

Empowering Fatherhood and Averting Baby Daddy Drama

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Introduction:

Dads are far more than mere child supporters,¹ or sperm donors,² or adoption agreeers.³

The need for father empowerment is more important than ever. The objective of this session is to provide attendees with the law surrounding the rights of a father to empower dads to care for their children – expected or unexpected, and help lawyers, doctors, nurses, family members and pregnancy resource counselors to avert baby daddy drama.

Section I explains and covers all the laws on Putative Father Registries, the first step for rights assertion for a potential prospective dad. Then Section II examines who is a father, legally, and how that man can continue to assert his rights as a parent, from common law presumptions to constitutional standards. Finally, Section III examines legal conflicts between a child's father and mother and how to deal with those conflicts legally.

Providing the law surrounding fatherhood can work to empower fathers to make good choices not just for themselves but for their children first and foremost, which can not only avert baby daddy drama but can empower fathers in their roles as dads.

Law

I. Putative Father Registry

A. Purpose: Gives putative ("possible") fathers notice of a pending adoption to give them a chance to exercise their rights as fathers (Think *Mamma Mia!* but systematized) within a statutorily prescribed time.

1. Putative Father Registries by State: <https://adoptioncouncil.org/resources-and-training/important-adoption-laws/putative-father-registries-state-by-state/>.

¹ E.g. *Father of 30 kids by 11 women can't pay child support*, FoxNews, Nov. 28, 2015, <https://www.foxnews.com/us/father-of-30-kids-by-11-women-cant-pay-child-support>.

² E.g. *there's nothing taboo: Man fathers over 117 children*, CNN, Dec. 3, 2022, <https://www.cnn.com/videos/us/2022/12/03/this-is-life-lisa-ling-sperm-donor-ari-nagel-origseriesfilms-905.cnn>.

³ E.g. *Father kept in the dark about baby's adoption*, ABC News, Oct. 31, 2008, <https://abc7news.com/archive/6480038/>.

2. Putative Father Registries to Encourage Adoption (?):
<https://adoptionart.org/adoption/birth-expectant-parents/putative-father-registries/>.

B. Effects:

1. Pros:

- a. Preserves putative fathers' right to participate in parenting their biological children.
- b. Stabilizes the adoption process by eliminating the uncertainty of adoption contests.
- c. Prescribed time means adopted children do not have an undetermined legal status for an unreasonable amount of time.

2. Cons:

- a. Chaos. More likelihood of Baby Daddy Dramas. (Think *Mamma Mia!* but systematized)

Reason: Putative Fathers who need the registry probably have not gotten their name on their child's birth certificate, sought a DNA test, nor have gone through other methods of establishing their paternity (cite e.g., various state codes). Thus, the system could have lots of potential for abuse and, therefore, more litigation. This doesn't empower or encourage fatherhood.

- b. Impracticable. The lack of a National Registry makes achieving the purpose of a registry hard, without interstate cooperation or integration.

See *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031.

Reason: If an adoption happens across state lines, and the putative father is not registered in that state, then the father will not be notified. This could result in a legislative nightmare.

3. **How States differ:** States adopt some, all, or none of the following features into their putative father State code or registry.

- a. **Impossibility Exception** - Some states have established impossibility exceptions for the father whose efforts to parent the child were affirmatively thwarted.
 - i. where the father did not know the mother was pregnant.
 - ii. where the mother misrepresented the situation to the father such that she indicated falsely that she was not pregnant or that he was not the father.
 - iii. where the mother moved from the State of conception to a second State for delivery.⁴
- b. **Sex as Notice** - States have begun to assume the theory that sexual intercourse fairly serves as constructive notice of the possibility of a

⁴ Mary M. Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031 (2002).

pregnancy, and some state statutes now provide that sexual intercourse serves as notice of a conception or the possibility thereof.⁵

- c. **Prebirth Abandonment:** Some state statutes, case law, and SCRUFNA provide that pre-birth abandonment is grounds to foreclose the father's rights. Others consider whether ignorance of the registry amounts to the same thing.⁶
 - d. **Notice time limit:** States differ in how long the putative father must file, when he should start filing, and when the filing deadline occurs.
4. **Control:** Birth mothers, compared to “putative fathers,” exercise tremendous control in child custody proceedings today. While courts no longer apply the “tender years presumption,” the old presumption that mothers are somehow inherently better caregivers,⁷ putative fathers still face an uphill battle. Because even under the current “primary caregiver standard,” so-called “putative fathers” do not have a constitutionally protected fundamental liberty interest in the upbringing of their children.
 5. **Definitions:** While domestic relations are primarily regulated under state law, many states do not define “fatherhood.” Yet, whatever fatherhood means, the Supreme Court has held that, unlike married fathers, “putative fathers” do not have a constitutionally protected right to direct the upbringing of their children; they must legitimize a child by establishing a “substantial relationship” with the child, DNA testing, and ultimately by convincing a court that recognition of their parental rights is in the best interest of the child.
 6. **Obstruction:** Mothers may obstruct a putative father’s efforts to legitimize his child at every step. By proving delayed notice of birth or pregnancy to run the statutes of limitations on putative father registration, withholding consent to DNA testing, or allowing a spouse to adopt a child, mothers can prevent putative fathers from establishing the necessary substantial relationship and ultimately parenthood. Unless a birth mother marries her child’s birth father or otherwise assists in legitimizing, only through immediate and persistent legal action can a putative father preserve his fledgling rights.

II. Law Protecting Father’s Rights:

A. Who is a “father”?

1. Many state statutes do not define the term father.
 - a. Virginia
 - b. District of Columbia
 - c. North Carolina

⁵ *Id.* at fn. 77.

⁶ *Id.* at fn. 91.

⁷ *See* Section III, *supra*.

2. **West Virginia** has five (5) definitions for “father.”
 - a. Birth Father - § 48-22-105
 - b. Determined Father - § 48-22-109
 - c. Legal Father - § 48-22-110
Marital presumption - at the time of conception or at the time of birth
 - d. Outsider Father - § 48-22-113
Man, with whom the mother conceives while married to another.
 - e. Putative Father - § 48-22-114
“[Any man named by the mother as a possible biological father of the child pursuant to the provisions of section 22-502, who is not a legal or determined father.”

B. Presumptions

1. Marital Paternity Presumption:
 - a. Most states acknowledge the statutory rebuttable presumption that a **husband is the “father” of his wife’s child**; “despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child [is] not [always] sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother [is] the child's parent.” Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting) (citing Michael H. v. Gerald D., 491 U.S. 110 (1989)).
 - b. State Code
Example: The District of Columbia extends the paternal (parental) presumption to recent cohabitants and domestic partners. D.C. Code § 16-909.
 - a) No definition of “father.”
 - b) Complicated by same-sex couples.
 - c) “There shall be a presumption that a woman is the mother of a child if she and the child’s mother are or have been married, or in a domestic partnership, at the time of either conception or birth.” D.C. Code § 16-909 (A-1) (2).
2. Example: **Maryland** extends the paternal (parental) presumption to unmarried same-sex couples.
 - a. “There is a rebuttable presumption that a child born to parents who have not participated in a marriage ceremony with each other is the child of an individual who did not give birth to the child if the individual: (1) Has acknowledged himself or herself, in writing, to be a parent of the child...” Maryland Statutes Estates and Trusts § 1-208(C).
 - 1) Maryland categorizes children and parentage as incidents of property.
 - 2) Question: *Does recognizing two mothers negate a father’s parental rights?*

C. Judicial Determination

1. A court may determine that a putative father is a child's father based on the alleged father's acknowledgment of the child and has established a "substantial relationship" with the child. Caban v. Mohammed, 441 U.S. 380, 393 (1979).
 - b. But disinterested third parties (which putative fathers legally are until parenthood is established) cannot overcome the right of uncontested biological parents (mothers) to direct the upbringing of children. Troxel v. Granville, 530 U.S. 57 (2000).
Problem - Mothers can prevent putative fathers from establishing the "substantial relationship" necessary for judicial determination.
2. Putative Father Registries (provides notice only)
 - a. Provides notice to putative fathers when the suspected child is subject to court/adoption proceedings.
 - b. Must file with the registry within a specified number of days after the child's birth (how does the father receive notice of child's birth?)
 - c. Virginia requires filing within 10 days of the birth (unrealistic?).
 - d. "Discovery" of paternity standards would allow putative fathers an opportunity to establish a substantial relationship.
3. Paternity Acknowledged in Writing
 - a. In most states, there is a statutory rebuttable presumption that a putative father who acknowledges a child in writing is that child's father.
 - b. Example: The District of Columbia requires the mother to also sign the paternal acknowledgment; **the mother may refuse**. D.C. Code § 16-909.03(D).
4. Conclusive Paternity Evidenced by DNA
 - a. Mothers may, with consequences, refuse DNA testing of children under their control.
5. Fit Parent Presumption
 - a. **Fit parents presumptively act in the best interest of their children.** Troxel v. Granville, 530 U.S. 57, 68, 120 S. Ct. 2054, 2061 (2000) (plurality) (citing Parham v. J. R., 442 U.S. 584, 602 (1979)).

D. Substantive Due Process Standard(s):

1. **Fundamental Liberty Interest Standard**
 - a. Fundamental rights are those (1) "deeply rooted in [the] Nation's history and tradition" *and* (2) "implicit in the concept of ordered liberty." Chavez v. Martinez, 538 U.S. 760, 775 (2003).
 - b. Government action interfering with fundamental rights must be "[1] narrowly tailored [2] to serve a compelling state interest" (strict scrutiny). Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

c. Recognized Fundamental Rights

- i. Only fit parents and guardians have a fundamental constitutional right “to direct the upbringing and education of children under their control.” Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-535 (1925) (relying on Meyer v. Nebraska, 262 U.S. 390 (1923)).
- ii. Caveat - Children have a **liberty interest in familiar integrity**; “just as parents possess a fundamental right with respect to their children, children also enjoy a ‘familial right to be raised and nurtured by their parents.’” D.B. v. Cardall, 826 F.3d 721, 740 (4th Cir. 2016); *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 268 (2021) (finding that the Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits recognize a child’s right to family integrity).

2. Shocks the Conscience Standard

- a. The government violates substantive due process when its deliberate actions are “arbitrary” and “unrestrained by the established principles of private right and distributive justice.” Seegmiller v. Laverkin City, 528 F.3d 762, 767 (10th Cir. 2008) (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).
 - i. Problem - Setting aside a judicial determination that a parent is unfit requires a showing that the court’s action “shocks the conscience” (abuse of discretion); the right of parents to direct the upbringing of children must be balanced against “personal health and safety [of the children] and the state’s interest as *parens patriae* in protecting that interest.” D.B. v. Cardall, 826 F.3d 721, 740 (4th Cir. 2016) (holding that government was justified in separating a child from a parent because the court first concluded the parent was unfit) (on remand to the trial court, the case was decided on procedural due process grounds. See Beltran v. Cardall, 222 F. Supp. 3d 476 (E.D. Va. 2016)).
 - ii. Because “**When a state’s interference with parental control is predicated on a determination that the parent is unable to provide adequate care for a child, such interference does not contravene substantive due process, at least in the absence of governmental action that shocks the conscience.**” Cardall, 826 F.3d at 740.
- b. Once a court decides a parent is unfit, the court is likely shielded from any liability from resultant harm to the child; “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate established

statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

3. Equal Protection Standard(s)

- a. When an unwed mother dies, a putative father is entitled to the same due process rights as a married father before his child becomes a ward of the state. Stanley v. Ill., 405 U.S. 645 (1972). Unwed father are no longer “presumed unfit to raise their children,” and “it is necessary to hold individualized hearings to determine whether particular fathers are unfit parents before they are separated from their children.” Stanley, 405 U.S. at 647.

BUT

- b. Problem - **Putative fathers are not considered similarly situated as married/acknowledged fathers.**
 - i. The Supreme Court has narrowly defined “father” to exclude putative fathers; putative fathers, therefore, do not have a fundamental right to direct the upbringing of their children. Michael H. v. Gerald D., 491 U.S. 110 (1989).
 - ii. In Quilloin v. Walcott, the Supreme Court held that a putative father’s “interests are readily distinguishable from those of a separated or divorced father” and that a “state could permissibly give [putative fathers] less veto authority [*sic*] than it provides to a married father” in adoption proceedings, 434 U.S. 246, 256 (1978).

E. Legal Conflicts

1. Tender Years Presumption (Stormy)

- a. Definition: The tender years doctrine is a judicial presumption that operates in divorce cases to give custody of a young child to the mother.⁸
- b. Doing Away with the Tender Years Presumption:
 - i. Pre-Gender Equality mothers were presumptively awarded custody of children of a young age.⁹
 - ii. The gender equality movement ushered a presumption for a custody award to the parent who was the primary caregiver to the child during the marriage.¹⁰
 - iii. Most state statutes have done away with the presumption (eliminated), and some courts have held that the tender years doctrine violates the Equal Protection Clause of the 14th

⁸ *Tender Years Doctrine*, <https://legal-dictionary.thefreedictionary.com/Tender+Years+Doctrine>.

⁹ Lynne Marie Kohm, *Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence*, 10 J.L. FAM. STUD. 337(2008), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957143

¹⁰ *Id.*

Amendment to the United States Constitution, because it discriminates based on sex.¹¹

c. Prevalence Today and Battling the Presumption:

Though courts are not supposed to give deference to tender years in court rulings, and though we may not see it mentioned on paper, there is a foul remanence of the presumption found in the application of our courts.

i. From a Tender Years Presumption to a Primary Parent Presumption

ii. Though gender-neutral on its face, the primary caregiver presumption is broadly seen as achieving the same maternal preference results as the tender years doctrine. In many states, identifying the child's primary caregiver is a factor in the court's custody determination, but it is not entitled to presumptive weight.¹²

d. Today's standard for child custody determinations is the "Best Interest of the Child."

i. Some common factors courts weigh in determining the best interest of the child include (these are determined by common law or state statute):

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- Age, sex, health of the child
- The continuity of care before the separation
- Who has been the child's primary caregiver?
- The parent skills
- Each parent's willingness and capacity to provide primary childcare
- Each parent's employment and responsibilities to the employment
- It is one thing to look at people's deployments or demanding jobs, and it's another to see that the traditional caregiver will evidently have more time on their (her) hands
- Each parent's age, physical and mental health
- Emotional ties between the parent and child
- The moral fitness of the parents
- The child's ties to home, school, and community
- The child's preference if the child is of sufficient age

¹¹ *Tender Years Doctrine*, <https://legal-dictionary.thefreedictionary.com/Tender+Years+Doctrine>.

¹² J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 214 (2014), at "[From the Rule of One to Shared Parenting: Custody Presumptions in Law](#)" by J. [Herbie DiFonzo \(hofstra.edu\)](#)

¹³ *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

- Normally 12 in the state of Mississippi (will vary by state)
- Each parent's relative financial situation
- Differences in parents' personal values and lifestyle
- The stability of each parent's home environment
- Any other factors the court believes are relevant to the parent-child relationship.

MASSACHUSETTS¹⁴:

- What is the mental and physical health of each parent?
 - Who has historically been the primary caretaker?
 - How demanding is a parent's work schedule or other commitments outside the home?
 - How willing is a parent to encourage a relationship between the child and the other parent?
 - Can the parent provide a positive home environment?
- ii. Statistics showing disparity:
- a) According to a 2020 study conducted by the United States Census Bureau, as a national average, a female parent is granted around 65% of custody time whereas, the male parent receives around 35%.¹⁵
 - b) According to a study conducted by the American Psychological Association, gender stereotypes may indeed play a role in custody decisions.¹⁶
 - 1) In this study, good mothers received greater custody allocations than good fathers in the United States.
 - 2) Follow-up studies say this may be due to the propensity to prescribe warmth-related traits to women.

Which was the basis of the tender year's presumption?
- iii. Why it even matters:
- a) Just like having a mom around is important for the child's development and well-being, having a dad around also promotes development.

¹⁴ Jane A. Fraier, *Massachusetts Child Custody Guidelines: The "Best Interests of the Child,"* Fraier & Maillet, P. C. (Aug. 15, 2019), <https://northborolaw.com/massachusetts-child-custody-the-best-interests-of-the-child-standard/>.

¹⁵ U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2017*, (May 5, 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf>.

¹⁶ Luiza Costa et al., *Gender Stereotypes Underlie Child Custody Decisions*, 49 EUROPEAN J. SOCIAL PSYCHOLOGY (2018), at [\(PDF\) Gender Stereotypes Underlie Child Custody Decisions \(researchgate.net\)](#).

- b) According to Psychology Today, a father's involvement and caregiving can affect a child's social competence, performance in school and emotion regulation.¹⁷
- i. Plain and simple, sometimes dad is a better option than mom even though she has been the primary care giver.
- b. How do we battle this disguised tender years presumption?
 - 1) Take out factors that weigh who the primary caregiver is.
 - 2) Assess the effects rather than plain language of the statute's factors.
 - 3) Example primary caregiver is often the tender years presumption in disguise.
 - 4) Take a holistic approach. We need to attack presumptions and stereotyping by implementing more policies geared towards shared parental leave and flexible work, part time employment options, gender neutral birth leave, etc.

2. Pre-birth Duties on Fathers

Child support pre-birth

- a. Child support pre-birth is a relatively new concept in which most states have discussed, yet only one has mandated.¹⁸
 - i. Utah was the first state to require it in 2021, I can't find any other state that has mandated it, but other states mimic Mississippi, or have some reference to supporting mom pre-birth such as Wisconsin and New York.¹⁹
- b. The process of gaining pre-birth rights is the same as post-birth. You should establish paternity by order of the court, DNA Testing, or affirmation by both parents.
 - i. You can prove this by multiple state statutes and general family law concepts.
- c. Why it matters:
 - i. According to a study done in 2021 by Human Life International 96.5% of women get an abortion for social or economic reasons.
 - ii. How much does it cost to have a baby?
 - a) According to the Peterson-Kaiser Family Foundation \$18,865 on average. This is often covered by health insurance, so parents only end up paying about \$2000. However, women who don't

¹⁷ Psychology Today, *The Importance of Fathers for Child Development* (Jun. 2021), [The Importance of Fathers for Child Development | Psychology Today](#).

¹⁸ The Associated Press, *Utah fathers now legally required to pay half of pregnancy costs*, (Apr. 6, 2021), <https://www.nbcnews.com/news/us-news/utah-fathers-now-legally-required-pay-half-pregnancy-costs-n1263111>.

¹⁹ *Id.*

- have insurance, or see \$2000 as an unrealistic sum see this as the reason to terminate.²⁰
- b) This cost can vary depending on the risk, type of birth, location and more.²¹
 - c) If you don't have health insurance the average cost of prenatal care according to WebMD is \$2000.²²
- iii. For women in financially dire situations, \$2,000 to \$19,000 is daunting to say the least. This is how pre-birth support can help solve some of the disparity for unwed mothers.
- a) As of 2020, 86% of women who had an abortion were unmarried.²³
- iv. Implied:
- Mississippi:**
- a) §93-9-7 Obligations of the Father²⁴
 - 1) The father of a child which is or may be born out of lawful matrimony, whether the child is born alive, for the reasonable expenses of the mother's pregnancy, confinement, and for the education, necessary support and maintenance, and medical and funeral expenses of the child. A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband.
- ii. Mandated:
- Utah:**
- a) 78B-12-105.1 Duty of Biological Father to Share Pregnancy Expenses²⁵
 - 1) Except as otherwise provided in this section, a biological father of a child has a duty to pay 50% of the mother's pregnancy expenses.
 - 2) (a) If paternity is disputed a biological father owes no duty under this section until the biological father's paternity is established. (b) Once paternity is established the biological father is subject to section (1).

²⁰ Elizabeth Rivelli, *How Much Does It Cost To Have A Baby? 2023 Averages*, (Mar. 1, 2023), <https://www.forbes.com/advisor/health-insurance/average-childbirth-cost/>.

²¹ *Id.*

²² Heather Hatfield, *What It Costs to Have a Baby*, (Mar. 4, 2013), [How Much Does It Cost to Have a Baby? Hospital Costs, Baby Supplies, and More \(webmd.com\)](https://www.webmd.com/hospital-costs/baby-supplies-and-more).

²³ Jeff Diamant, *What the data says about abortion in the U.S.*, Pew Research Center (Jan. 11, 2023), <https://www.pewresearch.org/short-reads/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/>.

²⁴ Miss. Code. Ann. § 93-9-7 (West).

²⁵ 2022 Utah Code :: Title 78B - Judicial Code :: Chapter 12 - Utah Child Support Act :: Part 1 - General Provisions :: Section 105.1 - Duty of biological father to share pregnancy expenses., Duty of biological father to share pregnancy expense (July 1, 2022), <https://law.justia.com/codes/utah/2022/title-78b/chapter-12/part-1/section-105-1/>.

- 3) (a) Any portion of a mother's pregnancy expenses paid by the mother, or the biological father reduces that parent's 50% share under Subsection (1), not the total amount of pregnancy expenses. (b) Subsection (3)(a) applies regardless of when the mother or biological father pays the pregnancy expense.
 - 4) If a mother receives an abortion, as defined in Section 76-7-301, without the biological father's consent, the biological father owes no duty under this section, unless:
 - (a) the abortion is necessary to avert the death of the mother; or
 - (b) the mother was pregnant as the result of:
 - (c) Rape, as described in section 76-5-402;
 - (d) Rape of a child, as described in section 76-5-402.1;
 - (e) Incest, as described in subsection 76-5-406(2)(j) or section 76-7-102.
- b. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).
 Rules:
- 1) The Indian Child Welfare Act (ICWA) does not protect the rights of a parent who has never had custody of the child.
 - 2) With respect to adoptive placements for a Native American child, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family, (2) other members of the Native American child's tribe, or (3) other Native American families."
 - 3) To be a member of a Native American tribe for purposes of the ICWA one must register with the tribe.
- c. **Military dads –**
- 1) Service Members Civil Relief Act
 - 2) Family Care Plan
 - 3) Altering Custody Agreements
<https://www.militaryonesource.mil/relationships/separation-divorce/child-custody-considerations-for-service-members-and-milspouses/>
 - 4) Uniformed Deployed Parents Custody and Visitation Act
 - 5) Virginia Military Parents Equal Protection Act
 - 6) VA Code § 20-124.8
 - 7) The Uniform Child Custody Jurisdiction and Enforcement Act/State Code
 - 8) U.S. Military family benefits
 - a. Family Benefits
 - b. Housing Allowance
 - c. Health Care

- 9) Proving Parentage:
 - a. Genetic testing
 - b. Birth Certificate
 - c. Acknowledgement

d. Paternal Duties w/o Rights

- 1) Abortion
- 2) Adoption
- 3) Child Support (issue separate from visitation)

Conclusion: This outline projects not only the law surrounding father's rights, but legal solutions that fathers can access to be empowered dads involved in their child's life, for the best interests of that child. Here we have summarized the law and the legal conflicts which can indeed empower fatherhood and avert baby daddy drama.