

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-88

TITLE BARBARA ANN PAULUSSEN, Appellant v.
GEORGE RONALD HERION

PLACE Washington, D. C.

DATE March 5, 1986

PAGES 1 thru 41



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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA ANN PAULUSSEN, :
Appellant, :
V. : No. 85-88
GEORGE RONALD HERION :

- - - - -x
Washington, D.C.
Wednesday, March 5, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 o'clock a.m.

APPEARANCES:
ESTHER L. HORNIK, ESQ., Narberth, Pennsylvania, on
behalf of the appellant.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ESTHER L. HORNIK, ESQ.	
on behalf of the appellant	3
JOSEPH N. ONEK, ESQ.,	
on behalf of the appellee	20
ESTHER L. HORNIK, ESQ.	
on behalf of the appellant -- rebuttal	39

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Paulussen versus Herion. Ms. Hornik, you may proceed whenever you are ready.

ORAL ARGUMENT OF ESTHER L. HORNIK, ESQ.

ON BEHALF OF APPELLANT

MS HORNIK: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the Pennsylvania statute of limitations of six years from birth in a support action for illegitimate children violates the equal protection clause of the Fourteenth Amendment where no similar restriction exists in support actions for legitimate children.

There are two points to be made: first, the statute is unconstitutional. It treats legitimate and illegitimate children differently without a substantial state interest for such discrimination.

In particular, the only conceivable state interest of protection from stale and fraudulent claims is clearly weak. Current scientific procedures are sufficiently precise so that the risk of false paternity charges in no sense balances against unfair loss of support for illegitimate children.

Secondly, this case is not moot. Although

1 current Pennsylvania law establishes an 18-year statute
2 of limitations in response to federal law, the law
3 operates only from December 1st of 1985. Pennsylvania
4 precedent suggests that the new law does not apply
5 retroactively to a back child support award so that the
6 illegitimate child in this case would lose all right to
7 child support from the date of filing of the complaint
8 in this action, February 11th of 1980.

9 QUESTION: Mrs. Hornik, may I ask, that
10 statute was enacted since this case was decided below?

11 MS HORNIK: Yes, that is correct. The statute
12 was enacted --

13 QUESTION: If it did apply retroactively,
14 would there be any issue for us to decide?

15 MS HORNIK: If it did apply retroactively, no,
16 there would be no issue. But Pennsylvania precedent
17 suggests that the law --

18 QUESTION: Well, suggests, you say?

19 MS HORNIK: Well, actually, no, there's
20 definite Pennsylvania precedent, the cases of Williams
21 versus Wolfe, Hatfield versus Hazel, Hatfield versus --

22 QUESTION: Well, I just wondered if we ought
23 not to -- why should we address this issue if in fact a
24 new statute applies to this case? Why shouldn't we send
25 it back to find out?

1 MS HORNIK: Because this new -- the new
2 statute, the one that gives an 18-year limitation
3 period, contains no language in it to suggest that it
4 would apply retroactively. Pennsylvania has a rule of
5 statutory construction that in the absence of --

6 QUESTION: Well, my only suggestion is,
7 wouldn't the Pennsylvania courts be better able to --
8 more qualified to address this application than we are?

9 MS HORNIK: No, because it's already been
10 decided under Pennsylvania precedent that the law in
11 existence at the time of the filing of a paternity
12 complaint is the law to be applied in the case, and
13 since this case was filed in February of 1980, the law
14 to be applied would be the six-year statute of
15 limitations that was in existence in 1980.

16 QUESTION: And has the -- the courts of
17 Pennsylvania, in any case other than yours here, dealt
18 with this statute?

19 MS HORNIK: With the six-year statute, or with
20 the 18-year?

21 QUESTION: The 18-year.

22 MS HORNIK: No, because it's so new, it just
23 became effective on December 31st of 1985. No court to
24 my knowledge has had an opportunity to review its
25 implicatiosns.

1 QUESTION: Well, as Justice Brennan has
2 suggested, can you suggest a reason why the Pennsylvania
3 courts shouldn't deal with this first before we
4 undertake to do something, just as a matter of policy
5 and practice if nothing else?

6 MS HORNIK: I believe that it's more important
7 for this Court to make a determination regarding the
8 constitutionality of the six-year statute of limitations
9 that was in existence at the time of the filing of the
10 complaint rather than sending the case back to the
11 Pennsylvania court for a determination that has already
12 been made under Pennsylvania precedent.

13 In other words, in the Hatfield versus Hazel
14 Baker case, in the Jenner versus Stillman case, and most
15 particularly the Williams versus Wolfe case, the
16 Pennsylvania courts have spoken and said the appropriate
17 -- that the date of the filing of the complaint is the
18 date --

19 QUESTION: May I ask you this. Supposing you
20 filed this complaint on the 1st of December of last year
21 instead of now, and then on January 15th of something
22 they came in with the statute of limitations defense.

23 Would you not then have argued that the new
24 statute applies? You wouldn't have just thrown in the
25 towel on the issue, would you?

1 MS HORNIK: Well --

2 QUESTION: I mean, there must at least be an
3 arguable position to the contrary? Are you willing to
4 concede on behalf of your client that it does not
5 apply? I hope you won't, but --

6 MS HORNIK: Well, I -- there's one peculiarity
7 of Pennsylvania law which must be made clear, and that
8 is that the order of child support in every support case
9 is retroactive to the date of the filing of the
10 complaint, and so that in Pennsylvania --

11 QUESTION: I understand. You're making the
12 argument against the statute applying. It seems to me
13 if you were really put to the test you might come up
14 with some arguments for the other position, wouldn't you?

15 MS HORNIK: Well --

16 QUESTION: After all, you're representing a
17 client here. You're not trying to get a constitutional
18 issue decided.

19 MS HORNIK: That's correct, Justice Stevens,
20 but since there's this particular rule of civil
21 procedure which states that an order of support is
22 retroactive to the date of the filing of the complaint,
23 and I know of no Pennsylvania case in which child
24 support was awarded for a period prior to the date of
25 the filing of a child support complaint, I think I would

1 have a difficult time in the Pennsylvania court, finding
2 a favorable response to that argument.

3 QUESTION: I don't understand why we can't
4 allow the State of Pennsylvania to interpret its own
5 laws. Isn't that what we normally do?

6 MS HORNIK: No, for example --

7 QUESTION: Well, tell me where we didn't.

8 MS HORNIK: In the Mills case that was before
9 you the same thing happened. During the pendency of the
10 Mills case the Texas statute was changed from one year
11 to four years, and you decided the constitutionality of
12 the one-year statute of limitations in paternity cases
13 in the Mills case, because you made the determination
14 that the child in that case would not have gotten the
15 benefit of the four-year statute and would have been
16 barred from continuing on in a paternity case.

17 QUESTION: It's a little different.

18 MS HORNIK: Well, in this case --

19 QUESTION: All we're saying is, there's a
20 Pennsylvania statute that's come in between this case
21 and this Court, and in the interim we will send it back
22 to let the State pass on it, on its statute.

23 MS HORNIK: Justice Marshall, I believe that
24 one must distinguish between the right to file a
25 complaint and the remedy in this -- now, under the new

1 statute it's clear that Georgeann would have the right
2 to file a new paternity and support petition.

3 That petition -- her award of child support
4 would be retroactive to the date of the new filing,
5 which would be a date after December 31st of 1985. Her
6 rights to back support from February 1980 are
7 jeopardized, and it's an amount --

8 QUESTION: Well, I didn't suggest that. I
9 suggested that we send this case back, not the new case.

10 MS HORNIK: The new statute is not in issue in
11 this case. This case falls under the old statute.

12 QUESTION: We send it back -- well, who
13 decides whether it is under this statute or the old one?

14 MS HORNIK: That's --

15 QUESTION: The state court should decide
16 that. The state court decides its jurisdiction, not us.

17 MS HORNIK: I believe that the state court has
18 already decided that.

19 QUESTION: Under the old statute?

20 MS HORNIK: But the old statute -- well, okay,
21 the old statute was enacted in 1978. For example, in
22 this case, this child was born in 1973. Now, in
23 Williams versus Wolfe the Court was considering the
24 retroactivity of a statute of limitations, and if you
25 look at the facts in that case the child was already six

1 years old in 1979 when the complaint was filed.

2 And so, what the Court was asking is, can we
3 apply a newly enacted statute of limitations of six
4 years to a case which has been filed one year after the
5 effective date of this Act, and the child was already
6 five at the age of the enactment of any statute, and the
7 Court ruled that the date of the complaint determined
8 the law that would be applied in the case, not the date
9 that the child was born, and not the effective date of
10 the Act, but the effective date that the complaint was
11 filed.

12 Georgeann Veronica Paulussen was born on
13 today's date, March 5th, in 1972. At the time of
14 Georgeann's birth her mother, Barbara Paulussen and her
15 putative father, George Ronald Herion, were not married
16 to each other. Georgeann's mother and father continued
17 to have a relationship through April of 1975, and
18 throughout this time George Herion made voluntary
19 contributions to Georgeann's support, and then in April
20 of 1975 all support ceased.

21 Barbara Paulussen filed a paternity action on
22 behalf of Georgeann in the Court of Common Pleas of
23 Bucks County on February 11th of 1980. In this
24 complaint George Herion is named as her father.

25 George Herion immediately raised at bar the

1 six-year statute of limitations to Georgeann's claim,
2 pleading that the case was filed more than six years
3 after Georgeann's birth and more than two years after he
4 had made voluntary contributions to her support.

5 There was no trial on the merits of
6 Georgeann's claim in the lower court. By operation of
7 law, she was barred from presenting her evidence to a
8 trier of fact.

9 Her evidence included results of red and white
10 blood tests in which samples had been taken from her,
11 from her mother, Barbara Paulussen, and from George
12 Herion. The results of these tests indicated that there
13 was a 99.8 probability that George Herion was the father.

14 Cross motions for summary judgment were
15 filed. The mother's motion challenged the
16 constitutionality of the six-year statute. The father's
17 motion raised the bar of the statute.

18 The lower court granted the father's motion,
19 George Herion, and denied Barbara Paulussen's motion
20 thereby dismissing the complaint. The matter was then
21 appealed to the Superior Court of Pennsylvania where
22 again Barbara Paulussen's constitutional challenge was
23 denied.

24 A Petition for Allowance of Appeal was filed
25 in the Supreme Court of Pennsylvania. It too was denied

1 and the appeal to this Court followed.

2 The Superior Court of Pennsylvania ruled
3 against Barbara Paulussen on the basis of a Pennsylvania
4 precedent. In the Pennsylvania Supreme Court case of
5 Astemborski versus Susmarski, the Pennsylvania Supreme
6 Court upheld the constitutionality of the six-year
7 statute, and the Superior Court, being a lower court,
8 felt compelled to follow the precedent of the higher
9 court.

10 The Astemborski case had -- the Astemborski
11 court had initially considered the constitutionality of
12 the six-year statute. A petition for certiorari was
13 granted by this Court, and then judgment was vacated and
14 the case was remanded back to the Supreme Court of
15 Pennsylvania for consideration in light of this Court's
16 decision in Pickett versus Brown.

17 The Astemborski court reconsidered the
18 constitutional question in light of this Court's
19 decision and reaffirmed its original decision finding
20 the six-year statute constitutional.

21 In Mills, this Court struck down a one-year
22 statute of limitations from Texas as constitutionally
23 invalid, and in Pickett a unanimous court struck down a
24 two-year statute of limitations on the same basis. In
25 Mills and in Pickett this Court established a two-part

1 test for analysis of the constitutionality of a
2 paternity statute of limitations.

3 There had to be an adequate time frame for a
4 paternity action to be instituted on behalf of
5 illegitimate children. There had to be a substantial
6 state interest in avoiding stale and fraudulent claims
7 to justify the discriminatory impact of this statute on
8 the rights of illegitimate children, and other
9 countervailing state interests.

10 Despite these guidelines for constitutional
11 analysis, the Astemborski court found that the
12 Pennsylvania six-year statute was constitutionally
13 adequate. The holding of the Astemborski court was in
14 error.

15 First, is six years a constitutionally
16 adequate length of time to bring a paternity action?
17 The answer must be no. First, the child, Georgeann
18 Paulassen, is a real party in interest here although her
19 mother's name appears in the caption, and there can be
20 no assurance that her interest is identical to her
21 mother's interest.

22 The child cannot act on her own behalf but she
23 loses important rights. She cannot toddle into court to
24 find her Daddy. Her mother may be unwilling to sue in a
25 timely fashion for her own reasons, whether these

1 reasons be out of hate, love or utter indifference to
2 the father. The mother's feelings can continue for many
3 years, even if the father makes voluntary contributions
4 to the support of the child or acknowledges the child's
5 paternity in writing after the six-year period.

6 Second, the financial needs of a minor child
7 are not always predictable before he or she is six. A
8 child may not require her father's financial assistance
9 at age five, but at age 12 or age 17 may be in desperate
10 need of such assistance.

11 As to the second prong of the test suggested
12 by this Court, does the prevention of stale and
13 fraudulent claims counterbalance the interest of the
14 child and the countervailing interest of the State? We
15 present this issue by issue.

16 Is the prevention of stale claims really an
17 issue? No. Can an illegitimate child's claim for
18 ongoing financial support be considered stale? The
19 claim of a legitimate child is not considered stale.

20 Then, is the prevention of fraudulent claims a
21 substantial state interest? As this Court has noted,
22 advances in scientific testing have attenuated the
23 relationship between the statute of limitations and the
24 State's interest in the prevention of prosecution of
25 stale and fraudulent claims.

1 In the Congressional report accompanying the
2 Child Support Enforcement amendment of 1985, it was
3 noted that, "Increased reliability of scientific
4 paternity teting can exclude over 99 percent of those
5 wrongfully accused fathers, regardless of the age of the
6 child."

7 Pennsylvania recognizes that the results of
8 HLA testing are so reliable that they can be introduced
9 as affirmative evidence of paternity in a paternity
10 proceeding. In our concern over the prevention of
11 fraudulent claims, it should be recalled that in
12 addition to the right to call upon powerful scientific
13 tests, the accused father does not lose other defenses
14 in contesting paternity.

15 The accused father has the right to a jury
16 trial. If indigent, the accused father has the right to
17 counsel. If indigent, the accused father has the right
18 to free blood tests. The accused father has the right
19 to have the petition dismissed immediately if blood
20 tests and tissue tests show that he is excluded as the
21 father.

22 If the father is not indigent, then he has the
23 right to be notified that he can have counsel at the
24 proceeding and he has to be given an adequate amount of
25 time to secure such counsel. Also, the accused father

1 can appeal the lower court decision on the basis of
2 ineffective assistance of counsel.

3 And it's clear in another context that
4 Pennsylvania recognizes that it is possible to establish
5 paternity well after six years have passed. An
6 illegitimate child can probe paternity after the father
7 is dead, for purposes of intestate succession, if he
8 orshe can show paternity by clear and convincing
9 evidence.

10 Ironically, more liberal rights are given to a
11 child after the after the lips of his father have been
12 sealed by death than when the father is alive to contest
13 the claim.

14 In sum, it is Barbara Paulussen's belief that
15 the state interest in preventing stale and fraudulent
16 claims is now as it was in 1980, quite minimal. In
17 contrast the countervailing state interest and the
18 child's interest in the timely determination of
19 paternity are much greater.

20 As this Court has noted, there is a
21 substantial countervailing state interest in seeing that
22 justice is done and genuine claims for child support are
23 litigated. This conflicts with the arbitrary nature of
24 a limitations period, that provides no exceptions for
25 determination of a child's paternity after the statutory

1 deadline has passed, based on either the case's unique
2 facts and circumstances, or the quantity or quality of
3 the evidence that a particular child can produce to
4 prove that a particular man is its father.

5 Another countervailing state interest requires
6 consideration of the cost benefit of a statute which
7 grants financial immunity to a father for support
8 obligations and possibly shifts that support obligation
9 to taxpayers when the child's mother is unable to
10 support the illegitimate child, or is not adequately
11 able to support the illegitimate child.

12 QUESTION: Counsel, I take it you would make
13 th same argument whatever the statutory period is?

14 MS HORNIK: That's correct, and in
15 Pennsylvania a child beyond the age of 18 has a right to
16 ask the father for child support if she needs money for
17 college expenses, if she's impoverished or disabled, and
18 so that the right for a legitimate child could continue
19 on throughout the father's lifetime, and so that even
20 under the 18-year statute, I believe that there is an
21 equal protection problem.

22 QUESTION: Of course, there is an important
23 issue in the case of the illegitimate child, is the
24 question of paternity, and with your legitimate child
25 you generally don't have that issue. All you're talking

1 about is, how much does the father make and what are the
2 needs of the child.

3 MS HORNIK: Justice Rehnquist, that's correct,
4 but the illegitimate child never has the same procedure
5 as the legitimate child because the illegitimate child
6 has a two-part procedure. For every case of an
7 illegitimate child, you have to go through a paternity
8 proceeding and then a support proceeding.

9 A paternity proceeding is a safeguard. If you
10 can't make it through the paternity proceeding, you
11 don't go on to the support proceeding. Whereas, for the
12 legitimate child, because of the presumptions that
13 operate in favor of legitimacy, all a legitimate child
14 has to do is say, my parents were married, you know, at
15 the time I was conceived or at the time I was born, or
16 my parents were married after I was born, and I'm
17 legitimate so I have the right to proceed to --

18 QUESTION: Well, that was really my point,
19 that there is this separate issue in the case of the
20 illegitimate child that might justify a state in
21 treating that sort of issue and the time you can raise
22 it differently, and all you're arguing about, really,
23 are the assets of the father and the needs of the child.

24 MS HORNIK: Well, the thing is that the
25 procedure itself is a safeguard. In other words, as

1 long as -- in other words, the legitimate child and
2 illegitimate child should have equal opportunity to ask
3 for a father's support, and if a legitimate child has
4 through age 50, to ask for a father's support, then the
5 illegitimate child should have the same time period.

6 However, the illegitimate child will always
7 have the burden of proving paternity. Now, as I stated
8 before, over 99 percent of fathers today can be excluded
9 by tests as potential fathers.

10 So that you're looking at a fractional class
11 of fathers whose rights are being affected here, one
12 percent are going to go to trial. Whereas, you have the
13 entire class of illegitimates which is over 18 percent
14 now, of all births in the United States, are children
15 born out of wedlock, which I believe the last statistic
16 was that over 700,000 children being born out of wedlock
17 each year.

18 Finally, the interests of the child are
19 sacrificed, and the interest here -- the child's
20 interests are paramount and I think that that's out of
21 focus in the way that these cases are being analyzed.
22 And the child's interests are far more substantial than
23 any risks associated with a post-six year paternity suit.

24 There is clear discrimination in the statute
25 against an illegitimate child, and this Court has stated

1 very clearly in many opinions that there must be a
2 special concern shown for an illegitimate child, and
3 there are statutes that have classifications based on
4 illegitimacy, are subject to a heightened level of
5 scrutiny, because an illegitimate child is not
6 responsible for his or her status. It's the parents who
7 produced the child.

8 Had Georgeann been considered a legitimate
9 child on the date that her support petition was filed,
10 she would have been receiving support from both of her
11 parents in accordance with their means and needs as
12 determined by a court using a best interest of the child
13 standard, and she would have been receiving support from
14 February of 1980, unlike in this case where she has
15 never received one penny of support from her father
16 because she's never had an opportunity to litigate the
17 paternity case.

18 It's also submitted that Georgeann's right to
19 a determination --

20 QUESTION: Well, when you say that, I thought
21 she had received some support from her father in the
22 early days.

23 MS HORNIK: Oh, yes, she did in the early
24 days, but after her complaint was filed she hadn't.

25 It's submitted that Georgeann's right to a

1 determination of paternity is a fundamental personal
2 right. This determination is the keystone upon which
3 all of her rights as her father's child depend.

4 CHIEF JUSTICE BURGER: Mr. Onek.

5 ORAL ARGUMENT OF JOSEPH N. ONEK, ESQ.,

6 ON BEHALF OF APPELLEE

7 MR. ONEK: Mr. Chief Justice, and may it
8 please the Court:

9 At the outset, we do not oppose remand in this
10 case. Although in fact we agree with appellant's view
11 on retroactivity, the cases we both rely on are cases
12 from the intermediate courts in Pennsylvania such as
13 Williams v. Wolfe. There has been no definitive
14 resolution by the Supreme Court of Pennsylvania on the
15 retroactivity of the 18-year statute and we would not
16 oppose a remand on that issue.

17 QUESTION: But you think the law of
18 Pennsylvania is as your opponent has stated it?

19 MR. ONEK: Yes, we do agree to that. In fact,
20 the Pennsylvania courts, at least as we understand the
21 law, would interpret it the way appellant has. But
22 there has been no definitive resolution, and indeed the
23 cases we both rely on, Williams versus Wolfe, are
24 Superior Court, not Supreme Court cases.

25 QUESTION: And if a new action were filed, is

1 the law settled that the Pennsylvania courts would not
2 permit recoveries for that interval prior to the filing
3 of the new paternity --

4 MR. ONEK: That is my understanding.

5 QUESTION: Is your Supreme Court still so far
6 behind as it used to be, so that a new action would take
7 forever?

8 MR. ONEK: Your Honor, I'm a Washington
9 lawyer, not a Philadelphia lawyer. I do not know how
10 long it would take the Pennsylvania Supreme Court to
11 resolve this issue.

12 And, I turn to the constitutional issue. In
13 1980 petitioner filed -- appellant filed a petition for
14 support, at issue in this case. At that time there was
15 a six-year statute of limitations for paternity actions.

16 We submit that that statute of limitations was
17 constitutional and that therefore appellant's petition
18 was properly barred. This Court has established the
19 criteria for determining whether a statute of
20 limitations in a paternity action is constitutional
21 under the Equal Protection clause.

22 QUESTION: Mr. Onek, incidentally, is there
23 much argument here that this is the father of the child?

24 MR. ONEK: That has always been denied in this
25 case.

1 QUESTION: It has always been denied?

2 MR. ONEK: That is correct.

3 QUESTION: On the other hand, I take it he has
4 contributed to the support?

5 MR. ONEK: That was also denied, Your Honor.
6 I don't think that appellee has admitted support during
7 the early years of the child.

8 The first criterion is whether the statute of
9 limitations is substantially related to the state's
10 interest in preventing stale or fraudulent claims. The
11 second criterion is whether the statute of limitations
12 provides a reasonable opportunity for the child to
13 obtain child support through litigation.

14 QUESTION: If I might interrupt, to get back
15 to that question of whether or not he has ever
16 contributed support, was there a finding, a judicial
17 finding, that he had?

18 MR. ONEK: No, I believe there has been no
19 such finding.

20 QUESTION: But is it not true that there's an
21 allegation that he did support --

22 MR. ONEK: Yes, there was an allegation.

23 QUESTION: -- on the face of the complaint?

24 MR. ONEK: Yes, we take it on the face of the
25 complaint. There was an allegation that he contributed

1 support through --

2 QUESTION: For purposes of our decision we
3 assume that's true, even though it may not be?

4 MR. ONEK: That is right.

5 QUESTION: He did concede, as I understand it,
6 that he is potentially liable to pay the child support
7 today?

8 MR. ONEK: No, no, that just states that he is
9 potentially liable on a going forward basis if paternity
10 is proved.

11 QUESTION: It's really not much of a
12 concession.

13 MR. ONEK: I hope not. I certainly hope not.

14 Let me turn to the state's interest in this
15 case. Every statute of limitations has two purposes,
16 first to assure the accuracy of the fact finding
17 process, and second, to maintain settled expectations,
18 so-called principle of repose.

19 With respect to the fact finding issue, it is
20 of course true that scientific testing has reduced the
21 possibility of false accusations of paternity, but the
22 new scientific tests, including the HLA test which is
23 used in Pennsylvania, is not conclusive.

24 The leading study, the one cited by amici, the
25 Terasaki study of 1,000 people, shows that in ten

1 percent of those cases the HLA test could make no
2 resolution at all, and in the other cases where it did
3 indicate probatively that the defendant was the father,
4 the degree of probability ranged from 90 percent to
5 higher.

6 There is no court in the United States which
7 treats HLA tests as conclusive. To the contrary, all of
8 them permit a defendant to submit evidence on such
9 issues as non-access to the mother during the relevant
10 time period.

11 What kind of evidence must the defendant rely
12 on? Obviously, he must rely on witnesses who are
13 available, on the memory of those witnesses and his own
14 memory, and in some cases, of course, he must rely on
15 documentary evidence like appointment calendars, credit
16 card records and so forth.

17 There can be no question that the accuracy and
18 reliability of that evidence diminishes over time. It
19 is far more difficult for a defendant to reconstruct his
20 activities and the activities of the mother six years or
21 ten years after the event than it would be for him to
22 reconstruct those activities one year, two years, or
23 three years after the event.

24 QUESTION: May I just be sure I understand
25 your reference to the scientific tests. Do you

1 acknowledge that in nine cases out of ten the test is
2 accurate?

3 MR. ONEK: Your Honor, I think that,
4 regrettably, is too simple a way of putting it. The
5 statistical basis for these tests is very complex. In
6 some cases the tests will show up nothing at all. In
7 the --

8 QUESTION: Ten percent?

9 MR. ONEK: Ten percent, the cases will provide
10 no evidence whatsoever, and of course in advance --

11 QUESTION: But in the other 90 percent, as I
12 understand, the range is from 90 to something higher?

13 MR. ONEK: That is correct.

14 QUESTION: So that, it's not one out of ten,
15 it's -- I mean, there's nine chances out of ten you'll
16 be in a predictable group?

17 MR. ONEK: That is correct.

18 QUESTION: Then if you're in that group, the
19 chances are ten to one that they can identify --

20 MR. ONEK: That is correct, and in some cases
21 even higher. But nevertheless, every court enables
22 defendant to put on evidence, and as I said, that
23 evidence diminishes over time. It becomes more and more
24 difficult.

25 Now, there's no magic to a six-year statute of

1 limitations, but we do think that a state could
2 reasonably conclude that after that period of time the
3 reliability of all the evidence that it does permit the
4 defendant to put in, testimony from the mother and the
5 defendant, testimony of other witnesses and so forth,
6 decreases.

7 And so, with respect to the fact-finding
8 process, we submit that six years is a reasonable period.

9 QUESTION: May I ask again, is it possible --
10 I gather the Pennsylvania statute in effect treated
11 these as two kinds of claims, those in which there had
12 been no support at all, the flat six years, and the
13 second category is one in which there would be a finding
14 there had been support for a period of time. And they
15 allege that they're in the second category.

16 Do you think your argument applies with the
17 same force in that category as --

18 MR. ONEK: Under Pennsylvania law, if the
19 father has contributed support, that's an exception to the
20 six-year statute and it gives the mother more time. In
21 other words, if the father had provided support for
22 seven years, then the mother could come in two years
23 later, even in nine years, and bring it. But that's not
24 the case here.

25 That is, even the allegation of support says

1 that it ended in 1975..

2 QUESTION: I understand, but do you think your
3 argument on the fact finding process applies with the
4 same force to a case in which there had been a period --
5 it had to be proved, of course -- of support?

6 MR. ONEK: Oh, absolutely, Your Honor, because
7 there are many circumstances in which a man may support
8 a child of a friend because he admires and loves the
9 mother, not because he concedes in any way that he is
10 the father of that child. So, I don't think the
11 argument is changed.

12 There was a second purpose of the statute of
13 limitations. It's to maintain settled expectations, and
14 I think that's particularly important in defendant's --
15 in these types of cases.

16 After all, the defendant does not necessarily
17 know that he's the father. He's contesting that. And
18 in some cases he may not even know that the child in
19 question has been born.

20 Yet, under appellant's theory, ten years after
21 the fact or 25 years after the fact, he can suddenly be
22 accused of being the father of an illegitimate child.
23 And what are the consequences of that? I think there
24 are two sets of -- first, there can be enormously
25 significant adverse emotional and social consequences to

1 being accused 15 years after the event of being the
2 father of an illegitimate child.

3 It can disrupt your relationship with your
4 current family. It can jeopardize your status in the
5 community, even your employment.

6 For that reason we think that a state can
7 reasonably say, give the defendant fair notice. If you
8 think he's the father, tell him within six years so he
9 can make the necessary adjustments.

10 QUESTION: I suppose in light of the federal
11 requirements today, there is hardly any state that isn't
12 going to an 18-year --

13 MR. ONEK: That is correct, Your Honor.

14 QUESTION: -- period of limitations?

15 MR. ONEK: That is correct.

16 QUESTION: Your argument may fall on deaf ears
17 for the most part because states just aren't going for
18 the shorter time period?

19 MR. ONEK: I believe that every state, Your
20 Honor, will move to the 18-year period. I'm merely
21 saying that when this petition was filed and when
22 Pennsylvania passed this law, was it reasonable for them
23 to say, fair notice should be given to the defendant
24 within six years, and we think it should.

25 In addition to these emotional and social

1 consequences, of course there are the financial
2 consequences. A defendant who has not known that he has
3 a child for ten or 15 years, has not saved up money or
4 made the other kind of planning that legitimate fathers
5 often do to take care of their children.

6 So, in some cases, there can be a sudden and
7 unexpected burden.

8 QUESTION: Well, that could happen under the
9 '85 statute, couldn't it?

10 MR. ONEK: Oh, under the new statute, that is
11 correct. I'm merely saying --

12 QUESTION: Mr. Onek, you draw a distinction
13 between the six-year statute here and the one and two
14 year statutes have been stricken down.

15 Where is the dividing line, five, four, three?

16 MR. ONEK: Your Honor, I don't think there is
17 a magic dividing line, but I think there are several
18 things that can be said about the six-year statute of
19 limitations. If you look at statutes of limitations
20 generally, in the State of Pennsylvania or other states,
21 six years is on the high end.

22 In Pennsylvania, for example, generally torts
23 are two years; contracts are four years. Six years, if
24 you look at the state's general policies with regard to
25 settled expectations, with regard to the accuracy of the

1 fact finding process, six is on the high end.

2 QUESTION: Well, it's a slippery slope. We
3 have the same problem with the six-man jury case --

4 MR. ONEK: I am familiar with that case, Your
5 Honor, and I don't deny the slippery slope. I merely
6 say that if you look at statutes of limitations
7 generally, six years is at the high end, and that leads
8 me to this point --

9 QUESTION: In the Pickett case, Mr. Onek, the
10 Court looked at the incongruity of a longer statute of
11 limitations in the event of the death of the father, and
12 recovery by the illegitimate child, and that same
13 peculiarity or incongruity exists in Pennsylvania, does
14 it not?

15 MR. ONEK: Yes, but I think it's a very
16 different situation because all the arguments I have
17 just made about fairness to the father don't apply with
18 the same force when the father is dead. The emotional
19 and social impact on the father obviously doesn't exist
20 when the father is already deceased.

21 So, I think you have different factors. In
22 addition, in Pennsylvania you do have a much higher
23 standard when the father is dead, clear and convincing
24 as opposed to preponderance of the evidence.

25 Now, in assessing, and I think this goes to

1 your point, Justice O'Connor, in assessing the validity
2 of Pennsylvania's interest in the statute of
3 limitations, it's important to emphasize that prior to
4 1984 Pennsylvania did not have a provision generally
5 totalling the statute of limitations during impact. In
6 other words, any child, a legitimate child or
7 illegitimate child who was involved in a slip and fall
8 case had a two year statute of limitations.

9 I think this demonstrates that Pennsylvania
10 took very seriously its statute of limitations. It also
11 demonstrates that you cannot say that Pennsylvania was
12 somehow singling out paternity actions and
13 discriminating against paternity actions.

14 To the contrary, the six-year statute of
15 limitations, in effect, the paternity action in 1980,
16 was substantially longer than the two-year statute of
17 limitations that was in effect for tort cases, for
18 illegitimate or legitimate children.

19 Now, it is true that in 1984 Pennsylvania
20 changed its position. It did adopt, like many other
21 states, a general totalling provision.

22 The question then becomes whether, when
23 Pennsylvania eliminated the statute of limitations for
24 infants, in most general cases, did it also have to
25 eliminate the six-year statute of limitation for

1 paternity actions, and we submit that it did not.

2 There are very different interests at stake in
3 a paternity action situation. The general totalling
4 provision applies primarily to tort cases. It is one
5 thing for a defendant to be accused 15 years after the
6 fact of being a tortfeasor. It is another thing for a
7 defendant to be accused 15 years after the fact of being
8 a father of an illegitimate child.

9 As I have just noted, the emotional and social
10 consequences of that accusation and that determination
11 are much greater, so that any state --

12 QUESTION: May I just interrupt. Maybe your
13 argument is valid, because you are arguing as of the
14 time the statute was passed. But that risk is available
15 now, and now we're only talking about past due support
16 obligations?

17 MR. ONEK: That is correct. Pennsylvania has
18 changed its law. I'm just saying --

19 QUESTION: Supposing that were the only state
20 interest that supported the statute. I'm not suggesting
21 it is, and if that state interest is no longer viable
22 because of the change in law, would that be a proper
23 ground on which to uphold an otherwise discriminatory
24 statute?

25 MR. ONEK: I'm not certain, now, which statute

1 we're talking about.

2 QUESTION: Well, I'm talking about the one at
3 issue here. Supposing -- and this is not right, it's
4 kind of a hypothetical -- supposing the only interest
5 the state has to justify the statute, with this concern
6 about the emotional impact on the father who is sued too
7 late, and supposing now that possibility will exist
8 regardless of how we decide this case because you've got
9 a new statute, and that therefore there really is no
10 present state interest to justify the statute.

11 Would it be valid or invalid?

12 MR. ONEK: I think the statute as it existed
13 prior to the new statute is still valid. I think that
14 when the state --

15 QUESTION: Even if there's no longer any state
16 interest to justify the discrimination?

17 MR. ONEK: Yes, because I believe that when a
18 state changes its policy on a going-forward basis, that
19 doesn't mean that prior to that, the previous statute
20 was unconstitutional. Also, on the facts of this case,
21 you'd have a very awkward way of making that argument
22 because here it is probably true that Pennsylvania
23 changed its law, not because it revisited the question
24 of its interest but under duress from the federal
25 legislation.

1 QUESTION: Well, whatever the reason, the
2 interest is no longer -- no longer carries any weight?

3 MR. ONEK: That is correct, but I don't
4 believe that when a new statute is enacted, the previous
5 statute suddenly becomes unconstitutional.

6 As I was saying about the change in 1984, I
7 believe the Legislature in 1984 could legitimately say,
8 we are changing the statute of limitations in tort
9 cases. Paternity actions are much more sensitive and
10 we're not sure what we're going to do about that.

11 After all, this Court has often said that a
12 state does not have to reform all its laws all at once.
13 Just last week in the City of Renton case, this Court
14 held that a city did not have to resolve all its
15 problems with so-called adult entertainment at the same
16 time.

17 To the contrary, the Court said, we can
18 resolve the problems posed by adult theaters, without at
19 the same time dealing with other adult entertainment
20 such as bookstores and night clubs and so forth. And
21 this case is similar.

22 Pennsylvania was entitled to say in 1984, we
23 are going to change the law with respect to tort actions
24 but we are not at this point going to deal with the
25 tougher problem of paternity actions. As it turned out,

1 of course, Pennsylvania did deal with the problem of
2 paternity actions less than a year and a half later,
3 because a year and a half later Pennsylvania did in
4 fact, in effect, eliminate the statute of limitations.

5 Let me turn now to the other criteria
6 established by this Court for equal protection, and that
7 is, does the statute of limitations provide an ample
8 opportunity for paternity and child support actions to
9 be brought.

10 Again, we submit that the six-year statute
11 passes muster. We believe that six years gives an ample
12 opportunity for the mother to overcome the various
13 problems which might inhibit her from bringing a child
14 support action.

15 First, let's take a look at the financial
16 problems. In the state of Pennsylvania, if a mother is
17 on welfare, the Department of Public Welfare will
18 provide legal assistance to bring a paternity and a
19 child support action. Other poor mothers can use
20 community legal services to bring paternity or child
21 support actions.

22 I don't think it can be fairly said, in the
23 State of Pennsylvania, that a mother will be financially
24 unable to obtain the legal assistance that she needs to
25 pursue a paternity or a child support action within the

1 requisite six-year period.

2 Now, this Court has suggested that there are
3 other barriers that a mother may face, personal,
4 psychological barriers that might inhibit her from
5 bringing a suit within six years. Let me say first that
6 there is little evidence that there is a substantial
7 number of women who will not overcome whatever
8 inhibitions they have within the six-year period.

9 Furthermore, there is little evidence that --

10 QUESTION: Well, I think the concern is with
11 the person who is living with the father out of wedlock
12 and doesn't want to interrupt that ongoing relationship
13 by bringing action against him. There's an allegation
14 of that sort of situation in the Carey case.

15 MR. ONEK: If the man and woman are living
16 together and the man is contributing any support, any
17 amount of support for the child, the statute isn't
18 running because the woman would then have two years
19 after the ceasing of support to file it. So, your
20 hypothetical only exists in a situation where the man
21 and woman are living together and the man is not
22 providing a jot of support to the child, which is a
23 highly unlikely situation.

24 The father is paying -- or if the defendant is
25 even paying a dollar of rent, he presumably is helping

1 to contribute to the support of the child, and as long
2 as that is true the mother is not bound by the six-year
3 statute of limitations. She can sue two years after the
4 defendant's support stops.

5 So, I think that problem, which was a very
6 real problem in the Mills case, as this Court pointed
7 out, is not a problem under the Pennsylvania statute.
8 Under the Pennsylvania statute that is not a problem.

9 So, we don't think that there are going to be
10 a great many women inhibited from filing within six
11 years. Furthermore, even if there are such women, there
12 may be some women who will not file at any time. In
13 other words, what evidence is there that a woman who
14 won't file in six years will file in the interim between
15 six and 18 years?

16 We have to recognize the fact that there are
17 some women who for whatever reason will not file the
18 child support action. That is not a statute of
19 limitations problem. There's simply nothing in the
20 statute of limitations --

21 QUESTION: Then why in the world did
22 Pennsylvania change its law?

23 MR. ONEK: Pennsylvania changed the law -- the
24 short answer, I think, is that it was required to do so
25 in order to receive AFDC money. As you know, in 1984

1 Congress enacted a law which said that unless a state
2 moves to an 18-year statute of limitations, it would be
3 deprived of AFDC money.

4 Although I don't know the exact amount of AFDC
5 money that Pennsylvania receives, I assume that it's in
6 the tens or hundreds of millions of dollars. Therefore,
7 Pennsylvania and I assume every other state in the union
8 will now move to an 18-year statute of limitations.

9 That may in fact be a good policy judgment.
10 All I am arguing here is that the State of Pennsylvania
11 prior to that was not required constitutionally to have
12 an 18-year statute, that it could have a six-year
13 statute, and that such a statute is constitutional.

14 If you have no further questions, I conclude
15 my argument.

16 CHIEF JUSTICE BURGER: All right, Ms. Hornik.

17 ORAL ARGUMENT OF ESTHER L. HORNIK

18 ON BEHALF OF APPELLANT -- REBUTTAL

19 MS HORNIK: In my opponent's argument, first
20 of all it seems to be more like a due process argument
21 in favor of fathers, rather than the issue that's before
22 this Court, is how legitimate children are treated
23 differently than illegitimate children. And who is to
24 say that every birth of every child is a planned event?

25 You can have families where the parents are

1 married and they can have a surprise child, and then
2 they have to plan for the financial future of that
3 child, and so that, this kind of argument that a father
4 -- that especially a father who has been engaging in
5 sexual relations outside of the bounds of matrimony gets
6 financial immunity if someone happens to haul him into
7 court after six years, is absurd.

8 Now, this Court has pointed out that in this
9 kind of situation the children's interest -- the child's
10 interest is paramount. Not one word here was said about
11 the child. What about the social embarrassment of the
12 illegitimate child? What about the child who is given a
13 school assignment to fill out his family tree and she
14 can only fill out one branch, her mother's side. She
15 has nothing to put on her father's side.

16 And so that, an illegitimate child, because of
17 what the father has done, his irresponsibility, is stuck
18 with the consequences and if you can follow that
19 argument, that the statute of limitations is supposed to
20 work as a statute of repose for the father, it's plainly
21 unfair and doesn't balance against the interests of the
22 child.

23 In closing, I would like to state that this
24 statute of limitations is a violation of the due process
25 -- pardon me, of the right to equal protection of an

1 illegitimate child, and I would urge this Court to find
2 the six-year statute of limitations unconstitutional,
3 and reverse the Superior Court of Pennsylvania.

4 Thank you.

5 CHIEF JUSTICE BURGER: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 10:52 a.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-88 - BARBARA NN PAULUSSEN, Appellant V. GEORGE RONALD HERION

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BY Paul A. Richardson

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