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The Night is Dark and Full of . . . Family Law?: California Law and Marital Presumption in Game of Thrones

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The Night is Dark and Full of . . . Family Law?: California Law and Marital Presumption in Game of Thrones

Abstract

The television show Game of Thrones has developed a tremendous following in recent years. The show takes place primarily in the fictional state of Westeros, a feudal society that mirrors many of the legal structures of medieval England. As such, many of the laws and customs of Westeros seem antithetical to the beliefs and values of modern viewers. In an attempt to posit a more just outcome following the death of Westeros' king (the action which springboards the primary power struggle), this Article applies California law to the disposition of King Robert's property. Shockingly, this Article finds that California's marital presumption laws are as unsettling as some of the laws found in Westeros itself.

This Article argues that the current marital presumption laws are outdated and badly in need of reform. Using the disposition of King Robert's property as an example, this Article critiques the modern California Family Code's approach to paternity disestablishment. Part I provides a description of the marital presumption rule. Part II applies it to situations such as King Robert's where the father incorrectly believed that a child was his own. Part III concludes by suggesting how the law should be altered to create a more just outcome to situations of mistaken paternity.

While more information can be gleaned from A Song of Fire and Ice book series, this Article relies on the information obtained through the HBO series unless otherwise indicated. Additionally, this Article only addresses the disposition of property as it would occur under California law.

Keywords

Game of Thrones, family law, California, marital presumption, paternity disestablishment

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Essay

**The Night is Dark and Full of...Family Law?:
California Law and Marital Presumption in Game of
Thrones**

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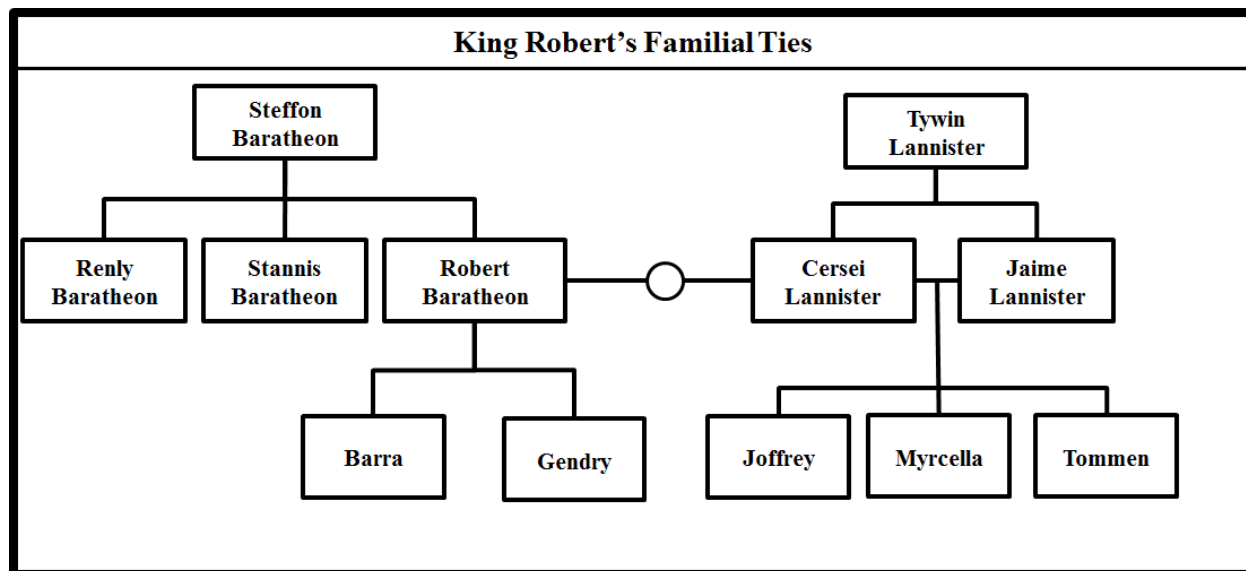
“All men must die.”
–Valyrian Proverb

I. INTRODUCTION

The television show *Game of Thrones* has developed a tremendous following in recent years. The show takes place primarily in the fictional state of Westeros, a feudal society that mirrors many of the legal structures of medieval England. As such, many of the laws and customs of Westeros seem antithetical to the beliefs and values of modern viewers. In an attempt to posit a more just outcome following the death of Westeros’ king (the action which springboards the primary power struggle), this Article applies California law to the disposition of King Robert’s property. Shockingly, this Article finds that California’s marital presumption laws are as unsettling as some of the laws found in Westeros itself.

This Article argues that the current marital presumption laws are outdated and badly in need of reform. Using the disposition of King Robert’s property as an example, this Article critiques the modern California Family Code’s approach to paternity disestablishment. Part I provides a description of the marital presumption rule. Part II applies it to situations such as King Robert’s where the father incorrectly believed that a child was his own. Part III concludes by suggesting how the law should be altered to create a more just outcome to situations of mistaken paternity.

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II. HEIR, HERE?

The following section explains the marital presumption rule, its justification, and how one would rebut the presumption.

A. *What is the Marital Presumption?*

The marital presumption law states that if a man's wife has a child during the course of the marriage the man is the presumed biological father of the child.¹ This presumption arose to prevent children from being labeled as illegitimate (due to associated social and legal stigmas), to address a lack of available scientific tools, to encourage personal responsibility for children, and to protect the integrity of the family unit.²

¹ CAL. FAM. CODE § 7540 (West 2014).

² See Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 56 (2003) (genetic testing was not available until the 20th century, whereas the rule originated in the 18th century); Niccol D. Kording, *Little White Lies That Destroy Children's Lives – Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J. L. FAM. STUD 237, 242 (2004); *In re Paterson's Estate*, 93 P.2d 825, 831 (Cal. Ct. App. 1939).

B. Fading Justification for the Marital Presumption Rule

These justifications, however, are no longer as salient as they once were. Today, children do not face substantial social and legal stigmas based on the marital status of their parents. As the number of children born out of wedlock has increased, the social stigma associated with children born out of wedlock has decreased.³ Additionally, legislatures have passed numerous statutes forbidding discrimination based on the marital status of a child's parents.⁴ Furthermore, today's courts are not limited by a lack of scientific tools. Modern genetic testing can determine whether a man is the biological father of a child with almost complete certainty.⁵ Therefore, social stigmas, legal stigmas, and a lack of scientific tools no longer form a legitimate justification for the marital presumption rule.

The remaining justifications for the rule are alleged support for personal responsibility of children and protection of the family unit. Application of this rule, however, does not encourage personal responsibility; it merely shifts who is presumed responsible for taking care of the child. The marital presumption rule allows a man to father children with a married woman and permits him to escape all legal and financial responsibility.⁶ In fact, that is *exactly* what happened in this case study. Furthermore, forcing a legal fiction of parenthood does not ensure the stability or longevity of the family unit. Prohibiting divorce does not ensure that all marriages are happy and, in the same way, prohibiting paternity disputes does not ensure that all families will be cohesive.

The sad truth is that the courts no longer enforce the marital presumption rule because of rational justifications; the courts enforce the marital presumption law because it is administratively convenient and straightforward. As scholars have pointed out, however, "convenience should not require that a husband remain financially responsible for the actions of other men."⁷

C. Rebutting the Presumption

While still rebuttable, the marital presumption is "one of the strongest and most persuasive presumptions known to the law."⁸ Rebutting the marital

³ See Brady E. Hamilton, et al., *Births: Preliminary Data for 2012*, 62 NAT'L VITAL STATISTICS REP. 2 (Sept. 6, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_03.pdf (concluding that 4.53% of children were born out of wedlock in 2012).

⁴Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1 (2007).

⁵ *Frequently Asked Questions Regarding Paternity: Parentage Testing* GENETIC PROFILES CORP., http://www.geneticprofiles.com/main_files/faq.htm (last visited Mar. 11, 2015) ("DNA Profiling can establish that the alleged father is the child's biological father with a probability of paternity of 99% or higher.").

I. ⁶ SEE VERONICA SUE GUNDERSON, *PERSONAL RESPONSIBILITY IN PARENTAGE: AN ARGUMENT AGAINST THE MARITAL PRESUMPTION*, 11 U.C. Davis J. Juv. L. & Pol'y 335, 349 (2007).

⁷ Gunderson, *supra* note 6, at 349.

⁸ CAL. FAM. CODE § 7540; *Richard B. v. Sandra B.B.*, 625 N.Y.S.2d 127, 129 (App. Div. 1995).

presumption adheres to a strict statute of limitations: a parent wishing to disestablish the presumption of paternity must raise a claim within two years of the child's birth.⁹ The claim can be brought by the husband, presumed father, or the child.¹⁰ Genetic testing can be used, but the statute provides little guidance for how to apply these scientific tests and their implications.¹¹

III. DISTRIBUTION OF PROPERTY AND THE APPLICATION OF THE MARITAL PRESUMPTION

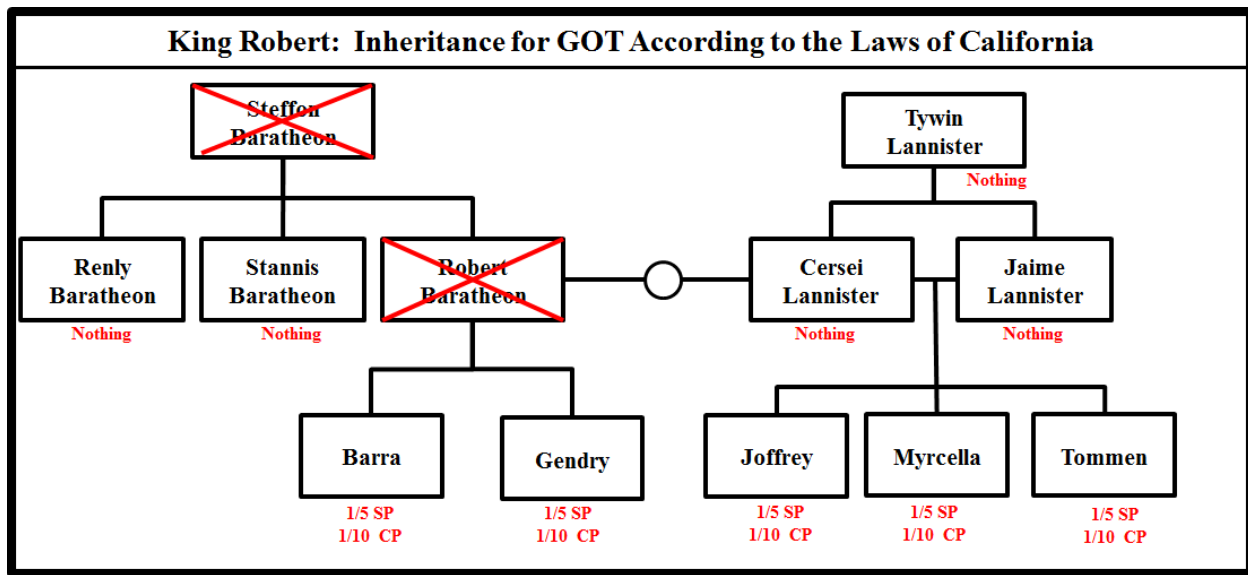
The distribution of King's Robert's property would be different under California law in three ways: (1) the application of California's slayer statute, (2) the application of California law concerning illegitimate children, and (3) the application of the marital presumption rule.

Before diving into the ways in which California law is distinct from Westeros law, an overview of California's property rules is in order. In California, property consists of both community property and separate property. Property produced during the marriage and by the labor of either spouse is termed community property. When one of the marriage participants dies, the decedent is allowed to distribute half of the community property via will or that half will be distributed via intestate succession. Things that are not considered community property include (1) property acquired before the marriage, (2) property acquired after a divorce, or (3) property acquired without labor (i.e. inheritance). Separate property, on the other hand, is held by individuals and held separately from the spouse. When one of the marriage participants dies, the decedent is allowed to distribute all of the separate property via a will or that separate property will be distributed via intestate succession. The following section discusses the distribution of King Robert's half community property and the entirety of his separate property.

⁹ CAL. FAM. CODE § 7541.

¹⁰ *Id.*

¹¹ *Id.*



A. Barred Inheritance for Slayers

First, California probate law prevents a slayer from inheriting property from his spouse, while Westeros law does not. A slayer is an individual who intentionally and feloniously kills his spouse.¹² Normally, under intestate succession, the surviving spouse of the decedent is entitled to half community property and one-third separate property of the decedent's property slated for disposition.¹³ Here, however, Cersei's orchestration of King Robert's death pegs her as a slayer and bars her from inheriting any property from him. Cersei instructed Robert's squire to intoxicate him during the boar hunt to increase the chances of Robert dying in a hunting accident. This demonstrates the necessary intent to qualify as a slayer, and the murder itself qualifies as felonious. Therefore, Cersei will not be able to inherit any property from her late husband.

B. Inheritance Rights of Children Born Out of Wedlock

Second, California probate law allows children born out of wedlock to inherit property, while Westeros law does not. Robert's illegitimate children would benefit substantially under California's property laws because California grants the same inheritance rights to children born out of wedlock as it affords to children born to married parents.¹⁴ California intestacy statutes indicate that if the decedent's wife is either deceased or barred from inheritance, all of the property will be inherited by

¹² CAL. FAM. CODE § 7541.

¹³ CAL. PROB. CODE § 6401 (West 2014).

¹⁴ See Lewis, *supra* note 4.

the issue of the decedent.¹⁵ Robert's illegitimate children, Gendry and Barra, qualify as issue and therefore stand to inherit part—and potentially all—of King Robert's estate.

C. The Iron Grip of Marital Presumption

Third, California family law adheres to the marital presumption law, while Westeros law does not. Cersei admits that her children were not fathered by Robert¹⁶ and Ned's analysis of genetic lineage confirms her statement.¹⁷ Despite this conclusive information disproving Robert's paternity, neither a confession nor genetic testing can overcome the presumption. Additionally, Ned lacks standing to bring this claim.¹⁸ California's family laws dictate that, despite clear evidence to the contrary, Joffrey, Myrcella, and Tommen are legally King Robert's issue, and as such, they each would inherit one-fifth of the King's separate property and one-tenth of the King's community property. Robert's actual issue would be forced to share his property with Cersei's children, despite clear parental fraud.

IV. PROPOSED SOLUTION

A. Proceedings with Caution

The initial response to a case study like the one above is to abolish the marital presumption rule. Before rash action is taken, however, there are two major problems with eliminating this rule. First, it would punish the child as well as the mother. Second, it would model the law based on an anomaly. When deceit occurs the wrongdoing falls on the shoulders of the mother, not the child; however, marital presumption laws protect both parties. As a result, alterations to marital presumption laws also have the potential to hurt both parties. Caution should be taken to avoid harming a child who played no role in deceiving a parent. Furthermore, abolishing the marital presumption law suggests that the norm involves married women giving birth to illegitimate children left and right. The problem of parental fraud exists, but it is not so rampant as to form the basis of our legal structure. These problems suggest that minor changes, rather than a complete overhaul, is the proper way to proceed.

An alternative to abolishment of the presumption is strengthening the tools to rebut the presumption. This Article's suggested changes will not fix all of the problems that arose in this case study. Under both the current family code and this Article's proposed changes, Joffrey, Myrcella, and Tommen will still inherit. Their mother lied to her husband, her children, and the kingdom; yet she will not be

¹⁵ CAL. PROB. CODE § 6402.

¹⁶ *Game of Thrones: You Win or You Die* (HBO television broadcast May 29, 2011).

¹⁷ *Game of Thrones: A Golden Crown* (HBO television broadcast May 22, 2011).

¹⁸ CAL. FAM. CODE § 7540.

punished for her deceit. While proposals exist to eliminate parental fraud,¹⁹ they are drastic and reduce the family unit to expectation of a series of lawsuits based on genetic links. California cannot write its laws with Cersei as the prototypical mother and Joffrey as the prototypical son. Laws cannot be based off of outliers, lest society allows the innocent to be punished along with the guilty. Instead, this Article applies a few changes to our existing system to feasibly achieve a more just system.

B. A Partial Solution

There are a few simple tweaks that would go a long way in preventing parental fraud problems in the future. First, the California Family Code should adjust the statute of limitations to run from knowledge of the paternity issue rather than from birth. Second, the law should allow genetic testing to help disprove paternity, but limits should be placed on the genetic tests to prevent abuse. Considering each of these suggestions would go a long way towards remedying an outdated common law doctrine.

i. Changing the Time Frame of the Statute of Limitations

Currently, the statute of limitations is set at two years after the child's birth.²⁰ If the father has no reason to suspect that his wife has been unfaithful during this time period, he will unknowingly run out the clock. Two reasons to justify the "from birth" statute of limitations include: (1) ease of the court system to avoid later litigation, and (2) emotional and financial stability for the child.

While predictability is important and forms the basis of different legal concepts, the concept can only go so far. Setting a statute of limitations without regard to knowledge prevents men from seeking justice for parental fraud.

While the goal of achieving a stable emotional environment is admirable, it is a fiction to believe that a short statute of limitations achieves this goal. A father who finds out that a child is not his own is unlikely to preserve and provide the emotional stability hoped for by the courts, regardless of a lack of legal remedies.

Rather than starting the clock from the moment the child was born, the clock should start running from when the father gained real or constructive knowledge that the child was not his own. Tolling the statute of limitations to begin after notice is common in other areas of law.²¹ This alteration would prevent adulterers like Cersei from bragging about her deception with impunity. By altering the

¹⁹ Kording, *supra* note 2, at 265-68 (suggesting mandatory genetic testing at birth to prevent parental fraud).

²⁰ CAL. FAM. CODE § 7540.

²¹ *E.g.*, CAL. PEN. CODE § 803 (West 2015) (asserting a discovery rule within criminal law); CAL. CODE CIV. PROC. § 340 (West 2014) (asserting a discovery rule within tort law); CAL. CODE CIV. PROC. § 338 (West 2014) (asserting a discovery rule within property law).

starting point of the statute of limitations, the law will permit a more realistic opportunity for men to rebut the marital presumption.

ii. Clarifying Limitations to Genetic Testing

It is laudable that the California Family Code allows genetic testing to prove or disprove parentage, however, the parameters of this rule should be clarified. Courts should place limitations on DNA testing, and Uniform Parentage Act (2002) provides helpful guidelines for when and how to incorporate genetic testing. In order to be entered into evidence, genetic tests must be either (1) court-ordered, or (2) with the full consent of all parties.²² Secretly conducting a genetic test of the family members in question would undermine the family structure and serve as a major violation of privacy. While Ned's actions were guided by moral principles, his analysis of Joffrey's, Myrcella's, and Tommen's genetic heritage should not be admissible in court.

V. CONCLUSION

The marital presumption rule persists because of its entanglements with other laws and social policies. The common law rule and newer family codes seek to protect the family unit while providing a remedy for parental fraud and creating a framework for dealing with scientific advancements. Keeping all of these considerations in balance is a difficult task and perhaps a perfect solution does not exist.

This Article suggests that small steps, rather than massive reform, are the preferred route to improving this doctrine. Readjusting the start date of the statute of limitations and creating more specific guidelines for DNA testing are some of these small developments that will improve the system without destroying the family unit. More steps will need to be taken as science continues to advance and as families create more interesting case studies with which to grapple.

²² Uniform Parentage Act § 621(e) (2002),
http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.