JUDICIAL ABROGATION OF A HUSBAND'S PATERNITY: CAN A THIRD PARTY SEEK TO ESTABLISH PATERNITY OVER A CHILD BORN INTO A MARRIAGE WHILE THAT MARRIAGE REMAINS INTACT?

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INTRODUCTION

The resolution of whether a third party may attempt to establish paternity of a child who is born into an intact marriage demonstrates the spectrum of jurisprudential philosophy in the courts of Indiana. Although the paternity statute[1] is silent concerning a third party's ability to invade an intact marriage and challenge the paternity of a child born during that marriage, there have been differing interpretations in the Indiana and federal courts as to whether such an action is allowed. Most recently, the Indiana Supreme Court, in *K.S. v. R.S.*,[2] held that a third party may attempt to establish paternity of a child born into an intact marriage while that marriage remains intact.[3]

The implications of that decision are far-reaching and involve concerns such as the preservation of an intact family structure, the impact of this type of paternity proceeding on the children involved, the biological father's rights, the child's intestate succession rights, and the children's rights to an orderly and stable family life. In the absence of express statutory language, the issue of judicial activism versus judicial restraint also arises. The most significant implication of the court's opinion is that a presumptive father-husband, mother or child may now disclaim paternity of a child born into an intact marriage when that marriage remains intact. This Article examines those implications in light of the recent Indiana Supreme Court opinion and the applicable common and statutory law.

I. COMMON LAW HISTORY

One of the most familiar rules of law is the principle that a child conceived or born during wedlock is presumed to be legitimate.[4] As noted by Justice Scalia in the plurality opinion of *Michael H. v. Gerald D.*,[5] the presumption of legitimacy was a fundamental principle of the common law.[6] Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had

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1. IND. CODE §§ 31-6-6.1-1 to -21 (1993 & Supp. 1996).
2. 669 N.E.2d 399 (Ind. 1996).
3. *Id.* at 402.
4. 41 AM. JUR. 2D *Illegitimate Children* § 10 (1995); 10 AM. JUR. 2D *Bastards* § 11 (1963).
5. 491 U.S. 110 (1989).
6. *Id.* at 124 (citing H. NICHOLAS, ADULTURINE BASTARDY 1 (1836)).

no access to his wife during the relevant time period.[7] "As explained by Blackstone, nonaccess could only be proved 'if the husband be out of the kingdom of England (or as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months.'"[8] Additionally, under English and American common law, "neither husband nor wife [could] be a witness to prove access or nonaccess."[9]

The primary rationale underlying the common law's severe restrictions on the rebuttal of the presumption appears to have been an aversion to declaring children illegitimate,[10] thereby depriving them of rights of inheritance and succession,[11] and possibly making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquility of the States and families,"[12] a goal that is obviously impaired by facilitating suits against a husband and wife asserting that their children are illegitimate. As such laws became less harsh, "[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the 'four seas rule'. . . [,] the law retained a strong bias against ruling the children of married women illegitimate."[13]

Although the presumption of legitimacy of such a child is a strong one, it is generally held that the presumption is rebuttable upon the presentation of proof sufficient to establish that the husband of the child's mother is not the child's biological father. Where attempts have been made to rebut the presumption of legitimacy, questions have occasionally arisen as to whether a person has standing to offer the requisite proof. Most often, standing is provided, or barred, by the statutory law of the particular state.

II. STATUTORY LAW

The standing of a person to dispute the presumption of legitimacy of children conceived or born during wedlock may be controlled or affected by various statutes, including those which: (1) limit standing to the husband or wife or their descendants; (2) grant standing to the husband and his heirs; and, (3) neither directly grant nor limit standing, such as statutes which authorize proceedings to establish the paternity of children or statutes which authorize the use of blood tests

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7. *Id.* (citing BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, bk. i, ch. 9, at 6; bk. ii, ch. 29, at 63; bk. ii, ch. 32, at 70 (1569)).

8. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *445) (emphasis added).

9. *Id.* at 124-25 (quoting JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS § 225 (Boston, Little, Brown & Co., 3d ed. 1882); R. GRAVESON & F. CRANE, A CENTURY OF FAMILY LAW: 1857-1957, at 158 (1957)).

10. *Id.* at 125 (citing SCHOULER, *supra* note 9, § 225; M. GROSSBERG, GOVERNING THE HEARTH 201 (1985)).

11. *Id.* (citing 2 J. KENT, COMMENTARIES ON AMERICAN LAW 175).

12. *Id.* (citing SCHOULER, *supra* note 9, § 225 (quoting BOULLENOIS, TRAITE DES STATUS, bk. 1, at 62)).

13. *Id.* (citing GROSSBERG, *supra* note 10, at 202).

in paternity proceedings.

Indiana's statutory scheme falls into the third category; no statute expressly limits or grants the standing of a third party to establish paternity of a child born during marriage. We must look instead to the statute which authorizes proceedings to establish the paternity of children,[14] including the statute which authorizes the use of blood tests in paternity proceedings,[15] the dissolution statute which defines what is meant by a child born in wedlock,[16] and various other statutes.

III. Common Law Interpretation of Indiana Statutory Law

A recent case, *K.S. v. R.S.*,[17] which involved a third party attempting to establish paternity over a child born into an intact marriage, presents difficult issues and does not fit comfortably into Indiana common and statutory law. K.S. ("Mother") and D.S. ("Husband") were married for thirteen years when the youngest of three children, D.S., was born during the marriage. During the marriage, Mother engaged in a sexual relationship with her neighbor. Neighbor claimed that D.S. was conceived during his relationship with Mother, and that he is D.S.'s biological father.[18]

Approximately one-and-one-half years after D.S.'s birth, Neighbor filed a petition to establish paternity. D.S. was neither named as a party nor otherwise represented by counsel or a guardian ad litem.[19] Neighbor also filed an agreed entry, which asserted that he was the biological father of D.S.[20] After Mother, Husband, and Neighbor signed the agreed entry, the trial court approved it. Approximately eight months later, Mother filed a motion to set aside the agreed entry pursuant to Indiana Trial Rule 60(B)(6) because the child was not named as a party and there was no physical evidence of Neighbor's paternity. The motion was denied, and Mother appealed. The Indiana Court of Appeals held "no cause of action exists in Indiana when a third person attempts to establish paternity of a child born during the marriage of the mother and her husband while their marriage remains intact."[21] Further, the court found that the agreed entry, as a

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14. Ind. Code §§ 31-6-6.1-1 to -21 (1993 & Supp. 1996).

15. *Id.* § 31-6-6.1-8 (Supp. 1996).

16. *Id.* § 31-1-11.5-2(c).

17. 657 N.E.2d 157 (Ind. Ct. App. 1995), *vacated and rev'd*, 669 N.E.2d 399 (Ind. 1996).

18. There was no other evidence in the record of proceedings as to Neighbor's biological paternity of D.S. at the time of appeal.

19. *K.S.*, 669 N.E.2d at 404.

20. The agreed entry provided for joint custody of D.S., with an alternating seven day visitation period. The agreed entry also provided that "because of the joint custody arrangement, there shall be no support paid from one party to the other party." *Id.* at 406.

21. *K.S.*, 657 N.E.2d at 159. The court first reasoned that the policy concerns under these conditions were too great for the court to create this cause of action. The legislature was "the appropriate body to design a statutory provision to properly weigh the interests at stake and adequately protect those interests."

private agreement, was void as against public policy.[22] The Indiana Supreme Court reversed that decision of the court of appeals.[23] The differing approaches of the court of appeals and the supreme court on this issue demonstrate with great clarity a line in the jurisprudential sand.

Both courts interpreted section 31-6-6.1-2 of the Indiana Code, which expressly authorizes certain persons to file a paternity action. In particular, the statute provides:

> (a) A paternity action may be filed by the following persons:
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> (1) The mother or expectant mother.
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> (2) A man alleging that he is the child's biological father or that he is the expectant father of an unborn child.
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> (3) The mother and a man alleging that he is her child's biological father, or by the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly.
>
> (4) A child.[24]

The statute makes no reference to the marital status of the mother. Accordingly, the Indiana Supreme Court held that "[n]othing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status."[25] Because the statute was not expressly prohibitive, the putative father's cause of action was recognized by the Indiana Supreme Court. In addition to the level of judicial activism[26] exhibited by our high court in

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22. *Id.* at 164. The court further stated, "Even if we do not view the Agreed Entry as a private contract, parties may not agree to establish a legal cause of action when no such legal cause exists in the eyes of the court or the legislature." *Id.* at 164-65.

23. *K.S.*, 669 N.E.2d at 406.

24. The Indiana Court of Appeals recently held that a child may seek to establish paternity in a third party, although the child's mother and her husband were married at the time of the child's conception and birth and remain married at the time the child brings the cause of action against the third party. C.J.C. v. C.B.J., 669 N.E.2d 197, 199 (Ind. Ct. App. 1996), *trans. denied.* In that case, the putative father had never had a relationship with the child, whereas the husband had a relationship with the child and assisted in his support. The putative father resisted the attempt to establish paternity on the grounds of estoppel and for public policy reasons. The court based its decision on the Indiana Supreme Court's recent position in *K.S. v. R.S.*

25. *K.S.*, 669 N.E.2d at 403.

26. Judicial activism occurs when a statute does not expressly instruct the litigants how to proceed and the court, rather than deferring to the legislature for guidance, expands the reading of the statute. As in the case of *K.S. v. R.S.*, where a statute presents two equally-weighted presumptions which appear to cancel each other out, it is not an exercise of traditional judicial restraint to recognize one presumption over the other without legislative guidance. Roscoe Pound summarized:

rendering its opinion, there are other significant issues which relate to or emanate from that holding.

A. When Is a Child "A Child Born Out of Wedlock"?

The Indiana Court of Appeals in *K.S. v. R.S.* analyzed the paternity statute as permitting only the establishment of paternity of a child born out of wedlock.[27] According to the appeals court, because D.S. was not a child born out of wedlock, no third party could attempt to establish paternity over him.[28] The Indiana Supreme Court held otherwise, and defined D.S. to be a child born out of wedlock.[29] However, whether D.S. is a child born out of wedlock is an important issue, regardless of whether paternity is challenged now or in the future. The statutorily-created presumptions may answer this question, to the extent that there are not two equally-weighted, conflicting presumptions.

The paternity statute creates a presumption that the mother's husband is the biological father of a child born during the marriage.[30] It also provides that a man

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> Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke, contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it." Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

HANDBOOK FOR JUDGES 230 (George H. Williams & Kathleen M. Sampson eds., 1984) (footnotes omitted).

27. *K.S.*, 657 N.E.2d at 159-61.

28. *Id.* at 162.

29. *K.S.*, 669 N.E.2d at 402.

30. There are five types of statutorily-created presumptive fathers defined by the statute, only two of which are relevant to this discussion:

> (a) A man is presumed to be a child's biological father if:
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> (1) the man and the child's biological mother are or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, or dissolution; . . .
>
> (4) the man undergoes a blood test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

IND. CODE § 31-6-6.1-9(a)(1), (a)(4) (Supp. 1996).

is presumed to be the biological father of a child when a blood test indicates with at least 99% probability that he is the child's biological father.[31] These presumptions, of course, clash head-on in a situation where there are two presumptive fathers, such as when a child is born during the marriage, but a blood test indicates that a third party is the biological father of the child.

Reconciling the differences between those two presumptions was the task of the courts in *K.S. v. R.S.* These presumptions are irreconcilable. The Indiana Supreme Court had already held that the presumption created in favor of the husband was rebuttable by "direct, clear, and convincing evidence."[32] A blood test in which another man is proved to be the biological father of a child is sufficient evidence to overcome the presumption in favor of the presumptive father-husband, regardless of whether the husband remains married to the mother.[33] In other words, the presumption in favor of the putative father created by section 31-6-6.1-9(a)(4) of the Indiana Code rebuts the presumption in favor of the presumptive father-husband created by section 31-6-6.1-9(a)(1). Thus, unless a presumptive father-husband obtains blood tests which indicate with 99% probability that he is the child's biological father, the presumption he gains under subsection (a)(1) of the statute is subject to attack by any man outside of the marriage[34] who wishes to assert his paternity over a child born during the marriage.[35] Absent a conclusive blood test in favor of the presumptive father-husband, a third party who does not prevail by virtue of blood test results is but one man of a potentially never ending number of men who may seek to establish paternity of a child born during the marriage. Therefore, the presumptive father-husband's statutory presumption exists only to defend, if he so chooses, his paternity against assertions of paternity made by third parties outside of the marriage.

Several scenarios may occur which have not been addressed by the Indiana Supreme Court. For example, a presumptive father-husband who would not have otherwise undergone blood testing to determine his biological status over the child

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31. *Id.*

32. Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990). Our supreme court held in the case, *In re Paternity of S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992), that a putative father may establish paternity over a child born during the marriage of the child's mother and her husband after the mother and husband have divorced, even though the child was found by the divorce court to have been a child of that marriage. The court stated, "Thus, a putative father may establish paternity without regard to the mother's marital status, so long as the petition is timely filed." *Id.* The court based its reasoning on the concepts put forth in *Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990).

33. *K.S.*, 669 N.E.2d at 403.

34. The child is also allowed to challenge the presumptive father-husband's parenthood, even against the wishes of the presumptive father-husband. IND. CODE § 31-6-6.1-2(a)(4) (Supp. 1996).

35. Although a putative father must produce the blood test result with 99% probability in order to prevail, he has standing to bring the cause of action and get the court to order blood testing, regardless of whether the actual result of the blood test provides him with sufficient probability of biological fatherhood to create a presumption in his favor under the statute. *See id.* § 31-6-6.1-8.

may do so when a third party asserts his paternity. Both may fail to obtain sufficient probability of biological fatherhood. One would guess that the presumptive father-husband retains his presumption of fatherhood under section (a)(1)[36] of the statute, until another man wishes to establish paternity over the child. However, the paradox created by the Indiana Supreme Court is that such a child is per se a child born out of wedlock, regardless of a third party challenge to paternity.

Justice Sullivan, writing for the Indiana Supreme Court, stated in *K.S. v. R.S.* that

> Indiana common law is clear that the term wedlock refers to the status of the biological parents of the child in relation to each other. A child born to a married woman, but fathered by a man other than her husband is a 'child born out of wedlock' for purposes of the statute.[37]

The Indiana Supreme Court thereby affirmed the majority opinion of the court of appeals in *R.D.S. v. S.L.S.*[38] In *R.D.S.*, the husband challenged the divorce court's findings that the child was a child of the marriage because the child was not conceived in the marriage. The majority opinion was that "a child born to a married woman but not fathered by her husband is a child born out of wedlock."[39] In that case the husband had not even met the mother until after she was visibly pregnant. They were married three weeks before the birth of the child. Under the holding of that case, had the husband not challenged the paternity at divorce, the child would have been considered a child of the marriage under such theories as equitable adoption, equitable estoppel, in loco parentis, or under a contract to support or adopt a child. Unlike the facts in *R.D.S.*, in *K.S. v. R.S.*, the child was conceived while the husband and mother were married, albeit a dispute arises as to which man is responsible for the conception.

The position of our supreme court on this matter rejects squarely the notion put forth by the appeals court over three decades ago in *Profitt v. Profitt.*[40] The court of appeals held that children born during the marriage were presumably legitimate, and where a presumption exists that children born of a valid marriage are legitimate, they cannot be presumed to be born of one other than the party to that marriage or out of wedlock unless this has been determined in the court having jurisdiction over such matters.[41] Such is no longer the case once our supreme court determined that "a child born to a married woman, but fathered by a man other than her husband is a 'child born out of wedlock' for purposes of the

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36. *Id.* § 31-6-6.1-9(a)(1).

37. *K.S.*, 669 N.E.2d at 402 (citing R.D.S. v. S.L.S., 402 N.E.2d 30, 31 n.2 (Ind. Ct. App. 1980)). *But see* Russell v. Russell, 666 N.E.2d 943 (Ind. Ct. App. 1996), *vacated and rev'd*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997) (expressly rejecting that language in *R.D.S.*).

38. 402 N.E.2d 30 (Ind. Ct. App. 1980).

39. *Id.* at 31 n.2.

40. 204 N.E.2d 660 (Ind. App. 1965).

41. *Id.* at 661.

statute."[42] Clearly, such a child is now, per se, a child born out of wedlock.

The holding of our supreme court in *K.S. v. R.S.* also calls into question the holding of the court of appeals in the case, *In re Marriage of M.E.*[43] The court of appeals held that a child born during the marriage is presumed legitimate and that in divorce proceedings, silence and that presumption of legitimacy will establish paternity.[44]

Because the court did not limit the application of what it defined as a child born out of wedlock to this context, it is reasonable to assume that any child born into an intact marriage but biologically fathered by a man outside of the marriage is a child born out of wedlock. The supreme court in *K.S. v. R.S.* extended its holding in *Paternity of S.R.I.*,[45] in that the child in *S.R.I.* and any child similarly situated is a child born out of wedlock.[46] In that case, the child was born during the marriage but the putative father did not seek to establish paternity until after the mother and husband were divorced. The court was not asked in *S.R.I.* to weigh the conflicting statutory presumptions of the husband and putative father. Thus, according to the unrestricted language provided by the Indiana Supreme Court in *K.S. v. R.S.*, regardless of whether a third party establishes paternity via blood testing, a child who is not with 99% probability the biological child of the husband, even though that child was born during a marriage, is a child born out of wedlock.

The interpretation by the Indiana Supreme Court is problematic because the language of the statute which creates the presumption in favor of the husband[47] is similar to the language of the statute which defines a "child" for purposes of marriage and dissolution.[48] Because the paternity statute does not tell us what is meant by a "child born during the marriage,"[49] the Indiana Court of Appeals analyzed both statutes together in *Russell v. Russell*,[50] in an effort to determine when exactly a child is "a child born out of wedlock," in the context of a child who is born during a marriage. Likewise, the Indiana Supreme Court, in adopting the rationale of *R.D.S.* in its determination of whether D.S. was a child of the marriage (in *K.S. v. R.S.*) for purposes of the paternity statute, also relied on the dissolution statute and common law relating thereto.[51] However, as will be discussed, the outcome in *R.D.S.*, though possibly applicable in the context of dissolution, distorts the paternity statute.

Section 31-1-11.5-2(c) of the Indiana Code defines "child" as "a child or

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42. *K.S.*, 669 N.E.2d at 402 (citing *R.D.S.*, 402 N.E.2d at 31 n.2).

43. 622 N.E.2d 578 (Ind. Ct. App. 1993).

44. *Id.* at 581 (citing Cooper v. Cooper, 608 N.E.2d 1386, 1387 (Ind. Ct. App. 1993)).

45. 602 N.E.2d 1014 (Ind. 1992).

46. *K.S.*, 669 N.E.2d at 402.

47. IND. CODE § 31-6-6.1-9(a)(1) (Supp. 1996).

48. *Id.* § 31-1-11.5-2(c).

49. *Id.* § 31-6-6.1-9(a)(1).

50. 666 N.E.2d 943 (Ind. Ct. App. 1996), *vacated and rev'd*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997).

51. *K.S.*, 669 N.E.2d at 402-03.

children of both parties to the marriage and includes children born out of wedlock to the parties as well as children born or adopted during the marriage of the parties." The court of appeals concluded in *Russell* that section 31-1-11.5-2(c) includes three classes of children: (1) children of both parties to the marriage, "and includes," (2) children born out of wedlock to the parties, "as well as," (3) children born or adopted during the marriage of the parties.[52] Thus, under the dissolution statute, a child born during the marriage is not a child born out of wedlock.[53] Likewise, the language of the paternity statute under section 31-6-6.1-9(a)(1) of the Indiana Code, creates a presumption for husbands when the child is born "during the marriage."

However, the Indiana Supreme Court interpreted the language of the paternity and dissolution statutes to mean that "the fact that the child was born while mother was married does not establish that the child was born during wedlock."[54] Thus, a husband who is not the biological father of a child born during his marriage to the child's mother has no presumption in his favor under the paternity statute with regard to that child, regardless of whether a third party has established paternity over the child. His statutory presumption was effectively abrogated by the Indiana Supreme Court in *K.S. v. R.S.*

Other than conceding semantically that paternity had never been established in such a child in the first place, it cannot be avoided that our supreme court's interpretation of the paternity statute leaves much room for a husband, child, or mother to disclaim the otherwise valid presumption under the paternity statute in favor of the husband, regardless of whether the disclaimer of paternity is accompanied by an establishment of paternity in another man.[55] The result is that the paternity statute is used to disclaim paternity.

The Indiana Supreme Court abruptly rejected the position of the court of appeals in *K.S. v. R.S.* that the paternity statute may only be used to *establish* paternity over children born out of wedlock.[56] Unless we narrowly construe the

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52. *Russell*, 666 N.E.2d at 953. The court of appeals was called to determine whether a trial court has subject matter jurisdiction to enter an order of support, custody and visitation with regard to a child who is born during the marriage but whose biological father is another man.

53. *Id.*

54. *K.S.*, 669 N.E.2d at 402.

55. As noted by the court of appeals in *K.S. v. R.S.*, we must not confuse the finding by a dissolution court that a child is not a child of the marriage for purposes of arriving at an equitable support order with the establishment or disestablishment of paternity. K.S. v. R.S., 657 N.E.2d 157, 160 n.3 (Ind. Ct. App. 1995), *vacated and rev'd*, 669 N.E.2d 399 (Ind. 1996). As noted by our supreme court in *Fairrow v. Fairrow*, 559 N.E.2d 597 (Ind. 1990), a man who is not a child's biological father but who discovers the fact of his nonpaternity incidental to the divorce may seek an equitable order of child support based on that discovery. The father in *Fairrow* did not seek to disestablish paternity, and there was no third party available to establish paternity in his stead.

56. *K.S.*, 669 N.E.2d at 402. The policy statement provided by our legislature with regard to the intent of the paternity statute is: "The general assembly favors the public policy of *establishing* paternity under this chapter of a child born out of wedlock." IND. CODE § 31-6-6.1-1.5 (Supp. 1996) (emphasis added).

supreme court's holding in *K.S. v. R.S.* to mean that *only* when a third party seeks to establish paternity over a child born into an intact marriage is the presumptive father-husband's status as to paternity negated, *then and only then* may such a cause of action be allowed. However, Justice Sullivan's language in *K.S. v. R.S.* indicates that a broader reading is in order.[57]

The Indiana Supreme Court's conclusion that a child who is not biologically fathered by the husband of an intact marriage is not a child of that marriage presents a conundrum of great importance. The opinion of the supreme court provides a very strong argument to be used not only for a third party to *establish* paternity but also for a husband, mother, or child to *disclaim* paternity when such is convenient or beneficial. Although a husband has no standing to establish paternity,[58] he is granted a rebuttable presumption that he is the biological father of a child born during his marriage.[59] The standing conferred on the mother and child by the paternity statute grants standing only to *establish* paternity. However, a husband, mother or child may disestablish, or better said, may *disclaim* the establishment of paternity, by arguing that because the child is not "a child born during the marriage," then paternity was never established in the first place. This scenario becomes particularly relevant in light of the laws of intestate succession, which will be discussed later.

As interpreted by the Indiana Supreme Court, the only irrebuttable presumption created by the paternity statute is the one under subsection (a)(4), which is the presumption that will be wielded by men outside of the marriage who wish to establish paternity of a child born during the marriage of another man.[60] Although the Indiana Supreme Court found "that Indiana statutes permit putative fathers to maintain paternity actions"[61] with regard to a child born into an intact marriage of the mother while that marriage remains intact, the paternity statute neither expressly bars nor expressly authorizes for such a cause of action in Indiana. Moreover, the paternity statute confers jurisdiction upon the court to hear paternity matters and standing upon parties to the litigation.[62] Absent an express

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57. The court's reliance on *R.D.S.* indicates that the existence of a third party who is asserting paternity is not a necessary criteria for a husband to disclaim his paternity. There was no third party willing to assert his paternity in *R.D.S.* However, because *R.D.S.* involved a dissolution, and not paternity, the husband was successful in overcoming the presumption of legitimacy merely for purposes of obtaining an equitable order of child support. The child was not deemed illegitimate for other purposes. The supreme court's application of that holding in the context of paternity presents broader implications because not only is child support affected, but other affected issues are intestate succession and social concerns of legitimacy of children. The holding of *R.D.S.* has thereby been expanded exponentially by the Indiana Supreme Court in *K.S. v. R.S.*

58. IND. CODE § 31-6-6.1-2(a) (Supp. 1996). Rather, until recently, he had no reason to establish his own paternity because of the presumption of paternity created on his behalf by the paternity statute.

59. *Id.* § 31-6-6.1-9(a)(1).

60. *Id.* § 31-6-6.1-9(a)(4).

61. *K.S.*, 669 N.E.2d at 404.

62. IND. CODE § 31-6-6.1-2(a)(1) to -(4) (Supp. 1996).

statement by the legislature as to whether a putative father's presumption may overcome a presumptive father's presumption when the child is born into an intact marriage, which remains intact, any judicial recognition of such a cause of action is a clear example of the court favoring one public policy rationale over another.

Perhaps the debate will prompt the legislature to revise the statute to clarify this issue.[63] No matter how it is articulated, the Indiana Supreme Court's interpretation of the putative father's presumption is a simple choice of public policy. The Indiana Supreme Court summarily rejected the interpretation by the court of appeals in *K.S. v. R.S.* that the putative father's presumption is rebuttable[64] by concerns of public policy and because the paternity statute is silent as to how far the putative father's presumption may stretch. Such an abrupt policy choice by the Indiana Supreme Court invites closer scrutiny of public policy.

B. General Public Policy Concerns

The U.S. Supreme Court addressed the most basic of policy matters relating to this issue in *Michael H. v. Gerald D.*[65] The *Michael H.* case involved a constitutional challenge to the California paternity statute on facts similar to those in *K.S. v. R.S.* A third party attempted to establish paternity over a child born into the intact marriage of the child's mother and the presumptive father-husband. The California paternity statute provided that "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[66] This presumption was rebuttable by blood tests, but only if introduced by husband, or by wife, if the natural father filed an affidavit acknowledging paternity, and if the motion was made within two years after the birth of the child.[67] The putative father in *Michael H.* challenged the constitutionality of this statute, claiming that the Fourteenth Amendment Due Process Clause afforded him a liberty interest in establishing and maintaining a relationship with his biological child.[68] In addition to his constitutional analysis,

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63. The legislature is perhaps better suited than the courts to resolve matters of public policy. They must answer to their constituents, and in so doing, any legislation drafted on this issue will more closely reflect the mores and norms of those who are governed by the legislation.

64. *K.S.*, 669 N.E.2d at 402-03. The court of appeals considered the presumption to be rebuttable to the extent that the third party's presumption was outweighed by the presumption of the husband for reasons of public policy. Further, a putative father's presumption could never outweigh the husband's presumption if the husband and mother's marriage remained intact.

65. 491 U.S. 110 (1989).

66. *Id.* at 115 (citing CAL. EVID. CODE § 621(a) (West 1989)).

67. *Id.* (citing CAL. EVID. CODE § 621(c)-(d) (West 1989)). Section 621 of the California Evidence Code has been recodified without substantive change. CAL. FAM. CODE §§ 7540-7541 (West 1994).

68. Justice Scalia's opinion in *Michael H.* was a plurality opinion joined by three other Justices; it did not command a majority of the Court. Four other Justices, in two separate opinions, concluded that the constitutional right and liberty interest advanced by the putative father existed and would have reversed the trial court. *Michael H.*, 401 U.S. at 136-57 (Brennan, J., dissenting,

Justice Scalia summarized the social policy matters at hand:

> What [the putative father] asserts here is a right to have himself declared the natural father *and thereby obtain parental prerogatives*. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance [the putative father's] claim. Thus, it is ultimately irrelevant, even for purposes of determining *current* social attitudes towards the alleged substantive right [the putative father] asserts, that the present law in a number of States appears to allow the natural father—including the natural father who has not established a relationship with the child—the theoretical power to rebut the marital presumption.[69]

The Indiana Supreme Court has recognized at least two nonconstitutional interests put forth by a putative father: (1) the public policy of correctly identifying parents and their offspring; and, (2) the public policy which disfavors a support order against a man who is not a child's father and which favors a support order against a man who is a child's father.[70] The second policy rationale applies only when a presumptive father-husband (while still married to the mother) has either disclaimed his paternity pursuant to the supreme court's holding in *K.S. v. R.S.*, or has divorced the mother, and the mother is seeking an equitable order of support.[71] In either event, it would be the presumptive father-husband's policy argument, and not the putative father's. The first policy rationale is the only of the two arguments which would be used by the putative father to justify an invasion of an intact marriage to establish paternity over a child born during that marriage.[72]

This policy in favor of the putative father of correctly identifying paternal offspring must be weighed against the countervailing policies which relate to the well-being of the child and the societal interests of preserving the integrity of the intact family. The Indiana Supreme Court did not consider any prevailing policies in reaching its conclusions in *K.S. v. R.S.* Instead, it relied on the paternity statute's failure to expressly preclude the putative father from bringing such an action as a means of interpreting to find that the statute thereby expressly allowed

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joined by Marshall & Blackmun, JJ.); *Id.* at 157-64 (White, J., dissenting). Justice Stevens concurred in judgment. *Id.* at 132-36. It was his view that, although the putative father might well have a constitutionally protected liberty interest in establishing and maintaining a relationship with his biological child, the California statute provided him with whatever due process of law he was entitled. *Id.* at 136.

69. *Id.* at 126 (plurality opinion) (emphasis added and footnotes omitted).

70. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

71. *See, e.g.*, Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990).

72. To that extent, the reasoning in *Fairrow*, does not apply to the facts of *K.S. v. R.S.* because there was no putative father in *Fairrow* wishing to establish paternity.

such a cause of action. In light of such an approach, it was unnecessary for the supreme court to delve into significant policy matters. However, the policy considerations will not magically disappear.

Because of the legislature's stated intention of establishing paternity as a policy driving the laws of paternity in Indiana,[73] any reading of the statute which allows for the potential disclaiming of paternity is in derogation of that stated policy. The Indiana Court of Appeals long ago held that a child can be declared legitimate only by legislative act and that the legislature had recognized no cause of action in which a putative-biological father could become the legitimate father of a child born into the marriage of another man and the child's mother.[74] Additionally, it is doubtful that the legislature intended for the laws of paternity to be used as tools of destruction in divorce proceedings,[75] as was the case in *Russell v. Russell*.[76] As the court of appeals stated in *Russell*, "Any number of situations may result from modern living arrangements, whereby the adults may attempt to use a child as a means of bargaining for their own ends without protecting the child's best interests."[77] Unfortunately, the plain reading of our supreme court's opinion in *K.S. v. R.S.* allows for such situations to arise, even when the mother and husband remain married.

Additionally, as was the situation in both *Russell* and *K.S. v. R.S.*, there are other siblings involved in the family who will be greatly affected by such attacks by third parties. Because of the putative father's unwillingness to sublimate his own personal interests to the interests of the family into which the child was born, his interests adversely impact the rights and desires of the other children in the family to exist in an harmonious, cohesive family unit.[78] This concern is most compelling when the child in question is subjected to visitation with the third party and segregated from the family unit in various other ways.[79]

That is not to deny that the child has unique interests in maintaining a

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73. IND. CODE § 31-6-6.1-1.5 (Supp. 1996).

74. A.B. v. C.D., 277 N.E.2d 599, 602 (Ind. App. 1971).

75. Although the presumptive father in *Fairrow* was merely seeking an equitable order of child support, our supreme court did state, "One who comes into court to challenge a support order on the basis of non-paternity without externally obtained clear medical proof should be rejected as outside the equitable discretion of the court." *Fairrow*, 559 N.E.2d at 600.

76. 666 N.E.2d 943 (Ind. Ct. App. 1996), *vacated and rev'd*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997).

77. *Id.* at 950.

78. This too, is arguably a protected liberty interest.

79. This arrangement is vastly different from an arrangement wherein there are stepsiblings who are also subject to visitation and other arrangements with their noncustodial parent. First, the parents of stepchildren enter into their marital arrangement most often with those visitation and custody issues already in place. Second, the children are aware before the union of the stepparents that they are two family units combining into one, and subject to outside involvement of the children's other natural parents. Third, there is an inherent value in keeping an unbroken family unbroken; whereas, in the case of stepchildren, their natural parents have already facilitated the breakdown of the family unit.

paternity action. As recognized by the court of appeals, a child's interests in a paternity action are not necessarily the same as those of the parents; the child's interests include inheritance rights, social security survivor benefits, employee death benefits, proceeds of life insurance policies, establishment of familial bonds, indoctrination into cultural heritage, and knowledge of family medical history.[80] However, in the case of a child born into a marriage while the marriage remains intact, most of those interests of the child are guaranteed by the presumptive father-husband. Those interests which are not guaranteed may never be satisfied, to the extent there is no third party willing or available to assume the role of putative father.

Moreover, we are ill-advised to ignore traditional societal values and replace them with new arrangements.[81] Such social engineering is best left to the legislature, which answers first hand the call of its constituents. Justice Scalia aptly stated:

> Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of [putative father] and [child] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family . . . against the sort of claim [putative father] asserts.[82]

Unless the legislature indicates otherwise, the policy of protecting the traditional intact family unit outweighs any claim a third party may have to such a child.

The Indiana Supreme Court failed to analyze the importance of this decision as a new complication to the existing body of family and inheritance law. We cannot ignore the implication this decision has with regard to women and children. Our supreme court gave preference to the rights of the putative and presumptive fathers over the rights of the mother and child. The implication of the supreme court's decision is that paternal rights are more important than a child's physical and emotional well-being. The court is silent and does not consider the rights of the mother to see that her children benefit fully as members of an intact family.[83] In essence, we revisit the medieval days in which a child was burdened with the

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80. Clark v. Kenley, 646 N.E.2d 76 (Ind. Ct. App. 1995), *trans. denied.*

81. Interestingly, even the U.S. Supreme Court could not issue a unified opinion on how best to preserve those traditional values, indicating the complexity of the policy matters at hand. Michael H. v. Gerald D., 491 U.S. 110 (1989).

82. *Michael H.*, 491 U.S. at 124 (plurality opinion).

83. This interest of the mother in protecting and nurturing her offspring via the family unit (or tribe), can be traced to the known origins of socialized human existence. Invasion of that unit from outside forces, though an inevitable human condition, has not and should not be remedied through a depletion of the family (tribal/communal) unit. Such a unit has been the facilitator of our human existence. Though we are civilized, to deny the most basic of factors with regard to our existence, implies certain hubris and deliberate disregard of what makes us who we are and what we have always been.

sins of his or her father. The rights of children to traditional family upbringing[84] should be paramount.

C. Intestate Succession[85]

One astounding effect the Indiana Supreme Court's opinion will have is on the interpretation of the laws of intestate succession for children born out of wedlock.[86] In *K.S. v. R.S.*, our supreme court recognized the holding put forth by the appeals court in *R.D.S. v. S.L.S.*[87] That holding suggests that in a dissolution of marriage proceeding, a support order against a husband is improper, under the applicable statute,[88] where, although the child was born to the wife during her marriage to the husband, the child was not fathered by the husband, and the evidence did not raise an issue of "probate" acknowledgment of the child by the husband such that its effect on the husband's support duty could be reached.[89] A

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84. One may argue that in such a situation where the mother has had an extramarital affair, the notions of traditional family are denigrated. However, even the most traditional of families has its problems. Nothing justifies casting those adult problems onto the backs of the children involved. When a husband and wife decide to remain in family union despite a wife's past infidelity, that decision should be supported by the laws of this state. Most certainly, but not for the putative father's insistence, the child would have remained protected from the psychological burden created by the adults around him.

85. There are also implications with regard to the Indiana's Wrongful Death Act. IND. CODE § 34-1-1-2 (1993). A child born out of wedlock is precluded from recovering under the Act for the presumptive father's death, even though the child knows no other father and the presumptive father held himself out as the child's father. Absent fraud on the court, a child and/or mother who knows the child is not the biological child of the decedent may not recover under the Act, regardless of whether there is a third party who has established paternity over the child. *See* Lucas v. Estate of Stavros, 609 N.E.2d 1114, 1122 (Ind. Ct. App. 1993) ("Where *paternity* has been established, an illegitimate child may qualify as a dependent child within the meaning of our wrongful death statute.") (citing Hollingsworth v. Taylor, 442 N.E.2d 1150, 1152 (Ind. Ct. App. 1982)).

86. The rights of children born out of wedlock to inherit under Indiana's law of intestate succession are as follows:

> For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if:
>
> (1) the paternity of the child has been established by law in a cause of action that is filed:
>
> (A) during the father's lifetime; or
>
> (B) within five (5) months after the father's death; or
>
> (2) the putative father marries the mother of the child and acknowledges the child to be his own.

IND. CODE § 29-1-2-7 (1993).

87. 402 N.E.2d 30 (Ind. Ct. App. 1980).

88. *See* IND. CODE § 29-1-2-7 (1993); *id.* § 31-1-11.5-2 (Supp. 1996).

89. *R.D.S.*, 402 N.E.2d at 35.

child who otherwise would have been considered a child born in wedlock by virtue of having been born into an intact marriage is now, presumably per se, a child born out of wedlock, regardless of whether a third party seeks to assert paternity over the child. A "child" is defined by the Indiana probate law as "an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in IC 29-1-2-5, a child born out of wedlock."[90] To that degree, given the Indiana Supreme Court's interpretation of what is meant by a "child born out of wedlock" and absent fraud on the court, a child born into an intact marriage but who is not the biological child of the presumptive father-husband, may not inherit from the husband under the laws of intestate succession, regardless of whether a third party has established paternity over the child.

The law of intestate succession allows for a child born out of wedlock to inherit from the putative father, if paternity has been established or if the putative father marries the mother and acknowledges the child to be his own.[91] Interestingly then, the putative father, by marrying the mother and acknowledging the child to be his own, can accomplish something a presumptive father-husband cannot. The presumptive father of a child who is not biologically his, who was married to the mother at the time of the child's birth and who holds himself out as the child's father, intact marriage or not, cannot overcome the status of illegitimacy for the child. According to the Indiana Supreme Court, such a child is a child born out of wedlock and will remain such, regardless of whether a third party establishes paternity over the child. Short of the presumptive father-husband's adoption of the child, many children fathered by men outside of the marriage will be left with no ability to inherit via the laws of intestate succession. This is because, often times, the third party putative father is unidentified or may be deceased.[92]

Most obviously, children who are conceived by means of artificial insemination when there has been a third party donor are greatly affected by the holding of the supreme court in *K.S. v. R.S.* The court has held that a husband is estopped from denying his obligation of support with regard to a child conceived during the marriage by artificial insemination with the sperm of a third party donor.[93] However, the third party donor[94] and the child[95] clearly have standing to

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90. IND. CODE § 29-1-1-3 (1993).

91. *Id.* § 29-1-2-7; W.M.T. v. A.R.H., 638 N.E.2d 815 (Ind. Ct. App. 1994); Hood v. G.D.H., 599 N.E.2d 237 (Ind. Ct. App. 1992); P.N.B. v. J.L.D., 531 N.E.2d 1203 (Ind. Ct. App. 1988); T.R. v. A.W., 470 N.E.2d 95 (Ind. Ct. App. 1984); R.L.G. v. T.L.E., 454 N.E.2d 1268 (Ind. Ct. App. 1983).

92. The child may bring a cause of action to inherit under the law of intestate succession during the father's lifetime or within five months after the death of the father. IND. CODE § 29-1-2-7(b)(1)(B) (1993).

93. Levin v. Levin, 645 N.E.2d 601, 605 (Ind. 1994).

94. Although it has been litigated in other states, it is not clear whether in Indiana a third party donor may seek to establish parental rights of a child born as a result of his donated sperm. *See, e.g.*, McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989). Given the holding of our supreme court in *K.S. v. R.S.* and the lack of statutory guidance with regard to the rights of third party sperm

establish paternity outside of the marriage because such a child is a child born out of wedlock according to the holding of *K.S. v. R.S.*[96]

Additionally, prior to the supreme court's decision in *K.S. v. R.S.*, a child born into a marriage who is the product of artificial insemination by a third party donor was a "child of the marriage."[97] The holding in *Levin* is now called into question by virtue of the fact that a child born into an intact marriage who is the product of artificial insemination of sperm from a third party donor is now considered a child born out of wedlock because "the term wedlock refers to the status of the biological parents of the child in relation to each other."[98] Not only are such children at risk of losing the support of the presumptive father-husband at divorce, but as children born out of wedlock, they are also at grave risk of not ever being allowed to inherit under the law of intestate succession, from either the presumptive father-husband or the putative father-donor.

D. Constitutional Issues

In the quagmire of policy considerations, statutory interpretation, and intestate succession, we are presented also with issues of constitutionality. Although neither party raised constitutional issues in *K.S. v. R.S.*, the Indiana Supreme Court stated:

> It may well be that putative fathers such as neighbor likely do have some constitutionally protected liberty interest in establishing and maintaining relationships with their biological children . . . Because we find that Indiana statutes permit putative fathers to maintain paternity actions under the facts of this case, we find it unnecessary further to define this liberty

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donors, the third party donor has a compelling argument for his standing to establish paternity and, hence, parental rights.

95. The rights of the child to establish paternity in the third party donor are more clear. First, the child has an arguable constitutional interest in identifying his biological father. J.E. v. N.W.S., 582 N.E.2d 829 (Ind. Ct. App. 1991). Second, the law of intestate succession does not limit a child born out of wedlock from inheriting when the father is a sperm donor. Third, our supreme court has held that a mother, [presumptive father-husband], or [putative father-donor] may not absolve a biological father of support obligation with regard to a child conceived of the union. Straub v. B.M.T., 645 N.E.2d 597 (Ind. 1994). Although the facts in *Straub* were such that the mother was unmarried and there was no presumptive father-husband. However, the supreme court directly stated in *K.S. v. R.S.* that "[n]othing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status." K.S. v. R.S., 669 N.E.2d 399, 403 (Ind. 1996). Presumably, the child also would be able to file the action against the third-party donor (to the extent his identity is available) because, according to *Straub*, the child's rights may not be contracted away or otherwise eliminated by the mother and biological father.

96. To date, the legislature has not required that the third-party donor be identifiable to the child, mother, or husband.

97. *Levin*, 645 N.E.2d at 605.

98. *K.S.*, 669 N.E.2d at 402.

> interest or the minimum requirements of such statutes and decline to do so.[99]

The Indiana Supreme Court has at least vaguely recognized a liberty interest of a biological father to establish paternity in his biological child, even when the child is born into the mother's marriage to another man while that marriage remains intact.[100]

However, such a vague recognition of a liberty interest in the biological father ignores the weighty liberty interests of a mother, child and family to remain intact and free from interference from attacks by third parties who wish to assert paternity over children born into an intact marriage. To prefer the rights of the biological father over those of the mother and child is to impose a patriarchal system onto the family from without.[101] Taken to its extreme, even a rapist of a woman who is married and conceives as a result of the rape by the third party is granted more latitude than the mother of the child with regard to the law of paternity.[102]

There is also the issue of equal protection, which was not addressed by the parties in *K.S. v. R.S.*, but which was raised by the putative father in *Michael H.* The plurality opinion applied the "rational relationship" test to the equal protection argument asserted by the putative father and determined that the legitimate state end of preserving family harmony in an intact marriage may be achieved through the rational means of denying a third party or the child the opportunity to establish the paternity in a man outside of the intact family.[103] The Indiana Supreme Court did not address the issue of equal protection. A similarly-situated mother, child, and presumptive father-husband are well-advised in future proceedings before the Indiana courts to frame their position in terms of equal protection. It remains to be seen whether the Indiana Supreme Court will view the preservation of family harmony in an intact marriage as a legitimate state end. It will also be interesting, though unlikely given the opinion of the Indiana Supreme Court in *K.S. v. R.S.*,

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99. *Id.* at 404.

100. The supreme court also mentioned, though tangentially, that "the analysis should turn on the level of commitment to the responsibilities of parenthood the father demonstrates." *K.S.*, 669 N.E.2d at 404 (citing W.W.W. v. M.C.S., 468 N.W.2d 719, 725 (Wis. 1991)). Although such an approach was not adopted by the court of appeals in *K.S. v. R.S.*, it is a preferable approach to the one taken by our supreme court in their resolution of the matter.

101. That is not to say that the child should necessarily be barred from bringing his own action of paternity against the father after the child reaches the age of adulthood. At that point, the family unit has completed its task of nurturing and rearing the child. Placing the decision in the hands of the adult child minimizes harm which may be inflicted upon the child and the family unit when a third party attempts to invade the marriage and establish paternity while the child is of tender years and subject to the whims of the adults and court system which surrounds him.

102. Of course, the parental rights of the rapist can be terminated, but it would be intolerable indeed to put a family through that ordeal. *Cf.* Pena v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996) (refusal of state to grant parental rights to statutory rapist did not violate Federal Constitution).

103. Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).

to see whether denial of a putative father-third party's attempts to establish paternity in a man outside the intact family is viewed by the Indiana Supreme Court, as a rational means of protecting the legitimate state end of preserving the harmony of an intact family unit.

CONCLUSION

The resolution of the issue of whether a third party may seek to establish paternity in a child who is born into a marriage while that marriage remains intact cannot more clearly demonstrate the spectrum of jurisprudential philosophy of the courts of Indiana. As indicated, the implications of such a decision are far-reaching and encompass such matters as the integrity of the intact family structure, the impact of certain paternity proceedings on the children involved, the rights of a biological father, the concept of judicial activism versus judicial restraint in the absence of express statutory language, intestate succession rights with regard to the child, and the rights of children to an orderly and stable family life. An underlying, and hopefully unintended, result of the *K.S. v. R.S.* decision is to place the best interests of the child second to the interests asserted by the biological father-third party. The legislature may choose to clarify the law in this area and, in so doing, will hopefully place a higher value on the harmony of an intact family unit than the current statutory provision does as is interpreted by the court. Until we obtain further guidance from the legislature, the courts should guard against the temptation of writing legislation in the absence of express statutory provision.[104]

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104. [Eds. Note: The Indiana Supreme Court decided *Russell v. Russell*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997), as this issue was going to print.]