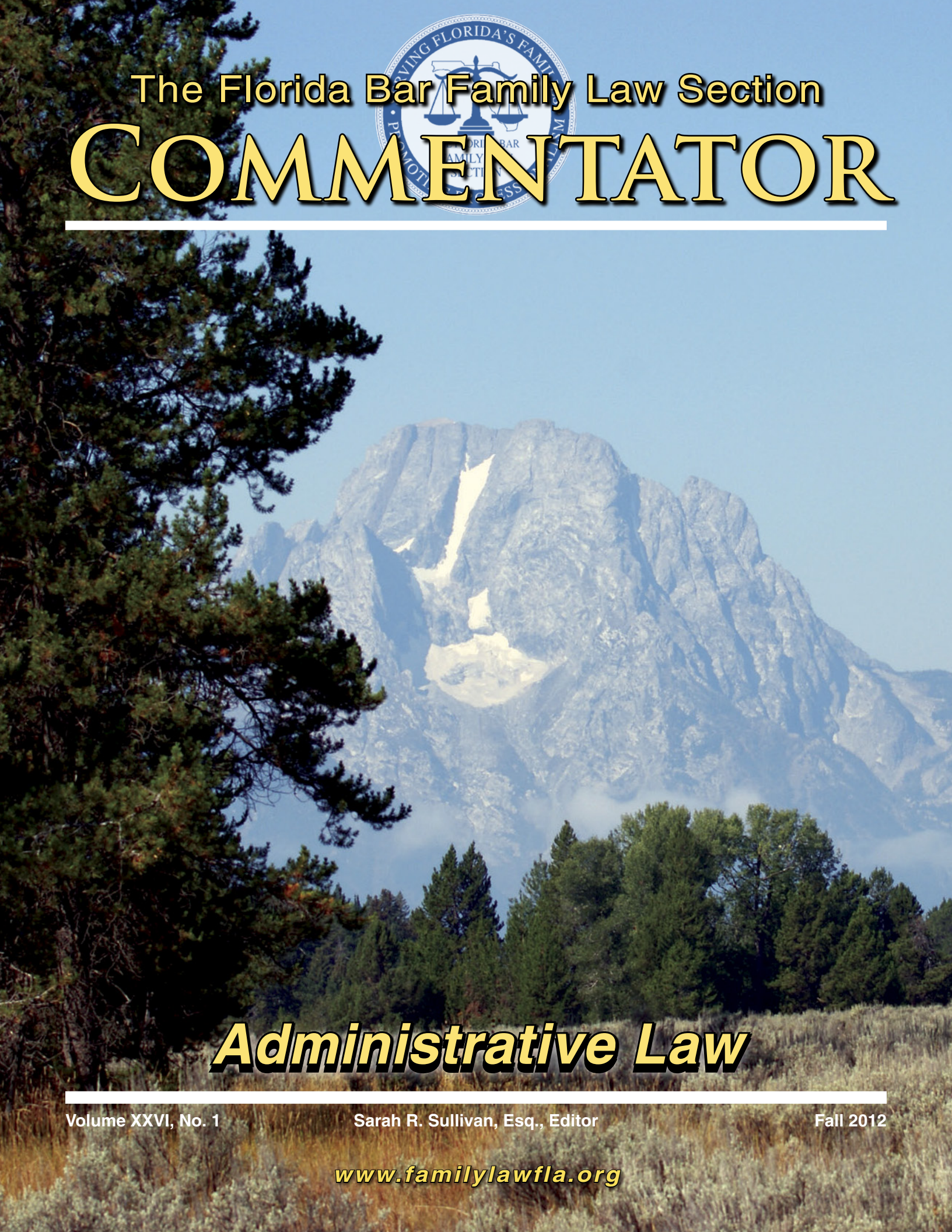

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Paternity in the Modern Family

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We've all heard the classic playground tune:

"First comes love… then comes marriage… then comes the baby in the baby carriage."

It's amazing how, once upon a time, this simple nursery rhyme formed society's view of the natural progression of relationships. However, modern life may not be so simple. In this twenty-first century world of the modern family, the order of romance first, marriage second, and finally childbearing is oft disregarded and only one axiom rings true today: no two families are alike.

Children are born into different types of families, for example: (a) families where the biological father and mother are married to each other, (b) families where the biological father and mother are not married with no intention to do so, (c) families where the biological father and mother are not married and intend to marry at some later date, (d) families with only one parent, (e) families with two mothers or two fathers, and (f) families where the biological father is not the biological mother's husband. Children born into the latter category have been more recently described as "quasi-marital children." *See, e.g., Fernandez v. McKenney*, 776 So. 2d 1118, 1119-20 (Fla. 5th DCA 2001) (Sharp, J., concurring) (hereinafter referred to as *Fernandez I*). In that scientific and genetic testing can now accurately, rapidly, and inexpensively determine paternity, this category of children known as "quasi-marital children" presents distinct and complex legal issues. Moreover, as has been expressly noted by the First District Court of Appeal: "[c]ases involving children are never easy, and cases involving "quasi-marital children" are particularly complicated because they "present major public policy issues that are difficult, if not impossible, to address within the case law method." *Nevitt v. Bonomo*, 53 So. 3d 1078, 1084 (Fla. 1st DCA 2010) (citations omitted).

In her concurring opinion, Judge Sharp observed that the "law" in this area is far from clear. *Fernandez I*, 776 So. 2d at 1119. Judge Chris W. Altenbernd analyzes the state of the law in his 1999 article entitled *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*. 26 Fla. St. U.L.Rev. (1999). For centuries, the common law divided children into only two categories – marital and nonmarital. At common law, the biological mother's husband was presumed to be the "father" of the child born during the marriage. However, the advents of scientific and genetic testing make such bright lined rules implausible. "The advent of genetically accurate testing for paternity has partially 'broken the back' of the common law presumption of legitimacy for children born while a mother and her husband are married." *Fernandez I*, 776 So. 2d at 1119; 26 Fla. St. U.L.Rev. at 233.

Current case law establishes certain principles, to wit:

(1). In that a quasi-marital child was born while her mother was married, the husband is the presumptive legal father. *Fernandez I*, 776 So. 2d at 1119;

(2). The presumption that the mother's husband is the child's legal father is rebuttable. *Nevitt*, 53 So. 3d at 1081; *Fernandez v. Fernandez*, 857 So. 2d 997, 999 (Fla. 5th DCA 2003) (hereinafter referred to as "*Fernandez II*"); *Fernandez I*, 776 So. 2d at 1119; *J.T.J. v. N.H.*, 2012 Fla. App. LEXIS 5186 (Fla. 4th DCA Apr. 4, 2012).

(3). The biological father of the quasi-marital child is entitled to pursue an action to establish paternity where, for instance, he manifests a substantial concern for the child's welfare. In other words, biological fathers are entitled to rebut the presumption that the biological mother's husband is the quasi-marital child's "legal father". *See Kendrick v. Everheart*, 390 So. 2d 53 (biological father is entitled to pursue claim for paternity where he manifests a substantial interest in the welfare of his quasi-marital child); *Nevitt*, 53 So. 2d at 1082-84 (biological father's complaint sufficiently reflected standing to pursue paternity action); *L.J. v. A.S.*, 25 So. 3d 1284 (Fla. 2d DCA 2010) (biological father allowed a hearing to establish standing and it was error to dismiss the biological father's paternity action); *Fernandez II*, 857 So. 2d at 999 (biological father was deemed to be the "legal father" based upon his quasi-marital child's best interests); *Fernandez I,* 776 So. 2d at 1120 (biological father's paternity action was allowed to proceed as to his quasi-marital children where the mother supported the paternity action); *Lander v. Smith*, 906 So. 2d 1131-35 (Fla. 4th DCA 2005) (dismissal ordered reversed and biological father permitted to pursue his paternity action).

(4). The establishment of the biological father's paternity will not impugn or otherwise affect a quasi-marital child's legitimacy. *Daniel v. Daniel*, 695 So. 2d 1253, 1255 (Fla. 1997); *Fernandez II*, 857 So. 2d at 999; *Dep't of Rev. v. Iglesias*, -- So. 3d --, No. 4D09-4790, 2012 WL 126053 at *1, 37 Fla. L. Weekly D160 (Fla. 4th DCA Jan. 18, 2012).

(5). The overarching concern in paternity proceedings is – and

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should be – the best interests of the minor children involved. *Dep't of Health and Rehab. Serv's v. Privette*, 617 So. 2d 305, 308-310 (Fla. 1993); *Fernandez II*, 857 So. 2d at 999 (finding that "the trial court properly made its determination based on a finding concerning the children's best interests, **as was required**."); *Lander*, 906 So. 2d at 1134-1135 (the best interests of the child "are the polestar which must guide judicial consideration of this case"); *Iglesias*, 2012 WL 126053 at *1; *J.T.J. v. N.H.*, 2012 Fla. App. LEXIS 5186 at *7.

According to Judge Altenbernd, common law judges in the Blackstone era saw families as desirable for children and, as such, created this legal presumption to ensure that children had, and belonged to, a family. 26 Fla. St. U.L. Rev. at 234. Today, a rigid application of this presumption calls into question whether or not the true purpose of the common law is being fulfilled in today's modern society, particularly where the marital "family" it once sought to protect no longer exists due to a divorce – or is superseded by the creation of a new biologically intact "family" which includes the biological mother, biological father and the minor child.

Given the evolution of the modern family, the case law will continue to develop and provide more guidance as to the appropriate circumstances for maintenance of the status quo or a shift in legal parenthood. Indeed, as Judge Altenbernd stated more than a decade ago, "[t]he common law never abandoned natural rights concepts for biological fathers of quasi-marital children, even long after the presumption had accomplished that practical effect. As a result, especially in a technological society with a high rate of divorce, it will now be very difficult for the judiciary, relying upon the common law, to return to the substantive law concealed within the historic presumption of legitimacy, a law providing family units for children. The judiciary can no longer consistently select marital fathers as legal fathers, now that the presumption of legitimacy can now be regularly overcome by scientific testing. If we wish to further the real policies promoted by the presumption of legitimacy, in whole or in part, we must create new substantive law either judicially, on a case-by-case basis, or legislatively in a more structured format." 26 Fla. St. U.L. Rev. at 238.

While the case law evolves, the one thing that remains clear is that the children – and their best interests -- need to remain the central focus of these proceedings. As confirmed by the Florida Supreme Court in *Privette*: "This policy [of advancing the best interests of the child] is a guiding principle that must inform every action of the courts in this sensitive legal area." 647 So. 2d at 307.


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John W. Foster *has extensive experience as lead counsel intrials and appeals,as well as stateand administrative proceedings. His practice includes emphasis on family and marital law matters and complex construction and commercial litigation. He has substantial experience in the areas of contract claims, tort claims and general civil litigation.*

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Kelli is actively involved in the George C. Young American Inns of Court, the Central Florida Association for Women Lawyers, the Paul C. Perkins Bar Association and serves on several committees of the Family Law Section of the Florida Bar Association.