1984

The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis

Richard P. Perna
University of Dayton

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Family Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol73/iss1/4

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis

BY RICHARD P. Perna*

INTRODUCTION

In 1950, the Commissioners on Uniform State Law enacted the Uniform Reciprocal Enforcement of Support Act [hereinafter URESA (1958 version) or RURESA (1968 version)]¹ in an attempt to aid the enforcement of support obligations between persons residing in separate states.² This Act, currently law in every state of the United States,³ attempts to provide an inexpensive and efficient enforcement mechanism⁴ for the collection

* Assistant Professor of Law, University of Dayton School of Law. B.A. 1971, Villanova University; J.D. 1975, Villanova University School of Law.

¹ This Act was amended in 1958 and revised in 1968. Both versions are currently being used. See UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9A U.L.A. 747 (1958) [hereinafter cited as URESA]; UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9A U.L.A. 647 (1968) [hereinafter cited as RURESA].

² "The Act is concerned solely with the enforcement of the already existing duties when the person to whom a duty is owed is in one state and the person owing the duty is in another...." RURESA, 9A U.L.A. 644 commissioner's prefatory notes (1973). See also In re Marriage of Ciganovich, 132 Cal. Rptr. 261 (Ct. App. 1976); Banks v. McMorris, 121 Cal. Rptr. 185 (Ct. App. 1975), cert. denied, 423 U.S. 871 (1975).

The Act can also be used for the collection of spousal support. In addition, RURESA has a provision that permits its intrastate use where the parties reside in different counties. See RURESA § 33, 9A U.L.A. 644 (1979). The enforcement mechanism for an intrastate URESA action is the same as that in the interstate URESA action. See note 21 infra and accompanying text.


New York and Iowa have laws which are similar in operation and effect. See N.Y. [DOM. REL.] LAW §§ 30-43 (McKinney 1977); IOWA CODE ANN. §§ 252A.1 to -.19 (West 1969).

⁴ Professor Fox describes the operation of the Act as a "simple, cheap, expedient mechanism." Fox, The Uniform Reciprocal Enforcement of Support Act, 12 Fam. L.Q. 113, 133 (1978). "URESA is designed to provide an inexpensive, simplified and effective means whereby an obligee in one state can enforce the duties of support owed by an obligor in another state." Clarkston v. Bridge, 539 P.2d 1094, 1096 (Or. 1975).
of child support. The most unique aspect of the Act is the so-called "Two State Lawsuit"—the procedural mechanism by which a support action may be initiated in one state and tried and adjudicated in another, thus relieving the initiating party of the necessity of traveling to a distant state to obtain jurisdiction over the support obligor. Invoking this procedure, a mother can institute and adjudicate a support action against an absent father without leaving her home state.

From the inception of the federal child support enforcement program, URESA and RURESA have remained the backbone of the program's interstate enforcement efforts. As our society becomes increasingly mobile, we can anticipate that the interstate enforcement of the support obligation will become an even more important aspect of the continuing war against "absent fathers." Given the rising number of out-of-wedlock births, we can also expect that more and more mothers will face the necessity of enforcing the father's support obligation in the courtroom. However, many of these mothers must overcome an additional hurdle—proof of the child's paternity.

Currently, an unwed mother seeking to establish paternity in an interstate action faces a judicial tangle. While many states have recently enacted long-arm statutes that are of help in obtaining jurisdiction over nonresident putative fathers, these statutes are only useful when conception occurred in the forum state. Thus, if the mother resides in a state other than the one

---

5 The Act is intended to operate as a procedural enforcement mechanism only and purports to create no substantive right to support. RURESA, 9A U.L.A. 643 commissioner's prefatory note (1973).
6 See note 21 infra and accompanying text for a detailed description of the actual procedure that allows a mother to enforce the support obligation without leaving her home state.
7 See Fox, supra note 4, at 123.
8 Recent statistics compiled by the National Center For Health Statistics show that the rate of out-of-wedlock births rose from 10.7% in 1970 to 17.1% in 1979—a 50% increase in raw number from 400,000 to 600,000. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CDS-80-7, Changing Family Composition and Income Differentials (1982).
9 The obligation to support a child generally arises by virtue of parentage. See, e.g., Trustees of Bloomfield v. Trustees of Chagrin, 5 Ohio 315, 318 (Hammond 1832) (no duty to support spouse's child from prior marriage); OHIO REV. CODE ANN. § 3109.05 (Page 1980).
10 See, e.g., CAL. CIV. PROC. CODE § 7007(b) (West 1983) ("A person who has sexual intercourse in this state thereby submits to the jurisdiction of the courts of this
in which conception occurred, or in a state that does not provide for long-arm personal jurisdiction over absent putative fathers, she has no alternative except the URESA action. However, URESA is silent concerning its use to establish paternity, and courts are not uniform in their interpretation of the Act regarding this issue. This lack of uniformity is best exemplified by contrasting the different treatment accorded two similarly situated mothers pursuing absent putative fathers for child support.

In one case, an unwed mother initiated a URESA support action in West Virginia on behalf of her infant child against a putative father residing in Ohio. In the Ohio court, the putative father admitted to having engaged in sexual intercourse with the petitioner and to sending her some money, but he denied being the father of the child. The Ohio court dismissed the support action, finding that the petitioner must first pursue "the legal procedure to determine the paternity of this child, and that cannot be done under the Uniform Support of Dependents Act." Denied the benefit of URESA and unable to obtain jurisdiction in West Virginia over the out-of-state putative father, the mother must travel to Ohio to litigate the paternity question, the precise result that the drafters of URESA sought to avoid.

In another case, an identical URESA support action was brought by an unwed mother residing in the State of Washington. The putative father, living in Oregon, filed a motion to quash service and demurrer to the complaint alleging that the
Oregon court lacked jurisdiction to establish paternity. Unlike the Ohio court which dismissed the URESA action, the Supreme Court of Oregon held, on appeal, that in a URESA support action "the statutory authority to establish paternity in that proceeding seems clearly implied." Thus, the Washington mother escaped the dilemma facing her West Virginia counterpart.

Attempting to eliminate this "jurisdictional" problem, the 1968 version of the Act, RURESA, specifically addresses the paternity issue:

If the obligee asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

Unfortunately, section 27 does little to actually remedy the paternity controversy in URESA actions. While section 27 clarifies the pre-1968 confusion concerning the "jurisdictional" authority of a court to hear the paternity issue, the grant of jurisdiction is merely permissive and not mandatory. Furthermore, the statutory language concerning when a court should adjudicate the paternity question is ambiguous at best. The requirement that both parties be present unless either or both are not necessary is particularly problematic. If a mother must travel to the home state of the father she loses the primary advantage of URESA—support enforcement without need to leave her home state. Yet, a mother benefits from URESA only when her presence in the responding state is "not necessary." When is the presence of the mother in a paternity case "not necessary"? The Act itself is of little help, and there are no reported cases which address this narrow issue. Nor does the

---

16 Id. at 1097.
18 "[T]he court may adjudicate the paternity issue. . . . [T]he court may adjourn the hearing until the paternity issue has been adjudicated." RURESA § 27, 9A U.L.A. 730 (1979) (emphasis added).
19 One commentator suggests that it is only the "rare" paternity case in which the
Act suggest procedural guidelines for litigating the complex question of paternity in a two-state proceeding.

The remainder of this Article examines the problems associated with interstate paternity adjudication and suggests standards and procedures that not only allow for increased use of the URESA interstate lawsuit to establish paternity, but also protect the due process rights of men who may be "falsely accused of paternity in the vigorous pursuit of the federal child support enforcement program." 20

I. THE PROCEDURE—THE TWO-STATE LAWSUIT

URESA creates a unique procedural mechanism for the interstate adjudication of support claims. The civil enforcement procedure, 21 which has remained essentially unchanged since the original 1950 version of the Act, allows a plaintiff to prosecute a claim against the defendant in a foreign state without leaving her home state courtroom. This two-state proceeding is initiated by either the mother 22 (obligee) 23 or by a state or political sub-

mother's presence is not necessary. See H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 205 (1981). Another adds that "[t]he presence of Section 27 in URESA is a step toward improvement, but it may prove to be so narrowly drafted that it forecloses the possibility of a paternity determination in its very terms." Fox, supra note 4, at 127.

20 H. KRAUSE, supra note 19, at 208. Professor Krause cites the problem of false accusation as one of a number of reasons supporting the need for general reform in the paternity area. See id.

21 In addition to the civil enforcement mechanism, the Act also contains criminal enforcement provisions which have been a part of the Act since its inception. Sections 5 and 6 of URESA provide for the criminal extradition of persons charged with criminal nonsupport in specified circumstances. See, e.g., In re Morgan, 53 Cal. Rptr. 642 (Ct. App. 1966).

22 Section 13 of RURESA specifically allows an action on behalf of a child to be brought by the person with legal custody without appointment as guardian ad litem. RURESA § 13, 9A U.L.A. 686.

23 The Act creates its own vocabulary. There are four important terms that are frequently used. The "obligee" is any person to whom a duty of support is owed and a state or political subdivision thereof. URESA § 2(f), 9A U.L.A. 656. The obligee is almost always the mother and/or the state welfare department that has furnished support to the mother and/or child. "Obligor" refers to any person owing a duty of support. URESA § 2(g), 9A U.L.A. 656. This is almost always the husband and/or (putative) father. The "initiating state" is "any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced." URESA § 2(d), 9A U.L.A. 656. The initiating state is usually the home state of the wife/mother. The "responding state" is "any state in which the proceeding pursuant to the proceeding in the initiating state is
division that has paid support to her. She initiates the action by filing a petition in the appropriate court in her home state. Throughout the proceeding she is represented by a prosecuting attorney or other designated representative also in her home state. Once the petition is filed, the plaintiff’s court (initiating court) reviews the petition to determine whether it contains the necessary allegations that the obligor actually owes a duty of support and to determine whether the responding court can obtain jurisdiction over the obligor. The court then forwards the petition to the appropriate court in the defendant’s home state (responding court). The responding court assigns the case to a prosecuting attorney who serves process on the defendant to obtain jurisdiction over him. The responding court is then requested to set a time and date for a hearing at which the obligor may appear and present his testimony. The obligee remains in her home state throughout the proceeding.

Often, the entire controversy ends in settlement with the obligor agreeing to pay the weekly support demanded. In other cases, when the obligor admits his duty or offers no real defense

or may be commenced.” URESA § 2(c), 9A U.L.A. 656. This is usually the home state of the husband/(putative) father.

A state or political subdivision stands in the shoes of an obligee for the “purpose of securing reimbursement for support furnished and of obtaining continuing support.” RURES § 8, 9A U.L.A. 675.


Section 12 of the Act mandates that counsel be appointed for the obligee: “[T]he prosecuting attorney upon the request of the court [a state department of welfare, a county commissioner, an overseer of the poor, or other local welfare officer] shall represent the obligee in any proceeding under this Act. . . .” RURES § 12, 9A U.L.A. 683. Cf. Duncan v. Smith, 262 S.W.2d 373 (Ky. 1953) (upholding constitutionality of similar section in earlier act).

The court in the initiating state in effect makes a determination that the obligor has made out a prima facie case. See, e.g., Martin v. Coffey, 268 N.W.2d 307, 308 (Mich. Ct. App. 1978). As to the determination that the responding court can obtain jurisdiction over the obligor, the court in the initiating state need only determine that the obligor resides in the responding state.


URESA § 18, 9A U.L.A. 694.

URESA § 18(b), 9A U.L.A. 694.

As suggested by Brockelbank and Infausto, the obligor, “[d]espite popular belief, . . . is often a good fellow, and not the determined defaulter seeking only to escape his family obligations.” W. BROCKELBANK & F. INFAUSTO, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT 52 (2d ed. 1971).
to the underlying support obligation, the responding court need only set the amount of support. To do so, the court evaluates both the child’s need and the ability of each party to contribute toward the child’s support. Because of the relative simplicity of these issues, this determination will rarely require a full adversarial contest.

The responding court may be able to receive evidence of the child’s need and of the mother’s financial situation in the form of affidavits. The father then presents to the responding court his testimony and any other supporting evidence regarding his financial condition and ability to pay. After hearing the evidence, the responding court sets the amount of support and subsequently acts as its transmittal agency for the weekly support payments. The presence of the mother is normally not necessary in these cases.

However, when the father raises any defense to the underlying support obligation a more troublesome situation arises. Upon the assertion of a defense the Act allows the court, at the request of either party, to continue the matter for presentation of further evidence. Section 20 of RURESA specifically con-

---

32 See Fox, supra note 4, at 129:
Moreover, obligors rarely have evidence which constitutes a defense or contravenes the assertions of the obligee. URESA hearings are typically open-and-shut matters, partly because there is often no factual dispute and partly because obligors often appear without counsel and, thus, are seldom able to construct a proper legal defense.

Id. See also W. Brockelbank & F. Infautso, supra note 31, at 51.

33 Since URESA does not establish the substantive duty of support, the responding court applies its own state law. See URESA 7, 9A U.L.A. 672. Though jurisdictions differ, the factors cited in the text are usually considered in determining the amount of support. See, e.g., Davidson v. Davidson, 405 P.2d 261, 265 (Wash. 1965).

34 The petition and accompanying affidavit are normally not admissible in evidence. See Way v. Fisher, 425 S.W.2d 704, 705 (Tex. Civ. App. 1968). However, admission may be had if the rules of evidence in the responding state so permit or if agreed to by the obligor. See generally W. Brockelbank & F. Infautso, supra note 31, at 52-53. However, when the action is initiated by a mother receiving AFDC, as a practical matter her income is easily established.

35 Though not specified by the Act, counsel for the obligee may prove much of the case by admissions of the obligor obtained by examining the obligor “as-of-cross.” See W. Brockelbank & F. Infautso, supra note 31, at 53.


37 The original Act and its 1952 Amendments were ambiguous as to how a court should proceed in the face of a defense. Because of the confusion that followed, § 21
templates that additional evidence will be adduced, either by
deposition of the mother or by her appearance in person.\textsuperscript{38}

If a defense is raised and the obligee can afford to make a
personal appearance in the responding state, the procedural and
evidentiary problems are eliminated. However, the obligee will
seldom have sufficient money to travel to the responding state
in order to prosecute her claim.\textsuperscript{39} In this more common scenario,
the obligee is limited to a "paper" presentation of her case in
the responding court since she never leaves her home state. The
obligor is deprived of the benefit of a face-to-face cross-exami-
nation and confrontation of his accuser, and the court has no
opportunity to hear live in-court testimony from both parties.

In theory, this "hearing" procedure poses significant prob-
lems for both parties and has been described by one commen-
tator as the "weakest link" in the interstate enforcement scheme.\textsuperscript{40}
However, despite the theoretical problems, in practice the pro-
cedure is rarely disadvantageous to either party. Defenses to the

\textsuperscript{38} Section 20 of RURESA provides:

If the obligee is not present at the hearing and the obligor denies owing
the duty of support alleged in the petition or offers evidence constituting
a defense the court, upon request of either party, [sic] continue the hearing
to permit evidence relative to the duty to be adduced by either party by
deposition or by appearing in person before the court. The court may
designate the judge of the initiating court as a person before whom a
deposition may be taken.

RURESA § 20, 9A U.L.A. 700.

The procedure under the 1958 version is virtually identical, though the scope of
the evidence to be presented is arguably narrower than that of RURESA. RURESA
allows the presentation of evidence relative to "the duty of support" while § 21 of
URESA limits the scope of the inquiry to "evidence which constitutes a defense." In
practice the distinction is probably without significance. See Fox, supra note 4, at 125.

\textsuperscript{39} Fox, supra note 4, at 114.

\textsuperscript{40} Id. at 128.

in URESA action not entitled to reduction of support order where unemployment is
enforcement of an existing support obligation are limited and usually focus on the unique circumstances of the obligor\textsuperscript{41} or of the child.\textsuperscript{42} In these cases, the cross-examination of the obligee will rarely be necessary to the effective presentation of the obligor's case.\textsuperscript{43} Nor will the obligee's case be prejudiced by the Act's hearing procedure, since her testimony can be adequately presented in the responding court in the form of a deposition taken by the initiating court.\textsuperscript{44}

While some accuracy may be lost because of this procedure, the loss is not significant when the interests at stake are compared to the benefits gained by use of the two-state procedure.\textsuperscript{45} However, the same conclusion is not so easily reached when the obligor challenges the existence of the support obligation by denying paternity of the child. There, the issue for adjudication is not how much support should be paid, but the filiation of the child—a finding having more significant consequences for both father and child.\textsuperscript{46}


\textsuperscript{42} The credibility of the mother will rarely be at issue in most situations in which defendants raise a defense since her testimony is often not relevant. Even when the focus is on her improved condition, e.g., better employment, remarriage, etc., the Act's normal procedures are sufficient to insure an accurate assessment of the changes. See notes 32-35 supra and accompanying text.

\textsuperscript{43} The following view about the hearing procedure seems to be shared by other commentators: "In order to have the benefit of arms-length enforcement which does not require the obligee to travel, the responding court must sacrifice some of the accuracy and efficiency which characterize a conventional in-person proceeding." Fox, supra note 4, at 129.

\textsuperscript{44} See note 143 infra and accompanying text.
II. THE STATUTORY DILEMMA

A. URESA Pre-1968

The 1958 version of URESA is silent concerning a court’s authority to adjudicate paternity in an interstate proceeding. In light of this silence, a number of courts have addressed the question. Unfortunately, there has been no unanimity regarding the meaning of the Act’s silence.

The minority of the courts addressing the issue have refused to adjudicate paternity questions raised in a URESA action. For example, in Smith v. Smith, an Ohio court held that URESA could not be used to establish the paternity of a child where “there [had] been no judicial determination of paternity ... under the laws of Ohio or any other state.” The Ohio court found that the petitioner, before resorting to the URESA support action, must first determine paternity of the child pursuant to the existing Ohio statutory scheme—a requirement she could not meet without traveling to Ohio. In addressing the same question in analogous cases, other courts have reached a similar result.

Although not clearly reasoned, these cases seem to suggest a narrow interpretation of section 7 of URESA which allows a person to invoke the Act to enforce only those support obligations “imposed or imposable” by law. One commentator em-
braces this reasoning in pre-1968 URESA cases and argues that a duty of support imposed or imposable by law within the meaning of section 7 of the Act, arises only "where there is already an order of support issued by the first forum state . . . [or] where paternity has been acknowledged or established judicially and the forum state has a law requiring support." 53 He argues that to allow the URESA support action to continue on the petitioner's mere allegation of paternity invokes an "artificial merger of support and paternity actions." 54 To fully accept this interpretation of the Act, however, one must be willing to accept a distinction between the use of URESA to enforce an already existing support obligation and its use to establish the underlying obligation itself—a distinction that seems overly restrictive, especially in light of the broad remedial purpose of the legislation. 55

There are currently thirteen states which still use the pre-1968 version of URESA with no statutory provision for the adjudication of paternity. 56 At least half of these states, without specific case authority, still refuse to allow adjudication of paternity in a URESA action 57 and immediately halt the URESA action upon assertion of a non-paternity defense. 58

The majority of courts addressing this question have adopted a more desirable approach. These better reasoned decisions take a broader, less restrictive view of section 7 and conclude that

The obligor is presumed to have been present in the responding state during the period to which support is sought until otherwise shown." URESA § 7, 9A U.L.A. 767.

53 Levy, supra note 10, at 215.

54 Id.


56 The following states, which have adopted the 1958 version of URESA, make no mention of paternity in their legislation: Alabama, Connecticut, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Oregon, South Carolina, Tennessee, Texas, Utah, and Washington. See 9A U.L.A. 392 for relevant statutory cites. The total is raised to 15 states when including Iowa and New York, neither of which has a provision in its reciprocal law specifically authorizing the adjudication of paternity. See N.Y. [Dom. Rel.] Law §§ 30-43 (McKinney 1977); Iowa Code Ann. §§ 252A.1 to -.19 (1969).

57 See NATIONAL RECIPROCAL AND FAMILY SUPPORT ENFORCEMENT ASSOCIATION, NATIONAL ROSTER AND URESA/IV-D REFERRAL GUIDE 138 [hereinafter cited as NATIONAL ROSTER].

58 See id.
the adjudication of paternity is well within the scope of the URESA support proceeding.\(^5^9\) For example, the Supreme Court of Oregon in *Clarkston v. Bridge*\(^6^0\) determined that URESA "authorizes both the finding and enforcement of duties of support which have not been previously established in another proceeding."\(^6^1\) The court reasoned that implicit in every determination of support is the finding that the defendant is the father of the child in question.\(^6^2\) As a necessary part of the support order, jurisdiction to determine paternity is implied whenever there is jurisdiction to determine support.\(^6^3\)

In arriving at this conclusion, the court emphasized the broad remedial purpose of the Act and for support turned to commentary by Professor Brockelbank, chairperson of the committee which drafted the original URESA.\(^6^4\) In his view, courts which have jurisdiction to determine paternity should not hesitate to do so in a URESA case, because otherwise courts would give defendants an incentive to deny parentage in order to avoid the support obligation.\(^6^5\)

In *Yetter v. Commeau*\(^6^6\) the Supreme Court of Washington reached the same result as did the court in *Clarkston v. Bridge*.\(^6^7\)

Seizing upon the commissioner's prefatory note to the 1968

---


\(^6^0\) 539 P.2d 1094 (Or. 1975).

\(^6^1\) Id. at 1096.

\(^6^2\) Id. at 1096-97.

\(^6^3\) Id. at 1097.

\(^6^4\) Id. (quoting with approval W. BROCKELBANK & F. INFAUSTO, supra note 31, at 62).

\(^6^5\) W. BROCKELBANK & F. INFAUSTO, supra note 31, at 62. See also Fox, supra note 4, at 126-27.

\(^6^6\) 524 P.2d 901, 903-04 (Wash. 1974).

\(^6^7\) See text accompanying note 63 supra.
Amendments to the Act, the court interpreted the subsequent addition of section 27 to RURESA merely as an attempt to clarify the procedures for use in the event of a non-paternity defense. The addition of section 27 was seen to create only a procedural mechanism for adjudication of an issue already within the jurisdictional power of a URESA responding court.

There are currently a small number of jurisdictions which apparently allow the adjudication of paternity without specific statutory authority. Permitting the adjudication of paternity is more desirable than a dismissal of the entire URESA support action, the result mandated by the more restrictive minority approach. As noted previously, a refusal to hear the paternity defense leaves the petitioner-mother in an almost impossible bind. However, sensitivity to the petitioner's plight should not mask the potential prejudice faced by the respondent forced to defend the two-state paternity action. Implying a grant of jurisdiction to determine paternity in the URESA support action should not result in a wholesale use of URESA paternity actions which fails to give serious consideration to the sufficiency of URESA procedures in the paternity context.

Because URESA offers no additional procedural guidance on the paternity issue, courts adopting the more liberal majority position must forge their own safeguards to protect the putative father from any unfairness inherent in the two-state proceeding. Unfortunately, the few decisions which address the procedural requirements of the URESA paternity action do so without sensitivity either to the unique problems created by the Act's two-state hearing proceeding or to the equally unique nature of

---

68 "The new Act has guidelines for the conduct of the trial in the responding state (Sections 21 and 23), for cases where paternity is in issue (Section 28 [sic]) or where there has been interference with visitation rights (Section 24) or where it may be desirable to take an appeal (Section 35)." RURESA, 9A U.L.A. 644 commissioner's prefatory note.


70 These jurisdictions are Iowa, the District of Columbia, South Carolina, Washington, Guam, Michigan (local practice), and Texas (local practice). See NATIONAL ROSTER, supra note 57, at 138.

71 See notes 47-55 supra and accompanying text.

72 See notes 14, 47-50 supra and accompanying text.

73 See text accompanying notes 179-322 infra.
As early as 1959, courts confronted the thorny procedural issues presented whenever a respondent denies the paternity of the child for whom support is sought. In *Lambrou v. Berna*, the Supreme Court of Maine considered the appropriate procedure for Maine courts to follow when the respondent "claims to have no knowledge of the birth of an alleged dependent child, and the petitioner is not present to testify." The *Lambrou* court noted that this problem was one not normally present in most URESA cases, because the duty of support is usually established through the testimony of the respondent himself—eliminating the need for the presence of the petitioner. However, when the respondent denies knowledge of the child, the testimony of the petitioner takes on added significance. The court resolved this dilemma by reference to the Act's hearing procedure, citing *Pfueller v. Pfueller*, a New Jersey case in which paternity was not in issue. Parroting the language of section 21 of the Act, the *Lambrou* court concluded that a non-paternity defense may be adjudicated in a URESA proceeding by permitting the petitioner to present evidence in person or by deposition taken in the initiating court. However, no attempt was made to examine the sufficiency of the Act's hearing procedures in the paternity context.

More recently, the Oregon Supreme Court confronted this same question in *Clarkston v. Bridge*. The court was asked to decide whether the respondent in a URESA action had a right to a jury trial on the question of paternity. The court began its analysis by recognizing the sensitivity of paternity adjudications and the corresponding legislative policy of providing procedural protections for the putative father.

The court then balanced the legislative policy in providing

---

74 See text accompanying notes 165-78 infra.
75 148 A.2d 697 (Me. 1959).
76 Id. at 703.
77 See id. See also notes 31-36 supra and accompanying text.
79 148 A.2d at 703-04.
80 539 P.2d 1094.
81 See id. at 1095, 1098-1100.
82 See id. at 1099.
procedural protections in paternity proceedings against the perceived legislative interest in minimizing the additional burdens and expenses which would otherwise be incurred by an out-of-state plaintiff. URESA was seen as a remedial statute "designed to equalize the relative positions of resident and nonresident plaintiffs in support proceedings." The addition of a jury did not, in the court's view, present greater difficulties for the out-of-state plaintiff and therefore did not contravene the remedial purpose of the Act. The court concluded that in the absence of legislative intent to the contrary, the procedures for establishing paternity in a URESA support action "should parallel those mandated by the legislature for establishing paternity in other support proceedings."

In holding that the defendant was entitled to a trial by jury, the court specifically declined to determine whether all of the procedural protections required in an Oregon filiation proceeding are also available in the URESA proceeding in which paternity is contested. Although the court could not discern any reason why they should not be available, the narrowness of the decision is significant. At best, the court viewed the URESA defendant as standing in the shoes of his non-URESA counterpart in determining the availability of procedural protections. Unfortunately, no attention was given to the additional procedural problems facing a URESA defendant in the interstate paternity context. It is difficult to criticize the result in Clarkston; certainly the interstate paternity defendant requires the same procedural protections accorded defendants in a non-URESA filiation

---

83 See id. at 1099-1100.
84 Id. at 1099.
85 See id. at 1100.
86 Id.
87 Id. See also Waddell v. State ex rel. Meeks, 357 S.W.2d 651, 652 (Ark. 1962) (jury trial allowed); Wahlers v. Frey, 288 N.W.2d 29, 30 (Neb. 1980) (jury trial allowed).
88 "While it is unnecessary for us to decide in this case whether all the procedural protections required in filiation proceedings are applicable in URESA proceedings in which paternity is contested, we do not discern any reason why they should not be." 539 P.2d at 1100 n.13.
89 See id.
90 See Note, Clarkston v. Bridge: Paternity Determination in Oregon URESA Proceedings, 12 WILLAMETTE L.J. 643 (1976), which criticizes the court's failure to address the need for procedural guidelines in the URESA paternity case.
proceeding. However, given the unique problems facing the interstate defendant, a serious question can be raised concerning the need for additional procedural protections. This more thorny problem was never considered by the court—much less answered.

The commentary, while considerably more vocal about citing the need for sensitivity to issues of procedural fairness, offers little real help in delineating a workable test for determining when an adjudication hearing is "fair." According to Professor Brocklebank, a court should decide whether to adjudicate the paternity defense only after "weighing the equities and considering the convenience and justice to the parties." In his view, a court is justified in refusing to hear the matter where the respondent makes a "substantial showing that he is not the father and it appears that it will be very difficult to conduct such a trial with the plaintiff not before the court."

This test draws a distinction between cases in which the defendant makes a "substantial" showing of non-paternity and those in which the defendant's proof is less than "substantial." Implicit in the distinction is an assumption that the procedural difficulty in each case is somehow directly related to the strength of the defendant's claim. The accuracy of this assumption aside, Professor Brocklebank fails to articulate how "substantial" a defendant's claim must be or how "difficult" the conduct of the trial must appear before a court is justified in refusing to hear the case.

B. URESA Post-1968: Section 27 of the Revised Act

On the surface, section 27 of RURES A resolves the earlier jurisdictional problem by specifically authorizing courts to adjudicate paternity in the context of the interstate support enforcement mechanism. However, section 27 does little to alleviate

91 Id.
92 See H. Krause, supra note 19, passim; Note, supra note 90, at 654-55.
93 W. Brocklebank & F. Infausto, supra note 31, at 63.
94 Id. (emphasis added).
95 Thus when a paternity defense is "frivolous and can be easily met by a deposition from the plaintiff, the issue should be accepted and decided as any other issue might be." Id.
96 See text beginning at note 295 infra.
the nagging procedural problems inherent in the two-state paternity proceeding. Although touted as an improvement over cases allowing paternity adjudications without articulated procedural standards, section 27 actually does little to inject consistency into the old dilemma.

The section provides that a court may adjudicate paternity when three conditions are met: (1) the obligor asserts non-paternity as a defense; (2) the court determines that the defense is not frivolous; and (3) both parties are present at the hearing, unless the proof required in the case indicates that the presence of either or both parties is not necessary.

The first requirement is clear and nonproblematic. The second requirement addresses the validity of the defense and mandates that a court hear the paternity issue only when the defense is not frivolous. This requirement presents a number of problems since it apparently anticipates at least some minimal form of judicial review prior to the full paternity adjudication.

In most cases, the fact finder cannot possibly determine the "frivolousness" of the claim until the parties have had the opportunity to present some evidence. On its face, section 27 requires a court to make a finding concerning the validity of the

---

97 "Whatever the shortcomings of RURESA in this context, it probably represents an improvement over URESA interpretations allowing the adjudication of paternity. Since Section 27 no more than reflects basic mandates of due process, there would seem to be little room for further 'improvement.'" H. KRAUSE, supra note 19, at 205-06.

98 See text accompanying note 17 supra for the text of RURESA § 27.

99 Frivolousness is an elusive concept, especially when used in reference to a paternity proceeding. In Glover v. Clark, 288 S.E.2d 887 (Ga. Ct. App. 1982), a URESA case in which the defendant asserted non-paternity as a defense, the court addressed the meaning of "frivolous" § in 27 and construed the term "to refer to a defense in which the respondent's realistic chances of ultimate success are slight." Id. at 889 (citations omitted). The usefulness of this definition is limited—how slight must a defendant's chance of success be before a court can legitimately refuse to hear the claim? Notwithstanding the definitional problem, the defense of non-paternity is factually frivolous only when the defendant is the biological father of the child—the ultimate factual issue which is the focus of the judicial proceeding. The validity of the defense can normally be ascertained only by reference to the evidence to be presented by the parties unless barred by res judicata or collateral estoppel. See McNeece v. McNeece, 562 P.2d 767 (Colo. Ct. App. 1977) (defendant's assertion of non-paternity in URESA action brought by mother barred by prior divorce decree between the spouses which by implication determined the paternity of the child); Luedtke v. Koopsma, 303 N.W.2d 112 (S.D. 1981) (paternity not properly raised in an action under URESA when paternity not contested in original divorce). However, the non-paternity defense may still be non-
defense before it can hear the paternity claim. The court can determine the validity of the defense only by hearing the evidence relevant to the paternity of the child. There is little sense to a requirement that conditions “adjudication” of the paternity defense upon consideration of the same evidence that will ultimately be dispositive of the entire action.

Although there is no official commentary in the 1968 Amendments on the purposes of the nonfrivolousness requirement, it is likely that the standard was intended to discourage the widespread use of a potentially costly and time-consuming defense that would frustrate the central purpose of the Act. However, a strict reading of section 27 actually produces the contrary result.

The Act allows a court to adjudicate the paternity defense only when it is not frivolous. When a defendant “frivolously” raises the defense of non-paternity, the court is precluded from addressing the paternity issue and section 27 seems to suggest that the support action be adjourned until the paternity question is adjudicated elsewhere. The converse is obviously more desirable: if a determination of frivolousness can be made, a court should “hear” the matter to dismiss the defense and judicially frivolous even in the face of a prior court determination. See Hodge v. Maith, 435 So. 2d 387 (Fla. Dist. Ct. App. 1983) (in URESA action brought by a Pennsylvania mother against a Florida defendant, the Florida court found that the prior Pennsylvania paternity judgment was not entitled to full faith and credit because the adjudication violated the fourteenth amendment due process clause (lacked minimum contacts) and defendant was allowed a defense of non-paternity); Brondum v. Cox, 232 S.E.2d 687 (N.C. 1977) (defendant allowed to assert non-paternity defense in URESA action when prior Hawaiian judgment was invalid for lack of personal jurisdiction and thus not entitled to full faith and credit); Smith v. Burden, 228 S.E.2d 662 (N.C. Ct. App. 1976) (prior criminal conviction for failure to support illegitimate children not conclusive in subsequent civil URESA action and defendant is entitled to have paternity issue litigated in the civil action). Similarly, even when the defendant was married to the mother at the time of birth, the presumption of filiation is usually rebuttable. See, e.g., Evans v. Evans, 434 So. 2d 254 (Ala. Civ. App. 1982), cert. quashed by Ex parte Evans, 434 So. 2d 257 (Ala. 1983). If the frivolous standard has any merit in this context, it should be limited to only those cases in which the defendant is legally barred from asserting the defense of non-paternity. See cases cited infra note 102.

100 See note 65 supra and accompanying text.

101 Even if we interpret “adjudicate” in § 27 to require an evidentiary hearing on the merits, the confusion is still not eliminated. Certainly no court wants to conduct an evidentiary hearing if the defense is frivolous on its face. Yet, a court must dismiss a frivolous defense and in this sense the matter is adjudicated.
establish the parent-child relationship.\textsuperscript{102}

The third requirement of section 27—that both parties be present unless either or both is not necessary—is even more problematic. It is this prerequisite that led one commentator to suggest that the section is “so narrowly drafted that it forecloses the possibility of a paternity determination by its very terms.”\textsuperscript{103} This dilemma is obvious and distressing.

A mother who resorts to URESA usually does so because there is no single suitable forum available for adjudication. Without the two-state enforcement mechanism, a mother faces the same difficult situation which existed prior to the passage of URESA.\textsuperscript{104} She must first find the putative father and travel (presumably with the child) to a forum with both subject matter and personal jurisdiction to litigate her claim.\textsuperscript{105} Throughout this period, both she and her child must live without support.\textsuperscript{106}

Except for a rare case involving parties who live physically close together but across state lines, a mother will usually be financially unable to travel to the responding state to prosecute her support action.\textsuperscript{107} When a court requires the mother’s presence as a precondition to hearing the defendant’s non-paternity defense, she is effectively barred from pursuing her claim in the URESA context.\textsuperscript{108} As a result, the determination of when the presence of either or both parties is not necessary is of major significance since only this class of cases will be litigated using the RURESAs scheme.\textsuperscript{109}

Courts faced with this question can glean little guidance from the statute itself or from the scant legislative history. Moreover, no court has fully addressed the issue in spite of the fact that

\textsuperscript{102} See East v. Pike, 294 S.E.2d 597 (Ga. Ct. App. 1982) (non-paternity defense in URESA action frivolous in light of former divorce judgment establishing support and visitation rights); Ely v. DeRosier, 459 A.2d 280 (N.H. 1983) (hearing on the issue of paternity in a URESA action available only when the defense not frivolously raised and no hearing available where prior judgment rendered by sister state is res judicata and entitled to full faith and credit). See note 295 infra and accompanying text.

\textsuperscript{103} Fox, supra note 4, at 127.

\textsuperscript{104} Id. at 114.

\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 126.

\textsuperscript{109} See RURESAs § 27, 9A U.L.A. 730.
numerous states have adopted section 27 authorizing the adjudication of paternity in the URESA support action.\(^\text{110}\)

Commentary is not very optimistic about resolving the problem. Writers cite the need for and the importance of live in-court testimony as a primary reason why only the "rare" paternity case will not require the presence of both parties.\(^\text{111}\) The belief (or perhaps assumption) underlying this conclusion is that paternity adjudication is unlike the ordinary URESA support action and other civil hearings in which the presence of the parties is not necessarily required.\(^\text{112}\) However, recognizing the unique nature of the paternity action\(^\text{113}\) is only a first step in


\(^{111}\) See note 19 supra.

\(^{112}\) See notes 31-46 supra and accompanying text.

\(^{113}\) See text accompanying notes 165-78 infra.
answering the fundamental question of section 27: When is the presence of one or both parties not necessary?

In his commentary on section 27, Professor Krause hails the section’s narrowness as an “improvement over URESA interpretations allowing the adjudication of paternity.” While recognizing the section’s limitations, Krause suggests that the section does no more than reflect “basic mandates of due process.” Unfortunately, Krause leaves his discussion of section 27 without addressing the specific application of the due process clause to the interstate adjudication of paternity. It is that question to which we now turn.

III. PROCEDURAL FAIRNESS

A. The Yardstick

The clear purpose of URESA is to allow the enforcement of support obligations without requiring the mother asserting the claim to travel to the father’s home state. The fact that every jurisdiction in the country has adopted the Act or its equivalent demonstrates legislative intention to provide an efficient and economic means of assisting a custodial parent in enforcing her right to child support. While this goal is not insignificant, it must be tempered, in the case of a putative father, by his right to have the filiation question adjudicated in a manner consistent with fundamental fairness.

Although the interstate nature of the action can present procedural difficulties for both litigants, the “decision” to litigate interstate is initially that of the mother and any difficulties

114 H. Krause, supra note 19, at 205.
115 Id.
116 See text accompanying notes 1-6 supra.
117 See note 3 supra.
118 See note 64 supra and accompanying text.
119 The Supreme Court “frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). Just as the termination of such bonds demands procedural fairness, see Lassiter v. Department of Social Services [452 U.S. 18 (1981)], so too does their imposition.” Little v. Streater, 452 U.S. 1, 13 (1981).
she faces are by "choice." Unlike the mother, the putative father is not given the option to completely forego litigation. When a support action is brought against him he must defend and, if he defends on the ground that he is not the father, he must litigate the paternity issue in a two-state proceeding.

A comparison to intrastate paternity litigation highlights the additional difficulties the URESA paternity defendant must confront when forced to litigate interstate. As a number of courts have noted, the state's alignment with the mother as the moving party in a paternity action potentially results in an inherent unfairness to the defendant. The URESA proceeding exacerbates this inherently potential inequity in two ways. First, the mother is afforded the benefit of not one but two states and an attorney to prosecute her case, while the putative father does not necessarily receive similar benefits. Second, the putative father faces the prospect of defending an action in which the parties reside in separate states perhaps a continent apart. This distance, and its adverse impact on a putative father's ability to adequately prepare and present his case, combine to form the

---

120 In many cases, the mother's choice is illusory at best. See Fox, supra note 4, at 114. In addition, if the child receives assistance through the AFDC program, the decision to institute the action must be made by the state from which the child receives AFDC. 42 U.S.C.A. § 602(a)(26)(A) (West 1983) requires an AFDC applicant to "assign the state any rights to [child] support" to which the child is entitled.

121 Since process in the URESA case is issued by the responding state which will acquire personal jurisdiction over the defendant, failure to defend may well result in a binding default judgment against him. See Pennoyer v. Neff, 95 U.S. 714 (1877); International Shoe v. Washington, 326 U.S. 310 (1945).

122 See, e.g., Salas v. Cortez, 593 P.2d 226 (Cal. 1979), cert. denied, 444 U.S. 900 (1979) (indigent defendants entitled to appointed counsel in paternity proceedings wherein state appeared on behalf of mother of child); M. v. S., 404 A.2d 653 (N.J. 1979) (court may require that counsel and scientific testing be provided to indigent defendant without costs); Madeline G. v. David R., 407 N.Y.S.2d 414 (N.Y. Fam. Ct. 1978) (paternity proceeding controlled by state officials was "state action"; due process required that indigent defendant be provided counsel at state expense). But see, e.g., Department of Health and Rehabilitative Servs. v. Heffler, 382 So. 2d 301 (Fla. 1980) (no denial of equal protection by not providing counsel for defendant). See generally Note, The Right to Appointed Counsel in Paternity Actions, 19 J. Fam. L. 497 (1981-82).

123 See notes 26-29 supra and accompanying text.

124 URESA has no provision for representation for the defendant, and the question of appointed counsel is governed by the law of the responding state. See notes 160, 334 infra. The right to appointed counsel is by no means uniformly upheld in state courts. See cases cited supra note 122.
most common fundamental problem faced by defendants in URESA paternity actions.\textsuperscript{125}

Well-developed constitutional principles establish that "persons forced to settle their claim of right and duty through the judicial process must be given a meaningful opportunity to be heard."\textsuperscript{126} While there can be no argument about a defendant's right to a meaningful opportunity to present a defense, procedural safeguards necessary to protect that right are "flexible" and are to be defined "as a particular situation demands."\textsuperscript{127} To determine the specific dictates of due process in interstate paternity adjudication we must consider the three elements articulated by the Supreme Court in \textit{Matthews v. Eldridge}:\textsuperscript{128} first, the private interest at stake; second, the likelihood that the procedures used will result in an erroneous deprivation of that private interest; and third, the government's interest, including the fiscal and administrative burdens that additional procedures might entail.\textsuperscript{129}

\textbf{B. The Parties and Their Interests}

In assessing the defendant's need for procedural protection, we first focus on the parties and the nature of the private interests at stake in the adjudication of paternity. Their interests will be examined in the following order: child, father, mother, and state.

Historically, paternity actions were seen primarily as a mechanism to economically benefit society at large.\textsuperscript{130} By establishing a parent-child relationship, the state hoped to shift the economic

\textsuperscript{125} See text accompanying notes 180-99 infra.
\textsuperscript{127} [T]he phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and by then assessing the several interests that are at stake.
\textsuperscript{128} 424 U.S. 319 (1976).
\textsuperscript{129} Id. at 335.
\textsuperscript{130} For a history of paternity actions, see H. Krause, \textit{ILLEGITIMACY: LAW AND SOCIAL POLICY} 105 (1971).
burden of supporting a child from public welfare authorities back to the family. This attitude is still prevalent, and is the underlying purpose of the URESA enforcement scheme. However, there is increasing acceptance of the importance of the paternity action to the child.

Since the action is initiated for support, economic issues may well continue to dominate in the eyes of the litigants and the court. However, the child’s interest in the URESA proceeding can be paramount, especially considering that, without URESA, the child faces the dilemma of an inability to establish the parent-child relationship.

Establishing the parent-child relationship has wide ranging economic consequences for the child. In addition to receipt of periodic support payments, a child is often eligible to make claims against a variety of governmental entitlement and insurance programs. Filiation also affects inheritance rights and

---

131 Id.

132 "The main object of [the paternity action] is to compel the putative father to contribute to the support of his illegitimate child to prevent the child from becoming a public charge." People ex rel. Elkin v. Rimicci, 240 N.E.2d 195, 199 (Ill. App. Ct. 1968) (cited in H. KRAUSE, supra note 130, at 105).

133 In the introduction to the second edition of their work on the interstate enforcement of family support, Brockelbank and Infausto suggest that the phenomenal success of [URESA] can be explained only by the fact that it holds out a promise of tax relief. The average member of a state legislature is ... almost compelled to vote for a law that will bring to boot the runaway pappy who is neglecting his moral duty to his wife and children, and at the same time reduces taxes by shifting the burden of relief for destitute families from the state to the father-husband who should bear it. W. BROCKELBANK & F. INFAUSTO, supra note 31, at 4-5.

134 Professor Krause refers to the child in the paternity action as the "principal plaintiff" and argues for recognition of the primacy of the child's interest. H. KRAUSE, supra note 130, at 108. See also Little v. Streater, 452 U.S. 1, 13 (1981); Note, The Nature of Paternity Actions, 19 J. Fam. L. 475 (1980-81).


136 See Lalli v. Lalli, 439 U.S. 259 (1978) (upheld New York statute allowing illegitimate child to inherit from intestate father where a court of competent jurisdiction has entered an order of filiation during the father's lifetime); UNIF. PROBATE CODE § 2-109(2) (1982) (person born out of wedlock receives intestate share of legitimate child if the parent and child relationship is established under the Uniform Parentage Act).
the receipt of benefits under state retirement plans.\textsuperscript{137}

More than economics are at stake for a child. Emotional and psychological well-being often depend upon a sense of identity and family history derived from both parents.\textsuperscript{138} Given the importance of the parent-child relationship to the future psychological and emotional health of the child, it is imperative to establish that relationship with the real father—not just any man capable of providing economic support.\textsuperscript{139}

Recent cases and commentary stress the need to consider the interest of the child when discussing the procedural sufficiency of the hearing process.\textsuperscript{140} Of particular significance is the Supreme Court's recent decision in \textit{Little v. Streater},\textsuperscript{141} which held unconstitutional a Connecticut statute charging costs of blood-grouping tests in paternity cases to the requesting party.\textsuperscript{142} The statute had been used to deny blood tests to an indigent putative father. In delivering the opinion for a unanimous Court, Chief Justice Burger recognized the "creation of a parent-child relationship" as one of a number of consequences flowing from a finding of paternity and deserving of constitutional protection.\textsuperscript{143}

According to Burger, both the putative father and the child


\textsuperscript{138} See H. Krause, supra note 130, at 263 n.14.

\textsuperscript{139} "It is in the child's interest not only to have it adjudicated that some man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified." Salas v. Cortez, 593 P.2d 226, 234 (Cal. 1979).

\textsuperscript{140} "If the child is to have anything, it must have a right to have his paternity ascertained in a fair and efficient manner." H. Krause, supra note 130, at 113 (emphasis in original). See also Note, supra note 134, at 492.


\textsuperscript{141} 452 U.S. 1.

\textsuperscript{142} The Court stopped short of mandating state-paid blood tests in all cases. The decision was premised on (1) the importance of blood tests as exculpatory evidence; (2) the prominent role of the State of Connecticut in the paternity litigation when the child is a recipient of AFDC payments; and (3) the unusual nature of the paternity action in Connecticut, citing the "quasi criminal" nature of the proceeding as well as an unusual evidentiary obstacle. See \textit{id.} at 7-10. It is this last factor which may operate to restrict the general applicability of the holding.

\textsuperscript{143} \textit{Id.} at 13.
share a "compelling interest in the accuracy of such a [paternity] determination."\footnote{144} The decision is particularly significant because of the weight given to the child's interest in the determination of the putative father's due process rights.

While both child and father share an interest in accuracy, the consequences to each of an erroneous paternity finding are markedly different. In the URESA context, a putative father's interest in accuracy does not necessarily flow from his desire to establish a genuine long-lasting parent-child relationship. Rather, his primary concern is to avoid the years of financial obligation following the finding of paternity.

Even apart from these significant economic interests, the failure to live up to a court imposed support obligation can produce other serious consequences for the father. At a minimum, a recalcitrant father faces an action for civil contempt with the prospect of fine, imprisonment or both.\footnote{145} Because of the potential severity of punishment, both commentators and courts describe the initial paternity adjudication as "quasi-criminal," a view enhanced by the state's active involvement in the action.\footnote{146}

Though founded upon different concerns, both the putative father and the child have a substantial interest in the accuracy of the paternity proceedings. Whether arrived at through URESA proceedings or intrastate proceedings, an incorrect finding of filiation has equally distressing consequences for both.

The interest in accuracy shared by the child and putative father should be contrasted with the primarily economic interests

\footnote{144} Id.\footnote{145} Civil contempt remains the primary enforcement tool used against recalcitrant fathers. See, e.g., Ohio Rev. Code Ann. § 2705.05 (Page 1981) (jail sentence of up to 10 days and/or fine of up to $500 for each contemptuous act). See generally Note, Due Process in the Civil Nonsupport Proceeding: The Right to Counsel and Alternatives to Incarceration, 61 Tex. L. Rev. 291, 309 (1982) (describes common enforcement techniques for collecting child support arrearages). In addition to civil enforcement mechanisms, some states still retain criminal sanctions for nonsupport. See, e.g., Ohio Rev. Code Ann. § 2919.21 (Page 1982) (person found guilty of failing to support minor child may be punished for first-degree misdemeanor).\footnote{146} "Although the State [Connecticut] characterizes such proceedings as 'civil,'... they have 'quasi-criminal overtones.'" Little v. Streater, 452 U.S. at 10 (citations omitted).
of the movant mother. Though obviously interested in establishing the correct parent-child relationship, a petitioning mother has already targeted the URESA obligor as the father of the child. Her primary interest is in substantiating her claim of filiation so that the child can benefit economically and otherwise.

However, in many cases, even this economic interest wanes. When the child is an AFDC recipient, federal law requires assignment of any support obligation to the state as a requisite for receipt of benefits. The state is federally mandated to collect the support obligation to offset the cost of public assistance payments to the child. In these cases, the immediate economic winner in the support action is the state itself, because the economic condition of mother and child cannot be improved unless the amount of support received exceeds the amount of AFDC received by the child. Only when her child no longer receives AFDC will the support payments represent a real increase in the family's standard of living.

In assessing the state's interest in the due process equation, we must be mindful that URESA's unique procedural scheme involves not one but two states with interests in the proceeding. As the home state of the child, the URESA initiating state has

---

This "quasi-criminal" characterization recognizes the potentially severe consequences which flow from paternity. See 452 U.S. at 13. It also recognizes the high level of state involvement in the "prosecution" of the civil action:

Because appellee's child was a recipient of public assistance, Connecticut law compelled her . . . "to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child."

The State's Attorney General automatically became a party to the action, and any settlement agreement required his approval or that of the Commissioner of Human Resources or Commissioner of Income Maintenance. The state referred this mandatory paternity suit to appellee's lawyer "for prosecution" and paid his fee as well as all the costs of litigation.

Little v. Streater, 452 U.S. at 9 (citations omitted). See also notes 151-52 infra. In the URESA paternity action, even when the child is not a recipient of AFDC the state involvement with the action is high. See notes 8-30 supra and accompanying text.

149 When a state IV-D agency receives support that is sufficient to make the family financially ineligible for AFDC, the monthly support is first used to repay the state for the AFDC paid in that month and the remainder is distributed according to 45 C.F.R. § 302.51 (1984). Amounts received for the following month must then be paid directly to the AFDC family. 42 U.S.C.A. § 454(5) (West 1983).
a legitimate interest in securing paternal support for the child.\textsuperscript{150} This interest is especially strong when the child receives public assistance paid from the initiating state's tax coffers.\textsuperscript{151} In contrast, the URESA responding state has no direct economic interest in the proceeding. Neither the state nor any of its citizens immediately stand to gain monetarily as a result of the URESA action. The responding state's only economic interest would rest in the prospective benefit its own citizens can receive by resort to the URESA interstate enforcement mechanism. As a participant in a cooperative nationwide support enforcement network, a responding state ultimately benefits economically from a national increase in support collected interstate.

Both states share the interest in an accurate determination of paternity—the initiating state because of its obvious concern for the important interest of its child resident and the responding state as residence of the putative father. However, both states' interests are tempered by their concern for fiscal restraint. Both have strong and obvious interests in keeping costs of the proceeding as low as possible, and neither state wishes to expend more than is necessary to finance the action.\textsuperscript{152}

The private interests implicated in the URESA paternity action, like those in the intrastate paternity action, are substantial and require constitutional protection. Given the importance of the familial rights at stake, the procedure used in the adjudicatory process must insure an accurate and just determination of paternity. Balanced against the private interests are the interests of two states desiring a proceeding which is just and accurate as well as economical. Whether the URESA paternity action can withstand constitutional scrutiny depends primarily upon the risk that an erroneous determination of paternity will result from the

\textsuperscript{150} "The state admittedly has a legitimate interest in the welfare of a child born out-of-wedlock who is receiving public assistance, as well as in securing support for the child from those legally responsible." 452 U.S. at 14. \textit{See also} note 132 \textit{supra} and accompanying text.

\textsuperscript{151} 452 U.S. at 14. \textit{See also} \textit{In re} Paternity of D.A.A.P., 344 N.W.2d 200 (Wis. Ct. App. 1983) (state has compelling interest in determining paternity of child where determination would cut welfare costs by requiring parental contributions to child's support).

\textsuperscript{152} "[T]he state also has financial concerns; it wishes to have the paternity actions in which it is involved proceed as economically as possible. . . ." 452 U.S. at 14.
use of the URESA two-state proceeding. Only then can we assess the desirability of additional procedures and their resulting fiscal and administrative costs.

C. The Risk of an Erroneous Finding of Paternity

Neither URESA nor RURESA offers a complete procedural mechanism to actually litigate the paternity case. The few hearing procedures that are part of both Acts were designed for use in the "normal" support case, without regard to complex issues often associated with paternity litigation. Because the original Act and its subsequent amendments adopt the presence of the obligor as the test to determine the choice of law to be applied, most cases will require the application of both the procedural and the substantive law of the responding state. While not a serious problem in the typical support cases, the variations in paternity litigation can be significant. Burdens of proof may vary, the admissibility and use of blood and other scientific tests are not uniform, and the need for corroboration of

---

153 Section 20 sets out the procedure to be used when the "obligor denies owing the duty of support . . . or offers evidence constituting a defense." See RURESA § 20, 9A U.L.A. 700. This section contemplates the use of a deposition as a substitute for an in-person appearance but offers little help in trying to determine when "the presence of either or both of the parties is not necessary" in the paternity context. RURESA § 27, 9A U.L.A. 730.


155 See W. BROCKELBANK & F. INFALSTO, supra note 31, at 36.


157 Many states allow the admissibility of blood test evidence only when offered to exclude a defendant as the father. As of January 1983, "human leukocyte antigens" (hereinafter HLA) test results were admissible to determine paternity in 36 jurisdictions. Kolko, Admissibility of HLA Test Results to Determine Paternity, 9 Fam. L. REP. (BNA) 4009 (1983). Since that time, HLA test results became admissible by statute in Indiana and West Virginia. Monograph Update, 9 Fam. L. REP. (BNA) 1113. When blood tests are used as "exclusionary" evidence, some states make a definite exclusion conclusive. See, e.g., N.C. GEN. STAT. § 8-50.1 (1981). Others view the results as conclusive if not challenged, but otherwise inconclusive. See, e.g., Symonds v. Symonds, 432 N.E.2d 700 (Mass. 1982). Other states treat the test results as inconclusive. See,
testimony is not universally accepted.\textsuperscript{158} The matter is further complicated by the availability of a jury trial in some jurisdictions,\textsuperscript{159} appointed counsel in others,\textsuperscript{160} and state-financed blood tests in yet others.\textsuperscript{161}

These fundamental variations in procedural protections and evidentiary matters militate against sweeping conclusions about the risk of an erroneous finding of paternity in the interstate context. The risk facing each interstate defendant is determined both by the evidentiary burdens and procedural protections mandated by state law, and by the interstate nature of the proceeding.\textsuperscript{162} Ultimately, the impact of the interstate procedures on the fundamental fairness of the entire proceeding must be assessed on a state by state basis.\textsuperscript{163} However, there are numerous common problems in the interstate action which can be isolated and examined.

Before assessing these procedural problems, it is important to emphasize that distance between the litigants merely compounds an already difficult situation for the defendant. Many defendants begin the paternity action significantly disadvantaged


\textsuperscript{162} See notes 127-28 supra.

\textsuperscript{163} See id.
because of their inability to disprove paternity, and we must acknowledge these proof problems in order to fully assess the impact of the additional interstate procedural hurdles on the defendant's due process rights.

1. The Difficulty of Proof

The paternity action differs from other civil matters in that it consistently presents problems for litigants rarely found in other areas of the law. For example, mothers must often confront the putative father's assertion of cohabitation with other men at the critical time—"a traditional and (due to frequent perjury) potentially vicious defense." Once asserted, this defense may force a mother to have to prove a negative—that she did not have sexual relations with other men—or forego the action. If she chooses to continue, the actual trial of the case can become what has been called a "sordid spectacle" focusing on the mother's alleged sexual promiscuity.

On the other hand, in many cases the putative father has the nearly impossible task of disproving paternity in the face of the mother's allegation of sexual relations. On the basis of the mother's uncorroborated testimony, some states shift the burden of proof to the defendant who must then affirmatively disprove paternity. Other states not only shift the burden of proof to the defendant but also require corroboration of his testimony to overcome the mother's prima facie case. It has

---


165 H. KRAUSE, supra note 19, at 198.

166 See H. KRAUSE, supra note 130, at 107. Note that the difficulty for the mother at trial will depend primarily on the nature of the defense asserted by the putative father. See text accompanying notes 295-307 infra.

167 A number of states do not require corroboration of the mother's testimony. See cases cited supra note 158.


169 See, e.g., Mosher v. Bennett, 144 A. 297 (Conn. 1929), in which the Connecticut Supreme Court held: "The prima facie case so made out places upon the reputed father
been suggested that, in this emotionally pressured milieu, lies and perjury abound.\textsuperscript{170}

The issues involved in the paternity action suggest the difficulty facing the fact finder searching for the "truth." It is little wonder that courts adjudicating questions of filiation stand accused of having abdicated their ultimate responsibility to fully and fairly decide the factual issues raised. According to one commentator, "many courts no longer try to find a fair resolution of each case—conviction rates reaching 95\% are not uncommon in paternity actions."\textsuperscript{171}

While it has been suggested that defendants admit paternity in 50\% to 75\% of all cases,\textsuperscript{172} these estimates do not show how many of these "admissions" come from men who merely give up because of a sense of despair in meeting their burden of

\begin{quote}
the burden of showing his innocence of the charge, and under our practice he must do this by other evidence than his own." \textit{Id.} at 298. For discussions of other evidentiary problems inherent in the paternity action, see H. Krause, \textit{supra} note 19, at 196; S. Schatkin, \textit{supra note} 168, at 74-76.
\end{quote}

\textsuperscript{170} A six year lie detector study by Arthur & Reid shows that 93\% of the tested parties lied in some respect concerning their sexual relationships. \textit{See} Arthur & Reid, \textit{Utilizing Lie Detector Techniques to Determine the Truth in Disputed Paternity Cases,} 45 J. Crim. L., Criminology \& Police Sci. 213, 215 (1954) (cited in H. Krause, \textit{supra note} 130, at 107 n.8).


\begin{quote}
In many areas conditions still resemble those described in a 1968 report of the Family Study Commission of the State of Illinois:

The investigation and information obtained by the Commission on paternity law and practice leads to the inescapable conclusion that coercion, corruption, perjury and indifference to the rights of the individual defendant pervade in the day to day practice in this area of judicial proceedings. . . . Testimony before the Commission revealed that generally defendants appear before judges who have a daily case load of about 140 cases. . . . Testimony from the sitting judiciary hearing paternity cases revealed to the Commission that the evidence in most cases consists of an accusation by the woman and a denial by the defendant. Under such circumstances, the judges feel constrained to enter a finding of paternity. Not even the slightest corroborating evidence is required.
\end{quote}


\textsuperscript{172} See H. Krause, \textit{supra note} 19, at 166.
proof. When defendants do contest the issues at trial, they are adjudicated to be the father in 75% to 90% of the cases.\(^\text{173}\) Thus, between 87% and 97% of all defendants are ultimately determined to be the father and ordered to pay support.\(^\text{174}\)

While this high percentage of paternity determinations suggests that defendants are actually the father in most cases in which they are accused, other studies seem to contradict this view. In blood test studies of 1,000 cases of disputed paternity, 39.6% of the men accused could not have been the father of the child in question.\(^\text{175}\) In another study, blood tests revealed that 18% of a group of men who had already admitted paternity could not have been the biological father of the child.\(^\text{176}\)

Although there have been repeated calls for reform,\(^\text{177}\) doubt remains concerning the extent to which these problems have been successfully remedied.\(^\text{178}\) Reform notwithstanding, the interstate nature of the URESA action only exacerbates difficult proof problems for defendants forced to defend the interstate paternity action when the moving party, the child and the medical records are located in another state.

2. The Effect of Distance

Distance between litigants, in and of itself, is benign. The importance of distance in any litigation depends primarily on its effect on the discovery, acquisition and effective presentation of the factual evidence supporting the various claims and defenses. While the impediments to successful long distance case presentation can be severe, most if not all are ultimately economic. For the party with money, distance is usually not a problem and

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Sussman, supra note 171, at 38, 41 (cited in H. Krause, supra note 130, at 107).


\(^{177}\) The call for reform centers primarily around the increased use of blood and scientific evidence. See, e.g., H. Krause, supra note 19, at 213; S. Schatkin, supra note 168, at § 8.11. See also text beginning at note 259 infra. Many of the long sought reforms are present in the Uniform Parentage Act described in Note, supra note 129, at 489.

\(^{178}\) See note 171 supra. See also note 262 infra.
can be a distinct advantage against an opponent without adequate funds to finance long-distance discovery and trial. The converse is equally true. In assessing the procedural fairness of the URESA paternity proceeding, any increased risk of an erroneous determination of paternity which results from the two-state lawsuit must be considered, as well as the availability of procedural devices likely to ameliorate the detrimental effects of distance between the litigants.

a. Pre-Trial Discovery

The importance of pre-trial discovery in paternity litigation cannot be overstated. Proper adjudication depends upon a clear and correct presentation of the legal issues in the case, which in turn requires that both parties acquire and present the relevant facts ultimately dispositive of those issues. Whenever either party is frustrated in an attempt to acquire relevant information, the potential for an erroneous finding is increased.

In the paternity context, most often this necessary evidence centers on the facts leading up to the child's conception and birth. The location of this evidence is rarely a factor in the

---

179 "Today though discovery seems indispensible to the governing of all relevant data for trial. As discovery becomes more expensive there is a de facto discrimination suffered by low income litigants unable to afford the uncovering of all essential facts." Schmertz, Written Depositions Under Federal and State Rules as Cost-Effective Discovery at Home and Abroad, 16 VILL. L. REV. 7, 56 (1970).


181 How do notice and hearing serve as tools for "arriving at truth"? The most obvious purpose of a hearing is to permit the gathering of evidence to aid in the resolution of some issue or controversy. A hearing promotes accurate discovery of facts by giving a party the opportunity to present evidence. . . . The implementation of law demands that the underlying facts of the situation be accurately ascertained, because otherwise the social policy which a particular law represents will be frustrated.


182 Of particular relevance are the records of birth and other items of medical evidence which are significant in fixing the period of gestation. A defendant who cannot
"normal" intrastate paternity action, since both parties usually reside in close proximity to each other and to the crucial evidence. However, discovery is more difficult in the URESA context, because the parties reside in different states.

Much of the necessary evidence relevant to the question of filiation is likely to be found in the state in which conception and birth took place\[^{183}\] [hereinafter the birthing jurisdiction]. Yet, at least one and possibly both of the parties will no longer reside in that state. This can pose a significant problem for the defendant who must discover and acquire evidence from a foreign birthing jurisdiction for presentation at trial in his home state. The paternity defendant is obviously free to go to the birthing jurisdiction to investigate and acquire evidence through informal means.\[^{184}\] However, even when informal discovery is affordable and successful, the acquisition of certain information requires use of discovery devices.\[^{185}\]

In the URESA action, the scope and availability of formal discovery will be governed by the law of the responding state since the Act itself neither addresses nor provides procedures for formal pre-trial discovery.\[^{186}\] In theory, only those defendants who reside in states which restrict the scope or availability of formal discovery in the paternity action will face difficulty in formulating an effective defense.\[^{187}\] In practice, however, most URESA defendants are unable to take full advantage of the discovery available to them because of the expense involved. For

\[^{183}\] See note 182 supra. See also note 308 infra.


\[^{185}\] For example, absent agreement, the discovery of the mother’s and child’s medical records requires the use of either a request for production of documents or a records deposition.


\[^{187}\] In states in which the paternity action is regarded as "civil," the defendant will often have the benefit of the same discovery devices available to URESA defendants generally. See, e.g., Thelen v. Thelen, 281 S.E.2d 737 (N.C. Ct. App. 1981); Maza v. Ilaia, 430 N.Y.S.2d 244 (N.Y. Fam. Ct. 1980).
example, only the comparatively wealthy can afford the costs of conducting out-of-state discovery depositions—an essential tool in certain situations.\textsuperscript{188}

However, even the most indigent defendant is not without affordable discovery devices.\textsuperscript{190} As an alternative to the discovery deposition, most defendants can afford more economical discovery which, if used properly, can help minimize the difficulty in the interstate accumulation of evidence. Interrogatories and requests for production of documents offer inexpensive\textsuperscript{191} and effective methods of acquiring certain types of evidence. Defendants can also make broader use of requests for admissions to narrow and define disputed factual and legal issues.\textsuperscript{192}

Because of the involvement of two states in the URESA proceeding, the URESA defendant may actually have a slight advantage over the "normal" state court civil litigant attempting interstate discovery. Commonly, limitations on state subpoena power stall or halt interstate discovery altogether.\textsuperscript{193} As courts of limited jurisdiction, state tribunals have neither nationwide service of process\textsuperscript{194} nor nationwide enforcement of discovery orders.\textsuperscript{195} Thus, while state courts can monitor and enforce discovery involving in-state litigants,\textsuperscript{196} they have no such power

\textsuperscript{188} These costs can be significant. In addition to the cost of the deposition transcript, attorney's fees and travel cost must be considered. See Comment, The Uniform Reciprocal Enforcement of Support Act: Procedural Problems and a Technological Solution, 41 TEMP. L.Q. 325, 330-31 nn.27-29 (1967-68) (author discusses prevailing fees and costs for depositions).

\textsuperscript{190} For a discussion of the value of pre-trial interrogation of the opposing party in paternity cases, see S. Schatzkin, supra note 168, at § 20.03.

\textsuperscript{191} "Inexpensive" is used relatively. The expense of these written forms of discovery should be compared with that of oral deposition. Cf. note 188 supra. Since attorney time is still necessary, the actual cost will depend on the attorney's fee schedule.

\textsuperscript{192} G. Bellow & B. Moulton, supra note 180, at 418-26.

\textsuperscript{193} State courts generally have no mechanism to conduct discovery beyond their borders. See generally Mullin, Interstate Deposition Statutes, 11 U. BALT. L. REV. 1 (1981); Rafalko, Depositions, Commissions, and Letters Regatory in a Conflict of Law Case, 4 Duq. L. Rev. 115 (1965-66) (discusses in depth the problems associated with interstate discovery). However, in federal court, the Federal Rules of Civil Procedure provide for nationwide discovery. See FED. R. CIV. P. 45(d).

\textsuperscript{194} See Mullin, supra note 193, at 2.

\textsuperscript{195} See id.

\textsuperscript{196} Most states have provisions patterned after FED. R. CIV. P. 37 for sanctions against parties who fail to comply with the discovery rules. See Developments in the
over persons outside of the court’s jurisdiction. Similar problems do not exist in a URESA action because the case is docketed in two states, both of which can monitor and enforce the discovery process and issue subpoenas. When discovery is sought in the mother’s home state, the defendant can benefit from that state court’s subpoena power and availability to oversee the discovery process.

In the final analysis, pre-trial discovery can be somewhat problematic for the URESA defendant. However, this difficulty results primarily from the increased expense in conducting interstate discovery and not from the URESA action itself. The URESA paternity defendant’s discovery options are the same as if the mother had brought the action in his home state. Since no court has ever questioned the fairness of a proceeding brought originally in the defendant’s home state merely because of resulting problems in conducting interstate discovery, we should not be eager to do so in the URESA context. However, the URESA defendant’s discovery difficulties are nonetheless significant as one of a number of distance-related problems which can increase the likelihood of an erroneous finding of paternity.

b. Affirmative Presentation of Evidence

The most unique and troublesome provision in the Act is RURESA section 20 which specifically addresses the problem surrounding the presentation of evidence in cases where the putative father offers a defense. RURESA procedure antici-

---

*Law—Discovery*, 74 Harv. L. Rev. 940, 1050 (1960-61) (cited in Mullin, *supra* note 193, at 2 n.6). However, the power of the court extends only to those individuals subject to the court’s jurisdiction. Sanctions in the interstate discovery context can be enforced only by the court with jurisdiction over the person against whom sanctions are sought. Mullin, *supra* note 193, at 2 n.6.

197 See Mullin, *supra* note 193, at 2 n.6. However, note that many state courts retain the discretion to order the attendance of a witness in a deposition to be used in another state. See, e.g., Alaska R. Civ. P. 27(c) (1963); Idaho R. Civ. P. 28(e) (1979); Kan. Stat. Ann. § 60-228(d) (1983); N.Y. Civ. Prac. R. § 3102(e) (McKinney 1970). See also Mullin, *supra* note 193, at 30. Even in these states application must be made to the state court of the deponent’s residence. Id.

198 See note 187 *supra*.

199 See text accompanying note 351 *infra*.

200 See note 38 *supra* and accompanying text.
pates that most if not all of a mother's evidence will be adduced in her home state and subsequently transmitted to and presented in the responding state for consideration by the trial court. By sanctioning such a mechanism, the drafters sought to resolve the Act's essential dilemma—how to conduct an adversarial adjudicatory proceeding long-distance without requiring the mother to leave her home state.

By creating the two-state deposition procedure, the Act attempts to resolve this dilemma. However, the procedure raises a number of practical and theoretical problems for both sides. How can a mother who testifies in her home state effectively persuade an absent trier of fact? There is no doubt that testimony from a live witness has more impact than testimony presented by a "paper" witness deposed prior to trial. Yet the Act anticipates that most of the mother's evidence will be presented in exactly this way. Although this may not be the procedure of choice for most plaintiffs, the actual harm to the mother may be relatively insignificant. Little evidence is required to make out the mother's prima facie case of filiation and shift the burden of production to the defendant. Once the burden is shifted, the mother actually benefits from the two-state mechanism because she may be insulated from potentially harmful cross-examination.

Though rarely addressed, the defendant may confront a number of obstacles in affirmatively presenting evidence located outside of his home state. This dilemma, like that faced in

---

201 See id.
202 Id.
203 The importance of this factor will be determined by the extent to which there are factual disputes between the parties. Where the defense raised is not one which implicates the credibility of the mother, see note 301 infra, the "paper" presentation of evidence is without consequence to the mother.
204 See notes 38, 201 supra and accompanying text.
205 See notes 158, 167 supra and accompanying text.
206 Without cross-examination of the mother, her prima facie case remains intact and unchallenged, forcing a defendant to rely exclusively upon the affirmative presentation of evidence which itself may be problematic. See note 308 infra and accompanying text.
207 In discussing the procedural problems created by URESA, the focus is usually on the defendant's inability to cross-examine the plaintiff rather than on his affirmative presentation of evidence. See notes 225, 227 infra and accompanying text.
208 As to the likelihood that a defendant will require evidence located outside of his home state, see note 308 infra and accompanying text.
conducting interstate discovery, is primarily economic. The defendant will have to forego the use of certain evidence and testimony unless he can arrange to have the evidence available for use in his home state. In most cases he will have to either transport the witness to his state or preserve the testimony by deposition in the witness's state for subsequent use in the responding state. Neither alternative is economically realistic for most defendants.

When the out-of-state evidence is located in the mother's home state, a possible solution for the defendant lies in his use of the RURESA two-state deposition procedure. Although devised to allow the mother to present her testimony without leaving her home state, this procedure is also available to the defendant in RURESA paternity actions. However, the procedure is beneficial only if the defendant's witness resides in the same state as the mother. In this event, the defendant can depose his witness in the initiating state and present the deposition at trial in the responding state.

Despite the availability of the two-state deposition, practical difficulties abound. The defendant and his representative are located in the responding state and will find it difficult to take the deposition of a witness located in the initiating state without traveling to that state or obtaining counsel there to conduct the deposition. The defendant's only alternative is to conduct the deposition of his witness in a manner similar to that used to conduct depositions upon written questions. The defendant can draft and forward to the presiding judge in the initiating state a series of questions which the judge then addresses to the witness for answer under oath. Although this procedure offers a workable solution which preserves the out-of-state testimony for use at trial, defendants can legitimately complain that the

209 Absent stipulation to the contrary, the only alternative to in-court testimony is presentation by deposition pursuant to a local rule of court analogous to FED. R. CIV. P. 32 (regulating use of depositions in court proceedings).

210 See text accompanying note 202 supra.

211 The language of RURESA § 20, 9A U.L.A. 700 (1968), allows evidence relative to the duty of support to be adduced by "either party" through deposition.

212 Depositions upon written questions are sanctioned by Fed. R. CIV. P. 31 and are a commonly allowed form of pre-trial discovery. See Schmertz, supra note 179 (discusses problems associated with depositions upon written questions).

quality of the evidence is severely diminished. Spontaneity van-
ishes in the written format, and the overall effectiveness of the
testimony is lessened because the final product—the written tran-
script—is without life.\textsuperscript{214}

Videotaping offers a solution to the lifelessness of the written
transcript.\textsuperscript{215} Videotaped depositions have nearly all of the qual-
ities of live in-court testimony and are widely available.\textsuperscript{216} The
videotape deposition, however, is more expensive than a tradition-
al stenographic deposition.\textsuperscript{217} Moreover, full benefit of the
videotape may be achieved only if defendant's counsel either
travels to the initiating state to conduct the deposition, or retains
counsel in that state to do so.

Neither alternative offers the defendant a method of pre-
senting the testimony of out-of-state witnesses that is both eco-
nomical and effective in all cases. Unless the defendant can
afford to hire counsel in the initiating jurisdiction, or finance
the cost of travel, he must either limit himself to using written
questions in the context of the two-state deposition procedure
or do without the out-of-state testimony. Either option increases
the likelihood of an erroneous finding of paternity.

c. Cross-Examination

While affirmative presentation of out-of-state evidence is
difficult for the defendant, cross-examination of the mother and
her out-of-state witnesses is even more difficult. As suggested

\textsuperscript{214} The actual harm to the defendant resulting from use of this device will be
determined by the nature of the issues in the case. See notes 299-302, 352 \textit{infra} and
accompanying text.

\textsuperscript{215} See generally Comment, \textit{The Uniform Reciprocal Enforcement of Support Act:}
\textit{Procedural Problems and a Technological Solution}, 41 \textit{Temp. L.Q.} 325 (1967-68), which
argues that an increased use of technological advances by litigants will solve some of
the problems inherent in the two-state lawsuit. In addition, the Comment also discusses
audiotape depositions, telephone depositions, and the picture-phone. See \textit{id.} at 333-35.
While technological advances may provide the long-term solution to the URESA di-
llemma, the cost of the more useful devices, videotape and interactive picture-phone, is
presently beyond the reach of most litigants.

\textsuperscript{216} See generally Balabanian, \textit{Medium v. Tedium: Video Depositions Come of Age},
7 \textit{LITIGATION} 25 (1980); Murray, \textit{Videotaped Depositions: Putting Absent Witnesses in
Court}, 68 A.B.A. J. 1402 (1982); Rypinski, \textit{Videotaping Depositions}, 17 \textit{HAWAI'I B.J.}
67 (1982).

\textsuperscript{217} See Balabanian, \textit{supra} note 216, at 27.
above, the two-state deposition procedure may work to the mother's advantage because of the limitations placed on the defendant's ability to cross-examine. Inability to cross-examine witnesses "in absentia" may severely disadvantage some defendants and result in the same "go there or do nothing" dilemma originally confronting mothers before the passage of URESA. This may be the most serious defect in the Act. When a mother testifies in her home state, the defendant must give up his right to cross-examine unless he can afford to travel to her home state or obtain counsel there—alternatives usually not within the economic means of most defendants. This fundamental defect in the two-state procedure has led a number of litigants to raise constitutional challenges focusing on the denial of the right to confront and cross-examine witnesses at trial.

In Smith v. Smith, the Supreme Court of California upheld the constitutionality of the two-state hearing procedure despite the respondent's assertion that his due process rights were violated because he was denied the right to confront and cross-examine the obligee-mother whose testimony was elicited pur-

---

218 See note 206 supra and accompanying text.
219 However, the defendant's cross-examination problem does not exist when he has the economic resources to travel or hire counsel in the initiating state.
220 The importance of adversarial cross-examination as a tool to develop an accurate and complete factual predicate for judicial adjudication has been emphasized. See, e.g., L. Striker, The Art of Advocacy 65-84 (1954). Styker notes Wigmore's view of cross-examination to be "beyond any doubt the greatest legal engine ever invented for the discovery of truth." Id. at 73.
221 While there is no empirical evidence to support this conclusion, the enormous cost of conducting litigation in another state suggests that it is beyond the economic reach of most persons.
223 270 P.2d at 613.
suant to the URESA two-state deposition in the initiating state. Focusing on the civil nature of the proceeding, the court disposed of the cross-examination issue by noting that the California Code of Civil Procedure specifically authorizes the use, at trial, of depositions to present the testimony of out-of-state witnesses. The court concluded that the use of URESA's two-state deposition procedure did not deprive the defendant of due process because he was "given notice, an opportunity to be heard, by deposition to examine and cross-examine the plaintiff and any witness that may have testified in the initiating state, to examine and cross-examine any witnesses that may testify in this state [California], to meet opposing evidence, and to oppose with evidence."

Other cases have also addressed this cross-examination issue and all have uniformly reached the same conclusion using similar reasoning. Significantly, all of the cases which specifically uphold the constitutionality of the two-state procedure do so in the context of a support action where paternity is not in issue. This is an extremely important distinction because of the fundamental difference in the nature of the rights at stake in the two actions and the proof problems inherent in paternity actions. The fundamental interests at stake in the paternity case caution against adopting the holdings of these cases without a more rigorous examination of the problem.

---

224 The court found that "[a] defendant in a civil action or special proceeding is not guaranteed a right of confrontation at the trial of the action or proceeding." *Id.* at 622 (citation omitted). *Accord* Robinson v. Robinson, 221 N.E.2d at 399-600; Freeman v. Freeman, 76 So. 2d at 415; Commonwealth v. Shaffer, 103 A.2d at 435.

225 *See* 270 P.2d at 622.

226 *Id.* at 623.

227 "The fact that the petitioner is not required to be physically present in the responding state is no obstacle, because in any ordinary action a petition may be filed in a court of this state without the plaintiff being physically present, and in cases tried on depositions it is possible for a case to be tried in a court of this state without the plaintiff being present in the state," Duncan v. Smith, 262 S.W.2d at 377 (cited in Smith v. Smith, 270 P.2d at 623). Due process is met when the defendant had "reasonable notice and reasonable opportunity to be heard and present his claim or defense." Proctor v. Sachner, 118 A.2d at 625.

228 *See* 227 *supra*.

229 *See* text accompanying note 143 *supra*.

230 *See* text accompanying note 165 *supra*.
Those who want to endorse the use of the two-state hearing procedure in the paternity context will do so primarily by reference to the cases cited above and to state rules of civil procedure which sanction the use at trial of deposition testimony of out-of-state witnesses.\(^{231}\) By analogy, proponents can argue that since the testimony of out-of-state witnesses can be presented by deposition in other civil matters, the two-state deposition should be similarly admissible in the URESA proceeding. There will be no denial of due process because of inability to cross-examine adverse witnesses at trial as long as the putative father has notice and an opportunity to appear and conduct cross-examination in the initiating state. Thus, the defendant in the URESA paternity action stands in a position similar to that of other civil litigants facing opponents who seek to present testimony of out-of-state witnesses by deposition. Although this argument by analogy has surface logic, a close examination of deposition practice suggests a number of important distinctions not considered by courts that have addressed the question.

The Federal Rules of Civil Procedure, and modern state rules based thereon, clearly provide that depositions of witnesses\(^{232}\) and adverse parties\(^{233}\) are admissible as substantive evidence at trial.\(^{234}\) However, a party's use of his own deposition as substantive evidence at trial has been somewhat more controversial.\(^{235}\) Early cases cast some doubt on the use of this procedure,\(^{236}\) but subsequent decisions have uniformly embraced it, and the practice in both federal and state courts routinely allows either party his or her own testimony by deposition.\(^{237}\)


\(^{232}\) Fed. R. Civ. P. 32(a)(3) governs the use of witness deposition testimony as substantive evidence at trial.

\(^{233}\) The use of the deposition of a party by an adverse party is governed by Fed. R. Civ. P. 32(a)(2).


\(^{235}\) The controversy surrounds Fed. R. Civ. P. 32(d)(3) which allows use of the deposition when the witness (party) is more than 100 miles from the place of the trial, See generally 4A J. Moore, supra note 234, at § 32.05; 8 C. Wright & A. Miller, supra note 234, at § 2147.

\(^{236}\) See Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

\(^{237}\) See, e.g., GFI Computer Industries v. Fry, 476 F.2d 1 (5th Cir. 1973); Richmond
However, this general rule of admissibility is not without limitations. Use of depositions at trial in lieu of testimony is allowed only where the witness, whether a party or not, is unable to attend the trial or is beyond subpoena power of the court. This requirement insures an opportunity to confront and cross-examine the deponent in person before the deposition is admitted as evidence at trial.

These general principles support the use of the URESA two-state deposition as long as the defendant receives adequate notice of the deposition and the other requirements of the state's rules of procedure are met. But most URESA defendants are without adequate resources to finance the cost of attending the out-of-state deposition, and a legitimate question is raised regarding the significance of this economic issue. An examination of similar economic issues in the context of civil deposition practice is helpful in answering this important question.

In federal civil depositions it is generally up to the party taking the deposition to set the time and place of the deposition. The final designation of location, however, is solely within the discretion of the trial court, which is empowered to grant protective relief to an aggrieved party in order to further the interests of justice. As part of its discretion, the court can

---


See Fed. R. Civ. P. 32(a)(3). This provision of the rule reflects the “long established principle that testimony by deposition is less desirable than oral testimony and should be used as a substitute only if the witness is not available to testify in person.” 8 C. Wright & A. Miller, supra note 234, at § 2142 (footnotes omitted).


See note 221 supra.


Fed. R. Civ. P. 26(c)(2) allows for the issuance of a protective order requiring that discovery be had only on specified terms or conditions “including a designation of the time or place.”
establish the location of depositions or change locations when it deems justice so requires.243 This aspect of the court's discretionary power is often exercised when an out-of-state plaintiff institutes suit in the home state of the defendant.244 In this case, the out-of-state plaintiff will generally be required to make herself available for examination in the district in which the action is brought.245

As an alternative to fixing the place of deposition, a court also retains similar discretionary power to require a party who proposes to take an oral deposition at a distance from the forum to prepay the expenses which his opponent will incur in having an attorney attend the deposition.246 Thus, by either fixing the location of the deposition or by shifting the cost of attending the deposition to the out-of-state deponent, a court can and will insure a proper allocation of the economic burden in light of the circumstances of the case and the particularized need for discovery.247 The out-of-state plaintiff who wishes to preserve her testimony by deposition for use at trial may do so, but may have to be deposed in the forum state or prepay the defendant's expense in attending the out-of-state deposition.

The question of allocation of costs is an obvious concern in the context of the URESA deposition procedure. The purpose of the deposition in this phase of the URESA scheme is not discovery, but rather the preservation of testimony for trial.248 For the defendant who cannot attend the out-of-state deposition,

244 See note 245 infra.
245 "Since he has selected the forum, he will not be heard to complain about having to appear there for a deposition." 8 C. WRIGHT & A. MILLER, supra note 234, at 405. As Professor Wright points out, the rule is a general one, id. at 405 n.85, and is subject to exception.

State courts have also adopted the general rule requiring the party deponent to travel to the forum state. See Welter v. Welter, 267 N.E.2d 442 (Ohio Ct. C.P. 1971); Case Note, Civil Procedure—Which Party Must Travel—Costs—Protective Orders and the Requirement of Good Cause, 33 Omo Sr. L.J. 246 (1972).
247 See notes 245-46 supra.
248 See note 38 supra.
his loss is not the discovery of information but rather the loss of the ability to cross-examine the mother and her witnesses at trial. In the URESA paternity context, mere notice and opportunity to cross-examine may not be sufficient given the defendant's economic inability to adequately conduct the cross-examination in a foreign jurisdiction.\textsuperscript{249}

Alternatives to direct, live cross-examination may be of some value here. Though not contemplated by the Act, a defendant could conduct his cross-examination by written questions in a manner similar to that used for depositions upon written questions, with the questions being read by the court and answered by the mother as part of the initiating state's proceeding.\textsuperscript{250} This substitute procedure, however, will usually not approach the effectiveness of live cross-examination,\textsuperscript{251} and the essential purpose of cross-examination—to safeguard the accuracy and completeness of testimony—may be significantly compromised.\textsuperscript{252}

\textsuperscript{249} The URESA defendant must have the benefit of procedures "reasonably calculated" to protect his fundamental interests. See Rubenstein, \textit{supra} note 181, at 93. We cannot simply ignore the economic realities of adversarial litigation "[f]or if it is the adversary process which gives judicial adjudication its assurance of fairness and accuracy, that assurance cannot be maintained when some parties lack the resources to be effective adversaries." Mashaw, \textit{The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims}, 59 \textit{Cornell L. Rev.} 772, 776-77 (1974). In Boddie v. Connecticut, 401 U.S. 371 (1970), the Supreme Court invalidated on due process grounds the imposition of court fees and costs that barred petitioner's access to the courts: "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." \textit{Id.} at 380. However, the Court has refused to extend \textit{Boddie} where other relief is available. See Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

\textsuperscript{250} This is a slight variation from the normal procedure used for deposition upon written questions. See Schmertz, \textit{supra} note 179, at 10-12 (describes generally the written deposition practice under the federal rules). Because of the URESA two-state proceeding, the initiating court, rather than a court stenographer would read the questions. In lieu of this procedure, written interrogatories could also be used. See Schlecker v. Schlecker, 435 N.Y.S.2d 539 (N.Y. Fam. Ct. 1981) (in a reciprocal support action the court found that due process requires that defendant have the right to cross-examine the out-of-state mother and her witnesses by interrogatory).

\textsuperscript{251} See Schmertz, \textit{supra} note 179, at 35-49 (discusses the limitations of the written deposition devices as well as their usefulness in certain situations).

\textsuperscript{252} The extent to which accuracy is compromised will ultimately depend upon the functional importance of the cross-examination in a particular case. See Friendly, "Some
d. *Blood Tests*

The use of blood test evidence\(^{253}\) in paternity adjudication is at an all time high.\(^{254}\) The usefulness of this evidence is directly linked to the principles of Mendel's laws,\(^{255}\) which establish that an individual's inherited characteristics are determined by pairs of genes located within the chromosomal structure of his cells.\(^{256}\) Each gene of the pair is inherited, one from the mother and the other from the father.\(^{257}\) In simple terms, by testing a child's blood group (or to those other genetic markers), we can infer the parental genes giving rise to that blood group (or to those other genetic markers).\(^{258}\)

There is now general agreement that the use of blood test evidence is useful in many cases.\(^{259}\) Test results have been used...
extensively to exclude wrongly accused fathers. Although newer, more sophisticated tests are increasingly being used to help establish paternity, there is disagreement concerning the appropriate manner of reporting the test results. Nevertheless, the use of blood and other scientific test evidence is now an essential aspect of paternity adjudication, which by its nature can significantly affect the accuracy of the proceeding.

Our inquiry concerns the effect, if any, that the interstate nature of the URESA lawsuit has on the use of blood tests and other scientific evidence. Specifically, we will examine three crucial issues in the context of the URESA two-state lawsuit: (1) the availability of blood and other scientific tests; (2) the reliability of the tests; and (3) the presentation at trial of the test results.

Justice Brennan wrote while a member of the Appellate Division of the New Jersey Superior Court:

"[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.

"The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but 'they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts'. . . ."

Id. at 8 (citations omitted). See also H. KRAUSE, supra note 130, at 123; H. KRAUSE, supra note 19, at 213.

260 See note 157 supra.

261 See note 262 infra.


263 See notes 253-62 supra.

264 See note 259 supra.
The question of the admissibility and use of blood or other genetic test results is not specifically addressed in URESA. This silence reflects a position of neutrality which neither encourages nor discourages the use of these scientific tests in the paternity context. Like all substantive issues implicated in the URESA proceeding, the admissibility of blood tests will generally be governed by the law of the responding state. In this regard, the URESA defendant stands in the same position as his non-URESA counterpart; the invocation of the URESA mechanism by the mother has no effect on the defendant's substantive right to use this important evidentiary tool. Although variations in state law are great, states almost universally allow the admission of some form of blood test results in paternity adjudication.

Regardless of both the type of testing to be done and the test's usefulness in helping to resolve the disputed issues, all available tests require that blood samples from the mother, child and putative father be obtained and scientifically analyzed. Fortunately, the availability of blood tests is not adversely affected by the lack of proximity between the individuals being tested. Recent advances allow blood samples taken in one state to be shipped to a second state for analysis. Careful monitoring and coordination can eliminate any dangers associated with this interstate shipment. Consequently, there is no reason why these tests cannot be effectively used in the URESA action.

265 See note 154 supra and accompanying text.
266 See note 157 supra.
267 Those courts which have addressed the question have given URESA defendants rights coextensive with those provided non-URESA paternity defendants generally. See notes 87-88 supra and accompanying text.
268 See note 253 supra.
269 See note 262 supra.
270 See note 253 supra and accompanying text. See generally Krause, Sell, supra note 253, at 280.
271 The initial request to the laboratories taking the samples must be clear as to the name and address of the laboratory to which the sample is to be shipped, and special care should be taken concerning identification, collection, labeling, and mailing. See generally Krause, Sell, supra note 253, at 280. This is especially true when HLA testing is being done because white blood cells are less stable than red blood cells, especially at extreme temperatures, and because fresh blood cells are needed for testing. Note, Blood Test Evidence in Disputed Paternity Cases: Unjustified Adherence to the Exclusionary Rule, 59 Wash. U.L.Q. 977, 990-91 (1981).
The reliability of blood grouping tests and the more sophisticated Human Leukocyte Antigen (HLA) test is primarily dependent upon the quality of the testing laboratories and their procedures. Advocates stress the reliability of test results performed under proper laboratory conditions, while critics focus on a number of factors that can significantly affect test results. We make no attempts to resolve the debate. Our concern focuses on what effect, if any, the interstate nature of the proceeding has on the reliability of test results. Significantly, none of the errors that can adversely affect test results are necessarily exacerbated in the URESA context. Safeguards designed to achieve minimally acceptable risks in an intrastate situation would be equally effective in the interstate URESA context. Thus, the risk of error in the test results appears to be no greater in the URESA context than in the normal intrastate paternity action.


273 For a thorough discussion of the reliability of blood typing evidence see H. Krause, supra note 19, at 243. A general discussion of the reliability of HLA tests can be found in Note, Use of Human Leukocyte Antigen Test Results to Establish Paternity, 14 Ind. L. Rev. 831, 836-38 (1981). See also Inclusion Probabilities, supra note 262, at 229; Krause, Sell, supra note 253, at 280.

274 HLA typing is "highly reliable when performed under carefully controlled conditions by laboratories that perform quality control checks." Terasaki, supra note 262, at 548. "[S]uch evidence is not only clear and convincing, but is conclusive of the question." Anonymous v. Anonymous, 460 P.2d 32, 35 (Ariz. Ct. App. 1969) (citations omitted) (cited in H. Krause, supra note 19, at 244).

275 [With blood tests,] as with any other item that may be taken or sent to a laboratory for examination, there is always a possibility of error. Such matters as (1) although not a great possibility, the containers could have been mislabeled; (2) the failure to see the agglutination, particularly if it is weak; (3) proper control of temperatures; (4) use of too concentrated or diluted an antiserum, or red cell suspension solution; (5) allowing too much or too little time for the reaction to occur; (6) too much or too little centrifugal force which is required in some tests; (7) the deterioration or contamination of anti-serums [sic]; (8) deterioration of blood tested, especially if it has been stored too long or exposed to extreme hot or cold; (9) chemical solutions in which the agglutination takes place being improper for the specific anti-serum [sic]; and (10) biological errors, using in [sic] rare groupings of blood and lack of information on these types. Jackson v. Jackson, 430 P.2d 289, 292 n.1 (Cal. 1967) (Burke, J., dissenting) (cited in H. Krause, supra note 19, at 245).

276 See generally Krause, Sell, supra note 253, at 280.
The admissibility at trial and the evidentiary weight given to scientific test results is governed by substantive evidence law of the responding state. 277 However, state law is of little help in answering the peculiar problems faced by URESA litigants who wish to use this type of scientific evidence. Absent stipulation, expert testimony is required to admit the test results as evidence at trial 278 and the availability of that evidence depends upon the proximity of the expert to the forum state, which in turn is dependent upon the location of the facility that does the testing. 279 But proximity to which state, since the testimony can be presented in either of two forums?

Since the Act does not answer this question, the choice would seem to be that of the litigants and determined by which of the parties plan to use the evidence in their case. The plaintiff and defendant seem free to present expert testimony in their respective home states. However, the choice is too significant to the defendant to be left in the hands of the plaintiff.

If expert testimony is presented by the mother in her home state, the putative father's opportunity to effectively cross-examine the expert is severely limited. 280 However, the converse is not true. Because the mother has counsel in the home state of the father to protect her interest, 281 she does not face a cross-

---

278 Admission of this type of evidence requires the presence of the testing expert to overcome objections based on hearsay and to properly authenticate the test results. See H. KRAUSE, supra note 19, at 259, for a general discussion concerning evidentiary issues surrounding the use of blood test evidence. A recent study conducted by the U.S. Dep't of Health & Human Services suggests a high incidence of admission at trial without the need for testimony: "[Survey results] imply[ed] either the existence of informal agreement between medical and legal professionals or assumptions on the part of the legal or judicial professional that results could be certified if necessary. A third possible explanation is that many paternity tests are done in a setting that does not require certification of the results by the laboratory." CENTER FOR POLICY RESEARCH INC., OFFICE OF CHILD SUPPORT ENFORCEMENT, BLOOD TESTING TO ESTABLISH PATERNITY 17 (1971) [hereinafter cited as BLOOD TESTING].
279 Charges for expert testimony can range up to $1,200 per day. BLOOD TESTING, supra note 278, at 17. Since travel time and expenses are normally included in per diem charges, the expert's distance from the forum will directly affect the availability of the testimony by increasing costs.
280 See text beginning at note 219 supra. Cross-examination by the defendant is crucial, especially when the mother offers HLA test results as affirmative evidence of paternity. See notes 262, 275 supra and accompanying text.
281 See note 26 supra and accompanying text.
examination dilemma when the father presents expert testimony in the responding state. Nor would it be particularly difficult for the mother to present her affirmative blood test evidence in the responding state since she has counsel there.  

The solution to the defendant’s potential cross-examination problem lies in restricting the choice of the testing facility to those normally used in paternity adjudications by the court in the responding jurisdiction. With this limitation, the defendant’s opportunity for cross-examination of the expert witness is the same as in a typical intrastate paternity proceeding, and URESA creates no additional burden.

e. Other Mitigating Factors

A defendant forced to litigate a paternity claim interstate faces considerable disadvantages which stem from the fact that he and the mother no longer reside in the same state. However, many of these disadvantages are identical to those encountered by a defendant in an action brought by an out-of-state mother in the defendant’s home state. Were these the only problems facing a URESA paternity defendant, it would be difficult to find fault with the interstate procedures. However, unlike his intrastate non-URESA counterpart, the URESA defendant faces the additional difficulty that the mother need never appear for cross-examination outside her home state. Thus, coupled with the URESA procedural mechanism that effectively denies the defendant the right to confront and cross-examine the mother and her witnesses, the interstate nature of the action compounds the difficult burden already facing most paternity defendants.

By its very nature, the question of filiation carries a high degree of risk of an erroneous finding of paternity, and this risk is increased when the parties live in separate states, and is increased further when the mother invokes the URESA procedure to adjudicate her claim. While the risk of an incorrect

---

282 See id.
283 Both defendants face difficulties in discovering and presenting evidence located out-of-state. See notes 259-82 supra and accompanying text.
284 See text accompanying note 219 supra.
285 See text accompanying note 153 supra.
286 See text accompanying note 180 supra.
The finding of paternity attributable to the procedure followed is potentially significant in every URESA case, the risk to a particular defendant must be assessed on a case-by-case basis. The actual harm to each defendant resulting from the interstate impediments to acquisition and presentation of evidence depends upon the location of relevant evidence and its importance to the success or failure of a particular defense. In examining these two factors, we must initially distinguish between the factual questions common to most paternity cases and the defenses most often raised by the putative father.

In all paternity litigation the ultimate "conclusory" fact for determination is whether the defendant fathered the child in question. To reach this ultimate factual conclusion, the finder of fact must first establish a series of "historical" facts identified by asking a series of fundamental questions. First, during what period of time was the plaintiff biologically capable of becoming pregnant? Second, did plaintiff and defendant have intercourse at least once during this fertile period? Third, was the defendant biologically capable of fathering a child during the time in question? An affirmative answer to all three suggests that the defendant may be the biological father of the child, and a fourth question must then be addressed. Were there other men with whom the petitioner had intercourse during the gestation period, and if so, which of the men capable of fathering the child is actually the father?

Many of the available defenses center around these "historical" factual questions, and for most defendants, determining the

---

287 See note 127 supra and accompanying text.
288 Conclusory facts are those that require the prior determination of other facts. Here, for example, the finding that the defendant fathered the child is a conclusion that requires a finding that the defendant and the mother had intercourse during a particular time and that their intercourse led to the conception of the child. This ultimate question of "causation" can only be determined with reference to an "historical" fact. See note 289 infra.
289 The reference to "historical" fact comes from D. Binder & P. Bergman, supra note 180, at 4. Historical facts are those facts which took place in the past and trigger the applicability of the relevant substantive law. Id. In the paternity context, whether and when intercourse took place are "historical" facts which must be determined as a necessary basis for the "ultimate" fact in question, i.e., parentage. Thus, for example, the determination of paternity is premised in intercourse having occurred, an historical fact which may or may not be disputed.
gestation period is a crucial means of narrowing the period of time during which conception could have occurred. Only then should attention shift to whether and when intercourse took place. If the defendant admits to having intercourse with the mother during this period, he will then, as a practical matter, have the burden of showing that he is not the biological father. In most instances, this burden will be met only when the defendant proves that he is not physically capable of fathering a child, presents scientific evidence that strongly suggests or conclusively establishes that he is not the father, or shows that the mother had intercourse with other males during the gestation period. If the defendant denies having intercourse with the plaintiff, or denies that intercourse took place during the gestation period, then these two factual issues become the primary focus of the fact finder's inquiry.

While the ultimate factual question in all paternity litigation is the same, the defenses available to a putative father can vary significantly. Although not exhaustive, the major and most commonly used defenses can be categorized as follows: (1) defenses

---

290 See generally S. Schatkin, supra note 168, at 718-46 (discussing importance of the duration of pregnancy in determining whether the defendant is the father of the child).

291 Vasectomy, sterility or impotence of the father at the time of conception is a strong defense. See, e.g., E S v. G M S, 520 S.W.2d 652 (Mo. Ct. App. 1975) (evidence of husband's bilateral vasectomy and "no sperm" count is clear and convincing and enough to overcome presumption of legitimacy). See also S. Schatkin, supra note 168, at 536-55.

292 The use of blood, other genetic, and/or biochemical tests can show that the defendant is not the father, despite the occurrence of intercourse. See note 259 supra.

293 Of the available "factual" defenses, this is commonly asserted. See note 165 supra and accompanying text. It is also one of the most problematic, because the defense in reality does not help in determining which of the persons, with whom petitioner had intercourse, is the biological father. Id. However, the Unif. Parentage Act, 9A U.L.A. (1979) [hereinafter cited as U.P.A.], which requires joinder as defendants of men with whom defendant alleges the mother to have had intercourse, helps resolve this problem. The U.P.A. also authorizes the use of blood test evidence to help in the final determination of paternity. U.P.A. § 11, 9A U.L.A. 601-02. A thorough discussion of the U.P.A. is found in H. Krause, supra note 19, at 206-12.

294 This assumes of course that the defendant has not been excluded as the father by prior blood tests. See note 157 supra. To determine filiation, a fact finder must conclude that intercourse took place and that it occurred during the period of possible conception. See cases cited infra note 298.
of law; (2) scientific defenses; (3) medical defenses; and (4) other factual defenses. For purposes of the present analysis, the primary distinction between the categories is the extent to which the ultimate success of the defense is dependent on the resolution of disputed "historical" facts, particularly the factual questions highlighted above.


These defenses rest primarily on the use of scientific evidence including blood test evidence. See note 253 supra and accompanying text. See generally S. SCHATKIN, supra note 168, at 100-02. For a discussion of lie detector evidence, see id. at 469-84.

These defenses rely primarily on resolution of "historical" factual questions, see note 289 supra, which are often disputed and often involve credibility. These defenses include absence of intercourse between the parties and use of contraception by either or both parties, a factor usually not relevant alone but important in conjunction with other considerations such as intercourse with others, period of gestation, etc. See, e.g., Renee v. William, 360 N.Y.S.2d 514 (N.Y. App. Div. 1974), aff'd mem., 385 N.Y.S.2d 763 (1976). In recent years men have tried to assert fraud and deceit as a defense by alleging that the mother lied about her use of contraceptives. This defense, to date, has been uniformly rejected by the courts. See, e.g., Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Ct. App. 1980). Men have also asserted that intercourse occurred outside the period of gestation. See, e.g., Beaman v. Hedrick, 255 N.E.2d 828 (Ind. App. 1970) (verdict against the weight of the evidence when period of gestation would have been only 202 days); State ex rel. Isham v. Mullally, 112 N.W.2d 701 (Wis. 1961) (judgment reversed when gestation period was 309 days and no evidence of prolonged pregnancy or delayed birth). Another asserted defense is that the mother had intercourse with men other than the defendant during the period of possible conception. See H. KRAUSE, supra note 19, at 104-10. See also Sass, The Defense of Multiple Access (Exceptio Plurium Concubentiarum) In Paternity Suits: A Comparative Analysis, 51 Tul. L. Rev. 468 (1976-77).
By and large, the first three categories of defenses do not rely on the resolution of disputed facts for their success. For example, the legal defenses of res judicata and statute of limitations may require the resolution of an essential fact—such as the birth date of the child—\textsuperscript{299} or the nature of the previous judicial determination.\textsuperscript{300} However, these essential facts are often not in dispute, and if in dispute, resolution will rarely depend on the credibility of the parties. The same is true for medical defenses based on the sterility or vasectomy of the defendant and for scientific defenses which rely on blood or genetic testing or other genetic abnormalities.\textsuperscript{301} Because the mother’s testimony and credibility will rarely have an impact on these defenses,\textsuperscript{302} the defendant’s inability to adequately cross-examine the mother in person is not significant. Similarly, the defendant’s successful presentation of these defenses will rarely depend upon the discovery and acquisition of unknown out-of-state evidence.\textsuperscript{303} In these cases, the Act’s existing procedures are adequate and their use will rarely increase the risk of an erroneous determination of paternity.

These categories of defenses should be contrasted with the more “traditional” factual defenses often associated with paternity litigation, such as intercourse with males other than the defendant or no intercourse with the defendant during the period of gestation.\textsuperscript{304} These defenses rely on the credibility of both parties and their respective witnesses. In these situations

\textsuperscript{299} Normally, the statute of limitation begins to run from the birth of the child. \textit{See, e.g.}, 42 Pa. Cons. Stat. Ann. § 6704 (Purdon 1982) (provides that actions to establish paternity must be “commenced within six years of the birth of the child”).

\textsuperscript{300} Since parentage of a child is an issue not necessarily decided in advance, the court in the subsequent action must determine whether the issue was raised and decided in the prior action. \textit{See, e.g.}, McNeece v. McNeece, 562 P.2d 767 (Colo. Ct. App. 1977).

\textsuperscript{301} There can be factual disputes in the context of these defenses. However, the focus will be on the reliability and conduct of the tests and the interpretation of the test results—all issues that are resolved by focusing on the expert witness and not on the parties.

\textsuperscript{302} \textit{See note 301 supra.}

\textsuperscript{303} Defendant’s success will generally depend upon the strength of his evidence and the credibility of his expert witness. Defendant’s access to experts is usually not hampered in the URESA context and the data from which the expert’s opinion is drawn should also be readily available. \textit{See text accompanying note 279 supra.}

\textsuperscript{304} \textit{See note 298 supra.}

\textsuperscript{305} \textit{Id.}
cross-examination of the mother will be crucial, and the two-state deposition procedure is inadequate to insure a fair and just determination of the issues.

The nature of the defense asserted by the defendant is an important mitigating consideration in determining the actual prejudicial effect that distance has on the fundamental fairness of the URESA paternity proceeding. It is, however, only one of two factors which impact upon this determination. Another is the location of important factual evidence in relation to the defendant's residence at the time the lawsuit is initiated. The importance of this factor can best be appreciated by examining three different scenarios which are likely in the URESA context.

Case 1

In this scenario we assume that State A is the birthing jurisdiction. The mother and child remain in State A while the putative father, sometime subsequent to the conception, moves to State B. Since the parties now reside in different states, the mother has three theoretical options to obtain support from the absent father. Because the conception and birth took place in State A, the mother might attempt to obtain long-arm jurisdiction.

---

306 In discussing the relationship between these defenses and cross-examination, Schatkin is of the view that "[c]ross-examination is nevertheless the only method available to counsel to shake the court's conviction that the mother is telling the truth as to the paternity of her child." S. Schatkin, supra note 168, at 749 (emphasis in original). Credibility of the mother on this issue is crucial and the defendant will likely need the benefit of cross-examination to address the issue. See note 220 supra.

307 Because of the nature of the issues, see note 298 supra, and the importance of cross-examination to these issues, see notes 220, 306 supra, the defendant must be able to conduct live cross-examination of the mother. If the defendant is without the means to conduct cross-examination in the home state of the mother, the mother should have to appear in the responding state. Cross-examination by written question is an inadequate substitution in this situation.

308 Cross-examination of the mother can be crucial to the defendant's case. See notes 220, 306 supra. Since it is naive to think that the mother will admit to the disputed fact, other evidence which corroborates defendant's "version" of the facts or which contradicts the mother's assertions may be equally important to the success of defendant's case. Potentially important witnesses include, for example, friends, relatives, neighbors, welfare case workers, and others to whom the mother may have made admissions. Other relevant evidence includes hospital birth records, mother's medical records, birth certificate, and welfare records.

309 See text accompanying note 183 supra.
tion over the father in her home state. If she successfully acquires long-arm jurisdiction over the putative father, he must defend the action in the home state of the mother. There is an initial burden to the defendant because he will have to travel and obtain counsel in a distant state. However, since most of the important evidence remains in the forum state, the defendant should face no additional burden in finding or presenting exculpatory evidence.

Without long-arm jurisdiction, the mother must either travel to State B to institute suit or begin a URESA action in her home state. If she chooses to travel to the father's state she can obtain personal jurisdiction over him and litigate there. While both parties face a burden in litigating in State B which has little relationship with the cause of action, the defendant's due process rights are not transgressed merely because of the difficulty he may face in acquiring and presenting evidence that is located in another state. Traditionally, the plaintiff has the choice of forum, and the defendant can be forced to defend an action in his home state.

In most cases, the mother will choose the URESA action to avoid the necessity of traveling to State B. While this is more desirable for the defendant than having to defend in State A, the URESA action presents difficulties in the acquisition and presentation of evidence still located in State A. These problems, however, are no more severe than those he faces if the mother chooses to travel to his home state to litigate. More significant is the defendant's inability to cross-examine the mother and her supporting witnesses in State A when the nature of the defense requires assessment of their credibility. Here, the un-

---

310 See note 10 supra and accompanying text for a discussion of a state's jurisdiction over the putative father.
311 This assumes that jurisdiction in this context is consistent with due process. See International Shoe Co. v. Washington, 326 U.S. 310 (1945) (defendant must have "minimum contacts" with the forum state).
312 See Pennoyer v. Neff, 95 U.S. 714 (1877).
313 See text accompanying notes 180-99 supra.
314 There may be discovery advantages in defending a URESA action rather than an action initiated in the defendant's home state. See text accompanying notes 193-99 supra.
315 See note 307 supra and accompanying text.
fairness to the defendant results from the combined effects of his inability to cross-examine and the impediments to acquiring and presenting out-of-state evidence.

Case 2

In this scenario the birthing jurisdiction remains State A. However, here the mother and child move to State B while the putative father remains in State A. Unlike Case 1, the mother will be unable to assert long-arm jurisdiction over the defendant in her home state. Thus, this mother must either travel back to State A to institute suit or rely on URESA. If the action is commenced in State A, the defendant faces no problems in defending the suit. The relevant evidence remains in his home state, and as a result, he should experience no unique problem in either presenting affirmative evidence or in cross-examining the mother or her witnesses.

The URESA action is also less problematic for the defendant than in Case 1 since he does not face the problems associated with acquiring and presenting out-of-state evidence. While the mother's testimony will still be offered in her home state with the resultant cross-examination problem, it is unlikely that she will have any additional evidence to offer in her home state since it is likely that the mother's supporting testimonial evidence, if any, will be located and presented in State A. Thus, the real prejudice to the putative father in this situation depends primarily on the importance that cross-examination alone plays in the final determination of paternity.

Case 3

Unlike our prior two examples, in this scenario neither party remains in State A, the birthing jurisdiction. We will assume

---

316 The mere presence of the mother and child is insufficient to acquire jurisdiction over the putative father who has no other contacts with the state. Cf. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); International Shoe Co. v. Washington, 326 U.S. 310.

317 The kind of evidence normally relevant to the issue in the paternity case usually remains in the birthing jurisdiction. See note 308 supra.

318 See notes 302-07 supra and accompanying text.
that the putative father moves to State B while the mother and child move to State C. The mother cannot obtain long-arm jurisdiction in State C, and is therefore forced to sue in State B or use URESA. If suit is brought in State B, both parties face the burden of acquiring and presenting out-of-state evidence. Again, however, the choice of forum is traditionally the mother's, and the putative father cannot complain about litigating in his home state.

The URESA action presents problems for both parties. The relevant evidence is likely located in State A, which is no longer the residence of either party. Like Case 1, the mother's testimony and that of her witnesses will be offered in her home state, with resulting cross-examination problems for the defendant. Further, difficulties in the affirmative presentation of exculpatory evidence are again evident.

Thus, when the defense raised is not dependent on the resolution of disputed facts, the actual prejudice resulting from the use of the URESA two-state lawsuit may be significantly less than that encountered when the same defendant relies upon a factual defense or a defense that is dependent upon the credibility of the parties. Further, the analysis must consider both the location of the relevant out-of-state evidence vis-a-vis the defendant's residence and the likelihood that this evidence is necessary for an accurate determination of filiation.

IV. TOWARD A STANDARD

The due process implications are potentially significant in every case in which the defendant asserts non-paternity as a defense to a URESA support action. Both the father and the child have significant and fundamental interests in the accuracy of the proceeding. The nature of the interstate proceeding, coupled with the inherent problems of proof in paternity adjudication, generally escalates the potential risk of an erroneous
However, these increased risks should not suggest the need for a wholesale abandonment of the two-state lawsuit in the paternity context.

Because the filiation issue is so critical to the child and because of the difficulty in establishing paternity when one or more of the parties resides in a different state, whenever possible courts should hear the paternity defense as part of the URESA support action. Courts must recognize that without the interstate proceeding, the establishment of paternity for some children will be impossible. Given the need for accuracy, however, defendants must be given the benefit of procedural protections consistent with due process.

In seeking to articulate a standard, we begin with the knowledge that there is no simple solution to this complex problem. To succeed, any workable approach must accommodate the important and sometimes conflicting interests of the parties, as well as consider the availability of procedural devices which might reduce the inherent risk of error to an acceptable level. Our goal is to delineate an approach which the responding URESA court can apply to efficiently and effectively assess which cases should be adjudicated and which should be adjourned.

A. Preliminary Considerations

The defendant will normally raise the non-paternity defense at a fairly early stage of the URESA proceeding. Once the plaintiff submits the proper transmittal papers and acquires jurisdiction over the defendant, the matter is set for an initial hearing in the responding state, and it is at this point that the defendant generally raises the non-paternity defense.

It is important to note that initially the court has only the mother's petition and affidavit for support before it, neither of which is admissible in evidence without the putative father's...

---

324 See text beginning at note 153 supra.
325 The child's dilemma in attempting to establish paternity is identical to that facing the mother prior to the passage of URESA when she sought to collect support from an out-of-state father. See notes 4-19 supra and accompanying text.
326 See notes 145-46 supra and accompanying text.
327 See text accompanying notes 128-29 supra.
328 See notes 21-30 supra and accompanying text.
One commentator has suggested that this poses only a small problem in most URESA support cases since the mother can meet her burden of production and proof by calling the defendant "as-of-cross" and eliciting a series of admissions. This procedure requires the defendant to testify first and varies from the customary order of proof at trial. In the usual support case where the only issue is the amount of support due, this irregularity is insignificant. Once the defendant denies paternity, however, the prosecuting attorney must not be allowed to examine him further on the subject and the matter should cease until the court determines its course of action.

Once the defense is asserted, the court faces the threshold "jurisdictional" question—whether to hear or dismiss the paternity action. The determination can be made at this stage. However, the more desirable course of action is to delay the decision until there has been an opportunity to fully assess the due process implications. If the defendant appears at this initial hearing without representation, the court should ascertain his willingness and ability to obtain counsel. The complexity of the substantive issues, coupled with the additional procedural entanglements of the interstate proceeding, makes representation necessary. When the defendant desires and can afford private counsel, he should be given the opportunity to retain counsel before any further action is taken.

---

329 See note 34 supra.  
330 See note 35 supra and accompanying text.  
331 Id.  
332 Without counsel, the defendant is at an obvious disadvantage and he should not be compelled to testify concerning his assertions of non-paternity until he has had the opportunity to consult with counsel. See note 338 infra and accompanying text.  
333 This "jurisdictional" decision in states which have adopted RURESA § 27 requires a determination that one or both of the parties are not necessary to the determination of paternity. See RURESA § 27, 9A U.L.A. 730. Use of the procedural due process standard insures that the adjudication will not take place in a forum that deprives the defendant of a "meaningful opportunity to be heard." See note 126 supra and accompanying text. The use of this standard also protects the "effective-litigation values" that facilitate proper functioning of our adjudication process and underlie the excesses of personal jurisdiction based on notions of "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. at 316-17 (citations omitted). See Ratner, Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Custody Jurisdiction Act, 74 Nw. U. L. Rev. 363, 366-67 (1980).
If the defendant is indigent and unable to afford representation, counsel should be appointed if the proceeding is to continue. In those states in which courts have held that due process requires the appointment of counsel for indigent defendants in paternity cases, appointment in the URESA context logically follows. Jurisdictions not requiring the appointment of counsel must reconsider their approach in light of the additional burden facing the defendant in the URESA interstate proceeding. Without counsel, the nature of the paternity action, coupled with the increased procedural problems of the two-state lawsuit, creates an unreasonably high risk of error. The state's interest in not incurring the expense of providing counsel, while significant, cannot take precedence over the fundamental interests of the child and father. Given this high risk of error and the fundamental importance of the interests at stake, no URESA paternity case should continue in the absence of appointed counsel.

B. Pre-Trial Proceedings

Upon the appointment or retention of counsel, the court should set the case for an initial conference to discuss the nature of the case and to establish the necessary procedural guidelines for the litigation. At that meeting the parties should be queried concerning potentially dispositive motions. For example, when the defendant asserts that the action is barred by the statute of limitations, res judicata/collateral estoppel or some other

334 See note 160 supra. The URESA defendant requires procedural protections which, at a minimum, are coextensive with those provided to defendants in intrastate paternity actions. See note 86 supra and accompanying text.

335 The absence of counsel compounds the risk of an erroneous finding of paternity. The procedural problems surrounding discovery, see text accompanying notes 180-99 supra, presentation of evidence, see text accompanying notes 200-17 supra, cross-examination of the mother and the witnesses, see text accompanying notes 219-52 supra, availability of blood tests and presentation of test results at trial, see text accompanying notes 253-82 supra, are too complex to be handled effectively in the interstate context without counsel.

336 See note 152 supra and accompanying text.

337 See text accompanying notes 134-46 supra.

338 To succeed, this procedural due process approach to resolving the question of when a court should hear the paternity defense requires early, active judicial involvement in the management of the litigation. See generally, Resnik, Managerial Judges, 96 HARV. L. REV. 376 (1982).

339 See note 295 supra.

340 Id.
legal theory based upon the construction of a statute, the court should decide the legal question. Similarly, the court should hear claims of the mother—such as collateral estoppel or res judicata—which would act to bar the defense of non-paternity. Since these legal claims will rarely require the determination of disputed fact, courts should make use of formal motion practice to decide the claims without need for an evidentiary hearing. By preliminarily accepting jurisdiction to determine legal issues potentially dispositive of the entire case, the court can resolve the claims that have little or no merit. In contrast with the approach outlined in section 27 of RURESA, frivolous cases will be effectively ended rather than dismissed without binding adjudication.

Only a small percentage of cases can be resolved at this early stage of the proceeding. If neither side presents potentially dispositive motions, the court should then consider the question of the availability of blood or genetic tests. Recent advances in blood and other scientific tests offer a real step toward alleviating the proof problems associated with paternity litigation. When the defendant is conclusively shown not to be the father of the child in question, the action can be dismissed without procedural prejudice to either side. Even when not dispositive, blood test results are very reliable evidence which can significantly reduce the risk of error in the formal adjudication. In addition, the results of blood tests may spur the parties to realistically assess the relative strength of their claims and thereby greatly facilitate resolution by settlement.

See generally Havighurst, Settlement of Paternity Claims, 1976 Ariz. St. L.J. 461. The headnote to this Article explains: "Professor Havighurst discusses five variations that frequently appear in paternity statutes which authorize judicial approval of paternity settlements. He points out many of the problems attendant on judicial approval provisions and intimates several solutions after taking account of the policy of finality and its conflict with a mother and child's need of support." Id. at 461.


See notes 299-300 supra and accompanying text.


See note 99 supra and accompanying text.

See text accompanying notes 253-55 supra.

See notes 272-74 supra and accompanying text.

If blood tests are inadmissible under state law or are not provided for an indigent defendant, the court should be reluctant to adjudicate the paternity interstate. The URESA procedure and the proof problems in the absence of blood tests tip the constitutional scale in defendant's favor.\textsuperscript{348} A court should consider adjudication without blood test evidence only when the mother and her witnesses appear in the responding state to testify and only when the defendant encounters no other serious problems in presenting his defense.\textsuperscript{349}

Where the case is to continue subsequent to testing, the trial court should consider the defendant's need for and ability to conduct pre-trial discovery.\textsuperscript{350} Judicial involvement in the discovery process at this early stage is necessary, because it allows the court to determine the relevance, importance, and discoverability of potential evidence located outside the responding state. If necessary, the court can coordinate and help simplify the discovery process and thus lessen the burden of two-state litigation on the defendant.\textsuperscript{351} Any difficulty faced by the defendant in attempting to conduct discovery will alone not be grounds for the refusal of jurisdiction. However, it should be taken into account as one factor in the court's final assessment of jurisdiction.

C. The Final "Jurisdictional" Decision

The court's final decision to hear the paternity claim should await a point in the pre-trial stage of the litigation when the court will have available the necessary data to determine the actual harm to the defendant in having to litigate the paternity case interstate. This assessment requires the court's consideration

\textsuperscript{348} The risk of an erroneous determination of paternity is at least as great as that in Little v. Streater, 452 U.S. 1 (1981). See id. at 16 (refusal of state to provide blood tests for indigent defendant denies defendant a "meaningful opportunity to be heard" in violation of the requirement of "fundamental fairness").

\textsuperscript{349} Even when the mother appears to testify, absent any blood test evidence, the risk of an erroneous determination is high. See text accompanying notes 165-78 \textit{supra}. The risk may increase as a result of interstate procedural problems that affect the quality of the adjudicatory process. See notes 179-99 \textit{supra} and accompanying text.

\textsuperscript{350} See note 180 \textit{supra} and accompanying text.

\textsuperscript{351} See Resnick, \textit{supra} note 338, at 378-79.
of the nature of the defendant's defense, including the extent to which the mother's credibility is at issue. The court must also determine the location of important defense evidence and the extent to which the presentation of the evidence at trial is significantly impaired by the interstate nature of the action. This final decision should not be made until the parties are in a position to discuss the merits of their respective cases and can outline with specificity the disputed factual issues.

At this stage, potentially dispositive defenses should have been presented by way of motion. The remaining defenses rely primarily on the determination of disputed facts. Some factual defenses will be difficult to adequately present in the URESA context and others will not. The key consideration is the extent to which the defendant's ability to present an adequate factual defense is compromised because of the two-state proceeding.

For example, when the defense asserted is based on the defendant's physical or medical problem, the credibility of the mother is usually not an issue. The defendant may admit intercourse, but claim sterility, impotence or prior vasectomy. These are defenses that rest primarily on the defendant's credibility and the strength of his medical testimony. Since the mother's credibility is largely irrelevant in these defenses, there is no great need for her live in-court testimony and cross-examination. In these cases, the URESA deposition procedure is adequate even when the defendant has no funds to conduct cross-examination, and courts should not be reluctant to adjudicate paternity unless the defendant is severely prejudiced in his ability to present important out-of-state evidence. For example, a defendant may assert as a defense differences in racial characteristics between himself, the mother and the child. Scientific evidence is necessary for successful presentation of the defense, and that evidence can be presented easily at trial by expert testimony. However, the success of the defense may require the

358 See note 291 supra.
359 See notes 301-02 supra and accompanying text.
360 See note 291 supra.
361 See note 298 supra.
362 Here the substitute procedure, cross-examination by written questions, is sufficient. See notes 250-53 supra and accompanying text.
presence of the parties, especially the child, to allow the court to discern the existence or nonexistence of certain racial characteristics. The presence of mother and child in the responding state may be important to an accurate resolution of this defense despite the fact that the defense is essentially "scientific" in nature. Even here, however, a court should be careful to ascertain whether the burden is any worse than that which results when a mother chooses to institute suit directly in the defendant's home state.

Cases in which the mother's credibility plays an important role require the presence of the mother in the home state of the father or actual cross-examination of the mother in her home state. When the parties dispute having intercourse, or dispute when intercourse occurred, or when the defendant asserts access by others, effective cross-examination of both parties is crucial to a fair and accurate determination and the defendant must be given the real opportunity to cross-examine the mother.

The court may require the mother and her witnesses to testify in the responding state. Alternatively, the court may allow the two-state deposition procedure to be used as long as the defendant has a "real opportunity" to conduct cross-examination in the mother's home state. Both alternatives raise a thorny question concerning the allocation of cost: who must bear the burden of financing the mother's trip to the responding state or pay to assure that the defendant has adequate representation in the initiating state to conduct cross-examination of the mother?

Initially, the court should look to the mother to determine if she has the means to assume the financial burden since she chose the forum. If she does, then she should finance her appearance in the father's home state when necessary or assume the cost of having her deposition taken in her home state. In most cases, the mother will not be able to assume the financial burden.

357 See note 296 supra.
358 Id.
359 See note 298. See also accompanying notes 304-07 supra.
360 See notes 306-08 supra and accompanying text.
361 The defendant must have the economic ability to conduct the out-of-state cross-examination. See note 221 supra and accompanying text.
362 Assumption of this cost would include prepayment, if necessary, of the defendant's cost of attending the deposition. See notes 245-48 supra and accompanying text.
cost, and the court should then turn to the father. In either case, the court should retain discretion to tax these expenses as costs to assure that the party most able can assume the initial economic burden without necessarily shouldering the final cost.  

In the vast majority of cases, neither party will have the money necessary to properly conduct the litigation. When this occurs, the court should not be reluctant to look for financial assistance from the governmental unit aligned with the mother or from either of the two states involved in the litigation. Such an arrangement is not unprecedented. When the defendant is indigent, many states incur the initial cost of blood tests or appointed counsel. These expenses are often taxed as costs of the litigation to be borne ultimately by the losing party. This same approach can be effectively employed in the URESA paternity context.

Which of the two states involved in the two-state action should finance these expenditures? Both states have an interest in the action. However, when the mother is a recipient of state welfare benefits, the initiating state has a direct economic interest in the outcome. Given this direct economic gain, the initiating

363 In some states the power to allocate costs is statutory. See, e.g., Ohio Rev. Code Ann. § 3111.14 (Page 1983) which provides that a court:
may order reasonable fees for experts, and other costs of the action and pretrial proceedings, including genetic tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any party to be paid by the court, and, before or after payment by any party or the county, may order all or part of the fees and costs to be taxed as costs in the action.

In Kentucky the courts' power is limited to assessing these expenses against the obligor. See Ky. Rev. Stat. § 407.220 (1984) which states:
An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this state when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligor, be paid in whole or in part by the obligor. The costs or fees do not have priority over amounts due to the obligee.

364 See note 161 supra.
365 See note 160 supra.
366 See note 363 supra.
367 See notes 150-51 supra and accompanying text.
state should initially bear the financial burden associated with the URESA action. However, when neither state immediately stands to directly gain economically, the cost of the litigation should be shared equally.

While the states involved have legitimate financial concerns, these concerns are not significant enough to outweigh the fundamental private interests involved. In certain cases, the interests of the child and the putative father require that there be provision for the cost of transporting the mother to the responding state or of financing the defendant’s attendance at her deposition in the initiating state. Absent the defendant’s ability to effectively confront and cross-examine the mother, the court should decline "jurisdiction" and terminate the action.

CONCLUSION

This Article has examined the procedural problems associated with interstate adjudications of paternity conducted in the context of a URESA support action. It has suggested procedures and standards that allow for continued use of the URESA action while simultaneously protecting the due process rights of men who may be falsely accused of paternity. Both putative father and child have significant and fundamental interests in the accuracy of the URESA adjudicatory proceeding which deserve constitutional protection. The procedural scheme of the interstate proceeding compounds the proof problems inherent in paternity litigation generally, and significantly escalates the potential risk of an erroneous determination of paternity. The suggested standard attempts to preserve the effective litigation values which underlie the notion of procedural due process by focusing on the interstate impediments to the discovery, acquisition and presentation of factual evidence necessary to a fair adjudication. The approach distinguishes and categorizes available defenses by their level of fact intensity in an attempt to determine the real prejudice to a defendant which results from the use of the

\[1984-85\]

\[URES A\]

143

\[When the child is not a recipient of AFDC, the initiating state does not stand to immediately gain financially from the determination of paternity and the resulting support order.\]

\[See note 152 supra and accompanying text.\]

\[See notes 139-46 supra and accompanying text.\]
URES A two-state lawsuit. Also of concern is the location of necessary evidence in relation to the home state of the defendant. By accommodating the important and often conflicting interests of the parties and by stressing the availability of procedural devices which can reduce the inherent risk of error to acceptable levels, the standard presented attempts to offer an efficient and effective approach to determine when and under what procedural circumstances a court should adjudicate paternity as part of an interstate URESA support action.