



The Legal Landscape of Paternity Determination - Today¹

How we got here....

Determining parentage used to be straightforward – biologically and legally. A man impregnated a woman through sexual intercourse. If the woman was married, her husband was the father of any child born. A rebuttal to this conclusive marital “presumption” arose only later once the law allowed a cuckolded husband to prove he was “across the seas” making his parentage an impossibility.

A child born outside a marriage was a child of no one. To the extent anyone provided for the child, it was by the church or state. The Elizabethan Poor Laws brought a “Bastardy” statute², which permitted justices of the peace both to punish the mother and father and to provide financial maintenance to relieve the public of the cost of the child’s care. Criminal or quasi-criminal remedies followed – much later.

Skipping interesting but only nuanced changes between the 16th and 20th centuries (and moving to the U.S.), biology still limited the way humans procreate. However, 1935 brought Title IV of the Social Security Act, known then as Aid to Dependent Children (ADC). The legislation provided aid to needy children under the age of 16 who had been “deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent...”³ Originally aimed at widows and orphans, as divorce rates and births outside of marriage rose, ADC began to tilt toward divorced, separated, or unwed single mothers. Fifteen years later, ADC added “caretaker grants” and the first national child support enforcement program, focused on welfare reimbursement. A quarter century later, Part D was added to Title IV of the Social Security Act establishing the Office of Child Support Enforcement (OCSE) and the national/state/local IV-D program we know today.

At the time of OCSE’s creation, the marital presumption remained almost universal. In non-marital cases, paternity was determined by a jury, in a criminal or quasi-criminal trial, often with the child being passed around so jurors could determine how much the child looked like the putative father. The National Conference of Commissioners on Uniform State Law (now known as the Uniform Law Commission (“ULC”)), had adopted the Uniform Parentage Act in 1973; eventually it was enacted in full by 19 states. Many others wove UPA provisions into existing state law.

¹ This article is based on a presentation by T. Vernon Drew, Susan F. Paikin, and June I. Tomioka at the 2012 WICSEC Conference, Jackson Hole, Wyoming. Of necessity, this article is an abbreviated version of that session.

² Statute 18 Eliz., ch.3 (1576)

³ Section 406, Social Security Act of 1935 (8/14/35) (HR7260) found at:
<http://www.ssa.gov/history/35act.html#TITLE IV>

In the 40 years of the IV-D program's existence, defining and determining parentage has undergone nothing less than a revolutionary change. The IV-D program has been the major impetus to streamlining the paternity establishment process. Jury trials and quasi-criminal "Bastardy" proceedings were ended. Paternity testing became universally offered and generously funded through a federal match, which was originally set at 90%. State law changes included: a mandatory default process when a properly served and noticed putative father failed to cooperate with the testing; creation of a rebuttable presumption⁴ of parentage when paternity tests reached a threshold percentage; and an incentive performance measurement to underscore that establishing parentage was central to the mission of the IV-D program. Paternity testing "matured" from the exclusionary ABO test to HLA, etc., and then to genetic tests done with a buccal swab of the cheek. At a cost of less than \$70 per person, these tests can determine with more than 99% likelihood whether or not the putative father is the child's biological parent.

Arguably the most important change stemmed from the federal mandate that states have a voluntary paternity acknowledgment process to provide a mother and father the opportunity to establish paternity for a child born outside of a marriage.⁵ These new acknowledgments had to legally establish parentage without judicial ratification (unless withdrawn or contested within limited time frames); a birth certificate could not list the father unless the unmarried couple had signed an acknowledgment or paternity had been adjudicated by a tribunal; states were required to give full faith and credit to a properly executed acknowledgment of sister states; and paternity legally established in one state could not be challenged in a UIFSA proceeding in another state.

The results were nothing short of amazing. Between 1993 and 2010, the number of paternities established annually grew more than 300% – from 500,000 to 1.7 million. While the IV-D program is justifiably proud of this effort, the enormous leaps in science and tectonic shifts in family formation have created a situation in which the law and public policy struggle to catch up with the "reality" of parentage in 2013.

Who is a parent today....

The short answer is that courts and legislatures are expanding definitions and extrapolating solutions that reflect decisions and laws that seem as limited and old fashioned now as the Elizabethan Poor Laws once did. These new concepts may most easily be categorized as: "Pandora's Box" and "Brave New World."

⁴ Or a conclusive presumption of parentage, if a state so chooses.

⁵ See, section 655(a)(5)(c)(i) of the Social Security Act; 45 CFR 302.70(a)(5)(iii) and 45 CFR 303.5(a)

Thanks to highly refined, non-invasive, and inexpensive genetic testing, science can now say to an almost medical certainty whether a particular man is the biological father of a particular child. It matters not whether the child was conceived in or outside of marriage. Self-help testing is easy, available through the internet or from one of the countless companies that advertises on giant billboards across the states. It matters not that paternity has been legally determined – by acknowledgment, consent, default, or conclusive presumption – or that the child’s legal status was determined a decade or more ago. What the courts, IV-D agencies and legislatures are faced with are “hot” rhetoric – “paternity fraud” – and calls for a legal remedy – “paternity disestablishment”.⁶

“Pandora’s Box”

Science has opened the proverbial Pandora’s Box. It can now be ascertained whether a man is or is not a child’s biological parent. The question is: Once paternity is legally established, should a man be allowed *or forced* to abandon his social, emotional, and financial responsibilities to his child?⁷

The interests of the various actors in paternity cases often conflict and may change over the years. Final determination is critical to a social structure grounded on the rule of law. There is no one “typical” case, making rule making challenging, or maybe impossible. Is it reasonable to allow paternity to be “re-determined” years after it was established? Is a child’s well-being measured by emotional support or bio-identity? Should voluntary acknowledgments (as well as judicial determinations in contested cases) be permitted only after – and consistent with – genetic testing? Is it constitutionally sound to establish paternity for non-marital children and marital children using different standards? What role does the IV-D program have in permitting, discouraging, or supporting paternity disestablishment? The discussion will – and should – continue beyond these pages. Readers may find helpful the following publications: *Emerging Issues in Paternity Establishment: Symposium Summary* (a summary of the presentations and discussions at the Symposium held by the Office of the Assistant Secretary for Planning and Evaluation/HHS on January 25, 2006);⁸ and Drew, Vernon T., “Conceiving the Father: An Ethicist’s Approach to Paternity Disestablishment” 24 *Delaware Lawyer* 18 (Spring 2006).

⁶ For an excellent discussion, the reader is encouraged to read, Padawer, Ruth, “Who Knew I Was Not the Father” *The New York Times Magazine*, November 22, 2009, at page 38.

⁷ In discussing this issue, people forget that the same law that allows a man to get out of fatherhood can be used by a mother to push him out. Paikin, Susan F., “Paternity Establishment – Just the Facts, Please!” 24 *Delaware Lawyer* 24 (Spring 2006).

⁸ <http://aspe.hhs.gov/hsp/07/paternity/ch1.htm>

States have taken different approaches. At least nine⁹ have enacted some version of a paternity disestablishment statute. Texas ran a demonstration project at one hospital offering free genetic testing at birth, with an uptake rate of less than one percent. A few states passed legislation permitting older paternity default orders to be reopened for a limited time.¹⁰ Relatively few individuals requested relief; fewer still were found not to be the biological father after testing. OCSE has advised at least one state that it may not use FFP for the cost of genetic testing in disestablishment cases. As for the case law, rulings run the gamut. Where paternity is disestablished, courts generally do not order the IV-D agency or the mother to return child support already paid but do relieve the obligor from current support and arrears. The trend appears to be toward allowing paternity disestablishment but it is uncertain how this push for paternity based solely on bio-identity will modify the IV-D program in the future.

“Brave New World”

Assisted reproduction is now mainstream science – available, socially acceptable, and frequently covered by health insurance. Unlike 1576, 1935 or 1975, a child born via assisted reproductive technology (ART) can be related biologically to one, both or neither individual who is raising the child – and could have as many as six “parents”.¹¹ Carefully construed agreements setting out the relationship of various individuals to the child may fall apart, leaving courts to determine whose parental interest is most compelling. The Uniform Parentage Act (UPA) was rewritten in 2000 and further revised in 2002 to consider and set out a legal construct under which courts could make such Solomon-like decisions.¹² The UPA (2002) has been enacted in nine states, though none elected to include Article 8, Gestational Agreements.¹³

Layered on to the issues presented by ART is the increasing need to determine parentage for children of same-sex couples. More than 250,000 children are being raised by same-sex couples in the U.S. Increasingly, same-sex marriage is being authorized throughout the country by state legislation or judicial rulings.¹⁴ In 2012, the

⁹ AL, AZ, FL, GA, IL, IN, MD, OH, and VA.

¹⁰ CA, MO, and TX.

¹¹ The six include the sperm donor, the egg donor, the gestational mother, the gestational mother’s husband; the intended mother and the intended father.

¹² See the *Family Law Quarterly*, Vol. 39 (Fall 2005) for 10 articles and 2 book reviews on legal issues surrounding ART.

¹³ Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. Washington’s current version of UPA 2002 is unique in the nation because gender specific terms have been replaced with gender neutral terms, for example, the alleged father is now the alleged parent.

¹⁴ For example, Delaware’s Civil Union and Equality Act of 2011, has been supplanted after little more than a year by legislative adoption of same-sex marriage.

voters of the state of Washington legalized same sex marriage.¹⁵ From the perspective of the IV-D agency's ability to secure support for a child born during a marriage, the marital presumption could be applied in the same manner as it is to an opposite sex married couple, where the marital union is between two women and one of them is the parent of the child because she is the birth mother. This would not be the case, however, where the marital union is between two women and neither one of them is the birth mother, or where the marital union is between two men. In such cases, the presumption could not exist without documentary evidence of parentage (e.g., surrogacy contract) or genetic evidence of the parent-child relationship between the child and at least one of the same sex married couple.

Challenges to the Defense of Marriage Act (DOMA)¹⁶ are pending before the U.S. Supreme Court, which may have ruled between the time this article is written and published. Putting marriage aside, same-sex couples are establishing families, using domestic partnership or civil union laws – or just cohabiting as opposite-sex couples increasingly do.

The state of Washington enacted legislation in 2011 that adds back into its Uniform Parentage Act the legal parent status of a presumed parent by cohabitation. Under that provision, a person is presumed to be a parent of the child if that person lived with the child for the first two years of the child's life, and during that time, openly held out the child as their own. Unlike the "holding out" presumed parent provision that appears in other states' parentage laws, Washington's law is gender neutral (presumed *parent*, rather than presumed *father*). In neutralizing gender terms throughout the Washington version of the Uniform Parentage Act, the legislature intended to create a parentage law that could apply equally to same gender or opposite gender parents.

By operation of law, the presumed parent is a legal parent, whether they are presumed to be the parent by marriage or by cohabiting with and holding out the child as their own. The IV-D agency, however, is not able to administratively establish the legal parent status of the holding out presumed parent in the same manner as the married presumed parent. The legal status of a marriage is easily proved and the responsible parent (spouse) easily identified for purposes of securing support for the child. The administrative process, by design, is able to find the noncustodial spouse to be financially responsible for the child because the presumption is based in law (marriage). By contrast, the holding out presumed parent's legal status is based in facts, requiring a court to first make a finding that the individual claiming to be a holding out presumed parent meets the statutory requirements for the presumed parent status. Rather than

¹⁵ The legal status of state registered domestic partners who are same sex, and neither is age sixty-two or older, will automatically convert to marriage on June 30, 2014, if the registered domestic partnership has not been dissolved or converted to marriage before this date.

¹⁶ 28 U.S.C. § 1738C

waiting for the statutory time period required for cohabitation, adoption provides a quicker means of legitimizing the parent-child relationship. Adoption by gay and lesbian individuals or partners leads the way, though not without legal challenges.¹⁷ The smorgasbord of medical interventions offers a variety of options for same-sex couples to have children and from these options flow the legal complexities.

The issue for IV-D agencies is how to accommodate this changing family structure within a legal construct built for voluntary paternity acknowledgment by the *biological father*, paternity established by genetic testing, and marital presumptions. Two recent examples illustrate how quickly the legal landscape around questions of parentage is evolving. In May, 2013 the Iowa Supreme Court ruled unanimously that the Iowa Department of Public Health must begin listing both married same-sex parents on a newborn child's birth certificate. In Kansas, the IV-D agency is suing a sperm donor to establish paternity and child support. The case involves a same-sex couple whose relationship ended, a biological mother who applied for state health insurance triggering an automatic IV-D referral, and a sperm donor (who answered a Craig's List ad) who did not go through a licensed physician or clinic and thus was not protected under Kansas law.

For now, we are left with more questions than answers. May two "moms" sign a VPA? What about two "dads"? In the latter case, one could be the biological father but--for now at least--neither can give birth. Must states that don't recognize same-sex marriage or other forms of union grant full faith and credit to a parentage acknowledgment or child support order created in a state – or country – that does¹⁸? Would the IV-D agency in a DOMA state be able to establish a support order if there is no basis in its own statutes or case law for recognizing same-sex parents?

These questions – and many more – will challenge state and federal policy makers, judges, and legislators for the foreseeable future.

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¹⁷ In 2009, a New York court granted a second parent adoption to the genetic mother of a child conceived by donating her ova to be fertilized by an anonymous sperm donor and carried by her partner. Given New York's "evolving jurisprudence of same-sex relationships, equal protection and full faith and credit, and the effects of DOMA, the only remedy available in New York that would accord both parents full and unassailable protection was a second parent adoption." *Matter of Sebastian*, 879 N.Y.S.2d 677(Surr. Ct. N.Y. Co. 2009).

¹⁸ Paikin, Susan F. and Prof. William Reynolds, *Parentage and Child Support: Interstate Litigation and Same-Sex Parents*, 24 *Delaware Lawyer* 26 (Spring 2006); Paikin, Susan F. and Prof. William Reynolds, *Assisted Reproduction, Civil Unions and Parentage*, 29 *Delaware Lawyer* 24 (Fall 2011)