

1982

## Declaratory Judgment - Paternity - Unwed Father's Rights

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### Recommended Citation

Maria V. Mayercheck, *Declaratory Judgment - Paternity - Unwed Father's Rights*, 20 Duq. L. Rev. 701 (1982).

Available at: <https://dsc.duq.edu/dlr/vol20/iss4/9>

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**DECLARATORY JUDGMENT—PATERNITY—UNWED FATHER'S RIGHTS**—The Pennsylvania Superior Court has held that an unwed father has standing to seek a declaratory judgment regarding whether he is the father of a child born out of wedlock in order to determine his legal rights in relation to the child.

*In re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1981).

In April 1980, James McGarrity filed a petition in the Court of Common Pleas, Montgomery County, Pennsylvania, seeking a declaratory judgment that he was the father of a child, Jeffrey, born December 29, 1979 to Kathy Mengel.<sup>1</sup> He alleged in his complaint that it was physically possible he was the child's father and that the mother so claimed prior to Jeffrey's birth.<sup>2</sup> McGarrity requested that blood tests be taken to make this determination and that appropriate relief be granted if he was found to be the father.<sup>3</sup>

The trial court sustained the mother's preliminary objection to the petition and dismissed the case for failure to state a cause of action.<sup>4</sup> On appeal, the Pennsylvania Superior Court held that a putative father has standing to obtain a declaratory judgment of his paternity and remanded the case for further proceedings.<sup>5</sup>

After first determining that the central issue was whether the petitioner, an unwed father, had standing to seek a declaration that he was the father of a child born out of wedlock, the court noted that the doctrine of standing requires the aggrieved party to demonstrate a substantial, direct, and immediate interest in the subject matter of the litigation.<sup>6</sup> This interest must be one

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1. *In re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1981).

2. *Id.* at 188, 429 A.2d at 1164. Throughout most of her pregnancy, the respondent claimed petitioner was the father. Shortly before Jeffrey's birth, however, she denied this allegation.

3. *Id.*

4. *In re Paternity of Jeffrey Mengel*, 107 Montg. County L.R. 185 (1980).

5. *In re Mengel*, 287 Pa. Super. 186, 197, 429 A.2d 1162, 1168 (1980). Judge Brosky wrote the majority opinion which was joined by Judge Hoffman.

6. *Id.* at 189, 429 A.2d at 1164. *See* *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), in which a group of parking lot operators and city residents challenged a City of Pittsburgh ordinance imposing a tax on all portions of "non-residential parking places." The court held that these plaintiffs had a direct and substantial interest in the subject matter of the litigation and could therefore maintain the action.

which deserves legal protection.<sup>7</sup>

The court then examined several recent cases dealing with the rights of unwed fathers<sup>8</sup> and noted that in Pennsylvania unwed fathers have the statutory right to inherit from their illegitimate children.<sup>9</sup>

Based upon this authority the court concluded that an unwed father does have a substantial, direct, and immediate interest in the subject matter of the controversy because the determination that he was the father of a child would confer upon him the

7. 287 Pa. Super. at 189, 429 A.2d at 1164 (quoting K. C. DAVIS, ADMINISTRATIVE LAW, 714 (1951)).

8. 287 Pa. Super. at 189-90, 429 A.2d at 1164-65. See *Stanley v. Illinois*, 405 U.S. 645 (1972). The children of an unwed father were made wards of the state on their mother's death. The Supreme Court held that an unwed father has a substantial interest in obtaining custody of his children and ruled that the state's presumption of unfitness of an unwed father and denial of a hearing for custody violated the due process and equal protection clauses of the fourteenth amendment. In a similar case, *State ex. rel. Lewis v. Luthern Social Services of Wisconsin*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated and remanded sub nom.* In *State ex. rel. Rothstein v. Luthern Social Services*, 405 U.S. 1051 (1972), the Wisconsin Supreme Court ruled that unwed fathers have no right to custody of their illegitimate children. The United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Stanley*. The Wisconsin Supreme Court then ruled an unwed father must be given notice and a chance to be heard in adoption proceedings. 59 Wis. 2d 1, 207 N.W. 2d 826 (1973). See also *Petersen v. Hayes*, 252 Pa. Super. 487, 381 A.2d 1311 (1977), where the Pennsylvania Supreme Court held that a natural father is entitled to visit his children after his separation from their mother even though he has not supported them and is hostile to the mother's new husband. The court stated that the visitation privileges of a father of illegitimate children must be determined by the same standards that are applied to fathers of legitimate children; *Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976). The Pennsylvania Supreme Court held that a statute providing that consent of the mother only is sufficient for adoption of an illegitimate child created an impermissible distinction between unwed mothers and unwed fathers and violated the state constitutional provision that equality of rights under law shall not be denied or abridged because of sex.

9. 287 Pa. Super. at 190, 429 A.2d at 1164-65. See 20 PA. CONS. STAT. ANN. § 2107 (Purdon Supp. 1981) which states:

(a) Child of mother—for purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his mother.

(c) Child of father—For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways:

(1) If the parents of a child born out of wedlock shall have married each other.

rights to inherit from his child and the ability to contest his or her adoption.<sup>10</sup>

The Court then addressed the appropriateness of McGarrity's petition for a declaratory judgment.<sup>11</sup> The Court noted that the Declaratory Judgment Act<sup>12</sup> provides for the declaration of rights, status, and other legal relations and that McGarrity was seeking to establish his status as a parent which would determine his legal relation to the child.<sup>13</sup> Also, the court noted the purpose of the Act is to relieve uncertainties and insecurity with respect to rights, status, and other legal relations and that it is to be liberally construed.<sup>14</sup> Observing that a court may refuse to grant a declaratory judgment only when it appears the declara-

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(2) If during the lifetime of the child, the father openly holds out the child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child which shall be determined by clear and convincing evidence.

(3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

10. 287 Pa. Super. at 190-91, 429 A.2d at 1165.

11. *Id.* at 191, 429 A.2d at 1165.

12. 42 PA. CONS. STAT. ANN. §§ 7531-7541 (Purdon Supp. 1982). *See* § 7532 which provides:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

*Id.*

13. 287 Pa. Super. at 191, 429 A.2d at 1165. Although no Pennsylvania cases have involved a situation in which a putative father used a declaratory judgment action to determine his paternity, the court found two instances where children sought to determine their paternity and legitimacy through a declaratory judgment action. *See* Liddick v. Loudon, 52 D. & C. 402 (Perry County 1945) (jurisdiction exists under the Uniform Declaratory Judgment Act of to determine the legitimacy of one claiming under a testamentary trust); Spencer v. Spencer, 47 D. & C. 192 (Dauphin County 1942) (declaratory judgment may be had to determine whether one claiming rights under a trust conferring benefits upon the lawful issue of a said person is a lawful issue of that person).

14. 287 Pa. Super. at 191, 429 A.2d at 1165. *See* 42 PA. CONS. STAT. ANN. § 7541(a) (Purdon Supp. 1982) which states: "This subchapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered."

tion will not settle the uncertainty that gave rise to the litigation,<sup>15</sup> the court concluded that in the present case, granting a declaratory judgment would indeed terminate the uncertainty.<sup>16</sup>

The Court then examined decisions from jurisdictions which had enacted the Uniform Declaratory Judgment Act, from which the Pennsylvania Declaratory Judgment Act was derived.<sup>17</sup>

The *McGarrity* court noted that Pennsylvania has a support statute which provides for determining paternity.<sup>18</sup> The Court, however, observed that the statute was not available to *McGarri-*ty because the child's mother supported him.<sup>19</sup> The Court emphasized that even if the petitioner could seek relief under the Sup-

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15. See 42 PA. CONS. STAT. ANN. § 7537 (Purdon Supp. 1982):

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding, but as provided in section 7541(b) (relating to effect of alternative remedy), the existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter.

See also *Melnick v. Melnick*, 147 Pa. Super. 564, 25 A.2d 111 (1942) (when a party asserts a legal relation, status, right, or privilege in which he has a concrete interest which is challenged by an adverse party, either party may request a declaratory judgment provided only that such a judgment will serve to terminate the controversy).

16. 287 Pa. Super. at 192, 429 A.2d at 1166.

17. *Id.* See *Johannesen v. Pfeiffer*, 387 A.2d 1113 (Me. 1978). The Supreme Judicial Court of Maine held that because an unwed father has the right to inherit from his child, a putative father could maintain a declaratory judgment action to determine his paternity. The court ruled that a putative father should be permitted to have his status determined while evidence was still available. See also *Slawek v. Strok*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974), where the Wisconsin Supreme Court held that a declaratory judgment was a proper means for a putative father to seek to determine his paternity. The Wisconsin Court noted that the state statute dealing with the support of dependents made provisions for the determination of parentage of illegitimate children, but ruled that because support action was not available to the putative father, he must be allowed some other procedure.

18. 287 Pa. Super. at 194, 429 A.2d at 1167. See 42 PA. CONS. STAT. ANN. § 6704(g) (Purdon 1982), which provides:

Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence.

*Id.*

19. 287 Pa. Super. at 194, 429 A.2d at 1167.

port Act, an alternative remedy was no longer a bar to seeking a declaratory judgment.<sup>20</sup>

The court next considered McGarrity's request that the trial court order blood tests pursuant to the Uniform Act on Blood Tests to Determine Paternity.<sup>21</sup> This Act gives the court power to order blood tests on the mother, child, and alleged father.<sup>22</sup>

The court also noted that the statute gives a party to a paternity action the right to request blood tests, and interpreted this language as requiring the trial court to order the tests upon a party's request.<sup>23</sup> Because the court had concluded McGarrity had standing to seek a declaratory judgment, it found his request for blood tests proper, and ruled that the trial court order them.<sup>24</sup>

The Superior Court then reviewed McGarrity's request that the trial court join in the action any person who could be the father if the blood tests proved that he was not. The Court held that the Declaratory Judgment Act does not give the trial court such authority<sup>25</sup> because the action was to determine only whether or not McGarrity was the father. Therefore the only persons who would be affected by the declaratory judgment

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20. *Id.* See 42 PA. CONS. STAT. ANN. § 7541(b) (Purdon Supp. 1982) which provides that "[t]he General Assembly finds and determines that the principle rendering declaratory relief unavailable in circumstances where an action at law or in equity or a special statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished."

21. See 42 PA. CONS. STAT. ANN. § 6133 (Purdon 1982):

In any matter subject to this subchapter in which paternity, parentage or identity of a child is a relevant fact, the court upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity, parentage or identity of a child against such party, or enforce its order if the rights of others and the interest of justice so require.

*Id.*

22. *Id.*

23. 287 Pa. Super. at 196, 429 A.2d at 1168.

24. *Id.*

25. *Id.* See 42 PA. CONS. STAT. ANN. § 7540(a) (Purdon 1982) which provides that "when declaratory relief is sought, all persons shall be made made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

were the mother, child, and McGarrity.<sup>26</sup> The court observed that if the trial court declares McGarrity to be the father, then none of the other possible fathers had any rights concerning the child. If McGarrity is declared not to be the father, then the natural father's rights are still intact. The court concluded that the Uniform Act on Blood Tests to Determine Paternity gives authority only to direct blood tests on the parties and no one else could be properly joined in the action.<sup>27</sup>

In a concurring opinion, Judge Spaeth noted that the majority found McGarrity's initial petition insufficient because he alleged he "may" be the father rather than he "was" the father.<sup>28</sup> Judge Spaeth contended that McGarrity's original petition was adequate.<sup>29</sup> Judge Spaeth stated that instructing the petitioner to plead something he does not know to be true is contrary to Pennsylvania's fact pleading system that seeks an honest statement of the issues.<sup>30</sup> He maintained that McGarrity's uncertainty was sufficient to give him standing to maintain an action.<sup>31</sup> Judge Spaeth concluded that the petitioner is entitled to know whether he has legal rights and obligations concerning the child.<sup>32</sup>

He also agreed with the majority that the trial court does not have the authority to order blood tests on anyone other than the mother, child, and petitioner, but he did not agree that if McGarrity is declared the father none of the other possible fathers have any rights concerning the child.<sup>33</sup> Because the Declaratory Judgment Act does not permit a declaration to prejudice the rights of anyone not a party of the action,<sup>34</sup> Judge Spaeth contended that a declaration McGarrity is the father would not bar another man's declaratory judgment action if he alleges that he may be the father.<sup>35</sup>

Although it is unlikely another man would seek a judgment

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26. 287 Pa. Super. at 197, 429 A.2d at 1168.

27. *Id.*

28. *Id.* at 198-99, 429 A.2d at 1168-69 (Spaeth, J., concurring). Judge Hoffman also joined in this opinion.

29. *Id.* at 199, 429 A.2d at 1169 (Spaeth, J., concurring).

30. *Id.*

31. *Id.* See 231 PA. R. CIV. P. 1019(a), 1501, 1601(a).

32. 287 Pa. Super. at 199, 429 A.2d at 1169 (Spaeth, J., concurring). See *A.B. v. C.D.*, 150 Ind. App. 535, 277 N.E.2d 599 (1971); *Kendrick v. Everheart*, 390 So. 2d 53 (Fla. 1980); *Slavek v. Strok*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

33. 287 Pa. Super. at 200, 429 A.2d at 1169 (Spaeth, J., concurring).

34. See 42 PA. CONS. STAT. ANN. § 7540(a) (Purdon Supp. 1982).

35. 287 Pa. Super. at 200, 429 A.2d at 1169-70 (Spaeth, J., concurring).

after the court had declared someone else the father, Spaeth maintained the court should have been specific regarding which blood tests should be ordered.<sup>36</sup> He also suggested that on remand the court should either determine that the tests exclude McGarrity as the father and decide the issue as a matter of law, or if they do not exclude him, use the tests along with other evidence to establish whether or not McGarrity is Jeffrey's father.<sup>37</sup>

Finally, Judge Spaeth noted that a woman does not have an unqualified right to refuse to cooperate in this type of paternity action because of the legally protected interest a father has in his child. Therefore, her right to privacy must yield to the putative father's right to have his status declared.<sup>38</sup>

In addition to a declaratory judgment, Pennsylvania provides several other options for parents wishing to establish paternity. Declarations of paternity are available, in part, because paternity proceedings are now strictly civil. Prior to 1978, proceedings to determine paternity in Pennsylvania were criminal.<sup>39</sup> If the alleged father waived his right to a jury trial and to the other protections afforded by criminal proceedings, he could then have his paternity determined in a civil action by a court of equity.<sup>40</sup> The criminal bastardy proceeding was, however, more civil than criminal in nature because a conviction carried no punishment but instead resulted in an order to support the child.<sup>41</sup>

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36. *Id.* See Commonwealth *ex rel.* Atkins v. Singleton, 282 Pa. Super. 390, 422 A.2d 1347 (1980) (lower court admitted the results of the HLA (human leukocyte antigen) test, but the issue was not reached by the appellate court).

37. 287 Pa. Super. at 201, 429 A.2d at 1170 (Spaeth, J., concurring).

38. *Id.* at 201-02, 429 A.2d at 1170 (Spaeth, J., concurring).

39. See Commonwealth v. Dillworth, 431 Pa. 479, 246 A.2d 859 (1968) (the Civil Procedure Support Law did not dispense with the criminal proceeding which entitled the defendant to a jury trial). The Pennsylvania legislature abolished criminal trials on the issue of paternity in 1978. See Act of July 13, 1953, Pub. L. 431, No. 95 § 5 (as amended April 28, 1978, No. 46).

40. See Commonwealth v. Jacobs, 220 Pa. Super. 31, 279 A.2d 251 (1971). In *Jacobs*, a putative father requested that he not be forced into criminal proceedings. The court held that he was not required to have the issue of paternity decided through criminal proceedings, but may have a civil determination where he would be deemed to have waived his right to a jury trial and the other protections ancillary to criminal proceedings.

41. See Commonwealth v. Dunnick, 204 Pa. Super. 58, 202 A.2d 542 (1964) (the court distinguished the offense of failure to support a child born out of wedlock from the offenses of fornication and bastardy). See 18 PA. CONS. STAT. ANN. § 4323(c) (Purdon) (repealed in 1978):

Before the trial, with the consent of the defendant indorsed on the bill of indictment, as now provided by law, or at the trial on entry of a plea of guil-



Provisions for determination of paternity are now found only in the civil procedural support statute. Jury trials are still available at the request of one of the parties, but the burden of proof is reduced to a preponderance of the evidence.<sup>42</sup> A complaint under the civil support statute must be filed by one to whom a duty to support is owing.<sup>43</sup> In the case of a minor child, the person having custody files the petition.<sup>44</sup> In most cases, therefore, the statute cannot be used by a man to establish paternity unless the action is brought against him.

In addition, a putative father may himself raise the issue of paternity under the Uniform Child Custody Jurisdiction Act<sup>45</sup> through a petition for a writ of habeas corpus seeking custody or visitation of a child.<sup>46</sup> While McGarrity did not choose to utilize this means of establishing paternity,<sup>47</sup> the trial court suggested

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ty, or after conviction, instead of imposing the fine provided by this title, or in addition thereto, the court having regard to the circumstances and to the financial capacity of the defendant, may make an order, subject to change from time to time, as circumstances may require, directing the defendant to pay a certain sum periodically, for such time and to such person as the court may direct. The court shall have the power to suspend the sentence provided in this section, and release the defendant from custody on probation, in the manner provided in section 4322 of this title (relating to support orders), if the defendant has entered into a recognizance, in such sum, with or without surety, as the court shall direct, for compliance with such order.

*Id.*

42. See 42 PA. CONS. STAT. ANN. § 6704(g) (Purdon 1982):

Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil action and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence.

*Id.*

43. *Id.* § 6704(b) states that "[a] complaint may be filed by any person, including a minor spouse, to whom a duty of support is owing. It shall be filed on behalf of a minor child by a person having custody of the minor, without appointment as guardian ad litem."

44. *Id.*

45. 42 PA. CONS. STAT. ANN. §§ 5341-5366 (Purdon 1982).

46. See *id.* § 5343 which defines contestant as "[a]n institution or an individual, including a parent who claims a right to custody or visitation rights with respect to a child. See *Burston v. Dodson*, 257 Pa. Super. 1, 390 A.2d 216 (1978). Purported natural father filed a petition for writ of habeas corpus seeking to establish paternity and obtain custody of the child. The court determined his paternity and awarded him the child.

47. 107 Montg. County L.R. at 187.

that it would have allowed McGarrity to petition for writ of habeas corpus for custody or visitation.<sup>48</sup>

McGarrity claimed, however, that an unwed father has other legally protected rights in his child that require a determination of his paternity regardless of whether the mother seeks support or whether he wishes custody or visitation. McGarrity specifically mentioned an unwed father's right to contest the adoption of his child and the inheritance rights provided for the father of a child born out of wedlock in the Pennsylvania Probate, Estates and Fiduciaries Code.<sup>49</sup>

The Pennsylvania Supreme Court and the Pennsylvania legislature have only recently expanded the right of unwed fathers. In *Adoption of Walker*,<sup>50</sup> the Pennsylvania Supreme Court struck down the provision of the Adoption Act which did not require the unwed father's consent to the adoption of his child. The statute allowed the court to terminate an unwed father's parental rights without the strict standards which are otherwise required when parental rights are to be involuntarily terminated.<sup>51</sup> The court stated the only differences between unwed fathers and unwed mothers are those based on sex, which is an impermissible basis for denying unwed fathers rights under the Adoption Act.<sup>52</sup> The court held the distinction between unwed mothers and unwed fathers patently invalid under the Equal Rights Amendment to the Pennsylvania Constitution.<sup>53</sup>

In 1978, the Pennsylvania Legislature amended the descent statute to provide for inheritance by, from, and through a person born out of wedlock. The child born out of wedlock is now considered the child of the father when the identity of the father has been determined.<sup>54</sup> The amendment to section 2107 of the statute refers to the Equal Rights Amendment implementation comment printed at the end of section 2519. This comment discusses the sections of title 20 which previously contained sex-based language and recognizes that section 2107 utilized impermissible

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48. *Id.*

49. 287 Pa. Super. at 190, 429 A.2d at 1164-65.

50. 468 Pa. 165, 360 A.2d 603 (1976).

51. 468 Pa. at 170, 360 A.2d at 605.

52. *Id.* at 171, 300 A.2d at 605-06.

53. *Id.* at 170, 360 A.2d at 605. See PA. CONST. art. I, § 28.

54. 20 PA. CONS. STAT. ANN. § 2107(c) (Purdon Supp. 1982-1983). See *supra* note 9.

sex-based language in considering a child born out of wedlock to be the child of the mother, but not the father.<sup>55</sup>

Further, to aid the determination of the father of an illegitimate child, the Pennsylvania Legislature adopted a statute in 1980 which allows the father of a child born to an unmarried woman to file with the Department of Health an acknowledgment of his paternity accompanied by a consent under oath of the mother. The Department will then amend the birth certificate giving the father all the rights and duties as to the child which he would have had if he had been married to the mother.<sup>56</sup> If the mother refuses to join the acknowledgement, the Depart-

55. See 20 PA. CONS. STAT. ANN. § 2519 (Purdon Supp. 1982-83):  
E.R.A. Implementation Comment

This section previously set different responsibilities for a parent to meet in order to retain the right to appoint a testamentary guardian for a child, based on the sex of the parent. It is changed to require the same standard for both mother and father.

Three other sections of Title 20 contain sex-based language: Sections 2107, 2514, and 6114, all of which state that "a person born out of wedlock shall be considered the child of his mother and not of his father." These sections have apparently been rendered unconstitutional as a result of *Trimble v. Gordon* . . .

The Supreme Court in *Trimble v. Gordon*, 430 U.S. 762 (1977), held unconstitutional an Illinois statute which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas a legitimate child may inherit through both parents. The Court found the statute to be a violation of equal protection which could not be justified as promoting legitimate family relations. *Id.* at 769-70. The Court concluded that the difficulties in proving paternity in some situations did not justify total statutory disinheritance of children born out of wedlock. *Id.* at 770.

56. See 23 PA. CONS. STAT. ANN. § 8302 (Purdon Supp. 1981-1982) which provides

#### Acknowledgment of paternity

The father of a child born to an unmarried woman may file with the Department of Health on forms prescribed by it an acknowledgment of paternity of the child which shall include the consent under oath of the mother of the child. The department shall, upon receipt of the acknowledgment, proceed as provided in . . . the "Vital Statistics Law . . . and the father shall have all the rights and duties as to the child which he would have had if he had been married to the mother at the time of the child's birth and the child shall have all the rights and duties as to the father which he would have had if the father had been married to the mother at the time of his birth. The acknowledgment may also provide for the assumption by the child of the father's surname or other name desired by the parents.

*Id.*

ment keeps the father's name on file and must notify him of any proceedings brought to terminate parental rights.<sup>57</sup>

Unwed fathers have significant substantive rights under Pennsylvania's Equal Rights Amendment,<sup>58</sup> but a determination of paternity must be made before these rights and privileges accrue. The declaratory judgment proceeding is clearly an appropriate means to accomplish this purpose. McGarrity requested a determination that he was the father of Jeffrey to settle the uncertainty of his legal relation to the child.<sup>59</sup>

When the present case arose, paternity proceedings could be instituted only in conjunction with support or custody.<sup>60</sup> However, the Pennsylvania legislature and courts have been enlarging the rights of unwed fathers outside the areas of support, custody or visitation since 1978,<sup>61</sup> and the existence of these rights depend on the determination or acknowledgement of paternity. The Pennsylvania Superior Court correctly determined that McGarrity's potential rights afforded him standing to seek a declaratory judgment.

A question left unanswered by *Mengel* is the protection Pennsylvania will afford an unwed father when the state's countervailing interest in protecting the child is more substantial. In 1981, the Delaware Supreme Court held that a putative father did not have standing to seek custody or visitation of a child born during the marriage of the mother to another man.<sup>62</sup> The Delaware court found the action was, in effect, a proceeding to determine the parentage of the child because the putative father alleged he was the natural father in his petition.<sup>63</sup> The putative

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57. *Id.* § 8303:

Claim of paternity

If the mother of the child fails or refuses to join in the acknowledgment of paternity provided for in section 8302 (relating to acknowledgment of paternity), the Department of Health shall index it as a claim of paternity. The filing and indexing of a claim of paternity shall not confer upon the putative father any rights as to the child except that the putative father shall be entitled to notice of any proceeding brought to terminate any parental rights as to the child.

58. PA. CONST. art. I., § 28.

59. 287 Pa. Super. at 190, 429 A.2d at 1165.

60. See *supra* notes 42-46 and accompanying text.

61. See *supra* notes 52-54 and accompanying text.

62. *Petitioner F. v. Respondent R.*, 430 A.2d 1075 (Del. 1981).

63. *Id.* at 1076-1077.

father claimed the denial of standing deprived him of his rights under the due process clause of the fourteenth amendment because he was entitled to a hearing on the issue of paternity.<sup>64</sup> The Delaware court determined that a man has no constitutionally protected interest in a determination of his parental status with respect of a child born during the marriage of the mother to another man who has not disavowed the child's legitimacy.<sup>65</sup> Further, the court contended that even assuming the putative father has a constitutionally protected interest, it would be outweighed by the competing public interest. The countervailing interests cited by the court were the promotion of the marital relationship, the preservation of an existing family unit, and the protection of the minor child from confusion, torn affection, and the stigma of illegitimacy.<sup>66</sup>

The United States Supreme Court has not acknowledged a fundamental right in the relation of unwed fathers to their children. In 1972, the Supreme Court, in *Stanley v. Illinois*,<sup>67</sup> held unconstitutional an Illinois dependency statute which excluded unwed fathers in its definition of parent. After the mother of Stanley's children died, the children became wards of the state because Stanley was presumed unfit to raise his children.<sup>68</sup> The Court found the presumption of unfitness that distinguished and burdened all unwed fathers constitutionally repugnant and held as a matter of due process that an unwed father is entitled to a hearing on his fitness as a parent before his children are taken from him.<sup>69</sup> The Court found Stanley's interest in his children to be "cognizable and substantial"<sup>70</sup> because he had been involved in raising the children, and stated that the private interest of a man in his children warrants deference absent a powerful countervailing interest.<sup>71</sup> The Court left unresolved the degree of protection that would be given unwed fathers when the countervailing interests were more substantial.

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64. *Id.* at 1078. See *Stanley v. Illinois*, 405 U.S. 645 (1972). See also *infra* notes 67-71 and accompanying text.

65. 430 A.2d at 1078-1079.

66. *Id.* at 1079.

67. 405 U.S. 645 (1972).

68. *Id.* at 646.

69. *Id.* at 649.

70. *Id.* at 652. Stanley lived intermittently with his children and their mother for eighteen years. *Id.* at 646.

71. *Id.* at 651.

In 1978 the Court decided *Quilloin v. Walcott*,<sup>72</sup> involving a Georgia adoption statute which denied unwed fathers the right to prevent the adoption of their children. The trial court had granted the adoption petition of the child's mother and her husband without finding the unwed father unfit or the child abandoned.<sup>73</sup> Determining that the best interests of the child superceded the interest of the natural father,<sup>74</sup> the Supreme Court held that a state may impinge on the rights of unwed fathers who do not have a substantial relationship with their children.<sup>75</sup> Notice to the father and a hearing to determine the best interests of the child are the only requirements the state must follow.<sup>76</sup>

The Court's decision in *Caban v. Mohammed*<sup>77</sup> involved an unwed father who had a substantial relationship with his children.<sup>78</sup> Caban challenged the New York adoption statute which did not require the consent of an unwed father although it did require the consent of all other living parents before their children could be adopted.<sup>79</sup> The statute allowed Caban's children to be adopted by their natural mother and her husband over Caban's objections simply because he was an unwed father.<sup>80</sup> In its decision, the Supreme Court used an intermediate level of scrutiny or middle tier analysis to find that the broad gender-based distinction of the New York statute were not substantially related to the state interest of providing adoptive homes for its children born out of wedlock.<sup>81</sup> The statute was found to be overbroad because it discriminated even when the identity of the father was known and he

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72. 434 U.S. 246 (1978).

73. *Id.* at 250-51.

74. *Id.* at 251.

75. *Id.* at 256. Quilloin could have gained the right to contest the adoption by legitimating his child, which he had not done in 11 years. *Id.* at 246. Further, although he had acknowledged his child with occasional support and visits, he had never accepted any significant responsibility in raising the child. *Id.* at 256.

76. *Id.* at 253-254.

77. 441 U.S. 380 (1979).

78. *Id.* at 382-83. Caban lived with his two children from their birth, one in 1969 and one in 1971, until the end of 1973. Thereafter he saw the children every week until the children were taken to Puerto Rico by their grandparents. He brought the children back to New York from Puerto Rico and retained custody of the children until the court awarded custody to the children's mother and her husband. *Id.*

79. *Id.* at 385.

80. *Id.* at 382.

81. *Id.* at 391.

had shown significant interest in the child.<sup>82</sup> The Court refused, however, to find that the parental rights of an unwed father constituted a fundamental right.<sup>83</sup> The decision in *Caban* is clearly limited to unwed fathers who have a substantial relationship with their children.<sup>84</sup> The court noted that problems of identifying and locating unwed fathers of infants may arise,<sup>85</sup> but did not comment on whether such difficulties would justify a statute directed specifically to newborn adoptions.<sup>86</sup>

By using the middle tier analysis which is triggered by gender-based distinction in statutes affecting unwed fathers, the Court requires a substantial relationship between the distinctions drawn and the state objective in passing the statute. By refusing to find a fundamental right in unwed fathers, the Court allows the state to interfere with the rights of unwed fathers when substantial countervailing interests exist.

These Supreme Court cases make it clear there is no requirement that a state protect the rights of an unwed father who does not have a substantial relationship with his child. The Pennsylvania Superior Court, however, allowed McGarrity to seek a declaratory judgment of his paternity although no substantial relationship with Jeffrey existed. Further, McGarrity did not express any desire to develop a relationship with Jeffrey as evidenced by the fact he was not seeking custody or visitation.<sup>87</sup> The court determined that the rights afforded unwed fathers in Pennsylvania<sup>88</sup> were sufficient to give McGarrity standing to seek a declaration of paternity to determine his legal relation to the child. The facts in *Mengel*, however, did not present the problem of a countervailing public interest.<sup>89</sup> The question remains whether in Pennsylvania the rights of unwed fathers are unqualified or whether they may be outweighed by the public interest in protecting the best interests of the child and the integrity of the family.

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82. *Id.* at 389.

83. Weinhaus, *Substantive Rights of the Unwed Father: the Boundaries are Defined*, 19 J. FAM. L. 445 (1980-81).

84. *Id.* at 455 n.71.

85. 441 U.S. at 392.

86. *Id.* at 392 n.11.

87. *See supra* note 47.

88. *See supra* notes 50-57 and accompanying text.

89. *See supra* notes 62-67 and accompanying text.