letter from Laurie A. Ensworth, Asst. Chief, Child Support Section of Office of Corp. Counsel, to Hon. James Nathanson, Chairman, Comm. on the Judiciary, 1-2 (D.C. Oct. 11, 1994) (arguing that a conclusive presumption is even more justified for a VAP than the finding of a genetic test because the man can think about the consequences of signing a VAP); *In re Paternity of an Unknown Minor*, 951 N.E.2d 1220, 1222 (Ill. App. Ct. 2011) (quoting *People ex rel. Dep't of Pub. Aid v. Smith*, 818 N.E.2d 1204, 1214 (Ill. 2004)) (holding that the presumption for signing a VAP should be stricter than marital presumption because the man signing "[made a] conscious decision to accept the legal responsibility of being the child's father."); *Cesar C. v. Alicia L.*, 800 N.W.2d 249, 257 (Neb. 2011); *Burden v. Burden*, 945 A.2d 656, 668 (Md. Ct. Spec. App. 2008).

¹⁶⁹ In the District of Columbia, even if a VAP is invalidated because adequate notice was not provided, the VAP may be construed as a written acknowledgement of paternity that creates a rebuttable presumption of paternity pursuant to statute. D.C. CODE § 16-909(a)(4) (2019). There is a two-year time limit to challenge this rebuttable presumption if the man lived with the mother and child during the period of conception or held himself out as the child's father. D.C. CODE §§ 16-2342(c)-(d) (2019).

VAP is invalid due to fraud, duress, or material mistake of fact.¹⁷⁰ Many jurisdictions have statutes that set time limits for challenging a VAP on these bases. The limitations periods span from one year to five years from the date of signing a VAP.¹⁷¹

Peter Johnson would not fare well under the strict legal standards and time limits for challenging a VAP. If Peter went to the child support hearing three years after signing the VAP and argued that he should not have to pay support because he is not the child's biological father, in some states and the District of Columbia, the judge may find that Peter is the child's legal father because he did not raise this claim soon enough, and order him to pay child support.¹⁷²

The legal standard for disestablishing paternity is so strict that even if a man comes forward claiming to be the child's biological father, the court may find that the man cannot establish paternity because another man signed a VAP and is the child's legal father. Accordingly, if David Wilson intervened in the child support lawsuit requesting that the court establish his paternity of the child, his claim may be denied. David may also be denied custodial rights to the child because Peter is the child's legal father.

The creation of a "simple civil process" to establish paternity has, for some families, particularly low-income families and families of color, resulted in protracted legal battles on the back-end that require the court to determine a child's legal father by balancing the interests and rights of the child, the child's mother, the man who signed the VAP,¹⁷³ and the child's biological father.¹⁷⁴ In the meantime, the child lacks a legally secure father-child relationship and may experience the only father figure he knows disappearing from his life forever.

¹⁷⁰ 42 U.S.C. § 666(a)(5)(D)(iii) (2018).

¹⁷¹ Colorado allows challenges to VAPs within a reasonable time, but not more than 5 years from the date the VAP was signed. COLO. REV. STAT. ANN. § 19-4-107(1)(b) (2018). Tennessee also has a 5-year statute of limitations. TENN. CODE ANN. § 24-7-113(e)(2) (2014). South Dakota sets a 3-year limit. S.D. CODIFIED LAW § 25-8-59. In some states and the District of Columbia, a father may only have one year after signing a VAP to raise this claim pursuant to the local Civil Rule 60(b). *See, e.g.*, D.C. CODE 16-909(c-1) (2019) (providing that "[a] parent-child relationship that has been established pursuant to [a VAP] may be challenged in the Superior Court after the rescission period . . . through the same procedures as are applicable to a final judgment of the Superior Court, but only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenging party.") and D.C. SUPER. CT. CIV. R. 60(c)(1) (providing that a Rule 60(b) motion based on mistake, fraud, or misconduct of an opposing party, must be brought within one year of the judgment date). Massachusetts and Oregon also have one-year time limits for challenging a VAP. MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West 2019); MINN. STAT. ANN. § 257.75, subdn. 4 (West 2018); OR. REV. STAT. § 109.070(7) (2017).

¹⁷² *Cf.*, 42 U.S.C. § 666(a)(5)(D)(iii) (2018).

¹⁷³ The man who signs the VAP is commonly referred to as the acknowledged father. *The Rights of Unmarried Fathers*, U.S. DEPT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU 2 (Aug. 2017), <https://www.childwelfare.gov/pubPDFs/putative.pdf>, archived at <https://perma.cc/ZC5U-BCK4>.

¹⁷⁴ *See, e.g.*, D.C. CODE 16-909(b)(3) (2019); *see also* Rogus, *supra* note 32, at 104.

In contrast, if Peter and Jane had gone to court to establish paternity instead of signing a VAP, Peter would have had at least two options: genetic testing or voluntarily acknowledging paternity at a formal hearing.¹⁷⁵ In court, Peter would have been presented with the option of genetic testing more clearly than when he signed the VAP, and by a judge instead of a nonlawyer hospital staff person.¹⁷⁶ If done, the test would have shown that Peter is not the child's biological father, and he would not have been required to pay child support. Conversely, if Peter had voluntarily acknowledged paternity in court in lieu of genetic testing, he may have found the in-court acknowledgement more difficult to undo than a VAP, even if he did not know that he is not the child's biological father, because he presumably had more procedural protections in court, namely the explanation of his options from a disinterested judge.¹⁷⁷ Thus, addressing paternity in court could have either helped or harmed Peter. However, he would likely have been more informed about his options.

VAPs are easy to execute, highly susceptible to error, and difficult to undo. These characteristics sometimes create a perfect storm that results in a man who is not a child's biological father being established as a child's legal father and assuming the attendant rights and responsibilities instead of the biological father. Although this result exists in other types of paternity establishment,¹⁷⁸ it is contrary to the intended result of a VAP—at least as it is articulated on the acknowledgement forms and by Congress when it mandated that states use the process.

*B. Custodial Power of Attorney (or Delegation of Parental Powers)*¹⁷⁹

Jane loses her job and becomes homeless. Her aunt agrees to care for her child until her living situation stabilizes. The child moves in with Jane's aunt. Jane discovers that her aunt cannot

¹⁷⁵ See 42 U.S.C. §§ 666(a)(5)(B)–(C) (2018). While most states use a judicial process to establish paternity when a VAP is not signed, some states use an administrative agency process. In addition to the two options listed above, the court or administrative agency could also hold an evidentiary hearing about paternity without ordering genetic testing, regardless of whether the putative father appeared at the hearing. See, e.g., D.C. SUPER. CT. DOM. REL. R. 55(b)(2)(A).

¹⁷⁶ See *infra* Part IV.A for a discussion of the challenges with the oral explanation provided in the VAP process by hospital staff.

¹⁷⁷ See *infra* Part IV.A for a discussion of the financial incentives that hospital staff may have to sign as many VAPs as possible.

¹⁷⁸ Paternity is also established by the marital presumption, conduct, and intent, which sometimes (in the case of the marital presumption and conduct) and always (in the case of intent) results in a man who is not the child's biological father being established as the child's legal father. See Murray, *supra* note 71; see also, e.g., D.C. CODE § 16-909(e) (2019) (parentage can be established by a person who intends to be a child's father if the child is conceived through artificial insemination); Purvis, *supra* note 94, at 222–30.

¹⁷⁹ This Article uses the term “custodial power of attorney” because it is more descriptive than “delegation of parental powers.”

enroll the child in school or take the child to the doctor because the aunt is not the child's parent, legal guardian, or legal custodian.

After being deemed the child's legal father and required to pay child support, Peter became involved in the child's life again. He lives in another state and visits the child about twice a year. There has never been a custody order entered regarding the child.

Jane does legal research on the Internet and learns that she can either sign a custodial power of attorney to delegate her custodial rights to her aunt, or consent to a third party complaint for custody that her aunt files in court. If her aunt files a complaint for custody, her aunt has to serve Peter with the complaint. Jane does not need to obtain Peter's consent or even notify him to execute a custodial power of attorney. Also, the custodial power of attorney is revocable at any time and does not impact Jane's rights to the child in a future custody case.

Jane decides to sign a custodial power of attorney. She finds a sample form online. Jane meets with her aunt at her aunt's home. They sit down at the kitchen table and review the form together. Jane signs the form; her aunt is not required to sign it. Neither a notary nor a disinterested witness is present to confirm the signature.

Jane's aunt uses the form to enroll the child in school and take the child to the doctor. Peter learns that Jane assigned her parental rights to her aunt when, months later, he participates by phone in the child's yearly special education meeting at school and the aunt is present.

In more than twenty states and the District of Columbia, a parent “may create a revocable custodial power of attorney that grants to another person . . . the parent's rights and responsibilities regarding the care, physical custody, and control of the child.”¹⁸⁰ The Uniform Probate Code includes a provision that allows parents to delegate their powers to a non-parent.¹⁸¹ Many states that permit a revocable custodial power of attorney have

¹⁸⁰ This data is based on a 50-state statutory survey conducted by the author. *See, e.g.*, D.C. CODE § 21-2301(a) (2019); ALA. CODE § 26-2A-7 (2019); ALASKA STAT. § 13.26.066 (2018); ARIZ. REV. STAT. ANN. § 14-5104 (2019); GA. CODE ANN. § 19-9-122 (2019); HAW. REV. STAT. § 560:5-105 (2019); IDAHO CODE § 15-5-104 (2019); IND. CODE § 29-3-9-1 (2018); KY. REV. STAT. ANN. § 403.352 (West 2019); LA. CIV. CODE ANN. art. 233 (2019); ME. STAT. tit. 18-A § 5-104 (2019); MASS GEN. LAWS ch. 190B § 5-103 (2019); MICH. COMP. LAWS § 700.5103 (2019); MINN. STAT. § 524.5-211 (2018); MISS. CODE ANN. § 93-31-3 (2019); MONT. CODE ANN. § 72-5-103 (2017); NEB. REV. STAT. § 30-2604 (2019); N.M. STAT. ANN. § 45-5-104 (West 2019); N.D. CENT. CODE § 30.1-26-04 (2019); NEV. REV. STAT. § 159A.205; OKLA. STAT. tit. 10 § 700 (2019); OR. REV. STAT. § 109.056 (2017); TENN. CODE ANN. § 34-6-302 (2019); W. VA. CODE § 49-8-3 (2017); WIS. STAT. § 48.979 (2017).

¹⁸¹ UNIF. PROBATE CODE § 5-105 (2008).

adopted language identical or similar to the uniform code.¹⁸² In some states, the authorizing statute includes a sample form.¹⁸³ In the District of Columbia and other states, a local nonprofit or court provides a sample form on its website.¹⁸⁴

The parent can make the power of attorney general or limited, durable or nondurable,¹⁸⁵ immediate or springing.¹⁸⁶ Regardless of the nature of the custodial power of attorney, the parent retains full parental and custodial rights even after assigning all or some of these rights to a non-parent.¹⁸⁷ In some states and the District of Columbia, there is no requirement that the custodial power of attorney is witnessed or notarized.¹⁸⁸

State statutes limit whether and for how long a parent can delegate parental authority. In some states, the parents must experience a specific “hardship” to execute a custodial power of attorney.¹⁸⁹ In all states, parents can only delegate the power they have.¹⁹⁰ Accordingly, a noncustodial parent would not be able to change the child’s primary custodian through a custodial power of attorney.¹⁹¹ In most states, the delegation of rights can last for only a limited period of time, typically six months¹⁹² or a year.¹⁹³ In the

¹⁸² At least twenty states have enacted the Uniform Probate Code, or a substantially similar set of laws. UNIFORM LAW COMMISSION (last visited Apr. 27, 2019), <https://www.uniformlaws.org/committees/community-home?communitykey=a539920d-c477-44b8-84fe-b0d7b1a4cca8&tab=groupdetails>, archived at <https://perma.cc/W6AA-LA58>.

¹⁸³ See, e.g., GA. CODE ANN., § 19-9-129 (2018); MISS. CODE ANN. § 93-31-5 (2019); and WIS. STAT. § 48.979(2) (2016). These statutes require that the power of attorney is substantially in the form outlined therein.

¹⁸⁴ In the District of Columbia, for example, parents can download a sample custodial power of attorney, sample revocation form, and an information sheet that answers frequently asked questions about the process from the website of the Children’s Law Center, a nonprofit organization that provides free legal services to low-income children and their families. *Custodial Power of Attorney and Revocation*, CHILDREN’S LAW CENTER (last visited Apr. 14, 2019), <http://www.childrenslawcenter.org/resource/custodial-power-attorney-and-revocation>, archived at <https://perma.cc/V9VX-MT9T>; see also *Power of Attorney Form for Care and Custody of Minor Child(ren)*, AM. CIVIL LIBERTIES UNION OF ALASKA (last visited Apr. 14, 2019), https://www.acluak.org/sites/default/files/field_documents/power_of_attorney_minor_form.pdf, archived at <https://perma.cc/LWK8-A75S>.

¹⁸⁵ A durable power of attorney remains in effect after the principal becomes incapacitated. To make a power of attorney durable, specific language about the document’s durability must be included. See, e.g., D.C. CODE § 21-2102 (2019).

¹⁸⁶ An immediate power of attorney is effective immediately upon execution. A springing power of attorney becomes effective at some future date after execution.

¹⁸⁷ See, e.g., D.C. CODE § 21-2301(c) (2019).

¹⁸⁸ See, e.g., *infra* App’x B; 1A Wis. Prac., Methods of Practice Form 29-12 (5th ed.) (indicating that a witness is optional).

¹⁸⁹ See, e.g., GA. CODE ANN. § 19-9-122 (2018); TENN. CODE ANN. § 34-6-302(a) (2018).

¹⁹⁰ UNIF. PROBATE CODE § 5-105 (2008), Comment (“This section does *not* create a guardianship or grant a parent powers not previously possessed—it merely allows delegation of the powers that the individual *already* has. Thus, the ability to make a delegation under this section may be quite limited for a divorced parent without day-to-day custody of a child”) (emphasis in original).

¹⁹¹ *Id.*

¹⁹² Arizona, Idaho, Michigan, Montana, Nebraska, Nevada, North Dakota, and Oregon permit a custodial power of attorney for six months. See, e.g., ARIZ. REV. STAT. ANN. § 14-5104 (2019); see also *supra* note 180.

District of Columbia and Georgia, there is no time limit—the custodial power of attorney continues until the parent revokes it.¹⁹⁴ Upon closer examination, the time limits do not have as much import as they first appear to possess. State statutes do not explicitly limit the number of times a parent can sign a custodial power of attorney. Theoretically, as long as the parent has capacity to sign the document, the parent can execute consecutive custodial powers of attorney and transfer parental authority to a non-parent indefinitely.¹⁹⁵

State statutes also require different levels of involvement from and vetting of the third party receiving the delegation of parental rights. In some states, the person receiving the assignment of parental rights, called the agent or attorney-in-fact, must sign the form to indicate acceptance of the assignment.¹⁹⁶ In other states and the District of Columbia, there is no requirement that the recipient of parental powers sign the custodial power of attorney.¹⁹⁷ A few states require a background check of the third party.¹⁹⁸

¹⁹³ In Alabama, Alaska, Hawaii, Indiana, Kentucky, Maine, Minnesota, Mississippi, Oklahoma, West Virginia, and Wisconsin, a custodial power of attorney has a one-year lifespan. *See, e.g.*, ALA. CODE § 26-2A-7 (2018); *see also supra* note 180. Several states with a time-limited custodial power of attorney include longer time periods for parents who are serving on active duty in the military. For these parents, the delegation usually lasts for 30 days after their active duty ends. Alaska, Indiana, Kentucky, Maine, Michigan, Mississippi, and Oregon provide an additional 30 days after active duty. *See, e.g.*, ALASKA STAT. ANN. § 13.26.066 (West 2018); *see also supra* note 180. Idaho allows parents who are on active duty in the military to delegate their parental rights for twelve months instead of the standard six months, and Montana's statute does not specify a time limit for a custodial power of attorney executed by parents on active duty. IDAHO CODE ANN. § 15-5-104 (West 2019); MONT. CODE ANN. § 72-5-103 (2019).

¹⁹⁴ *See infra* App'x B. The District of Columbia's statute is silent on the duration of the custodial power of attorney, but is clear that it is revocable. D.C. CODE § 21-2301 (2019); *see also* GA. CODE ANN., § 19-9-129 (2019).

¹⁹⁵ *See, e.g.*, OKLA. STAT. ANN. tit. 10 § 700(B) (West 2018) (allows the delegating parent to "execute a new power of attorney for each additional year that the delegation exists"). *But see* MICH. COMP. LAWS ANN. § 700.5103(2) (West 2018) ("A parent shall not knowingly and intentionally delegate his or her powers under this section regarding care and custody of the parent's minor child for longer than 180 days for the purpose of permanently transferring custody of the child in violation of . . . the Michigan penal code").

¹⁹⁶ *See, e.g.*, ARK. CODE ANN. § 13.26.066 (West 2018); WISCONSIN CLERK OF COURTS, PROB. OFFICE, POWER OF ATTORNEY DELEGATING PARENTAL POWERS, <http://www.co.marathon.wi.us/portals/0/departments/coc/documents/rpopoa-delegatingparentalauthority.pdf>, archived at <https://perma.cc/2GVZ-4623> (last visited Apr. 14, 2019) [hereinafter WISCONSIN POWER OF ATTORNEY].

¹⁹⁷ *See infra* App'x B. *See, e.g.*, NEBRASKA STATE COURT, TEMPORARY DELEGATION OF PARENTAL POWERS, FORM NO. DC 6:10(1) (2016), <https://supremecourt.nebraska.gov/sites/default/files/DC-6-10-1.pdf>, archived at <https://perma.cc/P86P-WDRC> (last visited Apr. 14, 2019) [hereinafter NEBRASKA DELEGATION OF PARENTAL POWERS].

¹⁹⁸ *See, e.g.*, ME. STAT. ANN. tit. 18-A § 5-104 (West 2017) (requiring background check for agent and adult members of agent's household); MISS. CODE ANN. § 93-31-3 (West 2019) (requiring a background check for the attorney-in-fact if the person is not a grandparent, aunt, uncle, or sibling of the child); WIS. STAT. ANN. § 48.979 (West 2018) (requiring a background check of the agent if a child welfare agency facilitates the delegation); W. VA. CODE § 49-8-3 (2017) (requiring a qualified nonprofit organization to conduct a background check of the designee).

Most states and the District of Columbia do not require any vetting of the third party.¹⁹⁹

Like the voluntary acknowledgement of paternity, executing a custodial power of attorney has the same legal weight as a court order. With a signed form in hand, a non-parent attains most parental rights. In the District of Columbia and most states that permit delegation of parental authority through a custodial power of attorney, the third party can direct a child's education and medical care.²⁰⁰ In almost all jurisdictions, the only parental rights that state legislatures expressly prohibit parents from delegating are the right to consent to the child's adoption or marriage.²⁰¹

Because parents execute custodial powers of attorney entirely outside of the court and administrative systems, the frequency with which parents use them is difficult to determine.²⁰² Nonetheless, given the large numbers of children who do not live with their parents, there is reason to believe that the custodial power of attorney is widely used and that there is widespread need for it. In 2017, nearly 3 million children nationwide lived in a household without a parent present.²⁰³ Without formal delegation of parental rights, third party caregivers have significant difficulty accessing educational and medical services for the children in their care.²⁰⁴ Given these challenges, a custodial power of attorney likely governs many of these arrangements. Furthermore, in the wake of the immigration policies of President Donald Trump's administration,²⁰⁵ legal services attorneys and immigration advocates are encouraging undocumented immigrants with children to sign a custodial power of attorney in the event that the parents are detained or deported.²⁰⁶

¹⁹⁹ See *supra* note 180.

²⁰⁰ See *supra* notes 57–58 and accompanying text.

²⁰¹ See, e.g., ALA. CODE § 26-2A-7(a) (2018); D.C. Code Ann. § 21-2301(b) (West 2019); IND. CODE ANN. § 29-3-9-1(d)(1) (West 2018); OR. REV. STAT. ANN. § 109.056(1) (West 2018); WIS. STAT. ANN. § 48.979(1)(a) (West 2018).

²⁰² Multiple cases regarding delegation of parental powers involve whether a judge could terminate the parental rights of a parent who had delegated their custodial rights to a non-parent. See, e.g., *In re Welfare of Child of T.C.M.*, 758 N.W.2d 340, 347 (Minn. Ct. App. 2008). In one case, a mother disputed a father's delegation of his visitation rights to his parents while he was deployed for military service. The court upheld the delegation, holding that the state statute permitted it. See *Webb v. Webb*, 148 P.3d 1267, 1271 (Idaho 2006).

²⁰³ See U.S. CENSUS BUREAU, *supra* note 26.

²⁰⁴ See Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 46 (2008) ("Without legal custody orders, third parties have difficulty obtaining health care for children, enrolling them in school, and obtaining other benefits or services for the children in their care").

²⁰⁵ See Sarah Pierce and Andrew Selee, *Immigration under Trump: A Review of Policy Shifts in the Year Since the Election*, MIGRATION POLICY INSTITUTE (Dec. 2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts>, archived at <https://perma.cc/E4WW-HCSQ>.

²⁰⁶ See, e.g., IMMIGRANT LEGAL RES. CTR., FAMILY PREPAREDNESS PLAN, https://www.ilrc.org/sites/default/files/resources/family_preparedness_plan.pdf, archived at <https://perma.cc/9C4E-D5CV> (last visited Apr. 14, 2019); see also *Legal Aid Expands Services for DC's Immigrant Community*, LEGAL AID SOCIETY OF THE D.C. (Nov. 15, 2017), <https://www.makingjustice>

Before the creation of the custodial power of attorney, parents had to engage in a court process to assign their custodial rights to a non-parent. As with the voluntary acknowledgement of paternity, in response to changing family forms, legislatures passed statutes to permit the use of a custodial power of attorney to delegate parental authority.²⁰⁷ The District of Columbia's experience with enacting a custodial power of attorney statute is instructive. In 2007, when the Council of the District of Columbia considered and passed its custodial power of attorney law, more than 16,000 children in the District lived with a primary caregiver who was not their parent.²⁰⁸ In testimony before the Council, advocates contended that "[litigation] brings government intervention where none is needed, unnecessarily intruding on personal relationships and burdening the judiciary."²⁰⁹ The custodial power of attorney provided parents with a non-litigation option to help them gain stability if their family experienced an emergency situation that prevented the parent from being able to care for a child.²¹⁰

The court process to transfer parental authority to a third party has many of the same features as a custodial power of attorney, with one important distinction. In a court proceeding to transfer custodial rights, a parent can consent to a custody complaint filed by a third party²¹¹ and the consent can be revocable.²¹² The major difference is that a parent seeking a court order must provide notice to the other parent, whereas almost all states that permit parents to execute a custodial power of attorney allow unilateral assignment without notification to the other parent.²¹³

Only a few states require notice to or consent of the non-designating parent. Minnesota requires the designating parent to mail or give a copy of the document to any other parent within 30 days of its execution.²¹⁴ This

real.org/legal-aid-expands-services-for-d-c-s-immigrant-community, archived at <https://perma.cc/MCS4-ASML>. In many states, a parent must be ill to execute a standby guardianship designation. See *infra* Part III.C. Therefore, a springing custodial power of attorney is the most appropriate paper court for undocumented immigrants in those states. In several states, a parent can execute a standby guardianship designation regardless of their health. In these states, an undocumented immigrant may choose to execute a standby guardianship designation because it provides more protections. See *infra* Part III.C.

²⁰⁷ See *supra* note 180.

²⁰⁸ See *Safe and Stable Homes for Children and Youth Act of 2007, Hearing on Bill 17-41 Before the D.C. Council Comm. On Pub. Safety and the Judiciary*, at 8 (Apr. 24, 2007) (written testimony of Judith Sandalow, Exec. Dir., Children's Law Ctr.).

²⁰⁹ *Id.* at 54 (written testimony of Legal Aid Soc'y of D.C.).

²¹⁰ See *id.* Advocates used the Iraqi soldier to illustrate the need for a custodial power of attorney. However, in the author's decade-long experience as a family law practitioner in the District of Columbia, the custodial power of attorney is primarily used by single mothers who are experiencing a destabilizing situation like eviction, incarceration, or domestic violence.

²¹¹ See, e.g., D.C. CODE §§ 16-831.02(a)(1)(A) (2012), 16-831.06(d) (2012), 16-831.11(c) (2012).

²¹² See, e.g., *id.* at §§ 16-131.02(a)(1)(A), 16-1831.06(d). When consent is revocable, the court must vacate and invalidate the custody order when the consenting parent files a revocation. See, e.g., *id.* at § 16-1831.11(c).

²¹³ See *supra* note 180 for relevant statutes.

²¹⁴ See MINN. STAT. ANN. § 524.5-211(b) (West 2003).

notice is not required if the other parent has supervised visitation or no parenting time, or there is an active protection order against the other parent to protect the child or the delegating parent.²¹⁵ Mississippi requires both parents to sign the power of attorney if they are living and have shared custody as a matter of law or pursuant to an existing court order.²¹⁶ Tennessee also requires both parents to consent to the custodial power of attorney if they are living and share legal custody.²¹⁷ If only one parent has legal custody, the parent must obtain the consent of the other parent or state why consent cannot be obtained.²¹⁸ If only one parent consents to the delegation, that parent must notify the other of the delegation via certified mail, return receipt requested, at the last known address.²¹⁹

The ability to unilaterally assign custodial rights without notice to the other parent is a unique feature of the custodial power of attorney in the states that permit it. For this reason, even though parents can only delegate the rights they have, the delegation of parental authority to a non-parent is momentous. Post assignment, the third party has the authority to direct the care, custody, and control of the child. The non-delegating parent must now co-parent with a third party, almost always without notice or input about the delegation of rights. This new co-parenting arrangement impacts both the non-delegating parent's physical access to the child and ability to make important decisions that impact the child's well-being.

In the story of Peter and Jane, Peter now has to share decision-making authority with Jane's aunt even though he received no notice of Jane's delegation of parental authority to her aunt and had no opportunity to object to the delegation before it was made. Furthermore, because the delegation of parental authority can last for six months, one year, or indefinitely, the third party could have custodial rights long enough to attain standing to sue for permanent custody of the child.²²⁰ Ultimately, Peter may have to contend with Jane's aunt for custodial rights in court.

Unilateral assignment without notice is not exclusive to the custodial power of attorney; it is also a marker of the process for designating a standby guardian.

²¹⁵ See *id.*

²¹⁶ See MISS. CODE ANN. § 93-31-3(c) (2016).

²¹⁷ See TENN. CODE ANN. § 34-6-303 (2007).

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ In a custody case, a child's living arrangement at the time of filing the complaint is a critical factor that a court must consider when determining the custodial arrangement that is in the child's best interest. See, e.g., D.C. CODE § 16-831.08(a)(1) (2012) (listing "the child's need for continuity of care and caretakers" as one of the factors a court may consider when determining the best interests of the child). In some jurisdictions, the child has to live with a non-parent for a specific period of time before the third party has standing to sue for custody. See, e.g., D.C. CODE § 16-831.02(a)(1)(B)(i) (2012) (stating that a third party can sue for custody if the child has lived with the third party for at least four of the last six months). Because stability of the child is paramount in custody cases, the longer the third party cares for the child, the greater the probability that the third party will retain custody.

C. *Standby Guardianship Designation*

Jane is diagnosed with a terminal illness. She wants her mother to become her child's legal guardian in the event that she can no longer care for the child. A friend tells Jane that her mother can be a standby guardian. Jane finds a form on the Internet that she can use to make the designation. She does not need to notify Peter or obtain his consent to designate a standby guardian. She meets with her mother, her aunt, and her cousin at her aunt's home. She and her mother review and sign the standby guardianship form in the presence of her aunt and cousin. Jane's aunt and cousin sign the form to indicate that they witnessed Jane and her mother sign the form.

Jane's health worsens, and she becomes unable to care for the child. Jane's mother becomes the child's standby guardian, and the child moves in with Jane's mother. The child lives with Jane's mother for six months before she files a petition in court to request that the court confirm her appointment as the child's standby guardian, which comports with local law. Peter learns about the standby guardianship designation for the first time when he receives a copy of the petition in the mail. He objects to the court appointment of Jane's mother as the child's guardian and requests that the court grant him custody of the child.

Twenty-nine states and the District of Columbia have enacted statutes permitting parents to designate a standby guardian to care for their minor child if the parent becomes unable to care for the child.²²¹ States vary on when and how a parent can establish a standby guardianship. In seventeen states, parents can elect a standby guardian regardless of the parent's health condition at the time.²²² In twelve states and the District of Columbia, parents can designate a standby guardian only if they have been diagnosed with a chronic or terminal illness or are "at significant risk of death or [have] a condition of incapacity that will impair [the parent's] ability to care for [the] child within the next [two] years."²²³

In most jurisdictions, courts do not play a role in the designation of a standby guardian. Twenty-one states and the District of Columbia allow parents to appoint a standby guardian "through a written designation that is signed by two witnesses."²²⁴ In contrast, seven states require the nominating

²²¹ See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFO. GATEWAY, *STANDBY GUARDIANSHIP 1* (2018), <https://www.childwelfare.gov/pubPDFs/guardianship.pdf>, archived at <https://perma.cc/5MDF-KJYP>.

²²² See *id.* at 2.

²²³ *Id.*

²²⁴ The written designation can be a will. *Id.* at 5–55.

parent to initiate a court proceeding to designate a standby guardian.²²⁵ Regardless of the preconditions and mechanism, the parent retains full parental rights even after the standby guardian's authority begins, and may revoke the standby guardianship at any time.²²⁶

The standby guardian's authority becomes active when a triggering event occurs, which is most commonly the parent's death, physical debilitation, or mental incapacity.²²⁷ This type of standby guardianship designation is akin to a springing power of attorney. In some states, the parent's consent is the triggering event that activates a standby guardianship.²²⁸ This type of standby guardianship designation is similar to an immediate power of attorney. Once a standby guardian's authority is active, the guardian can legally exercise parental authority by presenting the executed paperwork to the appropriate entity, usually school personnel or staff at a doctor's office.

Although court intervention is unnecessary to designate a standby guardian in most states, a court must affirm the parent's nomination before or after the triggering event occurs. Either the nominating parent or the standby guardian must file a petition and attend a court hearing.²²⁹ As a general matter, these petitions are filed after the triggering event occurs. The standby guardianship process is a unique paper court that incorporates judicial review in order for the assignment of parental rights to continue after the guardian's authority becomes active.

Despite judicial review on the back-end, the standby guardianship designation functions as a paper court because, in many states, there is a significant period of time when parental authority can be delegated to a non-parent through standby guardianship without court intervention. When a petition is not filed before the triggering event, pursuant to state statute, the standby guardian has anywhere from 10 to 180 days²³⁰ after the guardian's authority becomes active to file the petition requesting confirmation of the appointment as a standby guardian. During this time period, the standby guardian has the same rights as a parent to the care, custody, and control of the child without court approval.

²²⁵ In Tennessee, parents can designate a standby guardian through a custodial power of attorney. *See id.* at 2.

²²⁶ *See, e.g.*, D.C. CODE §§ 14-4804(c)–(d) (2012); 14-4810(a)–(c) (2012).

²²⁷ The triggering event is the death or incapacity of the parent in twenty-one states and the District of Columbia. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 221, at 2.

²²⁸ The parent's consent is sufficient to activate a standby guardianship in eight states. *See id.*

²²⁹ *See id.*

²³⁰ In states that allow parents to use a written designation to create a standby guardianship, if a court does not affirm the parent's nomination of a standby guardian before the triggering event, the standby guardianship activates without court intervention when the triggering event occurs. Though most states require standby guardians to file a petition in court within 30, 60, or 90 days of the triggering event, Missouri allows as few as 10 days, and Maryland and Wisconsin as many as 180 days. *See id.* at 5–55.

Before the invention of standby guardianship, parents could only designate a guardian by petitioning a court or executing a will.²³¹ Standby guardianship is preferable for two reasons. First, standby guardianship allows ill parents to make long-term plans for the care of their children. When the triggering event occurs, the standby guardian that the parent selected assumes authority to care for the child without court intervention.²³² In theory, there is no gap in the care or control of the child.²³³ Second, and most importantly, unlike traditional guardianship, designation of a standby guardian allows parents to legally transfer custody of their child without relinquishing their parental rights.²³⁴

During the 1990s, legislatures across the country adopted standby guardianship laws to address the needs of parents living with HIV/AIDS and other disabling and terminal conditions.²³⁵ These laws were also “spurred by the increasing number of single-parent families in the United States.”²³⁶ At the time, “the plague-like advent and progression of HIV/AIDS,” which primarily impacted young adults, underscored the inadequacy of traditional mechanisms to address the needs and concerns of parents who knew that there was a high likelihood that they would be unable to care for their minor children during their lifetime.²³⁷ Across the country, state legislatures enacted standby guardianship laws to address the mismatch between the available remedies in the legal system and the evolving needs of parents and children.

²³¹ See Joshua S. Rubenstein, *Standby Guardianship Legislation: Preparing Before the Tidal Wave Hits*, 22 ACTEC NOTES 60, 60 (1996); Peter Mosanyi II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. L. 253, 254 (2002).

²³² In this way, a standby guardianship is similar to a declaratory judgment. See Rubenstein, *supra* note 231, at 61.

²³³ See *id.* If the standby guardianship is challenged by another parent or guardian, delay and uncertainty are unavoidable.

²³⁴ See *id.* at 61 (noting that traditional guardianship “either terminate[s] parental rights or at least confer[s] absolute decision-making power upon someone else”); see also Mosanyi, *supra* note 231, at 255–56 (“[T]raditional guardianship [requires] the parent to relinquish all parental rights and perhaps even physical custody of a child.”).

²³⁵ See Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145, 207–09 (1994); see also Rubenstein, *supra* note 231, at 60 (1996).

²³⁶ UNIF. PROBATE CODE, Article V, Prefatory Note, U.L.A. 492 (2017).

²³⁷ Rubenstein, *supra* note 231, at 60. The District of Columbia’s standby guardianship statute begins with two findings that speak to the need for developing a mechanism that does not terminate or significantly limit parental rights:

- (1) Existing custody law does not provide adequately for the needs of a parent who is ill and desires to make long-term plans for the future of a child without terminating or limiting in any way the parent’s legal rights.
- (2) Children are becoming unnecessarily involved in adversarial court proceedings, or they are without legally sanctioned caretakers because their ill parents cannot or will not transfer custody to another person if such a transfer requires any limitation of the custodial parent’s rights.

Like the custodial power of attorney, in most states that permit standby guardianship by written designation, the nominating parent does not have to notify the other parent that the nominating parent has designated a standby guardian for the child.²³⁸ In these states, the other parent receives notice only when a petition is filed with a court to confirm the appointment of a standby guardian, which is typically after the standby guardian's authority becomes active.²³⁹ Depending on the state, as many as 180 days (six months), could elapse after a triggering event before the petition is filed. Consequently, similar to a third party that receives parental authority pursuant to a custodial power of attorney, a standby guardian could have authority to care for and make decisions about a child for a long enough period of time to acquire standing to sue for custody of the child.²⁴⁰ Although the unilateral assignment of parental rights without notice or court intervention usually lasts for a relatively short period of time for a standby guardianship, this transfer of authority is significant.

IV. COMPETING INTERESTS

For adjudicative processes in the family law system, access to justice, parental autonomy, and due process are three primary competing interests. Much of the critique of the traditional judicial process focuses on its inability to balance these interests properly.²⁴¹ Paper courts are an attempt to fill in

²³⁸ The United States Department of Health and Human Services conducted a fifty-state survey that catalogues standby guardianship statutes. The survey assessed whether each statute includes a provision related to the involvement of noncustodial parents. The District of Columbia and sixteen states that permit written designation of a standby guardian have statutes that include such a provision (California, Colorado, Connecticut, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin). CHILD WELFARE INFO. GATEWAY, *supra* note 220, at 5-55. Most of these statutory provisions relate to involvement of the non-designating parent after a petition has been filed in court rather than when a written designation is made. *Id.* Only a few states that permit written designation require consent of the non-designating parent. *Id.* Two states that require consent—Minnesota and Pennsylvania—allow the designating parent to nominate a standby guardian without the consent of the other parent if they indicate that the other parent is unable to care for the child. MINN. STAT. ANN. § 257B.03 (West 2018); 23 PA. STAT. AND CONS. STAT. ANN. § 5611(a)(3) (West 2018). Connecticut's statute requires that both parents consent to a designation if they are alive when it is made, unless either has been removed as guardian or has had parental rights terminated. CONN. GEN. STAT. ANN. § 45a-624a (West 2019). Florida requires both parents to agree to nominate a standby guardian if they are living. FLA. STAT. ANN. § 744.3046 (West 2018). The plain language of the Georgia statute does not require consent of the non-designating parent, but the designation form implies that consent is required if the parent is alive, can be located, and retains parental rights. GA. CODE ANN. § 29-2-11 (2019); GEORGIA PATERNITY ACKNOWLEDGMENT, *infra* note 270.

²³⁹ CHILD WELFARE INFO. GATEWAY, *supra* note 221, at 5-55.

²⁴⁰ In the District of Columbia, for example, physical custody for four months is sufficient for a non-parent to attain standing to petition the Family Court for custody. *See* D.C. CODE § 16-831.02(a)(1)(B)(i) (2012).

²⁴¹ *See, e.g.,* Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2708-15 (2014) (critiquing the lack of access to justice in family courts); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless*

the gaps where the traditional court system falls short. In some ways, paper courts achieve this goal, but in other ways, they lack the substantive and procedural safeguards that protect rights in traditional courts. While there have been considerable gains in the transition from traditional courts to paper courts for the promotion of procedural access to justice and parental agency, the lack of substantive access to justice—that is, informed consent—and procedural due process protections is troubling, particularly because of the considerable rights and interests at stake and the disproportionate impact on marginalized communities.

A. *Promoting Procedural Access, But Lacking Substantive Access*

Access to justice has both procedural and substantive elements. As a procedural matter, access to justice is the degree to which the legal process is easy to use, convenient, and affordable. As a substantive matter, access to justice is the degree to which the legal process fosters participant understanding of the legal issues, legal options, and legal consequences of each option. Both components must be present to achieve meaningful access to justice.²⁴² In order to engage in a legal process effectively, participants must be able to enter into, navigate, and understand the process.

Ensuring access to justice—both procedural and substantive—is one of the most pressing challenges for family courts. These courts face significant procedural access challenges.²⁴³ Court procedures are slow. They are not ideal for emergencies, and they have high time costs for litigants. Also, the adversarial nature of the court process carries a high emotional cost for litigants, especially when they have a child in common or are related—one person has to sue the other.²⁴⁴ There are also fees to access court processes. These fees can be waived, but requesting a waiver adds another layer of process, and litigants pay in time. Court procedures are inconvenient. Litigants have to travel to court to appear before a judge and often must take time off work to attend hearings.

Children, 81 NOTRE DAME L. REV. 325, 357 (2005) (critiquing court processes for acknowledging paternity due to absence of legal representation for most putative fathers, sheer volume of paternity cases, and “routine treatment” of such cases by the child support agency, which “leaves many fathers misinformed about the significance of the proceedings”); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 268–81 (1975) (critiquing the lack of parental autonomy in child custody determinations).

²⁴² Procedural and substantive access to justice are distinct from procedural and substantive due process. The former relates to the administration of legal processes as a matter of justice, and the latter relates to constitutional concerns of notice and opportunity to be heard as well as protection of fundamental rights, respectively.

²⁴³ See Peter Salem & Michael Saini, *A Survey of Beliefs and Priorities about Access to Justice of Family Law: The Search for a Multidisciplinary Perspective*, 17 CARDOZO J. CONFLICT RESOL. 661, 662 (2016).

²⁴⁴ See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 120 (1983); Michaela Keet et al., *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 WINDSOR Y.B. ACCESS TO JUST. 73, 76–78 (2017).

Family courts also have significant barriers to substantive access to justice. Family law involves a complicated web of substantive rights and civil procedure.²⁴⁵ Legal representation for both sides is critical to achieving access to justice;²⁴⁶ however, self-representation has become the rule rather than the exception in family courts.²⁴⁷ There are several explanations for this reality, particularly a lack of affordable legal representation.²⁴⁸

Paper courts promote access to justice as a procedural matter in ways that are unmatched by the traditional court process.²⁴⁹ Executing forms outside of court to establish and assign parental rights increases procedural access to justice for three reasons. First, the forms request basic information from the signatories that is simple to provide.²⁵⁰ Second, the forms are convenient to execute. The necessary documents are readily available. Most parents sign a voluntary acknowledgement of paternity at the hospital within 72 hours of the birth of the child while the mother and baby are receiving postpartum care.²⁵¹ Many states have custodial power of attorney and standby guardianship forms accessible on the Internet.²⁵² These forms are available to parents at the location and time that they are most likely to access them—evenings and weekends in the comfort of their home or local public library.²⁵³ Paper court forms also are convenient because they can be completed relatively quickly. One study found that, on average, executing a VAP added forty minutes to the birth registration process.²⁵⁴ The custodial power

²⁴⁵ See Weaver, *supra* note 241, at 2712–15 (outlining the complexities of family law).

²⁴⁶ See *id.* at 2743 (arguing that attorneys are necessary to achieve access to justice in family law cases).

²⁴⁷ A study of access to justice in the District of Columbia’s Family Court found that 77% of plaintiffs represented themselves in divorce and custody cases, and over 98% of respondents did not have counsel in paternity and child support cases. See *Justice for All?: An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community*, D.C. ACCESS TO JUSTICE COMM’N 63 (2008).

²⁴⁸ When low-income people seek legal representation, the majority cannot obtain it because of the constrained capacity of legal services organizations. Free legal representation is largely unavailable to family law litigants living in poverty. See John M. Greacen, *Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities*, 52 FAM. CT. REV. 662, 663 (2014).

²⁴⁹ Paper courts also offer other benefits for families. Research has shown that fathers who sign VAPs in the hospital “are more likely to be involved in their children’s lives than fathers who establish paternity elsewhere or not at all,” and father involvement benefits children in significant ways. See Osborne & Dillon, *supra* note 25, at 1.

²⁵⁰ See *infra* Appendices A, B, and C.

²⁵¹ See *infra* Part III.A.

²⁵² See *infra* Parts III.B and C.

²⁵³ Although the digital divide is shrinking, many low-income families do not have access to computers with Internet service in their home. Printers in the home are likely even less common for low-income families. See CAMILLE RYAN & JAMIE M. LEWIS, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2015 4, Table 1 (2017) (noting that for households with an annual income less than \$25,000, about 50% have computers and Internet service in their home).

²⁵⁴ See Osborne & Dillon, *supra* note 25, at 15 (“Nearly two-thirds of birth registrars indicate that the [Acknowledgement of Paternity] adds an average of between 15 and 30 minutes to the birth registration process”). For more complicated situations, the acknowledgement of paternity adds about 40 minutes to an hour to the process. See *id.*

of attorney and standby guardianship forms likely take much less time to sign than a VAP because many of these forms do not include written notice about the consequences of signing them, and none of the forms require that signatories receive oral notice of the consequences before signing them. Parents likely can complete these documents in a matter of minutes.

Third, paper courts promote procedural access to justice because the forms are low-cost for parents financially. Parents usually do not pay a fee to sign the documents. In many states, one or two witnesses are sufficient to certify the execution of a VAP.²⁵⁵ There are likely willing participants at the hospital,²⁵⁶ particularly hospital staff and family and friends visiting the newborn. If parents sign a VAP in the hospital in a jurisdiction that requires a notary, there is no charge for notarizing the VAP.²⁵⁷ Some of the custodial power of attorney and standby guardianship forms do not require a notary,²⁵⁸ and when one is required, the cost is relatively low even after departure from the hospital.²⁵⁹

²⁵⁵ See, e.g., ARIZONA ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; COLORADO VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; FLA. DEP'T OF HEALTH, OFFICE OF VITAL STAT., FORM NO. DH FORM 432, ACKNOWLEDGMENT OF PATERNITY (2006), http://www.floridahealth.gov/certificates/certificates/birth/_documents/dh_432_ack_paternity.pdf, archived at <https://perma.cc/84RJ-2HNR> [hereinafter FLORIDA ACKNOWLEDGMENT OF PATERNITY]; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17; MICH. DEP'T OF HEALTH AND HUMAN SERVS., FORM NO. DCH-0682, AFFIDAVIT OF PARENTAGE (2016), https://www.michigan.gov/documents/Parentage_10872_7.pdf, archived at <https://perma.cc/NUK2-2FXN> [hereinafter MICHIGAN AFFIDAVIT OF PARENTAGE]; BUREAU OF VITAL RECORDS, MO. DEP'T OF HEALTH AND SENIOR SERVS., FORM NO. MO 580-0651, AFFIDAVIT ACKNOWLEDGING PATERNITY (2010), https://www.courts.mo.gov/file/Affadavits%20Acknowledging%20Paternity_RRE.pdf, archived at <http://perma.cc/8T24-L8C3> [hereinafter MISSOURI AFFIDAVIT ACKNOWLEDGING PATERNITY].

²⁵⁶ Some states prohibit the signatories of a VAP from witnessing each other's signature. See ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17, MISSOURI AFFIDAVIT ACKNOWLEDGING PATERNITY, *supra* note 255; NEW YORK ACKNOWLEDGMENT OF PATERNITY, *supra* note 121; BUREAU OF CHILD SUPPORT ENF'T, PENNSYLVANIA DEP'T OF PUB. WELFARE, FORM NO. PA/CS 611, ACKNOWLEDGMENT OF PATERNITY FOR A CHILD BORN TO AN UNMARRIED WOMAN (2006), https://www.humanservices.state.pa.us/csww/CSWS/forms/completed_AOP.pdf, archived at <https://perma.cc/DY69-W4N9> [hereinafter PENNSYLVANIA ACKNOWLEDGMENT OF PATERNITY]. Some states prohibit anyone related to the signatory by blood or marriage from serving as a witness. See ARIZONA ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; MISSOURI AFFIDAVIT ACKNOWLEDGING PATERNITY, *supra* note 255. However, hospital or birthing center staff can serve as a witness. Some states require a witness from the hospital or birthing center staff. See CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121.

²⁵⁷ Some VAP forms state that signatories will not be charged a fee. See, e.g., COLORADO VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; MICHIGAN AFFIDAVIT OF PARENTAGE, *supra* note 255.

²⁵⁸ See, e.g., *infra* App'x B.

²⁵⁹ Notary fees range from \$1 for the entire document to \$10 per signature. See NAT'L NOTARY ASS'N, STATE NOTARY FEES CHART, <https://www.nationalnotary.org/file%20library/nna/knowledge%20center/outside%20pdfs/state-notary-fees-chart.pdf> (last visited July 27, 2018), archived at <https://perma.cc/Y6LG-3VU2>.

Although paper courts are more procedurally accessible than traditional courts,²⁶⁰ they lack substantive access to justice, in some respects to a greater degree than traditional courts. Paper courts document, ratify, and legitimize the signatories' consent.²⁶¹ One marker of substantive access to justice is informed consent. For consent to be informed, it must be knowing and voluntary.²⁶² Given the context and manner in which forms in paper courts are executed, there is a high likelihood that participants do not understand the implications of signing the documents. There are also concerns about the possibility of signing under duress, particularly to execute a VAP.

Consent in the VAP process is not always knowing or voluntary. This problem stems from how notice is given and the content of the notice. Federal law requires states to develop procedures that provide oral and written notice of "the alternatives to, legal consequences of, and the rights . . . and responsibilities [f]or acknowledging paternity."²⁶³ However, the location and timing of the notice impede comprehension and voluntariness. A VAP is often signed in the hospital room just hours after the child is born, which is usually a foggy and vulnerable time.²⁶⁴ Many signatories have never seen the document before they sign it.²⁶⁵ Emotional vulnerability, use of pain medication, and sleep deprivation are common, particularly for the child's mother.

²⁶⁰ Paper courts also promote judicial economy, which arguably increases both procedural and substantive access to justice for litigants in traditional courts. Paper courts either completely remove consent cases from the traditional court system, or, in the case of standby guardianship designations, can reduce the number of times the case is heard in court. Instead of suing each other in court, parties who agree about the allocation of parental rights can sign forms outside of court to establish parental identity and assign parental authority. Fewer cases in court theoretically result in shorter wait times for litigants and more time per case for court personnel, including judges, to assist unrepresented litigants understand the process. Accordingly, because paper courts exist, traditional courts can devote more time and attention to contested cases. In this way, paper courts are an access to justice solution.

Proposed access to justice solutions abound. Some advocates insist that ensuring a right to counsel in civil cases (known as civil *Gideon*) is critical. The Supreme Court has rejected a right to counsel in family law cases. *See* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981) (holding no right to representation in termination of parental rights cases); *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (holding no right to representation in child support civil contempt cases). Others tout pro bono and limited scope representation as the key to increasing legal representation, particularly at key moments during litigation. Proposals to incorporate assistance from nonlawyers are criticized due to concerns that they contravene legal ethics rules that prohibit the unauthorized practice of law. Self-help tools, such as forms, provided by courts and for-profit entities such as Legal Zoom garner criticism as insufficient and potentially harmful. *See* *Weaver*, *supra* note 241, at 2710–11; Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 *Geo. J. Legal Ethics* 485, 490–94 (2017).

²⁶¹ *See supra* note 3 and accompanying text.

²⁶² These components are symbiotic. In order for consent to be voluntary, it must be knowing. *See* Rogus, *supra* note 32, at 114–17.

²⁶³ 45 C.F.R. § 303.5(g)(2)(i)(C) (2017).

²⁶⁴ *See* NANCY DUFF CAMPBELL ET AL., NAT'L WOMEN'S LAW CTR. & CTR. ON FATHERS, FAMILIES, & PUB. POLICY, *FAMILY TIES: IMPROVING PATERNITY ESTABLISHMENT PRACTICES AND PROCEDURES FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN* 17 (2000).

²⁶⁵ Many unmarried parents learn about the VAP process for the first time after the birth of their child. A study of unmarried mothers in Texas found that nearly half were unaware before giving birth that the father had to establish paternity to become the child's legal parent. *See*

These conditions are not ideal for decision-making of such import.²⁶⁶ There are also challenges with voluntariness. The signatories may be pressured by relatives,²⁶⁷ each other, or hospital staff²⁶⁸ to sign the VAP.

The manner in which written and oral notice is provided also fails to promote knowing consent. The written notice on VAP forms uses complicated legal language. In a single form that spans a few pages, states attempt to explain the legal consequences of executing the form for waiver of the right to request genetic testing,²⁶⁹ parents' custodial rights,²⁷⁰ parents' legal duty to provide financial support for the child,²⁷¹ and inheritance and survivorship rights.²⁷² In many states, if the child's mother is married to a man other than the one signing the acknowledgment of paternity, there is a concurrent process that the mother and her husband must complete to deny the husband's paternity.²⁷³ If any signatory is a minor when signing a VAP, many states include language on their forms about the minor's capacity to execute

CHILD & FAMILY RESEARCH P'SHIP, THE UNIV. OF TEX. AT AUSTIN, WHY PARENTS ESTABLISH PATERNITY: A STUDY OF UNMARRIED PARENTS 5 (2014).

²⁶⁶ See OFFICE OF THE INSPECTOR GEN., *supra* note 163; see also Rogus, *supra* note 32, at 97 (“[O]ne of the easiest procedures for identifying a child’s father is also easily susceptible to manipulation and confusion.”).

²⁶⁷ See OFFICE OF THE INSPECTOR GEN., *supra* note 163, at 11 (finding that local child support staff reported that parents who sign VAPs are coerced by relatives at the hospital).

²⁶⁸ See Osborne & Dillon, *supra* note 25, at 8 (noting that there is debate about whether “the Texas Family Code fails to compel full disclosure from the mother, and effectively leaves open the possibility for the wrong father to establish paternity, either through persuasion from the mother, pressure from hospital staff, or lack of understanding as to the gravity of the commitment he is making”) *Id.* at 7. (“Other research has questioned the integrity of the in-hospital paternity establishment program, suggesting that, in the quest for federal incentive payments, states have been incentivized to jettison paternity accuracy in pursuit of higher paternity establishment rates.”). See also OFFICE OF THE INSPECTOR GEN., *supra* note 266, at 10, Table 3 (finding that about 40% of the child support and vital records staff surveyed had concerns about the hospital incorrectly administering a VAP).

²⁶⁹ See, e.g., ARIZONA ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17; MICHIGAN AFFIDAVIT OF PARENTAGE, *supra* note 255; PENNSYLVANIA ACKNOWLEDGMENT OF PATERNITY, *supra* note 256.

²⁷⁰ See, e.g., *infra* App’x A; ARIZONA ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; VITAL RECORDS, GA. DEP’T OF HUMAN RES., FORM NO. 3940, PATERNITY ACKNOWLEDGMENT (2018), <https://dph.georgia.gov/sites/dph.georgia.gov/files/Paternity%20Acknowledgement%20%28Form%203940%29.pdf>, archived at <https://perma.cc/Y7Z8-K58X> [hereinafter GEORGIA PATERNITY ACKNOWLEDGMENT]; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17; MICHIGAN AFFIDAVIT OF PARENTAGE, *supra* note 255.

²⁷¹ See, e.g., *infra* App’x A; ARIZONA ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; COLORADO VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 127; FLORIDA ACKNOWLEDGMENT OF PATERNITY, *supra* note 255.

²⁷² See, e.g., *infra* App’x; MISSOURI AFFIDAVIT ACKNOWLEDGING PATERNITY, *supra* note 255; NEW YORK ACKNOWLEDGMENT OF PATERNITY, *supra* note 121.

²⁷³ This process usually involves signing a form outside of court. See, e.g., *supra* note 17. Some states require a married woman and her husband to go to court to disestablish the husband’s paternity before another man can be established as the child’s legal father. *Id.*

and rescind the acknowledgment.²⁷⁴ The forms are also required to provide notice of the alternatives to voluntarily acknowledging paternity,²⁷⁵ which can be difficult to explain if signatories lack familiarity with the judicial or administrative process to establish paternity.²⁷⁶ Many of the forms also attempt to outline the rescission process and the procedure for challenging the acknowledgement, which is usually time-limited and claim-limited to fraud, duress, or material mistake of fact.²⁷⁷ These complex legal terms are merely stated on the form, but not defined or explained.²⁷⁸

There are also significant problems with how oral notice is provided in the VAP process. In many states, the VAP process relies on nonlawyers, namely hospital staff, to relay legal information to signatories.²⁷⁹ Because complex legal issues such as custody and child support intersect with paternity establishment, the competence of hospital staff to explain the alternatives, legal consequences, and rights and responsibilities that stem from signing a VAP is questionable.²⁸⁰

²⁷⁴ See, e.g., CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121; FLORIDA ACKNOWLEDGMENT OF PATERNITY, *supra* note 255; GEORGIA PATERNITY ACKNOWLEDGMENT, *supra* note 270; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17; KANSAS PATERNITY CONSENT FORM, *supra* note 127.

²⁷⁵ See 42 U.S.C. § 666(a)(5)(C)(i) (2018).

²⁷⁶ See LOUISIANA DEP'T OF HEALTH, STATE REGISTRAR AND VITAL RECORDS, FORM NO. VRR-2-P ACKNOWLEDGEMENT OF PATERNITY AFFIDAVIT 2 (2010), http://ldh.la.gov/assets/oph/Center-RS/vitalrec/AOP_2Party_Public.pdf, archived at <https://perma.cc/2SQU-8K5L> [hereinafter LOUISIANA ACKNOWLEDGMENT OF PATERNITY AFFIDAVIT]; MASS. DEP'T OF REVENUE, CHILD SUPPORT ENF'T DIV., FORM NO. R-130-02112011, VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE, <https://www.mass.gov/files/documents/2017/09/14/voluntary-ack-of-parentage-form.pdf>, archived at <https://perma.cc/D8YD-VVZ2> [hereinafter MASSACHUSETTS ACKNOWLEDGMENT OF PARENTAGE]; MINN. DEP'T OF HUMAN SERVS., OFFICE OF THE STATE REGISTRAR, FORM NO. DHS-3159-ENG, MINNESOTA VOLUNTARY RECOGNITION OF PARENTAGE 4 (2018), <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-3159-ENG>, archived at <https://perma.cc/4SD9-36SJ> [hereinafter MINNESOTA VOLUNTARY RECOGNITION OF PARENTAGE]; NEW YORK ACKNOWLEDGMENT OF PATERNITY, *supra* note 121, at 5.

²⁷⁷ See, e.g., *infra* App'x A; CALIFORNIA DECLARATION OF PATERNITY, *supra* note 121, at 1–2, 4; FLORIDA ACKNOWLEDGMENT OF PATERNITY, *supra* note 255, at 2; GEORGIA PATERNITY ACKNOWLEDGMENT, *supra* note 270, at 2; ILLINOIS VOLUNTARY ACKNOWLEDGMENT OF PATERNITY, *supra* note 17, at 2; LOUISIANA ACKNOWLEDGEMENT OF PATERNITY, *supra* note 276, at 2; MASSACHUSETTS ACKNOWLEDGMENT OF PARENTAGE, *supra* note 276, at 2; MAINE ACKNOWLEDGMENT OF PATERNITY, *supra* note 17, at 2; MISSOURI AFFIDAVIT ACKNOWLEDGING PATERNITY, *supra* note 255, at 1; NEW YORK ACKNOWLEDGMENT OF PATERNITY, *supra* note 121, at 3.

²⁷⁸ See, e.g., *infra* App'x A; *supra* notes 269–73.

²⁷⁹ See Weaver, *supra* note 241, at 2720–21 (discussing the ethical implications of this practice).

²⁸⁰ See Osborne & Dillon, *supra* note 25, at 6 (“Birth registrars are typically not attorneys, and though they are provided with training and state-mandated oversight, questions remain as to whether they possess adequate levels of education, experience, and support to handle the often sensitive legal complications associated with paternity establishment.”). See generally OFFICE OF THE INSPECTOR GEN., *supra* note 163.

In some states, the government reimburses the hospital for each VAP executed. For example, Washington State pays hospitals \$20 for each properly completed paternity acknowledgement. This policy raises concerns about the incentive it creates for hospitals to cut corners to increase the number of VAPs signed, such as only providing part of the mandatory oral notice and not fully explaining the process. See Osborne & Dillon, *supra* note 25, at 19. Federal funding is

Due to these flaws in the VAP process, there is a high likelihood that VAPs are executed without informed consent.²⁸¹ The shortfalls of the process present the risk that one or both signatories do not fully understand the consequences of executing the document or feel pressured to sign it.

The custodial power of attorney and standby guardianship processes also present challenges for obtaining informed consent. The forms are simple to complete, but the execution process does not promote understanding of the legal consequences or alternatives. Efforts to promote informed consent in these processes is virtually nonexistent. Unlike the VAP, there is no requirement that custodial power of attorney and standby guardianship forms include a written explanation of the consequences of completing the form.²⁸²

In addition, no third party is tasked with explaining the legal consequences of and alternatives to executing a custodial power of attorney or standby guardianship designation. The signatories must rely on their own understanding of the form and the family court process. Arguably, having a trained nonlawyer explain the legal consequences and alternatives, like in the VAP process, is better than receiving no explanation from anyone at all. One issue that may be difficult for signatories of a custodial power of attorney or standby guardianship to understand is where the designating parent's authority ends and the non-parent's authority begins. Parents are left to figure out such complicated legal issues on their own. Thus, similar to the VAP process, and arguably even more so, the likelihood that parents sign custodial power of attorney and standby guardianship forms without informed consent is high.²⁸³ Paper courts need significant reform to address these issues with substantive access to justice. Part V.A identifies possible solutions.

B. Maximizing Parental Agency

Unlike traditional courts, paper courts maximize parental agency. As outlined above in Part II.A.3, parents have a fundamental right to direct the

available for states to make these reimbursement payments. *See* 45 C.F.R. § 304.20(b)(2)(vi) (2017).

²⁸¹ *See supra* notes 269–272, and accompanying text.

²⁸² *See, e.g., infra* Appendices B and C. Some legal services providers and courts create instructions for completing the forms. *See, e.g.,* IDAHO LEGAL SERVICES, PARENTAL POWER OF ATTORNEY FORM AND INSTRUCTIONS, <https://www.idaholegalaid.org/node/2580/parental-power-attorney-form-and-instructions-non-interactive-form>, archived at <https://perma.cc/4GU Y-9LBE> (last visited Apr. 14, 2019); SUPREME COURT OF NEBRASKA, INSTRUCTIONS FOR FILLING OUT TEMPORARY DELEGATION OF PARENTAL POWERS, <https://supremecourt.nebraska.gov/sites/default/files/DC-6-10-1a.pdf>, archived at <https://perma.cc/4HXH-82UW> (last visited Apr. 14, 2019).

²⁸³ Because the custodial power of attorney and standby guardianship designation processes do not require written or oral notice of the legal consequences of executing the forms, the critique of the lack of informed consent in these processes is brief, yet important. Unlike the VAP process, efforts to provide informed consent in the custodial power of attorney and standby guardianship designation processes is virtually nonexistent. Arguably, some attempt to inform is better than none.

upbringing of their children protected by the Due Process Clause of the Fourteenth Amendment.²⁸⁴ The constitutional canon links the Fourteenth Amendment's liberty interest to human dignity and autonomy.²⁸⁵ The Supreme Court has applied these concepts to parental rights. According to the Court, "[p]ersonal decisions relating to . . . family relationships [and] child rearing" are "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."²⁸⁶

Like most rights, the liberty interest in raising children is not absolute. The state has a palpable presence as a regulator²⁸⁷ and arbiter of parental rights.²⁸⁸ The traditional court process limits parental agency, particularly for low-income parents and parents of color.²⁸⁹ The court system puts judges in the shoes of parents. When parents appear in family court, judges can substitute their own opinion for the judgment of fit parents about what is best for the child,²⁹⁰ even when parents consent to a different arrangement.²⁹¹ In spite

²⁸⁴ See *supra* Part II.A.3.

²⁸⁵ See Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 *CARDOZO L. REV.* 519, 547 (2010) ("As seen in Supreme Court cases, the right to liberty provides a right to human dignity and the ability to exercise autonomy.").

²⁸⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015) ("[The fundamental] liberties [protected by the Due Process Clause of the Fourteenth Amendment] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

²⁸⁷ Courts serve a quality control function over parenting in their *parens patriae* role, which manifests most clearly in abuse and neglect cases in which states are allowed to remove children from their parents' care. "Insofar as a court assumes responsibility for seeing how a child is to be raised, it is assuming a managerial role." Mnookin, *supra* note 106, at 255.

²⁸⁸ The Supreme Court has explained that, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503–04 (1977). For this reason, the state has an interest in regulating families. The state dictates the limits of parental rights when judges determine whether a parent can retain parental rights in cases of alleged child abuse and neglect, and sets the limits on parental rights in custody cases when deciding the amount of time a parent can spend with a child, and the level of involvement a parent can have in making education, educational and medical decisions that impact the child's well-being. See Mnookin, *supra* note 106, at 225.

²⁸⁹ The negative impact of state intrusion into the lives of low-income families and families of color has been most documented in the child welfare system. See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 *CORNELL L. REV.* 668, 707 (1998) (arguing that child welfare workers have broad discretion to make judgments about bad mothering that reveal their race and class bias). See also Murphy, *Revitalizing the Adversary System*, *supra* note 41, at 901, 910–911 (arguing that the expanded role of nonlegal staff and the increased use of "informal, nonadversarial alternative dispute resolution mechanisms in child welfare cases" harms low-income families).

²⁹⁰ The Supreme Court has noted that judges should not substitute their own judgment for that of fit parents. See *Troxel v. Granville*, 530 U.S. 57, 68–70 (2000).

²⁹¹ In the District of Columbia, for example, a judge does not have to accept an arrangement agreed upon by two fit parents if the judge finds that there is clear and convincing evidence that the arrangement is not in the best interests of the child. See D.C. CODE § 16-914(h) (2018).

of the fundamental right to parent, judges have broad latitude to order a custodial arrangement over the objection of a child's parent.

Furthermore, in contemporary "problem-solving courts," judges have nearly unlimited authority to require families to access services and monitor their compliance. Judges can order home studies, mental health evaluations, and interactive studies, many of which are performed through the court.²⁹² This practice runs the risk of invading families' privacy and restricting parental autonomy.²⁹³ Moreover, the use of informal procedures and investigations increases the likelihood of unwarranted and unchecked state intervention and due process violations.²⁹⁴

Some families are able to exercise more parental agency in the traditional court process than others. Unlike their low-income counterparts, well-resourced litigants "remain under the court's radar" because they can buy their own services and hire lawyers to settle their disputes.²⁹⁵ The experiences of low-income parents and parents of color in traditional courts are similar to their negative encounters with other government agencies such as the police and child welfare agencies.²⁹⁶ In many respects, family courts serve as another arm of surveillance of low-income black and brown bodies.²⁹⁷

Paper courts maximize parents' ability to establish parental identity and delegate parental authority as they choose, without intervention from the traditional court system. Paper courts allow low-income parents and parents of color to exercise their liberty interests and make their own parenting decisions in the privacy of their homes and hospital rooms. Paper courts recognize that fit parents are best suited to make decisions related to their children because they are experts about their children.²⁹⁸ Efforts that promote parental agency such as paper courts are critical to ensuring fairness and justice in the legal system, particularly for low-income families and families of color.

²⁹² See Murphy, *Revitalizing the Adversary System*, *supra* note 41, at 910–914.

²⁹³ See *id.* at 914 ("Services" in these contexts require significant disclosure of personal information by family members with few rules or procedures to protect the scope of the information sought or, in some instances, the limits of its dissemination.").

²⁹⁴ See *id.* at 912.

²⁹⁵ *Id.* at 914.

²⁹⁶ *C.f.* Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 428–29, 441–45, 461, 464–71 (2017) (discussing the surveillance of marginalized people, particularly African Americans and people living in poverty, in multiple contexts); ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT*, 131–42 (2017) (examining disproportionate surveillance of African Americans in the criminal justice system); Dorothy E. Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012) (examining surveillance of African American mothers in the foster care and prison systems). See generally Starla Williams, *Violence Against Poor and Minority Women & the Containment of Children of Color: A Response to Dorothy E. Roberts*, 24 WIDENER L.J. 289 (2015) (arguing that surveillance of African American mothers in the child welfare system is a form of containment).

²⁹⁷ See Murphy, *Revitalizing the Adversary System*, *supra* note 41, 911–14.

²⁹⁸ See Buss, *supra* note 61, at 667 ("Families, as the child-specific experts, can be expected to make better decisions for their particular children than the state will make in all but the starkest situations.").

C. Compromising Procedural Due Process

Despite the important benefits of paper courts, moving from traditional adversarial court procedures to out-of-court forms has been costly. By creating paper courts as an alternative to traditional courts, states have compromised the procedural due process protections that are hallmarks of the court process: notice and the opportunity to be heard.²⁹⁹

In traditional courts, all interested parties are entitled to notice of the proceeding and an opportunity to be heard.³⁰⁰ Court rules include detailed requirements for service of process,³⁰¹ and judges must hear from all parties before making a final decision in a case.³⁰² If all necessary parties are not present before the court, they must be joined before the case can proceed.³⁰³ Although traditional courts do not provide sufficient notice and an opportunity to be heard in every case, they have procedures in place that attempt to protect due process.

Paper courts present significant notice problems. The VAP process does not include any mechanism to apprise interested parties who are not signatories that a VAP has been signed. As a result, a man who believes that he is a child's father does not receive any notice that another man has acknowledged paternity and established himself as the child's legal father. Because parental recognition is finite,³⁰⁴ the establishment of one person as a child's parent (for example, when a man who is not biologically related to the child signs a VAP) can constructively terminate the parental rights of another person who claims parental status (for example, the child's biological father). As with the termination of parental rights, "[a] parent's interest in the accuracy and justice of the decision to [establish parentage] is . . . a commanding one."³⁰⁵

Furthermore, as outlined in Parts III.B and C, most states that allow parents to delegate parental authority through a custodial power of attorney or standby guardianship designation do not require the delegating parent to provide notice of the delegation to the other parent. Because parental authority is interdependent,³⁰⁶ its delegation to a non-parent may infringe on

²⁹⁹ See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (holding that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

³⁰⁰ See *id.*

³⁰¹ See, e.g., D.C. SUPER. CT. DOM. REL. R. 4.

³⁰² See, e.g., *id.* 7, 52, 54. See also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner").

³⁰³ See, e.g., D.C. SUPER. CT. DOM. REL. R. 19.

³⁰⁴ See *supra* Part II.A.2.

³⁰⁵ *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

³⁰⁶ See *supra* Part II.A.4.

the liberty interest of the non-delegating parent.³⁰⁷ Because one parent assigns parental rights, the other parent is forced to co-parent with a third party without notice.

There are also considerable obstacles to being heard by a traditional court when a parent objects to the designation of parental recognition and allocation of parental authority in paper courts. Federal law requires that, after the 60-day rescission period lapses, VAPs can only be challenged in traditional court based on fraud, duress, and material mistake of fact.³⁰⁸ Some states put strict time limits on when these challenges can be brought.³⁰⁹ Consequently, if a challenge is not brought on a specific basis and within the appropriate amount of time, a man who is not the child's biological father may remain the child's legal father—and have the legal rights and responsibilities of a parent—even if the biological father attempts to establish paternity.

The extent to which there is an opportunity to be heard to challenge a delegation of parental authority through a custodial power of attorney or standby guardianship designation is more difficult to determine. Unlike VAPs, the law governing these paper courts do not outline procedures for challenging the delegation. Published cases about challenges to delegations of parental authority have upheld the delegation over the objection of the non-delegating parent on the grounds that state law allows unilateral delegations.³¹⁰ Courts overlook the interdependent nature of parental rights and neglect to examine the procedural due process issues with unilateral delegation without notice.

Paper courts need significant reform to address these challenges with procedural due process. Part V.A identifies possible solutions.

V. A PATH FORWARD: BALANCING COMPETING INTERESTS

Paper courts have substantial benefits. States should continue to use them to enhance procedural access to justice and maximize parental agency. However, the significant concerns about informed consent and procedural due process raised in this Article demand changes to paper courts. Additional substantive and procedural safeguards must be included in the processes. As outlined below, it is possible to add these protections without losing the benefits of paper courts.

³⁰⁷ See *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (“[T]he State’s recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.”).

³⁰⁸ See 42 U.S.C. § 666(a)(5)(D)(iii) (2018).

³⁰⁹ See *supra* note 171.

³¹⁰ See *supra* note 193.

A. Promoting Informed Consent

To adequately protect constitutional rights, paper courts must provide signatories substantive access to justice. Anyone considering executing a paper court form should fully understand the legal consequences of signing the form and the alternatives. Substantial changes must be made to the current paper court processes to achieve this goal. These reforms should preserve the procedural access to justice and parental agency benefits of the existing paper court processes.

States should create a two-track system for the VAP process to promote informed consent and retain the benefits of the current process. This two-track system should align the consequences of signing a VAP with the quality of the notice that signatories receive before they sign the document. In the first track, the signatories could execute a VAP that confers custodial rights and financial obligations on the signatories, which this Article refers to as a “comprehensive VAP,” similar to the existing forms. However, to ensure informed consent, there must be at least three significant changes to the execution process.

First, the comprehensive VAP form should be signed at a location other than the hospital. For the reasons explained in Part IV.A, the hospital is not an ideal location for acknowledging paternity.³¹¹ In addition to government agencies, comprehensive VAPs could be signed at a doctor’s office or a public library. A comprehensive VAP should only be signed with the assistance of a trained legal professional such as an attorney or paralegal.

Second, states should require potential signatories to complete a course or individual consultation before executing a comprehensive VAP form. States could offer signatories one or both options. A trained legal professional should teach the course or provide the consultation. States could use existing staff to provide these services.³¹² If the demand exceeds the capacity of existing staff, states should hire additional staff or enter into contracts with local legal services providers to supply these services. States could offer these services before or after the child’s birth. To maintain procedural access to justice, states should provide these services at no cost to the participants. For the consultation, each signatory should meet with a different legal professional to preserve confidentiality and prevent conflicts of interest.³¹³ Both the course and consultation would promote substantive access to justice by providing parents with a meaningful opportunity to understand the VAP process and consider its legal implications and alternatives.

Third, states should offer free or low-cost genetic testing to signatories before they sign a VAP. If the genetic test reveals that the man who intends

³¹¹ See *supra* Part IV.A.

³¹² Legal professionals currently employed by state child support agencies and vital records offices could provide paternity consultations.

³¹³ See Weaver, *supra* note 241, at 2747 (recommending VAP signatories meet with separate legal professional to preserve confidentiality and prevent conflicts of interest).

to sign the VAP is not the child's biological father, he could choose not to sign the document.

The second track for the VAP process retains the procedural access to justice benefits of the current process provided by the hospital-based program.³¹⁴ Signatories would execute a VAP at the hospital before or after the child's birth. However, given the challenges with establishing paternity in the hospital outlined in Part IV.A,³¹⁵ the legal consequences of signing a VAP there would be limited. If a man executes a VAP in the hospital, this act would only result in the man's name being listed as the child's father on the child's birth certificate. The birth certificate could later be used as a basis for survivor's benefits and inheritance. However, this "limited VAP" would not confer custodial rights or financial obligations on the signatories. If a limited VAP is signed, paternity would need to be established for custody and child support purposes at a judicial or administrative hearing, or by executing a comprehensive VAP. If paternity is established through a judicial or administrative process, the parties could conduct genetic testing to definitively determine whether the man is the child's biological father.

Some scholars have recommended mandatory genetic testing before a VAP of any kind is signed.³¹⁶ Although this proposal would best prevent error in the VAP process,³¹⁷ it is a drastic requirement. Although the rate of error in the VAP process could be as high as 30%, requiring unmarried parents to submit to genetic testing to establish paternity is overly burdensome, particularly when compared to the presumption that married couples enjoy. Genetic testing requires a medical procedure and payment for that procedure.³¹⁸ It also raises privacy concerns. Legal scholars and potential test takers are apprehensive about how samples of genetic material will be stored and whether the samples can or will be used for other purposes, such as

³¹⁴ Federal law requires that states operate a hospital-based VAP program. 42 U.S.C. § 666(a)(5)(C)(ii) (2018); 45 C.F.R. § 303.5(g)(1)(i) (2017). To eliminate the hospital-based program completely, federal law would need to be amended. Such a change would be difficult, particularly in light of the success of the hospital-based program with increasing the rate of paternity establishment.

³¹⁵ See *supra* notes 279 and 280, and accompanying text.

³¹⁶ See, e.g., Vanessa S. Brown-Barbour, *Mama's Baby, Papa's Maybe: Disestablishment of Paternity*, 48 AKRON L. REV. 263, 313 (2015). Many scholars have opposed this proposal. See Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 205 (2017); Jayna Morse Cacioppo, Comment, *Voluntary Acknowledgments of Paternity: Should Biology Play A Role in Determining Who Can Be A Legal Father?*, 38 IND. L. REV. 479, 504–05 (2005); c.f. Kayla Britton, Note, *You Shall Always Be My Child: The Due Process Implications of Paternity Affidavits Under Indiana Code Section 16-37-2-2.1*, 43 IND. L. REV. 499, 499–500 (2010).

³¹⁷ Mandatory genetic testing would also remove the emotionally fraught act of requesting testing, which suggests doubt about the mother's fidelity.

³¹⁸ For example, in Georgia, "genetic testing . . . costs \$29.65 per person, making the cost of genetic testing for a mother, father, and child \$88.95."

William C. McDonald & Daniel R. Richardson, *Determination of Paternity: Amend Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, Relating to Determination of Paternity, so as to Revise Provisions Relative to Paternity Testing in Certain Cases*, 32 GA. ST. U. L. REV. 103, 112 (2015).

scientific data collection or evidence in criminal cases.³¹⁹ If mandatory genetic testing is imposed, it should be a requirement to establish parentage for all children—whether they are born to married or unmarried parents.³²⁰ However, biological connection should not automatically confer parental status. The state should determine whether the person biologically related to the child should be deemed the child’s legal parent, with the attendant legal rights and responsibilities, by considering the best interests of the child.³²¹

The custodial power of attorney and standby guardianship processes would benefit from reform similar to the proposal to enhance informed consent in the VAP process. States should require the delegating parent and third party to complete a course or consult with a trained legal professional about the legal consequences of the delegation before signing the forms. These services should be provided at no cost to the signatories. The trained legal professional should certify that the signatories completed the course or the consultation occurred, in order for the form to be valid.

The course or consultation should be mandatory for all these paper courts because signatories cannot fully understand the legal consequences of and alternatives to signing the forms unless they receive information from a trained legal professional and have the ability to ask questions in real-time.³²² Family law is complicated and requires expertise to explain correctly.³²³ Also, for the comprehensive VAP process, if the course or consultation were optional, the decision to complete either would likely be a source of tension between the signatories because it would suggest doubt about the mother’s fidelity. These proposed reforms preserve procedural access to justice and parental agency, while enhancing substantive access to justice.

B. *Providing Adequate Procedural Due Process*

The move to paper courts has increased the risk of erroneous infringement on liberty and property interests.³²⁴ To adequately protect fundamental

³¹⁹ See, e.g., Browne-Barbour, *supra* note 316, at 311–12 (noting that objections to mandatory genetic testing will likely be based on “tenets of individual and family privacy law pursuant to the federal and state constitutions”).

³²⁰ See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1066–70 (2003) (recommending elimination of distinctions between married and unmarried men to establish paternity).

³²¹ The question of how parentage should be determined (e.g., biology, marriage, function, intent, etc.) is beyond the scope of this Article. For further discussion of these issues, see generally Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017).

³²² Some states provide oral notice via video and provide a telephone number for questions. See 45 C.F.R. § 303.5(g)(2)(i)(C) (2019) (allowing states to fulfill the oral notice requirement through video or audio equipment). However, given the complexity of the legal issues involved and the import of the legal document being executed, an automated consultation is insufficient.

³²³ See Weaver, *supra* note 241, at 2712–15.

³²⁴ See *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (“Given the weight of the private interests at stake, the social cost of even occasional error is sizable.”); see also *Turner v.*

rights, the state must erect substantial procedural safeguards to prevent erroneous deprivation.³²⁵

In *Mathews v. Eldridge*, the Supreme Court outlined a three-part balancing test to determine what process is due when the state takes official action that affects an individual's liberty and property rights.³²⁶ The court must consider: 1) the private interest impacted by the government's action; 2) "the risk of an erroneous deprivation of the private interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards"; and 3) "the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail."³²⁷ The nature of the interests at stake, including the finality of the deprivation, determine the procedural protections that are due.³²⁸ The passage of legislation that creates paper courts constitutes official state action that triggers application of the *Mathews* test.³²⁹

1. *Due Process and Voluntary Acknowledgement of Paternity*

Under the *Mathews* test, the voluntary acknowledgement of paternity process does not include the procedural safeguards necessary to satisfy due process. First, the private interests at stake are considerable. Executing a VAP establishes parental recognition. The purpose of the VAP process is to identify the child's biological parents as a matter of law. The signatories become the child's legal parents and are listed as parents on the child's birth certificate. Parental recognition is a prerequisite for parents to exercise their constitutionally-protected parental authority. Once legally recognized as parents, they have the fundamental right to the care, custody, and control of the child, as well as the attendant responsibilities. VAP signatories attain the right to petition a court for custodial rights,³³⁰ and they assume a legal duty

Rogers, 564 U.S. 431, 447–48 (2011) (providing an assessment of the probable value of additional or substitute procedural safeguards to reduce the risk of erroneous deprivation of the private interest at stake in a child support case).

³²⁵ See *Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

³²⁶ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³²⁷ *Id.*; see *Turner v. Rogers*, 564 U.S. 431, 447–48 (2011) (assessing the probable value of additional or substitute procedural safeguards to reduce the risk of erroneous deprivation of the private interest at stake).

³²⁸ See *Parham v. J. R.*, 442 U.S. 584, 608 (1979) ("What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made."); see also *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) ("Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average [procedural protections] turns on both the nature of the private interest threatened and the permanency of the threatened loss.").

³²⁹ See *United States v. Raines*, 362 U.S. 17, 25 (1960); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

³³⁰ Conventionally, the child's biological mother has custodial rights from birth even if a VAP is not signed. *Huntington*, *supra* note 5, at 203–05. In fifteen states, unmarried birth

to provide financial support for the child.³³¹ Because children can only legally have two parents in most states,³³² once two parents are recognized as a child's parents, no other person can be deemed the child's legal parent without terminating an existing parent's rights.³³³ Thus, parental recognition is a zero-sum proposition.

The acknowledged father, biological father (if different), biological mother, and child all have important interests at stake in the VAP process. The child has an interest in establishing a parent-child relationship with a father. The biological mother has an interest in having a co-parent with whom to share parental rights and responsibilities. A man who is a child's biological father, and wants to be the child's legal father, has a fundamental liberty interest in establishing parental recognition and attaining parental authority.³³⁴ A man who unknowingly signed a VAP for a child to whom he is not biologically related is required to provide financial support, for the child has a constitutionally-protected property interest at stake, if his paternity is not disestablished.³³⁵ Because these interests, particularly those of the biological and acknowledged father, are so weighty, the state is required to establish substantial procedural safeguards to protect them.

The second *Mathews* consideration is "the risk of an erroneous deprivation of the private interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards."³³⁶ The risk of erroneous deprivation of liberty and property interests in the VAP process—due to establishing the wrong man as the child's biological and legal father—is particularly high. Some scholars estimate that as many as 30% of the men who sign VAPs are not the child's biological father,³³⁷ while others argue that the rate of error is less than 10%.³³⁸

mothers have sole legal and physical custody of their children at birth. The child's biological father has to petition a court for custodial rights. *See id.* at 204, n.204.

³³¹ *See supra* Part III.A.

³³² *See supra* Part II.A.3.

³³³ *See supra* Part II.A.3.

³³⁴ *See supra* Parts II.A.3 and III.A. The United States Supreme Court has recognized that biological parents have a fundamental, constitutionally-protected liberty interest in the care, custody, and control of their minor children in multiple cases. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

³³⁵ *See* Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 797 (2018). *See* *Guba v. Huron Cty.*, 600 F. App'x 374, 382 (6th Cir. 2015) (recognizing a constitutionally-protected property interest in child support for the obligor). *See also supra* Part III.A.

³³⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³³⁷ *See* Kristen K. Jacobs, Comment, *If the Genes Don't Fit: An Overview of Paternity Disestablishment Statutes*, 24 J. AM. ACAD. MATRIM. LAW. 249, 256–57 (2011).

³³⁸ Ayres, *supra* note 34, at 240–41 ("Despite the common belief that false paternity rates are 10–30%, studies by cultural anthropologists indicate that the overall rate of false paternity is lower than popularly believed, and that it is not static, but is tied to paternity confidence," which is the man's level of certainty about whether the child is his biological child).

Error in the VAP process can occur in at least four scenarios.³³⁹ First, the child's mother and a man who is not the child's biological father sign a VAP—both believe the man is the biological father, but neither is certain. Second, the child's mother knows the man signing the VAP is not the only possible biological father, but does not inform him of this fact. Third, the child's mother tells the man signing the VAP that he is not the only possible biological father, but he signs anyway. Fourth, the child's mother and a man who is not the child's biological father sign a VAP both knowing that the man is not the child's biological father.³⁴⁰

The consequences of error in the VAP process are weighty. Because parental recognition is finite, a signed VAP may foreclose other claims to parenthood. Accordingly, if a man who is not the child's biological father signs a VAP, the biological father's parental rights are constructively terminated, unless he knows his rights are in jeopardy, petitions a court within the statutory time limits, and has a sufficient legal basis to challenge the VAP, such as fraud.³⁴¹ He may never be able to "grasp the opportunity" to develop the parent-child relationship that the biological connection is supposed to afford him.³⁴² Therefore, each time a VAP is executed by a man who is not the biological father, the biological father's liberty interest in establishing a parent-child relationship with his biological child is jeopardized.

An erroneous VAP also affects property rights. A signed VAP establishes paternity with the same legal weight as an adjudication in court.³⁴³ Therefore, if a man who is not the child's biological father signs a VAP, he assumes a legal duty to pay child support and can therefore be deprived of his property rights without additional process.³⁴⁴ If he does not have a sufficient legal basis for challenging the VAP or raises the claim too late, the state can require him to pay child support for a child to whom he is not biologically related.³⁴⁵ In addition, the child can inherit from him and receive benefits that are derivative from parental recognition, including veterans' benefits and Social Security disability and survivor benefits.³⁴⁶ With the addition of claims for the non-biological child, any of the man's other heirs will receive a smaller share of these resources.

The VAP process is prone to manipulation. In many instances, the child's mother is the only person who knows the number and identity of possible biological fathers. Also, there is no mechanism to alert a child's biological father if a man who is not the child's biological father signs a VAP. The child's mother and a man who both know he is not the child's

³³⁹ See *supra* Part III.A.

³⁴⁰ See *supra* Part III.A.

³⁴¹ See *supra* Part III.A.

³⁴² See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

³⁴³ See *supra* Part III.A.

³⁴⁴ See *supra* note 335.

³⁴⁵ See *supra* Part III.A.

³⁴⁶ See *supra* note 128.

biological father could sign the VAP, constructively terminate the biological father's parental rights, and circumvent legal processes that implicate parental rights and require notice to the biological father such as adoption, custody, child support, and probate.³⁴⁷ VAPs are one way that birth mothers can be gatekeepers of children.³⁴⁸

The potential for error in the VAP process is even more consequential due to the high degree of finality. As outlined in Part III.A, a VAP is difficult to undo, even if a genetic test reveals that the man who signed it is not the child's biological father.³⁴⁹ There are strict deadlines for rescinding and challenging a VAP, and strict legal standards for challenging the VAP after the rescission period has lapsed.³⁵⁰

Given the potential for error, the probable value of additional procedural safeguards is high. There are at least three additional procedural safeguards that will reduce the potential for error or correct error in the VAP process. One way to decrease error is to ensure that signatories are adequately informed of the legal consequences of executing a VAP. Part V.A outlines proposals for promoting knowing and voluntary consent. A second way to decrease error in the VAP process is to provide adequate notice to all interested parties that a VAP has been signed, particularly non-signatories who may have an interest at stake. States should use a putative father registry to alert potential biological fathers that a VAP was signed for a child to whom they may be biologically related.³⁵¹ About half of the states have a putative father registry to provide notice of a child's adoption to potential biological fathers.³⁵² These registries could be used to alert putative fathers that a VAP has been signed by a woman with whom they had sexual relations during a specific time period. Putative father registries are not an absolute safeguard against error; for example, men who are unaware of the woman's pregnancy may not know they need to register. However, these registries will provide some protection against error where little currently exists.

A third procedural mechanism that would remedy error in the VAP process, by expanding the opportunity to be heard when error occurs, is permitting easier disestablishment of paternity. Meaningful judicial review is

³⁴⁷ See generally *supra* Part III.A. A legal services attorney recently shared an example of this situation with the author. The putative father came to the legal services organization for help because the mother of a child he believed to be his biological child called him from the hospital and told him that he had no parental rights to the child because another man signed the VAP.

³⁴⁸ See Huntington, *supra* note 5, at 171.

³⁴⁹ See *supra* Part III.A.

³⁵⁰ See *supra* Part III.A.

³⁵¹ See Britton, *supra* note 316, at 529 (proposing a putative father registry for VAPs).

³⁵² About 25 states use a putative father registry to notify putative fathers about a child's adoption: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wyoming. See CHILD WELFARE INFO. GATEWAY, *supra* note 173, at 3.

critical to providing due process for all individuals who have fundamental rights and important interests at stake in the VAP process. States should eliminate strict deadlines for challenging VAPs and allow interested parties to raise paternity challenges in a reasonable amount of time after they knew or should have known they have a claim. If states specify a time period for disestablishing paternity, they should consider the benefits of finality and stability for the child in addition to the realities of how paternity doubts arise and when such claims are typically raised in court.

These reforms are necessary to provide all parties with a potential interest in the VAP process with notice and a meaningful opportunity to correct errors in the process.³⁵³ The probable value of these additional procedural safeguards is considerable due to the fundamental rights at stake, the high potential for error, and the finality of parental recognition.

The third consideration under the *Mathews* test is “the Government’s interest . . . including fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”³⁵⁴ The government has at least two main interests in the VAP process that primarily center around fiscal and administrative burdens. First, the government is concerned with protecting the well-being of children. When children have two parents who care for and support them, they are less likely to rely on government assistance or become involved with the child welfare system.³⁵⁵ Second, the government is invested in achieving efficiency and saving money. As a “simple civil procedure,” the VAP process saves the state money and time because paternity can be established easily.³⁵⁶ VAPs create a “fast track” to replace public funds with private child support. Once paternity is legally established for a child who receives government cash assistance, the government can sue the acknowledged father for child support and use these payments to reimburse the government for the welfare benefits.³⁵⁷ To protect these interests, the government enacted strict timeframes and standards to challenge a VAP in order to promote the finality of signing this form.

³⁵³ See Parness & Saxe, *supra* note 316, at 206 (“To facilitate finality in Social Security Act VAP contests, and to meet constitutional procedural due process demands, state laws should generally require the joinder of all interested parties in any VAP contest.”).

³⁵⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³⁵⁵ See SARA EDELSTEIN ET AL., URBAN INSTITUTE, CHARACTERISTICS OF FAMILIES RECEIVING MULTIPLE PUBLIC BENEFITS 8 (2014) (finding that “[a]mong families that receive no benefits . . . , a minority are single-parent families (25 percent), with the majority being married-couple families (67 percent)”); ANDREA SADLAK ET AL. U.S. DEP’T OF HEALTH AND HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 16 (2010) (finding that children living with their married biological parents were least likely to experience maltreatment).

³⁵⁶ See OFFICE OF THE INSPECTOR GEN., *supra* note 163, at ii (“State child support agencies cite a number of advantages of voluntary acknowledgment over other methods of paternity establishment, including saving agency time and money”).

³⁵⁷ Custodial parents who receive government cash assistance must assign their right to child support to the government as a condition of receiving benefits. See 42 U.S.C. § 608(a)(3) (2018).

The additional procedural safeguards proposed may significantly increase the fiscal and administrative costs of the VAP process, particularly the requirement of a mandatory course or consultation with a trained legal professional before signing a comprehensive VAP. However, given the protracted nature of litigation to disestablish paternity after VAPs are signed, it is unclear how the expense of additional process on the front-end of the process would compare to the current cost of litigating paternity cases at the back-end of the process. The additional procedural protections may ultimately be cost saving. Furthermore, although these changes will pose added costs to states,³⁵⁸ they will preserve fundamental rights, which should not be compromised to enable high rates of paternity establishment on the cheap.

The *Mathews* analysis reveals that the current VAP process does not provide the procedural safeguards necessary to satisfy due process, particularly given the constitutionally-protected rights and interests at stake, high potential for error, and finality of parental recognition. The government's interests in the easy establishment of paternity and the finality of this determination are paramount in the current process, to the detriment of private interests. The government's fiscal and administrative interests should not outweigh a biological father's liberty interest in a parent-child relationship, or the property interest of a non-biological father who unknowingly signs the VAP and assumes the legal obligation to financially support a child to whom he is not biologically related. In order to ensure that the VAP process adequately protects constitutional rights, states should adopt the additional procedural safeguards outlined above.

2. *Due Process, Custodial Power of Attorney, and Standby Guardianship*

The custodial power of attorney and standby guardianship processes also implicate considerable due process concerns. One of the main private interests at stake is the liberty interest of biological parents to direct the upbringing of their children. As outlined in Part II.A.4, parental authority is

³⁵⁸ Paper courts are not free for states to operate. Some states reimburse hospitals for executing VAPs. For example, Washington State pays hospitals \$20 for each properly completed paternity acknowledgement. See Osborne & Dillon, *supra* note 25, at 19. In addition, VAPs have administrative costs because they can be signed at and are registered by state agencies. However, paper courts are less costly than the traditional court process. In 2013, Washington State spent \$110.8 million on its state courts. See CONFERENCE OF STATE COURT ADM'RS, 2012-13 BUDGET SURVEY 85 (2002), https://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/COSCA_Budget_Survey_all_states_2012.ashx, archived at <https://perma.cc/Z2AD-EZ3T>. The same year, Washington State established paternity for about 35,000 children. If all these paternities were established by voluntary acknowledgment, the hospital reimbursement rate would have been \$700,000. See CHILD SUPPORT BENEFIT OFFICE, DEP'T OF HEALTH & HUMAN SERVS., FY 2017 PRELIMINARY REPORT 76, https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2017_preliminary_data_report.pdf, archived at <https://perma.cc/HK82-QLNK> (last visited Apr. 14, 2019).

not unitary, but interdependent.³⁵⁹ Many state custody statutes include a presumption of joint custody or give a preference to shared custody arrangements.³⁶⁰ Parents are expected to co-parent, even when they are separated. Thus, when parents are separated, one parent's exercise of parental authority both directly and indirectly impacts the other parent's authority. For example, typically, the parents rarely spend time with the child together. Each has separate parenting time. And, unless a parent has sole legal custody, that parent cannot make a decision about the child's education, healthcare, or religious upbringing without at least consulting the other parent.³⁶¹ Thus, when one co-parent assigns parental rights to a third party, the other co-parent's liberty interest is affected, and arguably infringed. "When parental status is granted to one adult, the rights of any other legal parent are diluted."³⁶²

When one parent unilaterally delegates parental authority to a third party without notice to the other parent, the assigning parent's liberty interest is maximized while the other parent's liberty interest is disregarded. Although it is arguably better for a child's well-being to be placed with a legal custodian or guardian selected by a fit parent rather than the state, it is questionable whether this delegation is in the child's best interest if the other parent is unaware of the arrangement or does not consent to it.

Error in the custodial power of attorney process occurs when the delegating parent assigns parental rights to a third party who is not fit to care for the child. The risk of this error is lower than it is in the VAP process because the assigning parent can revoke the assignment of rights at any time.³⁶³ In addition, in most states, the delegation of parental rights is temporary. Thus, delegation of parental authority is less final than determination of parental recognition. However, when the non-delegating parent does not have notice of the delegation, the risk of error increases.

The custodial power of attorney process presents significant constitutional concerns in states that permit unilateral assignment of parental authority without notice to the other parent, particularly when the assignment is not time-limited. In the District of Columbia and Georgia, a parent can assign her custodial rights to a third party for an indefinite period of time without ever notifying the child's other parent.³⁶⁴ Depending on how long the ar-

³⁵⁹ See *supra* Part II.A.4.

³⁶⁰ See Dorothy R. Fait et al., *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. BAR J. 13, 14 (2012). See also Abramowicz, *supra* note 50, at 89–91; DiFonzo, *supra* note 104, at 215–21.

³⁶¹ Parents must consult with each other about important decisions related to the child even if one parent has final decision-making authority in the event of a disagreement. See, e.g., *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008) ("A significant and unique aspect of full joint custody is that both parents . . . are expected to consult and participate equally in the child's upbringing.").

³⁶² Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 308 (2017).

³⁶³ See *supra* Part III.B.

³⁶⁴ The possibility of an indefinite, unilateral assignment of parental rights without notice also raises concerns about the potential to circumvent the adoption process. In some states and

rangement lasts, the non-parent could obtain standing to sue for custody as a third party custodian.³⁶⁵

The risk of error in the standby guardianship process is the lowest among paper courts in the family law system because of the judicial review on the back-end.³⁶⁶ In many states, the designation of a standby guardian is only valid for 30 to 90 days without court intervention. This procedural safeguard protects against error by affording the other parent an opportunity to challenge the designation in court.³⁶⁷ In most states, the 30- to 90-day life span of a standby guardianship prevents the third party from obtaining standing to sue for custody.³⁶⁸

Nonetheless, error is still possible in the standby guardianship process for two reasons. First, similar to the custodial power of attorney process, the delegating parent could designate a standby guardian that is not fit to care for the child. Although revocation by the delegating parent and judicial review can correct this error, the likelihood of error remains, particularly when the non-delegating parent does not receive notice of the designation. In most states, there is no requirement that the designator notify the other parent of the standby guardianship designation when it is made.³⁶⁹ In at least two states, a non-parent could have guardianship over a child for as long as six months before the other parent receives notice of the designation and has the opportunity to challenge it in court.³⁷⁰ Although the non-delegating parent will have an opportunity to challenge the designation in court once the petition is filed, the parent may not know about the designation for several months.

Second, the standby guardianship process is susceptible to misuse when the start date of the guardian's authority is not clearly documented. In many

the District of Columbia, a parent can unilaterally assign her custodial rights indefinitely without a court vetting whether the arrangement is in the child's best interests. No court assesses whether the third party is well-suited to care for the child. Arguably, this exercise of parental authority is appropriate under *Troxel*. See *Troxel v. Granville*, 530 U.S. 57, 68–70 (2000). However, because *Troxel* concerned visitation and not physical and legal custody, it is unclear whether the Supreme Court would agree that this exercise of parental authority falls within the purview of decisions that fit parents can make without state intervention or notice to the other parent.

³⁶⁵ In the District of Columbia, a “third party may file a complaint for custody of a child [if] [t]he third party has [l]ived in the same household as the child for at least 4 of the 6 months immediately preceding the filing of the complaint.” D.C. CODE ANN. § 16-831.02(a)(1)(B)(i) (West 2019). The third party must have “[p]rimarily assumed the duties and obligations for which a parent is legally responsible, including providing the child with food, clothing, shelter, education, financial support, and other care to meet the child’s needs.” D.C. CODE ANN. § 16-831.02(a)(1)(B)(ii) (West 2019).

³⁶⁶ See generally *supra* Part III.C.

³⁶⁷ In twelve states and the District of Columbia, when a standby guardian files a petition to finalize the arrangement, the other parent must receive notice of this petition, and has an opportunity to challenge the designation. See CHILD WELFARE INFO. GATEWAY, *supra* note 221, at 3 (June 2018). See, e.g., CAL. PROB. CODE § 2105(f).

³⁶⁸ See *supra* note 230 and accompanying text.

³⁶⁹ See *supra* Part III.C.

³⁷⁰ See *supra* Part III.C. and note 238.

states, there is no requirement to include the date that the standby guardian's authority begins (which is when the "triggering event" occurs) on the form. This oversight poses the potential for the standby guardian to extend the delegation of parental authority beyond the statutorily prescribed period without court intervention. Notice to the non-delegating parent could help correct this error if it occurs. If the non-delegating parent knows about the delegation, this parent can monitor when the triggering event occurs and when the standby guardian's authority begins. The non-delegating parent can seek judicial sanctions if a standby guardian attempts to extend the delegation beyond the statutory grace period for filing a petition in court.³⁷¹

To reduce error in the custodial power of attorney and standby guardianship processes, states should include notice requirements in these statutes. States should require the delegating parent to provide adequate notice to the non-delegating parent when the delegation occurs. States should also require the delegating parent to file the executed forms and proof of notice with a government agency. Transfers of real property require recordation. Transfer of parental rights should have at least the same level of government oversight. To enhance the opportunity to be heard, the notice of delegation should inform the non-delegating parent about the right to object to the delegation by petitioning a court to set it aside within a clearly specified time period of at least 30 days. The notice should also provide information about the legal consequences of the delegation. To preserve parental agency, the court should only set aside the delegation if doing so is in the best interests of the child. If the delegating parent is unable to notify the non-delegating parent, the delegating parent should provide proof of a good faith attempt to notify the other parent or the reason notice could not be provided (for example, the other parent is deceased). The government agency should decide whether notice was adequately provided and certify delegations that meet the requirements. Only government-certified delegations should carry the same weight as a court order. Due to the likelihood of error in the current custodial power of attorney and standby guardianship processes, as well as the fundamental rights at stake, the probable value of these additional procedural protections is considerable.

Like the VAP process, the government's primary interests in the custodial power of attorney and standby guardianship processes are to preserve the well-being of children, promote efficiency, and achieve cost savings. It stands to reason that the government wants to make it easy for parents to assign their parental authority to non-parents under exigent circumstances.³⁷² In theory, such assignments will decrease the number of child abuse and

³⁷¹ In some states, the standby guardian's authority will lapse if the guardian fails to file a petition before the statutory grace period expires. *See, e.g.*, N.C. GEN. STAT. ANN. § 35A-1374(e) (West 2018).

³⁷² The passage of custodial power of attorney and standby guardianship statutes in many states and the District of Columbia indicate the government's desire to promote delegation of parental authority to third parties. *See generally supra* Parts III.B and C.

neglect cases, and, as a result, lower the number of children placed in foster care.³⁷³ Placing children with caregivers without state intervention saves the government money and promotes children's well-being.³⁷⁴

Also similar to the VAP process, additional procedural safeguards for the custodial power of attorney and standby guardianship processes would likely increase the fiscal and administrative burden on the government, particularly the requirement that a government agency certify that notice has been provided to the non-delegating parent. To reduce the costs of the certification for a custodial power of attorney or a standby guardianship designation, states should use existing agency staff, to the extent feasible. Weighing the additional cost against the probable value of additional procedural safeguards is difficult because it is impossible to value the cost to a parent or child if these processes go wrong. Error in these processes could negatively impact the parent-child relationship or harm the well-being of a child. These costs are nonquantifiable. The stakes are substantial. The protection of constitutional rights and ensuring adequate care for a child are invaluable.

The *Mathews* analysis suggests that the custodial power of attorney and standby guardianship processes do not sufficiently protect the due process interests of non-delegating parents. There are significant deficiencies with providing adequate notice and, as a result, the opportunity to be heard. The unilateral delegation of parental rights without notice, which most states allow, limits the parental authority of the non-delegating parent. Although the judicial review on the back-end of the standby guardianship process helps prevent error, additional procedural safeguards are necessary to protect the non-delegating parent's fundamental right to exercise parental authority. The private interests at stake are considerable, and, although moderate, the risk of error is too high. The probable value of additional procedures to protect these interests and reduce error is not outweighed by the fiscal and administrative costs to the government. Adequate due process requires additional procedural safeguards to protect the fundamental right to parent.

³⁷³ See Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 40 (1998) (noting that state legislatures enacted standby guardianship statutes to "reduce demands on the state to provide foster care"); Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1041 (2014) (identifying drafting a power of attorney as a legal intervention that could prevent a child from entering the foster care system).

³⁷⁴ See Katherine Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 5, 10 (2016) (finding that children who are in foster care have worse physical and mental well-being than children who are not in foster care, and at least some of the difference in mental well-being may be attributed to being placed in foster care).

C. Addressing Counterarguments

There are at least three potential counterarguments to the reforms proposed in this Article: the changes are 1) unnecessary; 2) too costly; and 3) fail to strike the proper balance between access to justice, parental agency, and procedural due process.

The first main counterargument to the proposed reforms is that they are unnecessary. According to this critique, the VAP process mainly accomplishes its intended goals. In most instances, the biological father signs the form and is established as the child's legal father. When a man who signs the form is not the child's biological father, he has agreed to assume the legal rights and duties of parentage. Intent rather than biology should determine a child's parents.

This counterargument is unpersuasive for two reasons. First, although the VAP process usually produces the intended result, error sometimes occurs. The frequency of litigation to challenge VAPs and the protracted nature of these cases suggest that the system is deeply flawed.³⁷⁵ This error is significant because of the zero-sum nature of parental recognition. When a man who is not the child's biological father signs a VAP, the biological father's parental rights are constructively terminated. Because there is no notice to non-signatories who may have an interest in the VAP process, a biological father in this situation may not ever discover that he had parental rights to protect. Furthermore, due to strict time limits and legal standards, challenging a VAP when error occurs is too often impossible.

This counterargument also overlooks the challenges with informed consent in the VAP process. As outlined in Part IV.A, there is a high likelihood that consent in the VAP process is neither knowing nor voluntary. Thus, a man's signature on a VAP form is not always a consensual expression of intent to parent the child. The proposed reforms are necessary to address these significant deficits in the VAP process.

This Article is not the first to propose changes to the VAP process. Several legal scholars have examined the process and recommended reform.³⁷⁶ This Article adds to that work by focusing on reform of the VAP execution process, and proposing changes that enhance informed consent and procedural due process.

Critics may also argue that the proposed reforms to the custodial power of attorney and standby guardianship processes are unnecessary. According to this argument, unilateral assignment of parental authority without notice is relatively harmless. Most of the non-assigning parents would likely consent to the assignment if they knew about it. For those who would not consent,

³⁷⁵ See Rogus, *supra* note 32, at 104, for a description of the protracted nature of litigation to disestablish paternity.

³⁷⁶ See *id.* at 109; Weaver, *supra* note 241, at 2747; Parness & Townsend, *supra* note 124, at 92.

the parents who are actively engaged in taking care of the child will discover the assignment and petition a court to set it aside. Parents who are so uninvolved in their child's life that they do not discover that a third party is caring for their child until after the third party has attained standing to petition for custody should not have the right to veto the third party caregiver designated by the only active parent in the child's life.

This critique is based on assumptions that are not uniformly accurate. This argument assumes that a parent—whether involved or uninvolved—will seek relief from a court if the parent objects to the delegation of parental authority. Research reveals that many people, particularly those with low incomes, often do not seek legal solutions for their legal problems.³⁷⁷ This critique also assumes that an uninvolved parent does not want to be involved in the child's life. There are many reasons why a parent may be absent from the child's life for several months, including geographical distance, incarceration, illness, military service, and a poor relationship with the child's primary custodian.³⁷⁸ In addition, an absent parent may have delegated parental authority to the other parent because this arrangement is in the best interests of the child at that time. In this situation, arguably, the absent parent should receive the right of first refusal if the other parent can no longer care for the child.³⁷⁹ To preserve constitutionally-protected parental rights, the primary caretaking parent should not be allowed to unilaterally assign parental authority to a non-parent with no notification to the other parent.

The second main counterargument to the recommended additional procedural safeguards is that they are too costly. This critique is addressed in Parts V.A and V.B. These proposed reforms to the VAP process may not be as costly as they seem. States already employ legal professionals that handle paternity and child support matters. Depending on demand, these staff may be able to teach the mandatory course or provide consultations before signatories execute a comprehensive VAP. Also, many signatories may choose to sign a limited VAP in the hospital. In a study of unmarried mothers, 82% said they signed a VAP to include the father's name on the child's birth certificate, while only 56% signed to establish the father's custodial rights, and only 29% signed to file for child support.³⁸⁰ Furthermore, the proposed reforms to the VAP process may be a cost savings given the protracted nature of litigation on the back-end.

To reduce any additional costs to execute a custodial power of attorney or standby guardianship designation, states should also use existing staff to manage the new components of the process, to the extent feasible. Existing

³⁷⁷ See FAITH MULLEN & ENRIQUE PUMAR, D.C. CONSORTIUM OF LEGAL SERVS. PROVIDERS, *THE COMMUNITY LISTENING PROJECT* (2016) (finding that many people do not perceive the problems in their life as legal issues that can be remedied by lawyers and courts).

³⁷⁸ See Huntington, *supra* note 5, at 171.

³⁷⁹ See Huntington, *supra* note 5, at 226.

³⁸⁰ See Osborne & Dillon, *supra* note 25, at 27–29.

staff may be able to teach the mandatory course or provide pre-signing consultations, as well as administer the post-execution certification process.

Even if the proposed reforms increase the fiscal and administrative costs of paper courts to state governments, the probable value of these procedural protections outweigh the additional cost. The rights at issue are fundamental, the likelihood of erroneous deprivation of these fundamental rights is too high, and, in the VAP process, the finality of parental recognition raises the stakes. Accordingly, justice requires adequate procedural protections. The increased fiscal and administrative costs are not prohibitive. The primary costs of the proposed reforms are training and potentially hiring government personnel to administer them. States can and should assume these costs to protect fundamental rights.

A final counterargument is that the proposed reforms fail to strike the appropriate balance between access, agency, and due process. According to this critique, the reforms give too much weight to substantive access to justice and procedural due process at the expense of procedural access to justice and parental agency. For this reason, the changes will decrease the use of paper courts.

This counterargument raises the central question of this Article: what is the proper balance of access, agency, and due process? This question is difficult to answer. What is clear is that the current processes have significant flaws and jeopardize fundamental parental rights and important interests. Thus, reform is necessary.

The issue of declining use is most relevant to the custodial power of attorney and standby guardianship designation. The use of the VAP process should not decline because parents will still have the opportunity to sign a VAP—although with limited consequences—in the hospital. Because the primary reason unmarried parents sign VAPs is to include the man's name on the child's birth certificate,³⁸¹ many will likely be satisfied with a limited VAP. Although the use of the custodial power of attorney and standby guardianship processes may decline due to additional procedural safeguards, these protections are necessary to preserve fundamental parental rights and children's well-being. Because all of these out-of-court, form-based processes will remain available to families as alternatives to the traditional court process, the access to justice and parental agency benefits that accompany paper courts will persist, even after states implement the recommended reforms.

³⁸¹ See *id.* at 27 (reporting 96% of birth registrars and 82% of unmarried birth mothers ranked "to have the father's name on the birth certificate" as the number one reason to establish paternity).

CONCLUSION

Paper courts are a welcome addition to family law because they use accessible processes to allocate parental rights, while maximizing parental agency. However, the shortcomings of paper courts arguably render them unconstitutional in their current form. States should reform paper court processes to promote informed consent and afford adequate due process protections. Striking the appropriate balance between access to justice, parental agency, and due process is difficult, but possible. The traditional court process is a helpful guide. By retaining the components of paper courts that promote accessibility and agency and including additional procedural safeguards to protect the fundamental rights and important interests at stake, paper courts can make justice a reality in the lives of the families that rely on them.

APPENDIX A: ACKNOWLEDGEMENT OF PATERNITY (AOP)



Government of the District of Columbia

Parents: This Acknowledgement of Paternity (AOP) is a legal document, used to identify and acknowledge (or recognize), the child's biological (or natural) father. In order for the father's name to appear on the birth certificate of a child born out of wedlock, both biological parents must complete and sign this statement in the presence of a notary public. See, D.C. Official Code § 16-909.01.

You must read and sign the back of this form before you sign on the front.

** You have the right to seek legal counsel or obtain a genetic test before signing. **

Questions? Speak to the hospital Registrar of Births or call the Child Support Services Division (202-442-9900).

CHILD Information (Print legibly)

Form with fields for First Name, Middle Name, Last Name, Suffix, Sex, Birth Date, Place of Birth (Washington, D.C.), Social Security Number, and Birth Certificate Number.

MOTHER Information (Print Legibly)

Form with fields for First Name, Middle Name, Last Name, Street Address, Location Where AOP is Signed, RACE, Home Telephone Number, Date of Birth, and Social Security Number.

FATHER Information (Print legibly)

Form with fields for First Name, Middle Name, Last Name, Suffix, Street Address, Location Where AOP is Signed, RACE, Home Telephone Number, Date of Birth, and Social Security Number.

PARENTS' Acknowledgments and Signatures

MOTHER: I consent to the admission of paternity and acknowledge that the man named above is the only possible biological father of my child. I solemnly affirm under penalties of perjury that the contents of this Acknowledgement of Paternity (AOP) are true and correct to the best of my knowledge, information, and belief.

Signature line for Mother and Notary signature section with date and commission expiration fields.

FATHER: I acknowledge that I am the biological father of the child named above. I solemnly affirm under penalties of perjury that the contents of this Acknowledgement of Paternity (AOP) are true and correct to the best of my knowledge, information and belief.

Signature line for Father and Notary signature section with date and commission expiration fields.

RIGHTS AND RESPONSIBILITIES OF THE MOTHER AND FATHER

Parents: Do NOT initial or sign the front or back of this form until you have read, or have had this read to you, the following Rights and Responsibilities and have had the opportunity to have all of your questions answered. This form must be signed and initialed by the mother and father.

1. I sign this Acknowledgement of Paternity voluntarily and understand that I am not required to sign it. No pressure has been placed on me to sign. I understand that instead of signing this form I can:
 - Speak to an attorney. _____
 - Request a paternity (genetic) test to determine paternity. _____
 - Have paternity determined by a court. _____
2. I understand that a completed, signed and notarized AOP constitutes a legal determination of paternity. The child will be considered the legitimate child of both of us, and the legitimate relative of our relatives by blood or adoption. _____
3. I understand that this AOP creates legal rights and obligations relating to the child, and may impact custody, child support and visitation. _____
4. I understand that if we both agree, the child's surname (last name) on the birth certificate will be changed to the father's surname. _____
5. I understand that parents are jointly responsible for the child. This means that each parent has all the rights and responsibilities that the law gives to parents. These rights include, but are not limited to, inheritance and the right to make decisions concerning the child's education, medical care, and other matters of legal significance (subject to court order). Each parent has the responsibility to support the child until the child turns age 21 or beyond, as required by law. _____
6. I understand that when paternity is established, it is easier for the child to learn each parent's medical history and benefit from health care coverage available to both parents. It will also be easier for the child to receive benefits, such as survivor benefits from the Veterans Department or the Social Security Administration. _____
7. I understand that the parent who does not have custody of the child (the non-custodial parent) could be required to pay child support to the person with custody, or to the government, depending on the circumstances. If the child is ever placed into foster care, the District will seek child support payments from either or both parents. _____
8. I understand that if either parent seeks financial assistance from the District of Columbia to care for the child (including through TANF and/or Medicaid), the District will seek child support payments from the non-custodial parent. _____
9. I understand that each parent has the right to request that a court enter an order determining the child's custody. I understand that the non-custodial parent has the right to visitation with the child, and that this right can be enforced through legal action. _____
10. I understand that the signed, completed and notarized AOP will be filed with the Vital Records Division of the District Department of Health. It may be made available to the Child Support Services Division (CSSD) to assist CSSD in providing services to either parent. It may be used in legal proceedings involving the child. _____
11. I understand that this AOP can be rescinded (or revoked). A rescission must be in writing and must be completed, signed, notarized and received by Vital Records or Child Support 60 days after the date that either: (1) the last parent signed the AOP; or (2) an administrative or judicial proceeding (including a proceeding to establish a child support order) was held relating to the child and in which the parent who wants to rescind was a party, whichever is earlier. _____
12. I understand that after the 60 days, only a court can rescind the AOP, and then only after finding fraud, duress, or material mistake of fact. _____
13. I understand that I can speak to the hospital Registrar of Births or call the Child Support Services Division (202-442-9900) to answer any questions I have about this form or establishing paternity. _____

** I was told and have read, or had read to me, these Rights and Responsibilities, and I understand all of the Rights and Responsibilities addressed above.**

Mother's Signature _____

Date _____
(Month, Date, Year)

Father's Signature _____

Date _____
(Month, Date, Year)

APPENDIX B: CUSTODIAL POWER OF ATTORNEY INFORMATION PACKET

These materials are for information only. They do not provide legal advice. If you have questions about whether a custodial power of attorney is right for you or your family, or how to prepare a custodial power of attorney, you should seek legal advice.

What is a custodial power of attorney?

Under District of Columbia law, a parent can sign a custodial power of attorney that authorizes a third party (a person other than a parent) to make decisions on the child's behalf and/or designate with whom his/her child will live. A custodial power of attorney can also authorize the third party to obtain services for the child, like medical care or mental health care. You may wish to give such authority to a third party if you cannot take care of your child due to, for instance, a physical or mental health condition, extended hospitalization, incarceration, military deployment, or for any reason. You do not have to say why you are granting a custodial power of attorney, but you may do so if you wish. The powers and responsibilities granted to a third person by a custodial power of attorney are broad. Both the parent and the third party can seek legal advice regarding this document.

What powers does a custodial power of attorney grant?

The parent decides what powers to grant to the third party when preparing the custodial power of attorney. The attached sample power of attorney lists various powers that a parent may wish to grant. To grant the most power to a third party, a parent should check all of the lines in paragraph 5, especially the last line.

A parent may also limit the powers granted by the power of attorney. A parent may do so by writing specific limitations in paragraph 7.

Do I have to get a custodial power of attorney notarized?

Although notarization is not required, it may be helpful. Notarization may make it easier to use the form to obtain services for the child.

How should a third party use a custodial power of attorney?

When the third party seeks to enroll a child in school, obtain medical care for the child, or obtain any other service or benefit for the child, the third party should bring the custodial power of attorney. It may also help to bring a copy of the law (which is attached).

Can a parent revoke or withdraw the custodial power of attorney?

Yes. A parent can revoke the custodial power of attorney at any time after signing it. The custodial power of attorney form itself may describe how a parent can revoke the custodial power of attorney. A sample revocation form is also attached.

How long does a custodial power of attorney last?

Generally, if the custodial power of attorney does not include a time limit, it lasts until the parent revokes it. The sample form provides that you can revoke it in writing at any time, and a sample revocation form is also attached.

A parent can also specify a time limit for the power of attorney. For example, the parent could write in the form: "This custodial power of attorney shall take effect on [date] and shall remain in effect until [date]."

What is the difference between a custodial power of attorney and a court custody order?

A custodial power of attorney is a legal document signed by a parent but not approved by a court. Generally, it is easier to revoke a custodial power of attorney than to change a court custody order. Every case is different and you should seek legal advice if you have questions about which option to use.

DISTRICT OF COLUMBIA CUSTODIAL POWER OF ATTORNEY
PURSUANT TO D.C. CODE § 21-2301

1. I, _____, am the parent of the child(ren) listed below. There are no
Parent's name
court orders now in effect which would prohibit me from exercising the power that I now
seek to convey.

2. My address is:

3. _____ is an adult whose address is:
Third party's name

4. I grant to _____ the parental rights and responsibilities listed below
Third party's name
regarding care, physical custody, and control of the following child(ren):

Name: _____ Date of Birth: _____
Name: _____ Date of Birth: _____
Name: _____ Date of Birth: _____
Name: _____ Date of Birth: _____

5. I grant _____ these parental rights and responsibilities regarding the
Third party's name
above-listed child(ren):

INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING. IF YOU DO NOT
WISH TO GRANT A SPECIFIC POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU
MAY, BUT NEED NOT, CROSS OUT EACH POWER THAT YOU DO NOT WISH TO
GRANT.

- ___ physical custody of the child(ren) listed above;
___ the authority to enroll the child(ren) listed above in school;
___ the authority to obtain educational records regarding the child(ren) listed above;
___ the authority to make all school-related decisions for the child(ren) listed above;
___ the authority to obtain medical, mental health, or dental records regarding the child(ren)
listed above;
___ the authority to consent to medical, mental health, or dental treatment for the child(ren)
listed above;
___ the authority to act as representative payee for any Social Security benefits for which the
child(ren) listed above may be eligible;
___ the authority to receive any other benefits for which the child(ren) listed above may be
eligible; and

___all of the rights and responsibilities listed above and, to the greatest extent possible by law, the authority to make any other decision or obtain any other benefits necessary for the welfare of the child(ren) listed above.

- 6. This custodial power of attorney does not include authority to consent to the marriage or adoption of the child. In addition, unless otherwise agreed by the parties in writing, the custodial power of attorney granted in this form does not affect:
 - A) the right of the above-listed child(ren) to inherit from his or her (their) parent;
 - B) the parent’s right to visit or contact the child(ren);
 - C) the parent’s right to determine the child(ren)’s religious affiliation;
 - D) the parent’s responsibility to provide financial, medical, and other support for the child(ren).
- 7. The custodial power of attorney granted in this form is further limited by these instructions:

- 8. As set forth in D.C. Code § 21-2301, the custodial power of attorney granted in this form does not affect my rights in any future proceeding concerning custody of or the allocation of parental rights and responsibilities for the child(ren) listed above.
- 9. The custodial power of attorney granted in this form shall take effect immediately. It shall continue to be effective even if I become disabled, incapacitated, or incompetent.
- 10. The custodial power of attorney granted in this form shall continue until I revoke it in writing and notify _____ in writing of my revocation.
- 11. A person or entity that relies on this custodial power of attorney in good faith has no obligation to make any further inquiry or investigation into the authority of the attorney to act as described in this document. Revocation of this custodial power of attorney is not effective as to a person or entity that relies on it in good faith until that person or entity learns of the revocation.

Signed this _____ day of _____, 20__

(Parent’s Signature)
District of Columbia

This document was acknowledged before me on _____ (Date) by _____ (name of principal)

(Signature of notarial officer)

My commission expires: _____

REVOCAION OF A DISTRICT OF COLUMBIA CUSTODIAL POWER OF ATTORNEY PURSUANT TO D.C. CODE § 21-2301

1. I, _____, am the parent of the child(ren) listed below. My
Parent's name
address is:

2. _____ is an adult whose address is:
Third party's name

3. On _____ I signed a custodial power of attorney granting to
Date
_____ parental rights and responsibilities regarding the care,
Third party's name
physical custody, and control of the following child(ren):

Name: _____	Date of Birth: _____
Name: _____	Date of Birth: _____
Name: _____	Date of Birth: _____
Name: _____	Date of Birth: _____

4. I hereby revoke the above-reference custodial power of attorney. I have sent written notice of this revocation in person, by regular mail, or by fax to _____ on _____. This revocation will take
Third party's name Date
effect upon that person's receipt of that written notice.

Signed this _____ day of _____, 20__

(Parent's Signature)

This document was acknowledged before me on _____ (Date) by _____ (name of principal)

(Signature of notarial officer)

My commission expires: _____

APPENDIX C: DESIGNATION OF STANDBY GUARDIAN

I, _____, want to designate a standby guardian who will care for my child(ren) if I become unable to take care of them.

PRINT YOUR NAME

1. I state the following about myself:

- a. My name is _____
b. My address is _____
c. My date of birth is _____
d. My telephone number is _____

2. I state the following about my children:

Table with 4 columns: Child's Name, Current Address, Date of Birth, Gender. Multiple empty rows for data entry.

3. I hereby designate this person to be the Standby Guardian of my children:

- a. The Standby Guardian’s name is _____.
- b. The Standby Guardian’s address is _____.
- c. The Standby Guardian’s telephone number is _____.

4. If the person I designated is unable to accept for any reason, I hereby designate this person to be the Alternate Standby Guardian of my children:

- a. The Alternate Standby Guardian’s name is _____.
- b. Standby Guardian’s address is _____.
- c. The Alternate Standby Guardian’s telephone number is _____.

5. I state the following with regard to the child(ren)’s non-custodial parent:

- a. The non-custodial parent’s name is _____.
- b. The non-custodial parent [CHECK ONE]
 - Lives at _____.
 - Has no known address.
 - Has had his/her parental rights terminated by a court.
 - Is deceased.
 - Is unknown.

6. The Standby Guardian’s authority will take effect if any one of these “triggering events” happens:

- a. My written acknowledgment of debilitation and consent to commencement of the standby guardianship; or
- b. A determination by an Attending Clinician that I am physically or mentally unable to care for my child(ren); or
- c. I die prior to the commencement of a judicial proceeding to appoint a guardian of my child(ren).

- 7. **If any one of these “triggering events” happens, my designated Standby Guardian shall have authority to act and shall assume the rights, powers, duties and obligations existing under law between a legal custodian and a child.**
- 8. **I understand that I retain full parental rights even after the beginning of the Standby Guardian’s authority, and that I may revoke the standby guardianship at any time.**
- 9. **I understand that my Standby Guardian’s authority will end 90 days following the occurrence of any one of these “triggering events” unless by that date my Standby Guardian petitions the court for appointment as guardian.**

SIGN YOUR NAME

DATE

PRINT YOUR NAME

Signatures of Two Witnesses

THIS DESIGNATION IS NOT VALID UNTIL IT IS SIGNED BY THE LEGAL CUSTODIAN, OR ANOTHER ADULT IF THE LEGAL CUSTODIAN IS UNABLE TO SIGN. IT MUST BE SIGNED IN THE PRESENCE OF TWO WITNESSES WHO ARE 18 YEARS OLD OR OLDER *AND* WHO ARE NOT THE STANDBY GUARDIAN OR THE ALTERNATE STANDBY GUARDIAN. THE WITNESSES’ SIGNATURES ARE TO SHOW THAT THEY SAW THE LEGAL CUSTODIAN SIGN THIS DOCUMENT (OR SAW ANOTHER ADULT SIGN IF THE LEGAL CUSTODIAN CANNOT SIGN). D.C. CODE §16-4803(d) (2002)

I declare that the designator

- signed this document in my presence, or
- was physically unable to sign and asked another adult to sign this document, and the other adult signed the document in my presence.

I further declare that I am at least 18 years of age and that I am not the person designated as Standby Guardian or Alternate Standby Guardian of the minor child(ren) listed in this document.

Witness:

SIGN YOUR NAME

DATE

PRINT YOUR NAME AND ADDRESS

Witness:

SIGN YOUR NAME

DATE

PRINT YOUR NAME AND ADDRESS

Acceptance of Standby Guardian Designation

Standby Guardian: I accept the designation as Standby Guardian of the children listed on page one of this document.

SIGN YOUR NAME

DATE

PRINT YOUR NAME AND ADDRESS

Alternate Standby Guardian: I accept the designation as Alternate Standby Guardian of the children listed on page one of this document.

SIGN YOUR NAME

DATE

PRINT YOUR NAME AND ADDRESS

