



6-24-2001

Rethink the Laws Relating to Fathers (Change: With the Decline in Married Mothers and Traditional Families, the Legal Image of Dads Needs Re-Examination)

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Recommended Citation

Rethink the Laws Relating to Fathers, *The Baltimore Sun*, Perspective Section, June 24, 2001

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Rethink the laws relating to fathers

Change: With the decline in married mothers and traditional families, the legal image of dads needs re-examination.

By JANE C. MURPHY

THE U.S. CENSUS count, taken every 10 years, is used to rethink public policy on everything from schools and hospitals to voting districts and roads. Government officials pore over the data and decide whether to change the social, political or economic status of those counted.

The 2000 census makes clear that married mothers and traditional families are on the decline. Shouldn't we use this data, then, to rethink family law, particularly the legal image of fathers?

The number of women raising children without a husband grew by more than 25 percent in the last decade, and only a quarter of American households fit the traditional family model of mother, father and kids. Even in the minority of households that could be described as traditional, roles of men and women have changed. The once clearly defined roles of mothers as child caregivers and fathers as breadwinners have eroded.

Although many debate the extent of the change, most agree that

men today are participating more in family life than did their fathers. Popular culture images of fathers have abandoned the distant provider in favor of the nurturing caregiver. Think of the father in the Volvo commercial driving back and forth between a soccer game and a swim meet. Social scientists have filled books and journals with studies purporting to demonstrate the importance of fathers in all aspects of the lives of children.

But, as is often the case, the law lags behind. The legal definition of fatherhood has changed little in the last 100 years. For centuries, the law's answer to the question of who is a father was simple: the mother's husband. Before DNA testing, the husband of the woman was presumed to be the biological father of her child, and so was proclaimed the child's legal father. The only recognized exceptions were cases where a man was sterile or impotent.

This "marital presumption" permitted courts to assume a set of biological facts in the name of preserving the sanctity and stability of what was assumed to be the cornerstone of a healthy society — the traditional family of husband, wife and children. In the last decades of the 20th cen- [See *Fathers*, 4c]

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Legal image of dads needs new thinking

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ture, science developed paternity testing with results approaching certainty. Despite the availability of DNA testing, the marital presumption is still used in many courtrooms to answer the question of who is the legal father. What one scholar has called "the law's struggle to preserve the fiction of an older moral order" has become increasingly inadequate in defining today's father.

One arena where the inadequacy of the law's definition of fatherhood is evident is in the cases columnist Ellen Goodman recently called the "Duped Dads." These cases typically involve situations in which a man has consented to paternity of a child without DNA testing, and later, often after many years have passed, questions whether he is the biological father.

For the record, not all fathers in these cases are innocent victims. They may have consented to paternity to solidify a relationship with the child's mother or to facilitate receipt of welfare benefits. Whatever the motive for agreeing to paternity without DNA tests, that decision often prevents further investigation or legal determination of paternity until too late for the child to establish a relationship with the biological father.

Challenge at divorce

In many cases, the challenge comes at divorce when child support is about to be ordered or after the state attempts to collect back child support through one of its many new tools — revoking a driver's license, intercepting a large tax refund or threatening jail.

While some courts have relied on the marital presumption to resolve these cases, that rule works only where the mother was married when the child was born. And the principal justification for the rule — to preserve the traditional family — makes sense only if such a family is there to preserve

ther. In some situations, letting the man "off the hook" will make sense for the child. Perhaps the child has no emotional bond with — or even knowledge of — the man whose name is on the paternity order. Maybe it's not too late to find the biological father and develop or legally recognize a relationship with that man or a stepfather or another man who has assumed the role of father in a child's life.

Creating a definition of fatherhood to account for complexity of families is a difficult task, but one that must protect children.

Another area that courts and policymakers need to rethink in light of changing family patterns is the law of child custody.

Early in our national history, the law recognized husbands, but not wives, as owners of property in the family. During this unenlightened period, children were considered property. When the mother and father split up, the father got everything, including the children.

This "paternal presumption" was replaced in the mid-18th century with another rule that declared mothers as the only acceptable caregivers of children, thus relegating fathers after divorce to the role of economic providers.

In the mid-1970s, the standard changed across the country to one that purports to look at "the best interest" of the child. But, in practice, this standard does little to prevent judges from relying on old stereotypes of father as breadwinner and mother as nurturer and is often punitive when either parent deviates from these roles. Fathers cannot be ordered to spend time with their children, but will be subject to an ever-expanding legal arsenal if they don't pay child support.

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While some courts have relied on the marital presumption to resolve these cases, that rule works only where the mother was married when the child was born. And the principal justification for the rule — to preserve the traditional family — makes sense only if such a family is there to preserve.

A few courts, in the interest of collecting child support or reducing the welfare rolls, have cut off a man's right to challenge paternity after a fixed period, usually one or two years after the paternity order. Courts in other states, including Maryland, have responded to changing patterns in families by opting for a rule based on biology. If a man has suspicions, he's entitled to have DNA testing. If he's excluded as the biological father, he is no longer a father under the law.

While this biological test might protect "Duped Dads," what about fairness to the child, the truly innocent party in this triangle?

Marriage and biology have little to do with the person a child thinks of when asked about her father. If she is lucky, she thinks about the person who is there each day when she wakes up, who makes lunches before school or does the car pool or carries the laundry up from basement and is a good partner to her mother. Or she may think of a person she does not live with, but sees regularly and who supports her emotionally, financially and all other ways that count.

Even in situations where the man has played no active role in the child's life, it is surprising how much emotional sustenance child development experts tell us a child gets from a name or a picture of someone she has been told is her father. He may have no emotional attachment, but the child feels a close bond with the only father she has known.

A "biology rule" that takes that away from a child is bad public policy. Also, given the loss of the right to support, governmental benefits and the right to inherit, the child suffers financial harm from vacating a paternity decree on the basis of biology alone.

While the statutes of limitations approach — which defines fatherhood by the number of years a paternity order has been in place — is generally better for children, it ignores the child's definition of fa-

therhood. This standard does little to prevent judges from relying on old stereotypes of father as breadwinner and mother as nurturer and is often punitive when either parent deviates from these roles. Fathers cannot be ordered to spend time with their children, but will be subject to an ever-expanding legal arsenal if they don't pay child support.

A new approach suggested by a group of academics, judges and lawyers from the American Law Institute proposes limiting the court's ability to resort to stereotypes and shifts the paradigm in child custody cases from parents to children. Instead of asking which parent has deviated from the prescribed role, the new approach states that a child's best interest is served by "continuing existing parent-child attachments" and giving responsibility to "adults who love the child, know how to provide for the child's needs, and place a high priority on doing so."

Parents are directed to define future roles with their children, based on the child's needs rather than using court resources to win a contest that depends on discrediting the other parent's ability to conform to narrow standards of parental skills that have little meaning to children.

Outdated conceptions

The problem with legal definitions of fatherhood that rely on marriage or biology or success as a breadwinner is that they are based on outdated conceptions of fatherhood. Being a father is not a status determined by a single fact or function, but a way of life. The genetic or marital facts are important components but are meaningless unless tied to a series of functions that, for children, are the essence of fathering.

Nurturing is more essential to fatherhood than biology or marriage to the child's mother and should be defined beyond emotional and financial support to include other important tasks of parenthood: cooking, shopping, cleaning, driving, arranging, worrying, participating and later, watching an endless array of artistic, academic or athletic activities and all the other time-consuming, exhausting, exhilarating and rewarding aspects of being a parent.

The new information about families in the census should encourage us to rethink family law.

Existing laws don't reflect the fact that children are central to the function of fatherhood. The needs and feelings of children ought to be central to any definition the law creates.