FAMILY LAW—THE SUBSTANTIAL RELATIONSHIP TEST: THE PUTATIVE FATHER GAINS STANDING TO REBUT THE PRESUMPTION OF LEGITIMACY—C.C. v. A.B.

T. Carmen Loconto

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
FAMILY LAW—THE SUBSTANTIAL RELATIONSHIP TEST: THE PUTATIVE FATHER GAINS STANDING TO REBUT THE PRESUMPTION OF LEGITIMACY—C.C. v. A.B.

INTRODUCTION

"The presumption of legitimacy of a child born during marriage is one of the strongest presumptions known to law."1 Many courts grant the mother or her husband a cause of action to rebut the presumption of legitimacy which attaches to a child whose mother is married.2 The putative,3 or biological father, is not always as fortunate.4

In 1989, the United States Supreme Court, in a plurality decision, held that the conclusive presumption of legitimacy which attaches to a child born to a married woman was constitutional.5 Consequently, the Court denied standing to a putative father because he had no fundamental right to assert paternity.6 However, in 1990, in a case with similar facts, the Massachusetts Supreme Judicial Court granted

1. Espree v. Guillory, 753 S.W.2d 722, 724 (Tex. App. 1988). In order to minimize the stigma of illegitimacy of a child born out of wedlock, the common law developed a presumption that a child born to a married woman was the child of the marriage. However, this presumption could be rebutted by proof beyond a reasonable doubt that the husband could not have been the father. See Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 4.1, at 151 (2d ed. 1988); see also Tiana M. Hinnant, Note, Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption, 25 WAKE FOREST L. REV. 617 (1990).


6. Id. at 113-32.
standing to the putative father. Not only was he allowed to rebut the marital presumption of legitimacy, but he was allowed to do so by meeting a lower evidentiary standard than previously existed under Massachusetts law.

The purpose of this Note is to show that the Massachusetts Supreme Judicial Court in *C.C. v. A.B.* took a realistic look at the problem that arises when a putative father asserts paternity, and developed a test which balances the interests of the relevant parties with minimal intrusion. Section I describes the historical background of the marital presumption of legitimacy. Section II discusses the Supreme Court decision in *Michael H. v. Gerald D.*, which denied that a putative father had a fundamental right to rebut the marital presumption of legitimacy. Section III examines *C.C. v. A.B.*, in which the Massachusetts Supreme Judicial Court granted standing to the putative father to rebut the marital presumption of legitimacy. Section IV analyzes the Massachusetts Supreme Judicial Court's substantial relationship test, which grants the putative father standing in a preliminary hearing to rebut the presumption of legitimacy. Section IV further discusses whether this new standard accomplishes its purported purpose: to balance the state's dual interests in legitimizing children and protecting the marital family from intrusion against the putative father's interest in maintaining a relationship with his child. Section IV concludes that the Massachusetts Supreme Judicial Court correctly acknowledged the rights of putative fathers who desire to maintain that relationship without being encumbered by burdensome standards.

I. The State's Interest in Maintaining the Presumption of Legitimacy

The common law created the marital presumption of legitimacy. Primarily, two factors motivated its adoption. First, the harsh treatment of illegitimate children motivated the state to avoid attaching illegitimate status to children. Second, the lack of a scientifically re-

---

8. *Id.* at 370.
9. *Id.* at 365.
13. *Id.; see C.C.*, 550 N.E.2d at 369. Justice Nolan stated that the origin and pur-
liable method of determining paternity was a logical reason for presuming the husband's paternity. The state's interest in the protection of children and the marital family prompted the adoption of the presumption, but it provided no relief for the putative father. A brief survey of the presumption's creation provides a backdrop against which the current developments in the status of the putative father can be examined.

A. Historical Background: The Need for a Presumption of Legitimacy

The presumption of legitimacy had its roots in common law. An illegitimate child was labelled *filius nullius*, the "son of nobody." Under the English common law, which the American courts adopted, the parents were not obligated to support their child. Furthermore, an illegitimate child had no rights of inheritance from either parent.

The common law thus condemned the illegitimate child to punish the parents' actions. The hardship placed on the illegitimate child formed the basis for the presumption of legitimacy. The law could minimize the number of illegitimate children by preventing couples from "bastardizing" their offspring. In order to mitigate these harsh burdens on illegitimate children, the common law created a strict application of the presumption "that a child born in lawful wedlock is legitimate." At its inception, this marital presumption, called Lord Mans-

16. C.C., 550 N.E.2d at 368.
17. *Id.* (citing Ruttinger v. Temple, 4 Best & Smith's Rep. 491 (Q.B. 1863)). The Massachusetts court in Somerset v. Dighton, 12 Mass. 383, 387 (1815) created a duty of a mother to care for her child. C.C., 550 N.E.2d at 369 n.4. Massachusetts statutes dating back to 1668 required a man to support his illegitimate child. *Id.* The father's duty to support his child did not improve his rights.
19. C.C., 550 N.E.2d at 369; see also Barnes, *supra* note 12, at 238.
21. *Id.* (citations omitted).
22. C.C., 550 N.E.2d at 369 (citing Phillips v. Allen, 84 Mass. (2 Allen) 453, 454
field’s Rule,23 made rebutting the presumption of legitimacy more dif­
ficult. This rule provided that “where the legitimacy of a child born in
lawful wedlock is in issue, in the absence of statutory authority neither
the husband nor the wife may testify as to nonaccess between them.”24
The result of this rule was that a child conceived by a married woman
was presumed to be a child of the mother’s marriage. This presump­
tion was conclusive25 and applied whether the husband was actually
the child’s biological father,26 whether the husband and wife were di­
vorced when the child was born,27 whether a subsequent divorce oc-
(1861)); see supra notes 13-14 and accompanying text for the factors motivating the com­
mon law’s adoption of the presumption of legitimacy.

23. Hinnant, supra note 1, at 623. According to Lord Mansfield’s Rule, on the
grounds of decency, morality, and public opinion, a husband or wife is incompetent to
 testify as to the husband’s non-access. (Non-access is the “[a]bsence of opportunities for
sexual intercourse between husband and wife; or the absence of such intercourse.”
BLACK’S LAW DICTIONARY 1050 (6th ed. 1990). It is used by an alleged father as a de­
fense in paternity cases. Id.). Such evidence would tend to show that a child conceived

24. c.c., 550 N.E.2d at 371. Lord Mansfield’s Rule provided “that where the legiti­
macy of a child born in lawful wedlock is in issue, in the absence of statutory authority
neither the husband nor the wife may testify as to nonaccess between them.” Sayles v.
1922)). Because statutes and cases in Massachusetts have allowed testimony in contraven­
tion of the rule, the Massachusetts Supreme Judicial Court abrogated Lord Mansfield’s
Rule and declared that “a wife and a husband are no longer incompetent . . . to testify as to
nonaccess or impotence during the time relevant to conception.” C.C., 550 N.E.2d at 371.

(1861)). The conclusive presumption was later modified to allow rebuttal by evidence be­
yond a reasonable doubt that the husband could not have been the father. Id.

The conditions to be proven are that: “(1) the husband had no access to the wife
during the time of possible conception; (2) the husband was impotent; or (3) a properly
conducted blood grouping test, administered by a qualified expert, definitively excludes
the husband as a father.” In re J.S.V., 524 N.E.2d 826, 827-28 (Mass. 1988) (denying standing
to a putative father to adjudicate paternity in the context of a proceeding to dispense with
the need for parental consent to adoption; no facts being offered to overcome the presump­
tion of legitimacy).

1985) (refusing to inquire into actual biological paternity of the child through blood tests),
(precluding husband from denying paternity notwithstanding blood tests showing conclu­
sive evidence that he could not be the biological father); People v. Thompson, 152 Cal.
Rptr. 478 (1979) (deeming husband legal father and responsible for support of wife’s child
conceived while husband and wife were cohabiting); Hess v. Whitsitt, 65 Cal. Rptr. 45
(1967) (holding white husband to be the father although his white wife gave birth to a
mixed race child); see also Hinnant, supra note 1, at 624.

27. Barnes, supra note 12, at 239 (citing P.B.C., 483 N.E.2d at 1096). See also
during marriage but born after divorce is legitimate and the ex-husband is the father);
Hinnant, supra note 1, at 624 (citation omitted).
curred, or whether the husband acknowledged or had a relationship with the child.

B. Massachusetts Application of the Presumption of Legitimacy

Massachusetts law also presumed that the husband was the father of a child conceived by or born to his wife. The presumption of legitimacy operated automatically without formal proceedings to establish paternity. The husband was responsible for the child's support and entitled to a constitutionally protected parent-child relationship. Conversely, the presumption of legitimacy created difficulty for a putative father who wished to prove paternity of a married woman's child in order to assert parental rights such as visitation.

In Massachusetts, prior to C.C. v. A.B., a putative father was either

28. Barnes, supra note 12, at 239 (citing P.B.C., 483 N.E.2d at 1096); Michelle W. v. Ronald W., 703 P.2d 88 (Cal. 1985) (holding that the presumption of legitimacy is not overcome even if the mother remarried after divorce), appeal dismissed, 474 U.S. 1043 (1986); see also Hinnant, supra note 1, at 624-25.

29. Barnes, supra note 12, at 239 (citing Lirette v. Lirette, 430 So. 2d 1150 (La. Ct. App. 1983) (presuming former husband to be the father of a child born to his ex-wife even though she committed adultery and concealed her pregnancy from him)); see also Hinnant, supra note 1, at 625.

30. P.B.C. v. D.H., 483 N.E.2d 1094 (Mass. 1985), cert. denied, 475 U.S. 1058 (1986). In P.B.C., the mother, D.H., had filed for divorce in May, 1981. Id. at 1096. A final judgment of divorce was entered on Dec. 8, 1981, and became final on June 9, 1982. Id. The child was born the next day. Id. Since birth, the child lived with the mother and never with the putative father; nor did the mother allow the putative father access to the child. Id. The mother and her former husband remarried on September 12, 1983. Id. The child's birth certificate listed the husband as the father. Id. In this case, the Massachusetts Supreme Judicial Court extended the presumption of legitimacy from a child born to a married woman to one conceived by a married woman. Id. The court held that "in the circumstances of this case" it would not recognize in a putative father the common law right to a paternity adjudication. Id. at 1097. The court continued to recognize that "ordinarily an unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father." Id. The facts of this case coupled with the state's interest in affording legitimacy to children and protection of the marital family outweighed the putative father's interest. Id. The court used the lack of a developed substantial relationship between putative father and child as support for the denial of standing. Id. For a discussion of how P.B.C. relates to paternity and constitutional law, see Barnes, supra note 12; see also Valerie S. Meiners, Comment, The Child With Two Fathers: Updating the Wisdom of Solomon, 46 LA. L. REV. 1211, 1223-24 (1986).


32. Id. at 238; see also Michael H. v. Gerald D., 491 U.S. 110 (1989).

33. Barnes, supra note 12, at 236; see also Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that a putative father has no standing to rebut the presumption of legitimacy; this denial of standing is neither a violation of the equal protection nor due process clauses).

foreclosed from asserting a cause of action to adjudicate paternity,\textsuperscript{35} or allowed to rebut the presumption of legitimacy only by proof beyond a reasonable doubt.\textsuperscript{36} The husband was, therefore, afforded rights superior to those of the putative father.\textsuperscript{37}

Massachusetts upheld the presumption of legitimacy to preserve three interests: (1) to make children legitimate wherever possible;\textsuperscript{38} (2) to remove the disadvantage placed on illegitimate children\textsuperscript{39} as well as to ensure the care and support of the child;\textsuperscript{40} and (3) to protect traditional family units.\textsuperscript{41} The operation of the presumption of legitimacy

affords legitimacy to the greatest number of children through its preference that paternity reside in married rather than unmarried men. It protects traditional family units by erecting barriers to an unmarried, putative father's ability to disrupt an intact family unit through his attempts to prove that he is the father of a child conceived or born during the marriage. Finally, the state classification system ensures the care and support of children by guaranteeing that at least one man will be presumed to be the legal father of a child.\textsuperscript{42}

The state's interests did not recognize the rights of a putative father to establish and maintain a relationship with his child because his interest was one which the law had not historically recognized.\textsuperscript{43} When a putative father asserted paternity, his interests clashed with those of the state.\textsuperscript{44} However, a different situation exists where a putative father has established a substantial relationship with the child.\textsuperscript{45}


\textsuperscript{37} Barnes, supra note 12, at 236-37.

\textsuperscript{38} C.C., 550 N.E.2d at 370; see also Barnes, supra note 12, at 237.

\textsuperscript{39} C.C., 550 N.E.2d at 370.

\textsuperscript{40} Barnes, supra note 12, at 237 (citing P.B.C. v. D.H., 483 N.E.2d 1094, 1096, 1099 (Mass. 1985), cert. denied, 475 U.S. 1058 (1986)).

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} C.C., 550 N.E.2d at 370.

\textsuperscript{44} Id.

\textsuperscript{45} Id. This substantial relationship mitigates the clash between the putative father's and the state's interests. The United States Supreme Court began to recognize a constitutionally protected interest when such a relationship existed between a putative father and an out of wedlock child.

In Lehr v. Robertson, 463 U.S. 248 (1983), the Supreme Court held that an unmarried father who had neither a developed relationship with his child nor admitted his paternity through New York's putative father registry had no claim that his due process rights had been violated because he was not notified of the impending adoption of his child. \textit{Id.} at
Whether this substantial relationship gives rise to a protected interest that will rebut the marital presumption of legitimacy remains a controversial issue that the United States Supreme Court and the Massachusetts Supreme Judicial Court addressed and answered differently.46

II. MICHAEL H. v. GERALD D.47

In 1989, in Michael H. v. Gerald D., a case filed by the putative

265. The Court reasoned that because the putative father had never established any custodial, personal or financial relationship with the child, the State could treat the mother and putative father differently without violating the equal protection clause. Id. at 267-68. In Caban v. Mohammed, 441 U.S. 380 (1979), an unmarried father who had lived with his children and their mother for four years and who visited with them frequently and was granted visitation rights was given the opportunity to object to the children's adoption by the mother and her husband. The Court held that the existence of a substantial father-children relationship and the admission by the father of his paternity did not bear a substantial relationship to the state's proclaimed interest in promoting adoption of illegitimate children. Id. at 393. The Court stated that this holding would be different in a case in which the father had never acknowledged his children nor participated in their upbringing. Id. at 392. In Quilloin v. Walcott, 434 U.S. 246 (1978), an unmarried father who had only intermittent contacts with his child during a 12 year period was denied an opportunity to object to the child's adoption by her mother and the mother's husband. The Court held that the putative father's rights were outweighed by the full recognition of the family unit and the best interests of the child. Id. at 255. In Stanley v. Illinois, 405 U.S. 645 (1972), an unmarried father who lived intermittently with his children and their mother during an 18 year period was afforded protection under the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court recognized the unwed father's interest in retaining custody of his children. Id. at 652. For a discussion of the relationship among these cases, see Meiners, supra note 30, at 1218-24; John J. Brogan, Due Process Rights of Putative Fathers, 11 HUM. RTS. ANN. 199 (1984); Gregory F. Buckley, Comment, Lehr v. Robertson: Putative Fathers Revisited, 11 OHIO N.U. L. REV. 385 (1984). See also Michael H. v. Gerald D., 491 U.S. 110, 123-29 (1989). But see id. at 142-45 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting), id. at 158-61 (White, J., joined by Brennan, J., dissenting).


father, Michael, the United States Supreme Court addressed the issue of a putative father's right to gain standing to assert paternity. A plurality of the Supreme Court held that a putative father's due process rights were not violated by a conclusive presumption of legitimacy attaching to a child whose mother was married at the time of the child's birth and conception. Michael H. attempted to assert paternity and visitation rights under a California statute which denied him standing to rebut the presumption of legitimacy.

A. Facts

In Michael H., the married mother, Carole, and Michael, the putative father, began an extramarital relationship in 1978 that resulted in the birth of a child, Victoria, in May 1981. Gerald, the husband, was named on the birth certificate as the child’s father and he treated


48. CAL. EVID. CODE ANN. § 621 (West Supp. 1991). The relevant provisions of the statute are:

- Child of the marriage; notice of motion for blood tests:
  - (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
  - (b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
  - (c) The notice of motion for blood tests under subdivision (b) may be filed not later than two years from the child’s date of birth, by the husband, or for purposes of establishing paternity by the presumed father or the child through or by the child’s guardian ad litem.
  - (d) The notice of motion for blood tests under subdivision (b) may be filed by the mother of the child not later than two years from the child’s date of birth if the child’s biological father has filed an affidavit with the court acknowledging paternity.
  - (e) Subdivision (b) shall not apply to any case coming within Section 7005 of the Civil Code, or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

Id. (emphasis added to note language after Michael H. filed his complaint).

49. This section of the California code establishes a conclusive presumption that a child born to “a wife cohabiting with her husband, who is not impotent or sterile” is the child of the marriage. The presumption may only be rebutted by blood tests performed within two years from the date of the child’s birth. These blood tests must be performed by motion of the husband or the wife after the natural father had filed an affidavit acknowledging paternity. Id. § 621(a), (c), (d).

50. Michael H., 491 U.S. at 113-14 (Scalia, J., wrote for the plurality, joined by Rehnquist, C.J., and, in all but note 6, by O'Connor & Kennedy, JJ.).
the child as his.51 However, shortly after the delivery, Carole informed Michael that he might be the father.52 At the end of October 1981, blood tests of Carole and Michael established a 98.07% probability that Michael was Victoria's father.53

Following unsuccessful attempts to visit Victoria while she was living with Carole and Gerald, Michael filed a filiation action to establish paternity and visitation rights.54 In October 1984, Gerald intervened and moved for summary judgment asserting that under the California Evidence Code section 621 there were no issues of triable fact pertaining to Victoria's paternity because of the marital presumption of legitimacy.55

Gerald's motion for summary judgment was granted in January 1985. The superior court found sufficient evidence to show that Carole and Gerald were cohabiting at the conception and birth of Victoria and that Gerald was neither sterile nor impotent. The court denied Victoria's and Michael's claims for continued visitation because of its intrusion on the family. Michael challenged the constitutionality of California Civil Code section 4601.56 Michael asserted that his procedural and substantive due process rights had been violated by the su-

51. Id.
52. Id.
53. Id. at 114. During Victoria's first three years, she remained in Carole's custody but was exposed to a variety of living arrangements. Both Carole and Victoria lived for various periods of time with Gerald, or Michael, or Scott, another man involved with Carole. When Carole and Victoria returned to California they resided with Scott. During that spring and summer, Carole and Victoria visited Gerald in New York and Europe. In the fall, they returned to California and Scott. Id.
54. Id. at 114-15. In March 1983, the court appointed an attorney and a guardian ad litem to represent Victoria's interests. Carole filed a motion for summary judgment in May 1983. Id. From March through July 1983, Carole and Victoria lived with Gerald. Carole returned to California in August, rekindled her relationship with Michael, and removed the summary judgment motion. Id. In April 1984, Carole and Michael signed, but never filed, a stipulation that Michael was Victoria's father. Id. In May 1984, Michael and Victoria, through her guardian ad litem, sought visitation rights for Michael pendente lite. Id. at 115. Following a psychological evaluation to determine whether visitation would be in Victoria's best interests, the court granted Carole sole custody of Victoria and restricted visitation privileges to Michael. Id. Carole and Gerald reconciled in June 1984 and contact between Michael and Victoria ceased. Id.
55. Id. at 115-16.
56. Id. CAL. CIV. CODE ANN. § 4601 (West 1983 & Supp. 1991) allows the court the discretion to grant visitation rights to "any . . . person having an interest in the welfare of the child." Id. This statute provides:

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

Id.
perior court’s application of section 621. However, the California Court of Appeal affirmed the judgment of the superior court and upheld the constitutionality of section 621. After denial of rehearing and review by the court of appeal and the California Supreme Court, the United States Supreme Court, in February 1988, noted “probable jurisdiction.”

B. The Plurality Decision

Michael’s procedural due process claim asserted that the California statute, section 621, which denied him standing to assert his paternity, violated his procedural due process rights. Justice Scalia, writing for the plurality, rejected this challenge and stated that irrebuttable presumptions are analyzed by “calling into question not the adequacy of procedures but . . . the adequacy of the ‘fit’ between the classification and the policy that the classification serves.” Because standing to rebut the presumption would not serve California’s interest in protecting “family integrity and privacy,” this challenge was denied.

Michael premised his assertion on the underlying assumption that he had a constitutionally protected liberty interest in maintaining a relationship with Victoria, and that the state’s interest in protecting the marriage of Gerald and Carole was “insufficient . . . to support termination of that relationship.”

The plurality rejected Michael’s claim and held that he had no fundamental liberty interest. The Court stated that the liberty interest must not only be “fundamental,” but also “be an interest traditionally

57. Michael H., 491 U.S. at 116. Victoria also raised a due process challenge “seeking to preserve her de facto relationship with Michael as well as with Gerald.” Victoria’s challenge asserted that her equal protection rights had been violated because § 621 allows the husband and mother, but not the child, to rebut the presumption of legitimacy. Victoria also asserted rights to visitation with Michael under § 4601. See supra notes 48 and 56.

58. Id. (citing Michael H. v. Gerald D., 236 Cal. Rptr. 810 (Ct. App. 1987)). The court relied on California precedent in holding that when “an assertion of biological paternity is ‘determined to be legally impossible’ under § 621, visitation against the wishes of the mother should be denied under § 4601.” Id. (quoting Vincent B. v. Joan R., 179 Cal. Rptr. 9, 13 (1981), appeal dismissed, 459 U.S. 807 (1982)).

59. Michael H., 491 U.S. at 116-17. Both Michael and Victoria raised due process and equal protection challenges. However, Michael’s equal protection challenge was not reached because of his failure to raise it in prior proceedings. Id.

60. Id. at 121.

61. Id. at 120 (footnote omitted).

62. Id. at 119.

63. Id. at 121.
protected by our society."64 A traditional interest was defined as linked to the "conscience" of our society and reflecting society's underlying values.65 The Court noted that cases upholding parental rights rested not on the fundamental rights of the putative fathers, but instead, on the "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."66 The Constitution protects the relationships found in the unitary family and Michael's claim was an intrusion on that entity. Michael's right to assert paternity and rebut the marital presumption was not fundamental and, therefore, did not qualify as a protected liberty interest.67 The plurality stated: "Where . . . the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."68 Consequently, the Court denied Michael relief and upheld California's decision to protect the unitary family from intrusion by denying the putative father standing to rebut the marital presumption of legitimacy.69

C. The Dissent

The dissenting Justices70 recognized that a putative father who has developed a relationship with his child should not be summarily denied standing to rebut the marital presumption.

Justice Brennan71 criticized the plurality's examination of a puta-

64. Id. at 122 (footnote omitted).
65. Id. at 122-23 (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)).
66. Id. at 123 (footnote omitted).
67. Id. at 124-25. In an attempt to justify the historic basis of his decision, Justice Scalia examined the common law background which established the presumption of legitimacy attaching to a child born to a married woman. He found no case law granting standing to the natural father in these circumstances. Id.
68. Id. at 129.
69. Id. at 130-32. Justice Stevens concurred in the plurality's decision but used a different rationale in addressing Michael's liberty interest. Justice Stevens did not want to "foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this." Id. at 133 (Stevens, J., concurring). Justice Stevens asserted that, on the basis of Michael's relationship with Victoria, he might have a constitutional right to prove that visitation might be in the best interests of Victoria. Id. However, Justice Stevens stated that Michael's rights had not been violated because he had an opportunity to assert visitation under another statute. Id.
70. Justice Brennan wrote a dissenting opinion in which Justices Marshall and Blackmun joined. Id. at 136-57. Justice White wrote a separate dissent in which Justice Brennan joined. Id. at 157-63.
71. Id. at 136 (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.). Justice Brennan noted that five of the Justices remained open to the possibility that "a natural
tive father's interest. He stated that the proper question was not whether the specific relationship between Victoria and Michael was a traditionally protected family unit, but whether their relationship was "close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well" and, therefore, substantial enough "to qualify as a liberty interest under our prior cases." After examining prior case law, Justice Brennan determined that the biological link of an unwed father coupled with a "substantial parent-child relationship" should afford a putative father a protected liberty interest. Justice Brennan concluded that the state's interest was "minute" in comparison with that of a putative father's attempt to establish a relationship with his child.

Justice Brennan restated the issue to emphasize the procedural flaws in the California scheme: "The question before us, therefore, is whether California has an interest so powerful that it justifies granting Michael no hearing before terminating his parental rights." Following an examination of the state's interest in preserving the privacy of the marital family, Justice Brennan concluded that the state's interest did not support a denial of Michael's and Victoria's interests in establishing their parent-child relationship. This conclusion, Justice Brennan stated, did not infringe on the issue of visitation rights which may be denied as not being in Victoria's best interest. Instead, it meant that Michael's right should not be terminated prior to an opportunity to establish paternity.

Justice White authored a separate, dissenting opinion. Although Justice White agreed with Justice Brennan that Michael had "a liberty interest that cannot be denied without due process of the law," he grounded his opinion on prior case law which recognized a natural father's protected interest in establishing a relationship with his child, and analyzed the impact of these cases on Michael's claim.

father might . . . have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." Id. (quoting Justice Stevens' concurring opinion).

72. Id. at 142.
73. Id. at 142-45. For a discussion of prior case law, see supra note 45.
74. Michael H., 491 U.S. at 142-43.
75. Id. at 148.
76. Id. at 154.
77. Id. at 155.
78. Id. at 156.
79. Id. at 157 (White, J., dissenting, joined by Brennan, J.).
80. Id.
81. Id. at 158-60; see supra note 45 for a discussion of the relevant cases. See also infra text accompanying notes 129-40.
Under this analysis Justice White concluded that because of Michael's emotional relationship with Victoria, his contribution to her support, and Carole's admission that he might be Victoria's father, Michael had established a sufficient liberty interest to be protected by the Due Process Clause of the Fourteenth Amendment. Consequently, under the facts of this case, he concluded that Gerald's knowledge of Carole and Michael's extramarital relationship negated the kind of intrusion the state attempted to protect.82

Although the plurality held that a putative father in Michael's predicament did not have a fundamentally protected liberty interest in maintaining a relationship with his child, the dissenting Justices disagreed. Unlike Justice Scalia who distinguished prior case law83 dealing with the rights of putative fathers, Justices Brennan and White relied on that same prior case law to find that the existence of a substantial relationship between the putative father and child was sufficient to overcome the state's fear of intrusion on the family caused by an assertion of paternity.

In C.C. v. A.B.,84 a case raising similar issues, the Massachusetts Supreme Judicial Court adopted the reasoning of the dissenting Justices.

III. C.C. v. A.B.:85 THE MASSACHUSETTS SUPREME JUDICIAL COURT’S VIEW OF THE PUTATIVE FATHER’S RIGHT TO STANDING TO REBUT THE MARITAL PRESUMPTION OF LEGITIMACY

In 1990, the Massachusetts Supreme Judicial Court was faced with a case factually similar to Michael H. Contrary to the United States Supreme Court's decision in Michael H., the Supreme Judicial Court held in C.C. v. A.B. that a putative father was entitled to standing to adjudicate paternity if he could prove in a preliminary hearing that a substantial relationship existed between him and his child.86

A. Facts

C.C. lived with the mother, A.B., during the time that A.B. was

82. Id. at 162.
83. See supra note 45 for a discussion of the relevant cases.
86. C.C., 550 N.E.2d at 372-73.
estranged from her husband. A child was conceived and born during this period of cohabitation.\textsuperscript{87} At birth, C.C.'s surname and a derivation of his middle name were given to the child. C.C. was listed as the father on the child's birth certificate and baptismal record. Until the termination of his relationship with A.B., C.C. claimed that he "cared for"\textsuperscript{88} the child. C.C. filed a complaint alleging that he was the biological father of the child. He asserted a right to adjudicate his paternity and a fundamental right to maintain a relationship with his child.\textsuperscript{89}

A.B. acknowledged that C.C. could be the child's father. Following the termination of A.B. and C.C.'s relationship, A.B. filed a custody and child support proceeding against C.C.\textsuperscript{90} However, at the time of this action, A.B. had reconciled with her husband and withdrawn the custody and support proceedings.\textsuperscript{91}

**B. The Majority Opinion Granting Standing to a Putative Father to Rebut the Marital Presumption of Legitimacy**

The Supreme Judicial Court recognized that a putative father has a protected interest in maintaining a developed relationship with his child. The court based its decision on an examination of the statutes under which the paternity suit was filed, the common law approaches

\textsuperscript{87} Id. at 367.

\textsuperscript{88} Id. The child was born May 19, 1986 and was baptized October 27, 1986. Id. The case does not specify the length of time that C.C. and A.B. cohabited.

\textsuperscript{89} Id. The complaint was filed under the General Laws of the Commonwealth of Massachusetts (hereinafter Massachusetts General Law) chapter 209C, § 5(a) (1988), which states in relevant part:

(a) Complaints under this chapter to establish paternity, support, visitation or custody of a child may be commenced by the mother, whether a minor or not; by a person presumed to be or alleging himself to be the father, whether a minor or not; by the child; by the child's guardian, next of kin, or other person standing in a parental relation to the child; by the parent or personal representative of the mother if the mother has died or has abandoned the child; by the parent or personal representative of the father if the father has died; by the authorized agent of the department of social services or any agency licensed under chapter twenty-eight A provided that the child is in their custody; or, if the child is or was a recipient of any type of public assistance, by the department of public welfare; provided, however, that if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.


\textsuperscript{90} C.C., 550 N.E.2d at 367.

\textsuperscript{91} Id. The Supreme Judicial Court granted an application for direct appellate review after the probate court judge reported the case to the appeals court. The case was heard on September 13, 1989, and decided on February 21, 1990. Id. at 365, 367.
to the presumption of legitimacy, and the constitutional cases which established that a putative father has a protected interest if a parent-child relationship exists.

1. Statutory Analysis: The Purpose and Effect of Massachusetts General Law chapter 209C, Section 5(a)

The court, in an opinion authored by Justice Nolan, initially considered the terms of the statute under which the suit was filed. The statute's purpose was to establish a means for children born out of wedlock to be acknowledged by their parents. This provision contains a number of exclusions, one of which pertains to those situations in which the mother of the child "was or is married and the child's birth occurs during the marriage or within three hundred days of its termination." This provision does not allow standing to adjudicate paternity by one alleging himself to be the father "unless he is or was the mother's husband at the time of the child's birth or conception." C.C. alleged that the exclusion was unconstitutional. However, the court pointed out that "[i]n our view, G.L. c. 209C, § 5 (a), does not abrogate or modify a putative father's right, as established by prior cases of this court, to bring a complaint to establish paternity under the general equity jurisdiction of the Probate Court."

The court held that although chapter 209C section 5(a) bars a putative father from bringing an action under this chapter, section 5(a) does not limit a putative father's rights to proceed under the general equity jurisdiction of Massachusetts General Law chapter 215, section 6. The court distinguished other Massachusetts statutes to deter-

---

92. For the text of Massachusetts General Law chapter 209C, § 5(a), see supra note 89.
93. C.C., 550 N.E.2d at 368.
94. Id.
95. Id. (quoting MASS. GEN. L. ch. 209C, § 5(a) (1986)). See supra note 89 for the current version of this statute.
96. C.C., 550 N.E.2d at 368. Chapter 209C § 5(a) limits the persons who may sue under this section to "the mother, the alleged father, the child, a person legally standing in the place of a parent or the child, or certain governmental agencies providing financial support or foster care." Brief for Appellant at 10, C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (No. 5134). If the mother were married at the time of the child's birth or conception, no man other than her then existing husband may sue under this section. Id. at 11. As the court correctly stated, the language of the statute does not preclude a putative father from filing suit under the general equity provision. For the language of the statute, see supra note 89; for the general equity provision, see infra note 97.
97. C.C., 550 N.E.2d at 368. Massachusetts General Law chapter 215 § 6 provides in relevant part: "The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all
mine generally the rights of putative fathers. As a result, it recognized that, consistent with other Massachusetts statutes permitting paternity actions, a putative father was not summarily foreclosed from bringing a paternity action because there were opportunities available through other statutory mechanisms. Having decided that a putative father was not procedurally barred from filing a paternity action, the court turned to a substantive analysis to determine in what circumstances the putative father should be granted standing.

2. Substantive Analysis: The Presumption of Legitimacy

Following an in-depth examination of the origin and purpose of the presumption of legitimacy and the standard used to rebut it,


99. C.C., 550 N.E.2d at 367-72. The presumption evolved from one that was conclusive to one that could be rebutted by proof beyond a reasonable doubt that the husband could not be the father. The conditions to be proven are that: “(1) the husband had no access to the wife during the time of possible conception; (2) the husband was impotent; or (3) a properly conducted blood grouping test, administered by a qualified expert, definitively excludes the husband as a father.” In re J.S.V., 524 N.E.2d 826, 827-28 (Mass. 1988) (denying standing to adjudicate paternity to a putative father who offered no facts to overcome the presumption of legitimacy, in the context of a proceeding to dispense with the need for parental consent to adoption). Justice Nolan abrogated Lord Mansfield’s Rule concerning the husband’s or wife’s incompetence to testify to non-access. C.C., 550 N.E.2d at 371. See also supra text accompanying notes 30-45.


In 1987, the Supreme Judicial Court used the substantial relationship test to decide the case of R.R.K. v. S.G.P., 507 N.E.2d 736 (Mass. 1987). In this case, a putative father sought visitation rights to his child who was conceived during the mother’s marriage to another. Id. at 737. After blood tests of the putative father, mother and child, limited visitation rights were granted to the putative father. Id. The putative father also was ordered to pay support. Id. The mother filed a motion to dismiss the paternity suit because of lack of standing. Id. Because the father and child had developed a relationship, the court remanded the case for findings beyond a reasonable doubt that R.R.K. was the father.
the court reduced the case to one succinct issue: the conflict between
the interest of the unwed putative father, C.C., and the interests of the
state in preserving the legitimacy of the child. The court continued to
adhere to the principle of the presumption of legitimacy and the strong
interest in legitimizing children.\textsuperscript{101} However, the court stated that the
presumption of legitimacy no longer required rebuttal by facts beyond
a reasonable doubt. Instead, the court established a new standard
which would preserve the interests of those involved "by requiring
that a putative father in the plaintiff’s position be required to prove
paternity by clear and convincing evidence."\textsuperscript{102} According to the
court, because the putative father deserved greater recognition, a bet­
ter allocation of the risks of error was necessary. A clear and convinc­
ing evidentiary standard would serve the purpose of affording
legitimacy to the child while at the same time recognizing the putative
father’s interest.\textsuperscript{103}

The court then focused on the evidentiary proof of paternity. The
common law approach to the presumption of legitimacy prevented a
court from reaching the issue of paternity because the child was pre­
sumed to be the husband’s child. However, because of advancements
in scientific technology, determinations of paternity have been ren­
dered more accurate. Therefore, the court reasoned that the putative
father should be allowed to produce evidence of his paternity. Ac­
cording to the court, the prior standard, which required proof beyond
a reasonable doubt of the husband’s impotence, non-access, or exclu­
sion as the father, could no longer be justified. These factors, the court
stated, remain relevant to the issue of the putative father’s biological
status, but are not dispositive.\textsuperscript{104}

The court maintained that, in a factual situation similar to this
case, a putative father is entitled to bring an action to establish pater­
nity pursuant to the general equity provision of Massachusetts Gen-

\textsuperscript{101.} \textit{C.C.}, 550 N.E.2d at 370.

\textsuperscript{102.} \textit{Id.}

\textsuperscript{103.} \textit{Id.}

\textsuperscript{104.} \textit{Id.} \textit{See also} Michael H. v. Gerald D., 491 U.S. 110, 140-41 (1989) (Brennan,
J., dissenting, joined by Marshall & Blackmun, JJ.). Justice Brennan stated:

[The original reasons for the conclusive presumption of paternity are out of place
in a world in which blood tests can prove virtually beyond a shadow of a doubt
who sired a particular child and in which the fact of illegitimacy no longer plays
the burdensome and stigmatizing role it once did.]

\textit{Id.} at 140.
eral Law chapter 215, section 6. 105 Because C.C. had developed a substantial relationship with his child, the court ruled that C.C. should be allowed to pursue a paternity action. 106 The court concluded that the existence of a substantial parent-child relationship "is an appropriate prerequisite for the commencement of an action such as this." 107

Thus, the court held that when a putative father asserts a paternity suit, the probate court must hold a preliminary hearing to determine the extent of the relationship between putative father and child. 108 This question is fact based, and, consequently, certain factors must be considered by the court in examining the relationship. 109

According to the court in C.C., establishing a substantial parent-child relationship protects the marital unit from intrusion. 110 The court noted that a paternity action places a "strain" on the marital unit. Therefore, to preserve the state's interest, in the absence of clear and convincing evidence of a substantial father-child relationship, the putative father should not be allowed to proceed with his claim beyond a preliminary hearing. However, the existence of a substantial relationship is evidence that the family unit has already suffered interference. The court reasoned that, where a substantial relationship exists, the burden on the family is minimized and the importance of the state's interest is lessened. Consequently, the putative father should be permitted to pursue a paternity action. 111

105. C.C., 550 N.E.2d at 372. For the relevant text of chapter 215, § 6, see supra note 97.
106. C.C., 550 N.E.2d at 372.
107. Id. In making this decision the court also relied on the United States Supreme Court cases that established a putative father's right to adjudicate paternity if a parent-child relationship existed. For a discussion of these cases, see supra note 45; see also infra text accompanying notes 129-40.
108. Id.
109. Id.; see infra notes 118-23 and accompanying text.
110. C.C., 550 N.E.2d at 372-73.
111. Id. Because of this holding, it was unnecessary for the court to address the issue of Massachusetts General Law chapter 209C, § 5(a), and C.C.'s denial of due process. Justice Nolan also did not address the issue of what further rights a putative father would have if he were able to prove that a substantial relationship did exist between himself and his child. That determination would depend on the best interests of the child. Id. at 373.

The court limited its decision to the conclusion that C.C. "should be given the opportunity to prove paternity," and the case was remanded to the probate court. Id. A.B.'s motion to dismiss the action was denied. Id.

Justice O'Connor, joined by Justice Lynch, dissented on two grounds. First, Justice O'Connor asserted that the majority misapplied the substantial relationship test. Second, he maintained that the decision created an inconsistency between the stated policy and legislative mandate of chapter 209C. Id. at 373.

Justice O'Connor stated that the substantial relationship test is important when a child
IV. THE SUBSTANTIAL RELATIONSHIP TEST: ACQUIRING STANDING TO REBUT THE PRESUMPTION OF LEGITIMACY

Although the United States Supreme Court and the Massachusetts Supreme Judicial Court analyzed factually similar cases, their conclusions are markedly different. The distinguishing feature between the decisions is the establishment by the Supreme Judicial Court of a procedure enabling a natural father to gain standing to rebut the presumption of legitimacy. The Supreme Judicial Court took a more realistic approach by recognizing that a developed parent-child relationship acknowledged the interests of the putative father and caused only minimal intrusion on the family unit.

The difference between allowing or denying a putative father standing to rebut the marital presumption lies in the interpretation given to prior cases. The United States Supreme Court analyzed earlier cases dealing with putative fathers' rights and concluded that those cases were distinguishable because the parties were unwed and the marital presumption was not an issue. The Supreme Judicial Court, on the other hand, analyzed these same cases and found that

is born out of wedlock to an unmarried mother. However, the reasoning is different when a child is born to a married woman. The dissent stated:

Because the "unitary family" accorded traditional respect may include the putative father, mother, and child born out of wedlock, but does not include the mother, child born in wedlock, and the mother's lover, the substantial parent-child relationship test applicable in the former context has no relevancy to the latter either as a matter of constitutional analysis or for policy formation purposes. Id. at 374-75.

For several reasons, Justice O'Connor believed the majority misapplied the use of the substantial relationship test. First, the holding of Michael H. clearly stated that a putative father in C.C.'s position "does not have a constitutionally protected interest in obtaining an adjudication that he is the father of the child." Id. at 375. Justice O'Connor conceded that the majority did not claim that C.C. did have such a right. Id. Second, he maintained that the majority wrongly decided, "as a matter of judicially declared policy (common law)," that a putative father is entitled to a paternity adjudication if a substantial parent-child relationship can be demonstrated. Id.

Justice O'Connor argued that the court also erred in establishing a new policy that was contrary to the legislative mandate as established by the enactment of chapter 209C, precluding a putative father from standing to adjudicate paternity. He noted that the social policy motivating the passage of this statute was the protection of the unitary family which included a mother, her husband, and her child. This provision foreclosed a putative father in C.C.'s position from attacking both the family's harmony and the legitimacy of the child. Id. Consistent with the United States Supreme Court ruling in Michael H., and Massachusetts legislative mandate and interests, he stated that a putative father should not have standing to adjudicate paternity if the child were conceived by and born to a married woman. Id. at 376.

112. See supra note 45.
they manifested an evolution of the rights granted to putative fathers in general.113 The court concluded, therefore, that to allow putative fathers the opportunity to rebut the presumption of legitimacy was only one more step in that evolutionary process.

Consequently, the Supreme Judicial Court found a mechanism through which a putative father could be granted standing. By using the general equity jurisdiction of the probate court under Massachusetts General Law chapter 215, section 6,114 the court paved the way for a putative father to establish paternity. In an attempt to maintain the interests of the state in legitimizing children and protecting the family from intrusion, it established the substantial relationship test.115

If the United States Supreme Court had used this same reasoning in examining the statutes at issue in Michael H., Michael would have been able to enter the preliminary stages of a paternity adjudication. Consequently, if he successfully proved the existence of a developed relationship with Victoria, he would be allowed to pursue his claim. Furthermore, the California court would be less likely to deny him visitation rights unless these were not in the best interests of his child.116

Unlike the United States Supreme Court, the Massachusetts Supreme Judicial Court recognized in the general equity statute a procedural loophole for putative fathers who faced the marital presumption. The court justified this equitable avenue for putative fathers based on substantive arguments that recognized the substantial relationship test as a preliminary inquiry into granting putative fathers' claims.117

113. C.C., 550 N.E.2d at 370.
114. Id. at 372. For the relevant text of Massachusetts General Law chapter 215, § 6, see supra note 97.
115. C.C., 550 N.E.2d at 372.
116. Justice Stevens reasoned that Michael had proven a developed relationship with Victoria, and although he was precluded from asserting paternity under California Evidence Code § 621, he could prove that he was an interested party under California Civil Code § 4601. For discussions and the relevant parts of §§ 621 and 4601, see supra notes 48-49, 56 respectively. The court would examine whether visitation was in the best interests of the child and grant or deny the visitation petition. The trial judge took this approach and found that “the existence of two (2) ‘fathers’ as male authority figures will confuse the child and be counter-productive to her best interests.” Michael H. v. Gerald D., 491 U.S. 110, 135 (1989) (Stevens, J., concurring) (quoting Michael H. v. Gerald D., 236 Cal. Rptr. 810, 821 (Ct. App. 1987)); see also Batty, supra note 47, at 1202.
117. See supra notes 30 and 45 for a discussion of the relevant Massachusetts and United States Supreme Court cases dealing with putative fathers and the substantial relationship issue.
A. The Massachusetts Test

The substantial relationship test adopted by the Supreme Judicial Court acknowledges changes in American lifestyles.118 Furthermore, it recognizes the interests of a putative father in maintaining a relationship with his child; it creates minimal intrusion because a developed relationship may be evidence that the family is aware of the circumstances of the child's birth; and it addresses the need to afford legitimacy to the child and minimizes the psychological damage resulting from a paternity adjudication.

In a preliminary stage, the putative father must prove by clear and convincing evidence that a substantial parent-child relationship exists between himself and the child.119 This test balances the natural father's interest in maintaining a parent-child relationship with the state's interests in affording legitimacy to children and protecting the marital family from intrusion.

The court chose a test which is fact-based.120 It instructed the probate court to "look at the relationship as a whole."121 In doing so, the court must consider "emotional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative father to attending to the child's needs, the consistency of the putative father's expressed interest, the child's name, [and] the names listed on the birth certificate."122 Along with this objective evidence, the court has the discretion to consider "any other factors which bear on the nature of the alleged parent-child relationship."123

118. See generally Batty, supra note 47, at 1203 ("The number of 'illegitimate' births, as a percentage of all births, increased from 5.3% in 1960 to 22% in 1985."); Vincent A. Errante, Jr., Note, Putative Fathers and Ganim v. Roberts: A Fundamental Right?, 3 CONN. PROB. L.J. 417, 417-24 (1988) (providing statistics indicating the steadily increasing numbers of illegitimate children being born in the United States in recent years). Nation­wide, between 1980 and 1983, the number of out of wedlock births rose from 18.4% to 20%. SIDNEY B. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 27.01 (1991).

119. C.C., 550 N.E.2d at 373. It must be noted that a putative father without a developed parent-child relationship will gain no access to the courts under the Massachusetts standard, and will be left in the same position as Michael H. A putative father who wishes to establish a parent-child relationship may be precluded from doing so by the mother. Thus, the will of the mother may foreclose a putative father from adjudicating paternity. Under this scenario, the result is the same under both the Michael H. and C.C. standards. See also Mary K. Kisthardt, Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D., 65 TUL. L. REV. 585, 626 (1991).

120. C.C., 550 N.E.2d at 372.

121. Id.

122. Id.

123. Id. For a guide to the filing of paternity actions consistent with the C.C. standard, see generally Robert E. Hanlon, Paternity Cases Filed in Equity, 8 MASS. B. ASS'N
B. Application of the Test

The court applied the substantial relationship test in evaluating C.C.'s assertion. The distinguishing features of C.C.'s claim show that his position as biological parent is enhanced by significant factors. He is the named father on the child's birth certificate and baptismal record; the mother, child, and C.C. lived together after the child's birth; and the child has a derivation of his name.\textsuperscript{124} The filing of his paternity action exhibits his desire to continue to maintain and foster a relationship with the child.

The Supreme Judicial Court's standard distinguished Massachusetts precedent which denied putative fathers standing to adjudicate paternity because of the non-existence of a parent-child relationship.\textsuperscript{125} The existence of such a relationship is "the controlling factor in determining whether this plaintiff may pursue his claim,"\textsuperscript{126} because the putative father is seeking to renew a developed parent-child relationship of which he was deprived.\textsuperscript{127} Due process is necessary

\begin{footnotesize}
\begin{enumerate}
\item C.C., 550 N.E.2d at 372.
\item Id. Standing will be denied if there is no evidence of the existence of a parent-child relationship.
\item Id. The Massachusetts Supreme Judicial Court affirmed its position in two subsequent decisions. In November 1990, the Supreme Judicial Court found that the absence of a substantial parent-child relationship barred the putative father from asserting his paternity. \textit{In re Walter}, 562 N.E.2d 474 (Mass. 1990). In \textit{Walter}, the Supreme Judicial Court upheld a lower court's denial of a motion filed by the Boston Children's Legal Services Association to compel the husband to submit to blood tests. In this case, the mother conceived and gave birth to a child during her marriage. \textit{Id.} at 475. One day after the child's birth, she placed the child for adoption. She claimed that her husband was not the biological father although she listed him as the father on the birth certificate. \textit{Id.} Because the husband had asserted his parental rights to the child and the putative father did not have any relationship with the child, the court upheld the husband's challenge to the adoption and the denial of the putative father's paternity claim. \textit{Id.} at 476-77. Although this case appears to be a return to the presumption of legitimacy established by Massachusetts General Law chapter 209C, upon closer examination the decision does not supersede the holding of C.C. In a case such as \textit{Walter}, no developed relationship existed between the biological father and the child nor the "legal" father (the husband) and the child. To be consistent with the purpose of 209C which affords "out of wedlock children" an opportunity to be "legitimized," the court upheld the husband's status as father.

In June 1991, the court rejected a putative father's action to establish paternity because of the absence of a substantial relationship. In \textit{M.J.C. v. D.J.}, 572 N.E.2d 562 (Mass. 1991), the putative father of a child born to a woman who was married to someone else at the time of the child's conception and birth sought to establish paternity. Approximately two weeks to four months after the child's birth, the putative father visited the mother and child two or three times a week staying an average of ninety minutes each visit. \textit{Id.} at 563-64. Although the child remained in the room during the first two months of these visits, during the last two months the child usually slept in a second floor bedroom and the putative father's visits were more sporadic. \textit{Id.} at 565-66. The court found that the child did not have a substantial relationship with the putative father and therefore denied his petition to establish paternity.
\end{enumerate}
\end{footnotesize}
because the unwed biological father has an interest in furthering a
developed relationship with his child.128

The substantial relationship test balances all interests involved
and creates an equitable standard for all parties. It gives the putative
father an opportunity to assert paternity and maintains the state's in­
terests in protecting the marital family and in affording the child
legitimacy.

Although the Supreme Judicial Court stated that all interests are
adequately protected, in order to determine whether the substantial
relationship test performs its intended purpose, the interests of all the
parties must be identified and independently evaluated.

1. The Interests of the Biological Father

The putative father's protected interest is the right to maintain a
relationship with his child. The interests of unwed fathers are estab­
lished in a line of Supreme Court cases beginning with Stanley v. Illi­
ois.129 In this custody case, an unwed father sought due process
protection from a denial of a hearing on fitness. The Supreme Court
declared: "The private interest here, that of a man in the children he
has sired and raised, undeniably warrants deference and, absent a
powerful countervailing interest, protection."130 In a subsequent case,
in which the Supreme Court examined these interests, Justice Stewart
wrote in his dissenting opinion that "[p]arental rights do not spring
full blown from the biological connection between parent and child.
They require relationships more enduring."131 Thus, a man may ac­
quire constitutional protection if he has developed a sufficient relation­
ship between himself and his child.

128. C.C., 550 N.E.2d at 372 (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983)).
130. Id. at 651.
supra note 45.
Unlike the putative father, the mother's relationship to her child is clear.

She carries and bears the child . . . . The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. . . . In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.\(^{132}\)

The Supreme Court agreed that "a biological link does not merit equivalent constitutional protection."\(^{133}\) This link creates an opportunity to accept the responsibility for the child while enjoying the parental relationship. However, if the biological father does not seize the opportunity, the Constitution will not grant him one.\(^{134}\)

The dissenting Justices\(^{135}\) in *Caban v. Mohammed*\(^{136}\) noted that the biological father who develops a relationship with his child is entitled to protection against arbitrary state action.\(^{137}\) In *Quilloin v. Walcott*,\(^{138}\) Quilloin was denied his opportunity to object to the adoption of his child, because, although he paid child support, "he ha[d] never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."\(^{139}\) Quilloin had no desire to seek custody nor to complain about his lack of access to the child. Consequently, on the basis of the nonexistence of any parent-child relationship, the Court found that Quilloin had no constitutionally protected interest.\(^{140}\)

These cases, as well as those decided by the Massachusetts Supreme Judicial Court, turn on the existence of a parent-child relationship and suggest that this relationship is the governing factor.\(^{141}\)


\(^{133}\) *Lehr*, 463 U.S. at 261.

\(^{134}\) *Id.* at 262.


\(^{136}\) 441 U.S. 380 (1979). For a discussion of this case, see *supra* note 45.

\(^{137}\) *Id.* at 392-94.

\(^{138}\) 434 U.S. 246 (1978). For a discussion of this case, see *supra* note 45.

\(^{139}\) *Quilloin*, 434 U.S. at 256.

\(^{140}\) *Id.*

\(^{141}\) Batty, *supra* note 47, at 1201. "The *Stanley* line of cases stands for the proposition that once a putative father has developed a parental relationship, that relationship
If the father has not developed an association with his child, he is estopped from asserting paternity. The opportunity given to attain standing to rebut the presumption of legitimacy in this preliminary hearing preserves the putative father's interest if he takes the initiative to establish a relationship with his child from the child's birth.

2. The Interests of the State

Even if the parent-child relationship exists, in order for the substantial relationship standard to accomplish its purpose, it must consider not only the putative father's interests but those of the state as well. According to the Massachusetts Supreme Judicial Court, the Commonwealth has a twofold interest. The state must protect the privacy interests of the marital family against intrusion and preserve the legitimacy of the child.

Despite numerous changes in the family unit's composition as a result of current lifestyles, the Commonwealth maintained that "[t]he traditional family unit is at the core of our society." The United States Supreme Court acknowledged that substantial disruption of the marital family may result from a paternity claim. This strain is what the plurality in *Michael H.* attempted to prevent. However, the Supreme Judicial Court concluded that if a plaintiff can prove that a substantial parent-child relationship exists, the marital family will have anticipated the claim of paternity. Nonetheless, the state's interests in protecting the mother's and her husband's interests must be weighed against those of the putative father.

The mother's interest is to protect her family and marriage. A paternity suit, even in a preliminary stage, places a strain on the family in general and the marriage in particular because it is a reminder of a former relationship and may threaten the mother's relationship with her husband. As a result of this increased tension, the relationship between the mother and child may also suffer. More importantly, the mother may be concerned that the results of a paternity suit would stigmatize the child. If the putative father succeeds in his suit and

---

143. Id. at 373.
144. Id.
145. Meiners, *supra* note 30, at 1226. For a discussion of a mother's rights and duties see *Clark, supra* note 1, § 4.5 at 197-201; *Krause, supra* note 14, at 28-29.
146. Id.
147. Id. In effect, the child would be considered illegitimate. Id.
eventually gains visitation rights, the court will gain supervisory control over the parent-child relationship.148 Even if in the past the mother allowed the putative father to visit the child, she was able to control the extent of the intrusion on her family.149 A successful paternity suit would place control of visitation in the courts, leaving the mother with court imposed compliance.150

The husband’s interests are similar to those of the mother. The husband also wishes to maintain his family’s privacy and protect his relationship from the reminder of a past transgression. In addition, a successful paternity suit can create two disturbing results: either the husband is left without paternal status as if he had disavowed paternity, or he, as legal father, will share dual paternity with the biological father in an unclear division of obligations and rights.151

The interests of both the mother and her husband must be protected. If a putative father has developed a substantial relationship with his child, the husband may already know that there is a possibility that the child is not his. Thus, the chances of intruding on an apparently intact marriage and harmonious family life are minimized. Conversely, if the putative father is unable to meet his burden of proof, his paternity suit will be denied and no further intrusion will occur.

When a putative father asserts paternity of a child born into a marital family and the husband is aware of the putative father’s existence, the intrusion on the marital family is minimal. Justice Scalia recognized that “it is more likely that the husband already knows the child is not his, and thus less likely that the paternity hearing will disrupt an otherwise harmonious and apparently exclusive marital relationship.”152 Ironically, this argument supports the Supreme Judicial Court’s conclusion.

To minimize further intrusion, the substantial relationship test looks more realistically at all relevant circumstances. The factors utilized are objective and can often be proven with documentation such as birth certificates and derivative names. It is likely that if any of the enumerated factors exists, the husband will be aware of the extant circumstances surrounding the child’s birth and will not be shocked by the proceedings. Granting the putative father a preliminary hearing to

148. Id.
149. Id.
150. Id.
151. Id.
152. Michael H. v. Gerald D., 491 U.S. 110, 120 n.1 (1989) (Scalia, J., wrote for the plurality joined by Rehnquist, C.J., and, in all but note 6, by O’Connor & Kennedy, JJ. Id. at 113-32; see supra note 5).
prove the existence of a substantial parent-child relationship is less intrusive on the family and preserves the state’s interests.\textsuperscript{153}

The second state interest is to afford legitimacy to children. Both statutes and the common law reflect society’s view that “discrimination against illegitimate children is not justified.”\textsuperscript{154} The Commonwealth’s enactment of Massachusetts General Law chapter 209C contemplates removing the stigma of illegitimacy and granting to children the same rights which all children possess.\textsuperscript{155} The evidence needed to verify the substantial relationship test creates minimal infringement on the child and the child’s legitimacy.

3. The Interests of the Child

The substantial relationship test recognizes not only the need to afford legitimacy to the child, but also the best interests of the child. If a relationship exists between the putative father and his child, denying the putative father access to the child contradicts the state’s purpose. Most experts agree that a child needs continuity in intimate relationships.\textsuperscript{156} When a child is separated from someone with whom the child has developed a relationship, the child’s ability to form attachments is damaged.\textsuperscript{157} The substantial relationship test seeks to minimize this damage by allowing a putative father the opportunity to prove an established relationship. Although having two “fathers” may confuse the child, this argument is shortsighted.\textsuperscript{158} It fails to consider that a child has developed a relationship outside of the marital

\textsuperscript{153} If the putative father is able to sustain his burden of proof at this preliminary stage, he will attain standing to assert a paternity claim. The Supreme Judicial Court lowered the burden of proof of paternity to “clear and convincing evidence.” C.C. v. A.B., 550 N.E.2d 365, 370 (Mass. 1990). Because of the accepted use of blood tests to establish paternity, an intrusion into the private lives of the parties is not necessary. Though the court abrogated Lord Mansfield’s Rule and gave the husband and wife the opportunity to testify to non-access and impotency, such testimony is not necessary. A blood test is a far more convincing fact. The Human Leukocyte Antigen (“HLA”) blood test is recognized as “the most precise method for accurately determining paternity. It is generally accepted that the HLA test, when used in conjunction with other tests, can establish as high as a 99 percent probability that a particular man is, in fact, the biological father of a particular child.” See Schatkin, supra note 118, §11A.01. The accuracy of a blood test combined with the lower evidentiary standard allows a court to determine paternity without the need for evidence as to infidelity or impotency.

\textsuperscript{154} C.C., 550 N.E.2d at 369.

\textsuperscript{155} Id. at 370.

\textsuperscript{156} Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 Va. L. Rev. 879, 944 (1984); see also Kisthardt, supra note 119, at 630-31 (1991).

\textsuperscript{157} Bartlett, supra note 156, at 903.

\textsuperscript{158} Id. at 882.
family. It also fails to consider the similarities between the putative father’s situation and that of natural parents who have been separated from their children through divorce.

A child’s sense of security is established through a knowledge of her past. A child that has developed a relationship with her putative natural father and who is subsequently separated from him is likely to suffer the same problems as children who are separated from their parents. In cases in which a child is separated from a parent with whom she has a developed relationship, unrealistic ideas or fantasies replace reality, only offering the child temporary help and creating an improper foundation for the “resolution of loss.” A child’s identity develops better when she is allowed to continue her relationship with her parent. Although loyalty confusion can result from the continued existence of dual paternity, experts say that dissolving these bonds may cause greater harm. In fact, those children who maintain these concurrent relationships appear to adjust more easily.

The substantial relationship test also considers the opposing viewpoint that a child could be psychologically damaged by a paternity adjudication. By allowing only those fathers with established relationships to acquire standing, the test considers the detriment to the child of having paternity asserted by a virtual stranger. If a putative father has not established a relationship with his child, he would be an intruder in the child’s life. The absence of an individual with whom no developed relationship exists, creates no noticeable difference in the life of a young child whose sense of time causes memories to weaken within a few days. Genetics does not create “an emotional attachment” and the putative father relying solely on his paternity is an intruder against whom the state must provide protection. The test affords that protection.

159. Id. at 910.
160. Id. at 906.
161. Id.
162. Id. at 908-11 (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979) and Judith S. Wallerstein and Joan B. Kelly, The Effects of Parental Divorce: Experiences of the Child in Later Latency, 46 AM. J. ORTHOPSYCHIATRY 256 (1976)).
164. Id. at 376-78.
165. It must be remembered that this test simply grants the putative father a preliminary hearing. At this stage, no serious intrusion on the child’s legitimacy occurs. If the putative father sustains his burden of proof at this level, he will be granted standing to rebut the marital presumption. The court did not deal with the ramifications of the putative father’s success at this level. C.C. v. A.B., 550 N.E.2d 365, 373 (Mass. 1990).
The substantial relationship test protects the interests of putative fathers seeking to maintain parental relationships with their children. The Massachusetts Supreme Judicial Court reconciled the problem of a putative father seeking to rebut the marital presumption of legitimacy and establish paternity. In doing so, it recognized the benefit of preserving the parent-child relationship and acknowledged that "parenthood is not based solely on a biological connection." The court removed legal barriers which summarily denied these men an opportunity to maintain such a tie. The elimination of these impediments balances all of the state’s interests at this preliminary level. However, acquisition of standing creates consequences which must be addressed.

Parental responsibility arises when paternity is affirmed. Questions of child support and the possibility of custody battles must be considered by the court. Although proving the existence of a substantial parent-child relationship may not be a significant intrusion on the family, subsequent proceedings are potentially intrusive. Furthermore, the biological father may face a charge of adultery. Whether or not courts will grant visitation to these fathers remains an unanswered question. Most likely the court will adhere to the "best interests of the child" standard to make that determination.

Even though evidence may establish the existence of a substantial parent-child relationship, the biological father may be denied the opportunity to maintain the relationship that he was allowed to prove because the courts will consider the best interests of the child in hearing the putative father’s request for visitation. While the court grants him the opportunity to assert his rights, the putative father must be willing to face these subsequent obstacles. In recognizing the putative

166. Bartlett, supra note 156, at 924.
168. On the same day that the Supreme Judicial Court decided C.C., it decided R.J.A. v. K.A.V., 550 N.E.2d 376 (Mass. 1990). This case involved a putative father of two children born to a married woman. The putative father sought to establish his paternity and to obtain orders for custody, visitation, and child support. Id. at 377. The defendant moved for dismissal based on Massachusetts General Law chapter 209C, § 5(a) which created a presumption of legitimacy for children conceived by or born to a married woman and which denied standing to the putative father. See supra note 89. The court remanded the case to probate court to seek an adjudication of paternity consistent with the holding of C.C. R.J.A., 550 N.E.2d at 377. The court restated its position that Massachusetts General Law chapter 209C, § 5(a) does not bar a putative father from commencing a common law action for a determination of paternity. See supra note 89. The court remanded the case to probate court to seek an adjudication of paternity consistent with the holding of C.C. R.J.A., 550 N.E.2d at 377. The court restated its position that Massachusetts General Law chapter 209C, § 5(a) does not bar a putative father from commencing a common law action for a determination of paternity. Id. Justice O'Conner, joined with Justice Lynch, filed a dissenting opinion consistent with the dissent in C.C. Id. at 378.
169. C.C. v. A.B., 550 N.E.2d 365, 372 (Mass. 1990). This case was remanded to the probate court for proceedings consistent with the opinion. Id. at 373.
father’s rights, the court reflects its desire to move forward. “The common law is ‘designed to meet and be susceptible of being adapted “to new institutions and conditions of society . . . new usages and prac­tices, as the progress of society in the advancement of civilization may require.”’ 170 The Supreme Judicial Court recognized the role of the common law in evolving to reflect current societal standards. Through the substantial relationship test the Supreme Judicial Court acknowledged its role in that evolutionary process.

CONCLUSION

The Supreme Judicial Court took a realistic look at a current problem. 171 The substantial relationship test adequately balances the competing interests of the putative father and the state. It is a flexible test which can be adapted to various circumstances and its objectivity mitigates intrusion into protected interests. The probate court must grant a preliminary hearing so that the putative father has the opportunity to establish clear and convincing evidence that a substantial relationship with the child exists. If he succeeds, he will acquire standing to rebut the marital presumption and, if successful, may assert his parental prerogatives. However, if he fails, no subsequent action can be taken. The court recognizes his rights and grants him an opportunity to be heard.

T. Carmen Loconto

---

170. C.C., 550 N.E.2d at 371-72 (citations omitted).

171. According to Justice Brennan, the Supreme Court’s decision “recognized a cramped vision of ‘the family,’ ” and did not acknowledge the changing world. Michael H. v. Gerald D., 491 U.S. 110, 157 (1989) (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.). He chastised the Court and stated: “When and if the Court awakes to reality, it will find a world very different from the one it expects.” Id. See also Judith O. Brown & Phyllis T. Baumann, Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell’s America, 15 VT. L. REV. 49 (1990). “The Supreme Court resorts to another myth—that of the traditional stereotypical family—to thwart efforts to maintain constitutionally protected privacy rights. This myth does not accommodate the reality of personal relationships or domestic problems of the 1990’s.” Id. at 58.