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Filiation

Robert Leckey

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FILIATION

*Robert Leckey**

While the *New Shorter Oxford English Dictionary* defines filiation as the relationship as a child or the relationship of a child to his father, legal notions are somewhat distinct. As one moves from general dictionary to law, the focus moves from talk of relationship to narrower talk of a legal bond. Filiation in the civil law is, from the child's perspective, the legal bond connecting child and mother or child and father. In the common law, the legal bond is known as parentage. Crucially, parental status—filiation in the civil law or parentage in the common law—is a legal construct and must be established. It does not arise, unmediated, from brute facts such as siring a child or giving birth. It is to be expected, then, as in the case of other legal constructs, that there will often be a gap between a parent-like state of fact and filiation or parentage as a matter of law. Indeed, two other kinds of parental connection between an adult and child are usefully distinguished and need not overlap with the legal bond. One is genetic: a man may have fathered many children while being legally the father of none of them if he has not been designated as such by the law of filiation or parentage. The other is the social connection that arises from carrying out the caring functions associated with parenting. A person who may be marked as a social parent may not hold parental status. Conversely, a person who is established as a child's legal parent may, depending on the circumstances, retain that status while executing few or none of his or her parental duties. Parental status in law is, further, distinct from legal notions which purport to bridge the gap between law and fact, such as the common law's concept of *in loco parentis* or the possibility under some regimes of de facto adoption.

Filiation was once enmeshed with marriage, such that legitimate filiation or parentage flowed from the marriage between the mother of a child and her husband. The child's mother was, ostensibly, known by having given birth to the child. Her husband was irrebuttably presumed to be the

* Dean and Samuel Gale Professor, Faculty of Law, McGill University. The original version of this entry was adopted as part of the *McGill Companion to Law* at a meeting in December 2011.

father. The sense was that one could never with certainty know who had fathered a child, but one could know to whom the mother was married and to whom an obligation of fidelity thus bound her. Baptismal records often served as the evidence for these relationships (leaving it open that the parents named in the register could be other than the genetic parents). Today, filiation and parentage are largely unmoored from marriage. Legislatures have abrogated the distinction between legitimate and illegitimate filiation (including, in some regimes, disgraceful subcategories such as adulterine and incestuous filiation). Legislation typically declares that children are not to be prejudiced by the circumstances of their birth or by their parents' marital status.

The civil law uses the term blood and it is often assumed that parental status identifies a child's birth mother and genetic father. Yet none of the means of establishing parental status mentioned so far requires proof of genetic connection between the parties whom law will henceforth hold together as parent and child. The presumption of paternity attracts varying interpretations. By some accounts, it reflects the probability that the mother's husband will be the child's genetic father. By others, it reflects, in social terms, the husband's undertaking in respect of any child borne by his wife or a desire to promote the stability of established families. (To muddy the waters, a woman who conceives via a donated egg and gives birth will usually be able to establish maternity.) There is thus a potential gap between the legal bond and the genetic facts of a child's conception. Moreover, these means for establishing filiation or parentage involve a robust measure of volition. It is only where a dispute arises that judicial involvement in the establishment of filiation or parentage occurs (except for adoption, mentioned shortly). It is also only in the context of a dispute that there is a role for proof of genetic relation. DNA testing has a role in paternity disputes, although its relationship with other indicators of paternity can be unclear.

The sole path to parental status that invariably requires judicial involvement (barring Indigenous customary practice) is adoption. A judgment of adoption creates new family bonds between the child and the adopting parent or parents and their families. Adoption regimes, developed at a time when illegitimacy was stigmatized and adoption served to invest a child with legitimacy, typically extinguish the ties between the child and the family of origin and shroud that family in secrecy.

As attitudes and the circumstances under which adoption occurs have changed (international, cross-racial adoptions; adoption of older children out of youth protection), that model is increasingly under strain. It is thought that adopted children have an interest in knowing their family of origin, or even a right to do so (similar issues arise in the cases of children conceived by genetic donation). Clarifying debate on such issues requires distinguishing the desire simply to know a genetic or medical history from

the desire to sustain a relationship with the genetic parent and to learn a social history. Claims framed in terms of the right to know genetic parents at times seem buoyed by a desire to develop a deep relationship with the genetic parent. In any case, there is some support for an approach to adoption that would not extinguish the kinship tie to the family of origin, instead simply adding the new family.

Adoption adds a nuance to the proposition above that parental status is a legal construct distinct from facts. Legislative drafting often hints at the limits on the creative ability of an adoption judgment in the realm of human relations: a child must have been placed with the intending adopter for a minimum period before a judgment of adoption. Suggestive of social life's law-making power, that period is reduced where the intending adopter has already acted as a parent towards the child.

Depending on the circumstances, a child may have a mother and father, two mothers, or two fathers. Exceptionally, a common law court has used its equitable jurisdiction to recognize that a child has three parents: birth mother, genetic father, and the birth mother's female partner.

The establishment of parental status, be it for the ostensible birth parents or for parents by adoption, produces immediate legal effects. The legal parents have a responsibility to maintain, educate, and supervise the child during his or her minority. They may determine where the child shall live. While such responsibilities end when the child reaches full age, some effects of parentage or filiation endure. There may be a reciprocal duty of support between parent and child as well as provision for the child should the parent die intestate. Parental status gives the child grandparents and a lineage. Some civil law regimes muddy the line between law and morality by stipulating in a civil code that children owe a duty of honour or respect to their parents. Symbolically, and beyond the concrete effects recognized by the positive law, the bond of filiation is seen by some scholars as locating the child in a genealogy, in a family history. Indeed, reaching beyond the usual remit of contemporary family scholars in the common law tradition, some civilian scholars speak of the bond of filiation as anchoring the child in relation to the symbolically foundational alterity of male and female. For such scholars, the recognition of the legal possibility of a child's having two mothers or two fathers is a betrayal of filiation's vocation.

Filiation is one of the foundational institutions of the civil law of the family. Traditionally, civilian scholars regarded marriage as the act that founds a new family and filiation as the institution by which that family extends forwards in time. Filiation makes up part of a person's civil status. Consistent with the notion that matters of civil status are characterized as being of public order, and thus shielded from the ordinary logic of private dealings and the market, matters of filiation are not susceptible to transaction (a private contract by which parties end a lawsuit or waive

the rights that would give rise to one) or to arbitration. The approach in common law jurisdictions varies. In general, parentage is less theorized than is filiation in the civil law. The structure of the common law of the family—or rather, the family law legislated against the outmoded backdrop of the common law—remains latent. Parentage does not play such a central role as the means of accessing parental rights and responsibilities. It is more common to find legislative provision for duties of support owed to children and applications for custody and access brought by individuals whom no bond of filiation attaches to the child.

It is worth returning to the gap between the legal model and family practices, signaled above. Adults raised children as their own and regarded themselves as duty bound to do so long before legislatures recognized the legal institution of adoption. Step-parents or foster parents may raise children absent a legal duty to do so. Before there were legal means to establish filiation or parentage, gay and lesbian couples used the parental lexicon in relation to the children they were raising. In recent decades, the frequency of divorce, other family breakdown, and new family formations has imposed pressure on the view of parental status as the source of all rights and duties connecting one person to another in their respective capacities as parent and child. Judges and legislatures have increasingly recognized the importance of individuals other than a legal parent having access to or custody of a child. By contrast to the top-down scheme of filiation set out in the *Civil Code*, such orders arise, bottom-up, from facts of family living filtered through the principle of the best interests of the child. It is not the case that a legally recognized right of access or custody on the part of someone other than a child's legal parent entails divesting the latter of parental authority or status. Instead it has become thinkable that a child should have more than two parent figures active in his or her life. Indeed, schemes in common law jurisdictions may recognize a duty of support on the part of a *de facto* parent, although there is a reluctance to do so in civil law jurisdictions where obligations are viewed as mediated through formal status.

On the orthodox view, the best interests of children may have an impact at the level of court orders concerning a child's custody or support but not at the level of determining parental status. After all, what role could welfare have if legal status is simply recognizing biological truth? Some civilian scholars say that filiation by blood is not “decided,” but mechanically “determined” in a syllogistic application of established, hierarchically ordered rules to facts. It may be suspected, though, that consideration of the child's interest colours judicial resolution of filiation or parentage disputes, for example in the appreciation of the evidence.

On some views, the recent developments around filiation and parentage have undermined a central legal institution. On others, the contests at the margins of legal parental status have prompted greater intention-

ality around the taking on of parental status, serving also as a rich reminder that law has no monopoly on love.

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