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## The Established Standard for Fathers Who Have Acknowledged Paternity and Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)

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## CASENOTES

### **THE ESTABLISHED STANDARD FOR FATHERS WHO HAVE ACKNOWLEDGED PATERNITY AND ARE SEEKING CUSTODY OF THEIR ILLEGITIMATE CHILD(REN): ROSERO v. BLAKE, 357 N.C. 193 (2003).**

BARTINA L. EDWARDS\*

#### INTRODUCTION

This casenote examines the holding in *Rosero v. Blake*<sup>1</sup>, and its potential effects, when the North Carolina Supreme Court refused to apply the common-law presumption applied in *Jolly v. Queen*.<sup>2</sup> In *Rosero*, the Supreme Court clarified the standard applicable when a father seeks custody of his illegitimate children after acknowledging paternity under section 110-132(a)<sup>3</sup> of the North Carolina General Statutes, instead of legitimating the children under Chapter 49 of the North Carolina General Statutes.<sup>4</sup> The Supreme Court held that the appropriate standard to be applied is the “best interest of the child” standard.<sup>5</sup> This “best interest of the child” standard directs the courts to award custody based on what will promote the best interest and welfare of the child.

The standard that was applied prior to the Supreme Court’s ruling in *Rosero* was expressed in *Jolly v. Queen*.<sup>6</sup> In *Jolly*, decided in 1965, the father of an illegitimate child did not have equal standing with the mother.<sup>7</sup> The standard applied in *Jolly* was the common-law presumption that a mother’s right to custody of an illegitimate child is superior to that of the father.<sup>8</sup> It was said that the mother’s right to general custody would not be denied except by a showing of her unfitness as a

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1. *Rosero v. Blake*, 581 S.E.2d 41 (N.C. 2003).

2. *Jolly v. Queen*, 142 S.E.2d 592 (N.C. 1965)(recognizing the common-law presumption where the mother’s right to custody of an illegitimate child is superior to that of the father).

3. N.C. GEN. STAT. § 110-132(a) (2001).

4. N.C. GEN. STAT. §§ 49-1, to -15 (2001).

5. *Rosero*, 581 S.E.2d at 50.

6. *Jolly*, 142 S.E.2d at 596.

7. *Id.*

8. *Id.*

parent or of other special circumstances.<sup>9</sup> Furthermore, it was established in *Jolly* that a father had rights to custody only if he had legitimated the child before a hearing on custody took place.<sup>10</sup>

However, *Conley v. Johnson*<sup>11</sup> established that where an acknowledgment of paternity was executed in writing, or where paternity was established judicially, the rights, duties, and obligations of the mother and father, with regard to the support and custody of the child, were the same; and these rights, duties and obligations could be determined and enforced in the same manner as if the child were the legitimate child of the father and mother. "When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child. Based on this provision, the court will apply the 'best interest of the child' standard by the preponderance of the evidence where paternity has been established."<sup>12</sup>

In *Conley*, the court declared that the natural father of a child born out of wedlock was entitled to seek visitation with the child.<sup>13</sup> The court reasoned this was the case under statutory law and case law. As it relates to statutory law, the court referred to N.C. Gen. Stat. section 50-13.1<sup>14</sup> that permits "any parent" to commence an action for custody of a child. The court found that this statute applied to both legitimate and illegitimate children, and the principle of the statute applied to visitation and custody. As a result, there was some confusion around the application of the statute, as it related to illegitimate children; and a father's custody rights were unclear until the Supreme Court's ruling in *Rosero*.<sup>15</sup>

While *Rosero* clarified the standard to be applied in a custody case where an acknowledged father seeks custody of his illegitimate child, the Supreme Court's ruling raised another issue among those in the legal community. One important issue is whether the distinction between acknowledging paternity and legitimation is necessary when determining an acknowledged father's parental rights. An acknowledged father is one who has formally acknowledged paternity by filing an Affidavit of Parentage with the appropriate court. This issue shall be addressed in greater detail in the discussion section of this casenote.

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9. *Id.*

10. *Id.*

11. *Conley v. Johnson*, 210 S.E.2d 88 (N.C. Ct. App. 1974).

12. N.C. GEN. STAT. §§ 49-15, 50-13.2(b) (2001). *See also* *Conley v. Johnson*, 210 S.E.2d 88 (N.C. Ct. App. 1974).

13. *Conley*, 210 S.E.2d at 90.

14. N.C. GEN. STAT. § 50-13.1 (2001). *See also* *Dellinger v. Bollinger*, 89 S.E.2d 592 (N.C. 1955).

15. *Rosero*, 581 S.E.2d at 43-45.

## THE CASE

The history of the *Rosero* case is as follows: the North Carolina Court of Appeals reversed and remanded an order granting permanent legal custody to the father, entered on January 2, 2001, *nunc pro tunc*, December 12, 2000, by Judge Anne Salisbury in District Court, Wake County. As a result, the plaintiff father, Daniel Fabricio Rosero, appealed from the decision of a divided panel of the Court of Appeals.<sup>16</sup> On August 15, 2002, the Supreme Court allowed the father's petition for discretionary review, and the case was heard in the Supreme Court on March 10, 2003.

Plaintiff father, Daniel Fabricio Rosero (hereinafter "Daniel"), and Defendant mother, Lisa Blake (hereinafter "Lisa"), are the biological parents of Kayla Alexandria Rosero (hereinafter "Kayla"). Kayla was born on March 20, 1996. Kayla's biological parents had a brief relationship in 1995 when the plaintiff lived in North Carolina. In December of 1995, Daniel moved to Oklahoma. After Kayla was born, Daniel agreed to submit to a paternity test that confirmed he was Kayla's biological father. In addition, on March 3, 1997, Daniel acknowledged paternity by signing a "Father's Acknowledgment of Paternity" form that was prepared in accordance with the North Carolina General Statute section 110-132(a).<sup>17</sup> Daniel and Lisa agreed that Kayla would remain in Lisa's care and Daniel would pay child support. On several occasions, Kayla traveled to Oklahoma to visit her father, and she stayed with him. Daniel also maintained regular contact with Kayla by visiting North Carolina, by calling on the telephone and by writing letters.

At the time this case was presented, Lisa had two minor sons, and their father had begun to develop a relationship with Kayla. Lisa's grandmother and mother were instrumental in caring for all three children.

While in Oklahoma, Daniel, Kayla's biological father, filed for custody. Lisa responded with a counterclaim for custody based on a best interest standard. Prior to the custody hearing, Daniel and his wife moved to North Carolina where the trial court heard from both parties. The trial court determined both parents were fit and awarded primary custody to Daniel, the father. The court awarded secondary custody to the mother, Lisa.

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16. *Rosero v. Blake*, 563 S.E.2d 248 (N.C. Ct. App. 2002).

17. Section 110-132(a) (provides for an Affidavit of Parentage in lieu of or in conclusion of any legal proceeding instituted to establish paternity, and once executed, it shall constitute an admission of paternity having the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation).

In addition to some jurisdictional issues raised by Lisa, she appealed the trial court's order. Lisa argued that the trial court applied an improper standard in determining who was entitled to custody of Kayla. Lisa based her argument on the standard applied in *Jolly*<sup>18</sup>. She asserted the common-law presumption and contended that the trial court had to find her to be unfit or otherwise unable to care for Kayla before it could apply the "best interest of the child" standard. Furthermore, quoting from *Jolly*, she argued "the mother of an illegitimate child is presumed to have a superior right to custody of her child as against all others, including the child's putative father."<sup>19</sup> Although others may offer more material advantages in life for the child; where the father has not legitimated, the father may defend only on the grounds that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child.<sup>20</sup> Daniel, the father, argued that the trial court applied the proper standard. After much discussion about the legitimation statutes as compared to N.C. Gen. Stat. section 110-132(a), the Court of Appeals held that in applying the canon of construction, "expression unius est exclusion alterius", the expression of one thing is the exclusion of another, the general assembly, by specifying certain procedures to confer parental status upon the putative father of an illegitimate child, necessarily excluded other procedures. For this reason, the court determined the father's execution of documents pursuant to the child support provisions of section 110-132(a) did not erase the common-law presumption in favor of Lisa, the mother. Thus, the Court of Appeals held that the trial court should have applied the common-law presumption as the proper standard, and the case was reversed and remanded.

Judge Walker dissented from the portion of the majority's opinion that held the trial court applied an improper standard in determining who should have custody of Kayla. Judge Walker stated, "in my opinion, the cumulative impact of the decisions handed down by the U.S. Supreme Court and our own Supreme Court, along with laws enacted by our legislature since *Jolly*, has been the abrogation of the common-law presumption that as between the mother and father of an illegitimate child, the mother is presumed to have superior right to custody."<sup>21</sup> Judge Walker went on to say, "furthermore this Court, in *Conley v. Johnson*, specifically recognized the abrogation of the common-law principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother. The fact that

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18. *Jolly*, 142 S.E.2d at 592.

19. *Id.* at 596.

20. *Id.*

21. *Rosero*, 563 S.E.2d at 255-56, 258.

plaintiff has failed to file the documents necessary to 'legitimate' Kayla should only be one factor to consider in whether he has assumed the responsibilities of parenthood. To establish a prerequisite for the enjoyment of constitutional protections simply raises form over substance and relegates plaintiff father to the status of a third party despite the absence of any dispute concerning his paternity of Kayla."<sup>22</sup>

Judge Walker agreed with the trial court that the proper standard to apply in this case was the "best interest of the child" standard because the common-law presumption in favor of the mother had been abrogated by statute. In addition, Judge Walker concluded that the case should be remanded for more detailed findings, as the trial court's findings were not supported by competent evidence.

The questions presented for review by the Supreme Court were: 1) whether the North Carolina common-law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law, and 2) whether the presumption violated the federal and state Constitutions.<sup>23</sup> The common-law presumption in favor of the mother of an illegitimate child stems in part from an issue peculiar to the illegitimate child's situation – uncertainty as to the identity of the father of the child. When a child is born to a married woman, her husband is legally presumed to be the child's father.<sup>24</sup> Whereas, a putative father is the alleged or reputed father of a child born out of wedlock.<sup>25</sup> Thus, in the latter situation, the identity of the father of a child born out of wedlock is presumed to be uncertain or unknown.

In reviewing the Court of Appeals' decision, the Supreme Court referenced that under early North Carolina common-law, an illegitimate child was "*nullius filius*", a child of no one. The law recognized no one as the child's father. There was not a distinction between a reputed father and an admitted father.<sup>26</sup> The mother's paramount right to custody was based upon the frequent doubt as to the identity of the child's father, and the fact that the mother, nearest in interest and affection, would best promote the child's welfare. In examining the application of common-law, the court cited to the N.C. Gen. Stat. section 4-1(2001), which promulgates that common-law shall apply when that "which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete,[is] hereby declared

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22. *Id.* at 256.

23. *Rosero*, 581 S.E.2d at 41.

24. N.C. GEN. STAT. § 49-12.1 (2001).

25. BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

26. *Rosero*, 581 S.E.2d at 43 (quoting *Allen v. Hunnicutt*, 52 S.E.2d 18,19 (N.C. 1949)).

to be in full force within this [s]tate.”<sup>27</sup> Thus, unless the common-law presumption recognizing a preference for maternal custody of an illegitimate child had been abrogated, a putative father was on unequal footing with the mother, unless the father had legitimated the child pursuant to statute or through legitimacy proceedings as provided for in Chapter 49.<sup>28</sup>

In 1955, the North Carolina Supreme Court held that a putative father was a “parent” as defined by North Carolina’s general custody statutes in effect at that time.<sup>29</sup> Yet, while a putative father could maintain an action for custody under N.C. Gen. Stat. section 50-13, the court confirmed as late as 1965 that to be awarded custody, the putative father had to still overcome the common-law presumption for awarding custody in favor of the mother. In other words, the father remained on unequal footing with the mother, and the mother’s paramount right to custody would yield only to a finding that she was an unfit custodian of bad character or other, special circumstances. The *Rosero* Court clearly set out the landscape for the law governing child custody, the rights of putative fathers, and the rights of illegitimate children. However, these laws changed drastically after *Jolly*.

In 1967, the general assembly repealed all prior statutes governing custody of minor children and enacted N.C. Gen. Stat. sections 50-13.1 to -13.8, a statutory scheme under which all child custody actions may be brought. Section 50-13.1 states that “any parent claiming the right to custody of a minor child may institute an action for the custody of such child.”<sup>30</sup> The court in *Conley* determined there was nothing in this section that limited custody proceedings to the parent of a legitimate child.

Against this historical background, The *Rosero* Court continued to explain that when enacted, N.C. Gen. Stat. section 50-13.2(b) directed the trial courts to award custody based upon what “will best promote the interest and welfare of the child. Between the mother and the father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.”<sup>31</sup> During the same year, the general assembly adopted N.C. Gen. Stat. sections 49-14, -15, and -16, abrogating common law.<sup>32</sup> As a result, an illegitimate child’s father was allowed to bring a judicial action establishing

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27. N.C. GEN. STAT. § 4-1 (2001) (last amended in 1778).

28. N.C. GEN. STAT. §§ 49-1, to -15 (2001).

29. N.C. GEN. STAT. § 50-13 (1950)(repealed 1967); *See also* N.C. GEN. STAT. § 50-13.1 (2001).

30. § 50-13.1 (2001).

31. *Rosero*, 581 S.E.2d at 45 (citing to N.C. Gen. Stat. § 50-13.2(a),(b)).

32. *Conley*, 210 S.E.2d 89, 90 (quoting 3 R. Lee, North Carolina Family Law § 251 (Supp. 1974)).

paternity. In addition, section 49-15, which sets out the support and custody rights and obligations for both parents, has not been amended since its enactment in 1967. Moreover, in *Dellinger*,<sup>33</sup> the court held that common-law had been abrogated by case law and statutory law. It appears that the definition of “parent” in *Dellinger* included both legitimate and illegitimate parents. Here, the Court of Appeals concluded that the illegitimate child’s father was entitled to all rights, duties, and obligations as was a parent under North Carolina Statutes governing custody disputes.<sup>34</sup>

In addition to the legislative changes acknowledged by the Court of Appeals in *Conley*, the North Carolina General Assembly

has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship between father and child. These provisions operate even where the father acknowledges paternity but fails to have his child judicially legitimated or fails to seek judicial determination of paternity.”<sup>35</sup>

The word “acknowledgment”, as used in cases and statutes that provide for establishing paternity by the father, typically means disclosing facts of paternity in writing and/or verbally to relatives, friends, acquaintances and others, holding the child out as his own<sup>36</sup>. In North Carolina, a father may establish paternity, formally, in accordance with section 110-132(a), which includes the filing of the “Father’s Acknowledgment of Paternity”, or the father may establish paternity in accordance with section 49-14, which establishes a procedure to establish paternity and legitimate. The father in *Rosero* availed himself of the former method, filing an Acknowledgment of Paternity. In contrast to *Jolly*, the Supreme Court found the following statutes relevant because they allow certain rights when the putative father has established paternity by “acknowledgement:”

- 1) N.C. Gen. Stat. section 7B-1111(a)(5)(2001) – provides that parental rights of an illegitimate child’s biological father cannot be terminated where the father has established or acknowledged paternity based upon any one of the four enumerated methods;
- 2) N.C. Gen. Stat. section 29-19 (b)(2), (c) (2001) – since *Jolly*, there was a change in this statute which governs intestate succession where the child is illegitimate; this section was amended in 1973 and confers the same rights for illegitimate children as legitimate children. Once there is proper adjudication or acknowledgment of paternity, illegitimate children today are entitled to inherit from

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33. *Dellinger v. Bollinger*, 89 S.E.2d 592 (N.C. 1955).

34. *Id.*

35. *Rosero*, 581 S.E.2d at 46.

36. Tracy Cashman, *When is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959 (1977).



their fathers and his relatives, and their fathers are entitled to inherit from them, even though they have not been legitimated;

- 3) N.C. Gen. Stat. section 48-3-601(2)(b) (2001) – provides that consent of illegitimate children's fathers who acknowledge paternity is now required for their adoption.

Thus, the provisions of N.C. Gen. Stat. section 110-132(a) merely provide another method for the formal acknowledgment of paternity. This statute sets forth that

in lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child shall have the same force and effect as a judgment.<sup>37</sup>

The Court held that given the changes in North Carolina's laws that govern familial relationships, the Court of Appeals improperly relied on *Jolly*. In *Jolly*, the relationship of the father to his illegitimate child was governed by the strict common-law doctrine of *nullius filius*, which dictated the presumption that custody of the illegitimate child vested in the mother. In addition, the Supreme Court disagreed with the Court of Appeals' majority that indicated the numerous changes to the law discussed above were a patchwork of abrogations to the common-law and therefore the common-law presumption was still the law in North Carolina. The majority in the Court of Appeals reasoned that the differences between sections 110-132(a) and 49-14 support its conclusion that the presumption still exists.

However, the Supreme Court found the differences and the divergent purposes underlying the article in which the N.C. Gen. Stat. section 110-132(a) is contained, to provide child support and N.C. Gen. Stat. section 49-14 to determine paternity, irrelevant.<sup>38</sup> The legislative intent of the "comprehensive" statutes addressing the child welfare should be the paramount consideration. "The court further noted that it construes multiple statutes governing a single subject in *pari materia* to effectuate legislative intent and to harmonize them into one law on the subject."<sup>39</sup> As espoused by the Supreme Court, the effects of acknowledging paternity, a judicial determination of paternity, and legitimation proceedings are similar. The legitimate child is able to inherit by and through the father, the father is able to inherit from his child, and the father's consent is needed for adoption.

The Supreme Court also noted that the Court of Appeals' majority found support for its conclusion in the distinction between the high

37. N.C. GEN. STAT. § 110-132(a).

38. *Rosero*, 581 S.E.2d at 48.

39. *Id.* (quoting *Brown v. Flowe*, 507 S.E.2d 894,896 (N.C. 1998)).

standard for establishing paternity judicially under section 49-14, by clear and convincing evidence, compared to the complete lack of standard for acknowledging paternity in section 110-132(a). Moreover, the acknowledgment could be rescinded, while the judicial determination of paternity was absolute. According to the Court of Appeals, these distinctions indicated that a father acknowledging paternity under section 110-132(a) was not on equal footing with the father who had received a judicial determination of paternity. The Court of Appeals reasoned the maternal-preference presumption still applied to the detriment of the father who acknowledged paternity under N.C. Gen. Stat. section 110-132(a).

However, the Supreme Court disagreed with the Court of Appeals. The Supreme Court quoted section 110-132(a) that sets forth, "in lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn by the mother of the dependent child shall have the same force and effect as a judgment."<sup>40</sup> Moreover, the Supreme Court disagreed with the Court of Appeals by espousing that although section 110-132(a) does not provide for a modicum of proof of paternity, it does require, in the current version, and the version in effect for the case, that the child's mother affirm that the acknowledging father is in fact the natural father. Such a requirement prevents a man from "simply declaring his paternity of a child unilaterally and easily filing for a court order approving his acknowledgment and agreement to support."<sup>41</sup> Furthermore, the Court advocated that whether the affirmation of paternity can be rescinded is irrelevant. At the time custody is adjudicated, a father who affirms his paternity pursuant to section 110-132(a) and pays child support in conjunction with that affirmation is acting consistent with his right to care for and have control of the child. The Supreme Court further noted that at the time *Jolly* was decided, sections 49-1 to -9 provided the exclusive remedy for collecting support for an illegitimate child.<sup>42</sup>

The court in its discussion went further and stated that "given the legal relationship between fathers and their illegitimate children now existing by virtue of certain statutory enactments, we believe that the legislatures' 1977 modifications to N.C. Gen. Stat. section 50-13.2(a) represent an express abrogation of the common-law presumption at issue in the present case."<sup>43</sup> To determine whether N.C. Gen. Stat.

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40. N.C. GEN. STAT. § 110-132(a).

41. *Rosero*, 581 S.E.2d at 49.

42. *Id.* at 44.

43. *Id.* at 49.

section 50-13.2(a) abrogated the presumption at issue, the Court examined its plain language. It is well settled that when the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain meaning.<sup>44</sup> Therefore, the Court concluded that, by its plain language, the statute clearly abrogated the common-law presumption vesting custody of an illegitimate child, in the child's mother. The Court held that applying N.C. Gen. Stat. section 50-13.2(a) in such a manner is not only dictated by its plain language, but also ensures that the best interest of the child, illegitimate or legitimate, not the relationship, or lack thereof, between natural or adoptive parents, is the district court's paramount concern. For as between natural or adoptive parents, "the welfare of the child has always been the polar star which guides the courts in awarding custody."<sup>45</sup> The Supreme Court cited to several courts in sister states that have applied this Court's same reasoning to find the common-law presumption for awarding custody in favor of the illegitimate child's mother is no longer applicable. In addition, these sister states gave varying degrees of consideration to the method by which the father acknowledged or established paternity. As a result, the Supreme Court held that a father's right to custody of an illegitimate child is legally equal to that of the child's mother, and is dictated by section 50-13.2. Thus, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child. The Supreme Court affirmed the trial court's order awarding custody of Kayla to plaintiff, Daniel. The court did not address the Constitutional issue of whether the common-law presumption violated the Equal Protection Clause of the United States and North Carolina Constitutions because it determined that the presumption had been abrogated by statute. The court cited *Anderson v. Assimos*,<sup>46</sup> "noting that the courts of this state will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."<sup>47</sup> The Supreme Court reversed the Court of Appeals' decision and remanded to the District Court, Wake County to reinstate the trial court's order.

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44. *Id.*

45. N.C. GEN. STAT. § 50-13.2(a) (2001). ("an order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and the father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child").

46. *Rosero*, 581 S.E.2d at 51 (quoting *Anderson v. Assimos*, 572 S.E.2d 101, 102 (N.C. 2002) (per curiam)(noting "the courts of this state will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds").

47. *Id.*

## DISCUSSION

I. *Acknowledgment of Paternity versus Legitimation: Is this distinction still needed when determining the parental rights of acknowledged fathers?*

While *Rosero* upheld the father's custody rights based on an Acknowledgment of Paternity and applied the "best interest of the child standard", the Court maintained a general distinction between paternity and legitimation. Yet, the Court carved out the distinction as it related to custody, and recognized several rights that attach when a father acknowledges paternity in North Carolina. Thus, this raises the issue of whether the distinction between acknowledged paternity and legitimation when determining an acknowledged father's parental rights is still needed. Do the "exceptions" of rights conveyed by an acknowledgment of paternity swallow the "rule" of rights conveyed by legitimation? This section of the casenote shall address this issue of distinction as it compares acknowledgment of paternity and legitimation against the historical background to the present.

Paternity is not synonymous with legitimacy in that paternity relates to the biological relationship between a man and child, whereas legitimacy relates to the legal relationship of father to child.<sup>48</sup> Procedurally, it is the subsequent marriage or the judicial acknowledgment of paternity, as contrasted to establishment of paternity based on "actual parentage," that renders a child born out of wedlock legitimate.

Legitimation confers upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, just as if the child had been born in wedlock.<sup>49</sup> Legitimation has been held to be more than paternity; it is a status that entitles the child to take real and personal property by succession, inheritance and distribution, just as if the child had been born in wedlock.<sup>50</sup> Whereas, an adjudication of paternity, on the other hand, only serves to equalize between the child's father and mother, "the rights, duties, and obligations, with regard to support and custody of the child."<sup>51</sup> However, in *Rosero*, it was noted that a child whose father had acknowledged paternity was entitled to these same rights by statute; and the father could inherit from the child.

While statutory law varies from jurisdiction to jurisdiction, an illegitimate child's father typically has fewer rights if the child is not legitimated as compared to a paternity determination. While paternity

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48. *Ellis v. Bennett*, 10 S.W.3d 922 (Ark. Ct. App. 2000).

49. N.C. GEN. STAT. § 49-11 (setting forth the effects of legitimation).

50. *Smith v. Barbour*, 571 S.E.2d 877 (N.C. Ct. App. 2002).

51. *Id.*

may suffice as it relates to some parental rights such as custody and child support, in most jurisdictions, paternity is not enough to vest full legal rights in the father. Historically, the biological father of an illegitimate child had no rights. Yet, as discussed below, in North Carolina, legitimation is becoming less of a conveyance of rights and more akin to a status. Several North Carolina statutes, independent of legitimation, confer rights upon an acknowledged father who has formally acknowledged paternity. In *Rosero*, the North Carolina Supreme Court held the father, who had not legitimated, but who had acknowledged paternity, was on equal footing with the mother, and a “best interest in the child” standard is to be applied when making a determination regarding custody.<sup>52</sup> The Court held that the common-law presumption was abrogated by statute, N.C. Gen. Stat. section 50-13.2(a).<sup>53</sup>

Notwithstanding the standard that applies, in most jurisdictions, both biological parents are equally responsible for the financial welfare of the child. The biological father of an illegitimate child is no longer excused from supporting a child.<sup>54</sup> Once paternity has been established, the same child support standards for legitimate children apply to illegitimate children. As it relates to financial support, the courts have refused to make a distinction between paternity, legitimation, legitimate or illegitimate classifications. Thus, once the identity of the father is established, as it relates to support, all else is irrelevant.

Moreover, it has been noted by the courts that certain rights have been granted by statute, to fathers who have acknowledged paternity. In addition to custody and child support rights, as established in *Rosero*, the following rights and benefits are now available to the father, the child or both, once paternity has been acknowledged:

- 1) **Inheritance, succession and distribution.** Pursuant to N.C. Gen. Stat. sections 29-19(b)(2),(c)(2001), a father may inherit from his illegitimate child through intestate succession, upon a filed acknowledgment of paternity with the court. In addition, section 31-5.5(2001) entitles afterborn illegitimate children to devise under the biological father’s will; and section 28A-22-2 sets forth that distribution of shares to after-born children apply to illegitimate after-born children;
- 2) **Termination of parental rights.** Pursuant to N.C. Gen. Stat. section 7B-1111(a)(5)(2001), parental rights of an illegitimate child’s biological father may not be terminated where the father has established or acknowledged paternity based on any one of the four

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52. *Rosero*, 581 S.E.2d at 49.

53. N.C. GEN. STAT. § 50-13.2(a)

54. N.C. GEN. STAT. § 49-15 (2001).

enumerated methods. Only two of the methods involve legitimation; and,

- 3) **Workers' Compensation and Special Death Benefits.** Pursuant to N.C. Gen. Stat. section 97-2 (12) (2001), an illegitimate child who has been acknowledged by the father, may receive benefits pursuant to the workers' compensation laws; and pursuant to N.C. Gen. Stat. section 143-166.2(a)(2001), illegitimate children are included in the definition of a dependent child for the purpose of allowing these children to receive death benefits if the fathers were employed as North Carolina law enforcement officers, firemen, or rescue squad workers.

Thus, by acknowledging paternity, without legitimation, a father and child currently are entitled to receive parental rights and benefits once reserved for "the legitimate." Furthermore, as acknowledged by the Court of Appeals in *Conley*, the North Carolina General Assembly has continually enacted and modified legislation that establishes legal bonds attaching illegitimate children to their biological fathers. These statutes acknowledge the rights and privileges that are inherent in a father-child relationship.

Yet, notwithstanding these similarities and acknowledgments of rights between a father who has acknowledged paternity compared to the father who has legitimated, North Carolina continues to distinguish between acknowledged paternity and legitimation when granting unlimited parental rights to an acknowledged father. Paternity and Legitimation are not mutually exclusive. The same or similar benefits flow from each. The legislative intent of the legitimation statute, to establish the identity of the father and prevent the child from becoming a public charge, is met when acknowledging paternity or legitimating. Therefore, to maintain different requirements, a different status and different standards for acknowledged paternity and legitimation, a "form over substance" line of reasoning seems to take shape.

Chapter 49 of the North Carolina General Statutes governs legitimation of illegitimate children. For purposes of this continued analysis of whether a distinction between paternity and legitimation is necessary, the focus in this section shall be on establishing paternity under section 49-14 as compared to establishing paternity under section 110-132(a). Both statutes involve an establishment of paternity, however they differ in procedure and conveyance of rights. Section 49-14 allows for the establishment of paternity while conferring a legitimation status. Section 110-132(a) only allows for an acknowledgment of paternity.

In North Carolina, there are primarily two formal methods to establish paternity:

- 1) in accordance with N.C. Gen. Stat. section 110-132(a), and 2) in accordance with N.C. Gen. Stat. section 49-14. Section 110-132(a) sets forth the requirements for an acknowledgment of paternity and is entitled "Acknowledgment Affidavit of Paternity Parentage and Agreement to Support". Subsection (a) states, "in lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment affidavits of paternity parentage executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge or the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found shall constitute an admission of paternity and shall have the same force and legal effect as a judgment of that court; and a paternity for the purpose of establishing a child support obligation. . ."<sup>55</sup>

Whereas, section 49-14 entitled, "Civil Action to Establish Paternity" sets forth the requirements for establishing paternity in order to have the effect of legitimation. However, it is not the establishment of paternity under this section that conveys legitimation status, but the civil action allowing for a judicial determination based on proof of paternity by clear, cogent and convincing evidence. The statute is clear to separate paternity from legitimation and states that the establishment of paternity does not have the effect of legitimation. Proceedings for paternity may be brought by the mother, the father, the child or the personal representative of the mother or the child. The proceeding may also be brought by the director of social services when the child or mother is likely to become a public charge. For purposes of jurisdiction, the act of sexual intercourse within North Carolina constitutes sufficient minimum contact for an action for paternity for a child conceived as a result of such act.<sup>56</sup>

Under paternity proceedings, in accordance with section 49-14, proof of paternity must be by clear, cogent and convincing evidence. If an action to establish paternity is brought more than 3 years after the death of the putative father or more than three years after the birth of the child, paternity shall not be established in a contested case without evidence from a blood or genetic test.<sup>57</sup>

In addition to section 49-14, which establishes paternity and may legitimate by a civil action, to legitimate in North Carolina, the father may avail himself of the following statutes:

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55. N.C. GEN. STAT. § 110-132(a).

56. N.C. GEN. STAT. § 49-17(a) (2001).

57. N.C. GEN. STAT. § 49-14 (2001).

1) Section 49-10, which establishes procedures for the putative father to legitimate his illegitimate child by filing a written petition in Superior Court. Mother and Child are "necessary parties to the proceeding," which allows legitimation when "it appears to the court that the petitioner is the father of the child." The court may then declare and pronounce the child legitimated;

2) Section 49-12, which provides for automatic legitimation of a child upon the marriage of the putative father to the illegitimate child's mother; and

3) Section 49-12.1 sets out the procedure for legitimation of a child whose mother is married to someone other than the putative father. The putative father may overcome the presumption of legitimacy arising from the mother's marriage by "clear & convincing evidence."

Upon compliance with the provisions of any of the above-referenced legitimation statutes, the putative father of an illegitimate child achieves the legal status equal to that of the child's mother. For example, pursuant to section 49-11, upon legitimation, "the father shall have all of the lawful parental privileges and rights to the same extent as if said child had been born in wedlock."<sup>58</sup>

Moreover, section 49-15 provides that "after the establishment of paternity of an illegitimate child pursuant to 49-14, the rights, duties & obligations of the mother and father so established, with regard to support and custody of the child shall be the same. . ."<sup>59</sup> Thus, only after the putative father legitimates his child according to statutory provisions, or submits to a judicial determination of paternity, will he stand on an equal footing with the mother, as it relates to full parental rights. Moreover, if a child has been legitimated in accordance with Chapter 49 of the North Carolina General Statutes, there is no basis for filing a proceeding for paternity.

While Chapter 49 sets out the legitimation requirements, the issue remains as to whether there is a need for the distinction between legitimation and acknowledgment of paternity for purposes of allowing an acknowledged father to receive full parental rights. The legislative purpose of an action under section 49-14 is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced, and the child will not become a public charge.<sup>60</sup> Moreover, it was stated in *Becton*<sup>61</sup> that the legislative purpose underlying section 49-14 is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support.

58. N.C. GEN. STAT. § 49-11 (2001).

59. N.C. GEN. STAT. § 49-15.

60. *Smith v. Price*, 328 S.E.2d 811 (N.C. Ct. App. 1985).

61. *Becton v. George*, 369 S.E.2d 366 (N.C. Ct. App. 1988).



The paternity statutes vary in their requirements to show certainty of paternity. On one hand, it could be argued that the reason for the differences in procedure and requirements is that the general assembly intended to exclude paternity from legitimation and therefore the rights were intended to be different under each. However, other statutes have been enacted providing the same or similar rights. Therefore, this is not necessarily consistent or reconcilable.

In addition, each statute, section 49-14 and section 110-132(a), requires some proof of paternity. If one of the arguments against removing the distinction is based on differences in the degree of proof, this places "form over substance." While formalities may serve dual purposes, the court in *Herndon*,<sup>62</sup> held that a written instrument acknowledging paternity, executed and filed with the clerk of court is enough to assure the requisite degree of certainty under 29-19(b)(2).<sup>63</sup> It is the intent to establish paternity that is critical. Moreover, the Court in *Rosero* addressed the issue of varying degrees of proof, when establishing paternity under the legitimation statute 49-14 and section 110-132(a), when it espoused, "although section 110-132(a) does not provide for even a modicum of proof of paternity, it does require, in both the current version and the version in effect for this case, that the child's mother affirm that the acknowledging father is in fact the natural father. Such a requirement prevents a man from 'simply declaring his paternity of a child unilaterally and easily filing for a court order approving his acknowledgment and agreement to support. Furthermore, whether the affirmation of paternity can be rescinded is irrelevant. At the time custody is adjudicated, a father who affirms his paternity pursuant to section 110-132(a) and pays child support in conjunction with that affirmation is acting consistent with his right to care for and have control of the child.'"<sup>64</sup> The Supreme Court in *Rosero* went further to say that "given the legal relationship between fathers and their illegitimate children now existing by virtue of certain statutory enactment, [it] believed that the legislatures' 1977 modifications to N.C. Gen. Stat. section 50-13.2(a) represent an express abrogation of the common-law presumption at issue in the present case."<sup>65</sup>

The language used by the North Carolina Supreme Court regarding care that is consistent with the father's rights to care for his child, can

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62. *Herndon v. Robinson*, 291 S.E.2d 305(N.C. Ct. App. 1982) (referencing the formalities of 29-19(b)(2), as a method for establishing paternity, a written instrument acknowledging paternity assures the requisite degree of certainty. The formalities further assure that the decedent intended that the illegitimate child share in the estate).

63. N.C. GEN. STAT. § 29-19(b)(2) (2001).

64. *Rosero*, 581 S.E.2d at 49.

65. *Id.*

be mapped to *Stanley v. Illinois*,<sup>66</sup> where it was established that a father has parental rights. The United States Supreme Court tempered the expansion of *Stanley* by requiring that an acknowledged father actively participate, in some way, in the care and nurturing of his child in order to establish a constitutionally protected liberty interest. While *Stanley* dealt more with a father's due process protection of his interest, it is important to note that the court acknowledged he had an interest. "The inherent value of the parent-child relationship, the importance of the responsibilities surrounding parenting, and the continued reliance on the institution of marriage to assist in defining legal issues all help to create boundaries which define the unwed father's liberty interest in his relationship with his child."<sup>67</sup> In *Rosero*, the father attempted to avail himself of a "normal" father's rights by acknowledging paternity instead of legitimating. Thus, based on the holding in *Rosero*, if a court takes the position that this plaintiff father who has taken steps to support his child and acknowledge paternity is consistent with actively participating in the care and nurturing of his child, then, it stands to reason that the acknowledged father in *Rosero* should be able to avail himself of full parental rights without having to legitimate.

Even under a constitutional analysis, if the unwed father's right is deemed to be limited, "the state should only intrude upon this interest through regulations that protect the child or the health and safety of its citizens. This interest would need to outweigh the liberty interest of the parent-child relationship."<sup>68</sup> However, the state's interest in enacting the legitimation statute, N.C. Gen. Stat. section 49-14 is to establish the identity of the father and prevent the child from becoming a public charge, as indicated by its legislative intent. This interest is equally met by an acknowledgment of paternity under section 110-132(a). Therefore, the state's interest may not be sufficient to deny full rights to a father who has actively and consistently participated in the nurturing care of his child.

Moreover, by statute, the standard applied by the court in *Rosero* was the "best interest of the child" standard, which places the issue back in the framework of protecting the child's interest. The Court held that the father who has acknowledged paternity is on equal foot-

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66. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that a father has a limited interest and due process prevents an unwed father from being deprived of his children without a hearing. . .).

67. *Id.*

68. Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of his Child by Withholding Consent: United States Supreme Court Cases Addressing Constitutional Rights of Unwed Father*, 61 A.L.R. 5th 151 (1998).

ing with one who has legitimated.<sup>69</sup> Thus, the child's interest, as well as the liberty interest of the parent-child relationship is maintained. While *Rosero* dealt with the custody rights, by analogy, the need for a distinction between legitimation and acknowledged paternity to receive full parental rights remains questionable. The United States Supreme Court has held that the history and tradition surrounding the function of a non-traditional family, and even an extended family elevates to a level that is protected by the Constitution. Thus, when addressing the issue of whether a distinction between acknowledging paternity and legitimation is still needed, the North Carolina General Assembly will undoubtedly examine existing statutes, parental rights and the constitutional ramifications of expanding or limiting these rights.

The majority in the Court of Appeals' decision in *Rosero* proposed that the general assembly intended a distinction between an acknowledgment of paternity and legitimation.<sup>70</sup> Nonetheless, if the general assembly intends to maintain this distinction based on its original drafting, to include certain paternity procedures while excluding other paternity procedures, and by specifying different procedures to confer legitimation status upon the putative father of an illegitimate child, the legislative intent of the paternity-related statutes and the language of the statutes need to be re-examined to ensure this outcome. In the current state of affairs, the holding in *Rosero* makes it necessary to address the issue of whether it is necessary for a father to legitimate in order to avail himself of his full parental rights, once he has formally acknowledged paternity. Responding in the affirmative appears to favor form over substance based on dated social policies or a mere lack of uniformity between statutes.

However, if all of the related statutes are deemed to be comprehensive and not a patchwork of statutes, it would appear that the Court in *Rosero* has provided a sufficient answer to whether a distinction is necessary. The general assembly should be encouraged by this finding, as a good beginning in re-examining the statutes relating to paternity and legitimation. Even though the North Carolina Supreme Court did not deal with the issue of full parental rights, but was presented with the question of custody rights, the Court held that there should not be a distinction between acknowledging paternity and legitimation as it relates to custody.<sup>71</sup>

At least one jurisdiction has recognized the right of the father of an illegitimate child to have custody even absent a legitimation proceed-

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69. *Rosero*, 581 S.E.2d at 49.

70. *Id.* at 49.

71. *Id.*

ing, holding that the natural father has equality of standing with the natural mother on the custody question. While affirming an award of custody to the child's father despite the absence of a finding of the mother's unfitness, the court in *Byrd*<sup>72</sup> acknowledged that "legitimation of a child is always a preferred goal, but concluded that legitimation should not be a prerequisite for the natural father's equality of standing in a custody action for two reasons: (1) each of the three methods in the jurisdiction by which a father could legitimate his child, through an acknowledgment proceeding, an adoption, or a marriage with the mother, required the consent of the mother, and therefore, she could thwart any attempt by the natural father to legitimate the child; and (2) a legitimation requirement would not necessarily be in the best interests of the child and would result in dissimilar treatment between legitimate and illegitimate children.<sup>73</sup> The court in *Rosero* found that additional sister courts had applied the same reasoning to find the common-law presumption in favor of the illegitimate child's mother no longer applicable.<sup>74</sup>

In support of its finding that an acknowledgment of paternity entitled the father to custody rights, the North Carolina Supreme Court in *Rosero* conclusively held that the common-law presumption was abrogated.<sup>75</sup> This is further support for removal of the distinction as it evidences the weakening of the distinction between acknowledgment of paternity and legitimation. The Court relied on the plain language rule. "When 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."<sup>76</sup>

In examining the statute in its plain language, the court held that the statute clearly abrogated the common-law presumption vesting custody of an illegitimate child in the child's mother.<sup>77</sup> The court relied on 50-13.2(a) to apply the "best interest of the child" standard. The court held that "the statute dictates and ensures by its plain language that 'the best interest of the child', illegitimate or legitimate, both the relationship or lack thereof, between natural or adoptive parents, is the district court's paramount concern. The welfare of the child has always been the polar star which guides the courts in awarding custody."<sup>78</sup>

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72. *In re Byrd*, 421 N.E.2d 1284 (Ohio 1981).

73. *Rosero*, 581 S.E.2d at 49

74. *Id.* at 50.

75. *Id.* at 41.

76. *Id.* at 49.

77. *Id.* at 50-51.

78. *Id.* at 50.

## II. The “Best Interest of the Child” Standard

In completing the analysis of *Rosero*, notwithstanding the other issues it raised as between the distinction between paternity and legitimation, the critical issue in *Rosero* hinged on the standard to be applied for custody as between a mother and father with an illegitimate child. However, the “best interest in the child” standard could not be applied properly until the Court was able to remove the distinction between legitimation and paternity as it related to custody and child support. This ability to remove the distinction was based on the statute that abrogated the common-law presumption. The Court in its wisdom espoused that the statutes must be taken comprehensively. Moreover, the Court stated that it construes statutes governing a single subject *in pari materia* to effectuate legislative intent and to harmonize them into one law on the subject.<sup>79</sup>

Courts have begun to consider in varying degrees, the child’s best interest within a specific situation. Such considerations have led to increasing rights for a biological parent. Key factors in the best interest standard are the maintenance of the children’s current environment, relationships, home, school, church, health, and whether their educational and emotional needs are being met.<sup>80</sup>

However, the “best interest of the child” standard has been applied broadly in the different areas of the law that concern children. The standard, although articulated, is difficult to specify, and as such, has been subject to differing definitions and interpretations. Assessing the best interest of the child may conflict with an interpretation of parental rights based upon biology and traditional interpretations of the family. This point is highly relevant where an acknowledged father’s rights are in jeopardy because he does not fall within the traditional interpretation of family. This is why the holding in *Rosero* is so critical to an acknowledged father who is seeking custody rights. While the standard may be subject to some interpretation, at least the standard has been established and applied. This application will assist acknowledged fathers to be placed on equal footing with the mothers. The criteria by which the mother is examined should be the same criteria by which the father is being examined to determine the best interest of the child. The governing statute in determining the best interest of the child is N.C. Gen. Stat. section 50-13.2(a) which directs the courts to award custody based upon what “will best promote the interest and welfare of the child.” As between the mother and the

79. *Id.* at 48 (quoting *Brown v. Flowe*, 507 S.E.2d 894, 896 (N.C. 1998)).

80. Cashman, *supra* note 38. See also Violence Against Women Act Manual, App. 15-1, (Aug. 2002) (quoting Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.”<sup>81</sup>

### III. Constitutional Dimensions

In *Troxel v. Granville*,<sup>82</sup> it was recognized that the “Due Process Clause of the United State Constitution does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>83</sup> The court in *Rosero* made note of applicable constitutional issues, and granted plaintiff’s petition for discretionary review on the additional issue of whether the common-law presumption that the mother of an illegitimate child retains a superior right to that child’s custody violates the Equal Protection Clause of the United States and North Carolina Constitutions.<sup>84</sup> However, the court did not deal with this issue on appeal. The Court determined that because the presumption had been abrogated by statute, there was no need to address whether it violated plaintiff’s rights under the United States and North Carolina Constitutions.<sup>85</sup>

The due process and equal protection arguments are important to unwed biological fathers because they provide the basis upon which to challenge the standards applied by the state courts.<sup>86</sup> The most common standards frequently applied by state courts in determining whether they will terminate an unwed biological father’s rights are: (1) whether his actions constitute abandonment of the child, (2) whether it is in the best interest of the child that the father’s parental rights be terminated, and (3) whether the nature of the relationship between the father and his child is worthy of constitutional protection.”<sup>87</sup> As was done by the father in *Rosero*, many fathers argue that the termination of their parental rights violates their constitutional rights.

Courts have consistently held that there is a presumptive preference for biological parents to assume the custody and care of children and that the state must show a sufficient cause for any intervention with this presumption. In response to the equal protection argument, it is important to note that mothers have been deemed not similarly situ-

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81. N.C. GEN. STAT. § 50-13.2(a).

82. *Rosero*, 581 S.E.2d at 47 (quoting *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000)).

83. *Id.*

84. *Id.* at 51.

85. *Id.*

86. Cashman, *supra* note 38 (quoting *Lehr v. Robinson*, 463 U.S. 248, 267-268 (1983) (finding that a father failed to take available steps to establish a relationship with his child)). *See also*, *Caban v. Mohammad*, 441 U.S. 380, 394 (1979) (holding that a father’s rights were entitled to constitutional protection because he lived with the children as their father and contributed to their financial support).

87. *Id.*

ated to an unwed father who may remain anonymous unless he takes affirmative steps to claim his child.<sup>88</sup> However, in the case of illegitimate children, where fathers have taken such steps, states have an interest in placing children in stable homes while fathers have an interest in parenting their children.<sup>89</sup>

Federal and state laws have attempted to balance these competing interests, and courts have held that a state does not violate a father's right to due process if it shows a compelling reason to terminate his parental rights. Yet, the Supreme Court has ruled that a state must afford a father due process protection of his interest in having contact with his child when he has demonstrated a full commitment to the responsibilities of parenthood.<sup>90</sup>

In *Rosero*, the father's argument was based on the equal protection clause rather than the due process clause of the United States and North Carolina Constitutions. However, the Court did hold that the father demonstrated a full commitment to the responsibilities of parenthood.<sup>91</sup> Federal precedent becomes important when there is unpredictability as to a state court's action on a matter. Thus, the father could be entitled to due process protection of his interest on the basis of his actions of responsibility, and the "best interest of the child standard" could be applied at that time. Therefore, should the North Carolina Supreme Court's decision be appealed, and on appeal the statute is placed under constitutional scrutiny, or is deemed not to have abrogated the common-law presumption, the father's constitutional argument may become critically important in asserting his rights.

### CONCLUSION

The North Carolina Supreme Court's decision in *Rosero* established and applied the standard to be used in cases where acknowledged fathers who have acknowledged paternity are seeking custody of their illegitimate children. However, more action on the part of the legislature may be needed to further resolve the issue of whether the distinction between legitimation and acknowledged paternity is still needed to allow an acknowledged father full parental rights.

It has been shown that certain North Carolina statutes provide parental rights. These statutes appear to be slowly eroding the conveyance of rights once reserved for legitimation statutes. Parental rights are slowly being given, statute by statute, to those fathers who ac-

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88. Cashman, *supra* note 38, (taken from Stanley v. Illinois, 405 U.S. at 651).

89. *Id.*

90. *Id.*

91. *Rosero*, 581 S.E.2d at 41, 51.

knowledge paternity as set forth in the applicable statutes. Therefore, by removing the distinction between legitimation and acknowledged paternity, the legislature creates uniformity and simplicity, while placing the matter within the realm of the Courts to better define these cases using a framework based on the best interest of the child.

In contrast, by not removing the distinction, the "form over substance" argument prevails, the illegitimate child is denied a legal status of legitimacy, and the father is denied certain parental rights, while retaining others. The latter option seems to be farther away from what is in the best interest of the child. With the distinction in tact, one might say the child becomes a "moral public charge" instead of a financial public charge.

If the paternity statutes allowed for the same procedures and a course of legitimation for all purposes, not just custody and child support, the distinction is essentially removed. "Without such a preference, we would simply be promoting a race to the courthouse based on assumptions as to which judge will best decide the issue of paternity."<sup>92</sup>

New family formations, equal rights for mothers and fathers, whether married or not, and an increased desire of parents to be involved in their children's lives have led to conflicts over custody. The willingness of courts to fashion remedies using inherent equitable powers, especially for *de facto* parents, have allowed more persons access to courts to litigate custody.

In contrast, if the intent is to discourage illegitimate children and to promote the marriage of the fathers to the mothers, social policy may be a valid reason for not removing the distinction between acknowledged paternity and legitimation. However, it is difficult to legislate morality and this intent is not apparent in the statutes. There has been a significant demographic and social change within the United States over the last fifty years. As a result, the states continue to have legitimate interests, but these interests may need to be updated to meet the changing realities of society. *Rosero* is just one indication of how the Court found a solution to an increasingly common issue. The overall percentage of children born outside of marriage increased over 39% between 1990-1994.<sup>93</sup> Currently, approximately 40% of all children are born to unwed mothers. Thus, if the legislature's new paternity and legitimation debate is based on social policy, it will have to examine the moral interest, the legal interest and the economic interest in determining the state's interest and the best interest of the child.

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92. Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, section 4:3 at 174 (2d ed. 1988).

93. Leah Y. Latimer, *Family Matters*, in *THE CRISIS* (Sept/Oct 2003).



Although the parental rights may vary in quantity, the rights granted by legitimation vary just slightly from the rights conveyed by acknowledged paternity actions. Thus, it will not only be good public policy to remove the distinction between acknowledged paternity and legitimation, as related to parental rights, but it will further judicial efficiency.<sup>94</sup> This distinction may be removed if the legislature amends section 49-14 of the North Carolina General Statutes. Other amendments may be deemed necessary to bring all statutes involving paternity and legitimation into uniformity. However, an amendment to section 49-14 may be enacted to remove the distinction by allowing an adjudication of paternity to constitute a *per se* legitimation of the child.

Notwithstanding any change by the legislature, however, the original premise for the state's interest is still valid, since "the majority of the children born out of wedlock are in a single-parent environment."<sup>95</sup> This original premise is based on preventing illegitimate children from becoming a public charge to the state. However, as stated herein, this interest is currently satisfied by acknowledging paternity or legitimation.

This new family dynamic holds broad and profound implications. Regardless of the exact action taken by the legislature, this issue is not going to go away. *Rosero* is the current decisional law. Yet, the general assembly is encouraged to review the paternity and legitimation statutes in a comprehensive manner. An ideal review and statutory approach will: 1) clearly cover the field and allow for a stated comprehensive scheme for legitimation and paternity actions and proceedings, 2) limit paternity and legitimation challenges in the courts by clarifying or eliminating the distinction, 3) prevent the children from becoming public charges, 4) specifically set forth all applicable parental rights, and 5) work in the best interest of the children. The Court in *Rosero* made an effort to meet all five of these objectives when it applied the "best interest of the child" standard; and the legislature is encouraged to implement a statutory scheme that will provide statutory direction to those coming after *Rosero*. Whether the legislative action involves repeals, modifications, amendments, and/or new legislation, the action should result in a fair, reasonable and just statutory scheme that can be relied upon by putative fathers, acknowledged fathers, mothers and illegitimate children throughout North Carolina for years to come.

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94. See CLARK, *supra* note 92.

95. *Id.*