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Heteropaternal Superfecundity: The Parentage Law Implications of Twins with Different Fathers

Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

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Verdict

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JOANNA L. GROSSMAN

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An ordinary paternity case became more interesting when DNA testing revealed that the alleged father was genetically related to only one of a set of twins. To be more exact, the results showed that there was a 99.9 percent chance he was the genetic father of one twin, and a zero percent chance he fathered the other.



In an earlier day, we might never have known the true paternity of these twins. Just as we might not have discovered whether a

married woman's child was conceived in adultery—even though studies over time have shown that 3-5% of the children of married women are not fathered by the woman's husband. But technological developments have led to the discovery—and near perfection—of DNA testing, which can tie or exclude an alleged parent to a child almost infallibly.

With answers come questions. Must law defer to science in matters of parentage? In this case, a New Jersey court held that, as long as the scientific analysis was done properly, the DNA results relieve the defendant of parental obligation to the twin with whom he has no genetic tie.

T.M. v. A.S.

This case started as many do—a local social services agency filed for establishment of paternity and child support on behalf of a single mother. The child support system is a complicated federal-state hybrid, which involves, among other features, substantial governmental assistance in obtaining a child support order in the first instance and enforcing it thereafter. And, when the mother is seeking or benefitting from public assistance, the right to help from the government becomes an obligation. As a condition of receiving welfare benefits, a mother must assign the right to establish and collect child support to the relevant state agency and cooperate with the effort to gain support for the child.

The mother in this case, T.M., was receiving public assistance from the state of New Jersey, and thus was obligated to cooperate with the pursuit of a child support order. The case was filed against A.S., a man with whom she had been involved romantically prior to the birth of her twins. The parties appeared in court, and a DNA test was ordered. The results were unusual, showing that A.S. was the father of twin A.M., but not twin B.M.

The case was delayed for several months because of the unusual result. The agency, litigating on the mother's behalf, offered an expert witness to testify about the accuracy of DNA testing and its validity in this particular case, despite the unusual result. The mother provided an explanation for the result: she had sexual intercourse with two men within the same week when her twins were conceived. But despite the mutually corroborating nature of the witness and scientific testimony, the court walked a cautious path before concluding that A.S. was legally obligated to support to A.M., his genetic child, but not B.M.

The Development of Parentage Law

Parentage law—the statutes and doctrines that determine who qualifies as a legal parent of a child, with the concomitant rights and obligations—is constantly evolving, as the modern family assumes ever-more complicated forms. At its core, parentage law must

provide a framework for deciding which adults are tied to which children.

Depending on the context, biology may be dispositive or completely irrelevant. For example, in many states, a lesbian co-parent can establish parental status with respect to her partner's child, with whom she has no biological link, either because she is married to the child's mother or has acted enough like a parent with the consent of the biological mother to earn equal status. Likewise, a married man may be deemed the legal father of his wife's child even if DNA testing establishes beyond dispute that he is not the child's biological father. This can be so either because the state has a conclusive marital presumption of paternity or because the procedural requirements for disestablishing paternity, often time-sensitive and burdensome, have not been met.

For unwed fathers, biology has come to play a central role in the establishment of parentage, particularly as science has developed the ability to determine the existence of a genetic tie with almost absolute certainty.

But this was certainly not always the case, and a child's true paternity was not always a question the law sought to answer. Children born out of wedlock were considered the "child of no one" in early American law; as a corollary to this principle, neither unwed mothers nor fathers were legally tied to the child. States changed that rule for mothers during the nineteenth century, assigning the same rights and obligations of motherhood regardless of legitimacy. But for unwed fathers, the law's shift was slower and, ultimately, the law stopped short of granting unwed fathers legal rights on par with those of unwed mothers.

By the early twentieth century, virtually every state imposed a duty of support on unwed fathers, enforceable through "bastardy" proceedings in civil or criminal court. But the obligation of support came with little or nothing in the way of parental rights for the fathers who desired them. Those rights came later, after a series of decisions by the U.S. Supreme Court, beginning in the 1970s, that established constitutional protection for the rights of unwed fathers.

The Court's 1972 ruling in ***Stanley v. Illinois*** (<https://supreme.justia.com/cases/federal/us/405/645/>) started things off, ruling that states could neither categorically deny the existence of unwed fathers, nor presume them unfit to care for their children. The Due Process Clause provided strong protection for the right of parents to direct the care, custody, and control of their children. Later cases developed the doctrine of unwed fathers' rights. The biological tie plays a starring role. Although the biological tie between mother and child gives rise to full-blown parental rights, the biological tie between father and child gives rise only to an opportunity to develop a parent-child relationship. If he steps up, he obtains rights co-equal with those

of the mother. But if the father fails to grasp that opportunity, he can forfeit those potential rights completely.

States responded to these cases by eliminating most of the categorical rules regarding unwed fathers. But rather than equalize the rights of unwed mothers (who were automatically given the full benefit of a parent-child relationship) and unwed fathers, most states adopted a compromise approach that gave full rights to unwed fathers only if they had satisfied certain criteria.

Under a typical law, an unwed father could earn full parental rights through marriage to a child's mother, being named on a birth certificate, being adjudicated the biological father, or living openly with the child and its mother. Most states also set up a "putative father registry," which permits men who registered to be notified of proposed adoptions or other actions regarding their children.

But what if the father doesn't want rights? Or perhaps doesn't even know he has fathered a child? Parentage is a two-way street. The legal father has an obligation to support a child whether or not he desires or has developed a parent-child relationship. And those obligations, in most cases, turn on nothing more than the establishment of paternity.

The Role of DNA in Establishing Paternity and Child Support Obligations

Parentage law obviously predates DNA testing, which was first used in the early 1980s. It also predates blood typing evidence, which was used beginning in the 1920s to exclude the wrong man. But, as discussed above, parentage law historically was tied to marital status. Husbands were deemed legal fathers regardless of the biological truth; unwed fathers were disregarded, also regardless of the truth. This system had the benefit of avoiding reputation-marring and often sordid trials that were unlikely, in most cases, to produce any verifiable "truth." Married women were spared an inquiry into their infidelity; single women were protected from proof of nonmarital sexual liaisons that transgressed strongly held social norms. Moreover, it was widely presumed that unwed fathers would not be a reliable source of financial or social support for children, so the reputational costs wouldn't be offset by any benefits.

But with science's ability to accurately identify the biological father—easily and discreetly with a quick swab of a cheek—and the dismantling of the system that refused to acknowledge sex or reproduction that occurred outside of marriage, the law developed to allow biological truth to dictate the outcome of parentage cases, at least in certain contexts. An unwed mother in search of a source of child support is one of those contexts.

Heteropaternal Superfecundity: The Science Behind Twins with Different Fathers

The DNA testing in this case revealed a scientific rarity—heteropaternal (or biternal) twins. A scientific rarity, this situation can arise when a woman ovulates more than one egg—raising the possibility of fraternal twins—and has sex with more than one man during the ovulatory period. The same situation can transpire through a combination of sex with one man and assisted reproductive technology with the sperm of another; for that reason, the rate of bipaternal twins seems to be increasing as reproductive technology becomes more common. Sperm are hearty and can lie in wait for several days. If the random chance of hyperovulation coincides with the random chance of multiple fertilizations with the random chance of available sperm from different men—Voilà!, a set of bipaternal twins.

There is no good evidence on the probability of this occurring. A DNA expert in the case testified that 1 in 13,000 paternity cases involve bipaternal twins, but paternity “cases” are not randomly selected, nor representative, of all gestations. An employee of the lab that processed the results in the *T.M. v. A.S.* case testified that his lab has handled six such cases in the past year. Again, this tells us very little about the overall likelihood of this occurrence, but shows that the answer is not “never.” While it might complicate the answer to a child’s question “where did I come from?”—“well, honey, when mommy’s egg got together with daddy’s sperm, and mommy’s other egg got together with your sister’s daddy’s sperm. . .”—it is not a scientifically novel, or unbelievable, finding. In the court’s words, the phenomenon of bipaternal twins is “widely accepted in the medical community specifically by obstetricians and gynecologists” and regarded by the scientific community as a true, if rare, phenomenon. Moreover, the advances in DNA testing, and greater reliance on it in family court proceedings have “substantially increased the likelihood of detecting bipaternal twins.”

The Ruling in *T.M. v. A.S.*

Given that evidence of a biological tie between father and child is sufficient to adjudicate paternity—and sufficient to trigger a child support obligation—one might think the inquiry started and ended with the evidence that A.S. fathered only one of T.M.’s twins. But the family court judge, well within his discretion, decided that an “unusual DNA result” merits “heightened concern” about the reliability and validity of the DNA testing, and that “[t]his is such a case.”

The judge then wrote a long and detailed opinion covering the development of DNA technology, the legal standards for the admission of scientific evidence, paternity law, the scientific explanation for bipaternal twins (with a helpful diagram), and the past legal treatment of such twins. It found only two reported cases nationwide involving bipaternal twins, one of which was a 1990 case in New York, *Celia D. v. Hector F.*, in which a man

was deemed liable to support only the twin he had fathered.

Given that the court found no irregularity in the process by which the DNA samples in *T.M.* were collected or processed, it reached the same result as in the New York case. Child support turns on the establishment of paternity, and paternity can legally be established through DNA evidence. In that regard, this is an extraordinary case with an ordinary resolution. A.S. is the legal father, but only of one twin. In order for the mother to obtain child support from the other twin's father, she will have to begin a new proceeding with a new defendant.



*Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of **Inside the Castle: Law and the Family in 20th Century America** (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of **Gender Equality: Dimensions of Women's Equal Citizenship** (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.*

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