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Constitutional Law - Fourteenth Amendment - Equal Protection Clause - Adoption - Rights of Putative Fathers

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION CLAUSE—ADOPTION—RIGHTS OF PUTATIVE FATHERS—The United States Supreme Court has held that a New York statute providing that a natural mother could withhold her consent to the adoption of her child, but denying the same right to an unwed father, violates the equal protection clause of the fourteenth amendment.

Caban v. Mohammed, 99 S. Ct. 1760 (1979).

In January, 1976, New York resident Kazim Mohammed and his wife, Maria Mohammed, filed a petition under section 110 of the New York Domestic Relations Law[1] seeking to adopt David Andrew Caban and Denise Caban.[2] David and Denise were illegitimate children parented by Maria Mohammed and Abdiel Caban, who had lived together in New York City from September of 1968 until the end of 1973. During this time, Caban and Mohammed represented themselves as being husband and wife, although they never legally married.[3] Throughout their relationship, both the natural mother and the putative father[4] were employed and contributed to the support of the family.[5] Maria eventually left Caban, taking their children with her, and took up residence with the appellee, whom she later married.[6] Caban continued to visit, support, and participate in the rearing of the children following Maria's departure.[7]

Given his relationship with the children, and in response to the Mohammed adoption petition, Caban and his wife cross-petitioned

1. N.Y. DOM. REL. LAW § 110 (McKinney 1977), which governs who may adopt, provides in pertinent part:

> An adult unmarried person or an adult husband and his adult wife together may adopt another person. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse.

2. Caban v. Mohammed, 99 S. Ct. 1760, 1763 (1979).

3. *Id.*

4. The term putative father refers to the alleged or reputed father of an illegitimate child. BLACK'S LAW DICTIONARY 1402 (Rev. 4th ed. 1968).

5. 99 S. Ct. at 1763; Brief for Appellant at 10.

6. 99 S. Ct. at 1763.

7. *Id.* In September of 1974, Maria's mother, Delores Gonzales, left New York to take up residence in Puerto Rico. At the Mohammeds' request, the grandmother took David and Denise with her. Caban communicated with the children through his parents who also resided in Puerto Rico. In November of 1975, Caban went to Puerto Rico, taking custody of the children from a willing Gonzales. Caban then returned with the children to New York City. *Id.* On January 15, 1976, the Family Court of New York issued a temporary order placing the children with the mother and awarding visitation rights to the father pending a trial on the merits. Brief for Appellant at 14.

under section 110 for adoption of the children.[8] After a hearing on the petition, a New York surrogate in Kings County, New York, granted the Mohammeds' petition to adopt the children,[9] thereby terminating Caban's parental rights and obligations.[10] The surrogate noted that section 111 foreclosed Caban from adopting David and Denise because the natural mother had withheld her consent.[11] Furthermore, Caban had not offered any evidence to indicate that the Mohammeds were unfit parents for the children.[12] The surrogate rejected Caban's argument[13] that section 111 violated the equal protection clause of the fourteenth amendment[14] by requiring the mother to consent to adoption in all situations,[15] yet at the same time requiring a father's consent only if he had been or was legally married to the mother,[16] was a surviving spouse, or had custody of the child.[17] The surrogate based his decision on the earlier New York Court of Appeals decision in *In re Adoption of Malpica-Orsini*,[18] in which the court, in a similar fact situation[19] rejected a putative father's constitutional objections to the Act.[20] The *Orsini*

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8. 99 S. Ct. at 1764. For the text of § 110, see note 1 *supra*.

9. 99 S. Ct. at 1764.

10. *Id.* N.Y. DOM. REL. LAW § 117 (McKinney 1977) provides that "[a]fter the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or his property by descent or succession . . . ."

11. 99 S. Ct. at 1765. N.Y. DOM. REL. LAW § 111 (McKinney 1977), which governs the consent required, provides in pertinent part:

> 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
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> . . . ;
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> (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
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> (c) Of the mother, whether adult or infant, of a child born out of wedlock;
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> (d) Of any person or authorized agency having lawful custody of the adoptive child.

12. 99 S. Ct. at 1765.

13. *Id.* at 1766.

14. U.S. CONST. amend. XIV, § 1 provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

15. *See* N.Y. DOM. REL. LAW § 111(1)(b), (c) (McKinney 1977).

16. *See id.* § 111(1)(b).

17. *See id.* § 111(1)(d).

18. 36 N.Y. 2d 568, 311 N.E.2d 486, 370 N.Y.S.2d 511, *appeal dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977).

19. The parents of the child cohabitated prior to and following the birth of their child. The putative father acknowledged paternity, provided support for the child, and shared parental responsibilities. After the period of cohabitation ended, the father continued to support and maintain personal contact with the child. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

20. The putative father in *Orsini*, like Caban, questioned the constitutionality of § 111. *Id.* at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

court had utilized a rational relationship standard of review[21] and had held that since a legislative enactment carries with it a strong presumption of constitutionality,[22] the putative father's equal protection challenge had to be dismissed because he did not meet the heavy burden of proving the statute's invalidity.[23]

After Caban had exhausted his state appeals,[24] the United States Supreme Court noted probable jurisdiction[25] to decide whether the statutory distinction drawn between the adoptive rights of an unwed father and those of other parents violated the equal protection clause of the fourteenth amendment.[26] Finding that it did, the Court reversed the judgment of the New York Court of Appeals.[27]

Justice Powell, speaking for a five man majority,[28] initially found that section 111 treated unwed fathers differently than other parents.[29] The Court noted that under the provisions of section 111, an unwed mother clearly had the right to withhold her consent to a proposed adoption of her illegitimate child. Since an unwed father had no similar control over the fate of his child, even where his parental relationship was as substantial as that of the mother, it was indisputable that unwed fathers were treated unequally.[30] This unequal treatment effectively gave the mother the right to control the fate of the child since under New York law adoption is impermissible without the consent of the unwed mother.[31] Thus, in the instant controversy, Maria could prevent Abdiel's adoption of the children simply by withholding her consent, although Abdiel could prevent Maria from adopting their children only

21. This standard presumes that a statutory classification is constitutionally valid provided that it is rationally related to a legitimate state interest. *Id.* at 570-71, 331 N.E.2d at 488, 370 N.Y.S.2d at 514-15.

22. The *Orsini* court further noted that this constitutional presumption is rebuttable if unconstitutionality can be demonstrated beyond a reasonable doubt; that every intendment is in favor of the validity of the statute; that the party alleging unconstitutionality has a heavy burden; that only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality; and that courts may not substitute their judgment for that of the legislature as to the wisdom and expediency of the legislation. *Id.*

23. *Id.* The *Orsini* court also found that the equal protection clause does not deny to states the power to treat different classes of persons in different ways if the classification has a fair and substantial relationship to the object of the legislation. *Id.* at 571-72, 331 N.E.2d at 488-89, 370 N.Y.S.2d at 515-16.

24. *See* Kazim M. v. Abdiel C., 56 App. Div. 2d 627, 391 N.Y.S.2d 846, *appeal dismissed*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

25. 436 U.S. 903 (1978).

26. 99 S. Ct. at 1764.

27. *Id.* at 1769.

28. The majority also included Justices Brennan, White, Marshall and Blackman.

29. 99 S. Ct. at 1766.

30. *Id.* at 1765-66.

31. *See* Gordan K. v. Martin L., 45 N.Y.2d 383, 38 N.E.2d 266, 408 N.Y.S.2d 439 (1978).

if he could show that her adoption of the children would not be in the children's best interest. Accordingly, Justice Powell ruled that the differing treatment of unmarried parents was based upon sex.[32]

After concluding that section 111 created a sex-based classification, the *Caban* Court analyzed its prior decisions on the constitutionality of gender-based distinctions. Relying upon *Reed v. Reed*[33] and *Craig v. Boren*,[34] cases in which the Court had held that gender-based distinctions must serve governmental objectives to withstand judicial scrutiny under the equal protection clause,[35] Mohammed asserted that the distinction was justified because there was a fundamental difference between maternal and paternal relationships in that a natural mother has a closer relationship with her child than does the father. The *Caban* majority dismissed this argument, noting that maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization about parent-child relations becomes less acceptable as a basis for legislative distinctions as the age of the child increases. Because the Caban children were not infants, the Court concluded that the maternal and paternal roles were equalized.[36]

The Court then examined the state's interest in promoting the adoption of illegitimate children. Justice Powell conceded that various purposes were served by the New York adoption consent scheme, since fathers could not deny illegitimate children the blessings of adoption, nor cause unnecessary delays in the adoption process.[37] He stated, however, that the state's interest in promoting adoption could not be furthered through the use of a gender-based distinction.[38] The Court held that classifications must be reasonable, and have a fair and substantial relationship to the object of the legislation. New York's legislative objective was to expedite the adoption of its illegitimate children by requiring only maternal consent. If the consent of both parents was required, there would be unnecessary delays and the possibility of

32. 99 S. Ct. at 1766.

33. 404 U.S. 71 (1971). *Reed* involved a challenge to an Idaho statute which gave preference to males as administrators of estates. The Court held that sex, although not suspect per se, could not be used to afford different treatment to similarly situated individuals absent a legitimate government purpose. Sex did not have a rational relationship to the purpose of providing competent administrators for estates in Idaho. *Id.* at 76-77.

34. 429 U.S. 190 (1976). *Craig* involved a challenge to an Oklahoma statute which provided separate legal drinking ages for men (21) and women (18). The Court held that the statute was unconstitutional since the 18-21 age requirement did not serve the asserted government purpose of increasing highway safety. *Id.* at 200-03.

35. 99 S. Ct. at 1766.

36. *Id.* at 1766-67.

37. *Id.* at 1767.

38. *Id.* at 1768.

criminal activities such as blackmail and extortion. Even if fathers would block the adoption of their children, it would, in the view of the *Caban* Court, be motivated by concern for the welfare of the child rather than by a negative or vindictive attitude.[39] According to Justice Powell, the putative father in the instant controversy was an example of such a concerned parent because of his continued participation in the rearing and support of his children.[40]

The Court recognized that practical difficulties in locating putative fathers for their consent to adoption could conceivably result in the delayed placement of children.[41] However, even if the difficulties justified a legislative distinction between mothers and fathers of newborns, a point the Court did not decide, those difficulties did not justify a distinction extending beyond infancy.[42] The Court reasoned that the difficulty in locating the putative father of an older child did not justify an inflexible distinction because the equal protection clause protects only those fathers who in fact have come forward to participate in the rearing of their child.[43] If a case involved a putative father who had not come forward, such as one involving a mother and child who were abandoned by the father,[44] the state could withhold the father's privilege of vetoing the adoption of the child.[45] Therefore, the Court ruled that where a father acknowledges paternity and has established a substantial relationship with his child, the right to consent or withhold consent must be preserved.[46] Justice Powell concluded that the differing treatment afforded unwed fathers and unwed mothers did not bear a substantial relationship to the state's interest in promoting the adoption of illegitimate children. Thus, the Court held that section 111 was an overbroad, gender-based classification which discriminated arbitrarily against unwed fathers who had participated in the support of their non-infant children.[47]

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39. *Id.* (citing Reed v. Reed, 404 U.S. 71 (1971)). *See* note 33 and text accompanying notes 33-36 *supra*.

40. 99 S. Ct. at 1763. *See* note 7 and accompanying text *supra*.

41. 99 S. Ct. at 1768.

42. *Id.* at 1768 n.11.

43. *Id.* at 1768-69.

44. *Id.* at 1769. Under the provisions of New York's Social Services Law, abandonment would include the situation in which the father has never come forward to participate in the rearing of the child. *See* N.Y. SOC. SERV. LAW § 371 (McKinney Supp. 1979).

45. 99 S. Ct. at 1768.

46. *Id.* at 1769.

47. *Id.* The Court stated:

> The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exer-

Justice Stewart dissented. He contended that the state's interest in promoting the welfare of illegitimate children was of far greater importance than the majority suggested.[48] Unlike the majority, Justice Stewart found that the state had not advanced this interest at the expense of Caban's equal protection or due process rights. He reasoned that since contested adoptions in New York were governed by the "best interest" of the child standard, the putative father's due process rights were fulfilled by his opportunity to express his concerns about the child's welfare.[49] Turning to the equal protection challenge to the gender-based classification adoption scheme, Justice Stewart stated that the equal protection clause is not violated unless men and women are in fact similarly situated in the area covered by the legislation. In the case of newborn children, and absent the legal tie of marriage, he opined that the unwed father and unwed mother are not similarly situated.[50] In the instant case, however, the father was similarly situated to the mother because both had established a close relationship with the children. Nevertheless, Justice Stewart ruled that it was neither the mother's nor the father's interest that was paramount, but instead was the child's interest in being legitimized.[51] In Justice Stewart's view, the father's equal protection rights would not be violated unless there had first been a finding that adoption by the father would serve the best interest of the child, and in the face of such a finding the mother had been permitted to veto the adoption.[52] Since no such action occurred in *Caban*, Justice Stewart concluded that the legislative goal

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cise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.

Id. The Supreme Court distinguished its earlier decision in Quilloin v. Walcott, 434 U.S. 246 (1978), which held that a Georgia statute did not deny a putative father due process of law by denying him the right to consent to his child's adoption when the best interests of the child were not promoted by the consent. *Id.* at 251-55. The majority noted that in *Quilloin*, unlike *Caban*, the father did not participate regularly in the rearing or support of the child nor did he seek to adopt the child, but only attempted to veto the adoption by the mother and her husband. 99 S. Ct. at 1766-67 n.7.

48. 99 S. Ct. at 1769 (Stewart, J., dissenting).

49. *Id.* at 1770 (Stewart, J., dissenting).

50. *Id.* The dissent noted that historically, basic biological differences have led to a custodial presumption in favor of the mother. Further, where an unwed father has not come forward and has not established a relationship with the child he is plainly not in a situation similar to the mother's. *Id.* at 1772 (Stewart, J., dissenting).

51. *Id.*

52. *Id.* at 1772-73 (Stewart, J., dissenting).

of facilitating adoptions that are in the best interest of illegitimate children was served by the gender-based classification.[53]

Justice Stevens, with whom the Chief Justice and Justice Rehnquist joined, expressed the concern that a mutual consent requirement would complicate and delay the adoption process.[54] Furthermore, Justice Stevens contended that the person challenging the constitutionality of statutes such as section 111 should be required to demonstrate the unfairness of its application in a significant number of situations before the Court can properly conclude that it violates the equal protection clause.[55] He urged that it was unwise to test the conformance of rules to the principle of equality simply by reference to exceptional cases such as Caban's.[56]

Caban v. Mohammed comports with the Court's previous decision involving gender-based parental classifications, the first of which was *Stanley v. Illinois*.[57] In *Stanley*, the Court adopted a rationale which balanced the interests of both the parent and the child.[58] The Illinois statute involved in *Stanley* did not include unwed fathers in the legislative definition of parent.[59] Thus, the unwed father was viewed not as a parent but as a stranger to his child in matters of custody and adoption.[60] When the unwed father's illegitimate partner for eighteen years died, he was left with their three children.[61] Pursuant to the statutory scheme,[62] the children became wards of the state upon the death of their mother. Without the benefit of a hearing to determine Peter Stanley's fitness as a parent, the state removed the children from Stanley's care and custody and placed them in the care of a guardian[63] upon a showing that the children had no legal parent living.[64] Stanley claimed that he was denied equal protection of the law because of the

53. *Id.* at 1773 (Stewart, J., dissenting).

54. *Id.* at 1776 (Stevens, J., dissenting).

55. *Id.* at 1779 (Stevens, J., dissenting).

56. *Id.* at 1778-79 (Stevens, J., dissenting). Justice Stevens also stressed that given the millions of adoptions granted, the *Caban* decision should not be applied retroactively. *Id.* at 1781 (Stevens, J., dissenting).

57. 405 U.S. 645 (1972).

58. *Id.* at 657.

59. *Id.* at 650. *See* note 65 *infra*.

60. 405 U.S. at 648. Pursuant to the Illinois statute, there was a conclusive presumption that unwed fathers were unfit to raise their child, thus making it unnecessary to hold individualized hearings to determine whether particular fathers were in fact unfit parents before they were separated from their children. *Id.* at 647.

61. *Id.* at 646.

62. *See* note 60 *supra*.

63. In Illinois, all that was required was proof of the death of the child's legal parent, in this case the mother. 405 U.S. at 650.

64. *Id.* at 646.

disparate procedural treatment afforded unwed fathers in Illinois.[65] The *Stanley* Court held that all unwed fathers could not, as Illinois had maintained, be viewed as unsuitable and neglectful parents, because inevitably, some are wholly suited to have custody of their children.[66] The Court noted that Stanley was not shown to be a neglectful father. Hence, contrary to Illinois law, Stanley, as all parents, had to be afforded the opportunity to be heard regarding his fitness as a parent for his natural children.[67] The Court ruled that application of a presumption that all unwed fathers were unfit ignored the realities of individual father-child relationships and did not advance the interests of both parent and child.[68] The *Stanley* ruling and rationale represented a significant departure from the common law and early American case law.[69] By extending procedural due process and equal protection guarantees to the putative father, *Stanley* rebutted the long standing presumption of unfitness.[70]

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65. *Id.* at 646-47. The Illinois Supreme Court rejected Stanley's constitutional argument. People v. Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970). Stanley's due process argument to the United States Supreme Court pointed out that legally married fathers, whether separated or divorced, and all mothers were included in the definition of parent, and thus entitled to a hearing as to their fitness. Since unwed fathers were not included in the statutory definition of parent, they were not entitled to a hearing on their fitness. Stanley contended that this denial of procedural due process resulted in a denial of his equal protection rights. 405 U.S. at 649.

66. 405 U.S. at 654.

67. *Id.* at 655. The Court reasoned that "[t]o say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Id.* at 652 (quoting Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968)). The Court further clarified the basis of its analysis as follows:

> But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

Id. at 652-53.

68. *Id.* at 657-58.

69. *See* 10 AM. JUR. 2d *Bastards* §§ 60, 62 (1963); 2 AM. JUR. 2d *Adoptions* § 4 (1962).

70. 405 U.S. at 658. The Court's decision in *Stanley v. Illinois* soon resulted in the extension of procedural due process protection of unwed fathers to adoption cases in State v. Lutheran Social Servs., 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated and remanded sub nom.* Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972). *Rothstein* was based on the *Stanley* rationale of considering the individual parent-child relationship. An unwed mother had relinquished her child for adoption when the putative father abandoned her after refusing marriage. *Id.* at 422, 178 N.W.2d at 57. Following the birth and relinquishment of the child by the mother, the putative father experienced a change of

Caban v. Mohammed is based on the same concerns for the rights of unwed fathers expressed in the *Stanley* decision. *Caban*, however, expands the rights of unwed fathers by allowing them to withhold consent in matters of adoption in limited instances. In *Stanley*, the children were already living with the putative father who merely sought to continue the parent-child relationship as it had existed during the mother's lifetime.[71] In *Caban*, the mother had custody of the children. However, both she and the putative father had taken legal spouses prior to the adoption contest, and both could provide socially recognized family units for the children's rearing.[72] Thus, the Court's decision in *Caban*, which granted a non-custodial father the right to withhold consent to the adoption of his children by their natural mother, places putative fathers on equal footing with all natural parents. This expands the rule of *Stanley* since in that case, the putative father, who was the only living natural parent, was merely granted the opportunity to a hearing on his fitness as a parent. This due process right was not necessarily conclusive as to the future disposition of his children. *Caban* significantly holds that an unwed father who has participated in the rearing of his child has a constitutional right to directly control the choice of his children's rearing in so far as an unwed mother has that right.[73]

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heart. Subsequent proposals of marriage went unanswered. Wisconsin required consent only from the mother where there was no legal marriage. *Id.* at 427, 178 N.W.2d at 60. Rothstein challenged, on equal protection grounds, the Wisconsin statute's exclusion of unwed fathers from the category of parent from whom consent was required in matters of adoption. On remand, the Wisconsin court, following the *Stanley* directive, afforded due consideration to the completion of the adoption proceedings and the fact that the child had lived with his adoptive parents for a considerable period of time. In so doing, the court determined that it would be in the best interest of the child to let the adoption stand. State v. Lutheran Social Servs., 68 Wis. 2d 36, 41, 227 N.W.2d 643, 647 (1975).

71. 405 U.S. at 658.

72. *Rothstein*, discussed at note 70 *supra*, is likewise distinguishable from *Caban*. In *Rothstein*, the question presented was not which natural parent should adopt the child, but whether or not it would be in the best interest of the child to allow the child to be adopted by a third party or by the putative father. 47 Wis.2d at 422, 178 N.W.2d at 658. The natural parents had not lived together following the conception, birth and relinquishment of the child for adoption by the mother. *See* note 70 *supra*.

73. 99 S. Ct. at 1768-69. The participation standard suggested by the *Caban* majority refines and adds to the earlier factors used by the Court in developing a judicial conception of fatherhood. In Quilloin v. Walcott, 434 U.S. 246 (1978), a unanimous Supreme Court found that the unwed father did not demonstrate sufficient participation in the life of his child to warrant protection of his veto power over the adoption of his eleven year old child by the child's mother and her husband. *Id.* at 256. Georgia required only the mother's consent in cases where the child was illegitimate; but where the child was legitimate, consent was required of both parents whether separated or divorced. *Id.* at 248-49. The husband of the mother filed a petition for adoption of her child which was granted over the objection of the father of the child. The Supreme Court upheld the constitu-

The participation standard of *Caban* is expressly limited to situations where the adoption of a non-infant child is at issue.[74] However, at the core of the ruling is the recognition that an unwed father has constitutionally protected rights with respect to his natural children irrespective of the father's legal relationship with his child's mother. This expansion of *Stanley* gives unwed fathers an equal right to withhold consent from the adoption of their children even when the natural mother is the proposed adoptive parent. The United States Supreme Court has thus taken a further step toward developing discernible boundaries for its concept of the natural law for unwed fathers.[75] The *Caban* rationale, which is based upon the level of an unwed father's participation in his child's life, takes judicial notice that protecting the

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tionality of the Georgia statute in *Quilloin* since the facts indicated that the father never sought, nor did he ever have legal custody of the child. Moreover his financial support and personal contact with the child were erratic, and the putative father did not seek to adopt the child but only to block the adoption of the child by Walcott. Finally, the *Quilloin* Court noted that the family situation created by the adoption would not create a new family, but would affirm an already existing relationship. The failure of the father to establish a substantial relationship with the child or legitimize the child during her eleven years proved crucial to the Court in *Quilloin*. *Id.* at 255-56. In *Caban*, adequate participation was demonstrated by proof that the father had lived with the unwed mother prior to and during the life of the child. It was particularly compelling to the *Caban* Court that the putative father continued his substantial contact with the children following the break up of the unmarried father-mother relationship. 99 S. Ct. at 1769.

74. 99 S. Ct. at 1768-69. Given that the Court has established participation as a key element in determining an unwed father's protected parental rights, it seems reasonable that an unwed father could demonstrate substantial participation in the life of the mother and unborn fetus, thus extending the *Caban* rule to situations where the adoption of an infant child is at issue. Using the participation standard, an unwed father could cohabitate with the unwed mother, providing her with financial and emotional support. Additionally, the unwed father could pay the medical expenses resulting from birth, voluntarily sign the birth and baptismal certificates, agree to continue to financially and emotionally support the child, and generally function in a parental manner during the pre-natal and post-natal periods. In essence an unwed father would need to do the things that the fathers in *Quilloin* and *Rothstein* did not do, and that the fathers in *Caban* and *Stanley* did do. In short it may be possible to raise an exceptional case which would have a significant effect on this as yet untouched area of adoption law.

In some states, the putative father may be afforded protection on non-federal grounds. *See, e.g.*, Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976), *noted in* 81 DICK. L. REV. 857 (1977) and 15 DUQ. L. REV. 757 (1977). In *Walker*, that portion of the Pennsylvania adoption statute which required only the consent of the mother as a precondition to the adoption of an illegitimate child was held unconstitutional as violative of the equal rights amendment of the Pennsylvania Constitution. 468 Pa. at 170-71, 360 A.2d at 605-06.

75. In his dissenting opinion in *Stanley v. Illinois*, Chief Justice Burger stated that the majority's invalidation of the Illinois statutory provision, which created a presumption of the unfitness of unwed fathers, embarked the Court "on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible." 405 U.S. at 668 (Burger, C.J., dissenting).

rights of parents, in the end, will provide for the best interests of the child.[76]

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76. *See* 434 U.S. at 251-55. Although the best interest standard is referred to by both the *Quilloin* and *Caban* Courts, the variables used to determine what is in the best interest of the child are not defined. The court in State v. Lutheran Social Servs., 59 Wis.2d 1, 207 N.W.2d 826 (1973) addressed the imprecision of this phrase by noting that:

> The phrase, "best interests of the child," means all things to all people: it means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers. If judges were endowed with omniscience, the problem would not be difficult; but the tendency in man is to apply intuition in deciding that a child would be "better" with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being "in the best interests of the child." Courts have not laid down any definite guidelines which can be followed in every case to insure protection of what the average person means by "best interests."

Id. at 9-10, 207 N.W.2d at 831.