

4-1-1989

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Recommended Citation

Solari, Frances Patricia (1989) "Custody of the Illegitimate Child," *North Carolina Central Law Review*: Vol. 18 : No. 1 , Article 4.
Available at: <https://archives.law.nccu.edu/ncclr/vol18/iss1/4>

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CUSTODY OF THE ILLEGITIMATE CHILD

FRANCES PATRICIA SOLARI*

I. INTRODUCTION

At common law, an illegitimate child was considered *filius nullius*, the son of no one.¹ As the law of illegitimates developed, a presumption arose in favor of the mother of an illegitimate child. If a putative father² desired custody of his illegitimate child, he had to show the mother was unfit before he could win custody of his child.

This presumption in favor of the mother was reaffirmed by the North Carolina Supreme Court as late as 1965 in *Jolly v. Queen*.³ In *Jolly*, the putative father and his wife sought custody of his illegitimate child over the child's mother and her husband. The trial court found that both couples were persons of good character and were fit and proper persons to have custody of the minor child. The trial court further found that it was in the best interests of the minor child to award custody to his father for nine months out of the year and to his mother for three months, with visitation rights to the respective noncustodial parent.⁴

In reversing the trial court's decision, the North Carolina Supreme Court stated:

It is well settled law in this State, and it seems to be universally so held, that the mother of an illegitimate child is its natural guardian, and, as such, has the legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child.⁵

The court said that the right of the mother to custody of her illegitimate child was paramount to that of the putative father. To defeat the mother's paramount right, the putative father must show that she is unfit to care for the child. Once it is shown that the mother is unfit, the child's best interest "overrides" the mother's paramount right to custody.⁶ Therefore, even though the trial court had determined that the child's interest would best be served by awarding custody to the father for nine

* J.D. summa cum laude (NCCU 1982); M.L.S. (NCCU 1989). Acting associate law librarian and assistant professor of law, NCCU.

1. See, e.g., *Dellinger v. Bollinger*, 242 N.C. 696, 699, 89 S.E.2d 592, 594 (1955).

2. As used here, "putative father" refers to the known father of an illegitimate child.

3. 264 N.C. 711, 142 S.E.2d 592.

4. *Id.* at 713, 142 S.E.2d at 594.

5. *Id.*, 142 S.E.2d at 595 (citations omitted).

6. *Id.* at 714, 142 S.E.2d at 596.

months, the mother's paramount right to custody was not defeated because the trial court also found that she was a fit and proper person to have custody.

The supreme court noted particularly that the putative father had never legitimated his son pursuant to the bastardy statutes.⁷ Therefore, the child could not inherit from his father or his father's relatives.⁸ The court also noted that the putative father's consent would not be necessary if the child's mother and her husband decided to adopt the child.⁹

Two years after the North Carolina Supreme Court decided *Jolly*, and against this common law background, the North Carolina legislature passed North Carolina General Statute section 49-15.¹⁰ That statute provides:

Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, *the rights, duties, and obligations of the mother and father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother.* When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and birth of the child.¹¹

The custody of a legitimate child is controlled by North Carolina General Statute section 50-13.29(a) (1987). The statute provides that the court shall award custody of a minor child "to such person, agency, organization or institution as will best promote the interest and welfare of the child. . . . Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child."

Reading section 49-15 *in pari materia* with section 50-13.2, it is clear that the legislature intended to abolish the common law presumption in favor of the mother of an illegitimate child. The standard in custody disputes between parents of an illegitimate child, once the child is legiti-

7. N.C. GEN. STAT. c.L 49, art. II, cited in 264 N.C. at 715, 142 S.E.2d at 595.

8. 264 N.C. at 715, 142 S.E.2d at 595.

9. *Id.*, 142 S.E.2d at 596 (citing N.C. Gen. Stat. § 48-6(a)). Under current North Carolina law, the putative father's consent is necessary for adoption of the child if paternity has been established, if the child has been legitimated in accordance with N.C. GEN. STAT. § 49-10 (1984), or if the father has provided substantial support or consistent care for the child. N.C. GEN. STAT. § 48-6(a)(3) (1984). Moreover, for the purposes of Chapter 48 of the General Statutes, which covers adoptions, the word "parent" is defined as "the biological or legal mother or father of a child." *Id.* at § 48-29(5).

10. 1967 N.C. Sess. Laws ch. 993, § 1.

11. N.C. GEN. STAT. § 49-15 (1984) (emphasis added). Section 49-14 allows a civil action to be brought to establish paternity. Section 49-10 provides the means by which a child may be legitimated. The fundamental distinction between a child whose paternity is established pursuant to § 49-15 and one who is legitimated pursuant to § 49-10 is that the legitimated child is entitled to take real and personal property from both parents through succession, inheritance, or distribution, and in the event of the child's death, his property is distributed according to the Intestate Succession Act, as if he had been born in lawful wedlock. *Id.* at § 49-11.

mated or paternity is established, should be the same as that applied in custody disputes between the parents of a legitimate child. That standard is the best interest of the child.

The legislative abolition of the common law presumption has been recognized by North Carolina courts¹² and commentators.¹³ In *Conley v. Johnson*,¹⁴ the North Carolina Court of Appeals held that the putative father of an illegitimate child was entitled to visit with his child, and that the trial court was authorized to hold the mother in contempt of court for refusing to allow the putative father's court-ordered visitation rights.¹⁵

The court specifically addressed the mother's argument that under the common law, the putative father of an illegitimate child was not entitled to visitation absent consent of the mother. The court found that, in passing section 49-15, the North Carolina legislature abrogated the common law rule and instead provided that once paternity is established, custody and visitation of an illegitimate child should be decided in the same manner as if the child were legitimate.¹⁶ The court quoted section 50-13.2(b) and stated the trial court should award custody to such person "as will in the opinion of the judge best promote the interest and welfare of the child."¹⁷

While *Conley* dealt only with visitation and not custody of the illegitimate child, the same principle should be applied in either event. Under the current statutory scheme, the court must determine what is in the best interest of the child without applying presumptions in favor of either parent. The rule that the putative father could not visit with his child absent consent of the mother was part of the common law presumption in favor of the mother. The *Conley* court rightly recognized that the legislature abrogated the presumption by enacting section 49-15.

In *Smith v. Price*,¹⁸ the mother of an illegitimate child instituted a civil action seeking a judicial determination that defendant was the father of her child and praying for custody and child support. The defendant denied paternity and countersued the plaintiff mother for fraud. The trial court found that defendant was the father of the child and granted plaintiff's motion for directed verdict on defendant's counterclaim of fraud. In addressing the correctness of the directed verdict, the court of appeals noted that section 49-15 provides, "[o]nce paternity is established, the proper custody and amount of support are determined in the same man-

12. See, e.g., *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

13. See, e.g., R. LEE, NORTH CAROLINA FAMILY LAW § 224, at 46 (1981).

14. 24 N.C. App. 122, 210 S.E.2d 88.

15. *Id.* at 124, 210 S.E.2d at 90.

16. *Id.* at 123-24, 210 S.E.2d at 89.

17. *Id.* (quoting N.C. GEN. STAT. § 50-13.2(b), now codified at § 50-13.2(a)).

18. 74 N.C. App. 413, 328 S.E.2d 811 (1985).

ner as for a legitimate child."¹⁹ The court stated, "In making this determination, the court has considerable discretion but the welfare of the child is the primary consideration."²⁰

In spite of the decisions in *Conley* and *Price*, one commentator on North Carolina domestic relations law has said, as late as 1983, that the common law presumption in favor of the mother still applies. In his book entitled *North Carolina Divorce, Alimony and Child Custody*, Lloyd Kelso has this to say: "Unlike the legitimate child, the mother's right to custody of an illegitimate child is superior to that of the father. Her permanent right to general custody will not be denied except by a showing of her unfitness as a parent or of other special circumstances."²¹

There has been at least one case decided by the North Carolina Court of Appeals since the passage of section 49-15 implying that the common law presumption is still valid in North Carolina.²² In *In re Custody of Owenby*, the putative father, William Thomas Taylor, and the mother, Dorothy Owenby, lived together for a number of years during which time three children were born. After Taylor and Owenby separated, the trial court placed temporary custody of the children with the Child Welfare Department. Shortly thereafter, Owenby married Kenneth Howell and petitioned the court for custody of her three children. The trial court found that neither Taylor nor Owenby were fit parents and that the interests of the children would best be served by allowing their custody to remain with the welfare department. Owenby appealed.²³

The court of appeals cited *Jolly v. Queen* for the proposition that "[o]rdinarily, if a suitable person, the mother of an illegitimate child is its natural guardian, and, as such, has the legal right to its custody, care and control."²⁴ The court recognized the mother's paramount right to custody, but nevertheless upheld the trial court's decision. The court stated that the children's best interests and welfare are the determining factors and that they will override the mother's right to custody if she is shown to be unfit.²⁵ Although *Owenby* was decided over a year after the passage of section 49-15, the court did not mention the statute in its opinion.

To the extent *Owenby* implies the common law presumption is still in effect in North Carolina even after the passage of section 49-15, the decision is wrong. A statutory analysis of section 49-15 mandates the conclusion that the North Carolina legislature intended to abrogate the

19. *Id.* at 422, 328 S.E.2d at 817.

20. *Id.*

21. L. KELSO, NORTH CAROLINA DIVORCE, ALIMONY AND CHILD CUSTODY § 9-2, at 96 (1983). Mr. Kelso does not elaborate on what would constitute "special circumstances."

22. *In re Custody of Owenby*, 3 N.C. App. 53, 164 S.E.2d 55 (1968).

23. *Id.* at 54, 164 S.E.2d at 55-56.

24. *Id.*, 164 S.E.2d at 56.

25. *Id.*

common law presumption. The test in all child custody cases, whether the child in question is legitimate or illegitimate, is the best interest of the child. Were the North Carolina courts to hold that the common law presumption remains in effect after the passage of section 49-15, illegitimate children would be treated differently from legitimate children on so fundamental an issue that there would be a certain violation of the illegitimate child's constitutional right to equal protection. Moreover, the putative father would have a strong argument that the presumption violates his rights to equal protection as well.

II. A STATUTORY ANALYSIS OF SECTION 49-15

The role of the judiciary in applying a statute to a given set of facts is to determine what the legislature intended by the words of the statute and then to carry out that intention. "By definition, statutory law is superior in authority to common law."²⁶ The North Carolina Constitution places the legislative power within the North Carolina General Assembly.²⁷ For any North Carolina court to attempt to judicially amend a statute would be a clear violation of this constitutional provision.²⁸ When the application of a statute is brought into question, the role of the court is to determine what the statute means and to apply it to the circumstances before the court.

In deciding the meaning of a statute, courts are guided by a number of canons of statutory construction.²⁹ Application of the relevant canons of construction to section 49-15 leads to the indisputable conclusion that, by passing the statute, the North Carolina legislature intended to abrogate the common law presumption that the mother of an illegitimate child has a paramount right to custody of her child. Instead, the legislature mandated that the courts look to the child's best interest as the sole test in determining matters of child custody, regardless of the legitimacy of the child in question.

A. *The Plain Meaning Rule*³⁰

If the language of the statute is clear, the only duty that falls to the

26. W. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 7 (1984).

27. "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." N.C. Const. art. II, § 1.

28. STATSKY, *supra* note 26, at 8.

29. The canons are not mandatory rules of construction, but are guidelines on how the courts should interpret statutes. *See id.* at 83.

30. The Plain Meaning Rule is sometimes not considered a canon of construction since it only applies when the words of a statute are clear and not open to interpretation by the courts. "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are said to aid doubtful meaning need no discussion." *Id.* at 3 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

court is to apply the clear meaning of the statute to the facts before it.³¹ The United States Supreme Court has said, "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which . . . [it] is framed, . . . and if that is plain, the sole function of the courts is to interpret it according to its terms."³² An examination of the relevant language of section 49-15 allows for only one interpretation:

Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, *the rights, duties, and obligations* of the mother and father so established, *with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother.*³³

The plain meaning of this statute is, once paternity is established, custody of illegitimate children shall be decided under the same test as that applied to cases involving legitimate children. The statute is mandatory, not discretionary, as evidenced by the language "*shall be the same.*" Such mandatory language does not leave room for interpretation.

Determinations of custody of legitimate children are controlled by section 50-13.2(a):

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.³⁴

Thus, when faced with a dispute between the mother and father of an illegitimate child, the court's *only* duty is to determine whether it is in the child's best interest to be placed with his mother or father. The court should view each party and his or her respective circumstances objectively, with no presumption in favor of either. The language of the statutes is clear and not subject to interpretation. The court must apply the

31. See *In re Estate of Stern v. Stern*, 66 N.C. App. 507, 311 S.E.2d 909 (1984). The court looked at N.C. Gen. Stat. § 29-19 to determine whether the heirs of the alleged putative father of the decedent Edward Gordon Stern had any rights to the decedent's estate. In holding that the requirements of the statute had not been met, the court stated, "It is well settled that '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.'" *Id.* at 510, 311 S.E.2d at 911 (citing 12 STRONG'S N.C. INDEX 3D Statutes § 5.5 (1978)).

32. 242 U.S. at 485, quoted in STATSKY, *supra* note 26, at 75. The Plain Meaning Rule has been codified in a few states. See, e.g., Minn. Stat. § 645.16 (1980): "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." (quoted in STATSKY, *supra* note 26, at 76).

33. (emphasis added).

34. (1987). Section 50-13.1 provides that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of the such child, as hereinafter provided." Neither section excludes or makes exception for a putative father.

statutory best interest test in custody cases involving both legitimate children and illegitimate children whose paternity has been established.

Even if it could be argued the language of section 49-15 is not all that clear and may allow for more than one interpretation, other relevant canons of construction require application of the best interest test in custody disputes between parents of an illegitimate child once paternity has been established.

B. *Legislative Intent*

If unsure of the meaning of a particular statute, the court should attempt to determine the legislative intent behind the statute, so that in applying the statute, the court will carry out that intention. One method of determining legislative intent is by application of the "mischief rule."³⁵ Under the mischief rule, the court should ask, "What mischief was the legislature attempting to correct [in passing the statute]? What was the objective of the statute?"³⁶

Looking at section 49-15, it is apparent that one mischief the North Carolina legislature intended to correct was the often harsh results of applying the common law presumption.³⁷ "The legislature has the power to pass statutes that change the common law. When it does so, it has given us what is called a statute *in derogation of the common law*."³⁸ Section 49-15 is precisely such a statute.³⁹ Once the legislature passed section 49-15 in derogation of the common law rule, North Carolina courts were no longer at liberty to apply it.⁴⁰

C. *Statutes in Pari Materia*

Section 49-15 provides that, once paternity is established, the rights, duties, and obligations of the parents of an illegitimate child "shall be the same as if the child were legitimate." The rights, duties, and obligations of the parent of a legitimate child are set out in chapter 50 of the North

35. STASKY, *supra* note 26, at 76.

36. *Id.*

37. See, e.g., *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965), discussed *supra* at pp. 1-2 (supreme court reversed trial court's grant of custody to putative father even though the trial court found as fact that it was in the child's best interest to live with his father nine months per year).

38. STASKY, *supra* note 26, at 7 (emphasis in original).

39. North Carolina courts have recognized that § 49-15 abrogated the common law presumption. See, e.g., *Conley v. Johnson*, 24 N.C. App. 122, 123-24, 210 S.E.2d 88, 89 (1974) (discussed *supra* at pp. 3-4). The abrogation of the common law with respect to matters of child custody is not without precedent. The common law rule that the father was generally entitled to custody of his legitimate children has given way to the best interest test. See *Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E.2d 417, 420 (1971).

40. See N.C. GEN. STAT. § 4-1 (1986): "All such parts of the common law . . . not abrogated, repealed, or become obsolete, are hereby declared in full force within this State." Since § 49-15 abrogated the common law presumption, that presumption is no longer in force in this state.

Carolina General Statutes. With respect to custody of a legitimate child, section 50-13.2(a) provides that the court shall award custody to the person who will best promote the welfare and interest of the child. That section further provides that there shall be no presumption in favor of either the mother or the father when it comes to determining who would better serve the best interests of the child.

Statutes in *pari materia* ("on the same subject") are to be interpreted together even though they may have been passed at different times. . . . The inclination to try to harmonize the two statutes is based on the common-sense assumption that when the legislature enacted statutes on the same topic, it most likely intended that they be consistent with each other even though the statutes contain no reference to each other.⁴¹

The two statutes, sections 49-15 and 50-13.2(a), do concern the same subject — custody of minor children. It matters not that section 49-15 covers illegitimate children, nor that it does not specifically cite section 50-13.2(a). Section 49-15 refers to the law respecting the "rights, duties, and obligations" of the parents of legitimate children. Custody of a minor is most certainly one of the primary rights, duties, and obligations of any parent. When the legislature enacted section 49-15, it surely was aware that there was a statute covering the rights, duties, and obligations of parents of legitimate children, and it was to that statute that the legislature must have referred when drafting section 49-15.

When section 49-15 was enacted in 1967, the statute then providing the rules for custody of legitimate children was former section 17-39.1⁴² That statute provided in part: "the judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child."⁴³

The North Carolina legislators made reference to section 17-39.1 in section 49-15 by referring to the rights, duties, and obligations of the parents of legitimate children. Yet no provision was made in either section to preserve the common law presumption. The only conclusion to be drawn is that the legislature intended to abrogate the common law presumption and adopt instead the best interest test set out in section 17-39.1.

On July 6, 1967, one week after the passage of section 49-15, the North Carolina General Assembly repealed section 17-39.1 and ratified sections 50-13.1 through 50-13.8.⁴⁴ The newly adopted section 50-13.2(a) pro-

41. STASKY, *supra* note 26, at 93-94.

42. Originally enacted at 1957 N.C. Sess. Laws ch. 545, repealed by 1967 N.C. Sess. Laws ch. 1153 § 1.

43. N.C. GEN. STAT. § 17-39.1.

44. 1967 N.C. Sess. Laws ch. 1153.

vided, "An order for custody of a minor child entered pursuant to this Section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child." Knowing that section 49-15 had just been passed one week earlier, the legislature had an opportunity to make exception for the common law presumption, but chose not to do so. Instead, the legislature reaffirmed the best interest test with no special provisions for illegitimate children. Again, the only conclusion to be drawn is that the legislature intended the best interest test to apply equally to legitimate and illegitimate children.

In 1977, section 50-13.2(a) was amended to add the following: "[B]etween the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child."⁴⁵ This sentence remains as a part of the current version of section 50-13.2(a). Again, the legislature made no provision to apply a different standard in custody disputes involving illegitimate children. Regardless of whether the child is legitimate or illegitimate, the standard remains what has been called "the polar star by which the court is guided"⁴⁶ — the best interest and welfare of the child.

III. A CONSTITUTIONAL ANALYSIS

Application of the common law presumption is an unconstitutional violation of the equal protection clause of the fourteenth amendment to the United States Constitution. The fourteenth amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The common law presumption raises problems with respect to the putative father's rights to equal protection and with respect to the equal protection rights of the illegitimate child.

A. *The Putative Father's Right to Equal Protection*

By keeping the common law presumption intact, North Carolina courts would be dictating disparate treatment between the father of an illegitimate child and all other parents, including fathers of legitimate children. In addition, the common law presumption draws a finer distinction between putative fathers on the one hand and unwed mothers on the other. The United States Supreme Court has addressed both these classifications, and has found constitutional violations with respect to both.⁴⁷

45. 1977 N.C. Sess Laws ch. 501 § 2.

46. See, e.g., *Green v. Green*, 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981).

47. With respect to an unconstitutional classification between the unwed father and all other parents, see *Stanley v. Illinois*, 404 U.S. 645 (1972). For an unconstitutional classification between unwed fathers and unwed mothers, see *Caban v. Mohammed*, 441 U.S. 380 (1979).

1. Classifications between the putative father and all other parents.

In *Stanley v. Illinois*,⁴⁸ the Supreme Court addressed an Illinois statutory scheme that allowed illegitimate children to be declared wards of the state upon the death of their mother, over the objection of their natural father, and without a determination that the father was unfit. Peter Stanley, the appellant, had lived with Joan Stanley for eighteen years. Although they had never married, they had three children. When Joan died, the State of Illinois took custody of the children under a state law providing that illegitimate children became wards of the state upon the death of their mother. The law presumed fitness on behalf of married fathers, whether widowed, divorced, or separated, and on behalf of all mothers.⁴⁹ Stanley appealed on the grounds that the Illinois statute violated both his due process rights and his rights to equal protection. The Court framed the issue as, 'is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?'⁵⁰ The Court concluded that,

as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.⁵¹

Under Illinois law, the state could take charge of minor children of any parent upon a showing that the children were abandoned or neglected, and then only after the parent was given notice and a hearing to determine fitness. On the other hand, the putative father was not entitled to a hearing on his fitness as a parent. Upon the death of the children's mother, the unwed father was presumed to be unfit to have custody of his children.⁵²

The Court began its due process analysis by noting the importance of familial relationships. "The rights to conceive and to raise one's children have been deemed 'essential,'"⁵³ "'basic civil rights of man,'"⁵⁴ and "'[r]ights far more precious . . . than property rights.'"⁵⁵ "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵⁶ The court concluded that Stanley's interest in the custody of his children was

48. 405 U.S. 645 (1972) (construing Ill. Rev. Stat., ch. 37, §§ 702-1 to -5).

49. *Id.* at 646-47.

50. *Id.* at 649.

51. *Id.*

52. *Id.* at 650.

53. *Id.* at 651 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

54. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

55. *Id.* (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

56. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

"cognizable and substantial."⁵⁷

Illinois defended its statutory scheme on the basis that most unwed fathers are not interested in caring or providing for their illegitimate offspring, and that therefore they may be presumed to be unfit parents. While the court did not dispute this assertion, it stated that not all unwed fathers are unfit, and that some are "wholly suited to have custody of their children."⁵⁸ The Court recognized that, since the identities of many unwed fathers were unascertainable, allowing the presumption would further the legitimate state interest of judicial efficiency. However, when the procedure forecloses determination of the precise issue at hand, the best interests of the children, it runs "roughshod over the important interests of both parent and child,"⁵⁹ and therefore cannot stand constitutional scrutiny.

After concluding that putative fathers have a due process right to a hearing on fitness before their parental rights are terminated, the Court turned to the equal protection argument. Since all parents other than putative fathers were allowed a hearing on fitness before termination of parental rights, the Court found that the statutory scheme unconstitutionally infringed on the putative father's fourteenth amendment right to equal protection.⁶⁰ The Court reversed the Supreme Court of Illinois and remanded the case for further proceedings.⁶¹

Section 49-15 does not on its face raise a due process argument since even putative fathers have a right to a hearing on custody. However, the application of the common law presumption in favor of the unwed mother is a violation of the father's fourteenth amendment rights to equal protection under the law. The North Carolina legislature has specifically provided that there is to be no presumption in favor of either parent when the custody dispute concerns a legitimate child.⁶² Any parent is entitled to custody of his or her child upon a showing that such an award will be in the child's best interest. The only person against whom the common law presumption works is the putative father. He alone is compelled to show not only that he is the best person to have custody of

57. *Id.* at 652.

58. *Id.* at 654. The court cited *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 27 (1967), where the Michigan Court of Appeals affirmed the trial court's finding that an unwed father was best suited to have custody of his illegitimate child. The Michigan court stated, "We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother" *Id.* at 146, 154 N.W.2d at 39 (quoted in 405 U.S. 654-55, n. 7).

59. 405 U.S. at 657.

60. *Id.* at 658.

61. *Id.* at 659. Chief Justice Burger, with whom Justice Blackmun concurred, dissented on the bases that the due process issue was not raised in state court, *Id.*, and that the state could legitimately discriminate between unwed fathers and unwed mothers in the interest of protecting the welfare of illegitimate children. *Id.* at 665.

62. N.C. GEN. STAT. § 50-13.2(a)

his child, but also that the mother of the child is unfit. This additional burden on the putative father is a violation of his right to equal protection.⁶³

This is not to say that unwed fathers may never be treated differently. In *Quilloin v. Walcott*,⁶⁴ the Supreme Court found no constitutional violation in a Georgia statutory scheme that allowed putative fathers to block adoption of their children only if they had legitimated their children prior to institution of the adoption proceedings. Georgia law provided that the putative father's consent to adoption was not necessary unless he had legitimated the child by marrying the mother, by acknowledging paternity, or by petitioning the court for a judicial determination of paternity.⁶⁵

In *Quilloin*, the putative father did nothing to legitimate his son until the child was eleven years old. When the child's stepfather filed an adoption petition, the putative father filed a petition to legitimate his child and to object to the adoption. The trial court afforded the putative father a hearing prior to ruling on his petition. At the hearing, the court concluded that it would not be in the best interests of the child to allow the father's petition for legitimation.⁶⁶ The trial court denied appellant's petition for legitimation and concluded that he had no standing to object to the adoption by his son's stepfather.⁶⁷

On appeal, the Supreme Court noted that the adoption by the child's stepfather did not break up an existing familial relationship, but merely gave legal recognition to a family unit already in existence. Under these circumstances, the trial court did not violate the father's due process rights by deciding his legitimation petition on the basis of the child's best interest.⁶⁸

The father also challenged the constitutionality of the adoption on the basis that his authority to block the adoption was subject to a different standard than that applied to a married father. The Court found this argument without merit as well. The Court based its decision on the fact that appellant had never shouldered any responsibility toward the child, and indeed, was not then seeking physical custody of the child. The Court held that it was constitutionally permissible for the state to distinguish the married father and the unmarried father on the basis of their

63. Robert E. Lee, a noted commentator on North Carolina domestic relations law has said that after *Stanley v. Illinois* and the enactment of section 50-13.2 (no presumption as between natural parents), "it should not be difficult for the putative father of an illegitimate child to obtain custody of the child if the court finds such will 'best promote the interest and welfare of the child.'" R. LEE, N.C. FAMILY LAW § 224, at 46 (1981).

64. 434 U.S. 246 (1978).

65. *Id.* at 249 (citing GA. CODE § s 74-101, -103, -203, & -403(3) (1975)).

66. *Id.* at 250-51.

67. *Id.*

68. *Id.* at 255.

respective commitment to the welfare of the child.⁶⁹

If North Carolina allows the common law presumption in favor of the unwed mother to stand, it is precluding the putative father from the benefit of the best interest test. In all other custody disputes, the court must base its decision regarding custody on what is in the best interest of the child. The same standard should be applied to custody disputes between the parents of illegitimate children. Otherwise, the courts would create a classification requiring differing standards based solely on the marital status of the parents. Such a state-created classification, at the very least, must be rationally related to a legitimate state interest.⁷⁰

The primary legitimate state interest in treating other parents differently than putative fathers is to further the best interest of the child.⁷¹ The common law presumption should not be allowed to prevent a court from basing its decision on the child's best interest. Burdening the putative father with an additional requirement to prove the unfitness of the mother bears no rational relationship to the legitimate state interest of providing for the child's best interest.⁷² Therefore, application of the presumption is a violation of the putative father's constitutional right to equal protection.

2. Classifications between the putative father and the unwed mother

While the classification between the putative father and all other parents is subject only to the rational basis test because of the lack of a suspect classification, this is not the case when the classification is strictly between fathers and mothers of illegitimate children. In that instance, the classification is based on gender alone. The Supreme Court has held, in order to withstand constitutional challenge, a gender based classification must serve an important governmental objective and must be sub-

69. *Id.* at 256.

70. It may be argued that more than a rational basis is required for this particular classification to withstand constitutional scrutiny. However, the distinction between unwed fathers and other parents is not a suspect classification warranting strict scrutiny by the courts. The Supreme Court has limited suspect classifications to those over which the person has no control. The father of an illegitimate child has complete control of his status, and therefore cannot claim that he has been made part of a suspect classification with respect to the distinction between unwed fathers and all other parents. Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. L. 1, 38 (1972). He may legitimate the child, see N.C. Gen. Stat. § 49-10 (1984), he may acknowledge paternity, or he may petition the court for a determination of paternity. See N.C. GEN. STAT. § 49-14 (1984 & Supp. 1988).

71. Other justifications for the common law presumption are discussed at text accompanying nn. 130-34, *infra*.

72. See *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592, discussed at text accompanying nn. 3-9, *supra*.

stantially related to the achievement of that objective.⁷³ The common law rule that gives the unwed mother paramount rights to custody over the father of her children creates a gender based classification. While this classification arguably serves the substantial state objective of providing for the best interest of its illegitimate children, the classification bears little, if any, relationship to that objective.

The United States Supreme Court addressed this very issue in *Caban v. Mohammed*.⁷⁴ Appellant Abdiel Caban and appellee Maria Mohammed lived together for a little over five years, during which time they were never married. While they were living together, appellee gave birth to two children. When the couple separated, Mohammed and the children began living with appellee Kazin Mohammed, whom she later married. Over the next two years, the children continued to reside with appellees, but appellant remained in communication with the children, and they lived with him intermittently. Appellees filed a petition to adopt the children in January, 1976. Appellant and his new wife, Nina, cross petitioned for adoption. At the hearing on the petition and cross petition, both couples were represented by counsel and were allowed to present evidence and to cross-examine witnesses.⁷⁵

The trial court granted appellees' petition for adoption, thereby terminating all of appellant's parental rights to the children. Under New York law,⁷⁶ the putative father's consent was not necessary for adoption of his child by the child's stepfather, although he was entitled to be heard in opposition to the adoption. On the other hand, the natural mother's consent was required for adoption by the putative father and his wife. Since appellee Maria Mohammed withheld her consent, appellant could not adopt his children, and he could only prevent the adoption by Maria and her husband by showing that the best interests of the child would not permit the adoption.⁷⁷

On appeal, the Supreme Court stated, "it is clear that [the New York statute] treats unmarried parents differently according to their sex."⁷⁸ The Court quoted the test from *Craig v. Boren*, that to withstand constitutional challenge, "gender based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'"⁷⁹ In response to appellees' argument that a mother

73. *Craig v. Boren*, 429 U.S. 190 (1976) (court declared unconstitutional an Oklahoma statute that prohibited the sale of beer to males under 21 and to females under 18).

74. 441 U.S. 380 (1979).

75. *Id.* at 382-83.

76. N.Y. DOM. REL. LAW § s 110-111 (McKinney 1977).

77. *Id.* at 384.

78. *Id.* at 388.

79. *Id.* (quoting *Craig v. Boren*, 429 U.S. at 197).

bears a closer relationship with her children than a father, the Court responded,

maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.⁸⁰

The Court determined that the gender-based distinction in *Caban* did not bear a substantial relation to the important state interest of providing for the well-being of illegitimate children, since it was possible that the unwed father may provide the most suitable home for his children. The rule had the effect of classifying all unwed fathers as less qualified than unwed mothers to care for their children. Because the Court reached its decision based on appellant's equal protection argument, it did not reach the due process argument.⁸¹

The common law rule that the unwed mother has paramount rights to custody unless she is shown unfit bears a striking resemblance to the statutory scheme declared unconstitutional in *Caban*. If the objective of the state in creating such a classification is to protect the welfare of its illegitimate children, the rule fails constitutional scrutiny because it is not substantially related to the objective to be served. The best interests of illegitimate children will be served by looking strictly at which parent can best provide for the children's welfare, without regard to antiquated presumptions about which parent is better suited to provide care for the children.

In *Parham v. Hughes*,⁸² the Supreme Court upheld what appears at first glance to be a gender-based distinction between an unwed mother and an unwed father. In *Parham*, the appellant was the biological father of an illegitimate child who was killed in an automobile accident along with the child's mother. The appellant had never legitimated the child pursuant to Georgia law, but had contributed to his support. The child used the same last name as appellant.⁸³

The appellant filed a wrongful death action against the appellee, the driver of the other car involved in the collision. The appellee moved for summary judgment on the grounds that appellant was not entitled to wrongful death damages for his illegitimate son. Under the Georgia statute, the mother of an illegitimate child could sue for wrongful death of

80. *Id.* at 389.

81. *Id.* at 393-94.

82. 441 U.S. 347 (1979).

83. *Id.* at 349.

the child, but the father could sue only if he had legitimated the child.⁸⁴ The trial court denied the motion for summary judgment on the grounds that the Georgia statute violated the due process and the equal protection clauses of the fourteenth amendment. The Georgia Supreme Court reversed, finding that the Georgia statute was rationally related to three legitimate state interests: "(1) the interest in avoiding difficult problems of proving paternity in wrongful death actions; (2) the interest in promoting a legitimate family unit; and (3) the interest in setting a standard of morality by not according to the father of an illegitimate child the statutory right to sue for the child's death."⁸⁵

On appeal to the United States Supreme Court, the Court first determined whether the Georgia statute was invidiously discriminatory — whether the classification was one which would be considered "suspect." The appellant relied on cases in which the Court had invalidated statutory classifications based on illegitimacy and on gender to support his argument that the Georgia statute violated the equal protection clause. The Court distinguished both lines of cases, however.

The Court first recognized that state classifications that discriminate between legitimate and illegitimate children have been held to violate the equal protection clause.⁸⁶ The justification for such classifications is often to condemn extra marital sexual relations. But, the Court noted, it is unjust to punish the illegitimate child since he is not responsible for his birth and is powerless to change his situation. The same is not true for the father of an illegitimate child. The father is responsible, along with the mother, for the birth of the child, and it is the father alone who has the power to legitimate his child. Since the father bears no immutable characteristics which classify him as the father of an illegitimate child, the cases regarding illegitimate children are inapposite.⁸⁷

Nor do the cases finding gender-based classifications unconstitutional apply to the situation in *Parham*. "Underlying these decisions is the principle that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."⁸⁸ The Georgia statute did not make overbroad generalizations based on sex. The classification excluded only unwed fathers who had failed to legitimate their children. Unwed fathers who had legitimated their children were afforded the same rights to sue for wrongful death of their

84. GA. CODE ANN. § 105-1307 (1978).

85. 441 U.S. at 350.

86. *Id.* at 352 (citing *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)).

87. 441 U.S. at 352-53.

88. *Id.* at 354.

children as were other parents.⁸⁹

Since there was no suspect classification involved in *Parham*, the Court applied the rational basis test and determined that the state had a legitimate interest in avoiding fraudulent wrongful death claims. Without some assurance that the plaintiff in a wrongful death action was indeed the parent of the deceased child, there could be multiple suits on the death of a single child, all brought by persons claiming to be the natural father. The court found that the Georgia statute allowing the unwed father to sue for wrongful death of his illegitimate child only if he had legitimated the child was a rational solution.⁹⁰

Again, in *Lehr v. Robertson*,⁹¹ the Court refused to find a violation of the unwed father's right to equal protection. In *Lehr*, the mother of an illegitimate child and her husband filed for adoption of the child when the child was two years old. The natural father of the child challenged the adoption on the basis that he was not afforded notice of the adoption proceeding or an opportunity to be heard.⁹² New York maintained a "putative father registry," which allowed a father registered to receive notice of any proceeding to adopt his child. Appellant had not entered his name in the register. Indeed, he had done none of the things that would have entitled him to notice under New York law.⁹³

The Court applied the *Craig v. Boren*⁹⁴ test and determined that the New York law was substantially related to the important state purpose of establishing procedures for the orderly adoption of illegitimate children. The Court noted that the classification was not between similarly situated parents since the mother had cared for the child since birth and the father had never established any relationship, custodial, personal, or financial, with the child.⁹⁵

The facts of *Parham* and *Lehr* are distinguishable from those out of which a claim for custody would arise under section 49-15. In the first instance, a prerequisite for seeking custody under section 49-15 is an adjudication of paternity pursuant to section 49-14. There can be no doubt, then, that the putative father seeking custody is indeed the father of the child in question. The classification set up by the common law presumption in favor of the unwed mother over the putative father is precisely a gender-based classification. There is no legitimate reason to assume that

89. *Id.* at 355-56.

90. *Id.* at 357-58.

91. 463 U.S. 248 (1983).

92. *Id.* at 250.

93. *Id.* at 251. Other actions that would have entitled appellant to notice of the adoption proceeding included obtaining an adjudication of paternity, identifying himself as the father on the child's birth certificate, living openly with the child and the child's mother, and holding himself out as the father of the child. *Id.*

94. See text accompanying n. 73, *supra*.

95. 463 U.S. at 267.

the mother will be better suited to care for a minor child than the father. The North Carolina legislature recognized this when it adopted section 50-13.2, which provides that between the father and mother of a legitimate child, there can be no presumption regarding who is better suited to have custody of the minor child.⁹⁶

One possible justification for having the presumption in favor of the mother is to punish the putative father for "flouting public morality."⁹⁷ The unwed mother, however, is just as guilty as the father in this respect. It is irrational for the state to punish one of the guilty parties by denying him a fair opportunity to provide for his child's welfare, and at the same time reward an equally guilty party by creating a presumption that she is the best suited to provide for the child. Both parents were responsible for bringing the child into this world, and they should have an equal opportunity to seek custody of the child. A presumption that arbitrarily favors the mother over the father bears no relationship to the state's objective of caring for its illegitimate children by awarding custody to the party with whom the child's best interests will be met. As such, the presumption is an unconstitutional violation of the unwed father's right to equal protection of the law.

B. *The Illegitimate Child's Right to Equal Protection*

The common law rule that the mother has paramount rights to custody of her illegitimate child over the father distinguishes illegitimate children from legitimate children. In North Carolina, when the custody of legitimate children is at issue, the trial court is bound by section 50-13.2(a) to determine what is in the children's best interest and to award custody on that basis alone. On the other hand, when the child in question is illegitimate, the common law presumption precludes a determination of what is in the best interest of the child unless the mother is shown to be unfit.⁹⁸

The United States Supreme Court has found state classifications that distinguish between legitimate and illegitimate children to be unconstitutional violations of the illegitimate child's right to equal protection. In *Levy v. Louisiana*,⁹⁹ the Court considered a Louisiana statutory scheme that allowed legitimate children to sue for wrongful death of their mother, but denied the same cause of action to illegitimate children. The Court held that this statutory scheme was unconstitutional as violative of the fourteenth amendment right to equal protection.

96. See text accompanying n. 45, *supra*.

97. Marcus, *supra* note 70, at 27.

98. An illustration of this is found in *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 314. See text accompanying nn. 3-9, *supra*.

99. 391 U.S. 68 (1968).

The Court said that a state may not make a classification which "constitutes an invidious discrimination against a particular class,"¹⁰⁰ and applied a rational basis test to determine the constitutionality of the Louisiana law.¹⁰¹ Finding no rational basis for the Louisiana statutory scheme, the Court concluded that it was invidious to discriminate against illegitimate children in this circumstance.

Three years later in *Labine v. Vincent*, the Court examined a Louisiana law that allowed collateral relatives of an intestate unwed father to inherit his estate to the exclusion of his illegitimate daughter.¹⁰² The deceased had acknowledged paternity of his daughter, but had never legitimated her.

The *Labine* Court distinguished *Levy v. Louisiana* on the basis that the children in *Levy* were totally precluded from recovering for the wrongful death of the mother, while the child in *Labine* could have inherited from her father's estate if he followed any one of three procedures. By leaving a will, the father could have bequeathed his daughter up to one-third of his estate;¹⁰³ he could have legitimated her so that she would be entitled to inherit on the same grounds as a legitimate child; or he could have written on his acknowledgment of paternity that he desired to legitimate her.¹⁰⁴

The Court gave great deference to a state's legislative power to create rules of intestate succession,¹⁰⁵ and noted that there were other classifications of heirs that were discriminated against. Under the Louisiana scheme, descendants take to the exclusion of ascendants, and ascendants to the exclusion of collateral relations.¹⁰⁶ On this basis, the Court, in a five to four decision, held that the Louisiana statutes did not violate the equal protection rights of illegitimate children.

Even in light of *Labine*, the common law presumption in favor of the unwed mother does not pass constitutional scrutiny. The State of North Carolina has provided that the best interest of the child shall control custody disputes involving a legitimate child.¹⁰⁷ The common law presumption provides that the mother of an illegitimate child has para-

100. *Id.* at 71.

101. *Id.*

102. 401 U.S. 532 (1971). LA. CIV. CODE ANN. art 206 provided: "Illegitimate children, though duly acknowledged, can not claim the rights of legitimate children . . ." Art. 919 provided: "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State." quoted in 401 U.S. at 534.

103. Louisiana law limited an illegitimate child to one-third of his father's estate, even when the father died testate. 401 U.S. at 539.

104. *Id.*

105. *Id.* at 536-37.

106. *Id.* at 537.

107. N.C. GEN. STAT. § 50-13.2 (1987).

mount rights to custody of her child over the father, even if the best interest of the child would be met by placing custody with the father. The only way an unwed father can gain custody of his child under the common law rule is to show that the mother is unfit. Nothing the father or the child can do will erase the presumption, and it therefore acts as a bar to the child's best interest.

Between 1972 and 1973, the Supreme Court declared three different state statutes unconstitutional as violative of the equal protection rights of illegitimate children.¹⁰⁸ In *Weber v. Aetna Casualty & Surety Co.*,¹⁰⁹ the Court struck down a Louisiana worker's compensation statute.¹¹⁰ The statute allowed legitimate and acknowledged illegitimate children to recover for the wrongful death of their father but relegated unacknowledged children to a lesser status and allowed them to recover only if the benefits were not exhausted by awards to other children.

The Court stated that the test of whether a statute violates the equal protection clause is whether the statutory classification, at a minimum, bears some rational relationship to a legitimate state purpose.¹¹¹ But the Court further stated that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."¹¹² The Court looked closely at Louisiana's stated purpose behind the statute. That purpose was to protect "legitimate family relationships."¹¹³ The court recognized that this was a legitimate state interest. However, in a much quoted passage, the Court concluded that the statutory scheme bore no significant relationship to the recognized purposes behind the worker's compensation statutes:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. 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. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where — as in this case — the classification is justified by no legitimate state interest, compelling or

108. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

109. 406 U.S. 164.

110. LA. REV. STAT. § 23:1021(3).

111. 406 U.S. at 172.

112. *Id.*

113. *Id.* at 173 (quoting 257 La. 424, 433, 242 So. 2d 567, 570).

otherwise.¹¹⁴

In *Gomez v. Perez*,¹¹⁵ the Court examined a Texas law that allowed legitimate children the right to paternal support but denied the same right to illegitimate children. The Court held the law was an unconstitutional violation of the illegitimate children's rights to equal protection. The Court stated that once the state had created a judicially enforceable right in favor of legitimate children to paternal support, it could not deny that right to illegitimate children solely because their father had not married their mother. "For a State to do so is 'illogical and unjust.'"¹¹⁶

In *New Jersey Welfare Rights Organization v. Cahill*,¹¹⁷ the Court struck down as an unconstitutional violation of the equal protection clause a New Jersey welfare law that provided assistance only to married couples with legitimate children. The Court noted that the law provided assistance to legitimate children but operated almost invariably to deny assistance to illegitimate children.¹¹⁸

In 1977, the Court decided *Trimble v. Gordon*,¹¹⁹ a case challenging the constitutionality of the Illinois intestate law that allowed illegitimate children to inherit from their mothers, but not their fathers, while allowing legitimate children to inherit from both parents. The only method by which an illegitimate child could be legitimated was by intermarriage of his parents.¹²⁰

In holding that the intestate scheme was an unconstitutional violation of equal protection, the court quoted the test set out in *Weber*, "[T]his court requires at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose."¹²¹ The Court recognized that illegitimacy is "analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations."¹²² While the Court conceded that it would not apply a strict scrutiny test to classifications based on illegitimacy, it stated that the scrutiny "was not a toothless one,"¹²³ thus indicating that the test was an intermediate one between the rational basis test and the strict scrutiny test.

In *Lalli v. Lalli*,¹²⁴ the Court upheld the constitutionality of a New

114. *Id.* at 175-76, quoted in *Pickett v. Brown*, 462 U.S. 1, 7-8 (1982); *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977); 411 U.S. at 620.

115. 409 U.S. 535.

116. *Id.* at 538 (quoting *Weber*, 406 U.S. at 175).

117. 411 U.S. 619 (1973).

118. *Id.* at 619-20.

119. 430 U.S. 762.

120. *Id.* at 764-65.

121. *Id.* at 766 (quoting 406 U.S. at 172).

122. *Id.* at 767.

123. *Id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

124. 439 U.S. 259 (1978).

York intestate statute that allowed illegitimate children to inherit from their father only if there had been a finding of paternity during the putative father's lifetime.¹²⁵ The Court referred to *Trimble v. Gordon*, and stated that the test to be applied to classifications based on illegitimacy is whether the classification is substantially related to a permissible state interest.¹²⁶ The Court concluded that the state had a substantial interest in providing for intestate succession and in avoiding fraudulent claims by alleged children of the deceased.¹²⁷ The Court further concluded that the New York requirement that paternity be proved during the life of the putative father was "substantially related to the important state interests the statute was intended to promote."¹²⁸

Thus, under *Lalli v. Lalli*, to determine the constitutionality of the common law rule that the mother has a paramount right to custody of her illegitimate child over the child's father, the question is whether the common law rule is substantially related to an important state interest.¹²⁹ As a first step, one must determine what interest the state is attempting to advance by continuing to apply the common law rule.

One state interest may be to encourage family relationships and discourage sexual relations outside the marriage. Another state interest may be to punish putative fathers for engaging in illicit relationships that end in the birth of an illegitimate child. A third, and the most legitimate, interest is to advance the welfare of illegitimate children. While each of these justifications may be considered legitimate state interests, the common law presumption bears no relation, substantial or otherwise, to those interests.

There is no foundation for the belief that giving the mother of an illegitimate child the paramount right to custody of the child will discourage sexual relations outside marriage.¹³⁰ Indeed, the common law presumption may encourage single women who are approaching the end of their child bearing years to conceive an illegitimate child, knowing the father

125. *Id.* at 262.

126. *Id.* at 265.

127. *Id.* at 271.

128. *Id.* at 275-76.

129. The North Carolina Court of Appeals has recognized this test: "The United State Supreme Court has made it clear that when considering statutes based on illegitimacy, courts are to apply an intermediate level of review which requires that the statute be substantially related to permissible state interests." In re Estate of Stern v. Stern, 66 N.C. App., 507, 511, 311 S.E.2d 909, 911 (1984). Subsequent decisions of the United States Supreme Court have also reaffirmed the test set out in *Lalli*. See, e.g., *Reed v. Campbell*, 476 U.S. 852, 855 (1986) (Texas statute of limitations relating to paternity and support actions for illegitimate children held unconstitutional as violative of equal protection clause); *Pickett v. Brown*, 462 U.S. 1, 8 (1982) (statute interpreted so as not to reach constitutional question); *United States v. Clark*, 445 U.S. 23, 27 (1980) (provision of Civil Service Retirement Act held unconstitutional violation of illegitimate children's right to equal protection).

130. See Marcus, *supra* note 70, at 45-46.

could not gain custody of the child without proving she is an unfit mother.

The possible state interest in punishing the father for his illicit acts fails for two reasons. It was not just the father who produced the illegitimate child. Since both the mother and the father are equally responsible for the conception of the child, if one should be punished, so should the other.¹³¹ Moreover, application of the common law rule acts to the detriment of the illegitimate child since a trial court, under the common law rule, may not determine who should have custody based solely on the best interest of the child.¹³² The common law rule in effect punishes the illegitimate child for his parents' illicit sexual relations, and the Supreme Court has said that it is illogical and unjust to punish the innocent child for the actions of his parents.¹³³

The final possible state interest in keeping the common law presumption is to protect the welfare of illegitimate children, but application of the common law presumption to meet this interest is also illogical. If the trial court is bound to award custody in accordance with the common law presumption regardless of whether the child's best interest will be served by placing custody with the mother,¹³⁴ the state's interest will not be met.

In light of the Supreme Court cases dealing with classifications based on legitimacy, the common law presumption must be declared unconstitutional. North Carolina has seen fit to award custody of legitimate children solely on the basis of what is in their best interests. The equal protection clause of the fourteenth amendment mandates that illegitimate children be afforded the same protection.

IV. CONCLUSION

The North Carolina legislature intended to abrogate the common law presumption in favor of the unwed mother when it passed section 49-15 providing that custody of illegitimate children shall be decided in the same manner as custody of legitimate children. Sections 49-15, and 50-13.2, when read *in pari materia*, require the trial court to award custody solely on the basis of what is in the child's best interest, without applying any presumptions in favor of either parent.

However, even those hardened skeptics who would argue that the common law presumption is still in effect in North Carolina must concede that under a constitutional analysis, the presumption fails as viola-

131. See text accompanying n. 97, *supra*.

132. See *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965), discussed at text accompanying nn. 3-9, *supra*.

133. See *Weber*, 406 U.S. at 175.

134. See *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

tive of the equal protection clause. The presumption is an unconstitutional violation of the father's right to equal protection, both when the classification is made between putative fathers and all other parents, and when the classification is made between putative fathers and unwed mothers. Moreover, the presumption operates to infringe upon the equal protection rights of illegitimate children by allowing their best interests to be subordinated to an antiquated rule that bears no relation to a legitimate state interest while providing that custody of legitimate children shall be based on their best interests.

The North Carolina courts are encouraged to set the record straight on this issue at the earliest opportunity by holding that the custody of illegitimate children shall be based solely on what is in their best interests. The illegitimate children of this state deserve nothing less.