Approved 1/29/85
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Joe Knopp at
Chairperson

3:30 ~~a.m.~~/p.m. on January 22, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Duncan and Vancrum were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes' Office

Conferees appearing before the committee:

Ron Hein, Johnson & Johnson
Bud Grant, Kansas Chamber of Commerce
Brian Moline, Kansas Judicial Council

The Chairman introduced Ron Hein, representing Johnson & Johnson, who presented the request concerning the Kansas Uniform Controlled Substances Act. He stated Johnson & Johnson's only interest was in "I. Rescheduling of Sufentanil from Schedule I into Schedule II" which is on page 2 of Attachment No. 1. He stated that this drug has a "currently accepted medical use in treatment in the United States", but Kansas citizens cannot receive the benefits of this substance until the 1985 session is complete. He requested, on behalf of the Kansas State Board of Pharmacy, that "express legislative authority be given the Board to reschedule, schedule or deschedule controlled substances on a temporary basis, subsequent to federal action".

Representative Fuller moved, seconded by Representative Harper, to introduce this proposal as a bill. It carried unanimously.

Bud Grant, representing the Kansas Chamber of Commerce, explained the request for the "Transient Merchant Licensing Act of 1985". Attachment No. 2 covers this act.

It was moved by Representative Buehler and seconded by Representative Wunsch to introduce this proposal as a bill. Motion carried.

HB 2012 - An act enacting the Kansas Parentage Act.

The Chairman introduced Brian Moline, representing the Kansas Judicial Council, who presented a proposal on changes of this bill. Mr. Moline gave some background history and the current status of the Kansas law, emphasizing that an adoption of this law would "help provide a cohesive yet flexible procedure in providing substantive legal equality for all children regardless of the marital status of their parents". He explained each section of the bill which is covered in Attachment No. 3. He pointed out that the deletion of Section 6, which would leave the area of artificial insemination identical to the Kansas Law, would help with the many serious problems raised by this practice. Attachment No. 4 states the deletion and amendments proposed for Sections 6 and 7.

The Chairman announced that the committee will be having persons come before them with bill requests which may not be announced unless they are significant.

It was moved by Representative Cloud and seconded by Representative Wunsch that the minutes of January 16, 1985, be approved. Motion carried.

The meeting adjourned at 5:00 p.m.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

LYNN E. EBEL, ATTORNEY
6602 HALSEY STREET
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913/268-5636

January 9, 1985

~~Mr. Michael Hayden~~
Speaker of the House
Capitol Building
Topeka, Kansas 66111

Re: Proposed scheduling, rescheduling and descheduling of controlled substances; and requested legislative change concerning the ability of the Board of Pharmacy to schedule, reschedule and delete controlled substances on an emergency basis

Dear Mr. Talkington:

Pursuant to K.S.A. §65-412 of the Kansas Uniform Controlled Substances Act, the Board of Pharmacy of the State of Kansas is required to report annually to the President of the Senate and the Speaker of the House regarding any proposed scheduling, rescheduling, or descheduling of controlled substances.

In compliance with said statute, the Kansas State Board of Pharmacy is proposing, for the 1985 Legislative Session, the following:

(1) Rescheduling of Sufentanil from Schedule I into Schedule II;

(2) Scheduling of Alfentanil into Schedule I;

(3) Rescheduling Methaqualone from Schedule II to Schedule I;

(4) Scheduling Bromazepam, Camazepam, Clobazam, Clotiazepam, Cloxazolam, Delorazepam, Estazolam, Ethyl Loflazepate, Fludiazepam, Flunitrazepam, Haloxazolam, Ketazolam, Loprazolam, Lormetazepam, Medazepam, Nimetazepam, Nitrazepam, Nordiazepam, Oxazolam, Pinazepam, and Tetrazepam into Schedule IV.

The Board is required to consider, in its determination regarding scheduling, descheduling, and rescheduling, the following factors:

(1) Actual/relative potential for review;

(2) Scientific evidence of pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the substance;

(4) The history and current pattern of abuse;

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(5) The scope, duration and significance of abuse;

(6) Risk to public health;

(7) Potential of the substance to produce psychological or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled.

Because of the number of controlled substances being preposed for scheduling and rescheduling this session, four separate reports addressing the above-enumerated factors are submitted for your review and information. The four reports will follow the proposal delineation which is set forth hereinabove.

I. Rescheduling of Sufentanil from Schedule I into Schedule II;

Sufentanil is a narcotic substance recently rescheduled by the DEA from Schedule I into Schedule II of the Federal Controlled Substances Act (CSA) (21 U.S.C. 801 et seq.). Attached hereto is a copy of Volume 49, No. 103 of the Federal Registrar which effects the same.

Sufentanil is a primary anesthetic agent and is used also as an anesthetic adjunct. Based on scientific and medical evaluation and recommendations of the Assistant Secretary for Health, Department of Health and Human Services, the Drug Enforcement Administration found that Sufentanil has a potential for abuse and such abuse may lead to a severe psychological or physical dependency. Furthermore, the Drug Enforcement Administration found that Sufentanil has a currently accepted medical use in treatment in the United States.

With the proposed scheduling into Schedule II, sufentanil will be available for medical treatment and use within the State of Kansas and its abuse findings are consistent with placement of the substance into such Schedule. Most of the security and control regulations for Schedule II Controlled Substances are the same for Schedule I Controlled Substances.

II. Scheduling of Alfentanil into Schedule I

The United Nations recently listed Alfentanil in Schedule I of the Single Convention on Narcotic Drugs. As the United States is a signatory member of this international treaty, the Drug Enforcement Administration placed alfentanil into the most appropriate schedule of the Federal Controlled Substances Act in order to meet the minimum requirements of the convention. The Federal Register which effects the same is attached hereto for your reference. (Federal Register, Vol. 49, No. 123, Monday, June 25, 1984).

Alfentanil is judged as having a high potential for abuse and has no currently accepted medical use in treatment in the United States. The controls required for substances placed in Schedule I would be effective to insure the health, safety and welfare of the public with respect to this drug.

III. Rescheduling of Methaqualone from Schedule II to Schedule I

Public Law 98-329 was enacted on June 9, 1984, and required the Attorney General of the United States to transfer methaqualone from Schedule II into Schedule I of the Federal Controlled Substances Act. It also required the Secretary of the Department of Health and Human Services to withdraw the approval for the new drug application for said substance. Such rescheduling and withdrawal of approval of the new drug application effectively removes methaqualone from the ability to be dispensed by pharmacists and available for prescription by medical practitioners.

In accordance with action taken by the Drug Enforcement Agency, the Kansas Board of Pharmacy desires to reschedule methaqualone from Schedule II to Schedule I to insure that medical practitioners are not able to prescribe and dispensing pharmacists are not able to dispense this controlled substance.

Withdrawal of approval of the new drug application for methaqualone has the additional affect of prohibiting any marketing of the substance for use as a prescription drug. Placement of methaqualone into Schedule I is necessary because methaqualone has a potential for abuse and no currently accepted medical use for treatment in the United States.

IV. Scheduling of Bromazepam, Camazepam, Clobazam, Clotiazepam, Cloxazolam, Delorazepam, Estazolam, Ethyl Loflazepate, Fludiazepam, Flunitrazepam, Haloxazolam, Ketazolam, Loprazolam, Lormetazepam, Medazepam, Nimetazepam, Nitrazepam, Nordiazepam, Oxazolam, Pinazepam, and Tetrazepam into Schedule IV.

In compliance with the Convention on Psychotropic Substances, 1971, the United States has temporarily controlled twenty-one (21) Benzodiazepines, into Schedule IV. The substances controlled have no accepted medical use in treatment and are currently not marketed in this country. It appears from the Federal Register, Volume 49, No. 195, Friday, October 5, 1984, a copy of which is attached for your review, that some of the compounds may be undergoing investigation for marketing in the future.

The effect of scheduling these substances into Schedule IV will require that the manufacturing, distribution, dispensing, securing, registration, record keeping, reporting, and inventory are subject to the controls for Schedule IV substances. Under the federal scheduling, the substances will remain scheduled until the process of permanent scheduling, pursuant to Section 201(a)(b) of the Federal Controlled Substances Act, is complete.

Placement of the above listed controls into Schedule IV under the Kansas Uniform Controlled Substances Act will insure that the drugs are available for use in treatment once permanently scheduled and insured compliance with action of the Federal Drug Enforcement Administration.

The Board of Pharmacy would also like to recommend new legislation concerning temporary scheduling, rescheduling and descheduling of controlled substances. This past year, sufentanil was rescheduled from Schedule I into Schedule II by the Federal Drug Enforcement Administration. The drug has a currently accepted medical use (as an anesthetic) in treatment in the United States and was available on the market prior to August of 1984.

Because of the manner in which controlled substances are scheduled in Kansas (by legislative action only), citizens of Kansas were not, indeed are still not, able to receive the benefits of this substance. In Kansas, sufentanil is placed in Schedule I which prohibits medical practitioners from prescribing and pharmacists from dispensing the substance. Sufentanil will remain in Schedule I and hence, will remain unavailable for use, until the 1985 session is complete. This is true even though the federal authorities have determined it has a medically acceptable use in treatment in the United States and may be marketed nationwide.

Suppose sufentanil, instead of being an anesthetic adjunct, had been a cure for cancer?

In 1983 the Kansas State Board of Pharmacy revoked the Kansas Administrative Regulations which placed controlled substances, already scheduled in the Kansas Statutes Annotated, in the Kansas Administrative Rules. The primary rationale for such revocation was, obviously, one of duplicity. However, it is my understanding that some questions have been raised as to the Board's authority to schedule controlled substances in the regulations. Nevertheless, with such ability, as well as the ability to adopt emergency regulations, arguably the Board could have affected the rescheduling of sufentanil, at least on a temporary basis, much faster than what current statutory procedures require.

It is requested that express legislative authority be given the Board to reschedule, schedule or deschedule controlled substances on a temporary basis, subsequent to federal action. It would seem that temporary scheduling, with the limitation that the federal Drug Enforcement Administration first approve such rescheduling and with the additional limitation that such temporary rescheduling, scheduling or descheduling occur only subsequent to Board action, would be of great benefit to Kansas citizens and yet would provide adequate safeguards and protections to insure the public health, safety and welfare.

Your assistance and support in developing and encouraging such a legislative change would be greatly appreciated. I am in the process of compiling research as to how this matter is handled in other states. I will provide you with such research once it is complete. Please do not hesitate to contact me for additional information or should you have any questions regarding this request. I sincerely appreciate your consideration of this matter.

Respectfully submitted,

Lynn E. Ebel
Attorney, Kansas State Board of Pharmacy

SECTION 1. This Act shall be known and may be cited as the "Transient Merchant Licensing Act of 1985."

SECTION 2. As used in this Act, the following terms shall have the meanings respectively ascribed to them in the Section:

(a) "Transient merchant" means any person, firm, corporation, partnership, or other entity which engages in, does or transacts any temporary or transient business in the State, either in one locality or in traveling from place to place in the State, offering for sale or selling goods, wares, merchandise or services, and includes those merchants who, for the purpose of carrying on such business, hire, lease, use, or occupy any building, structure, motor vehicle, railroad car, or real estate.

(b) "Temporary or transient business" means any business conducted for the sale or offer for sale of goods, wares, or merchandise which is carried on in any building, structure, motor vehicle, railroad car or real estate for a period of less than six (6) months in each year.

(c) "Person" means any individual, corporation, partnership, association or other entity.

SECTION 3. The provisions of this Act shall not apply to:

(a) sales at wholesale to retail merchants by commercial travelers or selling agents in the usual course of business;

(b) wholesale trade shows and/or conventions;

(c) sales of goods, wares or merchandise by sample catalogue or brochure for future delivery;

(d) fairs and convention center activities conducted primarily for amusement and/or entertainment;

(e) any general sale, fair, auction or bazaar sponsored by any church or religious organization;

(f) garage sales held on the premises devoted to residential use;

(g) sales of crafts or items made by hand and sold or offered for sale by the person making such crafts or handmade items;

(h) sales of agricultural products, except nursery products and foliage plants;

(i) sales made by a seller at residential premises pursuant to an invitation issued by the owner or legal occupant of such premises;

(j) school sponsored bazaars and sales, concessions at school athletic and other events, and sales of paraphernalia used in the celebration of any nationally recognized holiday or used in connection with any public school, university or college related activities, flea markets, retail fireworks establishments, gun shows, sales by charitable organizations, sales of coins, and expositions sponsored by government entities or by non-profit trade associations.

A transient merchant not otherwise exempted from the provisions of this Act shall not be relieved or exempted from the provisions of this Act by reason of associating himself temporarily with any local dealer, auctioneer, trader, contractor, or merchant or by conducting such temporary or transient business in connection with or in the name of any local dealer, auctioneer, trader, contractor or merchant.

SECTION 4. It is unlawful for any transient merchant to transact business in any county in this State unless such merchant and the owners of any goods, wares or merchandise to be offered for sale or sold, if such are not owned by the merchant, shall have first secured a license and shall have otherwise complied with the requirements of this Act.

SECTION 5. Any transient merchant desiring to transact business in any county in this State shall make application for and obtain a license in each county in which such merchant desires to transact business. The application for license shall be filed with the county clerk, and shall include the following information.

(a) the name and permanent address of the transient merchant making the application, and if the applicant is a firm or corporation the name and address of the members of the firm or the officers of the corporation, as the case may be.

(b) If the applicant is a corporation, there shall be stated on the application form the date of incorporation, the state of incorporation, and if the applicant is a corporation formed in a state other than the State of Arkansas, the date on which such corporation qualified to transact business as a foreign corporation in the State of Kansas.

(c) A statement showing the kind of business proposed to be conducted, the length of time for which the applicant desires to transact such business and the location of such proposed place of business.

(d) The name and permanent address of the transient merchant's registered agent or office.

(e) The applicant has acquired all other required city, county and state permits licenses.

(f) There shall be attached to the application a receipt or statement showing that any personal property taxes due on goods, wares or merchandise to be offered for sale have been paid.

SECTION 6. The county clerk in each county shall design and cause to be printed appropriate forms for applications for licenses and for the license certificates to be issued to applicants under the Act.

SECTION 7. Each registered agent designated by a transient merchant in the application for a license shall be a resident of the county and shall be agent of the transient merchant upon whom any process, notice, or demand required or permitted by law to be served upon the transient merchant may be served. The registered agent shall agree in writing to act as such agent and a copy of the agreement to so act shall be filed by the applicant with the application for a license.

The county clerk of each county shall maintain an alphabetical list of all transient merchants in the county and the names and addresses of their registered agents.

If any transient merchant doing business or having done business in any county within the State shall fail to have or maintain a registered agent in the county or if such registered agent cannot be found at his permanent address, the county clerk shall be an agent of such transient merchant for service of all process, notices or demands. Service on the county clerk shall be made by delivering to and leaving with the clerk or any person designated by the clerk to receive such service, duplicate copies of the process, notice or demand. When any such process, notice or demand is served on the clerk, the clerk shall immediately cause one copy thereof to be forwarded by registered or certified mail to the permanent address of the transient merchant. The provisions of this section shall not limit or otherwise affect the right of any person to serve any process, notice or demand in any other manner now or hereafter authorized by law.

SECTION 8. Each application for a transient merchant license shall be accompanied by a license fee of two hundred fifty dollars ($250.00) and by a cash bond or a surety bond issued by a corporate surety authorized to do business in the State in the amount of Two Thousand Dollars ($2,000.00) or

five percent (5%) of the wholesale value of any goods, wares, merchandise or services to be offered for sale whichever sum is lesser. The surety bond shall be in favor of the State of Kansas and shall assure the payment by the applicant of all taxes that may be due from the applicant to the State or any political subdivision of the State, the payment of any fines that may be assessed against the applicant or its agents or employees for violation of the provisions of this Act and for the satisfaction of all judgments that may be rendered against the transient merchant or its agents or employees in any cause of action commenced by any purchaser of goods, wares, merchandise or services within one (1) year from the date of the sale by such transient merchant. The bonds shall be maintained so long as the transient merchant conducts business in the county and for a period of one (1) year after the termination of such business and shall be released only when the transient merchant furnishes satisfactory proof to the county clerk that it has satisfied all claims of purchasers of goods, wares, merchandise or services from such merchant, and that all state and local sales taxes and other taxes have been paid.

SECTION 9. A transient business license shall be issued hereunder only when all requirements of this Act have been met, such license shall not be transferable, shall be valid only within the territorial limits of the issuing county, shall be valid only for a period of ninety (90) days, and shall be valid only for the business stated in the application. A license so issued shall be valid for only one person, unless such person shall be a member of a partnership or employee of a firm or corporation obtaining such license.

SECTION 10. Any person or entity that transacts a transient business as defined herein without having first obtained a license in accordance with the provisions of this Act or who knowingly advertises, offers for sale, or sells any goods, wares, merchandise or services in violation of the provisions of this Act shall be guilty of a Class A misdemeanor. The penalties prescribed herin shall be in addition to any other penalties prescribed by law for any criminal offense committed by the licensee.

SECTION 11. It is the duty of the county sheriff and other law enforcement officers in each county and the prosecuting attorney for each county to enforce the provisions of this Act.

The Kansas Parentage Act—A Proposal for Legal Equality for Non-Marital Families

By Brian Moline

I. Introduction

The Family Law Advisory Committee to the Kansas Judicial Council has recommended a revised and modified version of the Uniform Parentage Act (UPA) to the Council and, ultimately, to the Kansas legislature.[1] The UPA was approved by the National Conference of Commissioners on Uniform State Laws in 1973 and has been adopted, in one form or another, in Washington, California, Colorado, Hawaii, Minnesota, Montana, North Dakota and Wyoming.

The law concerning children born out of wedlock has long been of interest to the National Conference of Commissioners on state laws. The Conference developed the "Uniform Illegitimacy Act" in 1922, the "Blood Tests to determine Paternity Act" in 1952 and the "Uniform Paternity Act" in 1960.[2] The Uniform Illegitimacy Act was ultimately withdrawn by the conference and none of the others were widely accepted.[3] The Uniform Parentage Act was introduced with minor modifications, in the Kansas Senate in 1979 but did not pass.[4]

The purpose of this article is to review the current proposal of the Advisory Committee for a Kansas Parentage Act (KPA), compare it with the UPA and examine the effect on Kansas law if the current proposal is adopted.

II. The Common Law Tradition

In Kansas, as in most states, there has been little legislative concern with the total societal ramifications of illegitimacy, despite the steady growth in the rate of illegitimate births and its attendant strain on public resources.[5] Court cases on the subject have proceeded in an uneven fashion from common law principles which were strongly influenced by ancient moral taboos.[6]

Common law was particularly harsh to the child born out of wedlock. The child was variously known as "fillius nullious"—the son of no one—or "fillius populi"—son of the people.[7] He was considered a ward of the parish, and his parents had no legal relationship with him and no obligation to provide for his support.[8] The child had no inheritance rights with respect to either parent, and only the issue of his body could be his heirs.[9] No statutes provided for legitimization of the child by the subsequent marriage of his parents or by any other means other than a special act of Parliament.[10] Since adoption was unknown at common law, the child was unable to acquire surrogate parents.[11]

The doctrine of "fillius nullius" was generally adopted by the American states.[12] The first change in the status of children came with the enactment of statutes requiring parents to support their illegitimate offspring.[13] Prior to such statutory enactments, American courts had held that, without legislation on the subject, the father of an illegitimate child could not be required to provide for its support.[14] In the early case of *Doughty v. Engler*, Kansas became one of the first states to recognize a common law duty of a father to support his illegitimate child.[15] Virtually all states now require a father to support his non-marital children.[16]

Rights and obligations regarding illegitimate children developed in a piecemeal fashion. Gradually, limited paternal rights of visitation and custody were recognized.[17] Legitimization statutes which allow a putative father to "legitimize" the child by acknowledging him and receiving him into his home were adopted.[18] But always, statutes and case law used such pejorative and labeling terms as "bastard" or "illegitimate" to identify nonmarital children.

In the late 1960's and early 1970's, the United States Supreme Court decided a series of cases clarifying the constitutional rights of illegitimate children and their parents. In 1968, the Court issued its opinion in *Levy v. Louisiana*[19] and *Glona v. American Guarantee and Liability Company*.[20] In *Levy*, the Court invalidated a Louisiana wrongful death statute which denied recovery to nonmarital children for the wrongful death of their mother. The Court held it was invidious discrimination to treat illegitimate children differently under the statute. In *Glona* the Court found no rational basis for a state's refusal to allow the mother of nonmarital children to recover for the death of her children. *Levy* and *Glona* seemed to herald the emergence of a judicial doctrine of lowering the barriers between children born in and out of wedlock on equal protection grounds.

However, three years later the

1. *Proposed Kansas Parentage Act Prepared By the Kansas Judicial Council Family Law Advisory Committee*, Kansas Judicial Council Bulletin, 55th Annual

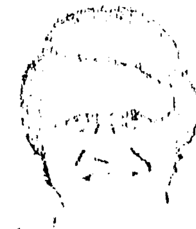
5. See, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB. NO. 61-130, UNMARRIED PARENTS, A GUIDE FOR THE DEVELOPMENT OF SERVICES IN PUBLIC WELFARE (1961).
6. Krause, *Bringing the Bastard into the Great Society*, 44 TEX. L.R. 829 (1966).

10. *Id.*
11. Wilson, *The Uniform Parentage Act: What It Will Mean For the Putative Father in California*, 28 HASTINGS L.J. 191, 192 (1961).
12. *Id.*
13. *Id.*
14. *Doughty v. Engler*, 112 Kan. 583, 211 P. 619 (1923) (citing 7 C.J. 955 (1966)).
15. *Id.*, See Note, *The Uniform Parentage Act, An Opportunity to Extend Equal Protection to All Kansas Children*, 19 WASHBURN L.J. 11 (1979) (citing 30 A.L.R. 1064, 1073 (1924)).
16. See CLARK, THE LAW OF DOMESTIC RELATIONS, § 53 (1968).

17. See supra note 11, at 195.
18. *Id.*
19. 391 U.S. 68 (1968).
20. 391 U.S. 73 (1968).

About the Author

BRIAN MOLINE *is General Counsel to the Kansas Corporation Commission. He graduated from Wichita State University in 1963 and Washburn Law School in 1966 and has a Masters degree in Public Administration from the University of Kansas. He was in private practice from 1966 to 1971 and served as Executive Director of the Legal Aid Society of Wichita from 1971 to 1979. He is a former member of the Kansas Legislature, has taught law at Kansas Newman College and Washburn Law School and was one of the founders of Kansas Legal S...*



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Court appeared to halt the trend in *Labine* v. *Vincent*[21] when it refused to extend the principle of *Levy* to invalidate a law that prohibited a nonmarital child from inheriting from her intestate father, even though he had acknowledged her as his child. The Court distinguished *Levy* on the basis that the Equal Protection Clause did not prohibit a State from treating an illegitimate child differently from legitimate off-

In 1972, the court recognized for the first time a putative father's parental rights in Stanley *v.* Illinois.

spring in all matters.[22] The Court affirmed the State's interest in the strength and preservation of family ties and its right to promote this interest through the regulation of the disposition of property by prescribed laws of intestacy.[23] The very next year, the Court added to the confusion by holding that workmen's compensation benefits related to the death of their father are due to dependent, acknowledged nonmarital children.[24] In 1973, the Court finally issued a seemingly definitive ruling:

> . . . once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother."[25]

Meanwhile, in another line of cases, the court dealt with the converse question of the father's right concerning the child. In 1972, the court recognized for the first time a putative father's parental rights in *Stanley* v. *Illinois*.[26]

In *Stanley*, the court held that due process entitled an unwed father to a hearing on his fitness as a parent before any decision regarding custody of those children could be made. And where such a hearing is provided for other parents, it is a denial of due process to withhold the hearing from unmarried parents.[27]

Moreover, any gender based statutes which allow a mother to block adoption of her child by withholding consent but do not extend a similar right to an unwed father may be unconstitutional under certain circumstances.[28]

A fair conclusion to be drawn from the line of decisions is that state and federal law may not discriminate between legitimate and illegitimate children in any substantive area other than inheritance. *Labine* notwithstanding,[29] the old law of illegitimacy is practically dead, and the decisions have provided the impetus for states to modernize laws dealing with nonmarital families. The Kansas Parentage Act is one such response.

III. Present Kansas Law

It is well established in Kansas that natural parents are to be given preference as to custody over non-parents.[30] However, contrary to the recent constitutional mandates, Kansas statutes currently seem to provide greater rights for the mother of an illegitimate child than the father.[31] Both parents of a legitimate child are natural guardians, but only the mother of an illegitimate child is statutorily so defined.[32]

In Kansas, a child can be adopted with the consent of the living parents of a legitimate child, consent of the mother of an illegitimate child, or

Kansas statutes currently seem to provide greater rights for the mother of an illegitimate child than the father.

consent of one parent of a child if the other has failed or refused for two years to act as a parent or is incapable of consenting.[33] This statute was attacked as unconstitutional in a 1978 Kansas case that addressed for the first time in Kansas the question of whether the natural father of an illegitimate child has a paramount right over non-parents to custody, and whether that portion of K.S.A. 59-2102 which required consent of the unwed mother, but not the unwed father was constitutional.[34]

After considering *Stanley* and related decisions, the Kansas appeals court found that due process required that a putative father who appears and asserts his desire to care for his child has rights paramount to a non-parent. Where he is found to be a fit parent, his right to custody is clear.[35]

However, the court opined that neither due process nor equal protection required that the consent of the putative father was required before his child can be adopted.[36] The court termed the rights of a parent who chooses not to appear and make known his desire to care for his child as de minimis when balanced against the strong state interest in placing children in a stable, nurturing family atmosphere.[37] While conceding that K.S.A. 59-2102 created separate classifications for unwed fathers and unwed mothers, the court did not view the classification as invidious, but rather based on a rational and logical difference, advancing the legitimate state interest in the adoption of children born out of wedlock.[38]

This reasoning was confirmed four years later by the Kansas Supreme Court.[39] Although complicated somewhat by questions concerning the applicability of the Indian Child Welfare Act, *In re Adoption of Baby Boy L* squarely dealt with the constitutionality of K.S.A. 59-2102 (2) in light of the series of U.S. Supreme Court cases dealing with rights of fathers.

The Kansas Court paid particular attention to *Caban* since that case dealt with a New York statute "identical to our own. . . ."[40] First, the court noted that *Caban* was a narrow (5-4) decision confined to its particular facts. Indeed, the court stated, both *Caban* and *Quilloin* v. *Willcott*[41] stressed the importance of the actual factual relationship that exists in a given case.

Since, in the instant case, the record indicated the natural father had a lengthy criminal record, used drugs, had never cared for children, had spent several months in Larned State Hospital and was currently incarcerated in the Industrial Reformatory, the Court had no trouble distinguishing the facts from *Quilloin* and *Caban* and

21. *Labine* v. *Vincent*, 401 U.S. 532 (1971).

26. 405 U.S. 645 (1972). *See, Rothstein v. Lutheran Social Service of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan*, 405 U.S. 1051 (1972).

27. 405 U.S. 645 (1972).

28. *Caban v. Mohammed*, 441 U.S. 380 (1979).

29. Labine has become a somewhat anachronistic decision, largely distinguished in subsequent cases. See, *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972); *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972).

30. See *Herbst v. Herbst*, 211 Kan. 163, 505 P.2d 294 (1973); *In re Armantrout*, 207 Kan. 366, 485 P.2d 1010; [illegible] *Russell*, 200 Kan. 176, 434 P.2d [illegible]

31. *See supra*, note 15, at 114 (citing KAN. STAT. ANN. § 59-3001-3034 (1981)).

32. *Id.* (citing Kan. Stat. Ann. § 59-3002 (3) (1981)).

33. *See* KAN. STAT. ANN. § 59-2102 (1981).

34. *In re Lathrop*, 2 Kan. App. 2d 90, 575 P.2d 894 (1978).

35. *Id.* at 96, 575 P.2d at 898.

36. *Id.*

37. *Id.* at 96-97, 575 P.2d at 898.

38. *Id.*

39. *In re Adoption of Baby Boy L*, 231 Kan. 199, 643 P.2d 168 (1982).

40. *Id.* at 216, 643 P.2d at 182.

41. [illegible]

a...rming the trial court's finding that the natural father was unfit and his consent to adoption was not required.

The court specifically rejected Appellant's argument that fitness was not an issue and that *Caban* should be applied to strike down all adoptions where the trial court relies upon K.S.A. 59-2102 (2) in dispensing with the necessity for the consent of the father of an illegitimate child.

The court was clearly troubled by the apparent inconsistency of the statute with the Supreme Court mandate. The opinion inquires rhetorically if there is not a middle ground in which the statute is constitutional based upon the facts of each case and answers its own question "we think so. . . ."[42]

Clearly neither *Lathrop* nor *Baby Boy L* resolves the separate classifications issue created by the statute and a case by case resolution based upon discrete questions of "fitness" would seem to invite a steady stream of factual disputes for ultimate appellate determination.

IV. The Kansas Parentage Act (KPA)

The Kansas Judicial Council created the Family Law Advisory Committee in 1977 and granted it wide latitude in the consideration and solution of problems in the area of family law.[43]

The Committee met over an eighteen month period to discuss and analyze the Uniform Act. The Committee decided that a suitably modified version of the UPA would be an important step in modernizing Kansas law dealing with nonmarital families. The Kansas Parentage Act (KPA or the Act), as proposed by the Committee, is the product of that inquiry.

... UPA 1) of the Act defines the parent-child relationship. The Act adopts subsections (1) & (2) verbatim from the UPA. These sections abolish illegitimacy, provide equality of legal status to all children and eliminate discrimination based upon marital status.[44] The Act eliminates all references to legitimacy and illegitimacy and, instead, refers only to the parent and child relationship. This is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers rights, privileges, duties and obligations." This relationship extends to every parent and child without reference to the parents' marital status.[45] If enacted, these sections would require amendment of current statutes which discriminate on the basis of the status of the child's parents.[46]

These sections abolish illegitimacy, provide equality of legal status to all children and eliminate discrimination based upon marital status.

The guiding principle of the Act is full equality for all children in their legal relationship with both parents. Pejorative adjectives such as "legitimate," "illegitimate" or "bastard" have been eliminated as inconsistent with this goal. Moreover, the Act emphasizes that the right in question is the right of the child—not the right of the mother. These sections and the subsequent procedural sections are intended to fulfill the mandate of *Stanley* and related decisions by ". . . providing substantive legal equality for all children, regardless of the marital status of their parents."[47]

44. *Id.*, §§ 1, 2 comment, at 15.
45. *Id.*

Section 3 (UPA 3) establishes how the parent and child relationship is established. It is nearly identical to the UPA and thoroughly consistent with current Kansas law. The relationship may be established by proof of birth, proof of adoption or ascertainment under the Act.

Section 4 (UPA 4) sets up a series of presumptions to cover those cases where circumstances point toward a particular man as the father of the child. The presumptions do not represent a serious departure from presumptions of legitimacy in current state law.

Under Kansas law, there is a strong but not conclusive presumption that a child born in wedlock is legitimate[48] and the presumption extends to a child born after divorce where conception takes place before the decree is entered.

The Act generally follows the UPA in presuming paternity when:

(1) The father and mother have been married to each other and the child was born during the marriage or within 300 days of termination of the marriage.[49]

(2) The father and mother have attempted to marry each other in a legal ceremony but the attempted marriage is void or voidable. If the marriage is voidable, the presumption applies during the attempted marriage or within 300 days after its termination.[50] If the attempted marriage is void, the presumption applies if the child is born within 300 days after termination of cohabitation.[51]

(3) The father and mother have married or attempted to marry in a legal ceremony that is void or voidable *after* the birth of the child (emphasis supplied) and the father has acknowledged his paternity in writing, or, with his consent, he is named as the father on the child's birth certificate, or, he is obligated to support the child under a written voluntary promise or court order.[52]

(4) The father has notoriously or in writing recognized paternity.[53]

The first three presumptions are nearly identical with the UPA[54] and correspond significantly to the present Kansas law relating to legitimacy. The Committee changed the language in Sec. 4 (a) (2) and (3) to be consistent with current Kansas terminology.

Presently in Kansas, an illegitimate child can inherit from an intestate father where the decedent has notoriously or in writing recognized paternity.[55] Since the Act abolishes distinctions based on illegitimacy, the Committee amended the presumption in Sec. 4 (a) (4) to insure that such a child can bring an action on the death of the alleged father.[56]

K.S.A. 60-413 through 416 sets forth the rules of evidence regarding presumptions. Where there is a conflict in presumptions, Kansas adopts the one "founded on the weightier consideration of policy and logic."[57] Subsection (b) sets forth the same test.

Section 5 (UPA 5) concerns the use of artificial insemination as applied to parentage issues. Neither the UPA nor the KPA attempt to deal with the many complex and serious legal problems raised by the practice of artificial insemination. After much discussion and several drafts,

48. *Id.*, § 4 comment, at 17.
49. *Id.*, § 4 (a) (1), at 16. *See Barnan v. Barnan*, 186 Kan. 605, 352 P.2d 29 (1960).
50. *See supra* note 1, § 4 (a) (2) (i). *See also In re Marsoll*, 200 Kan. 12d, 434 P.2d 1010 (1967).
51. *See supra* note 1, § 4(a) (2) (ii), at 16.
52. *Id.*, § 4(a) (3) (i) (ii) (iii).
53. *Id.*, § 4(a) (4).
54. *Id.*, § 4 comment, at 17.
55. K.S.A. § 59-501 (1981).
56. *See supra* note 54.
57. *Id.* *See also* KAN. STAT. ANN. [illegible]

the Committee omitted the UPA language in favor of the present Kansas statutes on the subject.[58] The Committee did include a modified version of Sec. 5 (b) of the UPA as Sec. 5 (b) of the KPA. This subsection provides that the donor of semen used in artificial insemination be treated in law as if he were not the natural father of the child thereby conceived, except in the instance where the donor is the consenting husband.[59] The KPA does not attempt to address the controversial issue of whether performance of artificial insemination should be limited to physicians.[60]

Sec. 6 combines 6 & 7 of the UPA to state when an action to determine parentage may be brought and who may bring it. The Act generally follows the UPA by relating who may be a party and when an action may be brought utilizing the presumptions in Sec. 4.[61]

Under present Kansas law, paternity can be established in one of three ways: an action brought by an unmarried woman under K.S.A. 38-1101, an action brought by the child or its next friend or an action brought through the secretary of Social and Rehabilitation Services (SRS) to enforce the child's non-statutory right of support under K.S.A. 39-755.[62] There is a one year statute of limitations on the right of the unmarried woman while actions on behalf of the child may presumably be brought until the child reaches majority.[63]

In combining Sections 6 & 7 of the UPA, the Committee has placed all statutes of limitations in this section for purposes of clarity. Subsections (a) and (b) deal with the action to declare or dispute the existence of the father-child relationship presumed under the presumptions in Sec. 4.[64] An action to declare the existence of the relationship may be brought at any time,[65] but an action to dispute presumptions (1) (2) and (3) of Sec. 4 may only be brought within five years after the child's birth.[66] Any interested party may bring an action at any time under the presumptions of Sec. 6 (a) (4) and where the father notoriously or in writing recognizes paternity of the child.[67] However, an action to determine the existence of the father-child relationship with respect to a child who has no presumed father under Sec. 4 may be brought by the child, the natural mother, the man alleged or alleging himself to be the father or their personal representative; the action may be brought not later than three years after the birth of the child or the effective date of the act, whichever is later, unless the action is brought by or on behalf of the child in which case action is not barred until three years after the child attains majority.[68]

The Act continues the right of the Secretary of SRS to bring an action at any time during the child's minority to determine the parent-child relationship.[69]

Finally, the Act adds a provision holding ineffective any settlement of a child's non-statutory right of support in accord with present Kansas case law.[70]

Sec. 7 (UPA 8) of the Act addresses jurisdiction and venue and it does not vary from current Kansas law. Jurisdiction is vested in the district court and actions under the Act may be joined with other domestic proceedings.[71] All venue provisions of the UPA are included in Sec. 7 as well as a provision for venue where the mother resides or is found. The latter provision complies with current Kansas law.[72]

The Committee deleted a UPA provision that provided for registered mail service outside the state.[73] The Committee was persuaded that per-

Finally, the Act adds a provision holding ineffective any settlement of a child's non-statutory right of support in accord with present Kansas law.

sonal orders against alleged parents should be limited to personal service.[74]

Sec. 8 (UPA 9) deals with parties to the action under the provisions of the Act. The language generally follows that of the UPA in emphasizing that the child is a party to the action. Kansas has long recognized that the child is the real party in interest in a nonstatutory action for support.[75] The Committee attempted to insure that the "guardian" envisioned in the UPA must be an attorney and followed the language adopted by Hawaii in mandating appointment of a guardian ad litem for an alleged father who is a minor.[76]

The UPA established a special and informal pre-trial proceeding in parentage actions in which the court evaluated the probability of establishing paternity and whether such proceedings were in the best interest of

58. *See supra* note 1, § 5 comment, at 18.
59. *Id.*
60. *Id.*
61. *Id.*, § 6 comment, at 18.
62. *Id.*
63. *Id.*
64. UNIF. PARENTAGE ACT, § 6 commissioners comments (1973).
65. *See supra* note 1, § 6(a) (1), at 18
66. *Id.*, § 6(a) (2).
67. *Id.*, § 6(c).
68. *Id.*, § 6(d).
69. *Id.*, § 6(e). *See also* KAN. STAT. ANN. § 39-755 (1981).
70. *See supra* note 1, § 6(f), at 18. *See also Lawrence v. Boyd*, 207 Kan. 776, 486 P.2d 1394 (1971); *Smith v. Simmons*, 4 Kan. App. 2d 60, 602 P.2d 546 [illegible]
71. *See supra* note 1, § 7, at 19.
72. *See* KAN. STAT. ANN. § 38-1102 (1981).
73. UNIF. PARENTAGE ACT, § 8(b)
74. *See supra* note 1, § 7 Comment, at 19
75. *Lawrence v. Boyd*, 207 Kan. 776, 486 P.2d [illegible]

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the child.[77] The Committee was concerned that making the court an active participant in settlement negotiations raised questions about the objectivity and impartiality of the tribunal in the event the matter ultimately proceeds to trial and deviated too radically from established Kansas pre-trial procedure.[78] The Committee believed current Kansas pre-trial practice to be the better alternative and deleted the UPA pre-trial provisions.[79]

Sec. 9 (UPA 11) of the Act refers to blood tests to determine paternity. The Committee considered present Kansas statutory law[80] to be far more comprehensive and desirable than the applicable UPA section[81] and incorporated the present statutory language into the Act.

Sec. 10 (UPA 12) relates to discrete evidentiary problems. The Committee generally followed the UPA[82] but modified it slightly where Kansas statutory provisions were considered the better alternative.[83] The Act incorporates the UPA provision denying privilege status to a physician's testimony concerning the medical circumstances of pregnancy and the conditions and characteristics of the child at birth.[84] Also, the Act incorporates the UPA provision denying admissability to testimony relating to sexual relations of the mother with others at times other than when conception could have occurred.[85] This is consistent with current Kansas law.[86]

The UPA makes clear that paternity actions are civil in nature and that a jury trial is not desirable because of the emotional atmosphere of cases of this nature.[87] Sec. 11 (UPA 14) of the Act confirms present Kansas law that all paternity actions are civil in nature[88] but departs from the UPA by making trial by jury discretionary with the court.[89] Although there is no constitutional right to a trial by jury in paternity proceedings in Kansas,[90] the Committee believed discretion should lie with the court.[91]

. . . the Act confirms present Kansas law that all paternity actions are civil in nature but departs from the UPA by making trial by jury discretionary with the court.

Sec. 12 (UPA 15) concerns the Judgment or Order and provides a series of flexible standards to help the judge in setting support obligations. The Committee adopted subsections (a) and (b) from the UPA. Subsection (a) makes a court order determining the existence or non-existence of the parent child relationship determinative for all purposes. Subsection (b) mandates the court to order a new birth certificate if the court's order is at variance with the child's birth certificate. The Committee rejected the UPA language on support, remedies and visitation. The Committee, instead, preferred to modify current Kansas statutory language.[92] The Committee also inserted the words "but not limited to . . ." before listing the guidelines on support to emphasize the latitude the court has in considering relevant factors.[93] The relevant factors include, but are not limited to:

(1) the needs of the child;

(2) the standards of living and circumstances of the parents;

(3) the relative financial means of the parents;

(4) the earning ability of the parents;

(5) the need and capacity of the child for education, including higher education;

(6) the age of the child;

(7) the financial resources and earning ability of the child;

(8) the responsibility of the parents for the support of others, and

(9) the value of the services contributed by the custodial parent.[94]

While not representing any real departure from current Kansas practice, the Committee believed the guidelines would be helpful to the court in setting support obligations.[95]

Sec. 13 (UPA 16) provides for costs of the action. The UPA allowed the court to apportion the costs of the litigation among the parties or, if a party is indigent, to charge the appropriate public authority.[96] Present Kansas law is not as liberal in this regard as the UPA. Attorney fees are recoverable only when the action is brought by the mother and when she is not represented by the district attorney.[97] Attorney fees are not allowed in actions to enforce the child's non-statutory right to support.[98] The Committee followed the UPA in providing for a guardian ad litem for a minor child in paternity actions which is presently not provided for in Kansas.[99] Currently, a paternity action is usually brought by a "next friend" in the non-statutory action,[100] although the child is considered to be the real party in interest. In statutory proceedings,[101] the Secretary of SRS is deemed to represent all persons, officials or agencies having an interest in the assignment of support rights.[102] The Committee recommendation, then, expands the scope of allowable attorney fees.

Current Kansas law allows for the payment of blood tests as costs, and the essence of the current statute has been retained.[103]

Sec. 14 (UPA 17) lists suitable enforcement remedies for the judgment or order where paternity has been established. Subsections (a) and (b) essentially condense UPA provisions (a) and (b) of UPA Sec. 17.[104] This section essentially follows current Kansas statutory law.[105] The Committee added a list of persons to whom the payment may be made, including the mother, clerk of the court and district court trustee and omitted the current statutory provision for a bond to secure payment.[106] The recommendation follows the wording adopted by Montana and Wyoming.[107] It eliminates direct payment to the child and does not itemize related expenses as required by UPA.[108] The Committee believed the better alternative was to leave such determination to the court's discretion.

Current Kansas law allows for modification of an order for support as the interests of the child may require.[109] Sec. 15 (UPA 18) continues jurisdiction to modify but does not

77. UNIF. PARENTAGE ACT §§ 10, 13 (1973) (pre-trial procedures and recommendations).
78. See supra note 1, § 8 comment, at 20.
79. Id.
80. KAN. STAT. ANN. § 23-131 (1976).
81. See supra note 1, § 9 comment at 21.
82. UNIF. PARENTAGE ACT § 12 (1973).
83. See supra note 1, § 10 comment, at 21.
84. Id. See also UNIF. PARENTAGE ACT § 10(c) [illegible] (1973).
87. UNIF. PARENTAGE ACT § 11 commissioners comments (1973).
88. See, KAN. STAT. ANN. § 38-1101 (1981); KAN. STAT. ANN. § 39-755 (1981). See also, Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974), cert. denied 419 U.S. 1003 (1974).
89. See supra note 1, § 11, at 21.
90. State ex rel. Wingard v. Still, 223 Kan. 661, 576 P.2d 620 (1978); State ex rel. Mayer v. Pinkerton, 185 Kan. 68, 340 P.2d 393 (1959).
91. See supra note 1, § 11 comment, at 22.
92. See KAN. STAT. ANN. § 38-1106 (1981).
93. See supra note 1, § 12 comment, at 22.
94. Id., § 12(d).
95. Id., § 12 comment.
96. UNIF. PARENTAGE ACT § 16 commissioners comments (1973).
97. KAN. STAT. ANN. § 38-1103 (Supp. 1982).
98. Crooms v. Whitfield, 4 Kan. App. 2d [illegible], 605 P.2d [illegible] (1980).
99. See supra note 1, § 13 comment, at 23.
100. Id.
101. See KAN. STAT. ANN. § [illegible] (1981).
102. See supra note 96.
103. KAN. STAT. ANN. § 23-152 (1981).
104. See supra note 1, § 14 comment, at 23-24.
105. See KAN. STAT. ANN. § 38-1104 (1981).
106. See supra note 104.
107. Id.
108. Id.
109. KAN. STAT. ANN. § [illegible] [illegible]

limit the authority of the court by the interests of the child solely.[110] The Committee, however, thought Sec. 12 (UPA 15) was adequate in this regard and therefore deleted Sec. 15. The Committee was persuaded that other factors such as changed parental circumstances may be compelling and the court should have the discretion to consider all relevant circumstances.

Sec. 16 (UPA 19) mandates appointment of counsel and availability of a trial transcript to indigent parties. This section is substantially the same as the UPA. Under current Kansas law, the district or county attorney is required to represent an unmarried mother who is not otherwise represented.[111] Kansas law also gives the Court discretion to appoint counsel for any party when the assignment is the basis for paternity action brought by the Secretary of SRS.[112] State courts have not uniformly resolved whether an indigent defendant is entitled to appointment of counsel in paternity proceedings.[113] The United States Supreme Court has noted the interests of the putative father in a paternity proceeding[114] and has emphasized the paramount need for procedural fairness in these proceedings.[115] The Committee believed the current trend, and the better rule is to require each party to the proceeding to be represented by counsel regardless of financial circumstances.

Sec. 17 (UPA 20) covers the confidentiality of hearings and records. Subsection (a) is identical to the UPA and imposes strict confidentiality on paternity proceedings in most instances. Currently Kansas has no provision for the confidentiality of paternity proceedings[116] although Kansas does provide for confidentiality of illegitimate births.[117] Subsection (b) was added by the Committee to insure that confidentiality need not apply if trial by jury is ordered under Sec. 11. Although somewhat at variance with traditional open court hearings, the Committee was persuaded that paternity proceedings are akin to juvenile proceedings in that the sensitive nature of the subject matter requires confidentiality in most circumstances.

Currently Kansas has no provision for the confidentiality of paternity proceedings although Kansas does provide for confidentiality of illegitimate births.

Sec. 18 (UPA 21) is new and taken verbatim from the UPA. It permits any interested party to bring an action to determine the existence or non-existence of a mother and child relationship where such relationship is in dispute. Although it is not believed that cases of this nature will arise frequently, the section simply makes the relevant provisions of the Act concerning paternity applicable in such instances.

Sec. 19 (UPA 22) refers to a promise to render support and substantially follows the language of the UPA. Subsection (a) permits any written promise to furnish support for a child to be enforced with the exception of agreements that seek to bar a paternity action by the child.[118] The exception is in accord with well settled Kansas law.[119] Subsection (b) recognizes the sensitive nature of a paternity promise and gives the court discretion to make it confidential when requested by the promisor, in which event, the Court must make it confidential.[120]

Sec. 20 (UPA 23) permits the issuance of an amended or new birth certificate to assume confidentiality. The section is substantially similar to the UPA. Subsection (a) was amended to include certified orders from courts of this state and authenticated orders from courts of other states.[121] The Committee also noted in the Comment that this provision should be located with other statutes reflecting registration of births[122] rather than with parentage provisions.

Sec. 21 (UPA 24) addresses adoption and relinquishment where the father has not been formally ascertained and one of the stronger presumptions of paternity do not exist.[123] In light of the decisions addressing the rights of fathers of illegitimate children,[124] this section sets up a procedure to formally terminate the unknown or unascertained father's potential rights in order to safeguard subsequent adoption proceedings.

Subsection (b) obliges the court to cause inquiry of the mother and any other person in an effort to identify the natural father. Subsection (c) provides for notice to all putative fathers and an opportunity to be heard. If any putative father fails to appear or fails to claim custodial rights, his parental rights are terminated. If a putative father does appear and assert custodial rights, his consent is still not necessary if the court makes one of the findings enumerated in subsection (e).[125] The findings are taken from current Kan-

110. *See supra* note 1, § 15 comment, at 24.
111. KAN. STAT. ANN. § 38-1101 (1981).
112. KAN. STAT. ANN. § 39-755(b) (1981).
113. *See supra* note 1, § 16 comment, at 24. *See also*

116. *Id.*, § 17 comment, at 25.
117. KAN. STAT. ANN. § 45-201 (1981).
118. *See supra* note 1, § 19 comment, at 26.
119. *Id.*, *See Lawrence v. Boyd*, 207 Kan. 776, 486 P.2d 1394 (1971); *Huss v. DeMott*, 215 Kan. 450, 524 ... *Smith v. Simmons*, 4 Kan. App. 2d 60,

120. *See supra* note 118.
121. *Id.*, § 20 comments, at 27.
122. *See* KAN. STAT. ANN. § 65-2401-2437
123. *See supra* note 1, § 21 comments, at 27.
124. 405 U.S. 645 (1972); 434 U.S. 246 (1977); 441 U.S. 380 (1979).

sas statutory law[126] and deal with such circumstances as fitness, abandonment and rape of the mother, where the court may reasonably find the father's consent is not required. The section is not considered to be at variance with *In re Lathrop* or *In re Adoption of Baby Boy L.*

Subsequent subsections provide for terminating parental rights when the father cannot be identified, appointment of counsel for an unknown father and court discretion in determining whether publication notice will be required based on the likelihood of identifying the father.

V. Repealers and Amendments

The remainder of the Act refers to changes required in current statutory law to conform with the provisions of the Kansas Parentage Act.

Sec. 22 amends K.S.A. 38-113 to conform with the procedure in Sec. 21 for determining whether a father's consent is necessary to a proposed relinquishment. Present Kansas law provides a procedure for relinquishment of a child to corporations authorized to place children for adoption.[127] The existing statute addresses the situation where the mother of an "illegitimate" child wishes to relinquish the child for adoption.[128] Since the Act abolishes the concept of illegitimacy, the Committee recommends that K.S.A. 38-113 (a) be repealed and K.S.A. 38-113 amended. Sec. 22 proposes an amended[129] statute which clarifies that once a child is relinquished, the corporation stands in loco parentis and only its consent is necessary for the child's adoption.[130]

Sec. 23 similarly amends K.S.A. 38-124-28, which provides a procedure for the relinquishment of a child to SRS.[131]

Sec. 24 amends K.S.A. 59-501 to insure rights of inheritance for children born out of marriage. Under this statute, illegitimate children can inherit through intestate succession from their father, when the father has notoriously or in writing recognized his paternity or his paternity has been adjudicated in his lifetime.[132] Since illegitimacy is abolished by the Act, the Committee attempted to insure that children similarly situated to "illegitimate" children under the present law will retain rights of inheritance.[133] Appropriate changes were made in the presumption in subsection 4 of Sec. 4 (a) to insure that a child with a presumed father would be allowed to bring an action upon the death of the father to have paternity determined.[134] Children with no presumed father could bring an action upon the death of the father only if the father died before the child reached age 21.

The Section would seem to be at variance with the recently decided case of *Gross* v. *VanLerberg*[135] wherein the Kansas Supreme Court decided that a nonstatutory action brought by an illegitimate child against his putative father to establish paternity does not survive the death of the putative father and cannot be continued against the decedent's personal representative.

Section 25 amends K.S.A. 59-2102 to eliminate reference to legitimacy in consent to adoption. Presently only the consent of the mother is statutorily required for the adoption of an "illegitimate" child.[136] In order to balance the rights of unwed fathers consistent with *Stanley* and related decisions with the need to facilitate adoptions, the Committee recommended amending K.S.A. 59-2102 to protect the unwed father's parental rights where he has manifested parental concern under the provisions of Sec. 21.

Sec. 26 amends 59-3002(3) to insure that both natural parents of a child are considered natural parents of a child unless a parent is incapacitated or had parental rights severed.

VI. Conclusion

In 1928, Judge Leon R. Yankwich recognized the injustice of thrusting upon innocent children society's condemnation of the illegal behavior of their parents when he said "there are no illegitimate children — only illegitimate parents."[137] Forty years later, the United States Supreme Court decided that illegitimate children were to be afforded rights that legitimate children had learned to expect.[138] The time is long overdue for society to recognize "illegitimate" children as simply children and to afford them the same rights as children of legally married parents.

Similarly, a realistic and nonpunitive stance towards putative fathers that recognizes their rights while providing a flexible mechanism for enforcing support obligations can only aid in the struggle towards equal protection for all children.

The Uniform Parentage Act does little more than fulfill a constitutional mandate.[139] The Kansas Parentage Act as recommended by the Family Law Advisory Committee has been carefully drafted to preserve those areas where Kansas law is currently the better alternative while insuring full compliance with constitutional mandates. Its adoption would take a giant step in providing a cohesive yet flexible procedure in providing substantive legal equality for all children regardless of the marital status of their parents.

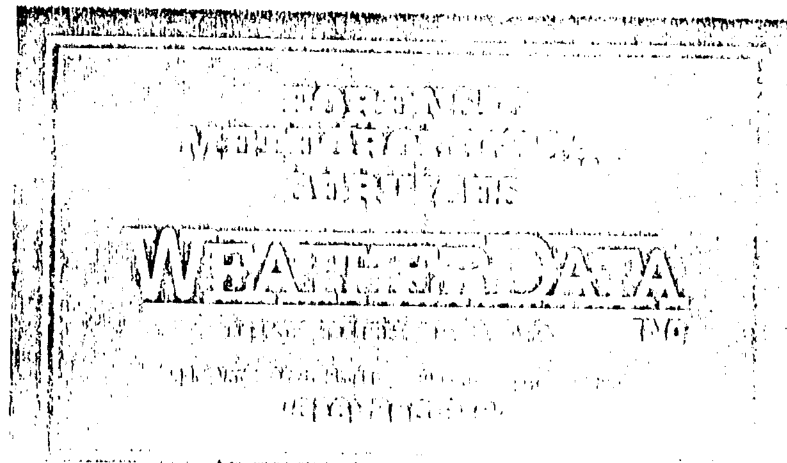
> *. . . a realistic and nonpunitive stance towards putative fathers that recognizes their rights while providing a flexible mechanism for enforcing support obligations can only aid the struggle towards equal protection for all children.*

132. See *Record v. Ellis*, 97 Kan. 754, 156 P. 712 (1916); *Jensen v. Hoeble*, 167 Kan. 1, 204 P.2d 703 (1949); *In re Estate of Julian*, 184 Kan. 94, 334 P.2d

137 Comment, *Washington's Parentage Act: A Step Forward for Childrens Rights*, 12 GONZ. L. REV. 455, 458 (1977).

138. *Levy v. Louisiana*, 391 U.S. 68 (1968).

139. *See supra* note 6.



RECOMMENDATIONS OF THE FAMILY LAW
ADVISORY COMMITTEE ON 1985 H. B. 2012

1. Delete § 6, lines 82 - 105, and remove K.S.A. 23-128 through 23-130 from the repealer.

2. Amend subsection (a) of § 7 on page 3, lines 107 - 111, to read:

(a) A child whose paternity has not been determined, or any person on behalf of such a child, may bring an action

(1) at any time to determine the existence of a father and child relationship presumed under subsection (a) of section 5; or

(2) at any time until three years after the child reaches the age of majority to determine the existence of ~~the~~ a father and child relationship which is not presumed under subsection (a) of section 5.

Attachment No. 4
House Judiciary
January 22, 1985