Forms Follow Function? Individualism, Family Law, and the Role of Government Documents
(Work in Progress)
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Introduction

Principles of individualism have shaped family law and its application since the late 20th century. State governments have recognized an increasingly diverse spectrum of familial ties. The function of one's relationship, rather than one's biological ties, has become central to the state's calculation of familial rights and obligations.[1] Furthermore, states permit a certain degree of freedom to individuals to tailor their marriages, their divorces, and their parenting arrangements to their particular needs through private agreements.

And yet this acknowledgment of familial functionality and customization is largely absent from an increasingly important aspect of government involvement in the family: standardized government forms. These forms, which range from birth certificate recordation documents to marriage license applications to pleading templates for use by pro se individuals in court proceedings, are intended to streamline and standardize interactions between the public and government entities. By their very nature, they are not meant to be customized. Often the forms are intended to improve access to government-sponsored relief, as is the case with templates for use by pro se litigants in family court.

However, despite these noble intentions, these forms can have the opposite effect and actually impede the individual's efforts to obtain the relief or services sought. When the individual's familial relationships or cultural practices fall outside of the norms that are standardized on these documents, the individual is left in a precarious position: the relief they seek may well be out of reach. Individuals whose experiences do not conform to preconceived notions of a family's composition must either mold their non-traditional situation into a pre-approved context—thereby misrepresenting the reality of their situation and potentially drawing the ire of the court or other government entity—or risk having their request for relief denied outright by a government official. In some instances, officials who assist individuals in filling out these forms are the ones making the errors but the outcome is the same: it is the individual and not the government official who is burdened with amending the inaccurate document and remedying the error lest they suffer the consequences. Members of vulnerable communities who face other obstacles to accessing the court system—including language barriers and physical or financial barriers to obtaining court remedies—are more likely to be impacted by rigid categories that do not account for exceptions.

In this article, I will explore the use of government forms in family law matters, as well as their limited utility in light of these diverse forms of familial ties. I will focus on the forms used in the District of Columbia as an example, but will refer to other jurisdictions as well. I argue that states have prioritized government efficiency at the expense of the actual experiences of their residents, and it is the individual and her family who subsequently suffer. For the family

[1] Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. Ill. L. Rev. 319 (2012)

courts of the future, government entities need to take steps today to ensure families will be properly served: increase efforts to educate the public on legal documents and procedures, counsel government officials and judges to "think outside the box" when reviewing non-standard information on forms, and limit the impact of standardized of templates and forms.

Individualism and Functionalism in Family Law

- Marriage on the wane
- Diversity in families: marriage equality, same-sex parents, three parent custody, children born to unmarried parents, extended family's role in caring for children
- State acknowledgment and support of private contracting among family members: custodial arrangements, distribution of assets, prenups and postnups and separation agreements
- Individual concepts of what parenting/marriage will look like largely left alone by the state (floor is abuse/neglect and other criminal sanctions)

Standardization in Family Law

Standardization of government forms is not a new concept. Record-keeping, including information about its citizenry, has become a central function of modern state governments; proper recordation of data is thus in a state's interest. The data have limited use if they are not substantially similar in format. Efficiency in both the collection and keeping of data preserves government resources and promotes the state's interest.[2] What cannot and should not be forgotten, however, is that the desire for easily calculable results means nothing to the individual whose family is experiencing the stress or even trauma of a breakdown in relationships.

In the context of family law, the need for quantifiable metrics is arguably in short supply. Much has been written about the absence of bright-line tests for child custody determinations, establishment of parentage, property distribution after divorce, and the issuance of alimony, and the resultant lack of predictability and precedential value available for litigants.[3] Child support laws almost exclusively rely on measurable and comparable metrics to determine support obligations of legal parents. These laws are not without their detractors however. The inflexibility of child support laws can result in the court failing to recognize a parent's in-kind contributions to their children, which in turn can inflame the parent's distrust of and disengagement with the court system.[4]

Pleading templates ostensibly designed to assist pro se litigants to properly seek relief from family courts are another example of standardization. State courts rely on these court forms

[2] *See* Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts To Provide Access to Justice in Family Courts*, 82 Fordham L. Rev. 2705, 2721-22 (2014) ("One of the strongest arguments for court approved forms is that the quality and uniformity of the documents will ensure more effective use of court time and administrative personnel time.")
[3] Rebecca Aviel, *A New Formalism for Family Law*, 55 Wm. & Mary L. Rev. 2003 (2014) ("indeterminate standards and contextualized decision making do not necessarily provide the best means of doing justice for separating families, who turn to the law at junctures of conflict and strife.")
[4] *See* Baker at 325; Margaret Ryznar, *In-Kind Child Support*, 29 J. Am. Acad. Matrimonial Law. 351 (2017)

to help low-income individuals who could not otherwise afford an attorney pursue their cases in court.[5] The results have been mixed, however, and Professor Jessica Dixon Weaver argues that the relationships and issues involved in family court cases are so complex that they necessitate the involvement of legal counsel, particularly when families are resorting to the adversarial court system for dispute resolution.[6] I would build on Professor Weaver's work and suggest that these court forms force pro se litigants to simplify their familial relationships to such a degree that court relief might elude them altogether, either because the forms no longer represent the reality of the litigant's situation or because the litigant's frustration with the forms and/or the officials assessing the forms are such that they choose not to pursue their matter with the court.

As states recognize a larger spectrum of familial relationships worthy of protection, a correlating flexibility should exist in its forms, which play critical roles in the legal system: standardized pleading templates serve as entry points to the legal system for many litigants, and standardized documents like birth certificates will be evidence in court cases. Placing the onus on the individual to seek special dispensation for their purportedly unique situation is unjust.

Arguably these forms are but a product of the laws and rules that produce them: change the laws, and the forms will change as well. But the reality is that the law is more pliable than these forms suggest. Jurisdictions that have prescriptive lists of factors for best interests of the child often indicate these factors are non-exclusive. There is plenty of caselaw suggesting that a court will fashion non-traditional remedies to provide appropriate relief.[7]

It is not the law then that is the problem, at least not in this context. The problem is the remedy itself: the forms approved by agencies, bars, and courts to be used by the public, and in particular an individual without legal representation. When a litigant is represented by counsel, the attorney, by virtue of being a repeat player in the courthouse and/or agency, will have access to means of avoiding the problem in the first instance or finding an appropriate work-around. Lawyers have access to troves of pleadings used successfully in earlier cases, as well as to the full text of the relevant laws in a jurisdiction. They can find ways to articulate nuanced deviations from the law if need be, or add in additional allegations to pleadings to signal to the court why their client is worthy of the relief sought.

The pro se litigant, however, will have a much more difficult time. Pro se litigants, often individuals who do not have the means to pay for legal representation, are often wary of the family court system and government involvement in their families. They will have just the one form available to them, will likely not be able to articulate additional details not prompted by the form or refer to specific laws. Their case will be defined by the four corners of the template they are using. If these documents play a gatekeeping role, and I contend that they do, then nonconforming litigants risk not being heard at all on the issue. It is not unheard of for judges—or their clerks—to deny relief or dismiss a case for failure to properly fill out one of these

[5] Weaver at 2705-06.
[6] *Id* at 2707.
[7] Cite to cases on three parent custody/support situations in states that do not formally recognize three parents.

templates.[8] As I will address in a later section, frequently the procedural rules that govern family court matters state that the court can dismiss an action if the complainant fails to comply with the law or procedures.[9]

Examples of Non-Conforming Families

1. Non-Western Naming Conventions

Examples of these problems abound. In D.C., where there are large Ethiopian and Eritrean communities, the birth certificate application form—which requires the child to have a first and last name—can result in errors on the official birth certificate when naming conventions in the parents' home countries result in the child having the name of their parent or grandparent as their second name and that name does not match either of their parents' second names, as is common in traditional Ethiopian and Eritrean cultures. Language barriers between the family and the state actors at the hospital or government agency assisting in the completion of the application can exacerbate the issue. The parent or parents are then obligated to petition for a child's name change, a confusing and laborious process, in order to correct the birth certificate to reflect the child's name.

2. Third Party Custody

In pleading templates typically used in custody disputes, an individual identifies themselves as either the father or the mother of the child. With the advent of third party custody laws, however, other individuals can seek court-mandated time with minor children. As an increasing number of extended family members provide important caregiving roles to young children,[10] these laws can help assure that close bonds between children and non-parents are protected. Where jurisdictions permit third parties to obtain custodial rights, the custody complaint or motion is often radically different than the one used by a child's legal parent, as third parties often have additional legal hurdles to clear—such as standing and overcoming a presumption in favor of custody with the child's legal parents—before the court will entertain the third party's request for relief. Thus a third party who attempts to use a template reserved only for legal parents might be instructed to amend (and re-serve) their complaint to comply with these additional requirements, thereby delaying their case, or have their case dismissed altogether for failure to meet the initial requirements for a third party custody case.

Even if an individual is aware of the differences between third party and legal parent custody, there may be complexities that cannot be captured in a form. The individual might occupy a gray area between third party and legal parent: a man might have reasons to doubt that he is the biological father, notwithstanding his signature on an Acknowledgement of Parentage or his presence in the child's life, and thus he might seek to have the court determine his paternity as a first step in his pursuit of seeking custodial rights. By choosing to file a custody

[8] I have witnessed a pro se litigant in D.C. have their custody case dismissed for failure to check a box on the "relief sought" section of a custody complaint template.
[9] *See,* e.g., D.C. Dom. Rel. Rule 41(b).
[10] *See* Solangel Moldonado, *Sharing a House But Not a Household: Extended Families and Exclusionary Zoning Forty Years After Moore*, 85 Fordham L. Rev. 2641 (2017).

complaint as a legal parent, he may risk waiving his right to contest his paternity at all. In DC, which has made many of its templates accessible electronically, there are still obstacles. An online program is available in which the user is responds to questions and prompts regarding their family law matter; the result is a pleading that the individual can then review, sign, and submit to the court.[11] It has limited utility however. If the litigant indicates that they are unsure if they are the biological parent of the child, the program will generate a third party custody complaint instead of the complaint reserved for custodial disputes between the child's legal parents. If the aforementioned putative father uses this complaint to seek custodial time with a child while also alerting the court that he is unsure of his biological connection to the child, the court may dismiss the case as wrongly filed. Without a lawyer to guide the individual through the process, the program could do more harm than good.

Third party custody laws and their implications for litigants is frustratingly obfuscated in many jurisdictions. In Virginia, any person "with a legitimate interest" may be awarded custody or visitation that is in the child's best interest.[12] Per the state statute, this term is to be broadly construed to accommodate the child's best interest and includes but is not limited to blood relatives such as grandparents, stepparents, and other family members.[13] However, there is little guidance for pro se litigants on how to initiate or intervene in a custody matter as an individual with a legitimate interest. There do not appear to be accessible online pleadings for such individuals.

Impact of Non-Conforming Documentation

Judges can and do dismiss a case due to defects in the pleading.[14] Even when dismissals are without prejudice—allowing the litigant to refile for the same relief—the burden is on the litigant to a) understand the defects, b) fashion an appropriate remedy to the defects, and c) refile the pleadings. Each of these steps takes time and resources that may be in short supply. Thus, the need for forms that can accurately capture the reality of modern familial relationships and the specific relief sought re crucial to ensure litigants will be heard.

While impact litigation has resolved some of these issues [discuss the EDVa 2019 case on race data on marriage licenses], these issues will continue to arise as a result of our society's acceptance of individualism in family law and familial units. There is no simple solution but individuals should not be denied relief on account of forms of limited utility. Forms are mere formalities after all and should not take on a gatekeeper role in the court system.

For corrections to the name listed on a child's birth certificate, the process is obscure and complicated. In D.C., the application for a minor's name change is thirteen pages long and requires additional documentation, notarization, and service on other parties. Unless the party

[11] *See* https://www.probono.net/dccourts/familycourt/
[12] Va. Code Ann.§ 20-124.2
[13] *Id.* at § 20-124.1.
[14] Local rules of civil procedure often mirror the language of the Federal Rules of Civil Procedure (cite examples). Federal Rule 41 gives the court the authority to dismiss actions for failure to comply with the rules or law.

obtains a fee waiver, a fee will be charged. Parties will need to find assistance via an attorney or the Self-Help Center, or attempt to initiate a correction on their own. In any case, the burden will be on them as well as obligations of service on other interested parties, attendance at subsequent hearings, and producing sufficient evidence regarding the need for the change.

Resolving the Issue

There will never be enough lawyers to assist every individual who seeks the court's help for their familial dispute. Self-help centers and hotlines are a valuable resource to those who are aware of their presence, but they too are not equipped to address every litigant's need. The law should not obligate a litigant to seek the assistance of an attorney in order to access the court system or other government agency. Forms and templates should benefit both the state actor and the individual using them, but the individual's use and access to relief should be prioritized over any benefit to the state. Court procedural rules are antiquated and complicated, and assume a level of knowledge that not even all members of the relevant bar possess.

In light of this, pleadings used by pro se litigants, including templates, should have limited weight in court cases. Government forms of any kind should not have gatekeeping powers, and relevant state decisionmakers should not confer such powers on to templates. Instead, such decisionmakers should recognize the limited utility of standardized forms to allow for creative usage by the individual, and especially the pro se litigant. Officials may need to "think outside the box" in order to ensure the individual is not burdened with additional time and resources spent seeking recognition of their so-called non-conforming family. Aggravation with government offices and courthouses can cause individuals to eschew their services in the future, which might in turn exacerbate challenges the individual's family faces.

As society continues to recognize the individual as the key component of any family unit, so too should forms operate to give meaning to the individual's familial relationships.[15] Familial ties will increase in their complexity and the law—and procedure—should catch up to reflect these realities, to ensure that all individuals can seek the benefits and protections available to them.

[15] Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families* 67 Stan. L. Rev. 167 (2015) (offering examples of families that do not comport to traditional familial structures and the ways that the relevant laws hamper relief for those involved).