

Paternity Determinations in Washington: Balancing the Interests of All Parties

I. INTRODUCTION

The law is gradually recognizing that the nonmarital¹ child has the same legal rights as the marital child. A growing number of United States Supreme Court decisions have applied the equal protection clause of the fourteenth amendment to strike down state statutes that discriminate against nonmarital children.² Many states have passed legislation expressly granting nonmarital children legal equality with marital children.³ Such changes are especially necessary because as premarital sexual activity has increased in recent years, so have out-of-wedlock

1. One commentator suggests that the terms "legitimate" and "illegitimate" be replaced with "marital" and "nonmarital" because the former are discriminatory and derogatory. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53 n.228 (1975).

2. See, e.g., *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (two-year state statute of limitations violated nonmarital child's equal protection rights to recover child support); *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982) (one-year state statute of limitations violated nonmarital child's equal protection rights to recover child support); *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (state intestate succession law that prohibited nonmarital children from inheriting property violated equal protection when applied to a nonmarital child whose father acknowledged her during his lifetime, but whose paternity was never judicially determined); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (Social Security Act provision covering entitlements to dependents of disabled parents violated equal protection because it was both overinclusive and underinclusive with regard to nonmarital dependents); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) ("Assistance to Families of the Working Poor" program denied equal protection to nonmarital children by limiting benefits to households in which the children's parents were married); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (denial of support right to nonmarital child violated equal protection under state law, even though no state statute defined the natural father's support duty); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (state may not exclude nonmarital children from sharing equally with other children in workers' compensation benefits following the death of their parent); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) (state statute may not deny a mother's recovery for the wrongful death of her nonmarital child); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (state may not create a right of action for the wrongful death of a parent that is available solely to marital children).

3. See, e.g., those states that have adopted the Unif. Parentage Act: CAL. CIV. CODE §§ 7000-7018 (West 1983); COLO. REV. STAT. §§ 19-6-101 to -129 (1978); HAWAII REV. STAT. §§ 584-1 to -26 (1976); MINN. STAT. ANN. §§ 257.51-.74 (West 1984); MONT. CODE ANN. §§ 40-6-101 to -135 (1983); NEV. REV. STAT. §§ 126.011-.391 (1983); N.J. STAT. ANN. §§ 9:17-38 to -59 (West 1983); N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1983); WASH. REV. CODE §§ 26.26.010-.905 (1983); WYO. STAT. §§ 14-7-101 to -126 (1977).

pregnancy and childbearing.⁴ The Census Bureau reports that in the last forty years the percentage of nonmarital births in the United States has doubled;⁵ the 1980 census reported 24,945 nonmarital children living in the State of Washington.⁶ Because forty-five percent of children living in single-parent homes in which the parent is female live below the federally determined poverty level,⁷ a nonmarital birth affects not just the child, the mother, and the alleged father, but the state taxpayers as well.

The first step in a nonmarital child's struggle for equality usually is a legal determination of the child's father.⁸ This Comment focuses on paternity determinations and on the parties who have an interest in those determinations. The defendant has an interest in procedural protection because he may not be the child's father.⁹ The child and the mother have an interest in the child's monetary support. The state also has an interest in the child's support because, according to one survey, more than forty-five percent of all Aid to Families of Dependent Children (AFDC) families have at least one nonmarital child.¹⁰

4. For example, the number of nonmarital births to women 20 years old rose from 18.7% of all births in the period from 1905-19 to 38.5% in the period from 1955-59. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 70 (104th ed. 1983) [hereinafter STATISTICAL ABSTRACTS]. Although the proportion of out-of-wedlock first conceptions has stabilized, the tendency for women to marry in the event of a premarital pregnancy or birth has sharply declined. Tanfer & Horn, *Contraceptive Use, Pregnancy and Fertility Patterns Among Single American Women in Their 20s*, 17 FAM. PLAN. PERSP. 10, 11 (Jan.-Feb. 1985).

5. STATISTICAL ABSTRACTS, *supra* note 4, at 70. The nonmarital fertility rate among white teenagers increased by about one-third during the 1970s. In the late 1970s, out-of-wedlock fertility increased among all women in their 20s. Tanfer & Horn, *supra* note 4, at 10.

6. U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION—DETAILED POPULATION CHARACTERISTICS: WASHINGTON at 159 (1983). Of women residing in Washington aged 15 to 44, 7.8% have had a nonmarital child. *Id.*

7. The federal government provides assistance to families in poverty through its Aid to Families of Dependent Children (AFDC) program. The AFDC program is intended to supply aid to children who are dependent because they "[have] been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent." 42 U.S.C. § 606(a)(1) (1983). Eighty-seven percent of the children receiving benefits under the AFDC program are eligible for AFDC because an absent parent is not providing adequate support. 129 CONG. REC. E163 (daily ed. Jan. 27, 1983) (statement of Hon. Mario Biaggi).

8. Proving maternity is rarely difficult. *Thompson v. Thompson*, 285 Md. 488, 495, 404 A.2d 269, 273 (1979) (paternity-determination statute not violative of equal protection when only the father's identity need be proved), *appeal dismissed*, 444 U.S. 1062 (1980).

9. See *infra* text accompanying notes 93-139.

10. According to a 1973 AFDC survey of 2,989,891 families, 45.6% of all AFDC families had one or more nonmarital children; 25.3% had one nonmarital child; 10.8% had

On two occasions, the State of Washington, through the Department of Social and Health Services (DSHS), has sought an administrative determination of paternity, basing its claim on implied statutory authority.¹¹ In both cases, the Washington courts held that administrative determinations are not permitted because such authority was neither express nor implied in the statutory language.¹² Despite this conclusion, administrative determinations of paternity are needed. The Washington State Legislature should adopt a scheme that provides such hearings in those situations in which the defendant's rights are not compromised.

The state and all parties in a paternity proceeding may benefit from a more efficient, administrative approach to paternity adjudication if certain procedural safeguards are assured the defendant. Section II of this Comment sketches the development of common-law and statutory rights of paternity actions in Washington. Section III examines the interests of each party in a paternity action. Section IV discusses the advantages of an administrative hearing. Section V suggests procedural safeguards for the defendant and proposes a framework for administrative determinations of paternity that is consistent with the interests of all parties. Administrative hearings in such circumstances are preferable because the overwhelming number of paternity actions are prosecuted by the state in an effort to

two nonmarital children; 1.2% had six or more nonmarital children; and 832 families had 10 or more nonmarital children. Of all the children in the AFDC survey, 32.7% were born out of wedlock, an increase of 292% in the nonmarital children receiving AFDC in just 12 years. Comment, *Child Support Enforcement and Establishment of Paternity as Tools of Welfare Reform—Social Services Amendments of 1974, pt. B*, 42 U.S.C. § 651-60 (Supp. V, 1975), 52 WASH. L. REV. 169, 177 n.59 (1976). While significant improvements occurred in child-support collection in the decade following the Act's passage, the Census Bureau surveys report that 40% of families supposedly entitled to support orders do not have them. 10 FAM. L. REP. (BNA) 305 (Oct. 23, 1984) (citing U.S. BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1981 (advance report)).

11. *Taylor v. Morris*, 88 Wash. 2d 586, 591, 564 P.2d 795, 797 (1977) (state contended that support obligations enforced under WASH. REV. CODE § 26.26.150 implied right to determine paternity administratively); *Woolery v. Department of Social & Health Servs.*, 25 Wash. App. 762, 764, 612 P.2d 1, 2 (1980) (at an administrative hearing held to recover public assistance pursuant to WASH. REV. CODE § 74.08.070, the state asked for a determination of paternity of one dependent child). DSHS has no authority to determine paternity administratively under WASH. REV. CODE ch. 74.20A, which governs the enforcement of support for financially dependent minor children. *Taylor* at 588, 564 P.2d at 796.

12. *Taylor v. Morris*, 88 Wash. 2d 586, 592, 564 P.2d 795, 798 (1977); *Woolery v. Department of Social & Health Servs.*, 25 Wash. App. 762, 764, 612 P.2d 1, 2 (1980).

recover the funds that it expends on AFDC children.¹³ Administrative law judges specializing in paternity determinations would provide prompt, efficient case handling in an informal, less expensive environment.

II. DEVELOPMENT OF COMMON-LAW AND STATUTORY PATERNITY ACTIONS IN WASHINGTON

In Washington, paternity actions are not monolithic in nature. They arise as statutory¹⁴ and common-law¹⁵ causes of action and include civil¹⁶ as well as criminal proceedings.¹⁷ Paternity actions may be initiated by the child, the child's guardian, the mother, the father or an alleged father, the state, or any interested party.¹⁸

Underlying a child's right to bring a paternity action are both the child's right to parental support and the state's interest in requiring parents to support their children. Washington law affords all children a right to parental support¹⁹ that may be

13. Telephone interview with James W. Sherry, Program Director, Office of Support Enforcement, Olympia, Wash. (Mar. 21, 1985).

14. WASH. REV. CODE ch. 26.26 (1983). "The superior courts have jurisdiction of an action brought under this chapter. The action may be joined with an action for divorce, dissolution, annulment, declaration of invalidity, separate maintenance, filiation, support, or any other civil action in which paternity is an issue including proceedings in juvenile court." *Id.* § 26.26.080(1).

"The existence of this parental duty of parental support is also assumed although not specifically stated, in statutes that provide civil and criminal sanctions for parents of either sex, married or unmarried, who neglect that basic duty." *State v. Wood*, 89 Wash. 2d 97, 100, 569 P.2d 1148, 1150 (1977). See, e.g., Family Abandonment or Nonsupport Act, WASH. REV. CODE ch. 26.20 (1983); Uniform Reciprocal Enforcement of Support Act (URESA), WASH. REV. CODE ch. 26.21 (1983).

15. See *Kaur v. Chawla*, 11 Wash. App. 362, 365, 522 P.2d 1198, 1199 (1974) (nonmarital child has judicially enforceable right to be supported by the child's natural father that is separate from and in addition to marital child's statutory right to be supported).

16. See *supra* note 14.

17. See Family Abandonment or Nonsupport Act, WASH. REV. CODE ch. 26.20 (1983).

18. WASH. REV. CODE § 26.26.060 (1983).

19. Historically, there was no common-law obligation on the part of a putative father to support his nonmarital child. *State v. Tieman*, 32 Wash. 294, 298, 73 P. 375, 376 (1903). Even if the father of an out-of-wedlock child acknowledged his parentage in writing, the father was not liable to the mother for support, absent an agreement. *Hurst v. Wagner*, 181 Wash. 498, 500, 43 P.2d 964, 965 (1935). Originally, only the father was given the duty of support and only the mother was given the remedy. *State v. Tucker*, 79 Wash. 2d 451, 452, 486 P.2d 1072, 1073 (1971). Today both parents are equally responsible for the care of their child, regardless of the legal relationship existing between the parents. See Equal Rights Amendment, WASH. CONST. art. 31, § 1. See also *State v. Wood*, 89 Wash. 2d 97, 100, 569 P.2d 1148, 1150 (1977) ("A parent's obligation for the

enforced in the courts.²⁰ Marital children may enforce this support right merely because of the established legal relationship that exists between parent and child at the time of birth.²¹ Nonmarital children first face the more difficult task of establishing paternity in order to enforce their support right.²² In most states, legislation has facilitated the procedure for determining paternity.²³ Moreover, as a supplement to statutory law, some states recognize a common-law right to support that is fundamental for all children.²⁴

Washington recognizes paternity actions premised both on the common-law fundamental right theory and on statutory enactments. Although a nonmarital child's common-law right to support was not recognized in Washington until 1974,²⁵ paternity statutes were enacted in 1881.²⁶ The primary purpose of the statutes was to establish the existence of the father-child relationship and thereby reduce the public burden of supporting

care and support of his or her child is a basic tenet recognized in this state without reference to any particular statute."); *State v. Booth*, 15 Wash. App. 804, 809, 551 P.2d 1403, 1406 (1976) (the primary obligation for support and care of a child rests on the child's parents and not on the taxpayers of this state); WASH. REV. CODE § 26.26.130(5) (1983) (amount of child support determined by considering needs of child and abilities of parents).

20. *Kaur v. Chawla*, 11 Wash. App. 362, 363, 522 P.2d 1198, 1199 (1974) (both marital and nonmarital children have a common-law right to judicially enforceable support by their natural fathers).

21. *See Van Tinker v. Van Tinker*, 38 Wash. 2d 390, 391, 229 P.2d 333, 334 (1951) (the support obligation is one created by common law). *See also Gomez v. Perez*, 409 U.S. 535 (1973). In *Gomez*, the United States Supreme Court recognized that all children have a fundamental right to parental support. The *Gomez* Court held that once a state granted marital children an enforceable right to parental support, it could not deny such a right to nonmarital children. *Id.* at 537-38.

22. *State v. Booth*, 15 Wash. App. 804, 808, 551 P.2d 1403, 1406 (1976) (upon a legal determination that a man is the father of a child born out of wedlock, the father's obligation to provide support is the same as if his child had been born in lawful wedlock).

23. Statutes have been enacted in most jurisdictions creating judicial proceedings to establish the paternity of a nonmarital child and to compel the father to contribute to the child's support. *See Annot.*, 59 A.L.R.3d 685, 691 (1974).

24. *See, e.g., Huss v. DeMott*, 215 Kan. 450, 453, 524 P.2d 743, 744 (1974) (obligation to support both marital and nonmarital children arises from the state's public policy); *State v. Bowen*, 80 Wash. 2d 808, 811, 498 P.2d 877, 879 (1972) (in an action based on filiation statute court stated that the marital relationship is unnecessary to establish a duty of child support).

25. *See Kaur v. Chawla*, 11 Wash. App. 362, 363, 522 P.2d 1198, 1199 (1974) (for first time in Washington, court held that putative father has a support duty based on common law rather than on a statutory cause of action).

26. The history of Washington's filiation statutes has been traced to the original bastardy statute enacted as a part of 1881 Wash. Laws §§ 1214-1221. *State v. Coffey*, 77 Wash. 2d 630, 632, 465 P.2d 665, 667 (1970).

nonmarital children.²⁷ This same purpose underlies current law.²⁸ In addition to the support function, however, paternity statutes serve other purposes: to establish the custody and guardianship of the child;²⁹ to establish visitation privileges with the child;³⁰ to protect the child's status as an heir;³¹ and to assist the mother in fulfilling her child support, care, and education obligations.³²

In contrast to the early statutory recognition of a paternity cause of action, the United States Supreme Court did not recognize a nonmarital child's right to paternal support until 1973.³³ In *Gomez v. Perez*,³⁴ the Court held that once a state granted marital children an enforceable right to paternal support, it could not deny such a right to nonmarital children without violating the equal protection clause of the fourteenth amendment.³⁵ This holding was reinforced in Washington in *Kaur v. Chawla*,³⁶ in which the court of appeals asserted that because the common law entitles marital children to judicially enforceable support by their natural fathers, nonmarital children are

27. *State v. Walker*, 87 Wash. 2d 443, 445, 553 P.2d 1093, 1095 (1976) ("The purposes of a filiation action are two: (1) determination of paternity; and (2) imposition of a support obligation if the accused is found to be the father of the child."); *State v. Pearson*, 13 Wash. App. 870, 873, 538 P.2d 567, 569 (1975) (purpose of a filiation proceeding is to fix paternity and to establish the legal obligation of support).

28. *State v. Booth*, 15 Wash. App. 804, 809, 551 P.2d 1403, 1406 (1976) ("The primary obligation [of support] is on [the nonmarital child's] parents and not on the taxpayers of this State. The obligation of a financially able father to pay [support should not be] excused for the reason that these necessities are being provided by the State's public assistance program.").

29. WASH. REV. CODE § 26.26.130(3) (1983) ("The judgment and order shall contain other appropriate provisions . . . concerning . . . the custody and guardianship of the child . . .").

30. *Id.* ("The judgment and order shall contain other appropriate provisions . . . concerning . . . visitation privileges with the child . . .").

31. WASH. REV. CODE § 11.04.081 (1983) ("For the purpose of inheritance to, through, and from any child, the effects and treatment of the parent-child relationship shall not depend upon whether or not the parents have been married."). *See also State v. James*, 38 Wash. App. 264, 266, 686 P.2d 1097, 1098 (1984) (father's estate subject to nonmarital child's claim to inheritance, worker's compensation benefits, and insurance proceeds).

32. *State v. Bowen*, 80 Wash. 2d 808, 809, 498 P.2d 877, 878 (1972).

33. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

34. 409 U.S. 535 (1973).

35. *Id.* at 538 ("[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.").

36. 11 Wash. App. 362, 522 P.2d 1198 (1974).

similarly entitled.³⁷ The *Kaur* court concluded that a child's right to support is fundamental; once paternity has been established, the nonmarital child's right to support is coextensive with that of the marital child.³⁸

The child's right to compel paternal support in Washington continues throughout the child's minority.³⁹ As a consequence of characterizing the child's support right as fundamental and continuing throughout minority, the Washington courts gradually have moved away from a statute of limitations on paternity actions.⁴⁰ In so doing, the courts have relied primarily on the public policy reasons underlying the enactment of paternity statutes.⁴¹ Furthermore, Washington's tolling of the statute of limitations was based on constitutional grounds⁴² and now is supported by federal statutory enactments.⁴³ Because no limitation of action exists on the marital child's ability to enforce the support right,⁴⁴ a state's application of a statute of limitations to paternity actions potentially allows different treatment of two classes of children.⁴⁵ Equal protection challenges⁴⁶ to such state

37. *Id.* at 364, 522 P.2d at 1199.

38. *Id.*

39. *Nettles v. Beckley*, 32 Wash. App. 606, 608, 648 P.2d 508, 510 (1982) (statute of limitations is tolled during the child's minority).

40. *State v. Bowen*, 80 Wash. 2d 808, 811, 498 P.2d 877, 879 (1972) (putative father should not escape liability for child support if no filiation proceeding is instituted within the two-year statutory period; there is no similar limitation upon the time within which the prosecutor can bring an action to enforce criminal nonsupport); *In re Burley*, 33 Wash. App. 629, 636, 658 P.2d 8, 11-12 (1983) (fact that a minor child's date of birth is before effective date of Uniform Parentage Act (UPA) does not prevent child from bringing paternity action under that statute); *Nettles v. Beckley*, 32 Wash. App. 606, 607-08, 648 P.2d 508, 509-10 (1982) (UPA does not limit time for commencing paternity action, and child may recover back support from his natural father); *Kaur*, 11 Wash. App. at 363, 522 P.2d at 1199 (a statute of limitations that might otherwise protect defendant's interests is not an impenetrable barrier that limits child's right to a paternity determination).

41. See *supra* notes 27-32 and accompanying text.

42. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); WASH. CONST. art. I, § 12 ("No law shall be passed granting to any citizen . . . privileges or immunities which upon the same terms shall not equally belong to all citizens . . ."). See *infra* notes 46-47 and accompanying text.

43. Congress has answered questions left open by *Pickett v. Brown*, 462 U.S. 1 (1983), and by *Mills v. Habluetzel*, 456 U.S. 91 (1982), regarding the minimum length of a statute of limitations for paternity actions. The 1984 amendments to the Social Security Act require that a state must allow establishment of paternity at least until a child's 18th birthday. Act of Aug. 16, 1984, Pub. L. No. 98-378, 98 Stat. 1305, 1307 (to be codified as 42 U.S.C. § 666(c)).

44. *Kaur*, 11 Wash. App. at 364, 522 P.2d at 1199.

45. For a comprehensive analysis of the various statutes of limitations provisions

legislative classifications have been successful.⁴⁷

When the statute of limitations is tolled during the child's minority, the child⁴⁸ becomes the real party in interest in a paternity proceeding.⁴⁹ The child's interests in determining his or her natural father and obtaining financial support⁵⁰ outweigh the interests of other parties, including the state's interest in securing a support obligor,⁵¹ the mother's interest in settling the claim,⁵² and the defendant's interest in procedural fairness.⁵³ The Washington Legislature and the courts have delicately balanced the interests of the parties in paternity actions by adopting the Uniform Parentage Act (UPA).⁵⁴ The recognition that the child's interest is superior, however, need not leave the other parties unprotected.

adopted in the United States and their effect on the rights of nonmarital children, see Comment, *Statutes of Limitations in Paternity Proceedings: Barring an "Illegitimate's" Right to Support*, 32 AM. U.L. REV. 567, 576-80 (1983).

46. The United States Supreme Court considered whether a nonmarital child's equal protection rights were violated by a statute of limitations applied to the child's support suit for the first time in *Mills v. Habluetzel*, 456 U.S. 91, 100 (1982).

47. *E.g.*, *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (a two-year limitations period failed to provide a nonmarital child, who was not covered by one of the exceptions in the Tennessee statute, with an adequate opportunity to obtain support); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). In *Mills*, the Court appears to permit a shorter statutory period for the nonmarital child, compared with the marital child, as long as the statutory period is "sufficient." The Court failed to consider the state's interest in reducing the public's financial burden of supporting nonmarital children. Comment, *supra* note 45, at 600.

48. *See, e.g.*, *Thompson v. Thompson*, 285 Md. 488, 499, 404 A.2d 269, 275 (1979) (statute of limitations designed primarily to assure fairness to defendants in paternity proceedings), *appeal dismissed*, 444 U.S. 1062 (1980); *Kaur v. Chawla*, 11 Wash. App. 362, 363, 522 P.2d 1198, 1199 (1974) (a statute of limitations that might otherwise protect the interests of defendants may not be an impenetrable barrier that limits a child's right to a paternity determination).

49. *See infra* note 55 and accompanying text.

50. *See supra* note 27 and accompanying text. The financial support due to the child from the father is determined under WASH. REV. CODE § 26.26.130(5) (1983) by considering only those factors that relate to the child's needs. One Washington court held recently that a parent's contract claims (breach of contract to use contraceptive measures) or tort claims (negligent use or misrepresentation of actual use) could not be considered by the court in setting child support. *Linda D. v. Fritz C.*, 38 Wash. App. 288, 687 P.2d 223 (1984). To do so would be discriminatory against nonmarital children. *Id.* at 296, 687 P.2d at 227.

51. For a discussion of the state's interests as a party to a paternity proceeding, see *infra* text accompanying notes 140-58.

52. For a discussion of the mother's interests as a party to a paternity proceeding, see *infra* text accompanying notes 82-92.

53. For a discussion of the defendant's interests as a party to a paternity proceeding, see *infra* text accompanying notes 93-139.

54. UNIF. PARENTAGE ACT, 9A U.L.A. 579 (1979). In Washington, the amended act is found at WASH. REV. CODE ch. 26.26 (1983).

III. INTERESTS OF THE PARTIES IN A PATERNITY ACTION

The statutory scheme developed by the State of Washington represents a legislative attempt to balance the interests of the parties in a disputed paternity proceeding. Washington's adoption of the UPA in 1976 provides the basis for this interest balancing. In Washington, the child is perceived as the real party in interest in a paternity determination.⁵⁵ The child's superior interest is not questioned here because it is firmly rooted in the common-law concept that all children have a right to parental support.⁵⁶ The other parties in a paternity determination, however, have interests that may be advanced and protected without diminishing the child's superior interest.⁵⁷

An example of balancing all parties' interests in a paternity action is found in the UPA's treatment of a statute of limitations. The UPA effectively eliminated such limitations⁵⁸ in an attempt to balance the rights of the child against the state's interest in preventing stale and fraudulent claims.⁵⁹ Although

55. *State v. Wood*, 89 Wash. 2d 97, 102, 569 P.2d 1148, 1151 (1977) (filiation proceeding designed for the benefit of the child, not for the benefit of the mother); *State v. Kline*, 69 Wash. 2d 107, 109, 417 P.2d 348, 350 (1966) (the object of the filiation proceeding is to ensure support for the child, not to punish the defendant). *But cf. In re Burley*, 33 Wash. App. 629, 639, 658 P.2d 8, 14 (1983) (paternity proceedings may be initiated by the state to recover expenditures of public assistance funds for a child's care; in these circumstances the state is the real party in interest).

56. *See, e.g., Nettles v. Beckley*, 32 Wash. App. 606, 607-08, 648 P.2d 508, 509-10 (1982) (nonmarital child has common-law right to bring an action on his own behalf to establish paternity).

57. *See infra* text accompanying notes 82-139.

58. "[A]n action brought by or on behalf of a child whose paternity has not been determined is not barred until [three] years after the child reaches the age of majority." UNIF. PARENTAGE ACT § 7, 9A U.L.A. 596 (1979). *See also id.* commissioners' comment (because statute of limitations is tolled for 21 years, "it is fully understood that such an extended statute of limitations will cause problems of proof in many cases"). The Washington Legislature chose not to adopt § 7.

59. Both the nonmarital child and the defendant have an interest in procedures that are designed to provide an accurate determination of paternity. Historically, because of proof problems and society's interest in fixing parentage, the paternity defendant had an onerous task to prove his innocence. This difficulty persists because reliable eyewitnesses to intimate sexual activity are rare, and the problem of perjured testimony in paternity proceedings is particularly acute. *See Larson, Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. FAM. L. 713, 713 (1973). In order to reduce the defendant's proof problems, which multiply with the passage of time, to prevent the litigation of stale and fraudulent claims, and to encourage an early determination of paternity, some states have enacted statutes of limitations. *See, e.g., Thompson v. Thompson*, 285 Md. 488, 499, 404 A.2d 269, 275 (1979), *appeal dismissed*, 444 U.S. 1062 (1980); *State v. Bowen*, 80 Wash. 2d 808, 811, 498 P.2d 877, 879 (1972).

Statutes of limitation recently have been challenged in the Supreme Court. *See, e.g.,*

the UPA approach makes sense because the child requires support until majority and because during that time and thereafter the child is entitled to collateral parental benefits,⁶⁰ the approach may leave the defendant in a procedurally insecure position.⁶¹ Statutes of limitation encourage an early determina-

Pickett v. Brown, 462 U.S. 1, 3 (1983) (Tennessee statute); *Mills v. Habluetzel*, 456 U.S. 91, 97 (1982) (Texas statute). For a statute of limitations on paternity determination to survive 14th amendment constitutional attack, it must provide nonmarital children with an adequate opportunity to obtain support and must be substantially related to a legitimate state interest. *Mills*, 456 U.S. at 98. But one commentator persuasively argues that statutes of limitations contain two significant deficiencies that render them impermissibly overbroad when applied to a nonmarital child's cause of action:

First, statutes of limitations impose an arbitrary and formidable impediment to the enforcement of the illegitimate child's right to support without regard to "alternatives which deal directly with the problem of proof. Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children." Instead of narrowly focusing on alternative procedures aimed at reducing the problems of proof inherent in paternity actions, the statute of limitations imposes an arbitrary time period within which a paternity action must be brought and, thereby, severely limits the illegitimate child's ability to enforce support rights. Second, because a child's right to support is continuing and because a determination of paternity is required before an illegitimate child may enforce the right to support, an action to determine paternity can never become stale. Moreover, a child's right to support is never "dormant"; the statute of limitations thus is an illogical foreclosure on the ability of illegitimate children to enforce a continuing right to support.

Comment, *supra* note 45, at 605-06 (quoting State Dep't of Health & Rehabilitative Servs. v. West, 378 So. 2d 1220, 1227 (Fla. 1979)). The direction that the Supreme Court has chosen in *Mills* and *Pickett* supports this assertion. The Court has said that statutes of limitations of one or two years are insufficient to allow the child to assert his or her rights to support. *Pickett*, 462 U.S. at 18 (Court struck down two-year limit); *Mills*, 456 U.S. at 101 (Court struck down one-year limit).

The controversy surrounding statutes of limitations in paternity actions has been mooted by Congress' adoption of the 1984 Social Security Act Amendments. States now are required to extend the statute of limitations for paternity actions and to compel support until the child's 18th birthday. Act of Aug. 16, 1984, Pub. L. No. 98-378, 98 Stat. 1305, 1307 (to be codified as 42 U.S.C. § 666(c)) ("[T]he state shall have in effect all of the laws to improve child support enforcement effectiveness [E]ach state must have in effect laws requiring . . . the following procedures Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.").

60. See *supra* note 2.

61. The UPA gives the child the right to bring an action for back child support. *Nettles v. Beckley*, 32 Wash. App. 606, 609, 648 P.2d 508, 510 (1982). *But cf. Hartman v. Smith*, 100 Wash. 2d 766, 768-69, 674 P.2d 176, 178 (1984). In *Hartman*, the custodial parent remarried and the stepfather adopted the child. Seven years later the court of appeals declared the adoption void *ab initio*. The natural father then resumed making support payments; the mother claimed that the child support and medical expenses that had accrued during the seven-year period of presumed adoption were now owed to her by the father. The court determined that the father's failure to pay support did not

tion of paternity⁶² and relieve the defendant of the potentially onerous burden of defending against accusations after the passage of many years.⁶³ However, the UPA counterbalances this procedural insecurity: if a man is aware of a possible paternity action, or if he is a presumed father but can rebut the presumption, then he may bring an action to disestablish paternity.⁶⁴

Adding to the defendant's procedural insecurity, the UPA attempts to balance the mother's interest and the child's interest in support against the inherent proof problems in paternity actions.⁶⁵ Typically, a mother has little difficulty establishing a prima facie case without corroborating witnesses,⁶⁶ whereas any defenses that the defendant might offer require extensive corroboration.⁶⁷ Furthermore, the UPA allows certain facts to raise a presumption of paternity that can be rebutted only by clear and convincing evidence.⁶⁸

Finally, the UPA again counterbalances the defendant's procedural insecurity by protecting the indigent defendant with appointed counsel, blood tests, and a transcript on appeal, all furnished at state expense.⁶⁹ Adopting states, however, have not

injure the mother-custodian or the child because the child was well cared for during this time. Furthermore, the father had relied on the validity of the adoption and was denied all parental rights for a significant period of time. Thus, although recognizing that a marital dissolution order and judgment requires the noncustodial parent to pay child support and that the cause of action for unpaid past due support lies with the custodial parent alone, the *Hartman* court applied equitable principles to relieve the natural father of past due support.

62. *State v. Bowen*, 80 Wash. 2d 808, 811, 498 P.2d 877, 879 (1972).

63. See *Thompson v. Thompson*, 285 Md. 488, 494, 404 A.2d 269, 272 (1979) (claims asserted after evidence is gone, memories have faded, and witnesses disappeared are so stale as to be unjust), *appeal dismissed*, 444 U.S. 1062 (1980).

64. These provisions are retained by Washington. See WASH. REV. CODE § 26.26.060(1)(a) (1983) (alleged father may bring action to disestablish paternity at any time); WASH. REV. CODE § 26.26.060(1)(b) (1983) (presumed father may bring action to disestablish paternity "within a reasonable time" after obtaining knowledge of relevant facts).

65. See *Larson*, *supra* note 59, at 733, 752.

66. For example, the mother need only establish the prima facie fact of sexual intercourse between the parties during the appropriate time period for the court to require that the putative father submit to a blood test. *State v. Meacham*, 93 Wash. 2d 735, 741, 612 P.2d 795, 799 (1980); WASH. REV. CODE § 26.26.100(1) (1983).

67. *Larson*, *supra* note 59, at 715 (defendant's testimony as to the defenses of non-access, sterility, impotency, or multiple-access usually requires extensive corroboration).

68. UNIF. PARENTAGE ACT § 4(b), 9A U.L.A. 591 (1979) ("A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence."). See also WASH. REV. CODE § 26.26.040(5) (1983) (requiring "clear, cogent, and convincing evidence").

69. UNIF. PARENTAGE ACT § 11, 9A U.L.A. 601 (1979) ("The court may . . . require

always retained each of these provisions and have thereby altered the balance.⁷⁰

For example, the Washington Legislature deleted the provision in the UPA requiring appointed counsel for indigents at state expense. Two subsequent Washington cases held that no constitutional right to appointed counsel exists.⁷¹ In the more recent of these cases, *State v. James*,⁷² the court concluded that appointed counsel is not constitutionally required in all state-initiated paternity proceedings.⁷³

The *James* court applied a three-part test⁷⁴ to determine when due process requires a certain procedural safeguard.⁷⁵ The reviewing court must consider: (1) the value of the private interest that would be affected by the private action; (2) the risk of an erroneous adjudication absent the procedural safeguard; and

the child, mother, or alleged father to submit to blood tests." See also *id.* § 19, 9 U.L.A. 611 (1979), which provides:

(a) At the pretrial hearing and in further proceedings, any party may be represented by counsel. The court shall appoint counsel for a party who is financially unable to obtain counsel.

(b) If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

70. Of the ten adopting states, four have retained the original language or intent of Uniform Parentage Act § 19. MONT. CODE ANN. § 40-6-119 (1983); NEV. REV. STAT. § 126.201 (1983); N.D. CENT. CODE § 14-17-18 (1981); WYO. STAT. § 14-7-120 (1977). Washington deleted the section. See *infra* notes 71-81 and accompanying text.

71. *State v. Walker*, 87 Wash. 2d 443, 553 P.2d 1093 (1976); *State v. James*, 38 Wash. App. 264, 686 P.2d 1097 (1984). In *Walker*, the Washington Supreme Court held that an indigent person has a constitutional right to free legal counsel only in an action that involves an imminent threat of imprisonment; the mere possibility of imprisonment for failure to follow a court order in the proceeding does not constitute such a threat. *Walker*, 87 Wash. 2d at 446, 553 P.2d at 1095. However, the court of appeals in *James* indicated that *Walker* was no longer persuasive authority because the three factors in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), see *infra* text accompanying notes 74-76, were controlling with respect to federal due process requirements. The *Walker* court had failed to analyze the right to counsel issue in accordance with those factors. Furthermore, the *Walker* court assumed that because paternity proceedings did not result in an imminent threat of imprisonment, a right to counsel did not apply. In *James*, however, the court regarded the lack of imminent imprisonment as merely giving rise to a rebuttable presumption against the right to counsel. *James*, 38 Wash. App. at 272 n.4, 686 P.2d at 1101 n.4.

72. 38 Wash. App. 264, 686 P.2d 1097 (1984).

73. *Id.* at 269, 686 P.2d at 1100.

74. *Id.* at 267, 686 P.2d at 1099. This test was originally set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

75. Paternity proceedings are subject to the requirements of due process. *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (indigent defendants in paternity proceedings entitled to blood-grouping tests furnished at state expense). See *infra* notes 110-18 and accompanying text.

(3) the government's interest in providing or withholding the procedural safeguard. These three factors are then weighed against the presumption that an indigent litigant has a right to counsel only when he may be imprisoned if he loses.⁷⁶

Applying these factors to the *James* defendant, the court concluded that the first factor—the interests of the putative father affected by the paternity action—weigh in favor of recognizing a right to appointed counsel. Both the accuracy of the paternity determination and the defendant's financial interests are compelling.⁷⁷ The second factor—the risk of an erroneous adjudication absent appointed counsel—depends on the circumstances of each case. Although recent developments in blood testing methods⁷⁸ have increased the probability of accurate paternity determinations, this evidence alone may not be conclusive.⁷⁹ Finally, in applying the third factor—the state's interest in providing or withholding the procedural safeguard—the court recognized that the interests of both the state and the defendant were served when the defendant was represented by counsel. The state, however, also has legitimate financial interests at stake.⁸⁰ After weighing these three factors with the presumption against appointed counsel in paternity proceedings, the *James* court concluded that the due process clause of the fourteenth amendment does not require appointed counsel in all state-initiated proceedings.⁸¹ Thus, although the court of appeals found that appointed counsel was not required in the circumstances of the *James* defendant, the decision permits a case-by-case determination of this problematic issue in future decisions.

In attempting to protect a defendant's procedural interests, the UPA weighs his rights against those of the other parties. Washington's adaptation of the UPA has altered that balance,

76. *James*, 38 Wash. App. at 268, 686 P.2d at 1099.

77. A defendant may have liberty interests at stake as well. See *Tetro v. Tetro*, 86 Wash. 2d 252, 253, 544 P.2d 17, 18 (1975) (father faces possible imprisonment for contempt if he fails to make support payments); WASH. REV. CODE § 26.20.030 (1983) (paternity adjudication may be basis for criminal prosecution for willful nonsupport); WASH. REV. CODE § 26.26.070 (1983) (plaintiff may petition court for arrest warrant for putative father even before defendant is adjudicated the father). However, subsequent actions based on the paternity determination would entitle the indigent defendant to appointed counsel. *James*, 38 Wash. App. at 272, 686 P.2d at 1101. See *infra* notes 125-36 and accompanying text.

78. See *infra* notes 95-109 and accompanying text.

79. *James*, 38 Wash. App. at 272, 686 P.2d at 1101.

80. *Id.* at 271, 686 P.2d at 1100.

81. *Id.* at 272, 686 P.2d at 1101.

giving even greater weight to the child's superior interests. Because both the defendant and the child have an interest in the accurate determination of paternity, the child's superior interests are preserved, while the defendant's interest in representation is recognized and protected.

A. *The Mother*

The UPA recognizes that the mother and child often have divergent interests. Therefore, the UPA provides that only a person who will objectively represent the best interests of the child, excluding the mother and alleged father, be appointed guardian ad litem.⁸² At those times when the interests of the mother and the child collide, the child's interest prevails.

For example, a mother's interests may diverge from those of her child when the mother wishes to settle the claim in order to obtain immediate monetary support⁸³ or when a mother refrains from bringing an action in the hopes of continuing a relationship with the child's father.⁸⁴ Some mothers may fear for their physical safety. Others may be embarrassed and reluctant to publicly reveal the pregnancy because of a desire to avoid disapproval of family and community⁸⁵ or because the pregnancy was the result of incest. In Washington, although a mother may have good reasons for not bringing suit, she is not permitted to foreclose her nonmarital child's right to support by either compromise⁸⁶ or inaction.⁸⁷

82. WASH. REV. CODE § 26.26.090 (1983). *But see* WASH. REV. CODE § 74.20.310 (1983) (a guardian ad litem need not be appointed in actions brought by the attorney general on behalf of DSHS, the child, or the mother; or in actions referred by DSHS and brought by the prosecutor on behalf of the state, the child, or the mother).

83. WASH. REV. CODE § 26.26.060(3) (1983) ("Regardless of its terms, no agreement between an alleged or presumed father and the mother or child, shall bar an action under this section."). *But cf.* *State v. Bowen*, 80 Wash. 2d 808, 815, 498 P.2d 877, 881 (1972) (a compromise and settlement of a paternity claim can be sustained if the consideration paid is at least as much as the law would require in a filiation proceeding); *Peterson v. Eritslund*, 69 Wash. 2d 588, 592, 419 P.2d 332, 334-35 (1966) (if alleged father obtains release from mother upon payment of a sum greater than the court would have required following a filiation proceeding, the agreement is binding).

84. *See Thompson v. Thompson*, 285 Md. 488, 494, 404 A.2d 269, 273 (1979), *appeal dismissed*, 444 U.S. 1062 (1980).

85. *Mills v. Habluetzel*, 456 U.S. 91, 100 (1982).

86. WASH. REV. CODE § 26.26.060(3) (1983). *See also State v. Bowen*, 80 Wash. 2d 808, 814-15, 498 P.2d 877, 881 (1972) (father's obligation to contribute to child's support may not be defeated by mother's agreement not to assert a claim against him).

87. Even when a statute of limitations in paternity actions was recognized in Washington, a putative father could not escape liability for child support if no filiation pro-

A mother who has no desire to bring suit may again have her interests overridden if she applies for public assistance.⁸⁸ The mother-applicant must cooperate in establishing paternity by naming the father if she knows his identity, by assisting in locating him, and by participating as the local law requires to establish his legal obligation.⁸⁹ In order to encourage her participation, DSHS will deny the portion of AFDC payments ordinarily provided for the caretaker parent if she does not cooperate.⁹⁰ The child may not be deprived of aid because of the mother's failure to cooperate,⁹¹ and the mother cannot be compelled to cooperate if she can show that such cooperation would not be in the best interests of the child.⁹²

ceeding was instituted within the statutory period. *State v. Bowen*, 80 Wash. 2d 808, 811, 498 P.2d 877, 879 (1972).

88. The Child Support and Establishment of Paternity provisions, part D of title IV of the Social Security Act, require of each participating state that a designated agency obtain and enforce support orders for AFDC children and establish paternity when necessary. 42 U.S.C. § 652 (1983). In Washington, the agency so designated is the Washington State Department of Social and Health Services. WASH. REV. CODE § 74.20.040 (1983).

89. 45 C.F.R. § 232.12 (1984).

90. 42 U.S.C. § 602(a)(26)(B)(ii) (1983); WASH. ADMIN. CODE § 388-24-108(2) (1983).

91. 42 U.S.C. § 606(f) (1983). Congress recently passed legislation that allows \$50 per month of child support collected from the absent parent to be paid to the AFDC family, rather than to the state. The intent of this incentive was to give greater benefits to families, while encouraging those families to cooperate in child support enforcement. 130 CONG. REC. S13757-58 (daily ed. Oct. 5, 1984) (statement of Sen. Leahy).

92. WASH. ADMIN. CODE § 388-24-111(6) (1983) provides:

[C]ooperation in establishing paternity and/or securing support is against the best interest of the child only if:

(a) The applicant's/recipient's cooperation is reasonably anticipated to result in physical harm or emotional harm which clearly demonstrates observable consequences substantially impairing the functioning of either:

(i) The child for whom support is to be sought; or

(ii) The parent or caretaker relative with whom the child is living which reduces the parent or caretaker relative's capacity to care for the child adequately; or

(b) At least one of the following circumstances exists, and . . . because of the existence of that circumstance . . . proceeding to establish paternity or secure support would be detrimental to the child for whom support would be sought:

(i) The child for whom support is sought was conceived as a result of incest or forcible rape;

(ii) Legal proceedings for the adoption of the child are pending before a superior court; or

(iii) The applicant/recipient is currently being assisted by a public or licensed child-placing agency to resolve the issue of whether to keep the child or relinquish it for adoption, and the discussions have not gone on for more than three months.

B. The Defendant

Because of the danger that the court might wrongly name the defendant as the child's father, the defendant in a paternity action is granted certain procedural protections. Probably the most important of these is the defendant's right to a blood test.⁹³ Because of the scientific advancements in blood grouping and typing, there is now general agreement that these results should be admitted into evidence.⁹⁴

Two kinds of testing procedures⁹⁵ have been used to determine if a defendant is excludable from the class of possible fathers: one procedure is based on blood groups and types; the other on genetic make-up. The blood-group-and-type tests⁹⁶ are more commonly used because they are less expensive than the genetic tests⁹⁷ and because a proper scientific foundation has been laid, thus increasing the chance of admittance at trial.⁹⁸ However, the results of the blood-group-and-type tests are less accurate and less discriminating than those afforded by the second procedure.⁹⁹

The second procedure, known as the human leukocyte antigen (HLA) test, is based on gene typing. This procedure dramatically reduces the chance of an inaccurate result in determining parentage¹⁰⁰ because HLA types occur with greater variety in

93. See, e.g., *Lyons v. DeValk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106, 108-09 (1970) (mother's refusal to submit to scientific testing deprives the defendant of his due process right to a defense and is a ground for dismissal).

94. A majority of states have enacted statutes authorizing the use of blood-group tests. See, e.g., WASH. REV. CODE § 26.26.100 (Supp. 1984). See also S. SCHATKIN, *DISPUTED PATERNITY PROCEEDINGS* § 9.13 (Supp. 1984).

95. For a complete discussion of the nature and reliability of blood and genetic tests used in determining paternity, see generally S. SCHATKIN, *supra* note 94, §§ 5.01-11.06 (discussion of the characteristics and accuracy of both blood group and human leukocyte antigen (HLA) testing); Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1977-78) (discussion of the characteristics and superior accuracy of the HLA procedure); *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976) (blood tests that exclude the defendant are the most probative evidence for the putative father in a paternity proceeding); Comment, *Paternity Testing with Human Leukocyte Antigen: A Medicolegal Breakthrough*, 20 SANTA CLARA L. REV. 511 (1980).

96. These tests are based on the scientific determination that all human blood falls within four groups and three types. See S. SCHATKIN, *supra* note 94, § 5.02. The procedure is reliable only to exclude a defendant as a possible father; it does not prove paternity because the combination of blood and group types appears in millions of men.

97. See S. SCHATKIN, *supra* note 94, § 9.01, at 188.

98. *Id.* at § 9.03.

99. See *infra* text accompanying notes 100-03.

100. Studies indicate that if a putative father is not excluded by the HLA test, the

the human population than do blood types and groups.¹⁰¹ For example, if a putative father shares a combination of HLA types with a child that are not also found in the child's mother, then there is a statistically high probability that the defendant is the child's father.¹⁰² The converse of this proposition provides exculpatory evidence for the defendant. Thus, if a putative father lacks a combination of HLA types found in the child that are not also found in the child's mother, then the accused defendant cannot be the child's father.¹⁰³

When the Washington Legislature adopted the UPA, it retained the blood test provision.¹⁰⁴ Although the provision does not specify the administration of the more sophisticated HLA genetic testing, in those actions involving court-ordered blood testing, HLA testing has been used exclusively for some time.¹⁰⁵ Either the blood-group-and-type test or the HLA test is now dispositive on the issue of nonpaternity, except when the state's presumption of legitimacy precludes these tests.¹⁰⁶ While exclusions of paternity can be established with scientific certainty, inclusions of paternity may only be established by degrees of probability.¹⁰⁷ Even so, blood-typing and HLA gene-typing results should be admissible as evidence to be weighed with other circumstantial evidence.¹⁰⁸ Washington permits the admission of the blood test results for purposes of inclusion as well as

probability of his being the child's father is likely to exceed 90%. Terasaki, *supra* note 95, at 552-53.

101. *Id.* at 544.

102. Comment, *supra* note 95, at 521.

103. *Id.*

104. WASH. REV. CODE § 26.26.100 (Supp. 1984) ("The court may, and upon request of a party shall, require the child, mother, and any alleged father who has been made a party to submit to blood tests."); UNIF. PARENTAGE ACT § 10, 9A U.L.A. 579 (1979).

105. See, e.g., *State v. Meacham*, 93 Wash. 2d 735, 737, 612 P.2d 795, 796 (1980).

106. *Miller v. Sybouts*, 97 Wash. 2d 445, 449-50, 645 P.2d 1082, 1085 (1982) (prior to establishing paternity by another man, a divorced husband must disestablish his presumed fatherhood of a child born within three hundred days after the marriage is terminated); WASH. REV. CODE § 26.26.040(5) (1983).

107. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 127 (1971).

108. *Id.* Professor Krause asserts that the issue of paternity should be viewed less as a legal question and more as a medical question. *Id.* at 123. "[E]ven if blood typing cannot establish paternity positively in *medical* terms, the positive proof of paternity may reach a level of probability which is entirely acceptable in *legal* terms." *Id.* at 128 (emphasis in original).

If a putative father receives HLA blood type results that place him in Column A, then his likelihood of fathering the child is described in Column B.

exclusion.¹⁰⁹

The indigent paternity defendant has a right to state-supported testing¹¹⁰ even though the Washington courts have ruled that indigent paternity defendants have no right to appointed counsel at state expense.¹¹¹ The issue of the indigent paternity defendant's due process right to have at least one objective and reliable method of proving paternity made available to him was decided by the United States Supreme Court in *Little v. Streater*.¹¹² The Court noted that blood grouping is a reliable and objective method of determining parentage because of three factors: (1) one's blood group can be determined at birth; (2) the blood group remains constant throughout life; and (3) the blood group is inherited by the child from the parents.¹¹³ The results of such testing may provide exculpatory evidence for the defendant.¹¹⁴ Thus, the Court concluded that denial by a state of such potentially valuable evidence constitutes a violation of the defendant's due process rights.¹¹⁵

Under a narrow reading of *Little*, blood testing may be

A. Probability Percentage

99.80 — 99.90
 99.10 — 99.79
 95.00 — 99.09
 90.00 — 94.99
 80.00 — 89.99
 < 80.00

B. Likelihood of Paternity

Practically proved
 Extremely likely
 Very likely
 Likely
 Undecided
 Not useful

Adapted from S. SCHATKIN, *supra* note 94, § 8.13, at 116 (Supp. 1984). Cf. MINN. STAT. ANN. § 257.62(5) (West 1982 & Supp. 1984) ("If the results of the blood test indicate that the likelihood of the alleged father's paternity is more than 92 percent, upon motion the court shall order the alleged father to pay temporary child support . . . [while awaiting] the results of the paternity proceedings.").

109. See, e.g., *State v. James*, 38 Wash. App. 264, 265, 686 P.2d 1097, 1097 (1984); WASH. REV. CODE § 26.26.100(1) (Supp. 1984) ("The expert's verified report identifying the blood characteristics observed is admissible in evidence in any hearing or trial in the parentage action.").

110. *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (unanimous decision).

111. *State v. Walker*, 87 Wash. 2d 443, 446, 553 P.2d 1093, 1095 (1976); *State v. James*, 38 Wash. App. 264, 269, 686 P.2d 1097, 1100 (1984). See *supra* notes 71-81 and accompanying text.

112. 452 U.S. 1 (1981). *Little* involved the constitutionality of a Connecticut statute requiring the party who requested blood tests in a paternity determination to pay for them. The Court held that the denial of such tests to an indigent defendant was a violation of his due process rights under the 14th amendment. *Id.* at 16-17.

113. *Id.* at 6-7.

114. *Id.* at 7.

115. *Id.* at 16-17.

required at state expense only when the state is a party.¹¹⁶ In Washington, when the state is not a party, the court may order the parties to submit to blood tests, but the court is required to do so only when a party requests these tests.¹¹⁷ Therefore, an indigent paternity defendant who is unrepresented¹¹⁸ in an action between private individuals may be unaware of the potentially exculpatory evidence provided by blood testing.

Defendants may object to, rather than insist on, blood testing. For example, in *State v. Meacham*,¹¹⁹ two Washington defendants, in separate actions, objected to court-ordered blood tests. The defendants asserted that such blood testing was equivalent to an unreasonable search within the meaning of the fourth amendment.¹²⁰ The Washington Supreme Court recognized that court-ordered blood tests are indeed searches.¹²¹ Nonetheless, a defendant's interests are less compelling than those of the child.¹²² The court reasoned that the fourth amendment proscription is directed only to those searches that are unreasonable: that is, those unjustified by the circumstances or those carried out in an improper manner.¹²³ The court held that under certain circumstances in paternity determinations, orders for the withdrawal of blood were reasonable.¹²⁴

Other procedural protection interests of the defendant arise from the overlap of the civil and criminal cause of action in paternity proceedings. The primary purpose behind the establishment of paternity statutes was not to punish a nonmarital father but to compel him to support his offspring.¹²⁵ Thus, while the earliest paternity cause of action arose from a criminal non-

116. In *Little*, the state was actively involved in pursuing a determination of paternity for a particular AFDC recipient. The extent of the state's involvement gave rise to a constitutional duty. *Id.* at 9-10.

117. WASH. REV. CODE § 26.26.100(1) (Supp. 1984). See *supra* note 104.

118. See *supra* notes 71-81 and accompanying text.

119. 93 Wash. 2d 735, 612 P.2d 795 (1980). In *Meacham*, two separate actions were consolidated on appeal. In each case the state had brought an action against a putative father who was then ordered to submit to the withdrawal of blood for testing to determine paternity. Each man resisted the court order, asserting that a compulsory blood test violated his rights to personal privacy, freedom from unreasonable searches and seizures, and freedom of religion.

120. *Id.* at 736, 612 P.2d at 797.

121. *Id.* at 738, 612 P.2d at 798.

122. *Id.* at 741, 612 P.2d at 799.

123. *Id.* at 739, 612 P.2d at 798.

124. *Id.*

125. *State v. Kline*, 69 Wash. 2d 107, 109, 417 P.2d 348, 350 (1966) (object of the proceeding is to ensure support of the child and not to punish defendant).

support statute,¹²⁶ the current statutory cause of action is civil.¹²⁷ A dangerous element exists in this dual system: one element of a criminal action may be proved by a civil standard, rather than by a criminal one. While the purpose of most paternity actions is to identify the child's father *and* to compel support,¹²⁸ other actions may be brought merely to ensure a child's intestate inheritance,¹²⁹ for example, or to secure a child's social security benefits.¹³⁰ Therefore, some paternity actions pose no threat to the defendant's liberty, as might be the situation in a paternity action for criminal nonsupport.¹³¹

The civil paternity determination is distinct from the criminal nonsupport action, and the nonsupport action affords the defendant all criminal due process rights.¹³² However, because nonsupport is quite simple to prove, full due process protections are of little use in the criminal nonsupport action.¹³³ As the defendant was afforded no counsel in the civil proceeding that determined the fact of his parentage by a mere preponderance of the evidence, the defendant's constitutional guarantee of due process should prohibit the court from imposing criminal penalties for nonsupport based on a prior determination of pater-

126. *State v. Russell*, 68 Wash. 2d 748, 753 n.7, 415 P.2d 503, 506-07 n.7 (1966) (criminal nonsupport is proved if a parent fails to furnish necessary food, shelter, or medical attention for child, regardless of the parent's marital status—past, present, or future).

127. The filiation statute, WASH. REV. CODE ch. 26.24, which was superseded by the UNIF. PARENTAGE ACT, WASH. REV. CODE ch. 26.26 in 1976, was supported by case law stating that the filiation proceeding is civil in nature, even though it is prosecuted in the name of the state and contemplates the defendant's incarceration if necessary to enforce compliance with the court's orders. *See, e.g., State v. Speed*, 96 Wash. 2d 838, 841-42, 640 P.2d 13, 15 (UPA did not convert filiation proceedings into a criminal prosecution), *cert. denied*, 459 U.S. 863 (1982); *Yetter v. Commeau*, 84 Wash. 2d 155, 162-63, 524 P.2d 901, 906 (1974) (the rules of civil procedure and usual evidentiary standards followed in filiation proceedings apply under Uniform Reciprocal Enforcement Support Act (URESA)).

128. WASH. REV. CODE ch. 26.26 (Supp. 1984). *See supra* note 27.

129. *See* WASH. REV. CODE § 11.04.081 (Supp. 1984). *See also supra* note 31.

130. 42 U.S.C. § 654(4)(A) (Supp. 1984) ("A State plan for child and spousal support must . . . provide that such State will undertake in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child . . .").

131. *See State v. Mottett*, 73 Wash. 2d 114, 115, 437 P.2d 187, 188 (1968) (if defendant is required to give bond and he fails to do so, he may be arrested and imprisoned). *See also supra* note 77.

132. WASH. REV. CODE § 26.20.030 (1983). *See also State v. Pearson*, 13 Wash. App. 870, 873-74, 538 P.2d 567, 569 (1975) (as with other defendants, putative father permitted to present proof of his willingness and ability to pay prior to court's requiring bond).

133. H. KRAUSE, *supra* note 107, at 154.

nity.¹³⁴ Nonetheless, in Washington, a civil paternity determination is *res judicata* in a subsequent criminal nonsupport case.¹³⁵ Thus, one element of a criminal action may be proved with a lower standard than that of "beyond a reasonable doubt."

To provide the defendant with full due process protections in paternity determinations, the defendant must be permitted to challenge a civil paternity judgment in the criminal nonsupport proceeding. The defendant's criminal prosecution for nonsupport of a nonmarital child must rest on evidence of paternity beyond a reasonable doubt. A prior civil adjudication of the defendant's paternity of a particular child may be presented as evidence of paternity in the criminal case, but it should not be conclusive on the issue of paternity.¹³⁶

Finally, because the Washington Legislature does not provide counsel for indigent paternity defendants at state expense,¹³⁷ several problems for the unrepresented defendant can be anticipated and routinely prevented. First, if the paternity defendant appears *pro se*, either because of indigency or by choice, he is most likely unaware of the sharp differences in the two available blood testing procedures. Not fully appreciating the benefits of the two procedures, he may, if given an option, choose the less expensive blood-group testing or no blood testing at all. Thus, to provide the paternity defendant with the opportunity to offer exculpatory evidence, the court should inform the defendant of the significant differences in result that may occur in the two testing procedures and should order the HLA tests.¹³⁸

Second, if the paternity defendant is indigent, and if the state is a party to the action, the court should routinely order HLA testing to aid the state in carrying out its obligation to provide such tests. Because the right test results will compel dismissal, the blood test easily can accomplish what the lawyer may

134. *Id. But cf. State v. James*, 38 Wash. App. 264, 272, 686 P.2d 1097, 1101 (1984) (although the paternity adjudication makes possible a later order for contempt or willful nonsupport, those subsequent actions must be based on the intervening, volitional act to withhold support).

135. WASH. REV. CODE § 26.26.130(1) (1983) ("The judgment and order of the court determining the existence or nonexistence of the parent and child relationship shall be determinative for all purposes.").

136. H. KRAUSE, *supra* note 107, at 158.

137. *State v. James*, 38 Wash. App. 264, 268, 686 P.2d 1097, 1099 (1984). *See supra* notes 71-81 and accompanying text.

138. WASH. REV. CODE § 26.26.100(1) eases the way for the parties to admit and to gain information about the blood test results.

not be able to do at all.

Third, if the parties choose an administrative hearing rather than a trial, the relative informality may lull the unrepresented defendant into believing that the consequences of such a proceeding are not serious.¹³⁹ For these reasons the paternity defendant must be apprised of the benefits of administrative hearings and of the serious, ongoing consequences of a paternity determination. Finally, the putative father should be encouraged to retain counsel.

C. *The State*

The state, in addition to its interest in an accurate determination of paternity,¹⁴⁰ has an interest in initiating paternity actions to protect the public from the burden of supporting nonmarital children¹⁴¹ whose fathers are capable of providing funds for their care, support, and education.¹⁴² Once paternity has been established, the state, through its statutory authority,¹⁴³ has the power to bring an action against the child's father to compel support.¹⁴⁴

139. See *infra* notes 156-58 and accompanying text.

140. *State v. James*, 38 Wash. App. 264, 270, 686 P.2d 1097, 1100 (1984) (state's interest in accurate paternity determinations is balanced by its interest in conducting paternity proceedings as economically as possible, thus no right to appointed counsel in paternity proceedings).

141. In *New Jersey Welfare Rights Org. v. Cahill*, a New Jersey statute that permitted the state to pay welfare benefits only to households that included marital children was held unconstitutional. 411 U.S. 619, 621 (1973). The Court ruled that the statute invidiously discriminated against the families of nonmarital children. *Id.* The state's payment of welfare benefits turned upon the marital status of the parents and depended upon a legal relationship between the parent and child, rather than on need. *Id.*

142. *State v. Wood*, 89 Wash. 2d 97, 102, 569 P.2d 1148, 1151 (1977) ("The State has a compelling interest in assuring that the primary obligation for support of illegitimate children falls on *both* natural parents rather than on the taxpayers of this state.") (emphasis in original); *State v. Klinker*, 85 Wash. 2d 509, 521, 537 P.2d 268, 278 (1975) ("The governmental interest in filiation proceedings is the need to insure that the burden of supporting illegitimate children will be equitably shared by both of its parents and will not be unnecessarily placed on the state."). *But cf.* *State ex rel. Partlow v. Law*, 39 Wash. App. 173, 177, 692 P.2d 863, 865 (1984) (income of the wife of man adjudged father of nonmarital child considered in setting the amount of child support in paternity action because related to father's ability to pay); *Linda D. v. Fritz C.*, 38 Wash. App. 288, 301, 687 P.2d 223, 227 (1984) (Wash. UPA does not create an irrebuttable presumption that parents have an equal duty of support).

143. WASH. REV. CODE § 74.20.330 (1983) (payment of public assistance creates an assignment to DSHS by operation of law).

144. Under the filiation statute (formerly WASH. REV. CODE ch. 26.24, now superseded by WASH. REV. CODE ch. 26.26 (1983)), a cause of action was granted only to an unmarried mother, her parents, or her guardian. Although the prosecuting attorney had

Because the overwhelming number of paternity actions are prosecuted by the state in an effort to recover funds expended on AFDC children¹⁴⁵ and because most suspected fathers admit to paternity without more evidence than the mother's accusation,¹⁴⁶ the state often may secure a support obligor who is not actually the child's father.¹⁴⁷ In addition to this problem, participation in a trial is expensive and time-consuming. An administrative hearing, rather than a judicial proceeding, would advance the interests of all parties in two situations: when the state, as a party, is attempting to collect AFDC expenditures and in non-AFDC cases when the parties so elect. Of course, certain procedural safeguards must be guaranteed.¹⁴⁸

IV. ADMINISTRATIVE DETERMINATIONS OF PATERNITY

The notion that administrative proceedings have a role in paternity determinations is not new. In *Taylor v. Morris*¹⁴⁹ and *Woolery v. Department of Social and Health Services*,¹⁵⁰ the State of Washington, through DSHS, sought an administrative determination of paternity. The state asserted that the legislature had delegated implied authority to DSHS¹⁵¹ to determine

the responsibility for prosecuting the action in the name of the state, the real parties in interest were the complainant-mother and the child. *State v. Casey*, 7 Wash. App. 923, 926, 503 P.2d 1123, 1125 (1972). Even though the state had no independent right to bring an action to establish paternity under the filiation statute, it could reach the issue directly through other statutes. See *State v. Russell*, 68 Wash. 2d 748, 752, 415 P.2d 503, 506 (1966). Under Washington's version of the UPA, any interested party, including the state and the Department of Social and Health Services, may bring an action to determine paternity. WASH. REV. CODE § 26.26.060 (1983).

145. See *supra* note 13.

146. See *infra* note 147. Even without a mother's accusation, one study found that an estimated 18% of men who voluntarily admitted paternity were not the fathers of the children in question. H. KRAUSE, *supra* note 107, at 108. Professor Krause suspects that many men admit paternity because they had sexual access to the mother and either deny or disbelieve that these mothers could have had concurrent relationships with other men. *Id.*

147. There is a surprising lack of data to support the accuracy of the state's paternity determinations. Professor Krause reported that 75-95% of putative fathers admit paternity even before the case comes to trial. Krause, *Child Support Enforcement*, 15 FAM. L.Q. 349, 362 (1982). Yet a separate study based on blood tests revealed that in a group of 1000 cases of disputed paternity, 39.6% of the accused men were not actually the fathers of the children. H. KRAUSE, *supra* note 107, at 107-08.

148. See *supra* text accompanying notes 93-139.

149. 88 Wash. 2d 586, 564 P.2d 795 (1977).

150. 25 Wash. App. 762, 612 P.2d 1 (1980).

151. *Taylor*, 88 Wash. 2d at 588, 564 P.2d at 796; *Woolery*, 25 Wash. App. at 765, 612 P.2d at 2.

parentage since the state required recoupment from the child's father for expended AFDC payments. On both occasions, the Washington courts denied that administrative determinations of paternity are permitted because such power was not express or implied in the statutory language.¹⁵² In both *Taylor* and *Woolery*, the courts held that the purpose of the statutes in question¹⁵³ was to provide additional and effective procedures for reaching the earnings and the property of a responsible parent whose child was receiving public assistance. These courts determined that the statutes in question failed to provide for an additional cause of action to determine paternity. Therefore, to ascertain parentage, DSHS was required to bring an action under the UPA.¹⁵⁴

The *Taylor* and *Woolery* decisions were based on the lack of statutory powers, implied or express, provided in the language and intent of the legislature. Although the delegation of power to determine parentage is not found in the public assistance statutes, administrative determinations of paternity are needed. Unfortunately, the *Taylor* and *Woolery* courts did not reach the question whether such an administrative procedure would be in the parties' best interests.

All parties would benefit by the use of an administrative procedure for paternity determinations. If the state could exert direct control over monies applied toward identifying parentage, administrative hearings would meet the needs of dependent nonmarital children without the considerable delay¹⁵⁵ these cases now experience. Furthermore, the appointment of administrative law judges, who could specialize and acquire experience by hearing a large volume of cases in a narrow area of the law, would ensure consistent decisions. Finally, the proceeding would be heard in a less formal, less threatening environment than that

152. *Taylor*, 88 Wash. 2d at 592, 564 P.2d at 798; *Woolery*, 25 Wash. App. at 764, 612 P.2d at 2.

153. In *Woolery*, the statutes in question were WASH. REV. CODE ch. 74.04 (governing public assistance generally); WASH. REV. CODE ch. 74.08 (governing eligibility for public assistance); and WASH. REV. CODE ch. 74.12 (governing the AFDC program). In *Taylor*, the statute in question was WASH. REV. CODE ch. 74.20A (governing support for dependent children).

154. *Taylor*, 88 Wash. 2d at 593, 564 P.2d at 799; *Woolery*, 25 Wash. App. at 764, 612 P.2d at 2.

155. One reason for delay in contested cases is court congestion. For example, in Pierce County the average wait for a court date is 9 months. Telephone interview with Sharon Fuller, Deputy Prosecuting Attorney, Pierce County, Tacoma, Wash. (Mar. 21, 1985).

of a judicial proceeding, and would perhaps reduce the parties' anxieties.

Although an administrative proceeding may be less formal than a trial, its consequences are not less serious. Moreover, a chance exists that hearsay might be admitted.¹⁵⁶ Therefore, among the defendant's other procedural protections,¹⁵⁷ there must be included an explanation that the administrative hearing results are just as binding as those of a court. Thus, because of the informal atmosphere, the possible admittance of hearsay, and the different burdens of proof,¹⁵⁸ the defendant's civil paternity determination should stand merely as evidence of paternity in criminal nonsupport cases and not as a finding of fact.

Implementation of the recommended procedural safeguards—mandatory HLA blood testing for all disputed determinations, civil paternity determinations to be used only as evidence of paternity in a criminal action, and representation by counsel when the defendant is indigent and due process demands it—would greatly reduce the risk of an erroneous result. These procedures would help ensure that *the* child's father was identified, not just *a* father. By including an administrative hearing as the original fact-finding process, the legislature would continue to protect the defendant, while enabling him to defend an action more quickly and less expensively. Shorter delays and reduced costs would benefit all the parties, while the HLA procedure would ensure the most accurate result.

V. CONCLUSION

The Uniform Parentage Act, adopted in Washington in 1976, regards the child in a paternity determination as the real party in interest. The UPA also provides procedural safeguards for paternity defendants. More safeguards are needed, however, if the defendant is to have full protection.

The HLA blood testing provides the most accurate scientific results in discovering parentage. When the defendant is indigent and entitled to state-funded blood testing under the fourteenth

156. The circumstances of the hearsay are important in a court's decision whether to admit the statement. See *Guiles v. Department of Labor & Indus.*, 13 Wash. 2d 605, 612, 126 P.2d 195, 198 (1942) (in worker's compensation hearing, employee's widow testified regarding her husband's complaints; the court held that this information was admissible and entitled to some weight if consistent with other evidence).

157. See *supra* text accompanying notes 93-139.

158. See *supra* text accompanying notes 125-36.

amendment, the court should order only HLA testing. When the defendant is adjudged the father of a particular child in a civil proceeding, that judgment should serve only as evidence in a later criminal nonsupport proceeding. If the defendant is indigent and the circumstances of his case indicate that representation is necessary to due process, then he should be represented by counsel.

The interests of all parties would better be served if, in a paternity proceeding brought by the state to recover AFDC expenditures, administrative determinations were permitted. The administrative proceeding would promote the interests of the child, the mother, the state, and the defendant: the child would receive benefits sooner, the state would conserve financial resources, and the defendant would receive the same safeguards provided in a judicial determination.

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