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# Notes: The Best Interests of the Child Must Be Considered before Rebutting the Presumption of Legitimacy. *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992)

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THE BEST INTERESTS OF THE CHILD MUST BE CONSIDERED BEFORE REBUTTING THE PRESUMPTION OF LEGITIMACY. *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992).

## I. INTRODUCTION

The birth of a child is undoubtedly one of the most joyous and momentous events in a married couple's life. When an outsider to the marriage declares himself to be the father of that child, however, the family's unity and strength is put to the ultimate test. The husband and wife are forced to agonize over the painful marital issues of fidelity, trust, and betrayal. Even more distressing are their emotions surrounding the child's true paternity. Because the child is the focal point of the battle between the outsider and the married couple, it is often the child who stands to suffer the most lasting injuries. For this reason, the concerns of the adults must rank below those of the child.

The Court of Appeals of Maryland deserves high marks for its careful handling of this type of dispute in *Turner v. Whisted*.<sup>1</sup> The court reached a fair and equitable solution to an unfortunate set of circumstances. No doubt, *Turner* will be received as one of Maryland's most significant family law decisions in recent years.

In *Turner v. Whisted*, the Court of Appeals of Maryland held that where a man claims to be the natural father of a child who is statutorily presumed to be the legitimate child of another man,<sup>2</sup> paternity is more appropriately established in an equitable proceeding under the Estates & Trusts Article,<sup>3</sup> rather than in a statutory action pursuant to the Paternity Statute of the Maryland Family Law Article (Paternity Statute).<sup>4</sup> Most importantly, the *Turner* court validated the use of blood tests for rebutting the presumption of legitimacy in order to establish paternity, so long as the trial court initially deter-

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1. 327 Md. 106, 607 A.2d 935 (1992).

2. "A child born or conceived during a marriage is presumed to be the legitimate child of both spouses." MD. CODE ANN., EST. & TRUSTS § 1-206(a) (1991 & Supp. 1994). "There is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception." MD. CODE ANN., FAM. LAW § 5-1028(c) (1991 & Supp. 1994).

3. MD. CODE ANN., EST. & TRUSTS § 1-208 (1991). See *infra* text accompanying note 24 for content of § 1-208.

4. *Turner*, 327 Md. at 113, 607 A.2d at 938 (referring to MD. CODE ANN., FAM. LAW §§ 5-1001 to 5-1048 (1991 & Supp. 1994)).

mines that a declaration of paternity will operate in the child's best interests.<sup>5</sup>

The *Turner* case does not involve a typical paternity suit brought by the mother of a child against the biological father. The plaintiff in *Turner* was instead the putative father. Jeffrey Whisted (Jeffrey) was born approximately five and one-half months into the marriage of Kelly Whisted (Whisted) and Danny Whisted.<sup>6</sup> At the time of Jeffrey's conception, Whisted and William Turner (Turner) were romantically involved.<sup>7</sup>

Two years later, Turner brought suit against Whisted in the Circuit Court for Harford County asserting that he was Jeffrey's biological father.<sup>8</sup> In his complaint, Turner sought, *inter alia*, visitation rights over Jeffrey.<sup>9</sup> After recognizing the presumption that Jeffrey was the legitimate child of Danny Whisted, Turner amended his complaint and named Danny Whisted as an additional defendant.<sup>10</sup> Turner further sought a determination that he was Jeffrey's biological father.<sup>11</sup> To that end, Turner filed a motion for blood test.<sup>12</sup>

The circuit court assumed that Turner's motion was filed pursuant to section 5-1029 of the Maryland Family Law Article.<sup>13</sup> The judge ruled that mandatory blood tests under section 5-1029 were not available to Turner for the purpose of rebutting Jeffrey's presumed legitimacy, and therefore denied the motion.<sup>14</sup> The court then granted the Whisted's motion to dismiss on the grounds of laches.<sup>15</sup>

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5. *Id.* at 116-17, 607 A.2d at 940.

6. *Id.* at 109, 607 A.2d at 936. Jeffrey was born on March 8, 1986. *Id.*

7. *Id.*

8. *Id.* at 109-10, 607 A.2d at 937. Jeffrey was two years old at the time. Originally, Turner attempted to proceed under the Paternity Statute. *Id.* at 111, 607 A.2d at 937. However, he was denied the State's Attorney's consent. *Id.* As a result, Turner invoked the equitable powers of the circuit court to grant him visitation rights. *Id.*

9. *Id.* at 109, 607 A.2d at 937.

10. *Id.* at 110, 607 A.2d at 937.

11. *Id.*

12. *Id.*

13. *Id.* "On the motion of a party to the proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child." MD. CODE ANN., FAM. LAW § 5-1029(a) (1991 & Supp. 1994).

14. *Turner*, 327 Md. at 110, 607 A.2d at 937.

15. *Id.* The Whisted's alleged that Turner delayed two years before seeking visitation. *Turner v. Whisted*, No. 90-792, slip op. at 3 (Md. Ct. Spec. App. Apr. 22, 1991). The circuit court held that Turner's delay in seeking visitation over Jeffrey was too long. *Id.*

Turner appealed to the Court of Special Appeals of Maryland.<sup>16</sup> The intermediate court remanded the case back to the trial court, specifically on the issue of laches.<sup>17</sup> Agreeing with the trial judge, the appellate court stated that initially the blood test provisions of the Paternity Statute are not available to overcome the presumption of legitimacy.<sup>18</sup> Thereafter, Turner appealed to the Court of Appeals of Maryland<sup>19</sup> which granted certiorari.<sup>20</sup>

## II. BACKGROUND

The Maryland Paternity Statute provides a comprehensive framework of legislation designed "to simplify the procedures for determining paternity, custody, guardianship, and responsibility for the support of children born out of wedlock."<sup>21</sup> While clearly available to a mother alleging a man's paternity of her child, the Paternity Statute is rarely used by men seeking to establish paternity over presumptively legitimate children.<sup>22</sup>

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16. *Turner*, 327 Md. at 110, 607 A.2d at 937.

17. *Id.* The court of special appeals held that the issue of whether Turner's delay in seeking visitation was too long was still in dispute. *Id.*

18. *Id.*

19. *Id.* at 111, 607 A.2d at 937.

20. *Id.*

21. MD. CODE ANN., FAM. LAW § 5-1002(b)(3) (1991 & Supp. 1994).

22. In fact, apart from *Turner*, the court of appeals has heard only one other case where a putative father proceeded under the Paternity Statute. See *Mattingly v. Shifflett*, 327 Md. 337, 609 A.2d 329 (1992) (decided one month after *Turner*). In that case, Shifflett, who impregnated a married woman with whom he was having an affair, instituted a suit in the Circuit Court for Montgomery County to establish paternity under the Paternity Statute. Section 5-1010 of the Family Law Article requires the State's Attorney's consent to proceed under the Paternity Statute, unless in "considering testimony or information given by affidavit," the court "finds that the complaint is meritorious" and "rules that the consent is not required." MD. CODE ANN., FAM. LAW § 5-1010 (1991 & Supp. 1994). As in *Turner*, the State's Attorney refused to consent to Shifflett's paternity action. *Shifflett*, 327 Md. at 340, 609 A.2d at 329-30. Shifflett's motion to allow a paternity complaint without consent of the state's attorney was granted by the circuit court. *Id.* The judge ordered that the parties and the child submit to blood and DNA tests to determine paternity. *Id.* at 342, 609 A.2d at 331. Test results showed a 99.86% probability that Shifflett was the father. *Id.* at 343, 609 A.2d at 331. Accordingly, the court granted Shifflett's motion for partial summary judgment on the issue of paternity and declared Shifflett to be the child's father. *Id.* at 343, 609 A.2d at 332. From this order, the child's mother and her husband appealed to the Court of Special Appeals of Maryland. *Id.* The court of appeals issued a writ of certiorari before the intermediate court's decision. *Id.* The court of appeals did not review the issues raised in the circuit court, however, because the judge's order granting partial summary judgment was not a final judgment from which an appeal would lie. *Id.* at 343-44, 609 A.2d at 332. "*Shifflett* is not, therefore, of any precedential value." *Monroe v. Monroe*, 329 Md. 758, 765 n.2, 621 A.2d 898, 901 n.2 (1993).

Apart from the Paternity Statute itself, and prior to *Turner's* affirmation of the statute, Maryland case law had hinted at another route possibly available to a man in *Turner's* position—a suit in equity under the Estates & Trusts Article.<sup>23</sup> Section 1-208 of the Estates & Trusts Article provides:

(a) *Child of his mother.*— A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.

(b) *Child of his father.*— A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father

(1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; or

(2) Has acknowledged himself, in writing, to be the father; or

(3) Has openly and notoriously recognized the child to be his child; or

(4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.<sup>24</sup>

Under this section, it seemed possible that a putative father claiming paternity over a presumptively legitimate child could offer evidence to show that the child was “born to parents who have not participated in a marriage ceremony with each other,” and that one or more of the four conditions of section 1-208(b) were satisfied.<sup>25</sup> The possibility of applying section 1-208 for such purposes existed because the section had been accepted as a legitimating statute.<sup>26</sup> Historically, however, section 1-208 was recognized as a means for establishing a parent-child relationship for purposes of inheritance only.<sup>27</sup>

*Dawson v. Eversberg*<sup>28</sup> provides a good example of the traditional use of section 1-208. In *Dawson*, Frederick Eversberg moved in with Doris Dawson.<sup>29</sup> Over the next eleven years, the unmarried couple had six children together.<sup>30</sup> The couple separated and Dawson brought

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23. MD. CODE ANN., EST. & TRUSTS § 1-208 (1991).

24. *Id.*

25. *See id.*

26. *See Bridges v. Nicely*, 304 Md. 1, 6-7, 497 A.2d 142, 144-45 (1985) (referring to § 1-208(b) of the Estates & Trusts Article as a more simple and less traumatic method of legitimizing a child, as contrasted with adoption).

27. *See Turner*, 327 Md. at 119, 607 A.2d at 941 (Eldridge, J. dissenting in part).

28. 257 Md. 308, 262 A.2d 729 (1970).

29. *Id.* at 309, 262 A.2d at 730.

30. *Id.*

suit under the Paternity Statute to legally establish Eversberg as the father of her six children.<sup>31</sup> The judge declared Eversberg to be the father and ordered him to pay support.<sup>32</sup> Nearly three years later, in order to ensure that his children would be his legitimate heirs, Eversberg filed an adoption proceeding.<sup>33</sup> The court stated that where the objective is simply to legitimize a child for purposes of inheritance, section 1-208 of Maryland's Estates & Trusts Article should be used as opposed to the more drastic adoption statutes.<sup>34</sup>

*Thomas v. Solis*<sup>35</sup> was the first major case to apply section 1-208 in an effort to establish paternity for purposes outside of inheritance.<sup>36</sup> The Court of Appeals of Maryland held that under section 1-208, Thomas could obtain his desired relief<sup>37</sup> even though he was not using the provision for inheritance purposes.<sup>38</sup> *Thomas* espoused a broad application of the Estates & Trusts Article. The court stated that:

[A] legitimation provision contained in an inheritance statute is not limited in its scope and application to matters of inheritance only. There certainly should be little that is

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 314, 262 A.2d at 732. For a discussion of the adoption statutes, see *Walker v. Gardner*, 221 Md. 280, 284, 157 A.2d 273, 275-76 (1960) ("Unlike awards of custody . . . adoption decrees cut the child off from the natural parent, who is made a legal stranger to his offspring.").

35. 263 Md. 536, 283 A.2d 777 (1971). Nelson Thomas and Shirley Williams, an unmarried couple, parented four children, one of which died prior to the controversy. *Id.* at 538, 283 A.2d at 778. Williams subsequently left Thomas and was able to get custody over the children. *Id.* She later married Daniel Solis. *Id.*

Shirley Williams Solis threatened that she and her husband would remove the children from the jurisdiction. *Id.* She also refused Thomas his visitation rights and informed him that she and her husband intended to adopt the children. *Id.* In response, Thomas filed a petition for declaratory relief in the Circuit Court for Prince George's County. *Id.* at 537, 283 A.2d at 778. Thomas requested the that court declare him the natural father, protect his visitation rights and those of his children, enjoin Shirley Williams Solis and Daniel Solis from adopting the children without first giving notice to him, and prevent the removal of the children from the jurisdiction. *Id.* In sustaining the demurrer to Thomas's petition, the circuit court ruled that there was nothing in the allegations, nor other circumstances, creating a justiciable issue. *Id.* at 539, 283 A.2d at 779. Thus, the circuit court ruled that Thomas was not entitled to the relief sought. *Id.*

36. In contrast to *Thomas*, *Turner* involved the use of § 1-208 to establish paternity for the purpose of gaining visitation rights—not for inheritance purposes. *Turner v. Whisted*, 327 Md. 106, 109, 607 A.2d 935, 937 (1992).

37. *Solis*, 263 Md. at 539, 283 A.2d at 779.

38. *Id.* at 542-44, 283 A.2d at 780-81.

startling about such a concept, for the reason that no right or privilege in the history of the common law, or in statutory law, is accorded greater sanctity than the right of inheritance. If the law provides a means of legitimation for the purposes of inheritance, such a procedure should certainly be of sufficient legal validity to establish other rights, oft-times inferior to that of inheritance, arising from the relationship between parent and legitimate issue.

The trend of the courts throughout the country is to give a liberal interpretation to legitimation statutes or legislation . . . .<sup>39</sup>

This strong language supports the notion that section 1-208 could be utilized by a man seeking to establish paternity over a presumptively legitimate child.<sup>40</sup>

Whether seeking to establish paternity under the Paternity Statute or under the Estates and Trust Article, a putative father of a child born into a marriage must still challenge the presumption that the child is the legitimate child of the mother and her spouse.<sup>41</sup> This is one of the strongest presumptions available in the law.<sup>42</sup> In Maryland, the presumption of legitimacy developed primarily under two sets of factual circumstances. The first set of circumstances is represented by cases involving men who were denied paternity. These cases generally included bastardy proceedings,<sup>43</sup> nonsupport defenses,<sup>44</sup> divorce proceedings,<sup>45</sup> or typical paternity suits where married mothers attempted to "bastardize" their children in order to prove that their paramours were their children's biological fathers.<sup>46</sup> In the second

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39. *Id.* at 542, 283 A.2d at 780.

40. *See Turner*, 327 Md. at 112, 607 A.2d at 938.

41. *See supra* note 2.

42. *See William Weston, Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 693 (1989). Without such a strong presumption, every newborn could be subject to legitimacy tests. *Id.* *See also* Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369 (1988); Tiana M. Hinnant, Note, *Family Law-Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right To Rebut the Marital Presumption—Michael H. v. Gerald D.*, 25 WAKE FOREST L. REV. 617 (1990).

43. *See, e.g., Clark v. State*, 208 Md. 316, 118 A.2d 366 (1955); *Hall v. State*, 176 Md. 488, 5 A.2d 916 (1939); *Hale v. State*, 175 Md. 319, 2 A.2d 17 (1938).

44. *See, e.g., Dayhoff v. State*, 206 Md. 25, 109 A.2d 760 (1954).

45. *See, e.g., Harward v. Harward*, 173 Md. 339, 196 A. 318 (1938) (husband, as grounds for divorce, alleged that his wife's child was not his, but rather was the product of an adulterous affair).

46. *See, e.g., Howell v. Howell*, 166 Md. 531, 171 A. 869 (1934). This type of paternity proceeding is referred to in this Casenote as the "typical" paternity action. In Maryland, the "typical" paternity action has been far more common than the *Turner*-type paternity suit. *See supra* notes 6-20 and accompanying text for a discussion of *Turner*.

set of circumstances, children attempted to "bastardize" themselves by using their mothers' and/or presumed fathers' testimony to prove that other men were their biological fathers in order to inherit from them.<sup>47</sup>

The presumption of legitimacy itself can be traced back to 1777 where, in an ejectment case involving the issue of the claimant's paternity, Lord Mansfield of the Court of the King's Bench declared:

[T]he law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage . . . . As to the time of birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious . . . .<sup>48</sup>

From Lord Mansfield's declaration, Maryland courts judicially created the presumption "that the child of a married woman was the legitimate issue of her husband."<sup>49</sup> This presumption was rebuttable only "by clear and convincing testimony of a person other than the husband or mother, that the husband did not have intercourse with the mother at the time when conception of the child in question would have been possible."<sup>50</sup> Therefore, in the typical paternity suit, only after such testimony was offered could the mother and/or her husband, the presumed father, testify to any other relevant facts, such as her sexual relations with a paramour.<sup>51</sup>

The Lord Mansfield rule was the subject of a 1961 Governor's commission studying the problems of illegitimacy.<sup>52</sup> The commission recommended a provision in the proposed Paternity Statute abrogating Lord Mansfield's rule.<sup>53</sup> Two years later, the Maryland General Assembly enacted the Paternity Statute at issue.<sup>54</sup> Ultimately, section 66F(b) of the statute only modified and relaxed Lord Mansfield's rule.<sup>55</sup>

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47. See, e.g., *Hawbecker v. Hawbecker*, 43 Md. 516 (1876).

48. *Staley v. Staley*, 25 Md. App. 99, 102, 335 A.2d 114, 117 (1975) (quoting *Goodright v. Moss*, 2 Cowp. 591, 592-94, 98 Eng. Rep. 1257, 1258 (1777)).

49. *Id.* at 102-03, 335 A.2d at 117.

50. *Id.*

51. See *id.*

52. *Shelley v. Smith*, 249 Md. 619, 622, 241 A.2d 682, 684 (1968).

53. *Id.*

54. *Id.* "By Chapter 722 of the Laws of Maryland of 1963, the General Assembly enacted Code, Art. 16, §§ 66 and 66A to 66P." *Id.* (the Code was repealed by Acts 1984, Ch. 296, § 1, effective October 1, 1984).

55. *Staley*, 25 Md. at 103, 335 A.2d at 117-18.



The new rule specified only one method for rebutting the presumption.<sup>56</sup> In substance, the presumption could be rebutted by testimony of persons other than the mother and her husband that at the time of conception the married couple was living separate and apart from each other.<sup>57</sup> Therefore, in the typical paternity dispute, the court was required to determine whether the mother and her husband lived apart at the relevant time *before* both parties were allowed to "testify as to non-access as well as to any other relevant matters" tending to prove or disprove paternity.<sup>58</sup> Additionally, the new Paternity Statute replaced the clear and convincing standard, previously required to rebut the presumption, with the lower standard of preponderance of the evidence.<sup>59</sup>

It is important to note that the new rule, at least initially, did not appear to be applicable to any actions other than those occurring under the Paternity Statute.<sup>60</sup> Thus, in Maryland, prior to 1968, two versions of Lord Mansfield's rule seemed to exist: The newly enacted Paternity Statute version applicable in paternity actions, and the case law version applicable in equitable actions where paternity was an issue connected to questions involving the right to inherit.<sup>61</sup>

Then, in *Shelley v. Smith*,<sup>62</sup> the Court of Appeals of Maryland had the opportunity to decide which version of Lord Mansfield's rule would apply in equity proceedings to determine paternity for inheritance purposes.<sup>63</sup> The court reasoned that "two different rules

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56. See MD. ANN. CODE art. 16, § 66F(b) (1966) (repealed by Acts 1984, Ch. 296, § 1, effective October 1, 1984).

57. *Staley*, 25 Md. at 103, 335 A.2d at 118.

58. *Id.*

59. *Id.* See MD. CODE ANN., FAM. LAW § 5-1028(a) (1991 & Supp. 1994).

60. *Shelley v. Smith*, 249 Md. 619, 627, 241 A.2d 682, 686 (1968).

61. *Id.*

62. 249 Md. 619, 241 A.2d 682 (1968).

63. *Id.* at 627, 241 A.2d at 686. In *Shelley*, Larry Smith claimed that the decedent, Mr. Shelley, was his true father so as to obtain a share of Shelley's estate. *Id.* at 625, 241 A.2d at 685. Of course, Shelley's acknowledged daughters alleged in defense that Larry Smith was not their father's son. *Id.* Larry's mother was married to Herbert Smith. *Id.* Herbert divorced Larry's mother claiming adultery with Mr. Shelley. *Id.* At the trial, a witness testified that Herbert Smith and Larry's mother were living apart for approximately two years. *Id.* The period of Larry's conception was within those two years. *Id.* Subsequently, Mr. Smith testified that he had nonaccess to Larry's mother during the time of Larry's conception. *Id.* The issue upon appeal was whether the chancellor erred in admitting Mr. Smith's testimony. *Id.* at 625, 241 A.2d at 686.

Under Maryland's common-law rule, Smith's testimony was improperly admitted because the witness only testified to Smith and Larry's mother living apart, not to the sexual status of the couple. *Id.* at 627, 241 A.2d at 686. But, under the Paternity Statute rule, such testimony alone was sufficient. *Id.* The court of appeals held that the Paternity Statute rule applied, despite the fact that this suit was an equity proceeding that was not filed under the Paternity Statute. *Id.* at 630-31, 241 A.2d at 688.

[should not govern] the resolution of identical issues of paternity[:] the Lord Mansfield's presumption in cases like the one before us, and the section 66F(b) rule in paternity proceedings under the statute."<sup>64</sup> The court stated that there was no reason why the Paternity Statute's presumption should not similarly apply in the rare cases where paternity is an issue in connection with inheritance rights.<sup>65</sup>

*Shelley* is valuable not only for its comprehensive analysis of Lord Mansfield's rule, but also because it establishes a bridge between the Paternity Statute and the Estates & Trusts proceedings. The willingness of the court to promote this interplay between the two statutes was crucial to *Turner's* ultimate holding that blood tests may be used to establish paternity.<sup>66</sup>

Today, the Paternity Statute's presumption remains substantively unchanged under section 5-1028.<sup>67</sup> In section 1-206 of the Estates & Trusts Article, the presumption was restated as follows: "A child born or conceived during a marriage is presumed to be the legitimate child of both spouses."<sup>68</sup> Unlike the Paternity Statute, though, section 1-206 does not address how the presumption may be rebutted.<sup>69</sup> Based on the court's analysis in *Shelley*, it is highly probable that the section 1-206 presumption is rebuttable in the same way as prescribed under the Paternity Statute.<sup>70</sup>

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64. *Id.* at 627, 241 A.2d at 686-88.

65. *See id.* at 630-31, 241 A.2d at 688.

66. *Turner v. Whisted*, 327 Md. 106, 113, 607 A.2d 935, 938 (1992).

67. Section 5-1028 of the Family Law Article provides in pertinent part:

(c) *Presumption*. — (1) There is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception.

(2) The presumption set forth in this subsection may be rebutted by the testimony of a person other than the mother or her husband.

(3) If the court determines that the presumption set forth in this subsection has been rebutted by testimony of a person other than the mother or her husband, it is not necessary to establish nonaccess of the husband to rebut the presumption set forth in this subsection.

MD. CODE ANN., FAM. LAW § 5-1028 (1991 & Supp. 1994).

68. MD. CODE ANN., EST. & TRUSTS § 1-206(a) (1991 & Supp. 1994). *See supra* note 2 for the text of § 1-206(a).

69. Clearly, the § 1-206 presumption is rebuttable. "Unless otherwise expressly provided, whenever the estates of decedents law states that a fact is presumed, the presumption is rebuttable." MD. CODE ANN., EST. & TRUSTS § 1-105(b) (1991 & Supp. 1994).

70. *Cf. Shelley v. Smith*, 249 Md. 619, 630-31, 241 A.2d 682, 688 (1968). "The [legitimacy] presumption . . . may be rebutted by the testimony of a person other than the mother or her husband." MD. CODE ANN., FAM. LAW § 5-1028(c) (1991 & Supp. 1994). It should be noted that the fact that the presumption is rebuttable is purely a legislative policy decision, as it would not be a violation of the United States Constitution for the General Assembly to make the presumption irrebuttable. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

One of the most effective ways for a putative father to rebut the presumption of legitimacy is to have a blood test conducted on the mother, the child, the presumed father, and himself.<sup>71</sup> Today, a man in Turner's position could file a Motion for Blood Test under section 5-1029 of the Paternity Statute<sup>72</sup> in order to attempt to rebut the legitimacy presumption. Prior to *Turner*, however, there were conflicting judicial opinions as to whether such a motion would succeed at trial.<sup>73</sup>

While Maryland case law was silent on whether a man claiming to be the biological father of a child born to a married couple could use a blood test to rebut the presumption of legitimacy, case law in other jurisdictions was clear. There are three approaches that deal with the issue of whether blood test evidence should be allowed to rebut the presumption of legitimacy.

One approach followed in a minority of jurisdictions is to absolutely deny a man in Turner's position from offering not only blood test evidence to rebut the presumption, but any evidence of his paternity of a presumptively legitimate child.<sup>74</sup> In these jurisdictions the presumption is completely irrebuttable. The controversial plurality opinion of the United States Supreme Court in the case of *Michael H. v. Gerald D.*<sup>75</sup> held that this approach is constitutional.<sup>76</sup> At issue in *Michael H.* was California's statutory presumption that a child born to a married woman living with her husband is the child of that marriage.<sup>77</sup> The statute provides that only the husband

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71. See Hinnant, *supra* note 42, at 624 n.72; Joanne G. Hujsa, Comment, Scott v. Mershon: *Disputing the Presumption of Legitimacy*, 14 AM. J. TRIAL ADVOC. 625, 636 n.87 (1991).

72. See Mattingly v. Shifflett, 327 Md. 337, 340, 609 A.2d 329, 330 (1992). See also *supra* note 22.

73. While the Maryland statutes clearly allowed the presumption of legitimacy to be rebutted, see MD. CODE ANN., EST. & TRUSTS § 1-105 (1991 & Supp. 1994); MD. CODE ANN., FAM. LAW § 5-1028 (1991 & Supp. 1994), uncertainty existed regarding how a putative father should proceed in his attempt to establish paternity over a presumptively legitimate child.

74. See Petitioner F. v. Respondent R., 430 A.2d 1075, 1078 (Del. 1981) (refusing to recognize that a natural father has standing to assert paternity because of the threat to family stability and the importance of the "time-honored presumption of legitimacy"). Other states under the Uniform Parentage Act have also decided that a man in Turner's position has no standing to rebut the presumption of legitimacy. See Hinnant, *supra* note 42, at 632. A majority of jurisdictions allow the putative father to rebut the presumption. See also Dallas, *supra* note 42, at 369.

75. 491 U.S. 110 (1989).

76. *Id.* at 130-32.

77. *Id.* at 115 (citing CAL. EVID. CODE § 621 (West Supp. 1989) (repealed by 1992 Cal. Stat. § 8 (A.B. 2650), operative Jan. 1, 1994, and relocated without substantive change to CAL. FAM. LAW CODE § 7500 (West 1993))).

or wife, under limited circumstances, are entitled to rebut the presumption.<sup>78</sup> The first issue before the Court was whether California's presumption of legitimacy violated the due process rights of a man wishing to establish his paternity over a child born to the wife of another man.<sup>79</sup> The second issue was whether this presumption infringed upon the child's constitutional right to maintain a relationship with her natural father.<sup>80</sup> In a five to four vote,<sup>81</sup> the Court held that California's irrebuttable presumption of legitimacy does not violate the constitutional rights of either the putative father or the child.<sup>82</sup>

A second approach in dealing with blood test evidence is to give the putative father an automatic right to rebut the presumption,

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78. *Id.* at 115. The California statute allows putative fathers to rebut the presumption, but only if at the time of conception, the husband and wife were not cohabitating, and the husband was impotent or sterile. CAL. EVID. CODE § 621 (West Supp. 1989). However, the putative father cannot ask for blood tests without the support of the wife. *Id.* Thus, under most circumstances, the California presumption may not be rebutted by putative fathers at all. Dallas, *supra* note 42, at 382 n.87. In effect, therefore, the California presumption was irrebuttable in *Michael H.*

79. *See infra* note 82.

80. *See infra* note 82.

81. Justice Scalia was joined in his plurality opinion by Chief Justice Rehnquist. *Michael H.*, 491 U.S. at 113. Justices O'Connor and Kennedy joined in all but note 6 of the plurality. *Id.* Justice O'Connor was joined in her concurring opinion by Justice Kennedy. *Id.* at 132. Justice Stevens filed a concurring opinion. *Id.* Justice Brennan's dissent was joined by Justices Marshall and Blackmun. *Id.* at 136. Justice White filed a dissenting opinion, in which Justice Brennan joined. *Id.* at 157.

82. *Id.* at 129-32. The putative father first claimed that the presumption violated his procedural due process rights because it terminated his liberty interest in his relationship with his child without affording him an opportunity to establish paternity. *Id.* at 119. Justice Scalia, in his plurality opinion, rejected this argument. *Id.* at 119-21. Justice Scalia held that the presumption was in fact a substantive rule of law, which, in effect, stated California's substantive policy that an adulterous natural father shall not be recognized as a legal father. *Id.* at 120. Next, based on the theory that his relationship with the child was a constitutionally protected liberty interest, the putative father claimed that his substantive due process rights were violated by the California law because the protection of the marital union is an insufficient state interest to support the termination of his liberty interest. *Id.* at 121. Justice Scalia rejected this claim as well, because the putative father failed to establish that his claimed liberty interest is one that is traditionally protected by our society so as to be considered "fundamental." *Id.* at 122-30. Justice Scalia also rejected the child's claim that the presumption infringed upon her claimed constitutionally protected right to maintain a relationship with the putative father, because "at best, her claim is the obverse of [the putative father's] and fails for the same reasons." *Id.* at 131.

including using blood test evidence.<sup>83</sup> For example, a putative father in Colorado has a constitutional right to rebut the presumption of legitimacy by blood tests<sup>84</sup> under the Equal Protection Clause of the federal and state constitutions, as well as the Equal Rights Amendment of the state constitution.<sup>85</sup>

Under a third approach, the putative father is allowed to rebut the presumption and introduce evidence of blood tests only after he passes a threshold test.<sup>86</sup> In some jurisdictions, therefore, courts will grant a request for blood tests and allow the results into evidence once it has been established that a paternity determination will operate in the child's best interest. For example, in *McDaniels v. Carlson*,<sup>87</sup> the Washington Supreme Court held that where someone outside the family files a paternity action, the trial court must consider the best interests of the child in making any determinations.<sup>88</sup> The court argued that it may not always be in the best interests of the child to automatically establish the identity of the child's biological parents.<sup>89</sup>

The *McDaniels* court stressed that the policy of maintaining the child's interest is always paramount. Among the factors important in the trial court's initial best interest determination are: (1) continuity of established relationships; (2) stability of the present home environment; (3) existence of an ongoing family unit; (4) extent to which uncertainty of parentage exists in the child's mind; and (5) any other

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83. See Dallas, *supra* note 42, at 373-74. The policy behind this approach is "necessary to avoid the gender discrimination of favoring the mother over the natural father," Hinnant, *supra* note 42, at 633, and to "protect the putative father's alleged constitutional right to a relationship with his child," Dallas, *supra* note 42, at 374.

84. The blood tests must show at least a 97% probability of the putative father's paternity. COLO. REV. STAT. §§ 13-25-126(1)(e)(iv)-(v) (1989), 19-6-105(1)(f) (1990).

85. *R. McG. v. J.W.*, 615 P.2d 666, 672 (Colo. 1980); see Hinnant, *supra* note 42, at 634.

86. See, e.g., *In re Marriage of Ross*, 783 P.2d 331 (Kan. 1989); *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987).

87. 738 P.2d 254 (Wash. 1987).

88. *Id.* at 262.

89. *Id.* at 261-62. The court stated:

Child development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent. Our courts and legislature have echoed these concerns. A paternity suit by its very nature, threatens the stability of the child's world. . . . It may be true that a child's interests are generally served by accurate, as opposed to inaccurate or stipulated, paternity determinations. However, it is possible that in some circumstances a child's interests will be even better served by no paternity determination at all.

*Id.* at 262 (citations omitted).

relevant factors.<sup>90</sup> The court stated that the various factors must be considered on a case by case basis.<sup>91</sup>

Similarly, the Supreme Court of Kansas held, in *In re Marriage of Ross*,<sup>92</sup> that it is better to apply the best interest test before a court orders a blood test to determine whether the presumed parent is in fact the biological parent.<sup>93</sup> The Kansas Supreme Court, in line with the Washington court's underlying policy, rejected the trial court's notion that the child's best interests are always served when the child's true paternity is established.<sup>94</sup> The Kansas high court stated that the trial court "has not only bastardized the child and relieved the presumed father of all necessity of support, but it has placed the obligation to support the child on the biological father, who has never had a bonding relationship with the child."<sup>95</sup>

In holding that a best interest test must be applied before a blood test will be mandated, the Kansas court stated that

[a] child's psychological tie to a parent is not a simple, uncomplicated relationship. A child requires from his parents not only bodily comfort and gratification, but also demands affection, companionship, and stimulating intimacy. Where these needs are answered reliably and regularly by the parent, the child-parent relationship becomes firm, with immensely productive effects on the child's intellectual and social development. Where there are changes of the parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident.

So long as a child is part of a viable family, the child's own interests are merged with those of the other family members.<sup>96</sup>

While the facts and issues involved in *Turner* were comprehensively dealt with in other jurisdictions, Maryland appellate courts had not yet addressed the issue.

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90. *Id.* at 262.

91. *Id.*

92. 783 P.2d 331 (Kan. 1989).

93. *Id.* at 338.

94. *Id.* at 338-39. The Kansas Court of Appeals reasoned that it is best to administer the blood test first, because if the presumed father is the biological father the case ends, but, if the blood tests determine the presumed father is not the biological father only then is a best interest hearing required. *Id.* at 338. The Kansas Supreme Court harshly criticized this logic. While recognizing the judicially economic advantages, the court stated that it is contrary to longstanding public policy to bastardize a child born during a marriage. *Id.*

95. *Id.* at 338.

96. *Id.* (citations omitted).

## III. THE INSTANT CASE

As support for the argument that he was entitled to have a blood test ordered to prove paternity, Turner cited section 1-208 of the Maryland Estates & Trusts Article<sup>97</sup> and *Thomas v. Solis*.<sup>98</sup> In acknowledging the validity of establishing paternity under section 1-208, the Court of Appeals of Maryland relied on *Thomas*. *Thomas* stands for the proposition that "an unwed father, wishing to protect his visitation rights and assure entitlement to notice of any attempted adoption of the child," may seek a declaratory judgment that he is the child's natural father by satisfying any of the four methods outlined in section 1-208.<sup>99</sup> The court stated that, on several occasions with regard to section 1-208, it had

indicated that a "liberal interpretation" of our legitimation statute [section 1-208] was essential; that it was "not limited in its scope and application to matters of inheritance only" but was legally sufficient "to establish other rights, . . . arising from the relationship existing between parent and legitimate issue," . . . and that the status sought by the father was afforded to him by compliance with the legitimation statute.<sup>100</sup>

Consequently, we believe that Turner, alleging that Jeffrey was a child "born to parents who have not participated in a marriage ceremony with each other,"<sup>101</sup> quite properly

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97. MD. CODE ANN., EST. & TRUSTS § 1-208 (1991).

98. *Turner v. Whisted*, 327 Md. 106, 111, 607 A.2d 935, 937 (1992). In his brief to the court of appeals, Turner argued that § 1-208 is not limited to matters of inheritance alone under *Thomas v. Solis*. Appellant's Brief at 4, *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992) (No. 92-52). Furthermore, Turner argued that § 1-208 applied because he alleged that Jeffrey was born to parents who were not married. *Id.* at 5. Turner argued that the trial court's refusal to order a blood test improperly denied him the opportunity to establish paternity under § 1-208(b)(1). *Id.* at 4.

99. *Turner*, 327 Md. at 111-12, 607 A.2d at 938 (citing *Thomas v. Solis*, 263 Md. 536, 544, 283 A.2d 777, 781 (1971)). Section 1-208 provides that a child born to parents who have not participated in a marriage ceremony with each other will be considered the child of his father if the father: (1) was judicially determined to be the father in an action brought under the Paternity Statute; (2) acknowledged himself in writing to be the father; (3) openly and notoriously recognized the child to be his child; or (4) subsequently married the mother and acknowledged himself, orally or in writing, to be the father. MD. CODE ANN., EST. & TRUSTS § 1-208(b) (1991 & Supp. 1994).

100. *Turner*, 327 Md. at 112, 607 A.2d at 938 (citing *Bridges v. Nicely*, 304 Md. 1, 7-8, 497 A.2d 142, 145 (1985), quoting *Thomas v. Solis*, 263 Md. 536, 542, 283 A.2d 777, 780 (1971)).

101. *Id.* While the court does not so hold, it appears that Turner satisfied at least § 1-208(b)(2) by filing a complaint claiming himself to be Jeffrey's biological

cited section 1-208 of the Estates & Trusts Article as a basis upon which he could seek to establish his status as Jeffrey's natural father.<sup>102</sup>

Having determined that Turner could prove paternity through an equitable proceeding using section 1-208, the court noted that it is also proper to establish paternity by a statutory action in a paternity proceeding under the Family Law Article.<sup>103</sup>

The court highlighted the importance of the reciprocal nature of the Family Law and the Estates & Trusts Articles.<sup>104</sup> Section 5-1005 of the Family Law Article provides that "[a]n equity court may determine the legitimacy of a child pursuant to [section] 1-208 of the Estates & Trusts Article."<sup>105</sup> Similarly, section 1-208(b)(1) provides that one way a child may be legitimized is if the father "[h]as been judicially determined to be the [natural] father in an action brought under the statutes relating to paternity proceedings."<sup>106</sup> From this link, the court concluded that the Maryland General Assembly "offered a choice of actions by which one could seek to establish paternity."<sup>107</sup>

The court's recognition of the link between the Estates & Trusts Article and the Family Law Article was crucial because it provided Turner with the possibility of getting a blood test to establish paternity. Given the General Assembly's flexibility with respect to providing a choice of options under which to proceed, the court reasoned that the method of proving paternity should be the same under either statutory option.<sup>108</sup> The court quoted *Shelley v. Smith*<sup>109</sup> for the proposition that that "the rules of evidence controlling the proof of paternity ought to be the same in either case."<sup>110</sup> In other words, because blood test evidence can be used for proof of paternity

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father because he "acknowledged himself, in writing, to be the father." See *id.* at 120-21, 607 A.2d at 942 (Eldridge, J., concurring). Thus, under § 1-208, Turner alleged conformity with subsection (b) and complied with one of the required conditions. If Turner proved all of the elements of § 1-208(b), the circuit court would declare Jeffrey the legitimate child of Turner. Of course, favorable results from a blood test would be the best way for Turner to establish that he and Whisted are the "parents," in accordance with subsection (b).

102. *Id.* at 112, 607 A.2d at 938.

103. *Id.*

104. *Id.*

105. MD. CODE ANN., FAM. LAW § 5-1005 (1991 & Supp. 1994).

106. MD. CODE ANN., EST. & TRUSTS § 1-208(b)(1) (1991 & Supp. 1994).

107. *Turner*, 327 Md. at 112, 607 A.2d at 938.

108. See *id.* at 113, 607 A.2d at 938.

109. 249 Md. 619, 241 A.2d 682 (1968).

110. *Turner*, 327 Md. at 113, 607 A.2d at 938 (quoting *Shelley*, 249 Md. at 630, 241 A.2d at 688).



in an action under the Family Law Article,<sup>111</sup> a blood test should likewise be available in a paternity action brought under the Estates & Trusts Article.<sup>112</sup>

After deciding that a blood test to establish paternity *was* acceptable under the Estates & Trusts Article, the court explained: (1) why establishing paternity under the Estates & Trusts Article is more appropriate in this case than proceeding under the Paternity Statute,<sup>113</sup> and (2) how a motion for blood test would be handled at the circuit court level and the underlying policy considerations governing its decision.<sup>114</sup>

Under *Turner*, not only is the Estates & Trusts action a valid way to establish paternity under such circumstances, it is the preferred way.<sup>115</sup> The court held that "in those cases where two men each acknowledge paternity of the same child, we believe that an action to establish paternity is more appropriately brought under the Estates & Trusts Article."<sup>116</sup> Quoting both *Thomas* and *Dawson*, the court explained that the "Estates & Trusts Article presents the 'more satisfactory' and 'less traumatic' means of establishing paternity."<sup>117</sup>

Next, the court explained how a trial judge should handle a motion for blood tests and the policy reasons regarding this matter. "A motion for blood tests made under the Estates & Trusts Article is best analyzed as a request for a physical examination under Maryland Rule 2-423,<sup>118</sup> and the court has discretion to grant or deny the blood tests."<sup>119</sup> In a footnote, the court pointed out that blood tests are clearly permissible under this provision.<sup>120</sup> Viewing the blood test motion as a Rule 2-423<sup>121</sup> request for physical examination, the court held that a trial court may order blood tests in a paternity

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111. "In general—On the motion of a party to the proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood tests to determine whether the alleged father can be excluded as being the father of the child." MD. CODE ANN., FAM. LAW § 5-1029(a) (1991 & Supp. 1994).

112. See *Turner*, 327 Md. at 113, 607 A.2d at 938.

113. *Id.*

114. *Id.* at 113-17, 607 A.2d at 938-40.

115. *Id.* at 113, 607 A.2d at 938.

116. *Id.*

117. *Id.* (quoting *Thomas v. Solis*, 263 Md. 536, 544, 283 A.2d 777, 781 (1971), and *Dawson v. Eversberg*, 257 Md. 308, 314, 262 A.2d 729, 732 (1970)).

118. Maryland Rule 2-423 permits the court to order an examination "[w]hen the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy." *Turner*, 327 Md. at 114 n.1, 607 A.2d at 939 n.1 (referring to MD. RULE 2-423).

119. *Id.* at 113, 607 A.2d at 939.

120. *Id.*

121. MD. RULE 2-423.

proceeding under the Estates and Trusts Article "for good cause shown."<sup>122</sup>

*Turner* sets forth guidelines for a trial court in an equity proceeding when it is confronted with a blood test motion pursuant to the Estates & Trusts Article.<sup>123</sup> In establishing these procedural guidelines, the court of appeals relied heavily upon the policy views expressed by the various Justices of the Supreme Court in *Michael H. v. Gerald D.*<sup>124</sup> The comprehensive and insightful discussion by the Justices on both sides of the issue in *Michael H.*<sup>125</sup> proved extremely valuable to *Turner's* holding.

The *Turner* court first highlighted the policy underlying the plurality opinion of *Michael H.* upholding California's irrebuttable legitimacy presumption.<sup>126</sup> The Supreme Court relied upon the common-law presumption of legitimacy and society's protection of the "integrity of the marital family unit from claims of paternity by other men."<sup>127</sup> The Court of Appeals of Maryland surmised that *Michael H.* was based upon the "promotion of family harmony" and a "reluctance to declare the children of a married woman illegitimate."<sup>128</sup> Maryland's highest court recognized that "'to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa.'"<sup>129</sup>

The *Turner* court also believed, however, that Justice Brennan's dissent warranted equal consideration.<sup>130</sup> The *Turner* majority quoted Brennan, who observed that prior case law

produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with

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122. *Turner*, 327 Md. at 114, 607 A.2d at 939. The court stated that even though Jeffrey is not a party to the action, he may be tested. *Id.* at 116, 607 A.2d at 940. Maryland Rule 2-423 "permits the physical examination of a party or a 'person in the custody or under the legal control of a party.'" *Id.* (quoting MD. RULE 2-423). Consequently, the court suggested that it would be appropriate for the trial judge to "appoint counsel to represent Jeffrey's interests if it believes that those interests might be compromised by the blood test. If Jeffrey's best interests would be jeopardized by submitting to a blood test, the child's representative may then request a protective order." *Id.*

123. *Id.* at 114-17, 607 A.2d at 939-40.

124. *Id.* at 114-16, 607 A.2d at 939-40. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

125. For a discussion of the various rationales underlying the holding in *Michael H.*, see *infra* text accompanying notes 128-33.

126. *Turner*, 327 Md. at 114-15, 607 A.2d at 939.

127. *Id.* (quoting *Michael H.*, 491 U.S. at 125).

128. *Id.* at 115, 607 A.2d at 939.

129. *Id.* (quoting *Michael H.*, 491 U.S. at 130) (emphasis in original).

130. *Id.* at 115, 607 A.2d at 939-40.

that child, such a link combined with a substantial parent-child relationship will do so. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause.<sup>131</sup>

In considering both the arguments of the plurality and the dissent in *Michael H.*, the Court of Appeals of Maryland decided to give credence to both views.<sup>132</sup> Thus, the Maryland high court held "that a trial court ought to be able to consider and balance the different interests that were separately recognized by the majority and the dissent in *Michael H.*"<sup>133</sup> The court stated that treating a motion for a blood test as a discovery request "allows a court to weigh these competing interests [and] [m]ost significantly . . . allows the court discretion to consider the best interests of the child."<sup>134</sup>

Thus, the court of appeals held that before blood tests will be ordered, the trial court must make an initial "best interests" determination.<sup>135</sup> As support for this procedure, the court cited *In re Marriage of Ross*<sup>136</sup> and *McDaniels v. Carlson*,<sup>137</sup> which both held that the child's best interests must be considered before ordering blood tests.<sup>138</sup>

The court of appeals listed the following factors to be considered by the trial court in determining the "best interest" of the child: (1) the stability of the child's current home environment; (2) whether there is an ongoing family unit; (3) the child's physical, mental, and emotional needs; (4) the child's past relationship with the putative father; and (5) the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history.<sup>139</sup>

Finally, the court directed the trial court upon remand to "consider the extent of Turner's commitment to the responsibilities of parenthood, and balance his interest in establishing his status as Jeffrey's natural father against the Whisteds' interest in protecting the integrity of the familial relationships already formed."<sup>140</sup> The

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131. *Id.* at 115-16, 607 A.2d at 940 (quoting Justice Brennan's dissent in *Michael H.*, 491 U.S. at 142-43) (citations and footnotes omitted).

132. *Id.* at 116, 607 A.2d at 940.

133. *Id.*

134. *Id.*

135. *Id.* at 117, 607 A.2d at 940.

136. 783 P.2d 331 (Kan. 1989). See *supra* notes 92-96 and accompanying text.

137. 738 P.2d 254 (Wash. 1987). See *supra* notes 87-91 and accompanying text.

138. *Turner*, 327 Md. at 116, 607 A.2d at 940.

139. *Id.* at 116-17, 607 A.2d at 940.

140. *Id.* at 117, 607 A.2d at 940.

court stated that the trial judge's "paramount concern" must be the protection of the child's interests.<sup>141</sup>

Therefore, the presumption of legitimacy in Maryland does not operate to preclude a blood test, although it is "impeded."<sup>142</sup> A blood test, if determined to be in the child's best interest, is now available.<sup>143</sup> As a result of *Turner*, if a trial judge determines that the child's best interests are not served by establishing paternity, the child may never know the true identity of his biological father. Additionally, if the establishment of paternity is in the child's best interests, the court held that it is more appropriately established in an equity proceeding under the Estates & Trusts Article, rather than in a statutory action pursuant to the Paternity Statute.<sup>144</sup>

#### IV. ALTERNATIVE APPROACHES

No doubt *Turner* will be received as one of Maryland's most important family law decisions. *Turner's* significance flows from its holding that a putative father may use blood tests to rebut the legitimacy presumption only if a paternity determination will operate in the child's best interests.<sup>145</sup> The court fashioned a workable and fair rule based on sound public policy considerations. However, the preliminary issues addressed by the *Turner* court, concerning which statute a trial court should proceed under, should have been decided differently. The court of appeals could have simply found a cause of action in the Paternity Statute alone. The court should not have declared that where a presumed father and a putative father both claim to be the biological father of the same child, "an action to establish paternity is *more appropriately* brought under the Estates & Trusts Article."<sup>146</sup>

In his concurring opinion, Judge Eldridge<sup>147</sup> convincingly argued that the majority misapplied the law in concluding that *Turner's*

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 112-13, 607 A.2d at 938.

145. *Id.* at 116, 607 A.2d at 940.

146. *Id.* at 113, 607 A.2d at 938 (emphasis added).

147. It should be noted that Judge Eldridge concurred in part and dissented in part. *Id.* at 117, 607 A.2d at 941. Judge Eldridge concurred with respect to the court's decision to remand the case for a determination of whether *Turner* is entitled to a blood test to establish his paternity, but disagreed with the court's holding that *Turner* properly proceeded under the Estates and Trust Article, rather than the Family Law Article. *Id.* at 118, 607 A.2d at 941. In addition, Judge Eldridge dissented with the majority's decision that *Turner* "must prove that a declaration of paternity is in the child's best interests before blood tests pursuant to Maryland Rule 2-423 will be ordered." *Id.* See *infra* notes 177-92 and accompanying text.

action is "more appropriately brought under the Estates & Trusts Article . . . present[ing] the 'more satisfactory and less traumatic' means of establishing paternity."<sup>148</sup> Essentially, Judge Eldridge asserted that Turner's cause of action exists in the Paternity Statute, not in the Estates & Trust Article.<sup>149</sup> In explaining this argument, Judge Eldridge restated the pertinent language from section 1-208(b) of the Estates & Trusts article: "Child of his father. A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father . . . ."<sup>150</sup> Judge Eldridge further asserted that "[t]his portion of the statute presumes that the child being legitimated is in fact '[a] child born to parents who have not participated in a marriage ceremony with each other.'"<sup>151</sup> In other words, according to Judge Eldridge, the statute assumes that the child's biological parents are the mother and the man seeking to legitimate his child. It also assumes that there is no dispute as to the identity of the child's biological father.<sup>152</sup> His opinion stated that the statute was never designed as a "mechanism for the resolution" of paternity disputes.<sup>153</sup>

Judge Eldridge asserted that a proper construction of section 1-208 of the Estates & Trusts Article demonstrates that Turner should instead proceed under the Family Law Article.<sup>154</sup> In his concurring opinion, he pointed out that "Mr. Turner and Mr. Whisted each has a basis under the Estates and Trusts Article for asserting that he is the child's father."<sup>155</sup> Turner claimed that Jeffrey was "born to parents who have not participated in a marriage ceremony with each other," and, under section 1-208(b)(2), Turner acknowledged himself in writing to be Jeffrey's father.<sup>156</sup> Conversely, Mr. Whisted asserted under section 1-206 of the Estates & Trusts Article that Jeffrey "was 'born or conceived during the marriage,'" and therefore that he is

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148. *Turner*, 327 Md. at 118, 607 A.2d at 941 (quoting the majority in *Turner*, 327 Md. at 113, 607 A.2d at 938).

149. *Id.* at 121, 607 A.2d at 942.

150. *Id.* at 118, 607 A.2d at 941 (quoting MD. CODE ANN., EST. & TRUSTS § 1-208(b) (1991)).

151. *Id.* at 119, 607 A.2d at 941.

152. *Id.*

153. *Id.*

154. *See id.* at 120-21, 607 A.2d at 942.

155. *Id.* at 120, 607 A.2d at 942.

156. *Id.* at 120-21, 607 A.2d at 942 (quoting MD. CODE ANN., EST. & TRUSTS § 1-208 (1991)). Judge Eldridge cited the following sources for the proposition that the pleading satisfies the acknowledgment in writing requirement under § 1-208(b)(2): *Thomas v. Solis*, 263 Md. 536, 544, 283 A.2d 777, 781 (1971) (acknowledgment of child in pleading satisfied both § 1-208(b)(2) and (b)(3)); *Hall v. Coates*, 62 Md. App. 252, 260, 489 A.2d 41, 45-46 (1985); *Skeens v. Paterno*, 60 Md. App. 48, 58, 480 A.2d 820, 825, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984). *See Turner*, 327 Md. at 121, 607 A.2d at 942.

the presumed father.<sup>157</sup> In his opinion, Judge Eldridge further stated that the fact that this situation can and does occur demonstrates that the Estates & Trusts Article was never intended to resolve such disputes.<sup>158</sup> Judge Eldridge concluded that

[i]n order for § 1-208(b) . . . to have a logical application, there cannot be a dispute as to whether the “parents” were married at the time of conception or birth. The provisions of the Estates and Trusts Article, because they were not designed to resolve an adversarial dispute between two men claiming paternity, require an assumption as to who is the natural father before a determination can be made concerning which section of the statute applies.<sup>159</sup>

Judge Eldridge also explained that “[b]ecause the Estates and Trusts Article presumes knowledge of the identity of the natural father before its legitimation procedures become meaningful,” the Estates & Trusts Article is not suitable for resolving disputes such as the type found in *Turner*.<sup>160</sup> Moreover, he asserted that the Paternity Statute is the best way to proceed under such circumstances.<sup>161</sup>

In further support of this argument, Judge Eldridge addressed the strong language in the cases relied upon by the majority when it decided that the Estates & Trusts Article was applicable for Turner’s purposes.<sup>162</sup> He pointed out that in each of those cases there was no dispute as to the identity of the child’s biological father, and it was the undisputed natural father who sought to legitimate his children born out of wedlock.<sup>163</sup>

Judge Eldridge also attacked the majority’s reliance upon *Thomas v. Solis*.<sup>164</sup> In *Thomas*, the undisputed biological father sought to use section 1-208, not to establish himself as the natural father, but to protect his visitation rights and ensure that the adoption of the child by another individual would not occur without his consent.<sup>165</sup> According to Eldridge, “[a]t no point did anyone suggest that Thomas was not the children’s natural father.”<sup>166</sup> Furthermore, he pointed

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157. *Turner*, 327 Md. at 121, 607 A.2d at 942 (quoting Md. CODE ANN., EST. & TRUSTS § 1-206 (1991)).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 119-20, 607 A.2d at 941-42.

163. *Id.* at 119, 607 A.2d at 941.

164. *Id.* at 119, 607 A.2d at 941-42.

165. *Thomas v. Solis*, 263 Md. 536, 538, 283 A.2d 777, 778 (1971).

166. *Turner*, 327 Md. at 119, 607 A.2d at 942.

out that the court of appeals in *Thomas* held that the Estates & Trusts Article could only be used to establish paternity under the type of fact pattern that was presented to the court.<sup>167</sup>

Judge Eldridge also disagreed with the *Turner* majority's use of *Dawson v. Eversburg* for the statement that the legitimation statute provided a "less traumatic approach."<sup>168</sup> He contended that the quoted phrase was taken out of context and was misapplied to the facts of the instant case.<sup>169</sup> In *Dawson*, the undisputed father, to ensure that his children would be his legitimate heirs, filed an adoption petition.<sup>170</sup> Judge Eldridge pointed to the *Dawson* holding for the proposition that when legitimization, and not inheritance, was the goal, the Estates & Trust Article was "less traumatic" as compared to the adoption statutes.<sup>171</sup>

Finally, Judge Eldridge argued that none of the Maryland cases relied upon by the majority involved the use of the Estates & Trust Article to settle paternity disputes.<sup>172</sup> Instead, suits brought to resolve the question of the identity of a child's biological father "are more appropriately resolved under the Family Law Article."<sup>173</sup> Nonetheless, Judge Eldridge concurred with the majority's decision to afford *Turner* an opportunity to establish paternity under the Estates & Trusts Article "because the General Assembly clearly intended that there be a judicial mechanism for resolving disputes over paternity," and because "no action was brought under the Family Law Article in this case."<sup>174</sup>

Judge Eldridge's analysis is convincing. The court should have simply concluded that the Family Law Article is the proper authority for resolving such disputes. The court would have avoided overextending past precedents and stretching the applicability of the Estates & Trusts Article, especially because the court concluded that the Paternity Statute was equally applicable.<sup>175</sup> Aside from this procedural problem, however, *Turner* was decided correctly. *Turner's* most important aspect, the requirement of a "best interest" determination before allowing blood tests to rebut the legitimacy presumption, is the best solution to a sensitive problem—contrary to Judge Eldridge's potent dissent to this part of the majority's opinion.<sup>176</sup>

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167. *Id.*

168. *Id.* at 120, 607 A.2d at 942 (quoting *Dawson v. Eversburg*, 257 Md. 308, 314, 262 A.2d 729, 732 (1970)).

169. *Id.*

170. *Dawson v. Eversburg*, 257 Md. 308, 309, 262 A.2d 729, 730 (1970).

171. *Turner*, 327 Md. at 120, 607 A.2d at 942.

172. *Id.*

173. *Id.* (citing *Taxiera v. Malkus*, 320 Md. 471, 578 A.2d 761 (1990)).

174. *Id.* at 121, 607 A.2d at 942-43.

175. *See id.* at 112-13, 607 A.2d at 938.

176. *Id.* at 121, 607 A.2d at 944.

Judge Eldridge agreed that a Rule 2-423 "good cause" analysis was appropriate, but argued that the implications of such an analysis are not as far reaching as the majority believed.<sup>177</sup> The dissent declared that traditional "good cause" analysis does not require a showing that a paternity determination be in the child's best interests before a court will allow blood tests.<sup>178</sup> In other words, according to the dissent, "good cause," as used in Rule 2-423, is not synonymous with "best interests of the child." A good cause showing, argued Judge Eldridge, merely requires that the party requesting the blood test "demonstrate that the mental or physical character or condition of another party is material to an issue in the case."<sup>179</sup> Thus, "blood test results would be material to the determination of who is Jeffrey's natural father."<sup>180</sup> The dissent further stated that "because the status of [the] natural father gives rise to a presumption that the best interests of the child are served by allowing the natural father visitation, the information obtained by the blood test is also material . . . for visitation."<sup>181</sup>

In this respect, the dissent failed to see that the trial court must be allowed discretion in each case to determine if and when blood tests are proper. Certainly blood test results are material to the issue of the identity of the child's biological father. Paternity, however, is not the primary issue before the court at the onset. Rather, the "good cause" issue is whether it is in the child's best interests to determine the identity of the child's biological father, assuming *arguendo* that the presumed father is not the child's biological father.

Under the view that it is *always* in the child's best interest to establish paternity, blood test results are never immaterial and should be ordered on demand.<sup>182</sup> The majority, however, did not take such a mechanical and objective approach. The majority opinion instead adopted the realistic view that it is not always in the child's best interest to establish paternity.<sup>183</sup> From a child's perspective, therefore, blood test results will only be material if determining paternity would be in his or her best interests. If determining paternity would not be in the child's best interest, then blood test results are immaterial and deserve no further consideration.

The majority, unlike the dissent, recognized that in many instances the child may be better served by not knowing the identity

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177. *Id.* at 122, 607 A.2d at 943 (Eldridge, J., dissenting in part).

178. *Id.* at 123, 607 A.2d at 943.

179. *Id.* at 122, 607 A.2d at 943 (citing *Roberts v. Roberts*, 198 Md. 299, 302, 82 A.2d 120, 122 (1951)).

180. *Id.*

181. *Id.* (citing *Ross v. Hoffman*, 280 Md. 172, 178, 372 A.2d 582, 586-87 (1977); *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952)).

182. See *Turner*, 327 Md. at 116, 607 A.2d at 940.

183. *Id.*



of his biological father. The dissent was clearly troubled by the real possibility that the child's paternity may never be conclusively established. Judge Eldridge wrote:

I cannot subscribe to the proposition that relevant, ascertainable evidence should be excluded because it may lead to a result which the court does not like . . . . I simply cannot agree with the majority's view that the government (through its courts) is entitled to determine in a particular case that one will be better off by the perpetuation of a falsity and the suppression of relevant, unprivileged facts.

The notion that people's best interests are served by ignorance of the facts, enforced by a governmental entity, is reminiscent of the society portrayed in George Orwell's 1984 . . . . While concealment of the truth is a fundamental tenet of totalitarian regimes, it should not be an operative principle in a free society.<sup>184</sup>

The dissent distinguished an adopted child's ignorance of the identity of his biological parents from a child's ignorance of the identity of his biological father under the circumstances in *Turner*.<sup>185</sup> The dissent pointed out that sealing adoption records was only instrumental after the General Assembly balanced the privacy interests involved.<sup>186</sup> Furthermore, the dissent argued that sealing adoption papers prevents the future disclosure of previously ascertained facts for collateral purposes, but does not prevent the ascertainment of these facts in the primary litigation.<sup>187</sup> Nonetheless, there is no escaping the fact that an adopted child will not know that he is adopted unless his parents disclose this information.<sup>188</sup> If it could be

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184. *Id.* at 124, 607 A.2d at 944. Judge Eldridge even quoted the engraving, "IGNORANCE IS STRENGTH," from one of buildings in Orwell's 1956 novel for the notion that people's best interests are served by ignorance of the facts. *Id.* (quoting GEORGE ORWELL, 1984 (1956)).

185. *Id.* at 125-26, 607 A.2d at 944-45.

186. *Id.* at 125, 607 A.2d at 944.

187. *Id.* at 125-26, 607 A.2d at 945.

188. The dissent was understandably concerned with the possibility under *Turner* that a child may go without knowing the identity of his natural father, and then, at some point in the future, may require his biological father's genetic information for medical treatment purposes. *Id.* at 126 n.7, 607 A.2d at 945 n.7. Under § 5-329, MD. CODE ANN., FAM. LAW § 5-329(a) (1991), an adopted individual may have access to his natural parent's medical information, assuming it exists, if the court finds that the medical information is needed for his, or his relative's health. It should be noted, however, that this provision is of little help to an individual who was never informed that he was adopted. Perhaps the Maryland General Assembly should consider requiring that a father's medical history be compiled, entered, and made available to the child as part of the best interest hearing, in the same way as medical information is made available to an adopted individual under § 5-329.

in a child's best interests to keep his biological identity concealed in adoption cases, then conceivably it could also be in a child's best interests to conceal his biological identity under the circumstances of the instant case.<sup>189</sup>

Finally, the dissent quoted a commentator for the purpose of explaining the "illogic of the majority's position."<sup>190</sup>

The question of the child's best interests . . . does not arise until the putative father has first been accorded his procedural right to standing to establish his paternity. *This is not to say that the best interests of the child are unimportant, but only that they are irrelevant to the preliminary and essential factual determination of paternity.* A successful paternity action by a putative father does not automatically entitle him to custody, for example, nor even to visitation with his child.<sup>191</sup>

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189. The dissenting judge offered a "switched at birth" hypothetical to illustrate an extreme example of *Turner*. *Turner*, 327 Md. at 124-25, 607 A.2d at 944. Two mothers each give birth to a baby girl. *Id.* Through hospital negligence, the two mothers return home to their families with the wrong child. *Id.* Eldridge asserted that in order to examine the hospital records to discover whether the switch actually occurred, a court would have to first determine that it would be in each child's best interest to make such a finding. *Id.* Of course, this assumes that the dissent is correct in applying a *Turner* analysis to this example.

Unfortunately, the dissenting opinion does not create all of the relevant facts of its hypothetical problem. If the possibility of the switch was discovered two days after the mothers returned home, a trial judge should certainly find it to be in the child's best interest to have this matter resolved, and thus order the records open. If both children are members of strong, close, and healthy families, however, and the suspicion arises at an older age, the determination is not as clear. One or both girls may be especially sensitive or unstable; one girl may have a severe disability that caused family bonds to become extraordinarily tight due to working through the pain and hardship together. A paternity determination does not coincide with a child's best interests under each and every circumstance.

It is questionable, however, that *Turner* is even applicable to the "switched at birth" hypothetical because the family dynamics in a case such as *Turner* are very different. Accordingly, a putative father's claim is too easily motivated by revenge, jealousy, and hatred. This is not the case in the "switched at birth" hypothetical because the integrity of the husband-wife relationship is not being challenged. Furthermore, having the child learn that she is the offspring of an adulterous affair may more likely be detrimental to the child's welfare than having the child learn of the "switch." For these reasons, *inter alia*, *Turner* may not apply.

190. *Turner*, 327 Md. at 127, 607 A.2d at 945.

191. *Id.* at 127, 607 A.2d at 945 (quoting Jean E. McEwen, R. McG. & C.W. v. J.W. & W.W.: THE PUTATIVE FATHER'S RIGHT TO STANDING TO REBUT THE MARITAL PRESUMPTION OF PATERNITY, 76 NW. U. L. REV. 669, 688 (1981)) (emphasis in original).

If the majority defined the essential preliminary question as that of the child's paternity, then the above-quoted comment would have merit. However, the majority made it clear that the preliminary question was instead, whether establishing paternity would be in the child's best interests.<sup>192</sup> Therefore, if as stated above, a successful paternity action does not guarantee the putative father at least visitation, it seems careless to rush into making a determination that could have devastating effects upon the child.

## V. CONCLUSION

*Turner* should have held that an action under the Paternity Statute, rather than an equitable proceeding under the Estates & Trusts Article, is the only procedure for establishing paternity of a child presumed to be the legitimate child of another man. Despite this defect, *Turner* fashions a workable and equitable solution to an unfortunate set of circumstances. In balancing the various policy considerations, the court succeeded in keeping the child's best interests paramount to the interests of the other litigants.

*Turner's* practical effect will probably be that under most fact patterns, a blood test will be granted. The very fact that such a case even arises may indicate a weak family bond—especially where the putative father, as in the instant case, has developed a relationship with the child, and the husband and wife appear to be separated.

The dissent's fears that a child may grow up never knowing the true identity of his or her natural father are legitimate. Unfortunately, it is not difficult to imagine circumstances where a child's knowledge of his or her biological father would irreparably damage that child's emotional and psychological well-being. The court does not hide from the reality that there are times when the truth exacts a price too costly for a child to pay. However, in practice, the threshold test will not be as onerous as portrayed by the dissent. In the majority of cases, it *will* likely be in the child's best interest to determine who is the child's real father.

David J. Shuster

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192. *Id.* at 116-17, 607 A.2d at 940.