Johnson v. Hunter: Protecting the Nonmarital Child's Interests Despite the Minnesota Parentage Act's Shortcomings

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The state of Minnesota and Stephanie Johnson Saunders, mother, brought a paternity suit against alleged father Terry Lee Hunter in 1969.[1] The trial court orally dismissed the suit with prejudice when Saunders failed to appear at the trial.[2] Sixteen years later, Saunder's daughter, Tia Marie Johnson, sought to establish paternity under the Minnesota Parentage Act (MPA).[3] In *Johnson v. Hunter*, the Minnesota Supreme Court held that dismissal of a paternity action brought by a parent did not preclude the child from bringing a paternity action under the MPA sixteen years later.[4]

The *Johnson* court examined the child's right to challenge the paternity dismissal. The court noted that although Ms. Johnson was not named in the original action, she would be precluded from bringing her paternity claim if she were in privity with her mother.[5] The alleged father pointed out that Ms. Johnson's paternity had been before the courts years ago when the state and the mother initially brought suit and that Ms. Johnson should be estopped from relitigating the matter.[6]

The *Johnson* case raised the issue of whether, in an atmosphere recognizing increased rights for children,[7] adjudication of a suit brought by a parent can prevent a child from later bringing a paternity suit herself. The *Johnson* court examined these issues because it could not rely squarely on the Minnesota Parentage Act to protect Tia Marie Johnson's interests. The MPA fails to recog-

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1. Johnson v. Hunter, 447 N.W.2d 871, 872 (Minn. 1989) (en banc).

2. *Id.*

3. MINN. STAT. §§ 257.51-257.74 (1980).

4. 447 N.W.2d at 871.

5. *Id.* at 873-74. Had the court found privity between Saunders and her daughter, the earlier adjudication would have been binding on Johnson. *See infra* notes 27-28 and accompanying text.

6. *See infra* notes 25-30 and accompanying text.

7. *See infra* note 79.

nize every nonmarital[8] child's need to be mandatorily joined as a party to her paternity suit. Although a child "may be made a party" to the paternity action under the MPA, the child *must* be made a party in only a few circumstances.[9] The MPA did not require a child in Ms. Johnson's position to be mandatorily joined, and she was not a party to the earlier suit.[10] The *Johnson* court, however, recognized her interests had not been heard.[11] The court was forced to find another way to allow the child's interests to be heard or risk denying the child an equal right to due process.[12]

This article proposes that the MPA be amended to require mandatory joinder of all nonmarital children whose paternity is at issue. *Johnson* recognized that a child's interests[13] in a paternity

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8. Representative Berglin, co-author of the bill adopted as the Minnesota Parentage Act (MPA), indicated to the Minnesota House Judiciary Committee the intent to remove all references to the term "illegitimate" in the paternity statutes as well as other state laws referring to children. *Parentage Act: Hearings on S. 134 Before the House Judiciary Committee*, 71st Leg., 2d Sess. 27 (1980) (statements of Rep. Berglin, co-author) (audio tape recording of House Judiciary Committee Meeting of Mar. 13, 1980, available in Minnesota Historical Society Archives, locator number 68.F.11.3B, at revolutions 835-1043). In adopting the MPA, the legislature specifically declared in Section 3 that "[t]he parent and child relationship may exist regardless of the marital status of the parents," and replaced "illegitimate children" with "children" in statutes relating to maternity and insurance benefits, custody disputes, adoption proceedings, and duties of the Commissioner of Public Welfare (now referred to as Human Services). Act of Apr. 23, 1980, ch. 589, 1980 Minn. Laws 1070. The Minnesota Supreme Court, sitting en banc, called the terms "legitimate" and "illegitimate" archaic, further noting "[t]he Minnesota Parentage Act appears to us to reflect a studied legislative effort to eliminate the vestigial remnants of social stigma once visited on children born out of wedlock, an effort which warrants the removal of the term 'illegitimate child' from the judicial vocabulary." Minnesota *ex rel.* Ward v. Carlson, 409 N.W.2d 490, 492 (Minn. 1987) (en banc).

To avoid the discriminatory and derogatory status that has been associated with the term "illegitimate," this article uses the term "nonmarital" to refer to children born out of wedlock. *See* Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S.CAL. L. REV. 10, 53 n.228 (1975).

9. *See* MINN. STAT. § 257.60 (1990). The child is a necessary party (1) when the suit involves a minor child and lump sum payment or a compromise—an agreement between the alleged father, the mother, and the child which defines economic obligations without determining paternity, (2) when the action is to declare the nonexistence of a father-child relationship, or (3) when the action seeks to declare the existence of the relationship and the child's mother denies the father-child relationship. *Id.* The usual purpose of a paternity suit, however, is to establish the parent-child relationship of a minor. Most mothers claim rather than deny the father-child relationship. Thus, only a relatively small group of nonmarital children are granted this statutory right to mandatory joinder.

10. Johnson v. Hunter, 447 N.W.2d at 872.

11. *Id.* at 876.

12. *See infra* note 50 and accompanying text.

13. In addition to child support, the *Johnson* court recognized specific rights unique to the child, including inheritance, medical support, dependent's allowances under workers' compensation laws, and veteran's education benefits, as well as the

proceeding are distinct from the parent's interests[14] and the state's interests.[15] The MPA presently provides only some classes of nonmarital children with adequate representation in paternity suits and protection of their rights and benefits resulting from adjudication of paternity. Part I outlines the background and development of paternity law and the legal status and rights afforded children in Minnesota. Part II examines the *Johnson* court's maneuvering to avoid the denial of the child's rights that results from a literal reading of the MPA. Part III critiques the MPA and the *Johnson* decision and concludes that *Johnson*, although reaching a just result for the child, demonstrates the need for amendment of the Act. Part III also discusses the problem of a putative father's inability to rely on the result of the original paternity action. This article concludes by proposing amendment of the MPA to protect the interests of all nonmarital children.[16]

"psychological and emotional benefits to the child from an accurate establishment of paternity." *Johnson*, 447 N.W.2d at 875 (citations omitted).

14. Adjudications of paternity frequently include an award to the mother of medical costs of the pregnancy and childbirth. MINN. STAT. § 257.66, subd. 3 (1990). In addition, the *Johnson* court noted the conflict between the interests of a mother and child:

> A mother may have a variety of reasons for not initiating paternity proceedings: she may have a continuing relation with or affection for the father; she may wish to avoid continuing any relation with the father, including child support; she may wish to avoid the disapproval of her family or the community that she believes a paternity action would produce; she may be subject to the emotional strain and confusion that often attend the birth of a child born out of wedlock and continue for a prolonged period, hindering any effort by her to seek child support; she may be able to support the child and not foresee a change in her circumstances.

Johnson, 447 N.W.2d at 875-76 (citing *In re* R.W.L., 341 N.W.2d 682, 686 (Wis. 1984)).

15. "[T]he state's interest in paternity actions is primarily to prevent the child from 'becom[ing] a public charge' by securing child support." *Johnson*, 447 N.W.2d at 875 (quoting MINN. STAT. § 257.19).

16. The prevailing trend, as recognized by Minnesota courts as well as the United States Supreme Court, is toward recognition that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re* Gault, 387 U.S. 1, 13 (1967). As early as 1973, the Court held that marital and nonmarital children should be afforded equal treatment under the Equal Protection Clause of the Fourteenth Amendment for purposes of ordering parental support. Gomez v. Perez, 409 U.S. 535, 538 (1973). However, the courts have been reluctant to discuss whether marital and nonmarital children command equal treatment for all substantive rights. In later cases the courts have limited their opinions to particular rights of nonmarital children. *See infra* notes 51-55 and accompanying text. Therefore, the argument for mandatory joinder of nonmarital children in paternity suits does not reach the level of a fundamental rights analysis. However, the lower level of scrutiny for due process rights seems inadequate in light of the parent-child relationship. This article examines the dilemma.

I. Paternity Law and Children's Rights

A. Legal Status of Children

A minor is defined as "[a]n infant or person who is under the age of legal competence."[17] Society considers children too immature and inexperienced to manage their own affairs.[18] Because of this perceived incompetence, children do not have the same legal rights as adults.[19] The nation's courts have not often addressed whether children have constitutional and statutory interests in their own right, because the courts usually presume a parent or guardian has adequately represented the child's interests.

Historically, the courts considered parents the natural guardians of their children's interests and as such able to bring suit on behalf of their children.[20] Our legal system has traditionally operated in a paternalistic manner, presuming that parents will make decisions for their children in the children's best interests.[21] Should parents neglect that duty, however, the courts intervene to protect children from harming themselves or their property by their own rash or uninformed acts, or to protect children from unscrupulous parties.[22] In some respects the paternalistic approach is changing. Many states have granted children statutory rights[23] to such things as financial support from their parents, educational

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17. BLACK'S LAW DICTIONARY 516 (5th ed. 1983). The reference to "legal age" reads: "The age at which a person may enter into binding contracts or commit other legal acts. In most states a minor reaches legal age or majority . . . at age 18; though for certain acts (e.g. drinking) it may be higher, and for others (e.g. driving) it may be lower." *Id.* at 463-64.

18. *See, e.g. In re* Davidson's Will, 223 Minn. 268, 26 N.W.2d 223 (1947) (referring to nonmajority status as the "disability of infancy").

19. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (state's authority to supervise and control infants broader than its authority over adults); George v. United States, 196 F.2d 445 (9th Cir.) (state may deny certain privileges to infants which may be granted to adults), *cert. denied* 344 U.S. 843 (1952).

20. State v. Sax, 231 Minn. 1, 4, 42 N.W.2d 680, 682 (1950).

21. Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 682-87 (1987).

22. Traditionally, it is our legal policy to protect the interests of minor children incapable of looking after their own affairs. *See, e.g., In re* Davidson's Will, 223 Minn. 268, 272, 26 N.W.2d 223, 225 (1947). It is the right and duty of the court, even though it has appointed a representative for the infant, to protect the rights and interest of an infant. *See, e.g.,* United States v. E. I. du Pont de Nemours & Co., 13 F.R.D. 98 (D.C. Ill. 1952); Workman v. Workman, 174 Neb. 471, 118 N.W.2d 764 (1962) (minor involved in litigation though not a party); Miller v. Belanger, 275 Wis. 187, 81 N.W.2d 545 (1957) (infant a party to litigation).

23. States including Alaska, California, Connecticut, Louisiana, Michigan, and West Virginia have child emancipation statutes to free children from the custody, care and control of their parents. The Adoption Assistance and Child Welfare Act of 1980 provides "reasonable efforts" be made to keep families together with assistance from state and federal social and financial services. 42 U.S.C. §§ 620 et seq. and §§ 670 et seq. (1980). Minnesota provides children rights to education and in-

benefits,[24] and inheritance rights.

Questions of adequate representation for a child arise when a parent's adjudication affects a child's interest. Under the doctrines of res judicata and collateral estoppel, adjudication of a claim or issue binds only a person who is a party or who is in privity with a party to a lawsuit.[25] Estoppel precludes relitigation of claims or issues when the claim or issue is identical, when there was a final judgment on the merits, when the estopped party was a party to or in privity with a party to the prior suit, and when the estopped party was given a full and fair opportunity to be heard on the adjudicated claim or issue.[26] In general, the courts recognize no parent-child privity[27] except when the parent or child had a sufficient interest in the outcome of the other's suit,[28] or has had her interests adequately represented.[29] The policies behind the application of estoppel include reducing the number of lawsuits, increasing judicial efficiency, promoting consistency and finality, and bolstering

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heritance. *See generally*, Mark Soler, *An Introduction to Children's Rights*, 74 A.B.A. J. 52, 53-56 (Dec. 1988).

24. While the Supreme Court has not deemed publicly financed education a fundamental right, it has upheld state legislation financing primary and secondary schools through property taxes. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Parents may control their child's education within the confines of state legislation. Parents may send their children to private rather than public schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Under the Free Exercise of Religion clause, the Court has held a state could not require members of the Amish Church to send their children to public school, since their religiously based refusal to do so outweighed the state's interest. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Although the Court did not discuss the interest of the Amish children themselves, Justice Douglas would have supported the child's interest against the wishes of the parent. *Id.* at 241 (Douglas, J., dissenting in part).

25. James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383, 384 (1983). This article provides a succinct background of the estoppel doctrine, focusing on the constitutional impact of estoppel when applied against nonparties.

26. Ellis v. Minneapolis Comm'n on Civ. Rts., 319 N.W.2d 702, 704 (Minn. 1982).

27. *See, e.g.*, Brown v. Terry, 375 So. 2d 457, 458-59 (Ala. 1979); James W. Moore et al., 1B MOORE'S FEDERAL PRACTICE ¶ 0.411[11] (1988). Minnesota does not recognize a general parent-child privity and instead determines privity on a case-by-case basis. Johnson v. Hunter, 447 N.W.2d 871, 874 (Minn. 1989) (citing as an example McMenomy v. Ryden, 276 Minn. 55, 59, 148 N.W.2d 804, 807 (1967)).

28. Three theoretical bases for privity include successive relationship to the same right, concurrent relationship to the same rights, and representation of the interests of the same person. MOORE et al., *supra* note 22, ¶ 0.411[12] at 482.

29. The court may appoint a guardian ad litem to represent an infant whose interests may be adversely affected by the proceeding. Current law requires such appointment when a child is made a party to a paternity action in Minnesota. MINN. STAT. § 257.60 (1990). Before the MPA was enacted (and even today whenever a child is not made a party), the commissioner of Human Services has the duty to safeguard the child's interests. MINN. STAT. § 257.33 (compare 1969 with 1989 version).

confidence in the judicial system.[30] As *Johnson* illustrates, however, society's growing recognition of the child as an interested party in his own right may at times conflict with these long-standing policies.

The jurisprudential history of children's issues demonstrates the importance of evolving social policy in determining children's rights. Recent decisions of the United States Supreme Court acknowledge certain constitutional rights due children.[31] For example, *Tinker v. Des Moines Independent Community School District*[32] held that children "are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect . . . ." including freedom of speech[33] and liberty interests which require protection by a due process right to counsel.[34] Although Minnesota courts frequently have considered the due process rights of adults in cases involving children,[35] they have less fre-

30. Pielemeier, *supra* note 25, at 394.

31. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (before being suspended from school, children are entitled to procedural safeguards); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (school age children have constitutional right to freedom of speech); *In re* Gault, 387 U.S. 1 (1967) (constitutional right to due process applies to juveniles as well as adults).

32. *Tinker*, 393 U.S. 503.

33. *Id.* at 511. "[N]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The *Tinker* Court allowed school children First Amendment rights to free speech. *Id.* The Court, however, has affirmed broad censorship powers of school officials to control student expression "so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). This limitation demonstrates an application of the Court's generally paternalistic policy.

The right to privacy in familial relationships is also subject to heightened levels of scrutiny. The right to privacy, encompassing freedom of choice in marital relationships, child bearing and child rearing, has been termed a "fundamental" right. Cary v. Population Services Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965). However, the extent of the constitutional guarantees protecting the parent-nonmarital child relationship has yet to be deemed "fundamental" by the Court.

34. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," declared the *Gault* Court when it reversed a denial of habeas corpus petition of a 15 year-old juvenile delinquent on due process grounds, including lack of notice of the child's right to counsel. *In re* Gault, 387 U.S. 1, 13 (1967).

35. The Minnesota courts recognize the due process rights of adults in litigation alleging child abuse or neglect. *See, e.g.*, State v. Merrill, 450 N.W.2d 318 (Minn. 1990); Matter of Welfare of J.W., 391 N.W.2d 791 (Minn. 1986); State v. Durfee, 322 N.W.2d 778 (Minn. 1982).

Adults' rights to due process in cases involving custody and child support are discussed in the following: *In re* Marriage of Schmidt, 436 N.W.2d 99 (Minn. 1989); State v. Andow, 386 N.W.2d 230 (Minn. 1986); State v. Ibarra, 355 N.W.2d 125 (Minn. 1984); Moberg v. Moberg, 347 N.W.2d 791 (Minn. 1984).

When paternity is at issue, the courts have frequently emphasized the alleged parent's rights to due process. *See, e.g.*, Morey v. Peppin, 375 N.W.2d 19 (Minn. 1985); Machacek v. Voss, 361 N.W.2d 861 (Minn. 1985); Howells v. McKibben, 281

quently addressed the process due the children themselves.[36] However, Minnesota does statutorily recognize that a minor party in a paternity suit is entitled to court-appointed counsel if unable to pay.[37]

Deciding which constitutional rights are extended to children and the scope of those rights requires balancing the interests of the child, the parent, and the government.[38] The Supreme Court, however, is hesitant to disturb the "sanctity" of the family[39] and to date has examined the parent-child relationship at a less-than-strict level of scrutiny.[40] Although the definition of "family" encompasses nontraditional family units,[41] legislation sometimes

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N.W.2d 154 (Minn. 1979); State *ex rel.* Nelson v. Nelson, 298 Minn. 438, 216 N.W.2d 140 (1974); State v. Sax, 231 Minn. 1, 42 N.W.2d 680 (1950); Clay v. Clay, 397 N.W.2d 571 (Minn. Ct. App. 1986); Markert v. Behm, 394 N.W.2d 239 (Minn. Ct. App. 1986).

36. This is not to say that the Minnesota courts have ignored children's due process rights completely. As early as 1948, Minnesota courts recognized a minor's due process rights in commitment proceedings. "[The requirement of notice] must be equally applicable to proceedings involving the competency of minors, who are ordinarily totally incapable of asserting or protecting their rights. . . . Even in the absence of a statute [or motion]. . . , the court should take such protective measures on its own" to adequately safeguard the child's interests by appointment of a disinterested party as guardian ad litem. *In re* Wretlind, 225 Minn. 554, 561, 32 N.W.2d 161, 166 (1948). Johnson v. Hunter, 447 N.W.2d 871 (Minn. 1989) (child's due process rights in paternity action); Lindell v. Oak Park Coop. Creamery, 369 N.W.2d 505 (Minn. 1985) (child's right to due process in workers' compensation claim); M.A.D. v. P.R., 277 N.W.2d 27 (Minn. 1979) (paternity suit); Unborn Child v. Evans, 310 Minn. 197, 245 N.W.2d 600 (1976) (nonmarital child's rights to proceeds of alleged father's state insurance policy). *Cf.* Matter of Welfare of M.A.C., 455 N.W.2d 494 (Minn. Ct. App. 1990) (due process in delinquency proceeding); Estate of Jones by Blume v. Kvamme, 430 N.W.2d 188 (Minn. Ct. App. 1988) (children's opportunity to be heard regarding distribution of father's estate).

37. MINN. STAT. § 257.69 (1990).

38. *See generally*, Laurence D. Houlgate, *The Child as a Person: Recent Supreme Court Decisions*, WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER (W. Aiken & H. LaFollette eds.) (1980) at 221-36 (concluding children, as a class different from adults, have some constitutional rights which will be determined by social policy).

39. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v. East Cleveland, 431 U.S. 494, 503 (1977). The Court hesitated to break up the family unit by removing the children from the home, even though the family was nontraditional in that the mother and father of the children were not married. *See* Stanley v. Illinois, 405 U.S. 645 (1972), *infra* note 53. Where disruption of an existing marriage was possible the Court is willing to preserve a fiction of legitimacy and overlook biological evidence of nonpaternity. *See* Michael H. v. Gerald D., 491 U.S. 110, 139, *infra* notes 40, 123.

40. Note, however, that the dissent in *Michael H. v. Gerald D.* points out that four Justices believe the putative natural father has a constitutionally protected liberty interest in the parent-child relationship since both elements of biology and development of a relationship (evidenced by support, visitation, etc.) are established, and another Justice assumes the putative father has a protected liberty interest. 491 U.S. 110 (1989) (Brennan, J., dissenting).

41. *See infra* notes 52-55.

makes distinctions based on legitimacy. When legislatures do make these distinctions, equal protection questions arise.

B. Equal Protection for Nonmarital Children

The distinction between marital and nonmarital children carries not only social stigma[42] but legal consequences as well.[43] When the legislature makes a distinction between marital and nonmarital children, such classification is subject to scrutiny to avoid unconstitutional results. Paternity legislation affects a child's right to due process[44] because denial of paternity can affect not only a child's right to support or a share in a parent's estate,[45] but the denial also arguably constitutes a taking of a child's liberty interest in the parent-child relationship[46] without notice and an

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42. "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage." Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972).

43. For example, the common law recognizes no duty of support for illegitimate children. Most states have imposed this duty upon parents of illegitimate children by statute and provide proceedings to establish paternity. Comment, *Privity, Preclusion, and the Parent-Child Relationship*, 1977 B.Y.U. L. REV. 612, 632 n.108. *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) (a comprehensive study of illegitimacy, its legal status and effects).

44. The Fourteenth Amendment of the Federal Constitution restricts the states from depriving "any person of life, liberty, or property without due process of law." Children are "persons" within the meaning of the Fourteenth Amendment. Levy v. Louisiana, 391 U.S. 68, 70 (1968).

45. Children are entitled to such things as veterans' educational benefits, rights to inheritance through intestate succession, and worker's compensation benefits for dependents. *See infra* note 79. Such benefits would *not* be available to a child should a court make a finding of *nonpaternity*. Thus, a child necessarily has interests needing protection in a paternity action.

> A general paternity determination . . . is rife with far reaching potential, and possibly yet unforeseen, legal consequences concerning, for example, rights of inheritance from or through collateral relatives; those that may ensue under statutes banning prohibited marriages; claims arising under public policy or laws prohibiting or governing human artificial insemination or surrogate parentage; and undoubtedly others of equal seriousness.

Voss v. Duerscherl, 425 N.W.2d 828, 830-31 (Minn. 1988) (footnotes omitted) (holding paternity action not brought by or on behalf of child does not survive death of putative father once personal representative is discharged).

46. The parent-child relationship is considered by many to fall into the penumbra of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. The right to privacy, a "liberty" interest, encompasses familial relationships, marriage, and child bearing. *See supra* note 33. The Supreme Court Justices, however, disagree as to how to analyze which interests are fundamental.

The parent-nonmarital child relationship was examined in Michael H. v. Gerald D., 491 U.S. 110 (1989). A fragmented court held that a California paternity statute creating the presumption that a child born to a married woman living with her husband is a child of the marriage does not violate the putative natural father's due process rights, even in light of blood tests indicating a 98.07 percent probability of paternity. *Id.* at 111. The parent-nonmarital child relationship, where the child

opportunity to be heard. More importantly, paternity legislation affects a child's equal protection rights when marital children are treated differently from nonmarital children.

In the early days of common law, marital children and nonmarital children were treated differently. Nonmarital children were not entitled to support[47] or inheritance from their fathers.[48] More recently, however, the United States Supreme Court has rec-

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is born into an existing marital union, was not a liberty interest under the plurality's analysis of due process questions. *Id.* at 127. The statute was upheld under the rational basis test. *Id.* at 131.

In his dissent, Justice Brennan emphasized that five Justices "refuse to foreclose 'the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.'" *Id.* at 136. The Justices disagreed as to the proper analysis to define a constitutionally protected liberty interest. They disagreed about how specific an interest was at issue ("parenthood" versus "natural father's rights vis-a-vis a child whose mother is married to another") and what level of societal tradition need be examined. Brennan pointed out that the plurality opinion's historical analysis was fully endorsed by only Scalia and Rehnquist, that O'Connor and Kennedy concurred in all but that single mode of historical analysis, and that Stevens concurred in the judgment but not in the analysis. *Id.* at 136.

The plurality did not decide whether a *child* has a liberty interest in maintaining her parent-child relationship, stating that "even assuming that such a right exists" the child's due process challenge is even weaker than her father's, since she claimed a right to maintain relationships with both her putative natural father and her mother's husband. *Id.* at 130. The dissent suggested that it would have found a liberty interest in the relationship between the child and her putative natural father. *Id.* at 146-47.

47. State v. Sax, 231 Minn. 1, 20, 42 N.W.2d 680, 692 (1950) (Knutson, J., dissenting) (citations omitted).

48. Although the legislature has expressed their intent to remove the words "illegitimate child" from Minnesota statutes, the courts adhere to the traditional view in the area of inheritance. When the word "child" is used in a statute, deed, or will, Minnesota courts have construed the term to mean a marital child and not a nonmarital child, unless language, context, or particular circumstances reflect an intent to the contrary. *See, e.g., In re* Estate of Karger, 253 Minn. 542, 93 N.W.2d 137 (1958). In *In re* Estate of Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970), the Minnesota court held that an illegitimate child could be required to produce an attested written declaration of paternity made by the putative father in order to inherit from his estate. The court explained the distinction was not based solely on illegitimate status but had the required rational relationship to the purpose of decedent statutes, to effectuate the presumed desires and intention of the decedent. *Id.* at 336, 717.

Although in Trimble v. Gordon, 430 U.S. 762 (1977), the Supreme Court found violation of equal protection in statutes providing nonmarital children could inherit from their mothers only while marital children inherited from both mothers and fathers, the Court found no constitutional problem with a statute conditioning inheritance by nonmarital children upon an order of paternity in a suit instituted within two years of the child's birth. Lalli v. Lalli, 439 U.S. 259 (1978). The Court held the evidentiary condition was substantially related to the important state interest in just and orderly property disposition in light of problems of proof of paternity and possible invalid claims. *Id.* at 259-60.

ognized some equal rights for nonmarital children[49] by emphasizing that statutory classifications based on illegitimacy will be subject to intermediate scrutiny under the Equal Protection Clause. A classification based on nonmarital birth must be substantially related to an important state interest.[50]

Classifications based on legitimacy were first scrutinized in light of the Equal Protection Clause of the Fourteenth Amendment two decades ago. Under this scrutiny, the U.S. Supreme Court has found Louisiana's wrongful death statute, providing no benefits for nonmarital children, unconstitutional.[51] The Court later held unconstitutional a worker's compensation law that denied recovery to unacknowledged nonmarital children[52] and struck down a statute that created an irrebuttable presumption that unmarried fathers were unfit to have custody of their children.[53] The Supreme Court has also recognized a nonmarital

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49. *See infra* notes 51-58 and accompanying text.

50. United States v. Clark, 445 U.S. 23, 27 (1980). *Accord* Clark v. Jeter, 486 U.S. 456 (1988).

51. Levy v. Louisiana, 391 U.S. 68 (1968). In a companion case, *Glona v. American Guar. & Liab. Ins. Co.*, the Court also found unconstitutional a statutory provision disallowing recovery for a mother for the wrongful death of her nonmarital children. Glona v. American Guar. & Liab. & Ins. Co., 391 U.S. 73 (1968). *Compare* Parham v. Hughes, 441 U.S. 347 (1979), where the Supreme Court found no unconstitutional discrimination against fathers when a statute permitted mothers of nonmarital children but not fathers to sue for the child's wrongful death. *Id.* The Court pointed out the dissimilar positions (only fathers could unilaterally legitimize a child) and noted the statute was reasonably related to the legitimate state interest in establishing paternity and avoiding multiple wrongful death suits based on alleged paternity. *Id.* at 357-58. *See generally* Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 2-8 (1974) (for cases leading up to creation of the Uniform Parentage Act. Professor Krause served as reporter-drafter to the Committee on a Uniform Parentage Act).

Levy's broad holding that nonmarital children are persons within the meaning of the Fourteenth Amendment and thus entitled to equal protection of a state's laws has been repeatedly cited in support of constitutional rights for children. "[I]t is invidious to discriminate against [nonmarital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done to the mother." *Levy*, 391 U.S. at 72. In later cases, however, the Court has limited its discussions to particular rights or duties affecting the parent-nonmarital child relationship, rather than substantive legal rights in general. *See supra* notes 46-47.

The Minnesota Supreme Court acknowledged that *Levy* and *Glona* established that discrimination *solely* upon nonmarital status is a denial of equal protection. *See Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1990).

52. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972). Under Louisiana law, only dependent marital children and dependent acknowledged nonmarital children could recover. *Id.* at 167. The Court found this violated the Equal Protection Clause, noting that an "unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born in wedlock or an illegitimate later acknowledged." *Id.* at 169.

53. Stanley v. Illinois, 405 U.S. 645 (1972). The Court noted the state could not, consistent with due process requirements, merely presume unmarried fathers were

child's equal protection right to paternal support[54] and held that the statute of limitations for paternity actions must be long enough to "provide a reasonable opportunity" to bring claims on behalf of nonmarital children.[55] The trend[56] is clearly to eliminate discrimination between marital and nonmarital children,[57] since "no child is responsible for his birth."[58]

C. *Uniform Parentage Act of 1973*[59] *(UPA)*

By the late 1960's, the United States Supreme Court had rec-

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unsuitable parents. Unwed fathers could not be denied a hearing on fitness that was accorded to all other parents whose custody of their children was challenged.

54. Gomez v. Perez, 409 U.S. 535 (1973) (equal protection for nonmarital children when father has duty to support marital children). The Court emphasized:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.

Id. at 538.

55. Mills v. Habluetzel, 456 U.S. 91 (1982). "First the period for obtaining support . . . must be sufficiently long . . . to present a reasonable opportunity . . . to assert claims on [the children's] behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." *Id.* at 99-100.

56. From *Levy* to *Michael H.*, the Court emphasizes that any distinction on the basis of legitimacy is subject to an intermediate level of scrutiny so as not to violate equal protection guarantees of the Fourteenth Amendment. For a comprehensive list of citations, see Carol DeNardo Spoor, *Paternity Determinations in Washington: Balancing the Interests of All Parties*, 8 U. PUGET SOUND L. REV. 653, 653 n.2 (1985).

57. "[S]tate and federal law may not discriminate between legitimate and illegitimate children in any significant area other than inheritance." Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974).

58. "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972).

One argument made for beneficial treatment of marital children compared to nonmarital children is to support the traditional family unit and discourage unwed parenthood. However, as *Weber* points out, the child is blameless for the circumstances of its birth. Moreover, granting unwed mothers access to wrongful death benefits should a child die, for example, will not encourage having children out of wedlock. *See* Glona v. American Guar. & Liab. Co., 391 U.S. 73 (1968).

59. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1973). The Prefatory Note of the Act stated its purpose:

> [I]n providing substantive legal equality for all children regardless of the marital status of their parents, the present Act merely fulfills the mandate of the Constitution. With the exception of the child's right to inherit from his intestate father, which a growing number of states has [*sic*] provided without constitutional compulsion, the equal treatment provided by the Act is not the Conference's 'wishful thinking.' It is the law of the land.

Id. at 289. The Act attempts to guide the states through the maze of rights granted

ognized the interests of a child in the determination of the parent-child relationship,[60] but state and lower federal courts had reached varying decisions in applying the principle of blameless birth status to areas of substantive law.[61]

Because children and their parents were subject to different treatment depending on the court's interpretation of a parent-child relationship, the statutory means of obtaining paternity adjudication became important. However, even statutory procedure for establishing paternity varied among the states. In the light of these divergent court and statutory schemes to determine paternity, scholars and legislators suggested a uniform statutory scheme to comply with the recent Supreme Court rulings requiring equal protection for nonmarital children and to clarify the rights of the child.

Work on uniform paternity laws began in 1969,[62] and the resulting Uniform Parentage Act was approved in 1973. According to the reporter-draftsman, Professor Harry D. Krause, the Uniform Parentage Act was intended to fill the vacuum created by diverse approaches to nonmarital children among the jurisdictions:

> Its guiding principle is full equality for all children, [marital] and [nonmarital], in their legal relationship with both parents. Moreover, the Act emphasizes that the right in question is the right of the child—not the right of his mother as current state laws insist. Accordingly, the mother may not stand in her child's way. . . .[63]

To achieve this purpose, Section 9 of the UPA *requires* that a child be made a party to all paternity actions[64] and be represented by a

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and denied by providing a constitutionally acceptable means of determining paternity.

60. The Supreme Court stepped in to review issues in the areas of wrongful death legislation, inheritance, welfare assistance, custody, workers compensation, and adoption. *See supra* notes 51-58.

61. The California court in *Ruddock v. Ohls* emphatically stated that:

> the establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights. To hold a child bound prospectively by a finding of nonpaternity in [an] . . . action in which the child was not a party would be to allow the conduct of the [parent] to foreclose the most fundamental right a child possesses in our system of jurisprudence.

91 Cal. App. 3d 271, 277-78, 154 Cal. Rptr. 87, 91 (1979). *But c.f.* Michael H. v. Gerald D., 491 U.S. 110 (1989) (a California statute creating a presumption of legitimacy made assertion of biological paternity legally impossible, even in the face of blood tests indicating a 98.07 percent probability of paternity).

62. UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287, 287 (1973).

63. Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974) (section references omitted).

64. UNIF. PARENTAGE ACT § 9, 9B U.L.A. at 312 (1973). Section 9 of the UPA states:

general guardian[65] or a guardian ad litem[66] appointed by the court; under the UPA, the child's mother or father may not represent the child.[67] Eighteen states[68] have adopted the UPA.[69]

D. Minnesota Parentage Act[70] of 1980 (MPA)

In light of the recent U.S. Supreme Court decisions and the recently introduced UPA, Minnesota recognized the need to update its paternity legislation to avoid constitutional challenges. Although the legislature first considered adoption of the UPA in 1974, Minnesota's final version of the UPA was not adopted until 1980. As originally introduced in the Minnesota State Senate,[71]

> The child shall be made a party to the action. If he is a minor he shall be represented by his general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may appoint the [appropriate state agency] as guardian ad litem for the child. The natural mother, each man presumed to be the father under Section 4, and each man alleged to be the natural father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard. The court may align the parties.

Id.

65. A general guardian is the person lawfully invested with the power, and charged with the duty, of taking care of and controlling the person and estate of a minor child. BLACK'S LAW DICTIONARY 361-62 (5th ed. 1983).

66. "A guardian ad litem is a special guardian appointed by the court to prosecute or defend, in behalf of an infant . . . , a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant . . . in the litigation." BLACK'S LAW DICTIONARY 362 (5th ed. 1983).

67. UNIF. PARENTAGE ACT § 9, 9B U.L.A. at 312 (1973). *See supra* note 64. The UPA drafters not only use the words "shall be made a party," they specifically state that the mother and father may not represent the child's interest. Their explanation is contained in the Comment to Section 9:

> This Section emphasizes that the child is a party to the action. While this is a departure from the law of a number of states which have viewed the mother as the sole party in interest, this provision is considered a necessary consequence of the U.S. Supreme Court decisions establishing the child's substantive rights vis-a-vis his father. The mother or father may not represent the child in the action, since their interests may conflict with those of the child.

Id.

68. The major provisions of the UPA have been adopted in Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island (which has adopted the format and many provisions of the Uniform Paternity Act as well), Washington, and Wyoming.

69. Courts have held that the UPA and similar amendments to paternity statutes are "remedial" in nature. Lisa Wilson Caddes, *The Determination of Paternity and its Consequences for the Illegitimate Child*, 8 JUV. L. 486, 487 (1984) (citing Doe v. Roe, 67 Haw. 63, 677 P.2d 468 (1984); R.L.G. v. T.L.E., 454 N.E.2d 1268 (Ind. App. 1983)). The parentage act is to be applied retroactively and interpreted liberally. *Id.* at 487 (citing *R.L.G.*, 454 N.E.2d at 1270).

70. MINN. STAT. §§ 257.51-257.74 (1980).

71. Senate File No. 134 was introduced January 15, 1979, by Representatives

the MPA was almost identical to the Uniform Act. Yet by the time the House passed the Minnesota Parentage Act,[72] a seemingly insignificant change was made to the "Parties" section of the MPA: joinder of a child in a paternity action was deemed discretionary rather than mandatory.[73]

Before adoption of the MPA, Minnesota's paternity statutes allowed a mother to bring a complaint, but the statutes did not address whether a child had standing.[74] The state joined the mother, the complaining witness, in paternity suits brought into court.[75] Minnesota courts focused on the mother's right to child support and childbearing expenses,[76] and on the state's interest in reducing welfare costs by forcing fathers to support their children.[77] The child's interests were not individually addressed.

Although the Commissioner of Public Welfare did have a duty "to take care that the interests of the child are safeguarded [and] that appropriate steps are taken to establish his paternity,"[78]

Davies, Merriam, Siller, and J. Keefe. Parentage Act, ch. 589, 1980 Minn. Laws (codified as amended at MINN. STAT. §§ 257.51-257.74 (1990)).

72. After its first reading in the Senate, the bill was referred to the Committee on Judiciary, which referred the bill to the Subcommittee on Judicial Administration. It eventually returned to the Senate floor where the bill as amended passed 37-13 on May 3, 1979. On May 7, 1979, S.F. No. 134 was introduced in the House by Representative Berglin. The House referred the bill to its Committee on Judiciary. That committee reported on March 19, 1980. On April 10, 1980 the bill passed the House as amended 126-0. On April 11, 1980, the Senate passed the bill, as amended by the House, 57-0. Chapter 589 was signed into law as the parentage act on April 23, 1980. S. 134, 71st Leg., 2d Sess. 1980 Minn. Laws 589 (codified as amended at MINN. STAT. §§ 257.51-257.74 (1990)).

73. MINN. STAT. § 257.60 (1980). Legislative history reveals the initial introduction of the section entitled "Parties" included the Uniform Act's mandatory language: "[a] child *shall* be made a party . . . ." By the March 19, 1980, House Judiciary Committee meeting, that section of the unofficial engrossment of the bill had been amended, presumably by the author of the bill, to read "[a] child *may* be made a party . . . ." Research of existing legislative materials does not reveal the author nor the purpose of the change. S. 134, 71st Leg., 2d Sess., 1980 Minn. Laws 589 (various audio tapes and recorded minutes of Senate and House committees located at the Minnesota Historical Research Center Archives, St. Paul, Minnesota) (emphasis added).

74. MINN. STAT. §§ 257.18-257.19 (repealed 1971).

75. *Id.*

76. *See, e.g.*, State v. Sax, 231 Minn. 1, 4, 42 N.W.2d 680, 682 (1950) (mother of child has a "definite personal financial interest" in paternity support awards).

77. *Id.* at 7, 42 N.W.2d at 684. Paternity suits are necessary "for the indemnity of society against the expense of the support of the child." Reilly v. Shapiro, 196 Minn. 376, 381, 265 N.W. 284, 287 (1936). Because the state has a financial interest in adjudication of paternity, the legislature may have assumed the state would automatically protect the child's interest in the adjudication when bringing a paternity suit. MINN. STAT. § 257.60 (1990). If the only interest the child had was financial, this assumption might be adequate. However, as is discussed in notes 46 and 80, financial support is only one of the child's interests in adjudication of paternity.

78. MINN. STAT. § 257.33 (1969), subsequently amended. Prior to Minnesota

Minnesota's legislature appears to have recognized that the child's interests in financial support and legal recognition as a child of an adjudicated father are distinct from a parent's and from the state's interests.[79] The MPA presently states that neither a parent[80] nor the Commissioner of Human Services[81] can represent a child in a disputed paternity suit.

Only relatively recently have state courts come to recognize that a child's and a parent's interests are different in a paternity suit.[82] The child has an interest in establishing paternity to determine rights to support as well as a medical history, heritage, and workers' compensation or social security benefits should the parent be injured.[83] Although some mothers bring paternity suits to obtain child support or reimbursement for pregnancy costs, other mothers may not wish to continue a relationship with the putative father or may want to avoid community disapproval and the emotional distress of bringing a paternity suit.[84] A lack of parent-child privity, accompanied by a statute making joinder of the child only discretionary may leave the nonmarital child's interests un-

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Statute § 257.33, § 257.19 (since repealed) mandated that the county attorney must prosecute "to assist the mother as well as to protect the county's interest so that the child may not become a public charge." State v. Sax, 231 Minn. 1, 8, 42 N.W.2d 680, 685 (1950).

79. Some of the rights unique to a child include inheritance (MINN. STAT. § 524.2-109); medical support (MINN. STAT. § 518.171, subd. 5); causes of action (MINN. STAT. ch. 573); workers' compensation for dependents (MINN. STAT. § 176.111, subd. 1); and veteran's education benefits (MINN. STAT. §§ 197.75-197.752). The Minnesota Supreme Court in *Johnson v. Hunter* also recognizes the "psychological and emotional benefits to the child from an accurate establishment of paternity." 447 N.W.2d 871, 875 (Minn. 1989) (en banc).

80. MINN. STAT. § 257.60 (1990).

81. The original MPA allowed the commissioner to act as guardian ad litem for the child; however, the potentially conflicting interests between child and state were recognized and the statute amended striking the language allowing the commissioner to act as guardian ad litem. MINN. STAT. § 257.60, 1983 Minn. Laws at 1753.

82. The California Supreme Court summed up the interests of a child in a paternity proceeding:

> The child, to a large extent forgotten in such proceedings, has been termed the "principal plaintiff" in a paternity action. In a sense, it is the child's identity that is litigated in a proceeding to determine parentage. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. Further, the child's rights of support and inheritance against the father are at issue as well as his or her future obligation to support the father. "If the child is to have anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner."

Paula Roberts & John Ott, *The Right to Counsel in Paternity Proceedings*, 18 CLEARINGHOUSE REVIEW 1170, 1176-77 (Feb. 1985) (citing Salas v. Cortez, 593 P.2d 226 (Cal. 1979)).

83. *See supra* note 79.

84. *See supra* note 14.

protected and also encourage multiple paternity actions. A paternity suit brought without a child as a party or without the child's specific interests addressed on the merits will not be binding against the child.[85]

Passage of the MPA in 1980 specifically gave the child, as well as the mother and presumptive father, standing to sue.[86] Unlike the UPA, however, the MPA does not *require* the child be joined in every action to establish paternity.[87] Although amendments to the MPA[88] show that the legislature may have understood a child's need to be a party, the language does not reflect a complete recognition of the child's unique interests because not all nonmarital children are protected by being made parties.[89]

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85. Reynolds v. Reynolds, 454 N.W.2d 271 (Minn. App. 1990) (citing with approval Johnson v. Hunter, 447 N.W.2d at 877).

86. MINN. STAT. § 257.57 (1980).

87. Compare language of UPA § 9, 9B U.L.A. at 312 (1973) (*supra* note 64) with MPA, MINN. STAT. § 257.60 (1990) (*infra* note 89).

88. MINN. STAT. § 257.60 has been amended three times since it was adopted in 1980. It was first amended in 1983 to reflect the legislature's acknowledgement of the potentially conflicting interests of the child and the Commission of Public Welfare. In 1980 the statute read, in pertinent part:

> The court may appoint the commissioner of public welfare as guardian ad litem for the child. . . . If the child is a minor and the case involves a compromise. . .or a lump sum payment. . .the child shall be made a party and the commissioner of public welfare shall be appointed as guardian ad litem before the court approves a compromise or orders a lump sum payment.

Parentage Act, ch. 589, § 10, 1980 Minn. Laws. In 1983 the legislature amended MINN. STAT. § 257.60, excluding the language allowing appointment of the commissioner as guardian ad litem. Act approved June 9, 1983, ch. 308, § 7, 1983 Minn. Laws.

The 1984 amendment simply changed the reference to the commissioner of "public welfare" to "human services." Act approved May 2, 1984, ch. 654, art. 5, § 58, 1984 Minn. Laws.

The 1987 amendment expanded the requirement of joining the child as a party to the paternity suit by requiring the child be made a party not only whenever a compromise or lump sum payment was under consideration, but also whenever nonexistence of a minor's father-child relationship was sought, or whenever a mother denied existence of a father-child relationship being sought. Act approved June 12, 1987, ch. 403, art. 3, § 47, 1987 Minn. Laws. *See infra* note 89 (language of the most recent amendment to MINN. STAT. § 257.60).

89. The statute presently reads:

> The child may be made a party to the action. If the child is a minor and is made a party, a general guardian or a guardian ad litem shall be appointed by the court to represent the child. The child's mother or father may not represent the child as guardian or otherwise. . . . The child shall be made a party whenever:
>
> (1) the child is a minor and the case involves a compromise under section 257.64, subdivision 1, or a lump sum payment under section 257.66, subdivision 4, in which case the commissioner of human services shall also be made a party; or
>
> (2) the child is a minor and the action is to declare the nonexistence of the father and child relationship; or
>
> (3) an action to declare the existence of the father and child rela-

II. Protecting the Nonmarital Child's Interests

The *Johnson* court was faced with determining whether Tia Marie Johnson, a child unrepresented in the initial paternity action, could litigate the matter in a later action. The court examined the case in light of both Minnesota's Parentage Act and present social policy. The court recognized the policy of protecting the particular interests of the children in adjudication of paternity, but the court could not rely on the MPA as a mechanism for Johnson's interests to be heard; Johnson did not fit into one of the three categories which required joinder. The case did not involve a compromise or a lump sum payment by the alleged father, nor did her mother deny existence of the relationship being sought.[90] Instead, the *Johnson* court had to rely on other arguments to achieve its goal of protecting the child.

Johnson v. Hunter presented a potential conflict with the MPA. In 1969, Stephanie Johnson Saunders brought a paternity action against Tia Marie Johnson's alleged father, Terry Lee Hunter.[91] At that time, Johnson was only six months old. She was not named as a party to the action nor was she represented by independent counsel.[92] When Saunders, Johnson's mother, failed to appear at the hearing, the court orally dismissed the case with prejudice for lack of prosecution.[93] In 1985, sixteen years later, Saunders again raised a paternity claim alleging Terry Lee Hunter was the father.[94] Tia Marie Johnson herself was substituted as plaintiff, and the court appointed a guardian ad litem for her.[95] In 1988 Terry Lee Hunter obtained a written order acknowledging the court's earlier oral dismissal with prejudice.[96] Tia Marie Johnson's paternity action was dismissed on the basis of res judicata,[97]

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tionship is brought by a man presumed to be the father under section 257.55, or a man who alleges to be the father, and the mother of the child denies the existence of the father and child relationship.

MINN. STAT. § 257.60 (1990).

90. *See supra* note 88.

91. Johnson v. Hunter, 447 N.W.2d 871, 872 (Minn. 1989).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. The Hennepin County Court issued the order nunc pro tunc as "merely a housekeeping chore" to formalize the dismissal with prejudice orally ordered in 1969. Johnson v. Hunter, 447 N.W.2d at 873. An order nunc pro tunc is an order of a court entered after the time when it should have been done, with retroactive effect. Its purpose is "not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake." BLACK'S LAW DICTIONARY 553-54 (5th ed. 1983).

97. Johnson v. Hunter, 435 N.W.2d 821, 822 (Minn. Ct. App. 1989). A dismissal for lack of prosecution, though a nonsubstantive ground, operates as an adjudica-

and the Minnesota Court of Appeals affirmed the dismissals.[98]

The Minnesota Supreme Court reviewed the lower court's action in light of not only res judicata and privity issues, but also the state of paternity law from 1969 through the present version of the MPA.[99] The court bypassed the MPA's mandate that the child be made a party to the action only in enumerated cases.[100] *Johnson's* conclusion tracks public policy trends that recognize the "paramount interests of a child in an adjudication on the merits of paternity."[101]

The *Johnson* court held that, although the lower court correctly exercised its discretion in refusing to vacate the 1969 dismissal with prejudice, Tia Marie Johnson was not barred from bringing a paternity action.[102] Although dismissal with prejudice is a bar to subsequent suits as an adjudication on the merits,[103] res judicata will preclude a subsequent suit only between the same parties or those in privity with the parties.[104]

The court held that Tia Marie Johnson was not in privity with her mother nor with the state in the previous action since neither, by failing to prosecute, adequately represented her specific interests in the 1969 action.[105] Therefore, res judicata did not bar Johnson's paternity action against Hunter.[106] Under 1969 Minnesota law, Tia Marie Johnson had no statutory standing to bring a paternity suit; the mother or the state initiated such suits and

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tion on the merits for purposes of res judicata. Johnson v. Hunter, 447 N.W.2d at 873 (citing Lampert Lumber Co. v. Joyce, 405 N.W.2d 423, 425 (Minn. 1987) and Firoved v. General Motors Corp., 152 N.W.2d 364, 368 (1967)).

98. Johnson v. Hunter, 435 N.W.2d 821, 823-24 (Minn. App. 1989).

99. *Johnson*, 447 N.W.2d at 874.

100. *See supra* note 89.

101. *Johnson*, 447 N.W.2d at 876.

102. *Id.*

103. Under the doctrine of res judicata, final judgment on a claim bars any subsequent action on the claim. Merger and bar precludes relitigation of claims identical to those already litigated by the parties in a prior action, while collateral estoppel bars relitigation of issues actually litigated and determined in previous litigation. 4 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE 114 (1979).

104. *See supra* notes 26-27 and accompanying text. The parties agreed the claim at bar concerning the paternity of Tia Marie Johnson was identical to the claim presented in the 1969 action. *Johnson*, 447 N.W.2d at 873. The court followed longstanding precedent, noting that a dismissal with prejudice, though nonsubstantive, "operates as an adjudication on the merits." *Id.* (citing with approval Lampert Lumber Co. v. Joyce, 405 N.W.2d 423, 425 (Minn. 1987) and Firoved v. General Motors Corp., 152 N.W.2d 364, 368 (Minn. 1967)). Because the state and Ms. Saunders were parties to the 1969 action, and because they had the opportunity to litigate the claim on its merits, the Minnesota Supreme Court found the state and Ms. Saunders were barred by res judicata from litigating the paternity claim against Terry Lee Hunter. *Johnson*, 447 N.W.2d at 874.

105. *Johnson*, 447 N.W.2d at 876.

106. *Id.*

Johnson, the child, could not be a party to the suit at that time.[107]

To determine whether Tia Marie Johnson and her mother were in privity, the court considered the commonality of their interests in adjudication of paternity.[108] In Minnesota, parent-child privity is determined on a case-by-case basis.[109] Following recent public policy trends, the court distinguished the interests of the mother—child support and reimbursement for pregnancy expenses[110]—from the interests of the child—emotional, psychological, and financial benefits.[111] Based on the inherent conflict of interests, the *Johnson* court found no parent-child privity. Similarly, the court noted the state's distinct interest[112] and refused to find privity between Tia Marie Johnson and the state.[113]

III. Recognizing the Interests of the Parties to a Paternity Suit

A. *The MPA Does Not Treat All Nonmarital Children Equally*

Unlike the UPA, Minnesota's version of the Parentage Act treats nonmarital children unequally by not requiring that all children be made parties to suits adjudicating their paternity. The MPA recognizes three classes of nonmarital children that must be made parties: minor children in paternity suits involving compro-

107. *See* MINN. STAT. §§ 257.19 (1969) (repealed in 1971) and 257.33 (1969) (amended 1980 and 1981).

108. *Johnson*, 447 N.W.2d at 874.

109. "It is next to impossible to formulate a definition of 'privity' in this context that will apply to all cases." McMenomy v. Ryden, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967). *See supra* note 27 and accompanying text.

110. *See supra* note 14.

111. *See supra* note 13.

112. *See supra* note 15 and accompanying text.

113. The court, however, specifically noted the duty of the commissioner of Public Welfare "to take care that the interests of the child are safeguarded [and] that appropriate steps are taken to establish his paternity." Johnson v. Hunter, 447 N.W.2d at 875 (quoting MINN. STAT. § 257.33 as it appeared in 1969). Yet the court brushed aside this concern, stating "we doubt whether Johnson's interests were adequately represented in the 1969 action." *Johnson*, 447 N.W.2d at 875. It is important to note, however, that if the court had found that the commissioner had discharged this statutory duty, Ms. Johnson might well have been bound by the previous judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42.

The legislature in 1969 had assigned the duty of representation of the child to the commissioner of Public Welfare. MINN. STAT. § 257.33 (1969). The statute was first enacted in 1917. That language remained intact until the enactment of the MPA and the accompanying statutory amendments in 1980. The statute has been amended numerous times since, and the Commissioner of Human Services continues to have a duty to "offer appropriate social services to . . . [the] child after the birth of the child." MINN. STAT. § 257.33 (1990). The child presumably would be entitled to bring an action against the commissioner for failure to perform this duty, such as failure to pursue a paternity claim in her best interests.

mise or lump sum payments for support,[114] minor children in suits brought to declare the nonexistence of parent-child relationships,[115] and children whose mothers deny the father-child relationship.[116] Nonmarital children outside these MPA-established categories may—but under the statute need not—be made parties. Although these nonmarital children may be identical in every other respect, and have the identical interests at issue,[117] some nonmarital children receive less protection under the MPA than others. Such a result is incompatible with U.S. Supreme Court decisions that require all nonmarital children be treated equally under the law.[118]

While classification of children solely by marital/nonmarital status is unconstitutional,[119] classification of nonmarital children is not unconstitutional if it bears a substantial relationship to an important state interest.[120] State interests which meet this test include avoiding multiple wrongful death actions,[121] discouraging unfounded inheritance claims and promoting orderly disposition of property at death,[122] preserving traditional marital family units,[123]

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114. MINN. STAT. § 257.60, subd. 1 (1990).

115. MINN. STAT. § 257.60, subd. 2 (1990).

116. MINN. STAT. § 257.60, subd. 3 (1990).

117. *See supra* note 82 and accompanying text.

118. *See supra* notes 54-56 and accompanying text. Since the Court has been reluctant to rule on the fundamental rights issue, the argument for a liberty interest in the parent-child relationship between a biological parent and nonmarital child will not be continued here; it would involve first resolving the proper mode of historical analysis for fundamentals rooted in society's traditions as discussed in Michael H. and Gerald D., 491 U.S. 110 (1989).

119. *See supra* notes 54-58 and accompanying text.

120. Clark v. Jeter, 486 U.S. 456 (1988); United States v. Clark, 445 U.S. 23 (1980) (citation omitted).

121. *See* Parham v. Hughes, 441 U.S. 347 (1979).

122. The Supreme Court is reticent to consider inheritance rights of nonmarital children. Although the Court has compared the protection afforded marital children with that afforded nonmarital children to avoid unconstitutional treatment, nonmarital children as a class are accorded different treatment under state law in the area of inheritance. *See* Lalli v. Lalli, 439 U.S. 259 (1978).

Although an adjudication of paternity might affect a parent-child relationship financially, Minnesota courts noted that nonmarital children (whether their paternity was formally adjudicated or not) would inherit through state intestacy laws only if acknowledged by the putative father. *See In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970).

123. The statutory presumption of legitimacy of a child born to a married woman was the legislative expression of social policy protecting the traditional unitary family from disruption and society's aversion to illegitimacy. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989). Even in the face of blood tests indicating a high probability of paternity, and despite his relationship with the child, the putative natural father was denied the opportunity to establish paternity and denied visitation. *See also supra* note 46 and accompanying text.

Moreover, once a parent-child relationship has been established, by presumption or adjudication, courts are reluctant to sever it, not wishing to judicially dis-

and safeguarding the best interests of nonmarital children in adoption proceedings.[124] Because courts meticulously consider paternity, challenges to presumptive paternity are severely restricted; and once paternity is adjudicated, the order is not easily overturned.

The issue in *Johnson* of which interested parties may bring a paternity action is distinguishable from cases denying nonmarital children statutory rights. Johnson had been denied protections afforded other nonmarital children by the MPA. Other nonmarital children were mandatorily made parties to their paternity suits, and their interests—financial, psychological, and emotional—were considered. The Minnesota legislature did not propose an important state purpose for the classification of nonmarital children in the MPA. When an analogous state interest is lacking, the classification of children into those entitled to mandatory joiner and those who are not is unconstitutional.

The *Johnson* case demonstrates how the courts must stretch to prevent inequality when a nonmarital child does not "fit" into one of the three classes the MPA requires to be joined. *Johnson* focused on protecting the "paramount interests of a child in an adjudication on the merits of paternity."[125] However, rather than being able to use the statutory language to ease the way for nonmarital children to establish paternity, the *Johnson* court had to explain how a child not a party to previous paternity litigation could escape the bars of collateral estoppel and res judicata. The court's decision was based on policy-based arguments rather than reliance on the statute.[126]

The MPA by itself fails to protect every nonmarital child's interests when a paternity suit is initiated because many

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rupt the family or subject the child to renewed stigma of illegitimacy. *See, e.g.*, Markert v. Behm, 394 N.W.2d 239 (Minn. App. 1986).

124. Lehr v. Robertson, 463 U.S. 248 (1983) (biological proof plus an established parental relationship with the child was necessary to constitute a constitutionally protected liberty interest); Quilloin v. Walcott, 434 U.S. 246 (1978) (not unconstitutional for a statute to require only a mother's consent for adoption of her nonmarital child).

One might draw the conclusion, especially after *Michael H.*, that biology alone is enough to establish paternity when an alleged father seeks to *deny* it, but biology—even a 98.07 percent probability of parentage based on blood tests—is not enough when an alleged father seeks to establish paternity of a child, if the child has developed a familial relationship with another father-figure. *See supra* note 123.

125. Johnson v. Hunter, 447 N.W.2d 871, 876 (Minn. 1989) (en banc).

126. *But see* Reynolds v. Reynolds, 454 N.W.2d 271, 272 (Minn. App. 1990), *rev'd in part on other grounds*, 458 N.W.2d 103 (a divorce/custody suit citing *Johnson* for the proposition that a "[c]hild must be made party represented by guardian ad litem *whenever* presumptive father alleges nonpaternity) (emphasis added).

nonmarital children will not be joined as parties to the suits. Yet under *Johnson*, the court's duty and paramount consideration is protection of the child's interests.[127] As a result, the potential for future relitigation of paternity suits is a reality. Relitigation could be allowed whenever children can show their interests were inadequately represented. This possibility undermines reliance in the judicial system and economical use of judicial resources.

B. Reliance Issues in Paternity Suits

The *Johnson* court did not address the alleged father's right to rely upon the prior paternity adjudication. In 1969, Terry Lee Hunter was called into court to defend himself in this paternity action.[128] He relied on the court's 1969 adjudication, and reasonably so, since dismissal with prejudice is generally recognized to be a final adjudication on the merits.[129] All parties who could bring the action had done so.[130] The paternity adjudication was undisturbed for sixteen years. However, because the court recognized the lack of privity between mother and child, Hunter was forced to prepare his defense a second time.[131]

Multiple suits on each paternity action serve neither reliance nor judicial economy. Under present MPA legislation, multiple actions can result from any paternity proceeding in which a child is not made a party, especially in cases like *Johnson*. Such a precedent may significantly impair judicial efficiency, allowing two or three suits for every paternity action. Conceivably, because of each party's unique interests, the state could bring a paternity suit to collect welfare costs for child support, then the mother of the child could initiate a paternity suit for expenses incurred during pregnancy and childbirth, and then the child could bring suit to establish the parent-child relationship for their particular interests. In effect, without a statutory joinder requirement for all nonmarital children, the courts must police themselves, appointing a guardian ad litem to advocate for the child whenever the possibility of a judgment affecting the rights of that child is imminent.

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127. *Johnson*, 447 N.W.2d at 876.

128. *Id.* at 872.

129. *See supra* note 104.

130. *See supra* note 113 and accompanying text (including the commissioner of Public Welfare whom the legislature had charged with the duty of protecting nonmarital children's interest).

131. The MPA does limit, however, an adjudicated parent's liability for past child support to "the proportion of the expenses that the court deems just, which were incurred in the two years immediately preceding the commencement of the action." MINN. STAT. § 257.66 (1990).

C. *Amendment of the MPA is Necessary*

Johnson demonstrates that without mandatory joinder, a second suit may be necessary to ensure protection of the child's interests. The child cannot rely on the state to protect her interests. The alleged father cannot rely on the court's order. To avoid these problems, the Minnesota legislature should amend the MPA. The following amendment will promote judicial economy and reliance while protecting the rights of the child:

> MINN. STAT. § 257.60 Parties
>
> A child shall be made a party to the action establishing paternity.[132] If the child is a minor, he or she shall be represented by a general guardian or a guardian ad litem appointed by the court. Because a child has specific constitutional rights and interests distinct from those of a parent or the commissioner of human services, neither the child's parent nor the commissioner of human services may represent the child as guardian or otherwise.[133] The court shall appoint independent counsel for the child.[134] The child, biological mother, each man presumed to be the father under the parentage act, and each man alleged to be the biological father shall be given notice of the action in a manner prescribed by the court and shall be given an opportunity to be heard.[135] The public agency responsible for support enforcement is joined as a party in each case in which rights are assigned under section 256.74, subdivision 5. A person who may bring an action under the parentage act may be made a party to the action. The court may align the parties.[136]

Unlike the current MPA language, this amendment, requiring mandatory joinder of a child as a party, ensures that every child receives notice and an opportunity for a hearing on her unique interests. Future courts will not be forced to perform the *Johnson* court's "balancing act" between the interests of the child and the interests of the alleged father, a weighing of the interests attendant a parent-child relationship and right to freedom from

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132. Mandatory joinder is specifically recognized as such by the drafters of the UPA. *See supra* note 67 and accompanying text.

133. This language notes the distinct, unique interests of the parties to a paternity action, and the inability of the state or parent to represent a child because of their conflicting interests.

134. Court-appointed independent counsel is mandatory for "a party who is unable to pay timely for counsel." MINN. STAT. § 257.69 (1990). Reiterating that right in § 257.60 as proposed serves to highlight the child as a separate party with distinct and protectable rights.

135. The child is added to the list of those entitled to notice of the paternity action.

136. The last three sentences follow the remaining provisions of the Uniform and Minnesota Parentage Acts. *See supra* notes 64 and 89, respectively.

continuing litigation. The amended MPA will be a more efficient tool in establishing paternity.

Should the Minnesota legislature adopt this amendment, mandating joinder of the child as a party, the courts will have clear, unambiguous language upon which to base a decision finding a nonmarital child's right to bring her own suit alleging paternity. Future courts will not have to first address corollary issues of competing interests, privity, and res judicata.[137] Rather than hindering the court, the MPA, if amended as proposed, will more effectively promote the acknowledged interests of a nonmarital child to establish a parent-child relationship and its attendant benefits and burdens. Future courts will not need to add their gloss to the plain statutory language of an unamended MPA to prevent an unconstitutional result for different classes of children. The resulting decisions can be based not merely on *Johnson* but also on clear statutory language that is in accord with present-day policy acknowledging the specific interests children have in suits adjudicating their paternity.

Importantly, this amendment will eliminate potential equal protection problems between nonmarital children who are outside the scope of MPA's present provisions and those whose interests are now protected by mandatory joinder.[138] Minnesota has indicated no rationale for classifying nonmarital children into different categories. In fact, the traditional paternalistic approach towards protecting children's interests would suggest that more rather than fewer nonmarital children should be protected by our courts through mandatory joinder.[139]

The proposed amendment recognizes the child's varied interests in a paternity determination and brings Minnesota law into line with current United States Supreme Court decisions.

Conclusion

Although children are not given the same rights as adults, the United States Supreme Court has recognized children have certain constitutional rights. The Court has recognized that a classification based solely on whether a child is born out of wedlock constitutes discrimination. Denial of equal protection to nonmarital children under a state's laws is unconstitutional unless a state can show its classification is substantially related to an important state interest.

137. Johnson v. Hunter, 447 N.W.2d at 873-76.
138. *See supra* note 57 and accompanying text.
139. *See supra* note 124.

Children have an interest in adjudicating paternity not only because of support, custody, medical history, emotional, and psychological issues, but also to ensure protection of their property interests, such as workers' compensation benefits, wrongful death benefits, and veterans' dependent educational benefits, to which they may be entitled as children of an adjudicated father. The MPA has taken the first steps to ensure that children are afforded an opportunity for those interests to be heard by giving children standing to bring paternity suits. The MPA, however, risks denial of equal protection to nonmarital children not joined as parties to their paternity suits. Mandatory joinder, as provided by the proposed amendment, is necessary to ensure that all children's interests are adequately represented in actions adjudicating paternity—an action affecting the child's recognized interests in establishing a parent-child relationship.