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PROTECTING THE FATHER-CHILD BOND AGAINST NONPATERNITY ACTION: LEGISLATIVE, JUDICIAL, AND CONSTITUTIONAL APPROACHES

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The presumption that a child born in wedlock is the biological offspring of the husband is one of the oldest and strongest presumptions in the Anglo-American legal tradition. It often took the guise of an evidentiary rule barring husband and wife from testifying about lack of sexual intercourse around the time of conception. The principle is also known as Lord Mansfield's Rule, named after an English noble, who articulated it in the name of "decency, morality, and policy" to prevent husband and wife from bastardizing the children of their marriage, 98 Eng. Rep. 1257 (1777), at 1258. A number of reasons have historically supported adherence to this rule: The expediency of establishing filial relationships and the attendant rights and obligations on the basis of the marriage of the parents, especially in the absence of means to prove biological ties; the community's interest in reducing the public burden of supporting "children of no one" (*fili nullius*); and the public interest in protecting children against the loss of legitimacy, parental care, and rights of inheritance.

Some of these rationales have recently eroded. While a high standard of proof vitiated most potential challenges to the marital presumption in the past, scientific testing now allows determination of paternity and non-paternity with high accuracy and thus affords a means to settle paternity disputes on the basis of clear and convincing evidence. Moreover, the disadvantages of illegitimacy have been reduced substantially.

Not only has the social stigma pertaining to illegitimacy lessened, legislatures and courts have increasingly curtailed discrimination against children on the basis of the mother's marital status. Under federal prodding motivated by fiscal considerations, all states have enacted legal mechanisms for voluntary and involuntary establishment of paternity and court-ordered child support orders for children born out of wedlock.

remains unproven). A child should not be deprived of his or her paternal relationship based solely on the absence of a biological link, where the husband has been the child's legal, de facto, and psychological father by virtue of marriage to the child's mother.

Case notes and law reviews articles frequently only address the problem from the litigants' and the courts' perspective, leaving out the legislative arena. The present article integrates the two perspectives in recognition of the bifurcated nature of the policy-making process in the United States, where legislative enactment and judicial rulings both determine public policy. Part I will examine the nature of the problem and the competing interests of the parties affected by it. Part II will present legislative reform proposals. Part III will review relevant legal theories and arguments and evaluate their respective merits in efforts to preserve father-child relationships when the non paternity issue is raised in court.

The strategy of first choice is to prevent or restrict challenges to the marital presumption, the fall-back position to minimize the legal consequences of a finding of non-paternity.

All approaches, whether statutory, doctrinal, or constitutional, serve the same normative objective: protection of the non-biological father-child bond for children born in wedlock.

PART I: THE PUBLIC POLICY CHALLENGE

In decades past it was difficult in most instances to prove a husband's non-paternity of his wife's child. A powerful technical instrument to overcome a legal presumption of biological paternity was simply not available. Highly accurate DNA and HLA blood tests, however, have changed this. Judges and legislators are thus confronted with new, troublesome questions (Bundschuh 1983). Should the presumption be conclusive and scientific evidence to the contrary be deemed irrelevant? If not, under what circumstances, and on what grounds should challenges to the husband's paternity of children born in wedlock be allowed? The wide array of different legal provisions and judicial holdings across the states bears testimony to the unsettled nature of this debate (Andrews 1988, Brogan 1984, Dallas 1988, Horton 1984, Johnson 1980, Keiffer 1986, Mallon 1989, Runner 1989-90, Shoemaker 1981, Stanger 1989, Visconti 1988).

The questions before policy-makers, be it in the legislative arena or in the courts, can roughly be summarized as follows: Should the state allow the marital presumption to be contested at all? If so, who should have legal standing to bring non-paternity action (only the husband, husband and wife, putative biological father, child?), when (within a set time period after birth, or after information or evidence indicative of non-paternity surfaces) and under what conditions (in divorce only?). Finally, what should be the legal consequences for the marital father and his child once the presumption is rebutted?

Should a ruling of non-paternity result in automatic destruction of the father-child relationship, or is the presumptive father recognized as an equitable parent? Should the law recognize only one legal father, two, or how many? Should an alternative remedy be provided to allow father and child continuing contact short of a full-blown legal parent-child relationship? What if the legitimacy presumption is rebutted, but no biological father can be identified?

1.1.1 Financial Gain

Many jurisdictions bar paternity suits where the child in question has a legal father. Termination of the presumptive father-child relationship may thus be a prerequisite for paternity action against the biological father, where the latter can be identified and subjected to the jurisdiction of the court. There is no guarantee that the financial loss resulting from the termination of the presumptive father's support obligation will be compensated for by means of an enforceable child-support order against the biological father. In some cases the biological father might be ordered to pay more than the presumptive father, based on his financial resources. Non-paternity action followed by establishment of paternity by another man may thus involve a comparative financial benefit, especially where the presumptive father is poor or indigent.

Policy question: Should availability of biological father with greater financial resources justify (be a consideration, or a prerequisite for) destruction of presumptive parent-child relationship?

1.1.2 Legal Recognition of the Extra-Marital Father-Child Bond

Money and financial resources are impersonal and can be substituted from another source. This is not true of psychological bonds, which are personal and specific to pairs of individuals. Termination of the presumptive father-child relationship on the grounds of biological non-paternity is always a loss to the child, assuming that the marital father has in fact played the role of father in the child's family unit. Whether or not the child subsequently develops a relationship of a similar nature with his/her biological father is a subsidiary consideration. On the other hand, in cases where the biological, but extra-marital father already has a developed relationship with the child by the time the mother brings the non-paternity action against the husband, termination of the relationship with the presumptive father may be in the child's best interest where the presumptive father has failed to be a psychological parent. [Cf. Dallas' (1988) proposed "developed relationship test" for determining whether a putative biological father should be allowed to reith aievegntmaicy presumpton]. (Policy question: Shouldtie's btweene biological father and child be a consideratio?: Shouldtthe woe father) Tj695.004 0 TD

their conception, such interest has little weight compared to the other interests at stake (see Dallas 1988, 377). Smaller children do not even understand the distinction between psychological and biological parent. "Unlike adults, children have no psychological conceptions of relationship by blood-tie until quite late in their development [...] These considerations carry no weight" (Goldstein, Freud, Solnit 1979, 12). Nor are the physical realities of conception and birth the direct cause of a child's emotional attachment to a parent.

This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation (ibid, p. 8).

It is hard to imagine a case where non-paternity action would be initiated by a child in the pure quest for genetic knowledge, rather than to effect a legal consequence. Relevant policy question: Should children be able to sever themselves from their presumptive father by means of a non-paternity suit?

Granting the child a right to rebut the marital presumption would put the child in a position to disavow his or her father against his will, and may therefore invite manipulation by a vindictive mother.

1.1.4 Genetic Origin, Medical Considerations

A related argument concerns the child's interest in knowing the family history for reasons of genetic heritage and availability of potential organ donors. As long as the parties are willing to cooperate, establishment of a legal parent-child relationship is not a requirement to accomplish this objective.

Voluntary blood testing would be sufficient. Transplantation of body tissue would in any event require the consent of the donor. It is hard to see how court-ordered blood-tests that establish a putative father's paternity would make him a more likely donor. As for genetic family history, again establishment of paternity against the wish of the alleged father would hardly further the prospects of obtaining such information, and the result would hardly justify the effort and the costs in terms of termination of the presumptive father-child relationship. Moreover, other means should be available for obtaining such information. In sum, these objectives can be served by less drastic means. They do not necessitate or justify rebutting the marital presumption.

The above discussion is premised on the termination of an existing presumptive father-child relationship, with or without replacement by a biologically-based legal father-child relationship. An alternative option is recognition of both the presumptive and the biological father. Policy question: Should children be allowed to keep their presumptive fathers, with no bar on establishment of biological paternity by someone else?

While it is part of social reality today that biological father and psychological father are often not the same person, and that children have more than one psychological parent of the same sex, the public policy question is whether to recognize more than one father-child relationship, and assign each of these identical rights and obligations. In practice, such multiple paternity would probably prove highly unstable and invite voluminous litigation due to the inherent contradictions of such an arrangement. Moreover, the concept of multiple legal fathers challenges deeply ingrained notions of family and parentage. Not surprisingly, policy-makers have been reluctant to contemplate such a novel approach. At best, psychological parents may be granted standing as "third parties" who may petition for visitation rights based on "substantial past contact", or a demonstrated "interest in the welfare of the 2T566.BT 54 1

in adoption statutes.

Generally, the termination of the parent-child relationship between the child and at least one of the natural parents of that child is a prerequisite for adoption. Nor have the courts been eager to embrace the concept of dual fatherhood. A recent Supreme Court Case opinion, *Michael H. v. Gerald D.* 491 U.S. 110 (1989), reflects the same exclusivity preference even for visitation purposes. A biological father was not only barred from rebutting the marital presumption and establishing his paternity in court, he was also denied visitation with his child notwithstanding substantial past contact. The court held that the child already had a presumed natural father due to the mother's existing marriage with another man. The child's ad litem attorney had also sought to maintain filial relationships with both men based on the existence of emotional ties with both of them.

1.2 The Presumed Father's Rights

Two distinct interests and rights must be assessed here.

1. The right of the husband to deny his paternity to overcome the marital presumption, which would require him to support an adulterously begotten child, or a child conceived before marriage and not the husband's, where the husband does not want to accept this child as his.
2. The right of the husband to continuing status of a father by marital presumption, when the wife challenges his paternity, but he wishes to remain the legal parent of the child. In view of the analysis of the child's interest presented above, the husband's legal stance would be injurious to the child in scenario 1, but beneficial in scenario 2.

Once the marital presumption is rebutted, a husband has no standing to sue for custody where the statute employs a biological definition of parenthood. Legally, his conduct as a parent is irrelevant. Whether or not there is a claim or interest by the biological father has no bearing. Nor does the husband have any means to protect his parental rights during the marriage. He cannot adopt a legitimate child. In order to avert the specter of bastardization in a divorce proceeding, he would have to bastardize the child (in the hope of later adoption) while the marriage is still intact, assuming such a suit is not barred, with potentially disastrous psychological consequences to the child in question. Where the law allows the presumption of legitimacy to be challenged only in divorce action, adoption is no longer likely, because it would normally require the consent of the mother.

Where the wife is entitled to deny the husband's paternity, the father's ability to preserve the legal and emotional parent child relationship is controlled by her action. His legal ability to retain his status as a parent depends on whether or not the wife engaged in extra-marital sex resulting in conception and birth of a child into the extant marriage, and whether the wife decides to exercise her legal right to deny the husband's paternity. In other words, the presumed father is at the mercy of the mother. He has to rely on her conduct to preserve his relationship with the child, and has no remedy to prevent the termination of his legal relationship with the child.

Moreover, a severe legal handicap may arise for any father committed to his children, even if the non-paternity claim is frivolous. The husband can never know with certainty whether the child was conceived adulterously. Given this uncertainty, the mere threat of non-paternity action by his wife limits the husband's ability to seek custody on the merits of his parenting abilities and the quality of the father-child relationship, irrespective of whether

the allegation is true.

To the extent that he perceives her claim as credible, he is severely constrained in his legal moves. The only procedure that would allow him to determine the validity of the claim would also effect the termination of the rights he wants to preserve (unless he can conceal the test results, and is not forced to testify about them.) Moreover, a wife can use the threat of non- paternity action to extract concessions on a financial settlement. For a discussion of an example see Visconti (1988, 111).

1.3 The Biological Father's Rights

The focus of this paper are challenges to the marital presumption by the husband or the wife, not by an alleged biological father. This excludes cases where the putative biological father initiates legal action and asserts an interest in the child, and is opposed by the presumptive parents of that child. Many jurisdictions bar such suits, either during the marriage of the child's parents, or altogether. Nevertheless the biological father is an important party in non-paternity actions initiated by the wife. If the husband's parent status is abrogated on the basis of non- paternity, it is highly relevant what happens afterward. Has a biological father been identified? Has that person ever developed a relationship with the child? What legal status should the biological father have with respect to the child? What are his respective rights and responsibilities?

The determination to what extent biological fathers should enjoy parental rights is a difficult one where biological and legal parent are not the same person. This issue involves a fundamental principle, namely the legal quality of the merely biological relationships, relative to other relationships, such as legal, custodial, psychological. There is, of course, no final answer on this question as illustrated by Justice White's dissent in *Michael H. v. Gerald D.*. Nevertheless, it is worthwhile to evaluate this claim of rights inherent in the biological link against the other values at stake.

With good reason the Supreme Court has held that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring," 441 U.S., at 397, 99 S.Ct., at 1770. While a woman endures the physical encumbrances and burdens of pregnancy, the biological contribution of the male is indeed minimal, and hardly involves hardship. For men, sexual intercourse is a sufficient condition that gives rise to a biological tie, should conception occur. For the mother, it involves much more. Moreover, in an era in which abortion is legal and available she accepts the responsibilities and burdens of parenthood by her own free choice. Hence it can be argued that it is justified not to grant men equal parental rights on the basis of biological parentage only; i.e. to impose a more exacting test, a requirement that a father assume responsibilities for the pregnancy and the child, as does the mother.

Moreover, in the case of a husband's non-paternity, sexual intercourse occurred outside the marital union. In some jurisdiction such conduct is still regarded criminal. At the minimum it is not generally condoned. Men who assert biologically based parental rights in children born into an extant marriages are seeking to derive a benefit from commission of an adulterous act, which alone may be judged not to merit recognition as a matter of state policy. There is a long tradition of denying such fathers standing to rebut the marital presumption. On the other hand, there is no justification for letting a biological father escape the financial responsibilities of parenthood based on the fact that conception results from an extra-marital liaison, if this is deemed to be in the child's and the state's interest. In short, there is justification for not granting extra-marital biological fathers superior rights to a child born into an extant marriage, but to hold them liable for support, should the presumed father disclaim paternity.

1.4 The Mother's Interests

The wife is the only party to benefit from her right to rebut husband's paternity. It allows her to have her husband support a child conceived in adultery (or misrepresented to him as his to induce him to marry her) by making use of the marital presumption, but also gives her total discretion over the relationship between the husband and such children. In fact, wives enjoy more rights by "virtue" of adultery or marriage fraud, than by giving birth to their husband's children. It cannot be presumed that divorcing mothers will act in disinterested fashion on behalf of the child, since the fact of the breakdown of the marital relationship itself implies conflict and animosity between husband and wife.

1.5 The State's Interest

The State's interest can be defined as promoting the marriage and family as the best way to procreate and raise children; failing that, to ensure children's welfare and reduce the public burden of providing for their support. Expediency in regulating familial relationships and adjudication of conflicts in the courts is a secondary, but nonetheless important public policy consideration. Given the rising incidence of illegitimate births, legislatures have adopted legal provisions for establishing parent-child relationships (and the attendant support obligations) through voluntary legitimation or paternity suits where such relationships do not exist by virtue of wedlock. It furthers State policy goals to establish and strengthen parent-child relationships, rather than severing them, unless important countervailing interests (protection and welfare of the child) call for it. The mother's unrestricted right to deny the husband's paternity results in bastardization, which the state has good reason to avoid.

State policy does not merely consist of mandates and proscriptions, but includes incentives and dis-incentives which have a bearing on people's conduct. Discussion and evaluation of official policy must thus include its influence on people's behavior. In this view, the public policy implications of an unrestricted right of the wife to deny the husband's paternity are preposterous. As long as wives are not barred from rebutting the marital presumption there is no assurance of a continued legal and substantial relationship between any married father with the children he believes to be his. No man can be certain that he is in fact the father he "admits" to being. The very reason for having a presumption of legitimacy is the state's interest in reducing such ambiguity by setting clear rules to establish and maintain parent-child relationships, and assure the child of continuity in terms of family, parentage, and identity. Since a husband may not be aware of the real facts of conception, he has no preventive legal means (adoption) to assure permanent legal status as a father. By contrast, the wife has unbridled discretion to terminate his relationship once either spouse files for divorce. A father's attempt to adopt his child at this point is futile because the consent of the mother would be a precondition. Under such legal uncertainty every caring father would have to get himself and his off-spring blood-tested to guard against possible future surprises, namely the frivolous termination of his rights to his children, and their right to a continuing relationship with him by their mother.

Moreover, willing prospective fathers are well-advised not to marry the women they think they impregnated where voluntary legitimation settles the issue of paternity for good, but legitimate birth in wedlock remains subject to rebuttal. A putative father who "admits" paternity and marries the expectant mother to legitimize the child would enjoy less protection than a father who voluntarily legitimizes his child outside wedlock if the former cannot rely on the marital presumption to permanently protect his interest in the child.

This is contrary to the state's interest in promoting marriage as best way to foster and safeguard parent-child relationships.

Wives, on the other hand, acquire a virtual legal insurance policy by conceiving adulterously. It will give them legal leverage in the event of divorce over the husband raising a non-biological child in the belief it is his.

PART II: LEGISLATIVE RECOMMENDATIONS

2.1 Non-Paternity Action By Wife Should Be Barred

It follows from the analysis presented in the preceding section that sound state policy would not give the wife the right to de-establish the husband's paternity of any child born during the marriage. According the wife such a right is detrimental to the child subject of the non- paternity motion, inequitable with respect to the husband who is committed to the child, and contrary to public policy objectives.

Some may object that to allow the husband, but not the wife, to deny paternity constitutes discrimination on the basis of gender. But appearances are deceiving. The marital presumption itself is gender-based. It necessarily applies to the relationship between the husband and the off- spring, not the wife and the offspring. It is necessitated by the inherent ambiguity of the paternal link, as opposed to the maternal link, which is obvious by pregnancy and birth. The presumption establishes the biological and legal father-It f(spquitablertuvalorce) ink,-

father in most cases, given the mother's marriage. By accepting the child as his in a recognized family unit the presumed father precludes the development of such a relationship, which cannot be created instantly, should he later chose to disavow the child on the grounds of non-paternity. While

3.1.3 Equitable Parent and Equitable Adoption

The equitable parent doctrine is a judicial innovation introduced by the Michigan Court of Appeals in *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987), to produce an equitable result after it rejected the equitable estoppel argument to prevent the wife from introducing the results of a blood test to disprove the husband's paternity. The court held that equitable estoppel did not apply because the mother made the non-paternity claim early in the divorce proceedings, that the presumption was rebuttable, and that the wife was entitled to offer the best evidence to overcome it (Runner 1989-90, Visconti 1988, 103, Andrews 1988). The husband whose paternity was thus disestablished was not left without a remedy, however, for the court further adopted the doctrine of the equitable parent for the purposes of deciding custody and visitation rights in light of an affectionate father-child relationship (Andrews 1988). The court elevated the non-biological father to the status of natural parent, based on three considerations: the mutually acknowledged father-

3.2 Constitutional Challenges

The U.S. Supreme Court has never addressed the constitutionality of non-paternity motions brought by the wife against the husband. Unfortunately the court declined to review a recent California case that may have presented an opportunity to clarify the issues, esp. the marital father's due process rights under the Fourteenth Amendment (*Frank v. Morando*, 58 LW 3619). The highest court had, however, addressed the constitutional implications of illegitimacy and parentage in a number of prior cases, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248, 261-262 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The Court has accorded constitutional recognition to a "developed" relationship between a child and a non-biological parent in the contexts of adoption and foster-parent proceedings. This recognition strongly implies a fourteenth amendment liberty right may be extended to a presumptive father (*Visconti* 1988, 99). Below, explicit constitutional arguments relying on due process and equal protection reasoning will be presented.

3.2.1 Marital Father's Due Process Rights

The Fourteenth Amendment of the U.S. Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. In a series of cases the Supreme Court has recognized the relationship of love and duty in a recognized family unit as an interest in liberty entitled to constitutional protection. "The intangible fibers that connect parent and child have infinite variety It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases," wrote Justice Stevens for the majority in *Lehr v. Robertson*, 103 S.Ct. 2985 (1983), at 2990. This implies that a father, whether biological or not, who has assumed a role of love, care and financial support within the institution of marriage, has acquired a protected liberty interest (*Visconti* 1988, 118). Statutes that authorize court-ordered paternity testing over his objection without a prior determination of his fitness as a parent and existence of a developed relationship with his child violate his fourteenth amendment rights. It is worth noting that the husband in non-paternity action is the legal father of the child by operation of the marital presumption, just like any other such father in a marital union. The parent-child relationship exists by virtue of birth in wedlock. In *Michael H. v. Gerald D.* the Supreme Court upheld California's presumption of legitimacy, which declares it to be generally irrelevant for paternity purposes whether a child of the marriage was begotten by someone other than the husband. The Court has yet to render an opinion in a case where the mother, rather than the biological father, seeks to overcome the marital presumption. Such a ruling would not have to depart significantly from the reasoning employed in previous cases. Judicial rulings upholding the marital presumption do not necessitate the wholesale TTD atment of the natural parent preference (*Salthe* 1990 -91), which would arguably spell chaos to the practice of family law, because as a matter of law the marital father is the natural parent.

A family code provision granting the wife the right to rebut the marital presumption violates the presumed father's due process rights and interferes with his constitutionally protected liberty interest in a continuing legal and substantial relationship with his legitimate child of the marriage. It forces him to furnish evidence that will automatically result in bastardization of his child and loss of all legal rights of a parent upon a finding of biological non-paternity. Moreover the determination over his parental rights hinges on a finding of fact (an extra-marital sexual act resulting in conception and birth), for which the wife, but not he, bears responsibility. While suits for involuntary termination of parental rights afford the respondent legal safeguards, a non-paternity action instituted against a marital father by his wife leaves him without any remedy to preserve his legal status as parent, should a biological connection b TTsent, a fact which is beyond his control. Under a biologically based legal definition of parentage, abrogation of parental

rights is not conditional or discretionary, it is automatic and conclusive. His fitness as a parent, the scope of the responsibilities he has assumed, and the quality of the father-child relationship are immaterial to the wife's entitlement to have blood- tests ordered over his objection to effect the termination of his status as a parent.

3.2.2 Child's Due Process Rights

The relationship between parent and child being defined as a value worthy of constitutional protection, a reciprocal argument can be made with respect to the child. The mother's statutory right to rebut the husband's paternity deprives children born in wedlock of their status of legitimacy, and a continued relationship of association, love, and support with the presumed father with no due process other than procedural safeguards relating to the proper collection and appraisal of the genetic evidence.

Time and again the Supreme Court has held that an existing parent-child relationship enjoys constitutional protection from state interference in the absence of a powerfully compelling countervailing interest. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981), citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Termination a child's legal and de facto relationship with his presumed father, the only father the child may have known from birth, subverts the state's declared interest of promoting the welfare of the child. Where no biological father ever asserted a claim to a relationship with the child, no weighing of competing interests is necessary, and consequently no limitation on the presumed father's rights to maintain his relationship with the legitimate child of the marriage is justified. Where two competing claims by marital and adulterous biological father conflict, the State may favor the former over the latter as a matter of social policy. Faced with the problem of weighing competing claims the Supreme Court has relied on the doctrine that "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring," *Lehr v. Robertson* 463 U.S. 248, 261 (1983), *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843-44 (1977). The Supreme Court has established the principle that "the rights of the parents are a counterpart of the responsibilities they have assumed," *Lehr*, at 2991, and employed behavioral criteria such as financial support, emotional attachments, and daily association. Conversely, the Court has consistently declined to recognize the claims of unwed fathers who have not provided for the support of their children, *Lehr v. Robertson* 463 U.S. 248, 263 (1983).

The unconstitutionality of the wife's right to deny the husband's paternity is not absolute, however. It is limited to where the state has narrowly defined paternity in terms of a formal biological connection and made scientific paternity tests the arbiter of legal father-child relationships, so that a presumed father automatically loses all rights of a legal parent upon a finding of non-paternity. Family codes that recognize non biological presumed fathers as legal parents make the mother's right to establish the husband's paternity legally inconsequential, and may thus pass constitutional muster.

Adoption of the equitable parent doctrine pioneered by the Michigan Court of Appeals in *Atkinson v. Atkinson* would be the judicial equivalent (see *Andrews* 1988). In both cases the issue of exclusive or dual paternity, and definition of legal parent would have to be resolved.

3.2.3 Equal Protection Challenge: Gender-Based Discrimination Between Spouses

The concepts of equal justice and due process under the Fourteenth Amendment of the U.S. Constitution require the state to govern impartially and not to draw distinctions between individuals on the basis of differences that are irrelevant to legitimate governmental objectives. Men and women may not be subjected to disparate treatment when there is no substantial relation between the disparity and an important state purpose.

The provision of the law entitling a wife to deny the husband's paternity violates this principle. It creates a sex based distinction between spouses in marriages with children. Wives can jeopardize and possibly terminate the husband's legal and de facto relationship with a child or children of their marriage, while the mother-child relationships would never be so imperiled, and held hostage, by the husband.

To pass constitutional scrutiny gender-based distinctions must advance a compelling state interest, *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). Not only is there no compelling state interest to justify discrimination against the husband here, there is in fact a compelling state interest to the contrary.

The effect of the law runs counter to the state's interest in preserving parent-child relationship, and in preventing the bastardization of children and termination of support obligations, especially where the biological father has no substantial relationship with the child, or is not even known. The only objective served by the wife's right to prove the husband's non-paternity is the termination of the father-child relationship, which is socially counter-productive at face value. Nothing justifies the blanket presumption that resumed (but nonbiological) fathers are unfit parents. Indeed, a denial of paternity by the wife, rather than the husband, implies that the latter is wholly committed to the child.

Otherwise he would seek to establish his non-paternity himself, and free himself of any child support obligation.

Moreover, the wife's right to deny the husband's paternity allows her to benefit from her transgression and to gain an advantage over a husband who cares and is committed to a child he has not sired. Her ability to terminate the husband's parent-child relationship based solely on the absence of a biological link arises from one of the following circumstances:

1. an act of adultery by her
2. an act of misrepresentation concerning a child conceived out of wedlock but legitimated by the marriage of the parties preceding the birth of the child
3. a consensual agreement to get married and raise the child as the legitimate child of the marriage, despite the husband's suspected or known non-paternity.

Does a statute that allows only the husband to disclaim paternity survive the constitutional gender-discrimination test? It should, for the presumption itself is gender-based, and is justified by the absence of obvious biological signs of paternity. It applies to husbands only. Hence it is only husbands who need a legal remedy to overcome it in cases where they would otherwise be forced to assume responsibility for children they have not begotten.

Wives, by contrast, need no such remedy to protect their interests, because an adulterously begotten child of their husband will never be presumed

theirs. No support obligations will therefore arise for the wife. The functional equivalent of a man's right to deny his paternity would be the wife's right to deny her maternity of a marital child. Since the biological link between mother and child is obvious by pregnancy and birth, this case hardly arises save in the rare instance of baby switching. Unlike the husband's right to deny his paternity, the wife's entitlement to do so furthers no other legitimate right or interest. Under such a statutory scheme neither the presumed father nor the child have any remedy against capricious termination of their

A paternity suit serves to establish a father-child relationship and a support obligation where neither exists. A suit to establish non-paternity serves to terminate an existing legal and substantial parent-child relationship. Paternity suits are a means to assure economic support for the child, lift the stigma of illegitimacy, and are increasingly viewed as promoting the general welfare of children (Dallas 1980, 370).

Non-paternity actions have the opposite intent and contrary consequences. They are harmful to the children in question, to fathers committed to the children they raise as theirs, and to society at large.

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