

Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?

James J. Vedder and Brittney M. Miller

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Legal presumptions are a useful and efficient way to deal with legal questions. A legal presumption is essentially a legal shortcut. It allows the court to reach a conclusion once a specific set of facts is established. The burden of proof then shifts to the other party to rebut the presumption. See Fed. R. Evid. 301. The legal system uses presumptions to increase efficiency and certainty. As Justice Byron White observed in *Stanley v. Illinois*, “it is more convenient to presume than to prove.” 405 U.S. 645, 658 (1972).

In the context of family law, perhaps the most significant legal presumption is the presumption of parentage. Constitutional rights and moral, social, and financial obligations arise from the parent-child relationship. As a result, parentage determinations are of critical importance in family law proceedings. However, as technology has advanced and family structures have evolved, parentage determinations have become increasingly more complex. Family law practitioners need to know how to navigate this developing area of law in order to respond to the needs of modern families.

Establishing the Presumption

Paternity presumptions can generally be divided into three categories: marital, biological, and intent-based. Each type of presumption is addressed separately below.

Marital Presumptions

Historical Overview

The oldest presumption of paternity is the “marital presumption,” which is derived from English common law. The presumption assumes that a child born during a marriage is the biological child of the mother’s husband. It is the marital relationship of the child’s parents that establishes paternity, rather than any biological relationship between the child and the father.

The marital presumption of paternity emerged out of necessity. DNA testing did not exist, so focusing on the biological mother’s relationships was the only means of establishing paternity. However, the marital presumption also worked to reinforce a number of societal norms and public policy goals such as securing financial support for children, keeping traditional family units intact, and shielding children from the social stigma associated with “illegitimacy.”

While the public policy rationale is outdated, the marital presumption of paternity continues to carry substantial weight in family law proceedings. Most states have enacted paternity laws that create some form of the marital presumption of paternity.

Lord Mansfield's Rule

The marital presumption of paternity is often discussed in connection with Lord Mansfield's Rule, an evidentiary rule that limits the ability of spouses to contest paternity. Specifically, the rule prevents spouses from testifying about extramarital affairs in order to rebut the marital presumption of paternity. The purpose of the rule was to preserve "decency" and "morality" within the marriage relationship. *People v. Wiseman*, 234 N.W.2d 429, 431 (Mich. Ct. App. 1975) (internal citations omitted). However, the practical effect of Lord Mansfield's Rule was to make it incredibly difficult for married couples to challenge the marital presumption of paternity.

Over the years, states have either abolished or modified Lord Mansfield's Rule. Most jurisdictions view the public policy rationale underlying the rule as antiquated and contrary to the interests of justice. As the Michigan Supreme Court stated, "[i]n our view the public peace and respect for the law are enhanced, not by arbitrarily assigning the duty of support to a man who is not the father of the child, but by allowing him to contest paternity by his best evidence." *Serafin v. Serafin*, 258 N.W.2d 461, 463 (Mich. 1977).

The UPA's Approach to Marital Presumptions

The Uniform Parentage Act (UPA) of 2002 includes the marital presumption of paternity but also expands the circumstances in which the presumption applies. Under the UPA, a man is presumed to be the biological father of a child if he is married to the child's mother at the time of the child's birth, but in addition, a man is presumed to be a child's biological father if:

- he and the mother of the child were married, and the child is born within 300 days after the marriage is terminated; or
- he and the mother of the child marry after the child is born, and he voluntarily acknowledges paternity of the child.

UPA § 204(a)(1), (2), and (4).

The UPA broadens the scope of the marital presumption. No longer does the presumption of paternity only apply to children born during a marriage. Under the UPA, the presumption may still apply to a child born before the marriage or even after a marriage is terminated. Further, the marital presumptions under the UPA apply regardless of whether the marriage is later declared invalid. See UPA § 204(a)(2) and (4).

Marital Presumptions and Same-Sex Marriage

While the law has progressed, it has not kept pace with the changing family structures of today. For instance, state paternity laws typically use gender-specific language. This creates confusion for same-sex couples because it is unclear whether the marital presumption of paternity applies to them.

The Arizona Supreme Court recently addressed this issue in *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017), after two appellate courts issued conflicting decisions. In *McLaughlin*, a lesbian couple had a child through artificial insemination during their marriage. Even though only one of the women had a biological connection to the child, the couple held themselves out as the child's parents and entered into a co-parenting agreement. When the couple later separated, the biological mother of the child attempted to terminate the nonbiological mother's right to contact with the child.

The Arizona Supreme Court held that the nonbiological mother was entitled to the marital presumption of paternity despite Arizona's use of gender-specific language in its paternity statute. Specifically, the Arizona Supreme Court stated that "[t]he marital paternity presumption is a benefit of marriage, and ... the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses." *Id.* at 498.

Minnesota reached a similar result through legislation. Minnesota's paternity statute provides that a child born during a marriage is presumed to be the child of the biological mother's husband. Minn. Stat. § 257.55, subd. 1(a). Without more, the statute's use of gender-specific language makes it unclear whether the presumption applies to same-sex couples. To remedy this issue, Minnesota enacted a separate statute requiring courts to use gender-neutral language when enforcing the rights of same-sex couples, including in cases involving "parentage presumptions based on a civil marriage" Minn. Stat. § 517.201, subd. 2. Thus, under Minnesota law, the marital presumption of paternity should apply to a child born to a same-sex couple.

Biological/Genetic Connections

While the marriage relationship is one way to establish a parent-child relationship, biology provides a separate basis for doing so. With the rise of DNA testing, it is now possible to know with scientific certainty the identity of a child's biological parents. Genetic testing is also readily accessible and can even be done at home, outside of the judicial process.

At first glance, genetic testing is an appealing solution to parentage determinations, as it appears to simplify the process. However, assisted reproductive technology refutes the notion that a child's biological parents must be the child's legal parents. For example, a surrogacy arrangement creates both biological parents and "intended" parents. The surrogate may be the biological mother of the child, but she likely has no intention of parenting the child. Instead, the surrogate is most often carrying a child for intended parents — one of whom may also have a biological connection to the child. In this scenario, relying solely on biological connections to the child would produce an unwarranted result — the surrogate and one of the intended parents would be treated as the child's legal parents. Simply put, biological realities may conflict with the intended family structure or the child's best interests.

Further, the rise of genetic testing has not rendered the marital presumption of paternity obsolete. Even as genetic testing has become increasingly accessible, the marital presumption of paternity remains “one of the most powerful presumptions” in the law. *Leach v. Leach*, 942 S.W.2d 286, 288 (Ark. Ct. App. 1997).

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the U.S. Supreme Court addressed the tension between biology and the marital presumption of paternity. In *Michael H.*, the child’s biological father, who was not married to the child’s mother at the time of the child’s birth, attempted to establish his parental rights. However, because a California statute created a rebuttable marital presumption of paternity, the mother’s husband was already presumed to be the child’s father. In order to rebut the marital presumption of paternity through genetic testing, the biological father was required to bring a motion within two years of the child’s birth, which he failed to do. As a result, the court held that the biological father was precluded from rebutting the marital presumption of paternity, despite his genetic connection to the child.

Intent-Based Approach

A third approach to parentage determinations is the intent-based or functional approach. It focuses on the actions and intentions of the parent seeking to establish parentage, rather than on their marital relationships or genetic connections. Such an approach has become necessary with the rise of assisted reproductive technology. Biological and marital connections do not always reflect the intended family structure, so courts must now look at the parent’s intentions and actions.

Under UPA 2002, a man is presumed to be the father of a child if he lives with the child and “openly held out the child as his own” during the first two years of the child’s life. UPA § 204 (a)(5). The presumption applies regardless of the father’s marital relationship to the mother or his biological relationship to the child. This provision recognizes that a father who has no biological connection to the child may still intend to care for and parent the child.

Fathers can also voluntarily assume parental obligations through a voluntary acknowledgment of paternity. Federal child support laws require states that are receiving child support enforcement funding to create a framework for fathers to voluntarily establish paternity by signing an affidavit. 42 U.S.C. § 666(a)(5)(C)(i). Such states must also establish procedures under which a signed voluntary acknowledgment of paternity constitutes a legal finding of paternity. 42 U.S.C. § 666(a)(5)(D)(ii).

Rebutting the Presumption

Once a presumption of paternity has been established, circumstances may arise or family structures may change in such a way that a parent or a third party may seek to challenge the presumption of paternity. Whether the parent or third party will be able to do so and ultimately disestablish paternity depends on the unique facts of the case, including the state in which the action is brought.

Rescinding a Voluntary Acknowledgement of Paternity

Under federal child support laws, states receiving child support enforcement funding are required to create procedures allowing a parent to rescind a voluntary acknowledgment of paternity within sixty days. 42 U.S.C. § 666(a)(5)(D)(ii). States must also create a procedure for contesting paternity in court on the basis of fraud, duress, or material mistake of fact for parents who fail to rescind the acknowledgment within that sixty-day timeframe. 42 U.S.C. § 666(a)(5)(D) (iii).

The specific procedures for rescinding a voluntary acknowledgment of paternity vary from state to state and consist of a mix of administrative and judicial processes.

Nonaccess

Initially, the only way to rebut the marital presumption of paternity was to prove that the husband was either “incapable of procreation” or that he “had no access to his wife during the relevant period.” *Michael H.*, 491 U.S. at 124. Even then, Lord Mansfield’s Rule prevented either spouse from testifying regarding nonaccess or extramarital affairs.

UPA 2002 outlines a more modern approach to the nonaccess rebuttal. Under section 607(b), a presumed father can bring an action to disprove the father-child relationship at any time if the court finds that: “(1) the presumed father and the mother of the child neither cohabitated nor engaged in sexual intercourse with each other during the probable time of conception; and (2) the presumed father never openly held out the child as his own.” Thus, under the UPA, so long as the father did not treat the child as his own, he can use nonaccess to rebut the presumption of paternity.

Equitable Estoppel

Some courts have invoked the doctrine of equitable estoppel to prevent a petition to disestablish paternity from moving forward. In those cases, courts have held that a presumed father is estopped from challenging paternity based on the length of time that he has held the child out as his own.

The doctrine “is based on the public policy that children should be secure in knowing who their parents are.” *Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997). In other words, once a presumed father has held himself out as a child’s father and they have formed a father-child relationship, “the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.” *Id.* An equitable estoppel case could result in a presumed father being required to financially support a child who has no genetic connection to him. Such cases prioritize the child’s best interests over the presumed father’s financial interests.

Notably, the use of the equitable estoppel doctrine in parentage cases is based on the underlying assumption that a child can only have two parents — a mother and a father. In a world where family structures are changing and children can have same-sex parents and multiple caregivers, this assumption may be outdated.

Res Judicata

Like the equitable estoppel doctrine, the principle of res judicata is a mechanism available to courts to dismiss petitions to disestablish paternity. The justifications underlying this principle are finality for families and prevention of continued litigation of issues already litigated and decided.

In *Dreyer v. Greene*, 871 S.W.2d 697 (Tex. 1993), a wife attempted to disestablish the paternity of her children's presumed father and establish the paternity of another man. In the context of a divorce proceeding, the wife stated under oath that she and her husband were the parents of three minor children. Based on the wife's statement, the trial court adjudicated the husband as the biological father of the parties' children and ordered him to pay child support. When the wife initiated a proceeding to establish another man as the children's biological father, the Texas Supreme Court held that such an action was barred because a final judgment had already adjudicated the wife's ex-husband as the children's biological father.

Genetic Testing and Best Interests

It would seem that genetic testing offers a conclusive means of challenging paternity. However, a number of courts preclude genetic testing once there has been a final judgment of paternity. In such cases, the court will only allow genetic testing to move forward if the court finds that testing is in the best interests of the minor child.

Vermont addressed this issue in *Godin v. Godin*, 725 A.2d 904 (Vt. 1998). The presumed father sought DNA testing fifteen years after the child was born. The court held that he was precluded from undergoing genetic testing "absent a clear and convincing showing that it would serve the best interests of the child" *Id.* at 910. In reaching this conclusion, the court stated that "the financial and emotional welfare of the child, and the preservation of an established parent-child relationship, must remain paramount." *Id.*

UPA 2002 takes a similar approach. The court may deny a request for genetic testing if it determines that:

"(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father." UPA § 608(a). In deciding whether to allow a motion for genetic testing to proceed, the UPA requires the court to engage in a "best interest" analysis and consider the age of the child, the nature of the father-child relationship, and a number of other factors. UPA § 608(b).

However, other courts have prioritized genetic test results over the best interests of the child. In *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003), the presumed father sought dismissal of his child support obligation based on a genetic test that proved he was not the child's biological father. Even though the man held himself out as the child's father for more than eleven years, the court granted his motion to dismiss his child support obligation. In reaching this decision, the court held that the marital presumption no longer applied because the parties were no longer married. In

addition, the court held that the equitable doctrine of estoppel did not apply because the man only held the child out as his own based on the mother's misrepresentations regarding paternity.

Conclusion

Significant rights and obligations attach to parentage presumptions. It is precisely because of these rights and obligations that parents and third parties are motivated to establish parentage or attempt to disestablish parentage. In such cases, the courts must look beyond a child's biological connections and consider the parental rights and financial obligations at stake, the intended family structure, and the child's best interests.

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Attorneys

Brittney M. Jones

James J. Vedder

Practice Areas

Family Law

