The Social Construction of Fatherhood in Law: Providing the Building Blocks of a Family

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Introduction

From nearly the beginning of the United States, there has been this recognition that "'family' is the cornerstone of American society" (Risman, 2010, p. 453). For this reason, though the relationship between a parental figure and a child is both deeply personal and intimate, the role of the parent, including accompanying rights and responsibilities, is largely shaped by the society-at-large. In the United States, this occurs primarily through the legal system. This legal establishment of the family unit was considered necessary to ensure that "'… conditions under which people are best able to make deep commitments of emotional and material support to one another'" (as cited in Struening, 2010, p.75) were developed. In addition, by creating this legal framework, it was possible "to mold families so that they meet the needs of the state…" (Struening, 2010, p. 90). Delineating the rights and responsibilities of family members through the legal system supported the stability of the family, so that the state could maintain a more orderly society. This is not to say that families do not define or create their own experiences. There are a variety of shapes and

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forms of families within the United States. However, by providing a legal definition to family and familial relationships, which can incentivize and stabilize certain familial relationships, a constraint is inevitably imposed on alternative forms of family. The coercive power of the law, and the direct and indirect benefits that are bestowed on families that conform to the legal model, ultimately influences the prevalence of certain family forms and their rights and responsibilities to each other.

Throughout the history of the American legal system, the role and definition of motherhood has remained consistent with a direct tie to reproduction, i.e. biological determination (Dalton, 2003, p. 269). In contrast, the role and definition of fatherhood was originally constructed socially and legally through marriage, i.e. a marital presumption (Singer, 2005, p. 246). The role of fatherhood primarily revolved around the relationship to the mother instead of the relationship to the child. Various case precedents, such as *Michael H. v. Gerald D.* (1989), have affirmed this determination on the sole basis of marriage. As family diversity and the changing dynamics of traditional marriage have increased though, a shift in legal and family policy has emerged. As was apparent in *Adoptive Couple v. Baby Girl* (2013), other factors are now taken into consideration when determining the legal basis of fatherhood. One of these factors, the biological relationship between father and child, is becoming more prevalent within state jurisdictions while also receiving more consideration in federal cases (Kelly, 2009, pp. 316-318). With such a transition, new implications and legal statuses will arise affecting families in new ways. While it is too early to tell definitively what all the effects will be, I do believe that taking other factors into consideration as a legal basis for fatherhood will more appropriately represent and support the full diversity of family composition in the

United States. By comparing previous literature on this shift to my own analysis of the most recent state and federal case law available, I hope to affirm that the courts are continuing to define the role of fatherhood flexibly.

Literature Review

As referenced in Murphy, family law has been oriented in the pursuit of "protecting children and preserving family stability" (2005, p. 329). Understanding this function of family law provides insight into the development of the social and legal construction of fatherhood. In a historical context, the institution of marriage was "the perceived cornerstone of a healthy society" (Murphy, 2005, p.326). Marriage was considered a legal agreement, or contract, between a woman and man. Under this contract, inherent protections were developed not only for the child, but also for the cohesive relationship between husband and wife. Originating in English common law, one of the most important legal protections of a marriage for centuries under American law was the marital presumption (Murphy, 2005, p.326). The marital presumption "is the legal rule that identifies the husband of a married woman as the legal father of any child born during that marriage" (Singer, 2005, p. 248). This protection was multi-faceted. First, it provided a framework in which inheritance and succession could be established. Second, it eliminated the possibility of males outside the marriage making claims of paternity which would create instability and resentment between the husband and wife. Third, it reduced the likelihood of a child being labeled illegitimate which included social stigma and economic insecurity for the child (Singer, 2005, p. 248). With this backdrop, the legal and social basis of fatherhood was established and sustained.

While this legal construction of fatherhood through the marital presumption was valid and rational throughout many years, its efficacy was diminished with the changing composition of the American family. With more divorces and more children born out of wedlock, the basis of marriage as fatherhood solely was inadequate (Murphy, 2005, p. 326). The "traditional" form of the family unit, i.e. a husband and wife with children born within the marriage, was no longer an accepted commonality. In addition, while the composition of the family was diversifying, science and technology continued to progress. Biological determination became an additional factor that the courts could consider as a basis of fatherhood with the increase in technological innovation such as blood-typing and DNA evidence as forms of paternity tests (Meyer, 2006, p. 127). There no longer was a need to presume that the husband was the biological father of the child when science could definitively prove if he was or not.

The shift from the primacy of marital presumption to the consideration of a biological imperative began in the U.S. Supreme Court case of *Stanley v. Illinois* (1972) and culminated in *Lehr v. Robertson* (1983). The Court found in *Lehr* "that most genetic fathers are eligible for federal constitutional child-rearing interests in adoption proceedings involving their nonmarital children born of sex" (Parness & Townsend, 2012, p. 227). It is important to note that this is only one consideration of a plethora of factors that a court could use in determining the status of fatherhood. For example, the Court emphasized that these child-rearing interests only "are secured when men take advantage of their paternity opportunities by timely establishing 'significant custodial, personal, or financial' relationships with their genetic offspring" (Parness & Townsend, 2012, p. 227). This would mean that there are limitations to paternal

claims for a genetic father. This is still significant though because up to this point the American legal system would not recognize any type of interest of a biological father separate from a marriage. Though this case was significant in this shift, it did leave a lot unsaid of the exact boundaries and determinations of fatherhood based on biology or marriage. By leaving this gap, the Court was empowering the states to fill in the blank for themselves.

Even though states have addressed this new determining factor differently, there are overarching trends that can be found. One such trend is that a biological determination of fatherhood has led to the development of disestablishment cases (Savard, 2009, p. 51). A disestablishment statute "provides that a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of a child" (Savard, 2009, p. 51). Such cases represent a clear disavowal of the marital presumption and the focus of legitimacy. Through disestablishment cases, the legal system allows "men to discard their status as fathers upon proof of genetic non-paternity" (Meyer, 2006, p. 138). Part of the intention of family law, which is to protect children, is clearly undermined by disestablishment cases in that a child can become illegitimate. In addition, it further disrupts a marriage, if the couple is still married, by drawing attention to the fact of the wife's possible infidelity. These are unintended consequences of the new understanding of the role and definition of fatherhood.

The biological determination has manifested itself in other ways as well. For example, in the state of Indiana, "the Indiana Supreme Court recognized a 'substantial public policy in correctly identifying parents and their offspring'" (Britton, 2010, p. 512). While the legal parent is not necessarily the biological parent, there is

a correlation between biology and public policy. There is an obvious preference for the biological father to assume the legal parental responsibilities. When a child is born at a hospital, the mother and a man who reasonably appears to be the child's biological father may execute a paternity affidavit at the hospital (Britton, 2010, p. 512). This affidavit includes "a sworn statement by the mother that the man signing the affidavit is the child's biological father, and the man must declare within the affidavit that he believes he is the biological father" (Britton, 2010, p. 512). The Indiana Supreme Court recognizes that it is in the best interest of the child if the role of the father is fulfilled by the actual biological father. Within the state of Indiana, the legal father, the one who signed the affidavit, may revoke the effects of the affidavit if he files for a paternity test and it proves that he is not really the biological father within 60 days of the date of the affidavit (Britton, 2010, p. 513).

Though this additional consideration exists, many state court systems continue to rely on a marital presumption or common law basis of fatherhood. In the case of *In re Marriage of Johnson* (1979), an appellate case in California, the court found that even though the mother's former husband was not the biological father of her son, he was still legally his father due to his continual role in the son's life starting from birth. As with previous cases, "the court used the marital relationship between the husband and the child's mother as the conduit for that [legal] connection" (Dalton, 2003, p. 286). What is interesting about this case and cases similar is that this represents a slight deviation from the intention of traditional family law. The intent of marital assumption is to ensure that children are legitimate and to preserve the actual marital union. In this case though, the marital union was dissolved. This means that courts can create a

"rule that courts can apply the presumption even where there is no longer an intact family to be preserved" (Ugbode, 2010, p. 690).

It is possible to view both considerations as being the same at the root of the issue. Though marital presumption constructs fatherhood on the marital union, there is this implicit understanding that the husband should also be the biological father. It is not that a biological consideration is completely ignored, but that it should be reasonable to assume that the husband is in fact the biological father. In this way, marital presumption is a "social construct, in fact normative and mutable, [that] draws substantial but disguised legitimacy from the representation that it simply expresses 'givens' of nature" (as cited in Kelly, 2009, p. 318).

In summary, the current articles that I have reviewed reveal a tension between the application of paternity in law on the state and federal levels. On a federal level, paternity remains tied to marriage though there is openness to biological considerations (Britton, 2010, p. 501). At a state level, on the other hand, there is variation in how paternity is established. While more states are constructing a basis of fatherhood with relation to biology, there remains a variety of approaches on an interstate level (Ugbode, 2010, pp. 706-710). The legal conception of fatherhood is a complex matter with different factors, but historically has been simplified to either one factor or another. By analyzing more current state law, I expect to find some variation in application of biology or marriage as a basis for fatherhood, but I also believe there will be a general tendency to abandon or modify the marital presumption. This reveals an openness to the changing demographics of the modern American family.

Methods

Determining which case law was appropriate to reference, study, and review was largely based off the most recent cases available within the online legal database of LexisNexis. I limited my searches to cases that were decided and filed in 2013. Due to different statutory requirements, I limited my sample to cases in which the opinions were already published. My original sample consisted of approximately fifty cases. Of those, all were state level cases due to the sparse number and wide unavailability of federal cases. Due to the time restraints of this paper, I chose to analyze only ten of the fifty cases. In order to cover a wide swath of cases that would be diverse, I chose to limit myself to one case per state. I only made one exception by choosing two cases from the same state, and I made that exception because they both happened to fit my coded requirements. I coded my cases by choosing certain types of paternity cases or custody cases. These paternity cases and custody cases were modeled after the cases I read in my literature review. For example, I chose two disestablishment cases that paralleled the example in my literature review. Their connection to my other cases is the biological factor being considered within the judgment. My other cases also had to include a party in which there was an argument for either paternity and/or custody to be based on a biological determination. I divided such cases up further by choosing paternity and custody cases that involved infants and choosing paternity and custody cases that involved young children. My justification for coding my cases based on paternity and custody cases in which a party uses the biological argument is that it forces the court in each case to either consciously affirm the precedent of marital presumption, to establish a new precedent by accepting the biological imperative, or to develop a new precedent entirely. With

these guidelines, I was able to analyze ten different state level cases.

Results

Out of the ten analyzed cases, half of the judgments leaned towards a biological determination and half of the judgments leaned towards a marital presumption determination. For the marital presumption determinations, there was a consistent precedent of downplaying the role of biology. In all five of these cases, the courts found that biology in and of itself was not a compelling interest for paternity or custody. Though each of these five cases was clear in asserting that a biological claim is not a compelling interest of itself, there was a certain amount of variation in which the court believed biology played a role in such judgments.

For example, within the state of Idaho, it is clear that biology does not automatically bestow legal rights or responsibilities to the father (*In re Doe*, 2013). In the case of *In re Doe* (2013), the Idaho Department of Health and Welfare sought an order of non-establishment of parental rights for the parents of "Son" for the possibility of physical abuse (p. 1202). Doe, who later proved that he was the biological father, was incarcerated at the time of his biological son's birth. He was not married to the biological mother, and she even had a different boyfriend than Doe at the time (*In re Doe*, 2013, p. 1202). Though Doe was clearly the biological father, the Department of Health and Welfare successfully argued that under Idaho law Doe was not the legal father since he failed to assert any paternity proceedings in a timely manner (*In re Doe*, 2013, p. 1206). It is possible for a biological father to make a paternity case, but only if he commenced a paternity proceeding in a timely manner

as defined by state law. If he misses the deadline under any circumstance, he waives the right of an evidentiary hearing. In addition, if a father commenced a paternity proceeding in a timely manner, it still is not guaranteed that paternity will be established (*In re Doe*, 2013, p. 1204). Doe argued that he was at least entitled to an evidentiary hearing to establish his parenthood before such determinations were made. Relying on *Lehr v. Robertson* (1983), the Court claimed that the lack of an evidentiary hearing was ultimately on Doe's shoulders for not taking the proper steps to ensure his legal recognition as a father (*In re Doe*, 2013, p. 1206).

Within the state of Pennsylvania, if a man has acted like a father to the child, which generally includes cohabitation and other caretaking roles, he cannot pursue a disestablishment of paternity on the basis of biology (*R.K.J. v. S.P.K.*, 2013, p. 42). Specifically, in the case of *R.K.J. v. S.P.K.* (2013), S.P.K. had acted as the surrogate father of A.Q.K. for at least six years. Not only did he claim A.Q.K. on his federal taxes, but he lived with him, interacted with him, financially supported him, and had encouraged A.Q.K. to call him "dad" (*R.K.J. v. S.P.K.*, 2013, p. 35). S.P.K. was never married to the biological mother of A.Q.K. nor was he the biological father of A.Q.K. When the biological mother filed for S.P.K. to pay child support after they had split up, S.P.K. tried arguing that he was not the legal father and he could not be forced to pay child support. The Superior Court of Pennsylvania held that for all intents and purposes, S.P.K. was the father of A.Q.K., and thus, made S.P.K. the legal father (*R.K.J. v. S.P.K.*, 2013, p. 42).

Similar to the state of Pennsylvania, in the state of Florida, the sole biological determination cannot be a compelling interest to de-legitimize a child or disestablish the status or paternity (*Van Weedle v.*

Van Weedle, 2013, p. 921). While it can be considered among other factors, it is not a compelling interest of itself. In *Van Weedle v. Van Weedle* (2013), Mr. Taylor Van Weedle fought to retain his legal status as father after his divorce from Ms. Emily Van Weedle. Since Taylor was not the biological father, Emily argued that he should have no legal rights or interests as a father such as custody or visitation (*Van Weedle v. Van Weedle,* 2013, p. 919). As was the case in the state of Pennsylvania, the Florida Court of Appeals held that the standard for determining paternity should be the history of the relationship between the man and child, not the biological determination. For this reason, the court favored the marital presumption as opposed to biological determination and reversed the lower court's summary judgment which had effectively de-legitimized the child (*Van Weedle v. Van Weedle*, 2013, p. 919).

In the case from the state of California, the determination of biology is almost irrelevant to the legal status of fatherhood (*In re Brianna M.*,2013, p. 1030). While there is a parental relationship of sorts, in that the biological father is not a legal stranger, the presumed father is the man who undertook the full responsibilities of fatherhood (*In re Brianna M.*, 2013, p. 1030). In the case of *In re Brianna M.* (2013), the state filed a juvenile dependency petition for Brianna after arresting her mother for deplorable home conditions (*In re Brianna M.*, 2013, p. 1031). Both the biological father of Brianna, Francisco, and the biological father of some of Brianna's half-siblings, Ron, sought presumed father status. Though the state recognized that both men had valid claims, Ron was designated as the presumed father because of a well-established parental relationship with Brianna (*In re Brianna M.*, 2013, p. 1030). Compared to Ron, Francisco was not involved in the upbringing and support of Brianna. It is worth nothing though that the presumed father status

of Ron did not terminate Francisco's parental relationship with Brianna (*In re Brianna M.*, 2013, p. 1056). To terminate his parental rights would require further proceedings. Rather, the presumed father status of a man other than the biological father appropriates further parental rights and responsibilities to men who have established a parental relationship with the child thus diluting the efficacy of biological determination.

Within the state of Illinois, the biological father has a legal interest in gaining visitation rights for his biological child (*In re J.W.*, 2013, p. 712). Nonetheless, if the court determines that it is not in the child's best interest, and the father cannot prove that it is, he can lose visitation rights (*In re J.W.*, 2013, p. 712). Within the case of *In re J.W.* (2013), the court ultimately decided that it was not in the best interest of the child for the biological father to gain visitation rights. Though the biological father had a legal interest, it was outweighed by the perceived best interest of the child. For all intents and purposes, the biological father was a stranger to the child (*In re J.W.*, 2013, p. 701). To introduce another father figure other than the step-father could introduce certain psychological risks to the child, especially at such an impressionable age of seven-years-old. If the child were older or younger, it is possible that the legal interest of the biological father would have won out.

For the biological determination cases, there was a consistent precedent of establishing the role of biology as a compelling interest in the role of paternity and custody cases. As with the marital presumption cases, there was a certain amount of variation in which the court believed that biology played a role in such judgments. Within the state of Virginia, in *L.F. v. Breit* (2013), Breit was the biological father by providing sperm for in vitro fertilization. After

Breit broke up with Beverly Mason, the biological mother and his girlfriend, he sought custody and visitation rights (*L.F. v. Breit*, 2013, p. 715). Beverly Mason argued that the relationship between sperm donor and child could not be construed as a historically protected relationship. The court though held that unmarried parents should be allowed to enter into voluntary agreements regarding custody if the parents have demonstrated a full commitment to the responsibilities of parenthood (*L.F. v. Breit*, 2013, p. 722). The case does not explicitly vest rights with biological fathers, but it is recognized that a non-married sperm donor can retain paternity if there were other factors present such as an agreement between the man and woman and a joint split of responsibilities (*L.F. v. Breit*, 2013, p. 724). Nonetheless, the state law of Virginia made it clear that the marital union makes a stronger case in parental custody cases.

Unlike the state of Pennsylvania, within the state of Louisiana, if the established father can prove that he is not the biological father, he can file a disestablishment case (*Pociask v. Moseley*, 2013). In *Pociask v. Moseley* (2013), Pociask was able to disavow the paternity of a child of his ex-wife after a paternity test proved that he was not the biological father (*Pociask v. Moseley*, 2013, p. 543). Though the state of Louisiana has an interest in preserving the marital family, once the martial bonds are dissolved by divorce, that interest of preservation is diminished (*Pociask v. Moseley*, 2013, p. 538). Under this context, biological determination becomes the suited standard. If the marital union is still intact, disestablishment would more than likely not be possible. Within the state of Indiana, if the mother, husband of the mother, and the biological father all agree to grant the biological father paternity, then the biological father preempts the husband of the mother (*In re Infant T*, 2013, p. 599). In the case of *In re Infant T* (2013), the biological father was a sperm donor. With

the agreement of the mother and her husband, they filed a petition to establish the biological father as the legal father. The court held that a joint stipulation can rebut the presumption of the husband being the legal father (*In re Infant T*, 2013, p. 599). It is apparent then that the marital presumption has a reduced efficacy in the state of Indiana.

Within the state of North Carolina, the biological father has a constitutional interest in relation to adoption proceedings (*In re S.D.W.*, 2013, p. 51). If the biological father did not know that the mother was pregnant and had no reason to know this, he has a constitutionally protected interest in giving his consent for adoption. Compared to the other cases analyzed, this vests a significant interest in the biological father.

An interesting outlier in the analyzed cases was a case from Pennsylvania. Within the state of Pennsylvania, if a mother, biological father, and former husband/legal father of the child all file a case for custody, the court could find that all three of them have a vested interest in the child and could each receive custody on certain days (*In re T.E.B.*, 2013, p. 179). Though the biological father does not have a preeminent interest over the other two, he does have an interest. In the case of *In re T.E.B.* (2013), the mother had an extramarital affair in which there was a resultant child. The husband/legal father of the child wanted to prevent the biological father from receiving any visitation or custody rights. Eventually, the mother files a divorce with her husband citing irreconcilable differences. The former husband retains his legal interest as a father due to his well-established parental relationship with the child (*In re T.E.B.*, 2013, p. 176). In addition, the court finds that the biological father also has a legal interest in the care and custody of the child.

Discussion

Compared to the articles in my literature review, there was some deviation in how cases are handled now in relation to defining the legal and social construction of fatherhood. In the case of Florida, there seems to be a return to marital presumption instead of a biological determination. The most likely reason for this retreat was the unintended effect of disestablishment cases. By putting children at risk to lose their legitimacy, the state had decided it was not fulfilling the purpose of family law. As a whole, the cases that I analyzed seemed to be all over the spectrum from marital presumption to biological determination while the cases within my literature review seemed to have less variation over the whole spectrum. The most likely reason for this is that with the passage of time and only minimal guidelines from the federal courts, the states are individually trying to cope with the new compositions of family and the new possibilities of defining fatherhood. As with the case of Florida though, it is very likely that these states will continue to experiment with the social and legal construction of fatherhood until they find a definition that has a wide consensus of approval within the state. I am certain though that the states will not be able to regard fatherhood as solely a case of marital presumption within the future. Even with the state of Florida, the new role of biology has to be balanced and weighed. In addition, states will begin to shy from purely biological determinations of fatherhood, which very few strongly do that now. States will attempt to determine the best interest of the child with the weighted considerations of biology, marital presumption, and previously established relationships with the child in question.

Conclusion

After analyzing the most current case law, I can say that my hypothesis was valid in that state courts are approaching the construction of fatherhood in a flexible manner. States are allowing a wider variety of claims of paternity through biology, marriage, personal history, and a combination thereof. This is proven by the wide variety of ways that courts are attempting to redefine the legal rights and responsibilities of fathers, including the very definition of father itself. In addition, the creative ways in which the courts have established precedent serve as an example that the states are willing to consider alternatives. Some of the states analyzed have not only moved from a marital presumption to a biological imperative, but have even returned to former precedent after deciding that the new precedent had unintended consequences. This fluctuation is necessary because the legal construction of fatherhood should represent the diverse forms of fatherhood within society-at-large. Moving forward, I do believe that is necessary for states to come to a more solid and unified conclusion in establishing paternity and the definition of fatherhood. While these laws are in flux, families will be more unstable without their rights and responsibilities clearly delineated through the law. While this certainly is a cost to change, I believe the cost will be worth the result.

Limitations and Future Research

Though my paper provides a more current analysis of existing state law, my findings and conclusions are limited by my small sample size. The sample size was small due to the limited number of cases available and limited time constraints involved in conducting and writing a research paper for a one semester class. In the future, I would like to extend this study by examining more cases. In

addition, I would like to focus on other alternative forms of fatherhood that could affect the social construction of fatherhood in law. For example, while my paper was limited to the social construction of fatherhood among heterosexual parents, I am interested to see how same-sex parents will affect certain determinations of fatherhood especially in light of the legalization of same-sex marriages in certain states. In such cases, I wonder if biology would be more of a determinant since marriage is not a possible avenue for same-sex couples in many states, likewise, where same-sex marriage is legal, if the marital presumption stands. In this way, we can ascertain a better understanding of the changing definitions of fatherhood in America, and if these changing definitions are being represented and protected by the legal system.

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Appendix

Cases in Study

In re Brianna M., 220 Cal.App.4th 1025, 1030-1057 (Cal. Dist. Ct. App. 2d Dist. 2013).

In re Doe, 304 P. 3d 1202, 1202-1206 (Ida. Sup. Ct. 2013).

In re Infant T, 991 N.E. 2d 596, 597-601 (Ind. Ct. App. 2013).

In re J.W., 990 N.E. 2d 698, 699-712 (Ill. Sup. Ct. 2013).

In re S.D.W., 745 S.E. 2d 38, 40-51 (N.C. Ct. App. 2013).

In re T.E.B., 74 A. 3d 170, 171-179 (Pa. Super. Ct. 2013).

L.F. v. Breit, 736 S.E. 2d 711, 715-724 (Va. Sup. Ct. 2013).

Pociask v. Moseley, 122 So. 3d 533, 534-550 (La. Sup. Ct. 2013).

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