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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

# SUPREME COURT OF THE UNITED STATES

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In the Matter of: )

CHERLYN CLARK, )

Petitioner )

v. )

GENE JETER )

) No. 87-5565  
)  
)  
)  
)

PAGES: 1 through 42

PLACE: Washington, D.C.

DATE: April 19, 1988  
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHERLYN CLARK, :

4 Petitioner, :

5 v. : No. 87-5565

6 GENE JETER, :

7 -----x

8 Washington, D.C.

9 Tuesday, April 19, 1988

10 The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at 1:02 p.m.

12 APPEARANCES:

13 EVALYNN WELLING, ESQ., Pittsburgh, Pennsylvania

14 on behalf of the Petitioners.

15 CRAIG A. MCCLEAN, ESQ., Pittsburgh, Pennsylvania

16 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear oral argument  
4 now in No. 87-5565, Cherlyn Clark v. Gene Jeter.

5 Ms. Welling, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF EVALYNN WELLING, ESQ.

7 ON BEHALF OF PETITIONER

8 MS. WELLING: Thank you, Mr. Chief Justice, and may  
9 it please the Court:

10 Cherlyn Clark filed a support complaint against Gene  
11 Jeter in 1983, on behalf of her daughter, Tiffany, who is 10  
12 years old. At that time Pennsylvania marital children to  
13 pursue claims for support against their parents at any time up  
14 until the were 18 years old, and in some instances, beyond.

15 However. Pennsylvania limited the right of non-  
16 marital children to pursue claims for support against their  
17 biological fathers by the requirement that paternity actions be  
18 commenced within six years from the date of the child's birth.

19 In Pennsylvania, a support action can be begun, but  
20 if a putative father denies paternity, it cannot be continued  
21 until a paternity determination is made.

22 Gene Jeter raised, as an affirmative defense, the  
23 six-year statute of limitations in paternity actions. This was  
24 an affirmative defense to show Ms. Clark's support complaint.  
25 Over the objections of the six-year statute of limitations was

1 unconstitutional, the trial court dismissed Cherlyn Clark's  
2 support complaint on the basis that the statute of limitations  
3 had passed.

4 While Cherlyn Clark's case was pending in the  
5 appellate court, Pennsylvania enacted an 18-year statute of  
6 limitations. Both the intermediate appellate court and the  
7 Pennsylvania highest court have refused to apply the 18-year  
8 statute of limitations to Cherlyn Clark's complaint.

9 The first issue before this Court today is whether  
10 the federal child support enforcement amendments of 1984  
11 require the invalidation of the six-year statute of limitations  
12 and require the application of an 18-year statute of limitation  
13 to Cherlyn Clark's complaint.

14 The 1984 child support enforcement amendments are  
15 part of Title 4(d) of the Social Security Act. Each state that  
16 participates in the AFDC program is required to comply with  
17 Part 4(d). The statute authorizes specific funding penalties  
18 for failure to comply with the child support enforcement  
19 amendments.

20 QUESTION: Isn't that the way that one would normally  
21 enforce the statute then? To tell Pennsylvania if their laws  
22 aren't in compliance, you cut off the funds?

23 MS. WELLING: This Court specifically, in Rosato V.  
24 Wyman in another AFDC case, indicated that it is not necessary  
25 for a claimant, who has no normal route through an

1 administrative appeal or no impact on the Secretary of HHS's  
2 decision to review for compliance and penalize the state, that  
3 in a situation like that the federal courts have the power to  
4 oversee the compliance of the state with the federal statute.

5 In this case --

6 QUESTION: Was that a case involving the distribution  
7 of funds, where the claimant was asking for funds?

8 MS. WELLING: It was a case that involved an  
9 exclusion from benefits of some AFDC recipients on the basis of  
10 a state law.

11 QUESTION: But what was involved were funds, part of  
12 which were federal.

13 MS. WELLING: That is correct.

14 QUESTION: And that seems to me different from the  
15 question that the Chief Justice was asking, because this is a  
16 case in which you are saying simply that a state statute on a  
17 procedural matter determining when an action can be brought  
18 under state substantive law is void because of a spending  
19 prohibition. So I think Rosato is quite distinguishable as are  
20 the other cases you have mentioned in your brief.

21 MS. WELLING: Perhaps a better response to that would  
22 be the case of Bennett v. Arkansas, which was very recently  
23 decided by this case. That also was a Social Security Act case  
24 in which the federal law provides that social security benefits  
25 cannot be garnished or attached.

1           Arkansas had a state law which specifically said  
2 when a person who was receiving a social security benefit was  
3 incarcerated the state could attach the social security  
4 benefits essentially to pay for their upkeep while they were in  
5 prison.

6           In that case, this Court held that the federal --  
7 what had happened in that case to bring it to this Court was  
8 that the State of Arkansas went into a state court and attached  
9 the pension benefits. And the pensioner raised as a defense to  
10 that attachment the fact that the state law was in conflict  
11 with the federal law.

12           And in that case, this Court held that the decision  
13 of the Arkansas court allowing this to proceed was reversed on  
14 the basis that there was a conflict between the Federal Social  
15 Security Act provision and the state law provision.

16           QUESTION: There was no grant to the state of funds  
17 involved in Bennett. That was a provision by Congress that  
18 said you shall not attach any of these benefits. And the State  
19 of Arkansas says we think there is an implied exception to  
20 that. But that wasn't a question of whether the Congress grant  
21 so much money and says, to be eligible for these you have got  
22 to have the following statutes in effect.

23           MS. WELLING: The cases under the AFDC statute,  
24 starting with King v. Smith, have dealt specifically with the  
25 kind of problem that we have here where a person who is remote

1 from the procedure which is brought to bring a compliance  
2 action depends upon the federal guarantees.

3 And in this case, Cherlyn Clark's case will go  
4 forward if the federal law is complied with. The compliance  
5 under the statute is not required except after three years.  
6 And the compliance may or may not deal with this issue.

7 If she -- she has no direct remedy against the HHS to  
8 ask them, or make them bring a compliance case, and she has a  
9 real harm caused to her now while her child is growing up and  
10 needing the support, and the fact that the federal law is not  
11 being complied with.

12 QUESTION: You still have a problem about  
13 retroactivity, don't you? Even if you are right in a way, you  
14 have to say the federal law intended a later adopted state  
15 statute to be applied retroactively.

16 MS. WELLING: In the situation --

17 QUESTION: Is that right? Is that right or not?

18 MS. WELLING: The retroactivity question is related  
19 to the fact that Pennsylvania only allows support to be granted  
20 from the date that a support complaint is filed. So that at  
21 the outset it's clear that we're not dealing with a child who  
22 comes in now and asks for support back to the time that they  
23 were one.

24 This kind of situation that will be presented at this  
25 point is a situation where a child files a new complaint, or a



1 child had a complaint that's ongoing at the time that the 18-  
2 year statute is compelled.

3 QUESTION: Well, Pennsylvania here said that it  
4 wouldn't apply, the 18-year statute which has been adopted at a  
5 certain time, to this case.

6 MS. WELLING: In this particular instance it is clear  
7 that the language of the statute comprehended this and included  
8 it. They wanted -- they said that the statute was to apply to  
9 any child at any time.

10 QUESTION: Who said that?

11 MS. WELLING: That's in the statute.

12 QUESTION: In the Pennsylvania statute?

13 MS. WELLING: No, in the federal statute.

14 QUESTION: Well, that's what I -- yes, so you do have  
15 to interpret the federal law to win on this particular  
16 statutory point.

17 MS. WELLING: That's absolutely correct.

18 QUESTION: You have to convince us that the federal  
19 law forbid Pennsylvania from refusing to apply the 18-year  
20 statute retroactive.

21 MS. WELLING: That is the heart of this argument,  
22 Your Honor.

23 In this particular situation the statute of  
24 limitations as contained in the federal statute, the  
25 requirement of this 18-year statute is framed in mandatory

1 language. It is one of the four sections of 666 which is  
2 required on the states, but which specifically is not included  
3 in the number of requirements that a state is allowed to  
4 request a waiver from the Secretary of HHS.

5 So the structure of the statute underlines the fact  
6 of the mandatory and clear language of the statute itself. For  
7 the statute to say it requires the state have in effect  
8 procedures which permit the establishment of paternity of any  
9 child at any time, the House report that accompanied the bill  
10 in the house talked about the fact that there were shorter  
11 statutes of limitations in the various jurisdictions.

12 Remember that this congressional decision to pass  
13 this statute follows hard on the heels of the Pickett v. Brown  
14 decision and the Mills v. Habluetzel decisions which had  
15 invalidated a one- and a two-year statute of limitations. That  
16 was in '82 and '83.

17 The congressional debate about this was taking place  
18 in '83, and specifically made part of that is the recognition  
19 that there are these shorter statutes of limitations out there.  
20 The House report, talking about the 18-year statute of  
21 limitations, says, "If a state's applicable statute of  
22 limitations does not permit establishment of a child's  
23 paternity past the child's second, sixth or other birthday, it  
24 will be impossible ever to establish support orders on behalf  
25 of a child past these ages, and therefore impossible to obtain

1 support for them."

2 The legislative history here is clear that Congress  
3 was thinking about children who were already past the statutory  
4 limits in their particular states. And that it intended by the  
5 broad comprehensive mandatory language of 666 to apply this 18-  
6 year statute to any child.

7 The Health and Human Services comment to the  
8 regulations is also helpful here, because it speaks  
9 specifically to this point. It says, they are not going to  
10 promulgate regulations on this because, "Since it is clear the  
11 case is previously closed because of a child age will now have  
12 to be reopened," they found it unnecessary to promulgate  
13 regulations on this particular issue.

14 So it's clear also from the HHS gloss on this that  
15 everybody was thinking about the fact that this would apply  
16 retroactively to children who were already born at the time  
17 this statute was in effect, to children who may already have  
18 passed the statute of limitations if it were shorter in their  
19 individual jurisdiction.

20 QUESTION: Did the court below us speak on the issue  
21 concerning the federal statute?

22 MS. WELLING: In Clark v. Jeter, they did not.

23 In Paulussen v. Herion, which was remanded from this  
24 Court for the specific purpose of determining the applicability  
25 of an 18-year statute to Pennsylvania, which came down right

1 around the time that Clark v. Jeter was being decided in the  
2 intermediate court, the Pennsylvania intermediate court said  
3 only that they viewed the federal child support enforcement  
4 amendments to be, "a motivating factor" for the passage of the  
5 18-year --

6 QUESTION: You are going to go on to your other  
7 points in due course.

8 QUESTION: Could I ask you first, did you present the  
9 statutory argument below?

10 MS. WELLING: Yes, we presented --

11 QUESTION: And how did they rule against you without  
12 ruling on that point?

13 MS. WELLING: What happened was that the child  
14 support enforcement amendments were passed in '84, but they  
15 weren't implemented in Pennsylvania until '86. So they were  
16 implemented while the appeal was pending.

17 At the oral argument -- they were implemented while  
18 the appeal was pending. They didn't come into effect in  
19 Pennsylvania until January of 1986.

20 QUESTION: So you think they were entitled not to  
21 rule on your point?

22 MS. WELLING: Oh, no, no, not at all.

23 QUESTION: Well, they rejected it, didn't they?

24 MS. WELLING: At the time of the oral argument, we  
25 asked for a remand, because this was an intervening factor

1 while the litigation was going on, while the appeal was going  
2 on, we asked for a remand to the trial court, which is the  
3 normal procedure in Pennsylvania, for a decision on the  
4 applicability of the 18-year statute of limitations.

5 The court denied that at the same day they decided  
6 the case against us. They had not allowed us to file briefs on  
7 this issue.

8 QUESTION: Because this statutory argument, and if  
9 this had happened while the Petition to a cert was pending, we  
10 very well have remanded for reconsideration in light of a  
11 statutory argument.

12 MS. WELLING: We, of course, raised this specific  
13 argument in the motion for reargument in front of the  
14 intermediate court, and again in our request for review by the  
15 State of Pennsylvania.

16 QUESTION: I'm sorry to waste your time.

17 If this Court decides that the federal child support  
18 enforcement amendments do not require the invalidation of the  
19 six-year statute of limitations under the child support  
20 enforcement amendments, if this Court decides that the child  
21 support enforcement amendments do not require an 18-year  
22 statute to be applied to Cherlyn Clark's case so that her  
23 ongoing support case can now move forward, then the next issue  
24 that must be decided by this Court is whether or not --

25 QUESTION: Must we take up the statutory issue, as

1 you call it?

2 MS. WELLING: Your Honor, I think so, yes.

3 QUESTION: Is it purely statutory? Aren't there  
4 supremacy clause overtones --

5 MS. WELLING: Precisely.

6 QUESTION: -- and other constitutional aspects to it?

7 MS. WELLING: That is precisely correct. That this  
8 statute, the Pennsylvania statute as it's been interpreted by  
9 the Pennsylvania Supreme Court, is in conflict with the federal  
10 child support enforcement amendments.

11 And only if this Court does not reach that issue,  
12 then before this Court will be the question of the equal  
13 protection claim --

14 QUESTION: Why do you say only if?

15 MS. WELLING: Well, if -- because of the nature of  
16 Cherlyn Clark's case, she has a support complaint that's  
17 pending since 1983, and she has damages which are dating from  
18 1983.

19 If this Court decides that the child support  
20 enforcement amendments do not compel and 18-year statute of  
21 limitations to be applied to her case, then she will be without  
22 remedy for all of the support in her ongoing support case?

23 QUESTION: Why is that? I don't follow that.

24 MS. WELLING: Because she will be barred by the six-  
25 year statute of limitations.

1 QUESTION: Yes, but if the statute is invalid on  
2 equal protection grounds --

3 MS. WELLING: Correct.

4 QUESTION: -- why is that a barrier? Therefore, I  
5 don't follow your "only if" argument.

6 MS. WELLING: Maybe I should just restate it.

7 The six-year statute is clearly invalid on equal  
8 protection grounds. This Court has repeatedly held that a  
9 classification based on --

10 QUESTION: Before you get to the equal protection,  
11 let me ask you one more question about the statute.

12 Would it not comply with the federal statute for  
13 Pennsylvania to say today, well, we're wrong in saying the six-  
14 year statute bars the action completely, but we will now allow  
15 the procedure to go forward to permit the establishment of the  
16 paternity of the child, but now allow any retroactive recovery  
17 before the paternity is established? Wouldn't that comply  
18 literally with the federal statute?

19 Do you understand my question?

20 MS. WELLING: Yes, I understand your question.

21 I think that if Pennsylvania said we will allow the  
22 paternity to be decided, then Pennsylvania procedure would  
23 carry the rest of the was, because once paternity had been  
24 decided her support --

25 QUESTION: But that would be a matter of Pennsylvania

1 law is what I'm -- it would comply with the federal statute for  
2 them to say, well, I guess we do have to, in order to comply  
3 literally because the language is very strong as you say,  
4 they'll say, well, I guess we cannot apply our six-year statute  
5 to prevent you from establishing your paternity, but we may  
6 apply the six-year statute to prevent you from recovering any  
7 support money for the period before you establish paternity.

8           It seems to me that would be consistent with the  
9 statute, and that wouldn't satisfy you. Then you would still  
10 say, well, I guess I want to go ahead with my equal protection  
11 argument anyway.

12           MS. WELLING: That's correct.

13           QUESTION: Yes.

14           MS. WELLING: And the equal protection argument is  
15 based on the fact that there has been this differentiation  
16 between the rights accorded marital children as opposed to the  
17 rights accorded non-marital children in order to establish  
18 support against their parents.

19           This Court has frequently spoken of the problems that  
20 the historic discrimination against illegitimate children have  
21 caused and the belief that it's unfair to punish illegitimate  
22 children for the acts or the conduct of their parents.

23           Pennsylvania has justified this discrimination solely  
24 in terms of the desire to meet problems of state proof and  
25 fraudulent claims. In *Astemborski v. Susmarski*, a case which



1 was remanded from this Court in order for Pennsylvania to  
2 consider the six-year statute of limitations in light of the  
3 Pickett and Mills cases.

4 In that case Pennsylvania -- the Supreme Court said  
5 very clearly that the reason for this six-year statute of  
6 limitations is only to prevent stale and fraudulent claims,  
7 that it's only a question of proof problems.

8 Nevertheless, in Pennsylvania, there are numerous  
9 paternity determinations which Pennsylvania allows now and has  
10 allowed in the past which permit paternity determinations to go  
11 on at any time after a child's birth without any worry on  
12 Pennsylvania's part about whether or not these present problems  
13 of state proof or fraudulent claims.

14 For instance, if a father wants to come forward and  
15 have a child's birth certificate amended to add his name, he  
16 can bring an action to do that. It doesn't make any difference  
17 if the child is 17 or the child is 2. If he wants to try to  
18 get custody of a child and he is --

19 QUESTION: Can that be opposed by the child?

20 MS. WELLING: By the child?

21 QUESTION: Yes. Well, I mean there is no problem if  
22 nobody is worried about the paternity. If the child wants to  
23 be declared a child of the father and the father wants it, I  
24 don't see why Pennsylvania would have any concern.

25 MS. WELLING: That's correct, but it can be opposed

1 by the mother, and that frequently happens actually.

2 QUESTION: It can -- I see.

3 MS. WELLING: Actions for custody in which the mother  
4 has never acknowledged that this particular man is the father  
5 of the child, in those case, again, paternity actions are  
6 permitted in Pennsylvania without any statute of limitations.

7 Actions to deny --

8 QUESTION: Excuse me. What kind of a case is that  
9 now? The father --

10 MS. WELLING: Where a father wants to sue for custody  
11 but his paternity has not been established. And so in order to  
12 have standing to sue for custody and not be considered a third  
13 party, he needs to have a paternity determination.

14 Actions to deny paternity, these can go forward no  
15 matter how old the child is. For instance, in the Connell v.  
16 Connell case that was cited in our brief, a father of a child  
17 denied paternity and had a litigation of it when the child was  
18 12 years old. Cases like this have had a special --

19 QUESTION: Had he been supporting the child up until  
20 that time?

21 MS. WELLING: He had been married and supporting the  
22 child. Then the family split up. He stopped supporting the  
23 child for a number of years, and then a support action was  
24 brought.

25 QUESTION: So that would have been the first time the

1 question of support was an issue.

2 MS. WELLING: Yes, I believe that's right.

3 QUESTION: Are there any cases to come down of what  
4 interests me in particular, is there any situation in which a  
5 living individual can be held by a court to have fathered an  
6 illegitimate child without encountering this statute of  
7 limitation?

8 MS. WELLING: Living individual --

9 QUESTION: Right.

10 MS. WELLING: -- can be held to have fathered a  
11 child.

12 QUESTION: Right.

13 MS. WELLING: In an action where the father is  
14 denying paternity --

15 QUESTION: Right, right.

16 MS. WELLING: -- and in that situation, yes. And  
17 that has the anomalous result that --

18 QUESTION: It can? How does that -- the father is  
19 denying paternity.

20 MS. WELLING: Right.

21 QUESTION: And you say you can get around this?  
22 There is a situation where this statute would not apply.

23 MS. WELLING: Right. There is no statute of  
24 limitations that applies to a after of marital children who  
25 says that he wants to deny that these children are his after a

1 support action is brought.

2 And the Pennsylvania Superior Court --

3 QUESTION: Well, excuse me. But he is not admitting,  
4 well, let's see. He is willing to admit illegitimacy. He is  
5 willing to admit that he has fathered illegitimate children.

6 No, he's --

7 MS. WELLING: No, he's saying this is not my child at  
8 all.

9 QUESTION: This is not my child.

10 MS. WELLING: This is somebody else's child.

11 QUESTION: Well, I am looking for -- see, what I  
12 think may underlie the Pennsylvania statute is the severe  
13 personal, legal, social consequences of a person being judged  
14 by the court to be the father of illegitimate children.

15 Now, is there any situation in Pennsylvania where  
16 that can occur without encountering the six-year statute of  
17 limitations?

18 I think Pennsylvania might say this is a serious  
19 thing. We want the proof to be fresh. We want to be sure that  
20 the individual who is judged to be the father of illegitimate  
21 children has a good chance to prove that that's not true, and  
22 we think the evidence gets too stale for that purpose, at  
23 least, after six years.

24 Now, is there any situation -- in your brief the only  
25 thing I see is after death of the putative father, the child

1 can claim to be an heir, and short of have the individual  
2 declared the father of an illegitimate child after he's dead  
3 which --

4 MS. WELLING: That's precisely right. Even when the  
5 father isn't able to come forward and testify about events.

6 QUESTION: Yes, but also he can't be personally hurt  
7 as much, or personally vilified as much.

8 MS. WELLING: Of course, his heirs are always  
9 concerned, and these are always in that context.

10 I would like to return to, though --

11 QUESTION: Your answer to my question is no then, you  
12 don't know of any.

13 MS. WELLING: I believe that the statute of  
14 limitations not being applied to denial of paternity is really  
15 the same thing; just a mirror image of it.

16 And I would, if I may, like to point out an anomaly  
17 situation that that brings up, which is that if a father is  
18 allowed to deny paternity and have a determination that he is  
19 not the father -- because he has been married to the mother --  
20 past the time, past six years, the putative father who has been  
21 married to the mother may get out of a determination that he is  
22 the father and he is no longer responsible for support for this  
23 child because there has been a determination, say when the  
24 child is 12, that he is not the father. But now the mother is  
25 in the situation of not being able to bring an action against

1 anybody else because of this six-year statute of limitations.

2 This Court has indicated in the Pickett decision that  
3 the existence of blood tests also further attenuate the  
4 concerns that a state may have for avoiding stale and  
5 fraudulent claims in this context. And I would only point out  
6 that in Allegheny County we recently had in a rape trial the  
7 first instance of this genetic fingerprinting used in a trial.  
8 The blood testing is getting ever more sophisticated and more  
9 valid, more reliable. And again this takes away from the claim  
10 of the state that this six-year statute of limitations is  
11 necessary to prevent stale claims.

12 This is the third time that this Court has heard  
13 argument on this six-year statute of limitations of --  
14 Pennsylvania's six-year statute of limitations in which equal  
15 protection was raised. And the cases continue to point out the  
16 kinds of reasons that people miss this statute, the kind of  
17 reasons that make this statute an extreme hardship.

18 Cherlyn Clark's case is a good example how she was  
19 misled, how she continued to believe, that she was afraid of  
20 Mr. Jeter for a long time, then was getting partial support  
21 payments from him. Basically got to the point where she filed  
22 what she thought was a support complaint, but it turned out to  
23 be just a paper with the Welfare Department. And by the time  
24 she got it straightened around, she was past the six years,  
25 past the time for filing her complaint.

1           Think about the mother who takes care of a child and  
2 is independent and not worried about support for the child who  
3 dies after the child is six, and the person who is a substitute  
4 caretaker has to take over the responsibility of caring for  
5 that child, or think about another client of mine who is  
6 married to a man and had two children. They got divorced, and  
7 she and he later reconciled. They had a brief reconciliation.  
8 She conceived another child. He came to the hospital for the  
9 birth of the child. He had been paying support for the older  
10 two children. He continued to pay support for awhile, and then  
11 he discontinued.

12           She finally decided that enough was enough. She  
13 would have to file a support action. And when she did, he  
14 denied paternity of the non-marital child, and she was past the  
15 statute of limitations.

16           Six years is the age when children also come to the  
17 time of going to school, and having themselves to fill out  
18 forms saying who their parents are. And the cutoff point at  
19 six years also brings to an impossible -- coincides with this  
20 time. It's before the child really begins to worry about who  
21 their father is before they can begin to very strongly say to  
22 their mother, please bring this case. And this cutoff operates  
23 to deny children a real impact on the decision of the mother  
24 not to pursue support for whatever reasons.

25           For this reason, the Pennsylvania court's decision

1 should be reversed.

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Welling.

3 Mr. McClean, we will hear from you now.

4 ORAL ARGUMENT BY CRAIG A. MCCLEAN, ESQ.

5 ON BEHALF OF THE RESPONDENT

6 MR. MCCLEAN: Mr. Chief Justice, and may it please  
7 the Court:

8 As to Ms. Welling's retroactivity argument, the issue  
9 must fall even if the 18-year statute of limitations would have  
10 been held to be retroactive, or if this Court would somehow  
11 deem that it should be retroactive, it doesn't apply to the  
12 Clark v. Jeter case.

13 The reason it doesn't apply to the Clark v. Jeter  
14 case is that the 18-year statute was enacted two and a half  
15 years after Clark v. Jeter, the complaint was filed. What's  
16 more, the 18-year statute was enacted after a final judgment  
17 had been rendered in this case.

18 I think we have to look at the Clark v. Jeter case,  
19 the Superior Court pronouncement --

20 QUESTION: May I ask, what do you mean a final  
21 judgement? This is still the same case, isn't it?

22 MR. MCCLEAN: Well, it is, but the court had, in July  
23 of 1985, rendered its decision in Pennsylvania. That is a  
24 final judgment which an appeal can be lodged. The case was  
25 over at that point.



1 QUESTION: Yes, but if the Pennsylvania statute  
2 clearly applied and said it will be retroactive to all cases  
3 still pending in our Court, something like that, the fact there  
4 was a final judgment wouldn't make any different, would it?

5 MR. MCCLEAN: Well, I think that that is true, but  
6 the Court did not say that. The Court specifically --

7 QUESTION: But what if the federal statute says that?

8 MR. MCCLEAN: Well, I don't think the federal statute  
9 says that.

10 QUESTION: It says procedures which permit the  
11 establishment of the paternity of any child at any time prior  
12 to such child's eighteenth birth. This is a child and it's  
13 prior to the child's eighteenth birthday.

14 MR. MCCLEAN: Well, that's correct.

15 QUESTION: So, literally this federal statute clearly  
16 applies, does it not?

17 MR. MCCLEAN: Well, I don't think that the  
18 Pennsylvania statute does not follow the federal 1984  
19 amendments. I think that it does.

20 QUESTION: Do you acknowledge that the Pennsylvania  
21 statute is in conflict with the federal statute?

22 MR. MCCLEAN: No, I don't. I think that it does  
23 follow the federal directive.

24 The reason why I say that it does is that for 19  
25 years we have been examining these cases involving children of

1 unwedded parents. And the issue with respect to any means the  
2 difference between a legitimate child and an illegitimate  
3 child, not as in this case where there is a specific narrow  
4 holding that Clark v. Jeter was finished, it was done. It was  
5 a case that has already been put to rest.

6 The differentiation isn't between case which have  
7 been put to rest and cases which still can be brought.

8 QUESTION: You rely on the fact -- you just don't  
9 rely on the retroactive point. You rely on the fact that there  
10 was a final judgment here even though the case was still on --

11 MR. MCCLEAN: That's correct. I think we have to  
12 look at this case as it stands, as it is. The broad brush that  
13 Petitioner wants to paint is too extensive.

14 QUESTION: Isn't the general rule that an appellate  
15 court looks at the law as of the time of its judgment rather  
16 than as of the time of the trial court's judgment?

17 MR. MCCLEAN: Well, we have to go back to what  
18 statute was in effect at that time. That is the relevant  
19 period of time.

20 QUESTION: At the time of the appellate court.

21 MR. MCCLEAN: I think that I should note that if  
22 Congress had wished that these amendments raise cases which had  
23 been put to rest, it should have said so. It didn't say so.  
24 It simply used the modifying word "any", and to construe that  
25 word to affect this case would be going too far.

1           QUESTION: What you would say it means paternity of  
2 any child at any time prior to such child's eighteenth birth  
3 really means paternity of any child except those who have tried  
4 to establish their paternity up to now and failed to do so.  
5 That's what you construe --

6           MR. MCCLEAN: I think that's a reasonable  
7 interpretation.

8           QUESTION: What happens on the final judgment on  
9 appeal, if the final judgment is reversed on appeal?

10          MR. MCCLEAN: What happens? For instance, if the  
11 Superior Court had determined --

12          QUESTION: I didn't say it's a final judgment, but it  
13 could be reversed on appeal.

14          MR. MCCLEAN: That's correct.

15          QUESTION: So, in Pennsylvania is that a final  
16 judgment or not?

17          MR. MCCLEAN: It is a final judgment with respect to  
18 what law applies to it --

19          QUESTION: Not with respect to it.

20          MR. MCCLEAN: -- was, the final judgment was entered.

21          QUESTION: With respect to this case, is it a final  
22 judgment before appeal?

23          MR. MCCLEAN: Yes, it was a final judgment in July of  
24 1985.

25          QUESTION: And that's because of Pennsylvania law.

1 MR. MCCLEAN: That's correct.

2 I think that we have to examine the --

3 QUESTION: That was not an adjudication on the merits  
4 though.

5 MR. MCCLEAN: No, it was a -- the hearing was held  
6 with respect to whether Gene Jeter was estopped from asserting  
7 the statute of limitations because of the particular  
8 circumstances of this case. It was not a judgment on the  
9 merits. There was no adjudication with respect to paternity,  
10 but it was an extensive examination with respect to those  
11 circumstances that surrounded the application of the statute of  
12 limitations.

13 I think that the Petitioner's reliance upon the  
14 Secretary of the Health and Human Services with respect to the  
15 retroactive application of the 18-year statute is misplaced.

16 We have to look to the Congress, and as I had said,  
17 if the Congress hasn't specifically required retroactivity, the  
18 Secretary of Health and Human Services can't in its regulations  
19 adopted pursuant to the amendments require it.

20 I should note to the Court that of the many  
21 procedures that were adopted in the 1984 amendments requiring  
22 compliance, it was only in this one instance that HHS decided  
23 to change the wording of what the Congress had enacted.

24 For those reasons, I don't think that the statute can  
25 be applied retroactively.

1           We have talked about the supremacy issue and whether  
2 the supremacy clause applies here. The reason why the  
3 supremacy clause does not apply is that Congress, by its 1984  
4 amendments --

5           QUESTION: The supremacy clause always applies. Your  
6 argument is that the Pennsylvania statute doesn't conflict with  
7 any federal enactment.

8           MR. MCCLEAN: That's true. I would note that if this  
9 Court would say that Pennsylvania is not in compliance, the  
10 proper determination would be to remand.

11           As to the equal protection arguments --

12           QUESTION: Wait, wait, wait, wait.

13           MR. MCCLEAN: Okay.

14           QUESTION: You sort of abbreviated that argument. I  
15 gather your contention is that even if this Pennsylvania rule  
16 is not in compliance with the federal statute, all that means  
17 is that Pennsylvania is not in compliance, and the federal  
18 government, if it wishes, withhold funds from Pennsylvania; not  
19 that the Pennsylvania law is automatically amended to comply  
20 with the federal state.

21           MR. MCCLEAN: That's correct.

22           QUESTION: Because Pennsylvania is entitled not to  
23 comply with the federal statute if it doesn't want to so long  
24 as it understands that it doesn't get the money.

25           MR. MCCLEAN: That's correct.

1           QUESTION: Okay. That's all very nice, but you tell  
2 me how someone in the position of Jeter is going to be able to  
3 require either the federal government to cut off the money, or  
4 Pennsylvania to shape up and follow the federal law.

5           MR. MCCLEAN: Jeter is my client.

6           QUESTION: I'm sorry, the putative child here.

7           MR. MCCLEAN: I think the --

8           QUESTION: The beneficiary of a program that was  
9 supposed to be run in a certain way by the state, but it hasn't  
10 been. And the state just comes in and says, well, that's too  
11 bad. I guess the federal government could have cut off the  
12 money.

13           MR. MCCLEAN: Well, I think it's incumbent upon the  
14 courts to direct that. I don't think the remedy is within the  
15 individual person. I agree with the Petitioner in that  
16 respect.

17           QUESTION: But that's what they are -- how do they  
18 get the courts to direct it?

19           MR. MCCLEAN: Well, if the Pennsylvania statute is  
20 deemed to be not in compliance, Pennsylvania has to be given an  
21 opportunity, with respect to the King case and the Townsend  
22 case, to come into compliance. One might be able to say why  
23 hasn't HHS cut of its funds.

24           I think that the procedure that this Court has  
25 adopted is to give Pennsylvania an opportunity to comply.

1 There has been no determination as of yet that they are not in  
2 compliance. One has to react to that determination.

3 QUESTION: What would you have suggested Ms. Clark do  
4 to get what she considered justice in the case?

5 MR. MCCLEAN: She did apply for certiorari to this  
6 Court.

7 QUESTION: Yes, but you are telling us we can't do  
8 anything. We can neither command Pennsylvania to -- you are  
9 saying we can't tell Pennsylvania to write its law properly,  
10 right?

11 MR. MCCLEAN: I have said that that is the situation,  
12 that is true. I think that --

13 QUESTION: So what should she have done then?

14 MR. MCCLEAN: I believe I did say that she applied  
15 certiorari to this Court, and that the Court's response, if it  
16 sees that there is no compliance, is to give Pennsylvania the  
17 opportunity to amend its statute with respect to the 18-year  
18 statute of limitations.

19 QUESTION: Oh, you acknowledge -- I see. You mean we  
20 can issue a judgment in this case. What would the judgment  
21 would be?

22 MR. MCCLEAN: Well, the judgment would be if --

23 QUESTION: Tell Pennsylvania to amend its statute  
24 subject to being what, judged in default and losing its federal  
25 funds?

1 MR. MCCLEAN: Correct.

2 QUESTION: We can issue that judgment in this case.

3 MR. MCCLEAN: I think that you can remand to  
4 Pennsylvania to examine its statute to see that if it is  
5 retroactive to include Ms. Welling's client.

6 QUESTION: Well, I guess we could also hold that the  
7 Pennsylvania statute violates the Equal Protection Clause.

8 MR. MCCLEAN: That's correct, you could do that.

9 If the Court were to do that, what you would be  
10 focusing on is those kinds of impediments that the Court has  
11 looked at in the past. In the Mills and Pickett cases, the  
12 Court examined those kinds of impediments that were related to  
13 the mother, the custodian, the guardian, the next friend not  
14 being able to go forward.

15 I think it's important to look at the particular  
16 facts of this case and see that the woman in this case was  
17 under no such impediment; that the birth-related impediments do  
18 not exist at six years. And, further, with respect to the  
19 state's interest in avoiding fraudulent claims, Pennsylvania  
20 has specifically looked at cases such as this one where 11  
21 years after the birth of a child the evidence is no longer  
22 available for the Defendant in this case to be able to  
23 adequately defend against this claim.

24 QUESTION: Well, what about the new 18-year statute?

25 MR. MCCLEAN: Pardon me, sir?



1 QUESTION: What about the new 18-year statute?

2 MR. MCCLEAN: Well, I think that those problems are  
3 prevalent there also.

4 QUESTION: But the legislature has adopted it, and  
5 hence isn't very concerned with it.

6 MR. MCCLEAN: Well, I think that we have to look at  
7 the motivating factors behind why that 18-year statute was  
8 adopted. That 18-year statute was adopted to bring it into  
9 compliance so that --

10 QUESTION: For money.

11 MR. MCCLEAN: -- Pennsylvania could receive money.

12 QUESTION: Money.

13 MR. MCCLEAN: That's correct.

14 QUESTION: But the state interests certainly didn't  
15 counterbalance the money interest.

16 MR. MCCLEAN: Well, I don't think we can compare the  
17 six-year statute against the 18-year statute. The 18-year  
18 statute isn't at issue. In comparing -- balancing interest  
19 between the state and the claimant in this case, I think that  
20 Pennsylvania has opted for saying that the statute does not  
21 violate equal protection.

22 It is their determination in Pennsylvania that there  
23 is some importance to avoiding stale and fraudulent claims.

24 One of the things I would like to point out is that  
25 the woman in this case had specifically signed a document with

1 the Department of Public Welfare where she did not give up her  
2 rights to lodge the claim herself, although she did assign the  
3 right to lodge that claim to the Department of Public Welfare.

4 What's more, the Department of Public Welfare -- the  
5 women that had testified in this case stated that the records  
6 of the Department of Public Welfare were routinely purged.

7 My client in this case has no ability to go back some  
8 15 years ago to examine the records in this case.

9 This woman in this case had named somebody else as  
10 the father of this child when the baby was born. And it was  
11 only until five years later did she recant and choose to name  
12 my client. I think that this particular case bespeaks the  
13 problems that are associated with avoiding state and fraudulent  
14 claims.

15 This woman on the stand had stated that my client had  
16 abused her. My colleague, Ms. Welling, has misrepresented to  
17 this Court that that was the finding of the court. If we would  
18 examine the trial court's finding, we would see that the trial  
19 court merely stated that Cherlyn Clark said one thing and my  
20 client said another.

21 Ms. Welling had also stated that there were partial  
22 support payments. The court did not find that. As a matter  
23 of fact, the court specifically put in quotation marks the term  
24 "support payments", and I think there was something on the  
25 record that my client had given her some \$25 within a 15-year

1 period of time.

2 Ms. Welling has talked about the attenuated nature of  
3 blood tests. If we examine what has occurred in recent past  
4 with blood tests, there is much talk these days regarding DNA  
5 fingerprinting. What is before the Court in this case is the  
6 ABO testing and the HLA testing. We don't have the DNA  
7 fingerprinting in Allegheny County, although I'd stated in my  
8 brief that I was unaware of any state within the United States  
9 that uses DNA fingerprinting. I understand that Washington is  
10 now to some degree experimenting with it, but we don't use it  
11 in Allegheny County. We don't use it in Pennsylvania.

12 Maybe some time down the road we will be at the point  
13 where a paternity can be an administrative hearing, but between  
14 the two footnotes to the Mills case where the paternity blood  
15 testing was discussed, those problems still exists.

16 And the problems are that if there is exclusion,  
17 there is a scientific fact. If there is a paternity index in  
18 the absence of exclusion, it's merely a mathematical  
19 probability.

20 Again, the problem continues to exist. The blood  
21 tests, as we go from a six-year statute even to an 18-year  
22 statute, become more of a problem. The reason why they become  
23 more of a problem is that as the years pass evidence become  
24 less and less available to the defendant. In the face of a  
25 blood test result that wouldn't change, it becomes more

1 compelling or more prejudicial, if you will.

2 QUESTION: How come the blood test results changed  
3 here? As I recall at an earlier stage it had been determined  
4 that the blood test established lack of parentage, and then in  
5 the later test, it was --

6 MR. MCCLEAN: I think you are thinking of the Connell  
7 case.

8 QUESTION: That was Connell?

9 MR. MCCLEAN: Connell was cited in Petitioner's  
10 brief.

11 QUESTION: How long ago was that case?

12 MR. MCCLEAN: Connell was 1984. In the Connell case,  
13 I'd like to address the Connell case if I can. Petitioner has  
14 stated that Pennsylvania exists and somehow treats illegitimate  
15 children differently from legitimate children routinely.

16 In the Connell case, in those other cases that deal  
17 with married parents raising the issue of paternity, they do so  
18 in a circumstance where a woman would claim support for the  
19 child, and there would be a mere answer, a denial of paternity.  
20 The question at that point is ordering of blood tests. There  
21 is no specific limitation on the ordering of blood tests in  
22 Pennsylvania.

23 In the Connell case, what happened was that two boys  
24 were at issue initially. One was excluded; the other wasn't.  
25 What happened then was the support case didn't go on. We can

1 only assume that the parties reconciled.

2 Some years later the blood test again was requested,  
3 and the blood tests were not allowed. Mr. Connell lost this  
4 case.

5 And in the other cases that are cited if we would  
6 look at those, what Pennsylvania does, because in the case  
7 where we are dealing with married people, you don't get to the  
8 paternity statute. What Pennsylvania does is it puts --

9 QUESTION: You don't, but the effect -- surely, the  
10 effect on the woman in that case is just as horrendous as the  
11 effect, if not worse, than the effect upon the man in a  
12 paternity case.

13 You are saying in those cases the woman, if the  
14 father establishes non-paternity, is in effect judged to have  
15 committed adultery and had these children as a result of an  
16 adultery relationship, right?

17 MR. MCCLEAN: That's correct, but I'm going --

18 QUESTION: And you say that can be done at anytime up  
19 until the --

20 MR. MCCLEAN: I didn't say that. I was going to get  
21 to the point --

22 QUESTION: Is there a six-year statute on that?

23 MR. MCCLEAN: What was specifically stated in the  
24 Petitioner's brief was that provided that the putative father  
25 is not barred by laches or estoppel, and in each one of these

1 cases the father was barred by laches or estoppel prior to the  
2 period of time that would have been represented by the six-  
3 year statute.

4 In the specific case, seven years later when Mr.  
5 Connell came in again, the court said, you waited too long.  
6 And in the uniform -- the Uniform Blood Testing Act that  
7 Pennsylvania has adopted, it specifically states that blood  
8 testing should be done as soon as possible after the birth of  
9 the child.

10 QUESTION: But now, wait. That laches defense, I  
11 assume that means that the father had reason to know of the  
12 illegitimacy of the children, and did nothing about it for a  
13 lengthy period, so that's laches.

14 But you acknowledge that --

15 MR. MCCLEAN: No, this is not illegitimate -- this is  
16 between wedded parents.

17 Are you speaking with respect to the child who has --

18 QUESTION: He is disclaiming paternity of the  
19 children.

20 MR. MCCLEAN: Fine.

21 QUESTION: Okay?

22 MR. MCCLEAN: Correct.

23 QUESTION: So that child would not be a child of the  
24 marriage, right?

25 MR. MCCLEAN: Correct.

1 QUESTION: The child would be an illegitimate child.

2 MR. MCCLEAN: Correct.

3 QUESTION: Correct?

4 And you acknowledge that you can bring such a suit  
5 beyond six years so long as there is no laches. But laches  
6 would consist of knowing of the adultery well within an earlier  
7 period and not doing anything about it. You have accepted the  
8 child as your own. But that won't always be the case.

9 What if the father finds out about it when the child  
10 is 16 years old? It's the first time he has ever known that  
11 this child was not legitimate. Then brings a suit saying I  
12 don't want to support this child. You acknowledge that in  
13 effect that suit goes forward and the woman can be publicly  
14 convicted of having had the child illegitimately as a result of  
15 an adulterous relationship 16 years after the fact, and  
16 Pennsylvania doesn't care about that.

17 MR. MCCLEAN: That's not true. The cases that are  
18 specifically cited by the Petitioner favor my client. I  
19 mentioned laches and I mentioned estoppel. Pennsylvania  
20 specifically looks at instances where men have been living in a  
21 situation where they are married, whether they have known about  
22 it or not known about it, and have supported the children for a  
23 period of time.

24 What we have to do is we have to look at what is in  
25 the nature of a defense when the issue of paternity is raised.

1 Marriage certainly is the counterpoint to -- in the  
2 illegitimate situation between unwedded people, the access,  
3 non-access, the continuing relationship. That's why in  
4 Pennsylvania what we say is that there is a rebuttable  
5 presumption of paternity in the case where people are married.  
6 That's how we treat it differently.

7 But to say that Pennsylvania does not post any  
8 barrier to a wedded parent as opposed to an unwedded parent is  
9 not true.

10 So too with respect to the case where the unwedded  
11 father can lodge an action. The case had arisen because the  
12 unwedded father not being the custodian, not being the  
13 guardian, not being the next friend, could not come into the  
14 court under the paternity statute and establish the paternity  
15 for the ability to have some kind of visitation rights, or to  
16 establish inheritance rights.

17 What happened in the Mengel case that Petitioner  
18 raised was that the Pennsylvania Superior Court gave the father  
19 the rights to come in under the Pennsylvania Declaratory  
20 Judgment Act. There are no prohibitions in Pennsylvania  
21 whatsoever to say that this man has to do -- cannot do this,  
22 excuse me.

23 There is no prohibition in Pennsylvania that the man  
24 has to come in with a certain -- excuse me. In Pennsylvania,  
25 that man must come in within a certain period of time. There



1 are no cases which say to the contrary.

2 I think that we have to pay strict attention to the  
3 particular facts of this case. The particular facts of this  
4 case show that, in this equal protection setting, the woman's  
5 rights are well taken care of. And in the face of the  
6 Defendant's ability to lodge a defense, the records are not  
7 available. She named someone else as the father of the child.  
8 The equal protection argument must fall.

9 If the equal protection argument, if this is found to  
10 be unconstitutional, it affects Gene Jeter in this case.  
11 Because of the 18-year statute of limitations, I think what  
12 occurs is that other children that have not lodged a claim are  
13 not estopped from coming to the court. What happens is in this  
14 case that there is a final judgment and the statute of  
15 limitations, as previously existed, has to apply.

16 The last argument, the due process argument, as a  
17 matter of procedural due process the Ferry and Martinez cases  
18 control. The state statute is not wholly arbitrary or  
19 irrational. I think that in looking at the statute of  
20 limitations, one can't say that Pennsylvania cannot have some  
21 statute of limitations at all. And apart from that, the  
22 ability of the child to get into court in Pennsylvania can be  
23 achieved through the custodian, the guardian or the next  
24 friend. And for those reasons, the due process argument must  
25 fall.

1           If we look at this case as a whole, I think that one  
2 has to examine that the retroactivity issue must be found in  
3 Gene Jeter's favor; that the equal protection argument must  
4 fall; and that the due process argument must fall.

5           If there are no further questions.

6           CHIEF JUSTICE REHNQUIST: Thank you, Mr. McClean.

7           Ms. Welling, you have three minutes remaining.

8           MS. WELLING: I have no rebuttal. Thank you.

9           CHIEF JUSTICE REHNQUIST: Thank you, Ms. Welling.

10          The case is submitted.

11          (Whereupon, at 1:55 o'clock p.m., the case in the  
12 above-entitled matter was submitted.)

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REPORTERS' CERTIFICATE

1  
2  
3 DOCKET NUMBER: 87-5565

4 CASE TITLE: Cherlyn Clark v. Gene Jeter

5 HEARING DATE: April 19, 1988

6 LOCATION: Washington, D.C.

7  
8 I hereby certify that the proceedings and evidence  
9 are contained fully and accurately on the tapes and notes  
10 reported by me at the hearing in the above case before the  
11 United States Supreme Court  
12 and that this is a true and accurate transcript of the case.

13 Date: 4-25-88

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