Brief of Amicus Curiae
Center for Family Policy and Practice
Submitted to the Wisconsin Supreme Court in a case involving termination of parental rights

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EXECUTIVE SUMMARY

The Wisconsin Supreme Court granted the Center for Family Policy and Practice (CFFPP) permission to write an amicus curiae brief in the case of In re the Termination of Parental Rights to Chezron M. This case involved the termination of the parental rights of an unwed father. The reason for the termination was that he did not have contact with his child for a period of six months or more before his paternity was ever established.

Wisconsin law provides that the state can generally terminate the parental rights of unwed fathers before their paternity is established under certain limited circumstances. Through this case the State of Wisconsin attempted to expand the number of reasons the State could terminate an unwed father's parental rights. CFFPP believed that the State's interpretation of the statute was contrary to both our nation's historical treatment of unwed fathers and the legislative history of the relevant statute. The Wisconsin Children's Code has never been interpreted the way the State suggests is applicable to this father.

The issue before the Court is when for purposes of the Wisconsin Children's Code do unwed fathers become parents. Our nation has historically distinguished between married and unmarried fathers in their relationship to their children. Historically this was done to discriminate against unwed fathers and their children and now the State attempts to blur this distinction in order to terminate the father's rights.

CFFPP wrote this amicus curiae brief as part of its focus on Child Welfare and Fatherhood policy. CFFPP is increasingly concerned that social welfare policy is looking for ways to terminate the parental rights of unwed fathers without affording them their due process rights. This emphasis is partially the result of the 1997 passage of the federal Adoption and Safe Families Act of which the goal is to accelerate the process of adoption of children in the child welfare system.

I. INTRODUCTION

The Center for Family Policy and Practice supports the interpretation of the relevant statute provided in James P.'s brief. The court of appeals correctly identified the critical issue as whether Wis. Stat. §48.02(13) considers an unwed father to be a parent for purposes of the Children's Code before a court declares him a parent. When does a father become a parent? That is the issue before this court.

Typically the section of Wis. Stat. §48.415 that is used to terminate the parental rights of an alleged father is subsection six. That section provides, "FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons *who may be the parent of the child* have never had a substantial parental relationship with the child." WIS. STAT. §48.415(6) (2004) (emphasis added).

Wis. Stat. §48.415(1)(a)3, however, requires that the abandonment occur "by the parent." See WIS. STAT. §48.415(1)(a)3 (West 2004). Clearly the subject of this section is the parent, not a person "who may be the parent." The Children's Code defines "parent" as follows:

"Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under 891.40, or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under 767.62(1) or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

WIS. STAT. §48.02(13)(West 2004). The State and the Guardian Ad Litem claim that unmarried fathers are covered by both the first and second sentences of this definition. They postulate that the first sentence covers unwed fathers because they are always the biological fathers of their children.

James P. reasons that this definition distinguishes nonmarital and marital fathers, and therefore the abandonment section of the statute was not applicable to him until he established his paternity. The State's attempt to misapply a section of the termination of the parental rights statute to the facts of this case contravenes the legislature's intent in the abandonment statute.

Our nation has historically distinguished between married and unmarried fathers in their relationship to their children. The legislative history of the definition of "parent" in the Children's Code maintains this distinction. Now the State attempts to blur this distinction to terminate their rights.

A. HISTORICALLY OUR NATION HAS ALWAYS DISTINGUISHED BETWEEN MARRIED AND UNMARRIED FATHERS

Social policy will explain why Wis. Stat. §48.415(1)(a)(3) does not apply to this case. Historically, society used marital status to distinguish parents. See HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1-6 (1971). Both English common law and American law defined the child's legal relationship to his or her parents in the context of the parents' marital relationship to each other at the time of the child's birth or conception. Laurence C. Nolen, *"Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U.L. REV. 1, 6 (1999). A child was considered "legitimate" only if the parents were married to each other when the child was born or conceived. At common law, the illegitimate child had few rights with respect to his or her parents and was known as nullius filius (no one's son). *See id.* at 6-7.

In the nineteenth century the law began to recognize that an unwed mother, as the legal guardian of her child, had rights with respect to custody, visitation, and adoption. *See id.* at 9. Yet most states, including Wisconsin, did not recognize that the unwed father had rights of custody, visitation, or adoption, unless the child had been previously legitimated or acknowledged. *See id; see, e.g., In re Adoption of Morrison: Jones v. Manesewitz*, 267 Wis. 625, 66 N.W.2d 732 (Wis. 1954).

Throughout our nation's history this distinction was so widely accepted that it rarely needed any justification. "As reflected in (and formed by) the traditional law, society saw the nonmarital child as the mother's child and all but denied the father's existence." HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 118 (1981). "Similarly, when the words 'child' or 'children' appear in a statute, such words are usually interpreted in the sense in which they are used in legal or common parlance, and refer to children begotten in lawful wedlock, whether born before or after the death of the father." *GRAHAM DOUTHWAITE, UNMARRIED COUPLES AND THE LAW, 114 (1979)*.
Only recently has the law recognized that an unwed father is always biologically tied to the child, but the definition of "parent" in the Children's Code does not reflect this new thinking.

B. THE LEGISLATIVE HISTORY OF THE DEFINITION OF "PARENT" WITHIN THE CHILDREN'S CODE SHOWS A CLEAR INTENT TO DISTINGUISH BETWEEN MARITAL AND NONMARITAL PARENTS

The Wisconsin Supreme Court has laid out a clear framework for when it will consider the legislative history of a statute to determine its interpretation. See *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dep't of Natural Res.*, 270 Wis. 2d 318, 329, 677 N.W.2d 612, 618(Wis. 2004). First it looks at the plain meaning of the statute. *See id.* at 329, 677 N.W.2d at 618. If

the statute is not ambiguous, the Court will not consult extrinsic sources. See id. at 329, 677 N.W.2d at 618. A statute is ambiguous only if a well-informed person can read the statute to have different meanings. *See id.* at 330, 677 N.W.2d at 618. If the statute is ambiguous the Court will turn to legislative history to aid its interpretation. *See id.* at 330, 677 N.W.2d at 618. The Court may also consult legislative history to support its reading of the plain meaning of the statute. *See id.* at 330, 677 N.W.2d at 618.

The history of the legislature's definition of "parent" shows that the legislature has always distinguished between nonmarital and marital parents for purposes of the Children's Code. The definition of "parent" in the relevant statute has undergone a number of changes over the years,[1] but throughout these changes an unwed father has never been considered the father until he establishes paternity.

The 1955 statutes contain the first definition of "parent" for purposes of the Children's Code, as follows: "'Parent' means either a natural parent or a parent by adoption. If the child is illegitimate, 'parent' means the mother." WIS. STAT. §48.05(11)(1955). Clearly at this point an unwed father was either considered a natural parent or the definition of parent contained within the Children's Code excluded him as a parent.

The latter interpretation is more plausible given the English common law belief that an illegitimate child was deemed to be "filius nullius . . . the child of no one." See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81-83 (Fall 2003). Mothers were generally accorded a legal connection to their out-of-wedlock children in the late nineteenth century, but nonmarital fathers were not. *See id.* at 82. Thus, given the time period, it is not surprising that the Wisconsin legislature's definition of "parent" did not include a father of an "illegitimate" child. *See, e.g., Adoption of Morrison* at 631, 66 N.W.2d at 736("[t]he 'consent of the parents' so referred to is the consent of the mother, alone, when the child is illegitimate, for at common law such a child had no father known to the law, 7 Am. Jur., Bastards, p. 627, sec. 3, and our statutes have not conferred the privilege of being consulted upon the father.")

Only after two United States Supreme Court decisions, see *Stanley v. Illinois*, 405 U.S. 645, 646 (U.S. 1972); *Rothstein v. Lutheran Soc. Servs.* 405 U.S. 1051 (U.S. 1972), did the Wisconsin legislature recognize the unwed father as a parent. *See*, Jerome A. Barron, *Notice of the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527, 535 (Fall 1975) (noting that the Wisconsin legislature revised the Children's Code in 1973 in response to *Stanley* and *Rothstein* and took a broad view of the rights afforded to unwed parents). In Stanley, a nonmarital father who had long lived with the mother was held entitled to notice and a hearing in proceedings about the custody of the children. *See, Stanley*, 405 U.S. at 646. The Court declared, "[t]he 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." *Id.* at 651. In *Rothstein*, the Court remanded to the Wisconsin Supreme Court, for decision in light of *Stanley*, a case involving a nonmarital father challenging an adoption. *See, Rothstein*, 405 U.S. at 1051.

In 1973, the legislature changed the definition of "parent" to: "'Parent' means either a natural parent or a parent by adoption. If the child is born out of wedlock but not subsequently legitimated or adopted, 'parent' means the natural mother *and a person adjudged in a court proceeding to be the natural father*." WIS. STAT.§48.05(11) (1973) (emphasis added). According to the legislative history, this change resulted from *Stanley* and *Rothstein. See* Prefatory Note of Analysis by the Wis. Legislative Reference Bureau to 1973 amendment of 48.02(11) (LRB 4575).

The Legislative Reference Bureau noted about the 1973 changes that "[t]he definition of 'parent' is expanded to include the natural father once a court has determined his paternity. . . If he is found to be the natural father, he is then a 'parent'." *Id.* Clearly, for an unwed father, the determination of paternity is the prerequisite to being a father. Thus, the definition of "parent" that this Court should adopt should reflect the legislature's decision that an unwed father is only a father, for purposes of the abandonment statute, after the paternity determination.

The next three changes to the definition of "parent," in 1977, further support this interpretation of the statute. Except for changes not relevant to this case,[2] this was the last time the legislature changed the definition of "parent". The legislature provided, "'Parent' means either a biological parent or a parent by adoption. If the child is born out of wedlock but not subsequently legitimated or adopted, 'parent' includes a person adjudged in a judicial proceeding to be the biological father. 'Parent' does not include any person whose parental rights have been terminated." WIS. STAT. §48.05(13)(1977). Thus, the legislature changed the wording of the definition of "parent" from "natural" to "biological", added the third sentence, and removed mothers from the second sentence in regard to when an unwed parent is considered a parent.

The legislative history of these 1977 changes shows that the first sentence of the definition of "parent" continued to not cover unwed fathers. Initially the legislative draft of this change only replaced the word "natural" with "biological" and added the third sentence to the definition. *See,* Preliminary Draft of changes of 1977 Chapter 354 (LRB 7644/2). Then the drafters realized that "biological parent" in the first sentence covered all mothers, so that the definition "as currently drafted would require parent, to mean <u>both</u> a person adjudged to be the biological father and the biological mother in a court proceeding. The biological mother is already referred to in the first sentence. The language referring to the biological mother in this sentence, therefore, is unnecessary." Wisconsin Legislative Reference Bureau Minor Substantive and Technical Changes to Working Draft 9/29/77. If

the legislature believed that the first sentence referred to all fathers, the entire middle sentence would be “unnecessary.”

The use of the word “includes” in the second sentence is logical given our nation's historical belief that an illegitimate child was not the child of his father. "Includes" is meant not to convey that the unwed father is a subset of all fathers, but to rebuke the notion that an unwed father is not a parent and to continue to conform to the constitutional dictates of *Stanley* and *Rothstein*. This Court has noted that the use of the word “includes” in a statute is not always a term of enlargement. See *Milwauke Gas Light Co. v. Dept. of Taxation*, 23 Wis. 2d 195, 203, 127 N.W.2d 64, 68 (1964) (noting that courts have found the use of the term “include” a difficult one to interpret and that it possibly has three different interpretations). Of course, he is only a parent if he is first “adjudged in a judicial proceeding to be the biological father.”

Other sections of the statutes show that the law has never considered an unwed father a parent until paternity is established. Until then he cannot be named on the birth certificate as the father. *See* WIS. STAT. §767.51(2)(West 2004). The judgment of paternity provides the first time that he can obtain orders for legal custody or physical placement. *See id.* at (3)(b). It is also the first time that he has any financial relationship with the child, being eligible to claim the child as a federal and state tax exemption, owe child support, or be ordered to pay for the costs associated with the birth. *See id.* at (3)(c)(d)&(e).

Nor can a court generally order him to pay child support for the period before the establishment of paternity. *See id.* at (4). Instead, a court can only generally order him to pay support from the date the paternity action is filed.[3] The guardian ad litem’s brief cites the decision of the Court of Appeals in *Brad Michael L. v. Lee D.*, 210 Wis. 2d 437, 564 N.W.2d 354 (Ct. App. 1997), regarding child support for the proposition that his “parental responsibility becomes retroactive to the child’s birth” (Guardian ad Litem’s Brief at 15). *Brad Michael L.*, however, was interpreting the paternity judgment statute as it existed in 1997. Subsequently, in response to *Brad Michael L.*, the legislature specifically changed the paternity judgment statute to generally not allow retroactive support. *Compare* WIS. STAT. §767.51(4)(1997-98)(“The father’s liability for past support of the child shall be limited to support for the period after the birth of the child.”) *with* WIS. STAT. §767.51(4)(2004). Thus, from a legal standpoint until paternity is established an unwed father has no relationship to the child because he is not bound to support or care for the child.

II. CONCLUSION

For all the foregoing reasons, along with those contained in James P.'s brief, the Court should allow the State to terminate parental rights of alleged fathers only as the legislature proscribed.

Respectfully submitted,

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[1] Many of these changes are not relevant to whether the legislature believed that a father is not a parent until paternity is established. For example, in 1959 the legislature's change of a 1955 definition of "parent" simply changed terminology from "illegitimate" to "born out of wedlock." *See* WIS. STAT. §48.05(11)(1959) ("'Parent' means either a natural parent or a parent by adoption. If the child is born out of wedlock, 'parent' means the mother.") For all other changes not discussed in the body of the text up to current law see footnote 2.

[2] In 1979-1980, the legislature simply added to the first sentence of its definition of "parent" to include "a husband who has consented to the artificial insemination of his wife under s. 891.40." WIS. STAT. §48.02(13)(1979-80). In 1983-1984, the legislature changed the preface of the second sentence, from "[i]f the child is born out of wedlock but not subsequently legitimated or adopted" to "[i]f the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60." *Compare* WIS. STAT. §48.02(13)(1979-80) *with* WIS. STAT. §48.02(13)(1983-84). In 1997-1998 the legislature expanded the number of ways that a nonmarital father could become a parent. This action was done to correspond to federal mandates required under welfare reform. The 1997-1998 law included nonmarital fathers who were "acknowledged under s. 767.62(1) or a substantially similar law of another state" *Compare* WIS. STAT. §48.02(13)(1983-84) *with* WIS. STAT. §48.02(13)(1997-1998). Since 1997-1998 there have been no further changes to the definition of parent in the Children's Code.

[3] Wis. Stat. §767.51(4) specifically provides:
(a) Subject to par. (b), liability for past support of the child shall be limited to support for the period after the day on which the petition in the action under s. 767.45 is filed, unless a party shows, to the satisfaction of the court, all of the following:
1. That he or she was induced to delay commencing the action by any of the following:
a. Duress or threats.
b. Actions, promises or representations by the other party upon which the party relied.
c. Actions taken by the other party to evade paternity proceedings.
2. That, after the inducement ceased to operate, he or she did not unreasonably delay in commencing the action.
(b) In no event may liability for past support of the child be imposed for any period before the birth of the child.