COMMENTS

WASHINGTON'S PARENTAGE ACT: A STEP FORWARD FOR CHILDREN'S RIGHTS

For centuries illegitimate children have been burdened with the sins of their parents. Suffering the insults of society throughout their lives, these children have grown up abused, ashamed, and with virtually none of the rights and protections the law afforded "legitimate" children. It is no wonder that "bastard" is a dirty word.[1]

In 1928 Judge Leon R. Yankwich recognized the injustice of thrusting upon innocent children society's condemnation of the illegal behavior of their parents when he said "there are no illegitimate children—only illegitimate parents."[2] It was not until forty years later that the United States Supreme Court decided that illegitimate children were to be afforded rights that legitimate children had learned to expect. In *Levy v. Louisiana,*[3] the Court held unconstitutional a Louisiana wrongful death statute which denied illegitimate children the right to recover for the wrongful death of their mother.

Levy was the first of several Supreme Court cases[4] which resulted in making much of the law on the subject of illegiti-

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1. For an excellent examination of the legal and social status of illegitimate children, see H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971); Gray & Rudovsky, *The Court Acknowledges the Illegitimate,* 118 U. PA. L. REV. 1 (1969).

2. This quote is attributed to Judge Yankwich in *In re* Woodward's Estate, 230 Cal. App. 2d 113, 118, 40 Cal. Rptr. 781, 784 (1964). *See also* Armijo v. Wesselius, 73 Wn. 2d 716, 440 P.2d 471 (1968); Kank v. Chawla, 11 Wn. App. 363, 522 P.2d 1198 (1974).

3. 391 U.S. 68 (1968).

4. *See* Gomez v. Perez, 409 U.S. 535 (1973) (holding the state could show no constitutionally sufficient justification for refusing to recognize illegitimate children's enforceable right to support from their natural fathers when the state recognized such right with respect to legitimate children); Stanley v. Illinois, 405 U.S. 645 (1972) (holding an Illinois statute's irrebuttable presumption that all unmarried fathers were unqualified to raise their children a violation of the due process clause); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (the denial to unacknowledged, illegitimate children of recovery, under workmen's compensation laws, for the death of their natural father was held to be a violation of the equal protection clause).

mate children either clearly "unconstitutional or subject to grave constitutional doubt."[5]

In response to the Supreme Court's rulings and in recognition of the questionable constitutionality of many state statutes affecting the rights of the illegitimate child, the Uniform Parentage Act was drafted and, in 1973, approved by the National Conference of Commissioners on Uniform State Laws.[6] Adopted in Washington during the 1975-76 legislative session,[7] the Act's primary goal of equalizing the rights of all children—legitimate or not—is set forth in its first two sections.[8] The remainder of the Act is concerned "with the *sine qua non* of equal legal rights—the identification of the person against whom these rights may be asserted."[9]

Washington had recognized the constitutional rights of illegitimate children prior to the *Levy* decision.[10] Until July 1976, however, when the Uniform Parentage Act went into effect in Washington, an enunciation of the illegitimate child's right to equal treatment under the law could only be found after a careful search through scattered cases. The new Act explicitly states that such rights exist and, in its attempt to equalize the status of all children, strikes the word "illegitimate" from Washington's Revised Code. In Washington there are now just children. Some of them are not yet acknowledged, but none are "illegitimate."

5. UNIFORM PARENTAGE ACT, Commissioners' Prefatory Note.

6. *Id.*

7. Ch. 42, [1975-76] Wash. Sess. Laws (2d Ex. Sess.) 1969 [hereinafter cited as Washington Parentage Act].

8. Sections 2-3 of the Washington Parentage Act are identical to §§ 1-2 of the UNIFORM PARENTAGE ACT, which provide:

1. [Parent and Child Relationship Defined]

As used in this Act, "parent and child relationship" means 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. It includes the mother and child relationship and the father and child relationship.

2. [Relationship Not Dependent on Marriage]

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

9. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 9 (1974).

10. *See* Armijo v. Wesselius, 73 Wn. 2d 716, 440 P.2d 471 (1968) (construing Washington's wrongful death statute to include the illegitimate children of a father within the term "child or children").

This codification of case law should come as a welcome relief to Washington practitioners who, until the Act's passage, were required to pose constitutional arguments or to wade through years of state and federal appellate decisions before proceeding with filiation suits or with workmen's compensation, probate, adoption, or wrongful death actions involving illegitimate children.

The Act's purpose of giving full equality to all children by recognizing their right to parental support and their legal relationship with both parents,[11] is to be achieved by determining the identity of the parent[12] against whom the child's rights may be asserted. In Washington, the adoption of the Act means the repeal of the state's filiation statute[13] and the establishment of new procedures to determine the parentage of children born out of wedlock. The Act also affects sections of the long-arm statute,[14] the adoption statute,[15] the probate statute,[16] the workmen's compensation act,[17] the vital statistics act,[18] and the marriage statute.[19]

I. IDENTIFYING THE FATHER

Any action attempting to identify the father[20] of a child is fraught with conflicting rights and interests. The state claims an interest based upon the costs incurred by the public because of the non-support of the child by the father.[21] The mother often attempts to shield herself from the state's alleged inva-

11. *See* Krause, *supra* note 9, at 8.

12. Although its provisions will most often apply to identify the father of a child, Washington Parentage Act § 18 provides that the act, insofar as practicable, applies with equal force to the determintion of the mother-child relationship.

13. WASH. REV. CODE ch. 26.24 (1976).

14. *Id.* § 4.28.185.

15. *Id.* §§ 26.32.030-.050, 060-.085, .300-.310.

16. *Id.* §§ 11.02.005, .04.081.

17. *Id.* § 51.08.030.

18. *Id.* §§ 70.58.200-.210.

19. *Id.* § 26.04.060.

20. Because the majority of actions brought to determine the existence of the parent-child relationship are concerned with the identification of the father, this discussion of procedures will refer to the defendant in such proceedings as a putative father. Such proceedings, however, may be brought to determine the existence of the mother-child relationship. Washington Parentage Act § 18.

21. *See, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970).

sion of her privacy or from the forced interference of a father who may not know of or care about the existence of his child.[22] And because of the social condemnation and inevitable financial burden which will be thrust upon the father, putative fathers have been less than eager to participate in filiation proceedings—particularly where, as in Washington, such proceedings may begin with arrest and an immediate, but short, stretch in the county jail.[23]

Finally, the rights and interests of the child must be considered. The underlying concept of an action to determine parentage is that every child has the right to financial support from its parents; that every child is entitled to secure from its parents the financial aid necessary and available for food, clothing, education, shelter, and welfare.[24]

The Uniform Parentage Act is an attempt to resolve these conflicting interests in favor of the child.[25]

A. *The Quasi-Criminal Trappings*

The former Washington filiation statute contained a provision for the arrest and incarceration of a man charged with being the father of an illegitimate child.[26] This travesty of justice has, unfortunately, been only slightly changed by the new Act.

In a major deviation from the Uniform Act, the Washington Legislature adopted a provision which allows a plaintiff in an action for the determination of the existence of the father-child relationship to petition the court to issue a warrant for the arrest of the alleged father at any stage of the proceeding. The new arrest procedure, however, does provide some safeguards not found in the former filiation statute.[27] In cases of

22. *See generally* Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection and the Uniform Parentage Act*, 23 KAN. L. REV. 23 (1974).

23. Washington Parentage Act § 8.

24. State v. Coffey, 77 Wn. 2d 630, 465 P.2d 665 (1970).

25. UNIFORM PARENTAGE ACT § 2, Comment.

26. WASH. REV. CODE §§ 26.24.010-.020 (1976).

27. *Id.* § 26.24.020 required the defendant, upon "sufficient cause," to post a bond prior to the determination of paternity or be committed to jail until trial.

prejudgment petitions, a warrant may be issued only if the evidence before the court gives reasonable cause to believe that the defendant is the father of the child *and* reasonable cause to believe: (1) that the alleged father will not respond to the summons; or (2) that the summons cannot be served; or (3) that the alleged father is likely to leave the jurisdiction; or (4) that the safety of the petitioner would be endangered if the warrant did not issue.[28]

If the petition for the arrest warrant is made after a judgment, under the court's continuing jurisdiction over the proceeding or in an action to enforce the judgment, a warrant will be issued only if there is reasonable cause to believe that: (1) the father is delinquent in complying with the court's order and so conceals himself that ordinary process of law cannot be served upon him; or (2) he has or is about to move his property from the state *with the intent* of delaying or otherwise frustrating the court's order; or (3) he has or is about to assign, secrete, convert, or dispose of any of his property *with the intent* of delaying or otherwise frustrating the court's order.[29]

The section provides that anyone arrested under the statute, whether before or after judgment, "shall be entitled *upon request* to a preliminary hearing as soon as practically possible, and in any event not later than the close of business of the next judicial day following the day of arrest."[30] In order to be entitled to the speedy court appearance provided under the act, a putative father is apparently expected to know the law well enough to request such an appearance or be faced with the possibility of a night in jail.

At this first court appearance, the alleged father will be ordered released on his own recognizance pending trial, unless the court determines that such recognizance will not reasonably assure his appearance or his compliance with the court's order.[31]

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28. Washington Parentage Act § 8(2). This section is in accord with the decision in State v. Klinker, 85 Wn. 2d 509, 537 P.2d 268 (1975). *See* Note, 11 GONZ. L. REV. 799 (1976).

29. *Id.* § 8(3).

30. *Id.* § 8(4) (emphasis added).

31. *Id.* § 8(6).

It is unfortuate that Washington legislators opted for what appears as a criminal proceeding rather than for the Uniform Parentage Act's pretrial procedures and pretrial recommendations[32] allowing the parties to voluntarily settle the case without the expense and anxiety of a trial. Although the Act does protect the alleged father from arrest resulting merely upon the accusation of the child's mother, the threat of imprisonment and of the stigma which results from an arrest remain.

Washington also failed to incorporate the Uniform Act's section providing an indigent with the right to counsel at any stage—pre- or post-judgment—of the proceedings.[33] The Washington Supreme Court, in *State v. Walker,*[34] recently held that a putative father has no constitutional right to counsel in a filiation proceeding because there is no immediate threat of imprisonment. Although *Walker* was brought under the old filiation statute, the court's decision unquestionably applies under the Washington Parentage Act. The *Walker* case, however, can be narrowly interpreted to apply only to the trial stage of the proceedings as the court expressly excluded the pretrial hearing from its consideration.

In determining that an alleged father in a filiation action does not have a constitutional right to counsel, the *Walker* court relied on the reasoning of the Michigan Court of Appeals in *Artibee v. Cheboygan Circuit Judge.*[35] The Washington court stated, "Never is deprivation or restriction of liberty a direct result of a filiation proceeding."[36] The Supreme Court of Michi-

32. UNIFORM PARENTAGE ACT §§ 10 and 13, with § 11, which provides for blood tests and which was adopted under the Washington Parentage Act, were drafted to "minimize inconvenience and embarrassment in the many cases [expected to] be resolved on the basis of the voluntary compromise contemplated by Section 13." *Id.* § 10, Comment.

33. *Id.* § 19 provides:

[Right to Counsel; Free Transcript on Appeal]

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

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

34. 87 Wn. 2d 443, 553 P.2d 1093 (1976). *See also* Tetro v. Tetro, 86 Wn. 2d 252, 544 P.2d 17 (1975); State v. Klinker, 85 Wn. 2d 509, 537 P.2d 268 (1975).

35. 54 Mich. App. 433, 221 N.W.2d 225 (1973).

36. 87 Wn. 2d at 445, 553 P.2d at 1095.

gan disagreed, however, and reversed the *Artibee* decision.[37] The Michigan court found that the complexity of paternity actions, the probability that a defendant would be unaware of his statutory rights, the threat of imprisonment, and the threat of a final obligation of the defendant to support the child all required that counsel be afforded an indigent defendant so that his right to due process would be protected. The *Artibee* court further found that the state's resources, supplied through the prosecutor's office to the complainant, created an imbalance because the state recognized the importance of counsel in such actions only when such counsel was advocating the rights of the complainant.

The Washington court will, hopefully, reconsider its decision in *Walker* in light of the reversal in *Artibee* and in light of the philosophy behind the Uniform Parentage Act.

B. Bringing the Action

An action to determine parentage under the Act is a civil action[38] and within the jurisdicton of the superior courts.[39] Every hearing or trial held under the Act will be in closed court,[40] without a jury,[41] and subject to strict rules of confidentiality.[42]

The Act provides that a child, his mother, or a man presumed under the Act[43] to be the father may bring an action to determine the existence of the father-child relationship "at any time."[44] An action to dispute a presumed relationship must be brought "within a reasonable time after obtaining knowledge of relevant facts."[45]

The Department of Social and Health Services (DSHS) or the State of Washington may bring an action to determine the

37. Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 243 N.W.2d 248 (1976).

38. Washington Parentage Act § 13(1). *Accord*, State v. Bowen, 80 Wn. 2d 808, 498 P.2d 877 (1972); State v. Mottet, 73 Wn. 2d 114, 437 P.2d 187 (1968).

39. Washington Parentage Act § 9.

40. *Id.* § 21.

41. *Id.* § 13(5).

42. *Id.* § 21.

43. Presumptions under the Washington Parentage Act § 5 are discussed *infra*.

44. Washington Parentage Act § 7(1)(a).

45. *Id.* § 7(1)(b).

existence of the father-child relationship at any time, but is restricted by a five-year statute of limitations if the action is for the purpose of establishing the duty of a man not presumed to be the father to support a child.[46] The Act also provides that if an action to determine the parentage of a child who has no presumed father under the Act has not been brought within a year of the child's birth, the state or DSHS may promptly bring an action on behalf of the child.[47]

Every case brought under the Act must name the child as a party. If a minor, the child must be represented by a guardian or guardian ad litem appointed by the court, and in no case shall he be represented by his mother or father.[48] The Act also requires that the mother and each man presumed or alleged to be the father be made parties to the action.[49]

Under an amendment to Washington's long-arm statute,[50] fleeing fathers will not escape their parental obligations if they have had sexual intercourse in Washington. The amendment limits the reach of the long-arm statute's new section to cases involving conception of a child.[51]

C. *Presumptions of Parentage*

The new statute lists five presumptions of paternity to aid in establishing the identification of the father.[52] No major de-

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46. *Id.* § 7(7).
47. *Id.* § 7(4).
48. *Id.* § 10.
49. *Id.*
50. WASH. REV. CODE § 4.28.185 (1976).
51. Washington Parentage Act § 22 provides in pertinent part:

Sec. 22. Section 2, chapter 131, Laws of 1959 and RCW 4.28.185 are each amended to read as follows:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived.

52. Washington Parentage Act § 5 provides:

New Section. Sec. 5. A man is presumed to be the natural father of a child if:

(1) He and the child's natural mother are or have been married to each

parture from existing case law is found in the presumptions.[53] The first two presumptions provide that the father-child relationship will be determined to exist, unless rebutted by clear, cogent, and convincing evidence,[54] if the man and the child's mother were married or appeared to be legally married 300 days before the child was born.

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other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or dissolution, or after a decree of separation is entered by a court;

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the child is born within three hundred days after the termination of cohabitation;

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(a) he has acknowledged his paternity of the child in writing filed with the registrar of vital statistics,

(b) with his consent, he is named as the child's father on the child's birth certificate, or

(c) he is obligated to support the child under a written voluntary promise or by court order;

(4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his child; or

(5) He acknowledges his paternity of the child in a writing filed with the registrar of vital statistics, who shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the registrar of vital statistics. If another man is presumed under subsections (1), (2), (3), or (4) of this section to be the child's father, such acknowledgment shall give rise to the presumption of paternity only with the written consent of the otherwise presumed father or after such other presumption has been rebutted.

A presumption under this section may be rebutted in an appropriate action only by clear, cogent, and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

53. *See* Peterson v. Eritsland, 69 Wn. 2d 588, 419 P.2d 332 (1966) (written acknowledgment of paternity in contract for support held enforceable); Pierson v. Pierson, 124 Wash. 319, 214 P.159 (1923) (child born 336 days after termination of cohabitation was presumed to be legitimate); Richards v. Richards, 5 Wn. App. 609, 489 P.2d 928 (1971) (child born during divorce proceedings presumed to be legitimate).

54. Washington Parentage Act § 5. *Accord,* Richards v. Richards, 5 Wn. App. 609, 489 P.2d 928 (1971).

If the man and child's mother marry after the child's birth, the man will be presumed to be the father if (a) he acknowledges, in writing, his paternity; (b) is named, with his consent, as the father of the child on the birth certificate; or (c) is obligated, under a written voluntary promise or by court order, to support the child. A presumption of paternity also arises if a man receives the child into his home and holds him out as his own child, while the child is a minor.

In the rare case where a father acknowledges his paternity of a child and files a written acknowledgment with the registrar of vital statistics, the man will be presumed to be the father unless the mother disputes the acknowledgment. Such written acknowledgment will give rise to the presumption only with the written consent of any other man who is presumed, under the Act, to be the father or after a presumption that another man is the father has been rebutted.

Evidence to prove or dispute the existence of the father-child relationship may include blood tests[55] or other medical or anthropological test results.[56] The Act essentially provides that *all* evidence which is relevant to the issue of paternity of the child may be admitted in such actions.[57]

D. *The Judgment*

The court's determination of existence or non-existence of

55. Washington Parentage Act § 11.

56. *Id.* § 12(4).

57. *Id.* § 12 provides:

New Section. Sec. 12.

Evidence relating to paternity may include:

(1) Evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(2) An expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

(3) Blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(4) Medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and

(5) All other evidence relevant to the issue of paternity of the child.

the parent-child relationship is, under the new Act, determinative for all purposes.[58] In addition to ordering support payments, and reimbursements for support to the mother, the judgment may determine custody, visitation privileges, whether a security bond should issue, whether the father should pay the reasonable expenses of the mother's pregnancy and confinement, and "any other matter in the best interest of the child."[59] Determination of the amount of support to be paid or a determination of custody of the child is to be based on a decision of what is best for the child.[60]

The Act also provides for the awarding of costs for experts and tests, attorney fees, and guardian ad litem expenses, in proportions and at times determined by the court.[61] Despite the conclusion of the legislature and the Washington courts that the filiation procedure is strictly civil in nature, the quasi-criminal character of the proceedings, particularly in actions brought by the state, makes the provision for fees and costs seem especially harsh. The provision will no doubt be felt most severely by the indigent defendant who, with no right to counsel in Washington, is forced to pay for the blood tests used to determine that he is obligated to support a child or suffer the consequences of a contempt citation.

The court which determines the issue of paternity may order that support payments be made to the Department of Social and Health Services, to a parent, to the clerk of the court, or to a person, corporation, or agency designated to administer such payments for the benefit of the child.[62] The court also has continuing jurisdiction to modify a judgment and order for future education and future supports.[63]

II. MAKING CHILDREN EQUAL

Because Washington's new Uniform Parentage Act aims at making children equal before the law, the legislature in con-

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58. *Id.* § 14(1).
59. *Id.* § 14.
60. *Id.*
61. *Id.* § 15.
62. *Id.* § 16(2).
63. *Id.* § 17. *Accord,* State v. Coffey, 77 Wn. 2d 630, 465 P.2d 665 (1970).

junction with the adoption of the Act decided to eliminate the use of the words "illegitimate child" and "illegitimate children" from the Washington Revised Code. The primary effect of the deletion is to make the laws of Washington apply equally to all children, regardless of the marital status of the child's parents at the time of birth.

In amending the adoption statute,[64] the Act strikes the word "illegitimate" from the law and changes the provision requiring notice to the parent not initiating the relinquishment of an unacknowledged child.[65] The new notice provision requires the notice to be "printed in the county or counties in which in the exercise of sound judicial discretion the court determines the alleged parent is likely to reside."[66]

III. CONCLUSION

Washington's adoption of the Uniform Parentage Act is a significant step forward in the long struggle toward equal protection for illegitimate children. Attaining legal rights equal to those of children born of legally married parents is but a step in the direction of society's recognition of illegitimate children as just children. And the erasure of the distinction between legitimate and illegitimate children should aid society in its acceptance of the equal status of all children.

With this recognition of equality under the law, the new statute sets forth a much needed revision of the procedure for determining the identity of the father of the child born out of wedlock. The new provisions, however, are too similar to those enumerated under the old filiation statute. The proceedings remain harsh and seemingly afford few of the constitutional protections that defendants have learned to expect. Thus, the Act cannot be considered the final statement of Washington law in this area.

Viewed with a realization of its purpose of affording equal rights to all children, the statute, while ignoring many of the problems of concern to unmarried mothers and unmarried fa-

64. WASH. REV. CODE §§ 26.32.030-.050, .070-.085, .300-.310 (1976).
65. Washington Parentage Act § 20.
66. *Id.* §§ 31, 35.

thers, meets the needs of children who have been shunned by both society and the law for centuries.

The Uniform Parentage Act does little more than fulfill a constitutional mandate[67] and, through its interpretation by the courts and through further constitutional challenges on behalf of children—and parents—the Act will change with the growing recognition of the legal rights and corollary responsibilities of children, mothers, fathers, and the state.

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67. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974).