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Paternity and the Quasi-Marital Child

*The Honorable Diana Tennis**

I. INTRODUCTION

It is difficult to imagine the depth of feelings aroused by some routine litigation. When that litigation centers on children and the adults who love them intensely, the result is often an emotional, chaotic and sometimes toxic courtroom mix. Given how much longer it takes to complete the appellate review process, one cannot help but think about the pain and turmoil the children (and adults) suffered while some of the herein cited cases made their way through our court system.

When reading the cases themselves, consider that the litigation likely took one to two years at the trial level, and often at least that much time working its way up through one or more levels of appeal. In some cases, the children have gone from being toddlers to middle-schoolers by the time the courts determine their lifelong legal parents. Sometimes the legal result is that the children no longer keep the parents they have loved since birth. To say that the legal system is not equipped to deal with the emotional quagmire it creates in family cases is a drastic understatement. Pointing out the structural problems inherent in utilizing a slow, logic driven, paid-by-the-hour legal system to determine the family dynamics for children is not the purpose of this article. However, the author hopes that with every new generation of legal professionals we will come closer to recognizing the harm being done to our families and develop better practices and principles to help families reorganize legally, and do so in an ever more child-centered and emotionally healthy way.

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II. QUASI- MARITAL CHILDREN AND THE PARENTS WHO LOVE THEM

Historically, fathers looking to establish their legal rights over children have had a hard row to hoe, at least as compared to their female counterparts. At common law and under early “bastardy” laws, biological fathers had no parental rights over children born out of marriage. The first paternity statutes were created as tools for mothers to obtain financial support,¹ and for a long time, men could not use these tools. Under the initial “Bastardy Act” of 1828, only unmarried women could sue for paternity and child support. Relevant to our discussion herein, this changed significantly in 1976, when the Florida Supreme Court found under equal protection grounds that a woman married to another man (who was not the biological father of the child) was permitted to sue the biological father for child support.² In 1980, the right to sue for paternity was finally extended to the biological fathers themselves.³

Fast forward to 2019. The “family” landscape has mushroomed exponentially in variety and diversity. We are now in the bold new age of complex merging families, men and women waiting longer to marry and have children, fading stigma regarding unwed births, and exploding technology in the baby-making sector. The result is an ever-expanding category of “quasi-marital” children. While traditionally defined as “a child born when the mother is married to a man other than the biological father,”⁴ it can now be said that there are a multitude of potential categories of “quasi- marital” children.⁵

Herein we will discuss the development of the fundamental rights of parenting and the expansion of fathers (and the author

¹23 FLPRAC Section 5:2.

²See *Gammon v. Cobb* 335 So. 2d 261 (Fla. 1976).

³See *Kendrick v. Everheart* 390 So. 2d 53 (Fla. 1980).

⁴See *Fernandez v. McKenney* 776 So.2d 1119 (Fla. 5th DCA 2001); See also *Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003) (citing Chis W. Altenbernd’s article *Quasi-Marital Children: The Common Law’s Failure in Privette and Daniels Calls for Statutory Reform*, 26 Fla. St. U.L. Rev. (1999)).

⁵*Nevitt v. Bonoma* 53 So. 3d 1078 (Fla. 1st DCA 2010) (“Cases involving ‘quasi-marital children’ are particularly complicated because they present major public policy issues that are difficult, if not impossible, to address with the case law method.” (quoting *Dep’t of Revenue ex. Rel. Preston v. Cummings*, 871 So. 2d at 1061 (Fla. 1st DCA 2010)).

would argue children's) rights to lay claim to a legal relationship between that biological parent and their child. We shall also endeavor to parse out of the myriad of patterns, those facts that appear to improve a biological father's legal chances to establish paternal rights, and explore what remains to be done to encourage truly children-centric determinations about parentage.

III. JURISDICTION OVER THE CHILD

No legal discussion about parentage would be complete, particularly relating to such a transitory state as Florida, without touching upon jurisdictional and standing issues. Before a trial court can make any initial custody decision, it must have subject matter jurisdiction to do so. Florida joins most other states in following the UCCJEA⁶, which has its Florida corollary in Florida Statute § 60.502. Generally speaking (and this could be an entire article)⁷ a Florida court has jurisdiction over a child, and can make an initial custody determination of that child, if Florida is the "home state" of the child.⁸This includes children born out of wedlock.⁹ To oversimplify, under the UCCJEA, Florida is the "home state" of the child if the child has been in the state for the last six months prior to filing, or has been in the state for a period of six months that ended in the last six months.

This last bit is a little tricky, and is better understood with a hypothetical. Let us say the Florida court is assessing whether it has "home state" jurisdiction over a child when presented with a Petition to Establish Paternity filed on October 1, 2019. Assume all technical pleading requirements have been met.¹⁰

As of the date of filing, the child is living with his grandmother in Michigan, but only as of June 2, 2019. Prior to that date, the child lived in Florida and attended school here and had done so since January 2016. Because the child's Florida residency ended less than six months prior to the date the court is deciding jurisdiction (October 1st back to June 2nd is four months), Florida

⁶Uniform Child Custody Jurisdiction Enforcement Act. Massachusetts remains a hold out, following instead the UCCJA.

⁷A full discussion would include important exceptions, and limited exceptions, such as when a Court takes on temporary "emergency jurisdiction" or when a child does not meet the conditions of "home state" in any jurisdiction.

⁸FLA STAT §61.514 (2018).

⁹See *Baker v. Tunney* 201 So.3d 1235 (Fla. 5th DCA 2016).

¹⁰See FLA STAT §61.514 (2018).

can be found to be the child's "home state" and the Florida court has jurisdiction to make the initial custody determination.

IV. STANDING AS A BAR

As indicated above, Florida's paternity statutes have not always been available to fathers when they sought to create a legal relationship between themselves and their children. Currently, Florida Statute § 742.011, our Paternity Statute, provides standing to the following persons, "*when paternity has not (already) been established by law or otherwise.*" {emphasis added}

- A pregnant woman
- A woman with a minor child
- Any man who has reason to believe he is the father of a child
- Any child

The qualifier italicized above is critically important, as the common law in Florida includes a deeply held concept that a child born into an intact marriage *creates the establishment* of legal paternity of that husband to that child. Furthermore, a mother who marries the reputed father after the birth of a child will result in her husband being deemed the legal father.¹¹ As an important and enduring corollary to standing, this "legal father"/ husband remains as an indispensable party to any litigation brought by a putative / biological father.¹²

Historically, a child having been born into an "intact marriage" was a complete bar to a biological father suing for paternity (legal parental rights), based on standing, when the Mother was married to another.¹³ The primary goal was to protect marriages, and the parochial concept of the "legitimacy" of children was determined to be so basic and sacrosanct as to wholly

¹¹See FLA STAT. §742.091 (2018) (states that when a mother marries the reputed father of a child born out of wedlock that child is legally the husband's child); see also FLA STAT. § 382.013(2)(f) (Upon receipt of marriage license, birth certificate shall be amended "as though the parents were married at the time of birth."); see also *Dep't of Health and Rehab. Servs. ex rel. D.A.R. v. C.M.B.*, 661 So. 2d 22 (Fla. 2d DCA 1994) (for discussion of the limits and what "reputed" may mean).

¹²See *Fla. Dep't of Revenue v. Cummings*, 930 So.2d 604 (Fla. 2006).

¹³See *Slowenski v. Sweeney*, 64 So.3e 128 (Fla. 1st DCA 2011); but see *Simmonds v. Perkins*, 247 So. 3d 397 (Fla. 2018) (disapproving); see also *Bellomo v. Gagliano*, 815 So. 2d 721, 722 (Fla. 5th DCA 2002).

determine standing, and gave the putative father no rights whatsoever. The biological father's rights were suborned if not downright ignored in this analysis. So too ignored, were the children's rights to their biologically connected families and in so doing, the children's best interests were, by definition, not championed.¹⁴

There is another way in which father's paternal rights are implicated. In addition to the deeply rooted common law concept that a man married to the mother is the legal father of the child even when he is not the biological father, there is another way men become "legal fathers" without court orders. Florida Statute §742.10 states there is a "presumption of paternity" that arises when both parties sign the affidavit of parentage at the birth of a child. This affidavit, usually signed by both parents in the hospital at or near the time of birth, affirms that the male is the biological father, and with that, he is placed on the birth certificate as the father of the child. This creates a presumption of parentage that has also been held to be quite strong. So strong, that a man who is on a child's birth certificate but wants to "take it back" must file a Petition to Disestablish Paternity to disengage legally from his parental obligations (and rights). This presumption however, historically, does not appear to carry the legal heft and import of a mother being married at the time of the birth. This is likely because it does not impact the revered "marital relationship" nor the "legitimacy" of a child.

At least as far as the Florida legal precedents of the last thirty years dictate, the value to society of a child having two biological parents is not as strong as ensuring that a child's legitimacy, once established, is maintained. Legitimacy has been the primary governing principle. Fathers attempting to insert themselves into this sacred territory have been routinely treated as the interlopers into what are treated as perfectly good marriages, despite the obvious evidence to the contrary. Historically, many more fathers failed than succeeded in asserting their parental rights into an "intact" marriage, in the name of this archaic principle of "legitimacy". It appears that finally this morality-based dictum is

¹⁴See *Michael v Gerald* 491 US 110 (1989) (Scalia, J., plurality) (upheld the constitutionality of the marital presumption and, in doing so, ruled that unmarried biological fathers have no constitutionally protected rights to assert paternity when the mother is married, and even in this fairly extreme case, when the child thought of the putative father as her own).

being scrutinized, challenged, stretched, and, some would argue, is slowly making its way into obsolescence. The factual variety abounds (even without getting into same sex parentage, surrogacy parentage, and adoptions). Currently legal fathers may be biological fathers or may not be biological fathers (eg. men listed on the birth certificate and/or a husband in an intact marriage). The plight and progress of putative / potentially biological fathers is the primary legal battle to be examined in this article.

Again, when potential fathers seek to lay claim to rights over children when the mother is married, the situation may be best referred to involving a “quasi-marital child”.¹⁵ As is the case in all legal areas, subtle differences in facts often drive the outcomes in legal precedents and cases that appear to stand for one outcome, fail to support that outcome over time. For example, to discuss the seminal case *Department of Health and Rehabilitative Services v. Privette*,¹⁶ in its full context, one must first look to the case of *Gammon v. Cobb*.¹⁷ When looking at the cases that would follow for the next decade and a half, one would have thought that the essential *Gammon* facts could easily have led to another result.

In *Gammon*¹⁸ the mother sought to establish paternity in order to obtain child support from the biological father of her seven children. There was already a legal father, as she was married, but she had not had any contact with her husband in 20 years. Her suit was dismissed at the trial level as Florida Statute §742, the paternity statute, required her to be an *unmarried* female plaintiff. The Florida Supreme Court in *Gammon* notes that the statute indeed contemplates a “unmarried” female petitioner, and the presumption of legitimacy flowing from her being married is “one of the strongest rebuttable presumptions known to law.”¹⁹ The Court notes in determining the constitutionality of Fla. Stat. §742 that allowing married women to sue other men for paternity would entail them de-legitimizing the child at issue, but that societal norms had so developed that being considered “illegitimate” was likely better than having seven more children on the public dole.²⁰

¹⁵*McKenney*, *supra* note 4.

¹⁶*Dep't of Health and Rehab. Servs. v. Privette*, 617 So. 2d 307 (Fla. 1993).

¹⁷*Gammon*, *supra* note 2.

¹⁸*Id.*

¹⁹*Id.* at 264

²⁰This concept, that illegitimacy could be worse than not being financially provided for is a concept that hung on with tenacity. *See Grant v. Jones* 635 So.2d 47 (Fla. 1st DCA 1994).

Additionally, in this scenario, there are seven children who would be de facto fatherless, as her husband does not appear to have taken that role. Accordingly, the Florida Supreme Court held that the portion of Fla. Stat. §742 requiring the woman suing to be “unmarried” violated the equal protection clause, was unconstitutional, and struck that portion down.²¹

Cracks in the presumption of legitimacy conferred by a marriage were inevitable. In the case *Barnes v. Frazier*,²² the presumption of the legitimacy of a child born during a mother’s intact marriage was all but ignored, where the married mother openly acknowledged the putative father as the biological father and where she was not attempting to use Fla. Stat. §742 as a sword in their custody dispute. Other cases still sought to differentiate their facts for just results, such as *Matter of Adoption Baby Doe*,²³ wherein a biological father (proven by DNA), who had been paying support, wanted to stop the adoption (to third parties) of a child he had with a married woman. The appellate court found a way to provide him standing.²⁴

The seminal Florida case that is the cornerstone of the current established law in this area is *Privette*²⁵. This case has had enduring, if not always clear-cut, influence on cases to follow. It is pivotal in that it reflected a 180 degree turn away from the *Gammon* court’s pragmatic approach to the conundrum presented by the quasi- marital child. The facts are simple. In *Privette*, the State of Florida sought to collect back child support, (whereas *Gammon* had been a private action by the mother). The State of Florida, through the Department of Revenue, sued the biological father for repayment of public assistance the state had provided to the mother. This type of state action is so mundane as to literally take place every day of the week in every corner of this state. The mother was married to another man when the child was born, so, in accordance with Florida law, it was her husband and not the biological father who was listed on the birth certificate as the father of the child.²⁶ The State, without acknowledging the mother was married to another, requested that the trial court order the

²¹*Gammon*, *supra* note 2 at 269.

²²*Barnes v. Frazier*, 509 So.2d 401 (Fla. 5th DCA 1987).

²³*Matter of Adoption Baby Doe* 572 So.2d 986 (Fla. 1st DCA 1990).

²⁴While still pointing out that at that time an unwed father was not similarly situated to an unwed mother. *Id.* at 988.

²⁵*Privette*, *supra* note 16.

²⁶Florida Statute §382.013(2).

parties to submit to scientific DNA paternity testing to prove parentage.

This routine request for scientific testing is so commonplace to our ears today, we must put some real effort into remembering that DNA testing was anything but commonplace in the law up until this time. In the 1960s, highly accurate genetic paternity testing became a possibility for the first time when HLA typing was developed. HLA compares the genetic fingerprints on white blood cells between the child and alleged parent. Even more accurate DNA parental testing became available in the 1980s with the development of RFLP. Then in the 1990s, PCR²⁷ became the standard method for DNA parental testing. PCR is a simpler, faster, and more accurate method of testing than RFLP,²⁸ and has an exclusion rate of 99.99% or higher. This DNA testing technology was not immediately accepted in forensic settings, of course. Results of DNA testing and comparison was first used to successfully convict a criminal defendant in 1987 when Tommie Lee Andrews was convicted of rape in Orange County Florida. This is all hard to keep in mind, given the ease and ubiquity of DNA testing in every type of forensic and non-forensic setting today. A DNA testing for paternity determination is now widely available, requires only a quick swab of the mouth of parent and child, costs less than \$200, and can be done at any number of labs available in most towns.

It is fitting then, that this seminal and enduring Florida Supreme Court case dealing with quasi-marital children is born of the era when technology was first being used to easily, inexpensively and reliably answer the question of who is the biological father of the child. It would be much easier to continue to keep putative fathers from “busting” up families if it continued to be impossible to definitively determine the identity of the true biological father. The advent of readily available, non-invasive and dependable paternity testing, more and more frequently obtained by the parties without a court order, has had significant impact working in the background of these legal developments.²⁹

²⁷PCR Polymerase Chain Reaction, first developed in 1983.

²⁸Restriction Fragment Length Polymorphism

²⁹*Fernandez*, Judge Alterbrand, footnote 11. See also *I.A. v. H.H.* 710 So.2d 162 (Fla. 2d DCA 1998) (showing clearly how DNA results can change outcomes when judges could not have definitively known who the biological father was).

In *Privette*,³⁰ the Florida Supreme Court ignored its previous logic in *Gammon* entirely, and looked to the more elusive, ephemeral and paternalistic goal of protecting the legitimacy of the child. Once again, the siren call of legitimacy sounded in Florida. “[W]e cannot agree that the State can risk plunging children into the stigma of illegitimacy and undermining parental rights for no better reason than appears on the present record. A good deal more is required.” The concept of “best interests” in *Privette*³¹ has nothing to do with ensuring financial security for the child or in the child having a father; it is singularly implicated the central principle of legitimacy itself.

A reminder that the apparent goal of *Gammon*,³² was not to protect the child’s legitimacy but to protect the child’s right to financial support. This particular goal was roundly derided by the *Privette* Court, “[t]his case is about impugning the legitimacy of a child for the sake of money allegedly owed to the State of Florida.”³³ It is clear the Florida Supreme Court was irritated that the State actor was sloppy in its pleading and presentation, and that it ignored wholly the legal hurdles inherent, ie. that the husband / legal father was in the picture (and likely technically obligated to support this child). IF the case had involved the financially strapped and child burdened mother as in *Gammon*, or if the trial court had perhaps made a better record; perhaps the outcome could have been different.

The procedure set out by the Supreme Court in *Privette*,³⁴ essentially adopted the district court’s ruling, and was the new procedure for dealing with the standing issue in quasi- marital children cases. This would be for putative fathers, or for a third-party actor wanting to remove the mantel of legal fatherhood from husbands and set it down on other men’s shoulders. Prior to a trial court ordering DNA testing, it must hold a full evidentiary hearing to determine, by clear and compelling evidence, the best interests of the child, together with the appointment of and full investigation by a Guardian Ad Litem (GAL).³⁵

³⁰*Privette*, *supra* note 16.

³¹*Privette*, *supra* note 16.

³²*McKenney*, *supra* note 4.

³³*Privette*, *supra* note 16 at 305.

³⁴*Privette*, *supra* note 16.

³⁵*Privette*, *supra* note 16 at 308.

Again, the focus being on the process to acquire DNA testing underscores the seismic shift this new technology brought. Cases pre-*Privette* would not have dealt with this issue at all. The standard set out in *Privette* did not foreclose a putative father bringing such an action, although it does not state such specifically. This third-party actor case still promoted the idea that the presumption of legitimacy was, always, rebuttable and not an excuse for courts to dismiss cases prematurely. The language that some courts used continued to evolve, softening the “presumption language”, and courts started to consider who was available to actually parent the child.³⁶ As much as the central ruling of *Privette* was DNA testing, which leads to the definitive truth about parentage, *Privette* is still cited in many cases that stand for the premise that the truth of paternity is relegated to “irrelevance”.³⁷ It is difficult to know if this is because the jurists making these decisions were depending on a history of cases made pre-DNA, or if these decisions were really grounded in the safer but nevertheless outdated idea of preserving traditional concepts of “intact marriages” and legitimacy at all costs. It’s ironic really, that the judicial efforts expended to obstruct and prevent biological fathers from asserting and obtaining parental rights were made in order to protect marriages that were sufficiently flawed to allow wives to become pregnant by men who are not their husbands.

During the development of the law related to invading this presumption of legitimacy from the outside, there was the development of the other side of the coin. Legal fathers were also actively seeking ways out of their parentage and financial obligations. In this way too, DNA testing brought clarity and heartbreak to many families. Fathers who became suspicious could use DNA technology to learn, to their joy or disappointment, that they were or were not biologically connected to the child they had been parenting.³⁸ Some men made a heartbreaking decision that they did not want to “support another man’s child”. As more men attempted to lay legal claim to their child born during the mother’s marriage to another man, so too were husbands and legal fathers endeavoring to terminate child support obligations by using DNA

³⁶*J.T.H. v. N.H.* 84 So.3d 1176 (Fla. 4th DCA 2012).

³⁷*C.G. v. J.R.* 130 So.3d 776 (Fla. 2^d DCA 2014).

³⁸As DNA company Identigene says in its marketing material, “Putting your mind at ease has never been more convenient, affordable or accurate.” New York times magazine article November 17, 2009.

paternity testing as a shield rather than a sword. As the law slowly thawed to allowing putative fathers to make a case in Court as to why they should be determined the legal father, so too did the law warm up to those who wanted out of that legal relationship.

The Florida Supreme Court in the groundbreaking case of *Daniel v. Daniel*,³⁹ continued the degradation of the “sanctity of legitimacy” by significantly expanding the possibilities for men who sought to avoid child support obligations. In *Daniel*, the husband / legal father married the mother knowing that the child to be born three months later was not his own.⁴⁰ Pursuant to *Privette*,⁴¹ the trial court appointed a Guardian Ad Litem who ultimately opined that the legal father was in a better position to take care of the child financially. It appears that neither biological or legal father wanted to assert any “parental rights” so the Court just behaved as if the child support obligation was separate from the legal fatherhood. Meaning you can take a man off the hook financially through disestablishment, while still considering the child born legally to that man and legitimate. The appellate court allowed the non- biological father to be relieved of his financial responsibility for the child because said responsibility was not “voluntarily undertaken”.⁴² In separating the concepts of “paternity” and “legitimacy”, the Florida Supreme Court made it easier for legal but non-biological fathers to avoid unwanted financial responsibilities. The bulwark of the traditional “legitimacy” principle continued to crack.

So just four years after *Privette*, the Florida Supreme court, which had created steep barriers for biological fathers seeking the privileges and benefits of parentage, held that, when uncontested, the legal father may walk fairly simply out of that legal relationship.⁴³ *Daniel*, perhaps unintentionally, may have also provided robust ammunition for biological fathers trying to

³⁹*Daniel v. Daniel* 695 So. 2d 1253, 1254 (Fla. 1997).

⁴⁰*N.H.*, *supra* note 36.

⁴¹*See Privette*, *supra* note 16.

⁴²*N.H.*, *supra* note 36.

⁴³*Daniel* is discussed in many disestablishment cases, wherein legal fathers seek to avoid their legal obligations and “disestablish” their paternity. *Daniel* was decided prior to the establishment of the requirements of the disestablishment statute Florida Statute §742.18. While not overriding any of the *Daniel* principles, this statute does include very particular pleading and procedural guidelines that must be followed.

establish paternity.⁴⁴ This appears to be the definitive legal separation of the principle of “legitimacy” from the principle of “paternity”. The Court found, conveniently for this “legal” father, that there is a difference between legitimacy, which reflects the public policy desire that children have a recognized father, and paternity, which establishes formal rights and responsibilities holding that “paternity and legitimacy are related, but are nevertheless separate and distinct concepts.”⁴⁵

V. POST *PRIVETTE* AND *DANIELS*

In the years since *Privette* and *Daniels*, courts have moved towards a greater acknowledgement of the importance of keeping the children’s best interests in the foreground. Although *Privette* included a GAL component, which would typically mean a “best interests” determination, that evaluation was still centered on whether the loss of “legitimacy” was in the child’s best interests. Courts appear more and more to have finally begun to address the genuine best interests of children, not the theoretical moral interests, but the quality of life that the child will have (and not just financially) in a given outcome. Concurrent with that development, and not coincidentally, the law has begun to really speak to the value of a father’s relationship with his child.

The slow move away from legitimacy and into real world best interests’ considerations was not uniform. From 2002, for example there are decisions like that in *RHB v. JBW*.⁴⁶ In *RHB*, the appellate court upheld the traditional old school holding that when the mother is married at birth of child, the putative father had no standing to bring suit under Florida Statute §742. This case just ignores a wealth of more nuanced situations in which biological fathers have been found to have standing, and have prevailed in exactly those types of paternity cases. In other cases, the Courts have ignored the standing issue, and instead created additional

⁴⁴Because if non-biology is enough to take the legal and custodial father away from a child, how can one not argue biology is the guiding factor? See *P.G. v. E.W.* 75 So.3d 777 (Fla. 2d DCA 2011) (Child born prior to the marriage, husband signed birth certificate. Divorce later and he takes on primary residential custody. Court finds that DNA test showing child is not the father’s is “newly discovered evidence” and grants of petition to disestablish paternity of 7-year-old living with petitioner).

⁴⁵*Privette*, *supra* note 16.

⁴⁶*RHB v. JBW* 826 So.2d 346 (Fla. 2d DCA 2002).

barriers, such as requiring allegations that the legal father had abused or abandoned the child.⁴⁷

Despite those throwback cases, there has been an overall shift away from use of standing as a total bar to actions brought by putative fathers, albeit not always without some moralizing. In *C.G. v. J.R.*⁴⁸ the Second District Court of Appeal uses a newer sounding “best interests” language, but it is also clear that the circumstances surrounding the quasi-marital child are less than impressive to the court. The mother in this case was married at time the child is born. The husband was also listed on the birth certificate as the father of the child. Putative father, C.G., filed his paternity action.⁴⁹ Interestingly, in a creative move ahead of its time, the two biological parents and the husband entered into a three-way agreement giving both men timesharing rights, which the trial court approved. The agreement was entered into by mother and bio dad during her separation from the husband, and appears to acknowledge the complicated family reality that this child had two men in her life who loved her like a father. After a dispute arose, the trial court changed course and found the agreement unenforceable as it would create a “dual paternity”, meaning two fathers. After input from a Guardian Ad Litem as to who should win in the daddy competition, the trial court found that the legal father/husband would remain the only legal father, and the Second District affirmed this decision.

The *C.G.* court appeared to consider the origins of this mess, in that the biological father happened to be the wife and husband’s “business partner”. This illicit office romance and resulting “who’s the daddy” question had been kept from the Husband for some time, while he innocently, and genuinely fulfilled his father role. The result is quite dramatic, as the child and the biological father had been engaged in timesharing since the birth of the child. The trial court followed the recommendations of the appointed Guardian ad Litem and ultimately decided that between the two “fathers,” the legal father / Husband was the better parental choice. An important finding was that the child had lived solely with him

⁴⁷*GFC v. S.G.* 686 So.2d 1382 (Fla. 5th DCA 1997).

⁴⁸*C.G. v. J.R.* 130 So.3d 776 (Fla. 2d DCA 2014).

⁴⁹This combo of rebuttable presumption under §742.10 and also the common law strong presumption of legitimacy for a married father, appears in some cases as a super factor. Perhaps courts consider this to signify the intactness of the marriage, and arguably, the innocence of the husband, and perhaps a resulting bond with the child.

for two years at this point. The Court also found, dubiously given the history of the family, that this continued placement would protect the “presumption of legitimacy”.

The reality was that all aspects of the actual biological paternity had been hashed out, agreed to and written down by the parties. The three parents, as they defined themselves, had lived a much messier reality than “one legal father, one legal mother” for some time. It appears that when faced with disputes between three “parents” the trial court determined there was just one too many moving parts that could not be reasonably parsed out when disputes arose. Likely those issues are not, at the heart of it, any more difficult or complicated than any other post-agreement disputes between two parents. For now, however, it appears that best interests’ determinations, although they are becoming as important as “legitimacy”, are not enough to overcome the concerns about dual fatherhood. As we will see this is not so, it would seem, with mommies.

Interestingly, even as the *C.G.* court agrees that the parties’ agreement produces an unacceptable “dual paternity”, the appellate court cites *T.M.H. v. D.M.T.*⁵⁰, which was affirmed by the Florida Supreme Court ultimately in *D.M.T. v. T.M.H.*⁵¹ If the three-way parental contract of *C.G.* was deemed by trial courts as too much to deal with, the facts of *T.M.H.* and *D.M.T.* will bring on the vapors. Essentially both cases deal with a lesbian couple having a child that was brought to term in one woman’s body with eggs supplied by the other. Although the holding in *T.H.M.* was specifically relating to the definition of the word “donor”, and the constitutionality of the statue vis-à-vis two women in this particular circumstance, this case still has huge impact for the fundamental constitutional rights afforded to biological parents (in that case the Court finding both women to be biological mothers and afforded constitutional rights to their child).⁵² The *C.G.* Court did not appear to read *T.M.H.* as a “dual mother case” in the way they considered dual fatherhood, or they decided that due to biological facts, there would never be a corollary “two biological father” situation. Of course, that is a factual scenario that science does not, yet, foresee. If the sanctity of biology means that two women can both have maternal rights, essentially dual

⁵⁰*T.M.H. v. D.M.T.* 79 So.3d 787 (Fla. 5th DCA 2011).

⁵¹*D.M.T. v. T.M.H.* 129 So.3d 320 (Fla. 2013).

⁵²*Id.* at 338.

motherhood, then how can it be that we deny fatherhood to the only father with a biological connection just because there may be a resulting messy two fathers situation? Certainly, given that a child can, fairly easily have two mothers⁵³ and one father, the potential for three parent situations is just a minor factual adjustment away.⁵⁴ It is possible other jurisdictions may look at things differently. The Fifth District court of Appeals in *Posik v. Layton*,⁵⁵ for example, found that cohabitation agreements between an adult gay couple was enforceable.

The Third district conveniently found that the Florida Supreme Court holding in *T.M.H* applied only to situations wherein Florida Statute §742 was applied when two women had a child in that exact factual scenario. Meaning still just two parents, they just happened to both be women. This incredibly narrow reading arguably misses the forest for the trees. And seems to ignore those missed trees that are only male, as two men will never have an opportunity to biologically procreate in this way, they appear foreclosed from dual paternity unlike their female counterparts.⁵⁶

Other specific factual scenarios have allowed for the softening of appellate courts in this area and for the gradual expansion of putative father's rights, and consider also relationship and responsibility. For example, in *Nevitt v. Bonomo*,⁵⁷ where the mother was divorced at the time of the birth of the child at issue, her marriage arguably not being "intact" at the time of conception. During the pregnancy, the putative biological father sued for paternity and alleged in his petition for paternity that he had provided financial assistance to the mother and alleged he showed a "manifested a substantial concern for the welfare of the child."⁵⁸

⁵³*Id.*

⁵⁴Particularly since courts have now upheld the validity of stepparent adoptions for lesbian couples, when only one is the biological parent. See *In re Adoption of D.P.P.* 158 So.3d 633 (Fla. 5th DCA 2014).

⁵⁵*Posik v. Layton* 695 So.2d 759 (Fla. 5th DCA 1997).

⁵⁶This should not be confused with foreclosing two men achieving dual fatherhood by way of stepparent adoption, which is currently available to male couples in the state of Florida and is achieved in various ways, surrogacy, adoption by both parties, etc. The fact that this vehicle actually results in dual fathers likely will have impacts in future cases such as *C.G.*...perhaps it is more accurate now that courts disdain "triple parentage".

⁵⁷*Nevitt v. Bonomo* 53 So.3d 1078 (Fla. 1st DCA 2010).

⁵⁸*Id* at 1081.

This terminology would become, if not magic, then certainly the developing standard. This developing standard reflects the courts' slow and creaking turn away from moralizing, to look to the actual care of the child shown by the putative father. In this case all three parties admitted the child was the biological child of the petitioner. The mother wanted to have the child adopted by a fourth party. In order to strengthen their case, she and her ex-husband went so far as to have their Final Judgment of Dissolution vacated. By doing this, the mother ensured that her former husband would be deemed the "presumed legal" father of the child. Indeed, the trial Court dismissed the petition for paternity for lack of standing. The appellate court reversed, finding standing based on the facts alleged and acknowledged in the pleadings; including that the legal father and mother were separated for extended time at birth, the biology was known, and financial support being provided by the biological father.⁵⁹

VI. CONSTITUTIONAL CONCERNS

Florida is relatively unusual in that it has a right to privacy specifically provided in its constitution⁶⁰, being one of eight states where this is the case.⁶¹ This has been reflected in the areas of family law in a myriad of ways. The termination of a parents' highly protected rights to a child is a high bar and hurdle for the State, or private petitioners, in termination of parental rights action, and includes a higher standard of proof and right to effective assistance of counsel.⁶² State actions in dependency, wherein the

⁵⁹It is important to note that the decision of the appellate court did not result, necessarily, in a "win" for the petitioner, because it was based on the pleadings and standing alone. Adequate pleadings in this area, more than ever, may make critical difference in the outcome of cases.

⁶⁰Added in 1980, Article I section 23 "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

⁶¹Others being Alaska, Arizona, California, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina and Washington. National Conference of State Legislation, Privacy Protections in State Constitutions November 7, 2018.

⁶²*In Re Adoption of Baby E.A.W.* 658 So.2d 961 (Fla. 1995) citing Florida Constitution Amendments 5 and 14 "We recognize the sanctity of the biological connection, and we look carefully at anything that would sever the biological

Department of Children and Families alleges a parent is currently unfit to have custody of a child, although less permanent and serious than termination actions, also entail a right to counsel under statute, (although not necessarily competent counsel).⁶³ The Florida Supreme Court has found that when a father participates in raising child, his rights to contact are constitutionally protected.⁶⁴ Courts have repeatedly found that parental rights based on biological relationship are inchoate.⁶⁵ Courts have repeatedly found that equal protection principles are not offended by the current version of Florida Statute §742, although one wonders about whether the realities of this “equal standing” between mothers and fathers, given the obvious advantage mothers have in the “control” over children born to them.⁶⁶ Beyond due process considerations, there has not appeared to be deep dives into the constitutional implications, in the area of equal protection, in the cases dealing with the quasi-marital child and the fathers who attempt to assert their rights.⁶⁷

VII. THE CURRENT STATE OF THE LAW

Courts in more recent years have appeared to wade further into the facts than the old “standing” based decisions, which allowed trial courts to throw cases out based merely on pleadings and technical definitions. While this may lead to more subjectivity,

parent-child link.” *Id.* at 967 ; *See also J.B. v. DCF* 158 So.3d 653 (Fla. 1st DCA 2014).

⁶³*S.B. v. DCF*, 851 So.2d 689 (Fla. 2003).

⁶⁴*In re Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989); *D.M.T v. T.M.* H 129 So.3d 320 (Fla 2013) “The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. But see *G.F.C. v. S.G.* 686 So.2d 1382 (Fla. 5th DCA 1997) “We reject (the) claim of a constitutional right to assert paternity” when the only relationship is “biological fatherhood” , citing *Michael H. v. Gerald* 109 S. Ct. 2333 (1989)).

⁶⁵*Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996);” ; *State v. J.P. v. L.P.* 907 So.2d 1101 (Fla. 2005); *Russell v. Pasik* 178 So.3d 55 (Fla. 2d DCA 2015).

⁶⁶*Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989); *Nevitt v. Bonomo*, 53 So. 3d 1078 (Fla. 1st DCA 2010); *L.J. v. A.S.*, 25 So. 3d 1284 (Fla. 2d DCA 2010); *G.F.C. v. S.G.*; 686 So. 2d 1382 ((Fla. 5th DCA 1997); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923-24 (5th Cir. 2000).

⁶⁷*Kendrick v. Everheart* 390 So.2d 53 (Fla. 1980) being an important exception, and dealing directly with equal protection issues.

it allows for a more thorough consideration of all circumstances, and looking at real world advantages aside from theoretical moralistic interests. This has allowed more creativity by Courts attempting to “do the right thing” for children (and fathers).

An example of this is the only case currently citing to *C.G.* (adulterer business partner)⁶⁸, and which has a very different outcome. The Court in *DOR v. L.M.M.*⁶⁹ comes to a completely different result, based on fairly minor factual distinctions and a further downgrading of the role of the presumption of legitimacy. In *L.M.M.*, the State of Florida through the Department of Revenue filed a paternity action on behalf of a mother against a putative father, despite her having been married at the time of the birth of the child (sounds like *Privette*, no?) Despite having cited *C.G.*, the Second district in *L.M.M.* found for the State and held that the putative father was the legal father on the following grounds: 1) the husband was not on the birth certificate (she was married and this “oversight” was not explained) and 2) finding that the “presumption of legitimacy” was merely “implicated” by her having been married at the birth of the child (what happen to being a complete bar to standing *C.G.*?). The appellate court pointed out that any presumption can be overcome or rebutted.⁷⁰ Either this is a seismic shift in thinking for all kinds of cases, or the courts have more difficulty denying mothers financial support than denying biological fathers relationships with their children. Of course, for every paternity granted for support purposes, there is a father who now may sue for parental rights and timesharing using similar logic.

The most recent word out of the Florida Supreme Court on this topic is *Simmonds v. Perkins*.⁷¹ Ushering in what appears to be the new standard and definition of the path to paternity for putative fathers. The presumption of paternity (legitimacy) belonging to the husband when a child is born to that intact marriage, is rebuttable when the putative father has “manifested a substantial and continuing concern for the welfare of the child” and when there is

⁶⁸*C.G. supra* note 48.

⁶⁹*DOR v. L.M.M.*, 192 So.3d 582 (Fla. 2d DCA 2016).

⁷⁰And certainly, this mental leap is shorter now that *Daniel* has explained that once a child is legitimate, they shall always remain.

⁷¹*Simmonds v. Perkins* 247 So.3d 397 (Fla. 2018) Approving *Perkins v. Simmonds* 227 So.3d 646 (Fla. 4th DCA 2017) and disapproving *Slowinski v. Sweeney* 64 So.3d 128 (Fla. 1st 2011) and *Tejerino v. State* 843 So.2d 984 (Fla. 3rd 2003).

a clear and compelling reason, based primarily on the child's best interests"(emphasis added).⁷² It is hard to know what part of the morality of the players will have an ongoing effect on the results of this newer, more specific and fact intensive approach. In *Simmonds*, there was no question that the biological father was faultless, he had a three-year relationship with the mother, whom he thought was single. The adulterer was duped this time. The biological father was at the birth and assisted in the raising of the child. The biological father was the only father the child knew.⁷³

In *Simmonds*, the Florida Supreme Court took issue with Florida court's continued practice of dismissing these cases based on standing, rather than follow the "*Kendrick* test", and looking more quickly and closely to children's best interests. As a review of *Kendrick* reveals that barely more than dicta actually related directly to these issues, it is understandable that trial courts were not reading it the way the *Simmonds* Court seemed to.

It is true that *Kendrick v. Everheart*⁷⁴ is a case about a father suing for paternity rights over a child born to an intact marriage. But the ruling did not directly address biological father's rights to their children, but instead the equal protection issues related to Florida Statute § 742. The issue in *Kendrick* for the Supreme Court was whether men could utilize section §742 to obtain parental rights, when the plain reading of the statute was that this was a vehicle for mothers to obtain financial assistance from fathers.⁷⁵ The Florida Supreme Court found that the statute allowing a mother and a mother alone to sue for financial support was not a violation of the equal protection clause of the Florida Constitution, but that a father should not be precluded from using the statute to establish his paternity by way of "declaratory judgment".⁷⁶ The Supreme Court, having dealt with the matter at hand, goes on to comment that putative fathers remain in a legal position subjugated by the positions of mother and husband, but that times are changing. They go on to provide, without significant discussion, that the father at hand had shown standing by way of having

⁷²*Id* at 9.

⁷³*Id.*

⁷⁴*Kendrick v. Everheart*, 390 So.2d 53 (Fla. 1980).

⁷⁵It is hard to imagine a more compelling set of facts, given the putative father was actually in custody of the five children at issue and had been raising and supporting them solely.

⁷⁶*Kendrick*, *supra* note 74.

manifested a substantial and continuing concern for the welfare of his children.⁷⁷

It is not difficult to understand that lower courts may not have read this case as the “pathway to standing” that the *Simmonds* Court, decades later, concludes. The discussion of “manifested a substantial and continuing concern” in *Kendrick* is brief, at the end of a discussion about equal protection, and not clearly identified as a new standard for courts to consider. The *Simmonds* court reconfirms, in much stronger terms, the standard of care the putative father’s must show, that of manifest substantial and continued concern for the child and the child’s actual best interests.⁷⁸ The Court also discounts further the legal presumption of paternity, and specifically, the objections of the mother and husband/legal father. In other words, the Supreme Court urges fewer legalistic dismissals based on standing, and more thoughtful consideration of who has actually parented and cared for the child and the good faith actions of the putative father. On the other hand, the Court also made clear that simple biology was not enough, and a clear and compelling reason to overcome the presumption of paternity (legitimacy) is needed, biology notwithstanding. Basically, a “mini-trial” is now required to determine the standing of the hopeful father on these issues, but once the “legal father” presumption is overcome it would appear that the biological, not the legal father, will ultimately prevail.⁷⁹

The *Simmonds* opinion came at a time when other lower appellate courts had already begun to focus on best interests, such as the decision in *DOR v. Iglesias*⁸⁰ and *Fernandez v. Fernandez*.⁸¹ Few cases on these issues have been reported since *Simmonds* and none provide further insight into how the Courts are going to actually determine what is “manifest substantial and continuing concern” or “clear and compelling” reasons sufficient to overcome presumption of legitimacy, or even “best interests” in this context. It remains to be seen whether courts will be expected to make specific findings on particular factors, such as those set out in Florida Statute §61.16 (timesharing) and, if so, if the courts will be expected to actually compare the two potential fathers. It seems

⁷⁷*Simmonds*, *supra* note 71.

⁷⁸*Simmonds*, *supra* note 71.

⁷⁹*Simmonds*, *supra* note 71.

⁸⁰*DOR v. Iglesias* 77 So.3d 878 (Fla. 4th DCA 2012).

⁸¹*Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003).

certain that the Simmonds approach would have led to different results potentially in various prior cases.⁸² One of the more recent cases of note is *In the Interest of M.L.H.*⁸³, a heartbreaking and unusual case wherein the biological father, who was also on the child's birth certificate, was denied standing in a dependency action by the trial court. This is even while the mother and legal father's rights being terminated leaving the child parentless and presumably in foster care. This was also a case wherein the putative father appeared to act in good faith and was without blame. The appellate court, based on *Simmonds*, reversed.⁸⁴

VIII. WHAT ARE PUTATIVE FATHERS TO DO?

What kind of facts will prove to be the most important for a putative father to achieve standing under *Simmonds* and surmount the barriers to paternity of quasi-marital children? This may be a good starting list:

- a. While detailed pleading of standing needed, insist on evidentiary hearing that is likely required.⁸⁵
- b. Moving quickly to assert claims / file paternity.⁸⁶
- c. This would include properly joining legal fathers.⁸⁷
- d. Intactness of the marriage.⁸⁸

⁸²It is difficult to know how many cases that have been determined against clearly meritorious biological fathers on standing grounds, such as *JAI v. BR* 160 So.3d 473 (Fla. 2d DCA 2015) were they to come to court post-Simmonds.

⁸³See *In the Interest of M.L.H.* 2018 WL 3672945 (Fla. 2d DCA 2018).

⁸⁴*Id.*

⁸⁵See *L.J. v. State* 25 So.3d 1284 (Fla. 2d DCA 2010); *J.T.L. v. N.H.* 84 So.3d 1176 (Fla. 4th DCA 2012); *In the Interest of M.L.H.* 43 Fla. L. Weekly D1782 (Fla. 2d DCA 2018).

⁸⁶See *M.L. v. DCF* 227 So.3d 142 (Fla. 4th DCA 2017) (noting distinction to *J.T.J. v. N.H.* 84 So.3d 1176 (Fla. 4th DCA 2012); *In the interest of M.L.H.* 43 Fla. L. Weekly D1782 (Fla. 2nd DCA 2018).

⁸⁷*Drouin v Stuber* 168 So.3d 305 (Fla. 4th DCA 2015) Remembering that the right of joinder as the indispensable party belongs to the legal father / husband "Constitutional rights are personal and cannot be asserted vicariously" citing *Epstein v. Bank* 162 So. 3d 159 (Fla. 4th DCA 2015).

⁸⁸See *Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003) (although this does not appear clear cut as to whether separation is sufficient, and whether it matters that the separation did not come until after the conception) Courts have taken a more pragmatic approach as of late, questioning the assumptions of "intactness" . (when there is a geographical separation that precludes conception, such as in *Fernandez II*).

- e. Failure, or not, of legal father to support and spend time with child.⁸⁹
- f. Biological/putative father listed on birth certificate or legal father signing “fraudulently”.⁹⁰
- g. Agreement of the mother and, even more so, a continuing committed relationship between putative father and mother.⁹¹
- h. Financial support to the mother.⁹²
- i. Timesharing and a developed relationship with the child.⁹³
- j. Innocence (not knowingly having affair with married woman in “intact relationship”).⁹⁴
- k. DNA test results.⁹⁵
- l. Reputation of the putative father (or legal father) as “father” to the world.⁹⁶

⁸⁹See *Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003); *G.F.C. v. S.G.* 686 So.2d 1382 (Fla. 5th DCA 1997) (I.S. H.H 701 So.2d 162 (Fla. 2d DCA 1998).

⁹⁰*Supra* note 83 and a case one hopes will forever be limited to the exact facts at hand *A.D.A. v. D.M.F.* 204 So.3d 523 (Fla. 4th DCA 2016) wherein the legal father was determined to be dispositive, despite fraud being difficult to prove. Also of interest is the court’s insistence that the husband having fraudulently signed the birth certificate affidavit would negate his claim as legal father...while at the same time finding that the Mother would be estopped from making the argument that the legal father was not the father (citing *Flores v. Sanchez* 137 So.3d 1104 (Fla. 4th DCA 2014). Father fraudulently signs birth certificate, meaning should not get to claim legal fatherhood, and if mother allows him to fraudulently, then she cannot dispute his legal fatherhood. It is nonsensical. This is also a case that could make a reasonable jurist wish they had a fourth parental option.

⁹¹See *Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003), even better when they are married.

⁹²*C.G.*, *supra* note 48.

⁹³*C.G.*, *supra* note 48 (with *Simmonds* “best interests” analysis, could this not become the “super factor”?)

⁹⁴*C.G.*, *supra* note 48; See also *I.A. v. H.H.* 710 So.2d 162 (Fla. 2d DCA 1998).

⁹⁵See *A.S. v. S.F.* 4 So.3d 774 (Fla. 5th DCA 2009) (including emphasis on the timing of the test, prior to Mother marrying “legal” father. (*I.A. v. H.H.* 710 So.2d 162 (blood test done by agreement to potentially foreclose putative father, he attempted use as sword under Fl statute 742.12 (DNA presumption). *Fernandez v. Fernandez* 857 So.2d 997 (Fla. 5th DCA 2003).

⁹⁶See *In the interest of M.L.H.* 43 Fla. L. Weekly D1782 (Fla. 2d DCA 2018); *A.S. v. S.F.* 4 So.3d 774 (Fla. 5th DCA 2009) (which provides a definition of “reputed father”: “the individual generally or widely believed or considered to be the biological father of a particular child.” *I.A. v. H.H.* 710 So.2d 162 (Fla. 2d DCA 1998) (and this is the case even though the mother did not marry the

- m. Having registered with Florida Putative Father registry.⁹⁷
- n. GAL opinion.⁹⁸ But keep in mind, a GAL may not be required.⁹⁹

IX. TIMES CHANGE

When the winds of change blow, some people build walls and other's windmills – Chinese Proverb. Despite the enormous changes of the last thirty plus years and the strides taken in making statutes more gender neutral and with specific changes to the law in the family arena to even the playing field in custody fights, it has been difficult to shake the vestiges of “mother” as the real and more important parent. This has slowed the father's movement to get truly equal rights in timesharing and other parental rights, including asserting their rights over quasi-marital children of intact marriages. Statutes that remain on the books, such as Florida Statute §744.301(1), reveal the lingering “mommy” bias in the system and the law. This Statute states “the mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.”

This provision has been read in more recent times as merely asserting that a mother of a child born out of wedlock is entitled to primary custody until there is an initial hearing and the first court order finding paternity and directing timesharing (as opposed to the mother receiving sole custody forever or until the final judgment is entered).¹⁰⁰ Similarly, Florida Statute §742.0312

husband/legal father until after the birth of the child, keeping in mind Florida Statute 742.091).

⁹⁷See *In the interest of M.L.H.* 43 Fla. L. Weekly D1782 (Fla. 2d DCA 2018)..

⁹⁸*G.F.C.*, 686 So.2d 1382 (Fla. 5th DCA 1997) Interestingly, although *Privette* appears to almost mandate a GAL for best interest's determination of the having-bio-dad vs. losing legitimacy evaluation, there are very few cases wherein a GAL appears to have been involved. This author's anecdotal experience is that GALs are very rarely actually involved in these cases currently. Likely, when requested, particularly by “legal” parents, it is necessary. See *I.A. v. H.H.*, 710 So.2d 162 (Fla 2d DCA 1998).

⁹⁹*DOR v. Iglesias* 77 So.3d 878 (Fla. 4th DCA 2012) (pointing out that *Privette* appears to require a GAL but then immediately indicating that if there is no GAL the Court must evaluate best interests itself).

¹⁰⁰*Steward v. Walker* 5 So.3d 746 (Fla. 4th DCA 2009) invites the reading into Florida Statute 744.301(1) the unwritten additional contempt, that if a unwed father demonstrates and carries out the requisite settled purpose to be a father, he

indicates that if a judgment of paternity contains only child support, even though this would require a paternity finding, the mother still retains the right to all time-sharing over the child and has sole parental responsibility without prejudice. The father in that situation would have to file a Petition to Establish Paternity and to establish a time-sharing schedule in order to receive and exercise paternal rights.

Once the unwed parents are in paternity litigation, theoretically they have comparable ability to prove that any particular timesharing schedule is in the child's best interests.¹⁰¹ But likely biases from the "tender years" era remain.¹⁰² The "tender years doctrine", set out in *Dinkel v. Dinkel*¹⁰³ required courts to provide mothers of younger, infants "prime consideration" in custody matters.¹⁰⁴ The judges who make these determinations, of course, are human and largely reflect the societal norms and attitudes of their times. It is still the case that more than half of Americans see mothers as doing a better job than fathers in the parenting role, and only 1% see fathers as doing a better job.¹⁰⁵ The joint power of the statutes, case law, and historical preferences inapposite to biological father's rights have created significant and entrenched legal barriers to putative fathers hoping to lay claim to a married man's legal child. Biological fathers have persevered and continued to seek rights to their

comes within the first sentence, and is now an equal guardian to the mother. Citing *State v. Earl*, 649 So.2d 297 (Fla. 5th DCA 1995). In the *Steward* case however, even with a generous reading of 744.301, the father was found to lack standing to sue for tortious interference with his custody, as the mother was presumed the custodial parent under Florida Statute 742.031. This portion of the holding would seem to be limited to cases wherein there are Title IV child support orders entered after findings of paternity.

¹⁰¹Florida Statute 61.13 (1983 and 1991) as discussed in *Kuutti v. Kuutti* 645 So.2d 80 (Fla. 4th DCA 1994); *Ayyash v. Ayyash* 700 So.2d 752 (Fla. 5th DCA 1997).

¹⁰²This "doctrine" was enshrined in the case law until superseded by Florida Statute 61.13 (1983). Courts had a hard time giving up this sexist notion even after the 1994 changes to Chapter 61.13. See *DeCamp v. Hein* 541 So.2d 708n (Fla. 4th DCA 1989) (coming around with a full abrogation on the doctrine in *Cherradi v. Lavoie* 662 So.2d 751 (Fla. 4th DCA 1995).

¹⁰³*Dinkel v. Dinkel*, 322 So.2d 22 (Fla. 1975).

¹⁰⁴*Id* at 24.

¹⁰⁵Pew Research Center *Seven Facts about American Dads* by Kim Parker and Gretchen Livingston (June 13, 2018).

children, and slowly then, have wound a narrow and precarious path forward for themselves and all others behind them.

A. THE BOLDER FUTURE

There is no end to the potential family make-up. Between same sex adoptions, surrogacies, and children born and being raised by multiple parents, the law lags behind in its consideration of ground rules that will further the needs and bests interests of the children, rather than the adults who love them. Anecdotally, families have entered locally into the type of “two dads” agreement that was central to the *C.G. v. J.R.*¹⁰⁶ case, as is surely happening elsewhere, even with uncertainty about what local judges will do if these agreements go south. It is impossible to know how many adult children have been on the happy receiving end of such progressive “three parent” arrangements that are just not talked about. It appears that this type of agreement would not receive a judicial seal of approval currently, in at least the Second District (given the opinion in *C.G. v. J.R.*), but it is unclear where else this type of agreement may be enforceable, or what future courts will decide should be done with these complex, but voluntary, family arrangements. It puts families and children in a very difficult position if they are forced to negotiate in good faith an arrangement that leaves the child with more parents to love and support them, only to have that turn to dust when someone has a disagreement over whose turn it is to have spring break.

The Ad Hoc Parentage Committee” (the “Committee”) of the Florida Bar’s Family Law Section continues the search for solutions for “quasi- marital children” that are centered upon the best interests of those children in a fast-developing area of the law. The Florida Family Law Section and its Committee, working with legislators, suggest that laws are needed to deal specifically with these “quasi- marital” families and that this legislation should go farther to take into account the multitude of family groups in the real world. Best interests of children may not, in the end, have as much to do with the niceties of “legitimacy” and “intact families”, as having children benefit from having everyone who cares for them inside the legal family compound. Legislation has been introduced, so far without success, that would give Courts more real-world pragmatic approaches to situations wherein a child may

¹⁰⁶*C.G.*, *supra* note 48.

benefit from having more than two parents. Guidelines for allocating child timesharing and financial responsibility in that event are set out in the proposed legislation. As would seem to be harkened by trends in the Courts, culminating in *Simmonds*, the proposed legislation gives more latitude to Courts to fashion more creative and complex arrangements, when it is in the child's best interests.¹⁰⁷ This would be in addition to revamped and "gender neutral" statutory revisions throughout.

Other thoughtful conversations about solutions to these issues have also been taking place. In 2017, the National Conference of Commissioners on Uniform State Laws, a group of lawyers and judges that proposes model laws, drafted its newest proposed paternity statute, (Uniform Parentage Act) that would also deal with these quasi- marital children and their family litigation. Its comments specifically state as a goal dealing in cases wherein there are more than one presumption (eg. there is a husband but another man is listed on the birth certificate). This code also allows for legal rights to be provided to third parties who have "functioned as the child's parent for a significant period". It calls for determining the victor in parentage contests between multiple parents by way of using best interests' factors that are very similar to Florida Statute §61.16. Interestingly, this proposed code provides two alternates for adoption by states, one that would limit the number of legal parents to two, and one that would allow for the option of more than two being named if to do otherwise would be detrimental to the child.¹⁰⁸ Various states have adopted laws that allow for both "psychological parents" to win custody as well as provide for more than two parents.¹⁰⁹ Certainly, same-sex co-parents are increasingly the norm in many jurisdictions, including Florida.¹¹⁰

The New York Times Magazine has reported that child-welfare advocates opine that best interests of children should dominate in contests between biological father and legal fathers. In addition to the biological connection, the recognition that

¹⁰⁷It would also allow for very open adoptions if all involved agree, resulting in more than two legal parents long term.

¹⁰⁸Uniform Parentage Act (2017) UPA Section 613 *Uniform Law Commission* www.uniformlaws.org, Enacted in California Washington and Vermont.

¹⁰⁹UPA including comments Section 6.

¹¹⁰*See Dep. Children and Families v. Adoption of X.X.G.* 45 So.3d 79 (Fla. 3rd DCA 2010).

parenthood is not necessarily bound to genetics must be remembered. Reproductive technology has opened up both the possible parenting combinations, and also the ways of thinking about what it means to be a parent. It is now possible for one woman to carry the egg of another woman, only to have that woman be surrogate to two altogether different parents.¹¹¹

Courts across the country struggle with these issues, and are in need of legislation that keeps up with the realities of paternity contests of all kinds. In the case *In re Paternity of Cheryl*¹¹² the Massachusetts Supreme Judicial Court urged the state to require that putative fathers submit to genetic testing before signing a paternity-acknowledgment form or child-support agreement, arguing that “to do otherwise places at risk the well-being of children.”¹¹³ This may not solve the problem of the presumption related to marriage, but it would help in scores of other problems, including disestablishments brought by fathers long after children are old enough to be aware they are losing a father. This would also assist in those too frequent cases wherein there is a legal father/husband, but there is a potentially biological father at the hospital ready to sign the birth certificate.

X. CONCLUSION

As is known intimately to anyone who has ever spent a morning in a family court hearing room, custody contests are some of the most heartbreaking, dysfunctional and emotional scenes of American life. Well-meaning legal professionals work to assist angry, hurt and embattled families through a labyrinth of substantive laws, procedural rules, confusing local standing orders, and judicial requirements (capricious and not). The outcome is that the public is often shocked and horrified about what does or does not make it into a courtroom, and confused about why everyone else’s values and assumptions are different from their own.

The areas of law discussed herein are common enough to come up in just about every family practitioner’s career, and yet not common enough for most practitioners to be conversant about

¹¹¹Alex Kuczynski, *Her Body, My Baby*, The New York Times (2008), <https://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html> (last visited March 19, 2019).

¹¹²*In re Paternity of Cheryl* 434 Mass 23 (S. Ct. of Mass., Suffolk 2001).

¹¹³*Id.*

the important legal history and cases that offer the most insight. It is likely many judges are also not as conversant as they could be, and may have a tendency to want to continue the old trend of using “standing” as the easy way out of these cases. The author hope that this article will assist everyone involved, at least on the legal end, to be more thoughtful and intentional in dealing with these kinds of cases, and consider, above all, the needs and best interests of the innocent children at the heart of it all.