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BASTARDIZING THE LEGITIMATE CHILD: THE COLORADO SUPREME COURT INVALIDATES THE UNIFORM PARENTAGE ACT PRESUMPTION OF LEGITIMACY IN *R.McG. v. J.W.*

INTRODUCTION

The United States Supreme Court in the last decade has raised the legal status of illegitimate children to equal that of legitimate children.[1] At the same time, the Court has elevated the rights of unwed fathers[2] and eliminated much gender-based discrimination.[3] These three disparate constitutional law trends coalesced in a ground-breaking Colorado Supreme Court decision, *R.McG. v. J.W.*[4] The combination produced a legally mandated but socially explosive result. *R.McG.* invalidated Uniform Parentage Act (UPA)[5] provisions denying standing to any man seeking to establish his paternity of a child born to a married couple that acknowledges the child as their own.[6] Thus, for the first time, a child born legitimately to a husband and wife can be bastardized by a man claiming to be the child's biological father. This comment explores the rationale and the social ramifications of the Colorado Supreme Court's decision.

I. THE FACTUAL SETTING

C.W. was born in mid-1976, at the time the mother, J.W., was having an affair with the plaintiff, R.McG. The mother's husband, W.W., was named on the birth certificate as the child's father and accepted the infant as his legitimate child.[7]

In early 1978, R.McG. filed a Declaration of Paternity in the Denver Juvenile Court on behalf of himself and the child, against the mother and her husband.[8] The complaint alleged that R.McG. was the natural father;

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1. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). *See also* the discussion of illegitimates' rights, pp. 159-62 *infra*.

2. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972). *See also* the discussion of unwed fathers' rights, pp. 162-64 *infra*.

3. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Frontiero v. Richardson, 411 U.S. 667 (1973); Reed v. Reed, 404 U.S. 71 (1971). *See also* the discussion of men's and women's rights, pp. 164-66 *infra*.

4. 615 P.2d 666 (Colo. 1980).

5. Nine states have adopted legislation conforming to the Uniform Parentage Act. CAL. CIV. CODE §§ 7000-7018 (West Supp. 1979); COLO. REV. STAT. §§ 19-6-101 to -129 (repl. 1978 & Supp. 1980); HAWAII REV. STAT. §§ 584-1 to -26 (1976); MINN. STAT. ANN. §§ 257.51-.74 (West Supp. 1980); MONT. REV. CODES ANN. §§ 40-6-101 to -131 (1979); NEV. REV. STAT. 126.011 to .391; N.D. CENT. CODE §§ 14-17-01 to -26 (1979); WASH. REV. CODE ANN. §§ 26.26.010 to .905 (Supp. 1980); WYO. STAT. §§ 14-7-101 to -126 (1977).

6. COLO. REV. STAT. §§ 19-6-105, -107 (repl. 1978).

7. Affidavit of W.W. and J.W. in Support of Respondent's Motion for Summary Judgment, R.McG. v. J.W., 615 P.2d 666 (Colo. 1980).

8. Necessary parties under Colorado law include the child, the natural mother, and each presumed father, as well as each man alleged to be the natural father who is subject to the

that he was the only man who had had sexual intercourse with the mother at any possible time of conception; that the mother admitted he was the natural father; and that blood tests were unable to exclude him as the natural father.

The defendants denied R.McG.'s allegations and moved for summary judgment on the ground that the plaintiff lacked standing to bring the action under the UPA.[9] In their motion for summary judgment, the defendants relied on a UPA provision[10] denying standing to all but the mother, the legally presumed father—in this case, the husband, W.W.—and their lineal descendants. Discrimination against third-party fathers is justified, the defendants claimed, due to the compelling state interest in keeping family units intact.[11] The husband's accompanying affidavit stated that he believed himself to be the natural father; that regardless of the outcome of the suit, he would continue to treat the child as his natural offspring; and that he had the desire and ability to continue providing for the child's support, nourishment, protection, and care.[12] The mother filed a similar affidavit.[13]

R.McG. opposed summary judgment, claiming that the denial of his standing to bring the action violated his right to equal protection under the United States and Colorado Constitutions and under Colorado's equal rights amendment.[14] In his affidavit opposing summary judgment, R.McG. further maintained that the mother acknowledged his paternity in a sworn codicil to her will and in correspondence, and that the child had visited with him almost daily until she was one-and-a-half years old.[15]

Before hearing the motion for summary judgment, the juvenile court appointed a guardian *ad litem* for the child,[16] and approved the plaintiff's request that Human Leukocyte Antigen (HLA) blood tests be administered to the parties.[17] The test results showed a 98.89% probability of R.McG.'s paternity.[18] No results were obtained for the husband, because an initial blood sample was defective and he refused to submit to further tests.

The juvenile court referee then rejected the plaintiff's constitutional claims and granted the motion for summary judgment, holding that third-party fathers have no capacity to sue under the UPA.[19] The referee was

court's jurisdiction. COLO. REV. STAT. § 19-6-110 (repl. 1978). For a definition of "presumed father," *see* note 70 *infra*.

9. 615 P.2d at 668.

10. COLO. REV. STAT. § 19-6-107(1) (repl. 1978).

11. Memorandum Brief in Support of Respondent's Motion for Summary Judgment at 9, 10.

12. Affidavit of W.W. in support of Respondent's Motion for Summary Judgment at 1.

13. Affidavit of J.W. in Support of Respondent's Motion for Summary Judgment at 1.

14. 615 P.2d at 668-69. Applicable provisions of the United States Constitution, the Colorado Constitution, and Colorado's equal rights amendment are set forth in notes 24-26 *infra*.

15. 615 P.2d at 668. In the codicil, J.W. swore that her present husband could not be the father and that to the best of her knowledge R.McG. was the father. She requested that R.McG. be appointed the child's guardian if she were to die while the child was still an unmarried minor. *Id.*

16. As provided in COLO. REV. STAT. § 19-6-110 (repl. 1978).

17. As provided in COLO. REV. STAT. § 19-6-112 (repl. 1978) and § 13-25-126 (1973 & Supp. 1980). 615 P.2d at 668.

18. *See* note 134 *infra* and accompanying text.

19. 615 P.2d at 669.

unwilling to allow the "turmoil and heartache" which would follow a judicial declaration that the child was conceived of an adulterous relationship.[20] The referee's order was subsequently confirmed by the juvenile court judge.[21] The plaintiff appealed and the Colorado Court of Appeals transferred the case to the Colorado Supreme Court because of the constitutional issues involved.[22]

The Colorado Supreme Court reversed the summary judgment order and invalidated the UPA's standing provisions.[23] The court held that under the circumstances of this case, the UPA's failure to grant R.McG. the right to sue for a determination of his paternity violated equal protection of the laws, under the federal[24] and state constitutions[25] and the equal rights amendment to the Colorado Constitution.[26]

II. THE BACKGROUND ISSUES

At common law, illegitimacy bore a tremendous stigma. The law made every presumption[27] in favor of legitimacy to protect children from that legal and social void. Gradually, the courts and legislatures removed many of the disabilities imposed upon those born out of wedlock. In *R.McG.*, the Colorado Supreme Court took the final step by holding that a legitimate child could be declared illegitimate.[28] This step represented a giant leap from the common law, but only a small step from recent United States Supreme Court decisions.[29] To understand the evolutionary nature of the step taken in *R.McG.*, the historical development of the rights accorded to three groups—illegitimates, unwed fathers, and men and women—needs to be explored.

A. *The Rights of Illegitimates*

1. Under State and Common Law

In the past, the child born to an unmarried mother fell into a legal void. He was known at common law as *filius nullius*, "the son of no one," or *filius*

20. Order of Referee Rogers, Apr. 23, 1979, Record at 156.

21. Order of Judge Lawritson, Oct. 9, 1979, Record at 190.

22. COLO. REV. STAT. § 13-4-110(1)(a) (1973) provides for the transfer of cases to the Colorado Supreme Court.

23. 615 P.2d at 667, 671-72.

24. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

25. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

26. "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." COLO. CONST. art. II, § 29. Colorado's due process clause, *id.* § 25, has been construed to include equal protection of the laws. *See* Vanderhoof v. People, 152 Colo. 147, 380 P.2d 903 (1963); Trueblood v. Tinsley, 148 Colo. 503, 366 P.2d 655 (1961); People v. Max, 70 Colo. 100, 198 P. 150 (1921).

27. One of these presumptions is Lord Mansfield's Rule. *See* notes 128-133 *infra* and accompanying text.

28. Technically, under the Colorado UPA, the terms "legitimate" and "illegitimate" should not be used since the statute does not use that terminology.

29. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 667 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

populi, "the son of the people."[30] He was considered a ward of the village parish, and neither his parents nor anyone else was required to support him. He could neither inherit from his parents nor be legitimated by them.[31] Christianity, with its emphasis on monogamous marriages, likewise rated him a non-entity.[32] The first statute according some status to illegitimates was the English Poor Law Act of 1576, which imposed on both parents a duty of support.[33] The law was not drafted out of concern for the children, whose legal status remained in limbo; rather, it was an effort to relieve the parishes of the financial burden of caring for them.[34]

2. Under United States Supreme Court Decisions

The United States initially adopted the common law *filius nullius* doctrine and accorded the illegitimate no rights.[35] By the early 1960's, compassion and social justice had brought about legislation in some states that tempered the legal impact of illegitimacy and further equalized the rights of children.[36] But many inequities remained until the United States Supreme Court began invalidating discriminatory state statutes in 1968. In that year the Court held that a state may not create a right of action in favor of children for the wrongful death of a parent, yet exclude illegitimate children from such a right.[37] Subsequently the Court has held that illegitimate children may not be precluded from sharing equally with other children who recover workmen's compensation benefits for the death of a parent,[38] and that illegitimates are not to be denied the child's right to support from his natural father.[39] In *Gomez v. Perez*,[40] the Court emphasized that "a State may not invidiously discriminate against illegitimate chidren by denying them substantial benefits accorded children generally."[41]

More recently, the Supreme Court has recognized that some statutory

30. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 246, 190 N.E.2d 849, 856 (1963), *cert. denied*, 379 U.S. 945 (1964).

31. 1 W. BLACKSTONE, COMMENTARIES 459 (1772).

32. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1 (1971) [hereinafter cited as KRAUSE]. Biblical aversion to the bastard predates Christ: "A bastard shall not enter into the congregation of the Lord; even to his tenth generation . . . ." *Deuteronomy* 23:2.

33. S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 1.08, at 1-28, § 1.09, at 1-30 (4th rev. ed. 1975).

34. *Id.*

35. 1 W. BLACKSTONE, COMMENTARIES § 485 (1772). At common law, the doctrine of *filius nullius*

> expresses no mere technical uncertainty as to the fatherhood of the bastard, but rather the moral antipathy, inculcated by the Church, to the irregular intercourse of which he was the fruit. The Common Law might take note sometimes of the maternal ties of blood but refused to follow the Civil Law in making them a conduit for inheritable rights, and conferring on the issue of irregular unions a quasi-legitimacy as regards the mother.

W. HOOPER, THE LAW OF ILLEGITIMACY 27 (1911). *See generally id.* at 100-24; KRAUSE, *supra* note 32, at 9-57.

36. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

37. Levy v. Louisiana, 391 U.S. 68 (1968).

38. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

39. Gomez v. Perez, 409 U.S. 535 (1973).

40. 409 U.S. 535 (1973).

41. *Id.* at 538.

classifications are necessary to protect overriding state concerns, such as protecting estates from fraudulent claims by alleged illegitimate offspring.[42] Consequently, the Court has wrestled with the technical proofs of parenthood that may be legally required.[43] In a recent case, *Lalli v. Lalli*,[44] the Court by a five-to-four decision, upheld a New York statutory scheme requiring that certain evidence of paternity exists before a natural father's death, if his offspring seek to inherit intestate from him. The Court stressed that only an important state interest justifies statutory discrimination against illegitimates: "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[45]

3. Under the Colorado Uniform Parentage Act

State legislation generally has not kept pace with the Supreme Court decisions; substantial discrimination persists.[46] Two early uniform acts were not well received and were withdrawn by the National Conference of Commissioners on Uniform State Laws.[47] In a 1966 article,[48] Professor Harry D. Krause of the University of Illinois College of Law sparked interest in a new effort at uniform legislation. The result was the Uniform Parentage Act (UPA) of 1973. Substantially similar legislation has been enacted by nine states since 1975.[49] Colorado's version of the UPA went into effect in 1977. Because the UPA has been adopted for only a few years in a small number of states, little case law has developed.

The UPA's primary goal is to bring substantive legal equality to all children regardless of the marital status of their parents. The concept is a revolutionary one.[50]

The substance of the UPA is expressed in the first two sections. First, the Act defines the parent-child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations."[51] Second, the Act specifies that the parent-child relationship includes both mother-and-child and father-and-child relationships, and extends equally to

42. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

43. *See* Parham v. Hughes, 441 US. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Labine v. Vincent, 401 U.S. 532 (1971).

44. 439 U.S. 259 (1978).

45. *Id.* at 265.

46. *See generally* KRAUSE, *supra* note 32, at 297-305. *See also* Wills, *Paternity Statutes: Thwarting Equal Protection for Illegitimates*, 32 U. MIAMI L. REV. 339 (1977).

47. The Uniform Illegitimacy Act of 1922 and the Uniform Paternity Act of 1960, 9A UNIFORM LAWS ANNOTATED 579 (1979). Note the names of the three acts, which changed as society's consciousness was raised—from "Illegitimacy" to "Paternity" to "Parentage."

48. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

49. *See* note 5 *supra*.

50. 9A UNIFORM LAWS ANNOTED 580 (1979).

51. COLO. REV. STAT. § 19-6-102 (repl. 1978).

every child and to every parent, regardless of the parents' marital status.[52]

The remainder of the Act deals primarily with standing requirements. Before *R.McG.*, a man who claimed parental rights faced differing standing and statute of limitation rules, depending on whether the child had a "presumed father" as defined by the Act.[53] R.McG. challenged the validity of these separate classifications.

B. *The Rights of Unwed Fathers*

1. Under State and Common Law

When American states adopted the common law doctrine of *filius nullius*, the unwed father[54] was treated as having, at most, a moral obligation to provide support.[55] He owed no legal duty; he received no visitation rights.[56] The first changes in the law imposed duties of support, in an effort to relieve welfare rolls, but conferred no attendant rights.[57] More recently, legitimation statutes have allowed the natural father to alter the child's status by openly acknowledging him, and thence to acquire visitation, and even custody, rights.[58]

2. Under United States Supreme Court Decisions

The United States Supreme Court first recognized an unwed father's parental rights in *Stanley v. Illinois*,[59] a 1972 decision. Under an Illinois statute, minor illegitimate children automatically became wards of the state if their mothers died. Although Stanley had never formally legitimated his children, he had always acknowledged them as his own and had lived with the mother intermittently over a period of eighteen years. In ruling the statute unconstitutional, the Court held that before a custody decision is made, due process entitles the unwed father to a hearing on his fitness as a parent.[60] The Court decided the statute made an impermissible, irrebutable presumption that all unmarried fathers are unsuitable.[61] The statute also violated

52. *Id.* §§ 19-6-102, -103.

53. *See* note 70 *infra* and accompanying text.

54. All fathers who are not married to their child's mother are termed "unwed fathers." They may also be called "non-marital fathers." The term "putative father" is often used interchangeably, but should be restricted to its definition: "the alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). Thus R.McG. is technically not a putative father because his child is legitimate. He is more correctly called a "claiming natural father" or a "third-party father." These latter two terms were used by the court in the instant case, but do not adequately express R.McG.'s status in relation to the mother's husband. The fact that the law has no precise term for such would-be fathers indicates how new these rights really are. This author favors coining the new term "extra-marital father" for a man who claims to be the natural father of a child born to a married couple when both the mother and her husband acknowledge the child as their natural offspring.

55. Note, *Father of an Illegitimate Child—His Right to be Heard*, 50 MINN. L. REV. 1071, 1072 (1966).

56. *Id.*

57. *See generally* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS § 8 (3rd ed. 1978).

58. *Id.*

59. 405 U.S. 645 (1972).

60. *Id.* at 649.

61. *Id.* at 656-57.

the equal protection rights of such fathers, because other similarly situated parents were accorded the opportunity for a hearing.[62]

Stanley produced much academic and legislative debate over the proper extent of these newly found rights. Some commentators interpreted the decision narrowly as a procedural due process case which required only notice and a hearing before parental rights could be terminated.[63] Others interpreted it broadly as a substantive due process case requiring unwed fathers to be given the same rights as all other parents.[64] The debate was illuminated—but not resolved—by subsequent cases. Six years after *Stanley*, in *Quilloin v. Walcott*,[65] the Court, utilizing the "best interests of the child" test, upheld the involuntary termination of an unwed father's parental rights after notice and a hearing.[66] More recently, in *Caban v. Mohammed*,[67] the Court, in reaffirming the rights of unwed fathers who have established a substantial relationship with their children, used equal protection analysis to strike down a New York adoption statute which set different standards for unwed mothers and fathers.[68] *Quilloin* lends support to the procedural due process interpretation of *Stanley*, while *Caban* supports the substantive due process analysis.

3. Under the Colorado Uniform Parentage Act

After *Stanley* and its progeny, there was no longer any doubt that the Supreme Court included responsible unwed fathers when it declared that parents have a basic right to their natural children.[69] However, the UPA was based on a wholly different premise.

The UPA set up two categories of fathers with different rights: first, "presumed natural fathers" who were married to the child's mother at the time of conception, or who performed some overt act of acknowledgement later; second, all other fathers.[70] If a child had a presumed father, another man could assert his paternity only if he had the written consent of the pre-

62. *Id.* at 649.

63. *See, e.g.*, Comment, *Limiting the Boundaries of* Stanley v. Illinois, 57 DEN. L.J. 671 (1980).

64. *See, e.g.*, Comment, *The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique*, 40 ALB. L. REV. 543 (1976).

65. 434 U.S. 246 (1978).

66. *Id.* at 256.

67. 441 U.S. 380 (1979).

68. *Id.* at 391.

69. The rights to conceive and to raise one's children were deemed essential in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); they were considered among the "basic civil rights of man" in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). For a good review of these and other cases, *see* Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 WASH. U.L.Q. 1029. *See also* Comment, *Equal Protection and the Putative Father: An Analysis of* Parham v. Hughes *and* Caban v. Mohammed, 34 SW. L.J. 717 (1980).

70. COLO. REV. STAT. § 19-6-105 (repl. 1978). The UPA presumptions are complex. Briefly, a man is presumed to be the natural father if he meets one of the following five conditions: 1) The child is born or conceived during the father's marriage to the mother; 2) the child is born or conceived during the father's cohabitation with the mother, after an attempt to marry ceremonially, even though the marriage could be invalidated; 3) the child is born before the father's marriage to the mother, and the father files a written acknowledgment of paternity, or is voluntarily named as the father on the birth certificate, or is obligated to support the child under a written voluntary promise or by court order; 4) the father receives the minor child into his home and openly holds him out as his natural child; 5) the father files a written acknowl-

sumed father, or if the presumption of paternity had been rebutted by someone else.[71] Standing to rebut the presumption was granted only to the presumed father, the natural mother, and their lineal descendants.[72] Thus, if the mother was married, an unwed father was realistically unable to prove his paternity without the concurrence of one of the legal parents. Whenever there was a harmonious family unit, as was the case in *R.McG.*, an extramarital father could not establish his rights under the UPA.[73]

This dual scheme was a deliberate move by the drafters, who sought to protect the legitimacy of children born in wedlock.[74] Although it reflected an appropriate state interest in maintaining the integrity of family units, it quite obviously discriminated against certain unwed fathers.

C. *Equal Rights for Men and Women*

1. Under State and Common Law

Western society's patriarchial culture has traditionally imposed significant legal and social disabilities on women. Women were long forbidden to vote and were denied educational and employment opportunities.[75] English law treated a married woman particularly badly—her husband controlled her property, her contracts, her debts, her will, and her testimony.[76] The first women's movement, in the mid-19th century, resulted in married women's property acts in many states, which granted all women the right to contract, to bring suit, and to sell their property.[77] Even these seemingly innocuous rights did not gain nationwide acceptance, however. As late as

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edgment of paternity with the court which is not disputed by the mother. COLO. REV. STAT. § 19-6-105 (repl. 1978).

71. COLO. REV. STAT. §§ 19-6-105(1)(e), -105(2) (repl. 1978).

72. *Id.* § 19-6-107. Before the UPA was adopted in Colorado, fathers had no statutory right to establish their paternity. Standing was granted only to mothers, guardians, and local welfare agencies. *Id.* The Colorado UPA gave standing to certain categories of fathers. *Id. See* People *ex rel.* L.B. 29 Colo. App. 101, 482 P.2d 1010 (1970), *aff'd*, 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dismissed mem.*, 410 U.S. 976 (1973).

73. In the R.McG. case, the court dismissed the action without prejudice, to preserve the child's right to bring suit at a later time. However, the court denied a motion by the guardian *ad litem* to continue to pursue the suit because this would allow the claiming father to accomplish indirectly what he could not accomplish directly. Order of Judge Lawritson, Oct. 9, 1979, Record at 190. Hence, it is also unlikely that courts will allow putative fathers access under the UPA through a suit brought by a descendant.

74. 9A UNIFORM LAWS ANNOTATED 594 (1979); Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974). The views of Krause, the Act's reporter-drafter, were clear even before the Act was formulated:

> In the best interests of the child born illegitimately to a *married* mother, pursuing its true paternity would not be indicated, unless the mother's husband has disavowed paternity. For the same reason (protection of the family) that continues to support the presumption of legitimacy of children born to a married mother, an illegitimate father's claim to his child born 'legitimately' to a married mother should not be heard—unless the mother's husband has disavowed paternity or consented to the legitimation of the child by its actual father.

KRAUSE, *supra* note 32, at 97 (footnotes omitted). For a discussion recognizing the inherent inequity of the policy, *see* Note, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191 (1976).

75. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

76. *See generally* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS § 5 (3rd ed. 1978); G. GUNTHER, CONSTITUTIONAL LAW § 3(c) (9th ed. 1975).

77. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

1977, Alabama still forbade married women to convey or to mortgage their real estate without the consent of their husbands.[78]

The nineteenth amendment to the United States Constitution, passed in 1920, gave women equal voting rights; full constitutional equality, however, awaits passage of the equal rights amendment. The proposed twenty-seventh amendment, which states that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," has sparked bitter controversy and has yet to be ratified by the requisite number of states.[79]

2. Under United States Supreme Court Decisions

For many years, the United States Supreme Court used a two-tier approach to judge the validity of statutes challenged under the equal protection clause of the fourteenth amendment. Most statutes, falling into the traditional "lower tier," were required merely to bear some "rational relationship" to a legitimate state end and were invariably upheld.[80] The "upper tier" test, which required justification by a "compelling state interest," was imposed upon statutes restricting fundamental rights and creating suspect classifications such as race.[81] Statutes subject to the latter tests were most often invalidated, because they failed to fulfill the "strict scrutiny" requirement that there be a compelling government interest unable to be achieved by less restrictive alternatives.[82]

Until recently, gender-based statutes were generally upheld because they were subjected only to the lower tier, rational relationship test.[83] In 1971, however, the Court radically changed its position in *Reed v. Reed*,[84] where it invalidated a statute which gave preference to men over women as administrators of decedents' estates. Two years later, in *Frontiero v. Richardson*,[85] four members of the Court voted to elevate gender to the status of a suspect classs, but the idea never gained majority support. Instead, what has emerged is a strong, middle-tier standard under which many discriminatory schemes have been invalidated. The new "substantial relationship" test requires that gender classes serve important government objectives, that their purpose be both identifiable and substantial, and that the distinction be reasonably structured so that all persons similarly situated are treated alike.[86]

78. The Alabama statute was ruled unconstitutional, over a scathing dissent, in Peddy v. Montgomery, 345 So. 2d 631 (Ala. 1977).

79. Three more states are needed to ratify the amendment before the June 30, 1982 deadline. NEWSWEEK, July 13, 1981, at 24, col. 1.

80. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

81. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

82. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

83. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled*, Craig v. Boren, 429 U.S. 190 (1976).

84. 404 U.S. 71 (1971).

85. 411 U.S. 677 (1973).

86. *E.g.*, Personnel Adm'r of Mass. v. Feeny, 442 U.S. 256 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Orr v. Orr. 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *See* Comment, *Equal Protection and the "Middle Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303 (1978).

Initially, the Court seemed unwilling to apply this middle tier, heightened scrutiny to strike down statutes that discriminated against men rather than against women.[87] Recent cases have shown a more even-handed approach, unless the challenged statute is clearly an ameliorative measure aimed at correcting past discrimination.[88] The 1979 *Caban v. Mohammed*[89] decision, which rested on gender-based equal protection grounds, exemplifies the more recent trend. In *Caban*, the Court found the statute to be another example of overbroad generalizations in gender-based classifications, the effect of which is to discriminate impermissibly against unwed fathers while according rights to similarly situated mothers.[90] This undifferentiated distinction, the Court maintained, does not bear a substantial relationship to the state's asserted interests.[91]

3. Under the Colorado Equal Rights Amendment (ERA)

Colorado's ERA states that equality of rights under the law cannot be denied on account of sex.[92] The amendment, which became part of the state constitution in early 1973, was first applied in *People v. Green*.[93] Although the Colorado Supreme Court upheld the rape statute challenged in that case, the court ruled that the ERA requires application of the strict scrutiny test to all such gender-based statutes.[94] Thus, in Colorado, gender-based classifications challenged on equal protection grounds must meet the strictest judicial test.[95]

III. THE INSTANT CASE

The Colorado Supreme Court's three opinions in *R.McG.* clearly reflect the three currently popular legal viewpoints regarding the right of unwed fathers to seek parental rights to a legitimate child. The majority, utilizing equal protection analysis, found that the statute was invalid because it impermissibly discriminated between natural mothers and claiming natural fathers.[96] The concurring opinion analyzed the father's rights in terms of procedural due process safeguards. The dissent found both arguments overridden by the compelling state interest in fostering harmonious legal family units.

87. *E.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

88. *E.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (granting rights to unwed fathers); Orr. v. Orr, 440 U.S. 268 (1979) (invalidating statute requiring only husbands to pay alimony); Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute prohibiting beer sales to males under 21 and females under 18).

89. 441 U.S. 380 (1979). *Caban* was the first unwed father case to face directly the equal protection issues. The Court in Quilloin v. Walcott, 434 U.S. 246 (1978), had refused to consider gender-based issues raised in the brief because they were not in the jurisdictional statement. *Id.* at 253 n.13.

90. 441 U.S. at 394.

91. *Id.*

92. *See* note 26 *supra*.

93. 183 Colo. 25, 514 P.2d 769 (1973).

94. *Id.* at 28, 514 P.2d at 770.

95. *Id.*

96. *See* note 54 *supra*.

A. *The Majority: Equal Protection Rights*

Justice Quinn's majority opinion first recognized the important state interest involved in preserving family harmony,[97] and then proceeded to weigh that interest against the UPA's gender-based classification, under the intermediate standard of judicial scrutiny used in *Caban v. Mohammed*.[98] Here, the court found that the challenged UPA provision created more than a difference in treatment; it created diametrically opposite treatments.[99] A natural mother can sue a non-spousal father for paternity and disrupt the father's family harmony, even if, as in this case, he is married to someone else and has other children. Claiming natural fathers, on the other hand, are not allowed to disrupt a married mother's family harmony by suing her to claim parental rights. According to the court, such a gender-based classification is precisely the kind of overbroad generalization invalidated in *Caban* and in *Stanley*.[100] The court distinguished *Quilloin v. Walcott*[101] by noting that the father in that case had never sought custody yet was still accorded a full hearing.[102]

Although the UPA states that all its presumptions are rebuttable by clear and convincing evidence,[103] the court noted that for fathers like R.McG. (even with a threshold showing of 98.89% probability of his paternity), the presumption in favor of the mother's husband is actually irrebuttable because such extra-marital fathers are precluded from suing. According to the majority in *R.McG.*, such a presumption is impermissible under the *Stanley* doctrine.[104] Equal protection doctrines under both the United States and Colorado Constitutions[105] mandate equal judicial access for natural mothers and claiming natural fathers. Justice Quinn concluded that since the statute failed to satisfy the intermediate level of judicial scrutiny, it also failed to satisfy the stricter judicial scrutiny demanded by the Colorado equal rights amendment,[106] and by *People v. Greene*.[107]

The majority rejected the defendants' due process right of privacy

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97. 615 P.2d at 670.

98. The standard used in *Caban* is as follows:

> [T]he unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction. . . . Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further these ends. . . . [S]uch a statutory classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [(1920)].

Caban v. Mohammed, 441 U.S. at 391.

99. 615 P.2d at 671.

100. *Id.*

101. 434 U.S. 246 (1978).

102. 615 P.2d at 671.

103. COLO. REV. STAT. § 19-6-105(2) (repl. 1978).

104. The court quoted *Stanley* for the proposition that "when that procedure forecloses the determinative issues . . . [and] explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." 615 P.2d at 671.

105. *See* notes 24, 25 *supra*.

106. 615 P.2d at 672.

107. 183 Colo. 25, 514 P.2d 769 (1973).

claims, stating that the interest they might have in protecting their family harmony was no greater than the interest of R.McG. in establishing his paternity, and the interest of the child in determining his or her biological parentage.[108] The court recognized that continuing the action could disrupt the mother's marriage and negatively influence the child's life; however, the court also acknowledged that the best interests of the child are not necessarily the same as those of the legal parents, and that these interests are extremely difficult to determine.[109]

Thus, the majority held that if a natural mother is allowed to sue for a Declaration of Paternity in cases where the child has a presumed father, a claiming natural father must be given the same opportunity.[110] The court reversed the lower court's summary judgment and remanded the case to the juvenile court.[111]

B. *The Concurrence: Due Process Rights*

Justice Dubofsky's special concurring opinion relied on due process, in treading a middle path between the majority and the dissent. She stated that the legislature may give preference in paternity proceedings to a mother's family unit in which the child resides, without violating equal protection guarantees.[112] This permissible preference, however, does not justify the statute's strong presumption of legitimacy. Due process requires that putative fathers have access to the courtroom, since *Stanley* held that a fit natural father has a due process right to maintain a parental relationship with his illegitimate child.[113]

In order to determine the unwed father's due process rights, Justice Dubofsky weighed the unwed father's expressions of interest in the child against the state's interest in protecting the integrity of the family unit.[114] Had the father not made continuing efforts to maintain contact and support the child, the state's interest would have prevailed:

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108. 615 P.2d at 672. The opinion cites *Caban*, *Stanley*, and *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, *cert. denied*, 421 U.S. 1014 (1975). The *Lisa R.* case held CAL. EVID. CODE § 661 (West 1966) constitutionally defective because it denied the use of the courts to an unwed father seeking to establish his parenthood of a minor child whose legal parents had died. The California Supreme Court found this denial of access to be unreasonable, arbitrary and capricious, as well as a violation of due process rights. 13 Cal.3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485. Subsequently, the state legislature replaced the statute with a UPA provision granting standing to a wide range of persons, including putative fathers. CAL. CIV. CODE § 7008 (West Supp. 1981). *See* Comment, *In Re* Lisa R.—*Limiting the Scope of the Conclusive Presumption Doctrine*, 13 SAN DIEGO L. REV. 377 (1976); Note, *In Re* Lisa R., 3 PEPPERDINE L. REV. 212 (1975).

109. 615 P.2d at 672.

110. *Id.*

111. On remand the Denver Juvenile Court entered a Declaration of Paternity in favor of R.McG., following a stipulation to that effect by the mother and the presumed father. R.McG. v. J.W., No. P-20082 (Den. Juv. Ct. Order, May 1981).

112. 615 P.2d at 672-73 (Dubofsky, J., concurring).

113. *Id.* at 673. The concurring opinion also recognized *Lisa R.*, as persuasive authority for this proposition. *See* note 108 *supra*.

114. The due process cases on which Justice Dubofsky relied are Board of Regents v. Roth, 408 U.S. 564 (1972); Hannah v. Larche, 363 U.S. 420 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

> But here, where R.McG. has no alternative remedy to protect his interest as the child's natural father, I think we must find that he has standing to assert those interests in a court proceeding. Otherwise, his constitutional right to due process of law in order to protect his basic right to conceive and raise his child has been denied.[115]

C. *The Dissent: Overriding State Interests*

Justice Lohr's dissent found both equal protection and due process arguments outweighed by the compelling state interest in fostering harmonious marital relationships and strong family ties.[116] The dissent began by quoting the purposes of the Colorado Children's Code[117] (of which the UPA is a part): to serve the best interest of the child and to strengthen the family.[118] Justice Lohr maintained that UPA presumptions of paternity faithfully implement these declared legislative purposes which must be liberally construed under the statute.[119]

Justice Lohr, addressing the equal protection issue, stated that no prior court has ever extended the *Stanley* doctrine to find that a man other than the mother's husband possessed an interest in determining the parental status of a child born in wedlock.[120] The dissenting Justice, noting that adultery is still a crime in Colorado, stated, "it requires more imagination than I can summon to find any legitimate expectation of a legally recognized relationship based solely on the blood ties between the child conceived of an adulterous relationship and the natural father of that child."[121]

According to the dissent, the appropriate judicial standard for testing R.McG.'s claims is the lower tier, rational relationship test, under which the challenged classification would prevail.[122] For example, when family relationships become so disintegrated that someone within the family wishes to challenge the husband's paternity, the legislature could reasonably determine that no useful purpose would be served by preventing that person from doing so.[123] Justice Lohr rejected the majority view that the challenged classification was gender-based, since both sexes are among persons able to sue in paternity proceedings. Therefore, he declined to apply the higher level of scrutiny demanded for gender-based statutes[124] and, further, found it unnec-

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115. 615 P.2d at 673-74 (Dubofsky, J., concurring).

116. *Id.* at 674-75 (Lohr, J., dissenting).

117. *Id.* at 674; COLO. REV. STAT. § 19-1-102 (repl. 1978 & Supp. 1980). For cases implementing these policies, *see* R.M. v. District Court, 191 Colo. 42, 550 P.2d 346 (1976); People *ex rel.* M.M., 184 Colo. 298, 520 P.2d 128 (1974). *See also* People *ex rel.* S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976).

118. COLO. REV. STAT. § 19-1-102(1)(a), -102(1)(b) (repl. 1978).

119. 615 P.2d at 674 (Lohr, J., dissenting).

120. *Id.* at 676.

121. *Id.*

122. *Id.* The two Colorado cases upon which Justice Lohr relied are Mosgrove v. Town of Federal Heights, 190 Colo. 1, 543 P.2d 715 (1975) and People *ex rel.* L.B., 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dismissed mem.*, 410 U.S. 976 (1973).

123. 615 P.2d at 676 (Lohr, J., dissenting).

124. *Id.* at 677. Justice Lohr stated that if he were to utilize the substantial interest test, the classification would still survive. *Id.*

essary to apply the Colorado equal rights amendment.[125]

Turning to the concurring due process arguments, Justice Lohr applied the same balancing test as Justice Dubofsky had, but he reached the opposite result, finding that public policy considerations outweighed the private interests of the extra-marital father in this case.[126] To Justice Lohr "the important criteria would be the duration and quality of the relationship of the parties, not the probability that the third-party father could in fact prove paternity."[127]

IV. THE SOCIAL CONSIDERATIONS

The presumption that a child conceived during a lawful marriage is legitimate is one of the oldest and strongest presumptions in Anglo-American law.[128] It was long supported by an evidentiary rule which rendered a husband and wife incompetent to rebut the presumption by testifying that they had not engaged in sexual intercourse at the time of conception. The precept became known as Lord Mansfield's Rule after the English peer articulated it in a 1777 ejectment case, declaring that "decency, morality, and policy" required that husbands and wives be barred from bastardizing their offspring.[129]

Some American states continue to employ a conclusive presumption of legitimacy. For instance, in 1967 a California appellate court held that a mixed race child born to a Caucasian woman was the legitimate child of the mother's Caucasian husband.[130] Other state laws contain a rebuttable presumption of legitimacy, yet make rebuttal quite difficult.[131] Colorado rejected Lord Mansfield's Rule in 1959, but continues to uphold the strong presumption of legitimacy.[132] Just four months before the *R.McG.* decision, in fact, the Colorado Supreme Court held that children with married parents enjoy a strong presumption of legitimacy and should be able to rely on it absent a paternity challenge by the presumed father.[133]

R.McG. has not destroyed the traditional presumption of legitimacy in Colorado, but has severely weakened it. The presumption still exists; however, any extra-marital father—indeed, probably any interested person—may now attack it.

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125. *Id.*

126. *Id.* at 677-78.

127. *Id.* at 678. Justice Lohr referred to Justice Stewart's dissent in *Caban*, in which the latter stated, "[p]arental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring." 615 P.2d at 678 n.9 (citing Caban v. Mohammed, 441 U.S. at 397 (Stewart, J., dissenting)).

128. In *In re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930), Justice Cardozo said the presumption could not fail unless common sense and reason are outraged by it. For a good general discussion, *see* Note, *Evidence—Incompetency of a Husband and Wife to Testify as to Nonaccess so as to Bastardize a Child*, 6 GA. ST. B.J. 448 (1970).

129. Goodright v. Moss, 98 Eng. Rep. 1257, 1257-58 (K.B. 1777).

130. Hess v. Whitsitt, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967). *Accord*, *In re* Marriage of A., 41 Or. App. 679, 598 P.2d 1258 (1979).

131. *E.g.*, Stewart v. Stewart, 91 Mich. App. 602, 283 N.W.2d 809 (1979).

132. Vasquez v. Esquibel, 141 Colo. 5, 346 P.2d 293 (1959). *See also* Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963); Lanford v. Lanford, 151 Colo. 211, 377 P.2d 115 (1962).

133. A.G. v. S.G., 609 P.2d 121 (Colo. 1980).

Such an attack today has a much greater chance of success than ever before. Just a few years ago, a true natural father in R.McG.'s situation probably would have lost his case, even if he could have obtained standing to bring the action to trial, because he could have mustered little scientific evidence to rebut the strong presumption of legitimacy. The blood tests then available were often inconclusive and only excluded certain fathers; they did not definitely establish paternity. Today, however, the new HLA tissue testing procedure has made it possible to determine paternity much more accurately. In approximately 90% of blood samples tested, the HLA procedure either absolutely excludes the tested party as the father, or rates his probability of paternity at over 90%.[134] Such evidence should be sufficient to rebut any presumption except a legally conclusive one. The Colorado Supreme Court was obviously influenced by what it called R.McG.'s "threshold showing of 98.89% probability of paternity."[135]

Thus, before HLA testing existed, the rebuttable presumption of legitimacy acted as an almost insurmountable barrier to extra-marital fathers.[136] Today, the presumption is more readily rebuttable. That is one reason *R.McG.* is so significant.

Many people, like the dissenting Justice Lohr, fear that the *R.McG.* decision will have a serious adverse social impact.[137] The defendants, in their appellate brief, stated that "the cost of abstract truth is dear when contrasted with the damage to the child and his or her family. . . ."[138]

Others, such as this author, believe that the decision was legally imperative regardless of the costs, and that those costs will not be excessive. Society must always pay a price for its freedoms. The price in this instance may be the destruction of some family units. However, many of those units would be destroyed by their complicated parental situation, even without the intervention of the legal process. Also, it should not be assumed that many extra-marital fathers will use this new avenue simply because it is now open to them. Only the most persistent and concerned claiming fathers are likely to pursue an action which may destroy their own family units and will, if successful, require substantial support obligations.

R.McG. believed that the law should not protect outmoded fictions. He maintained in his appellate brief that in the past, fictional presumptions were needed for the orderly support of society's children because at that time it was impossible to prove paternity. "But to try to foist such fictions on a

134. Comment, *Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough*, 20 SANTA CLARA LAW. 511 (1980). The HLA system was developed in 1964 at the University of California at Los Angeles (U.C.L.A.) School of Medicine, for the purpose of matching tissues precisely to minimize the possibility of organ transplant rejection. U.C.L.A. now has a large HLA paternity evaluation program, where the R.McG. tests were carried out. States were slow to recognize the new technology, but as early as 1976 the American Medical Association and American Bar Association recommended use of the HLA test. *See Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976). Since then, most states which have considered the matter have accepted HLA testing. FAM. L. REP. (BNA) 1173 (Sept. 16, 1980).

135. 615 P.2d at 671.

136. *See* note 54 *supra*.

137. 615 P.2d at 676.

138. Memorandum Brief in Support of Respondent's Motion for Summary Judgment at 9.

family in 1979," he said, "is a destructive anachronism."[139]

Every child has a right to know his or her biological heritage.[140] In addition to the obvious medical and economic considerations favoring such knowledge, many people, including the author, believe that the child has an essential right to the truth simply because it is the truth. In constitutional terms, the child has a substantive due process right to his own personhood.[141]

American society is no longer composed of neat nuclear units of biological families. Many children live with adults who are not their biological parents.[142] If children can adjust to stepfathers, adoptive fathers, live-in fathers, intermittent fathers and absent fathers, they can adjust to having two fathers, both of whom want them—a biological one with visitation rights and a "psychological" one with whom they live. If R.McG. is successful in establishing his parenthood, the child, one hopes, will be loved, supported and cared for by two fathers. Surely in today's world that is not such an adverse result.

Linda Shoemaker

139. Memorandum Brief in Opposition to Defendants' Motion for Summary Judgment at 10.

140. *In re* Adoption of Tachick, 60 Wis. 2d 540, 551, 210 N.W.2d 865, 871 (1973). Note also the increasingly militant stands taken by adult adoptees in search of their biological roots, *e.g.*, Alma Soc'y Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979).

141. Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 702.

142. Many academicians have argued that the rights of the natural "biological" parent are less important than those of the "psychological" parent to whom the child is attached. Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129 (1979).