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Comment

Just Say Know: The Rights of Putative Fathers in New York to Veto the Adoption of Their Children

I. Introduction

On February 8, 1991, in Iowa, Cara Clausen gave birth to a baby girl.¹ She was not married, and had decided to give the baby up for adoption.² Clausen named Scott Seefeldt as the father, and both Clausen and Seefeldt signed forms releasing custody and terminating their parental rights.³ The little girl was placed with a couple from Michigan, who began adoption proceedings in Iowa on February 25, 1991.⁴ The couple, the DeBoers, named their baby girl Jessica.⁵ Jessica went home with the DeBoers that day.⁶

On March 6, 1991, nine days after the DeBoers filed their adoption petition, Cara Clausen filed a separate petition revoking her release of custody.⁷ Clausen admitted that she had lied when she named Seefeldt as the father.⁸ The man she now named, Dan Schmidt, was proven to be Jessica's father to 99.9% accuracy.⁹ Schmidt himself filed a petition in Iowa to intervene

1. *In re Baby Girl Clausen*, 502 N.W.2d 649, 652 (Mich. 1993).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 653.

6. *Id.* at 652.

7. *Id.*

8. *Id.*

9. *In re Baby Girl Clausen*, 501 N.W.2d 193, 194 (Mich. Ct. App.), *aff'd in part*, 502 N.W.2d 649 (Mich. 1993).

The application of blood tests to the issue of paternity results from certain properties of the human blood groups and types. If the blood groups and

in the adoption proceeding started by the DeBoers.¹⁰ Thus began a long and emotional series of jurisdictional battles, culminating in the sight the nation watched in horror the summer of 1993.¹¹ The sight was that of little two and one-half year old Jessica being forced from the arms of the only parents she had ever known, to be carried away screaming by a social worker to her new home with the Schmidts. There, she would be renamed Anna.¹²

How common is this? For an adoptive parent in New York, or for a couple perhaps contemplating adoption in New York, the question is "Can this happen to me?" For men like Dan Schmidt, the question is just as compelling: "Can the State of New York prevent me from raising my own child?" This Comment will focus on the rights of putative fathers¹³ in New York who may not know of the birth of their children until it is too late,¹⁴ and whether they can veto an adoption that is not final,

types of the mother and child are known, the possible and impossible blood groups and types of the true father can be determined under the rules of inheritance. The ability of blood grouping tests to exonerate innocent putative fathers was confirmed by a 1976 report developed jointly by the American Bar Association and the American Medical Association. Miale, Jennings, Rettberg, Sell & Krause, Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L.Q. 247 (Fall 1976). The joint report recommended the use of seven blood test "systems" - ABO, Rh, MNSS, Kell, Duffy, Kidd, and HLA - when investigating questions of paternity. *Id.*, at 257-258 [sic]. These systems were found to be "reasonable" in cost and to provide a [93%] cumulative probability of negating paternity for erroneously accused . . . white men.

Little v. Streater, 452 U.S. 1, 7-8 (1981).

10. *In re Baby Girl Clausen*, 501 N.W.2d at 194.

11. Michele Lesie, *Baby Jessica Case Sparks Drive to Avoid More Like It*, PLAIN DEALER, Aug. 13, 1994, at F2.

12. Edward Walsh, *Two Parents Too Many For a Little Girl; Michigan Supreme Court Hears Emotional Adoption Case*, WASH. POST, June 4, 1993, at C1.

13. BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). A "putative father" is the "alleged or reputed father of a child born out of wedlock." *Id.*

14. See N.Y. SOC. SERV. LAW § 384(5) (McKinney 1992 & Supp. 1994). Once the necessary surrender agreements have been approved by the court and the child is placed with the adoptive parents, there is a 30 day waiting period after which the surrendering parents are barred from trying to revoke or annul the surrender agreement. This does not preclude actions to annul the surrender agreement on the bases of fraud, duress, or coercion in the execution or inducement of a surrender. *Id.*

In the cases selected for this Comment, typically there will be a putative father whose consent to the adoption was not required under the statutory scheme then in effect. Thus, the actions will not be to *revoke* a surrender, but to *intervene*

or reverse an adoption that is final. It will also examine how New York State tries to balance the interests of putative fathers against the interests of adoptive parents. It further examines the interests of the state in controlling adoption, and when the court considers the best interests of the child. Part II of this Comment will briefly summarize recent Supreme Court decisions in this area, outlining the growth of putative fathers' rights by focusing on *Stanley v. Illinois*,¹⁵ *Quilloin v. Walcott*,¹⁶ *Caban v. Mohammed*,¹⁷ and *Lehr v. Robertson*.¹⁸ Part III will focus specifically on how the law of New York has addressed the rights of putative fathers to secure custody of their children during the process of, or after, an adoption. In particular, Part III will examine the interim standard for consent from *In re Raquel Marie X*¹⁹ when the child is less than six months old at the time of the adoption and how each part of *Raquel Marie's* two-part test²⁰ has been interpreted. Part III will also examine how New York's common law defines the "best interests" of the child. Part IV will analyze New York's adoption veto standards and suggest how it might be possible for New York to give greater rights to those putative fathers who do not know of the birth of their children until after *Raquel Marie's* six month deadline for manifesting parental responsibility has passed.

II. Constitutional Rights of Putative Fathers

A. *The Main Cases*

1. *Stanley v. Illinois*²¹

Until 1972, unwed fathers were presumed to be unfit and neglectful parents.²² Indeed, until that time, the state could remove a child from her home following the death of her mother, even if she had grown up with her father, simply because her

in adoption proceedings. The adoptions will be considered final after the 30 day period following the mother's consent to the adoption.

15. 405 U.S. 645 (1972).

16. 434 U.S. 246 (1978).

17. 441 U.S. 380 (1979).

18. 463 U.S. 248 (1983).

19. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990).

20. See *infra* part III.B.1.

21. 405 U.S. 645 (1972).

22. *Id.* at 650.

parents were not wed to one another.²³ On the other hand, the only way a state could remove a non-delinquent child from the home of her married parents was to prove that they were unfit as parents, and unable to provide adequate care.²⁴ Thus, the state was discriminating against unwed fathers because of the presumption that they were unfit.²⁵

This was the issue brought before the Supreme Court in *Stanley v. Illinois*.²⁶ In *Stanley*, the father and mother formed a household with their two children, although they were not married to one another.²⁷ Upon the death of the mother, the two children were removed by the state from the father's household and automatically declared wards of the state without a hearing concerning his fitness as a parent.²⁸ The Supreme Court recognized that this situation violated the father's Fourteenth Amendment rights of due process and equal protection because it discriminated against him by presuming that his marital status was a direct reflection on his fitness as a parent.²⁹ The Court concluded that all parents were constitutionally entitled to a fitness hearing before the state could remove their natural

23. *Id.*

24. *Id.* at 649 (citing ILL. REV. STAT. ch. 37, §§ 702-1, 702-4 (1967) (repealed 1988)).

25. *Stanley*, 405 U.S. at 646. Under the pertinent Illinois statute, "parents" were defined as "the father and mother of a legitimate child . . . or the *natural mother* of an illegitimate child, and includes any adoptive parent." *Id.* at 650 (citing ILL. REV. STAT., ch. 37, § 701-14 (1967) (repealed 1988)) (emphasis added). Thus, all mothers, regardless of marital status, were presumed fit as parents, while unwed fathers were not presumed to be legal parents at all. The practical effect was that "the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it [was] presumed at law." *Id.*

26. *Id.* at 645.

27. *Id.* at 646.

28. *Id.*

29. *Id.* at 653-54. The Supreme Court had previously recognized that a parent has a fundamental right to raise his or her child as he or she sees fit. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 746 (1982) (determining that proof of a parent's unfitness must be clear and convincing before the parent-child relationship can be terminated); *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925) (providing that an act requiring that all children be sent to public schools was an unconstitutional interference with a parent's right to direct the education of children under his or her control); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (providing that a state cannot prohibit the teaching of a language other than English in private schools because it infringed upon the rights of parents to make educational decisions regarding their children).

children from their custody.³⁰ However, *Stanley* did not determine the level of protection that the state must give to unwed fathers when the state's interests are greater than those of a father who had raised his own children.³¹

2. Quilloin v. Walcott

Six years later in *Quilloin v. Walcott*,³² the Supreme Court considered a situation in which the father did not live with his child, was not married to the child's mother, had only sporadic visits with the child, and provided infrequent support payments.³³ In that case, a mother wanted her new husband to adopt her then eleven-year-old child.³⁴ The putative father chose not to seek custody for himself, but instead attempted to block the adoption and to secure visitation rights.³⁵ The Court did not find him to be an unfit parent.³⁶ However, the adoption petition was granted³⁷ because "the mother had recently concluded that . . . contacts [between the child and the putative father] were having a disruptive effect on the child,"³⁸ and the trial court found the adoptive father to be a "fit and proper person to adopt the child."³⁹ The putative father appealed, claiming he was constitutionally entitled to an absolute veto over the adoption proceedings unless there had been a finding that he was unfit as a parent.⁴⁰

The Supreme Court took the opportunity to narrow the broad rights granted to biological parents in *Stanley* by holding that the proposed adoption was in the "best interests of the child."⁴¹ The Court also said that since the father had been given notice and an opportunity to be heard, his due process rights had not been violated.⁴² The Court noted that the father

30. *Stanley*, 405 U.S. at 658.

31. See *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978).

32. 434 U.S. 246.

33. *Id.* at 247, 251.

34. *Id.* at 247.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 251.

39. *Id.*

40. *Id.* at 253.

41. *Id.* at 255.

42. *Id.* at 254.

in *Quilloin* "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."⁴³ Additionally, the Court emphasized that the child was being adopted into an already existing family unit.⁴⁴ The Court thus gave more weight to the state's interest in intact family adoptions over adoptions into a family that the child had never known.⁴⁵ The Court concluded that since this father had not displayed any commitment to his child, it was not in the best interests of the child to allow him to block the child's adoption.⁴⁶ The Court terminated this father's parental rights, and allowed the mother's new husband to adopt the child.⁴⁷

3. *Caban v. Mohammed*

Prior to *Caban v. Mohammed*,⁴⁸ even a father such as Quilloin who had maintained a relationship with his child was not allowed standing to consent to, or veto, an adoption without first proving his fitness as a parent.⁴⁹ In *Caban*, Abdiel Caban, although legally married to another woman, lived with, and held himself out to be the husband of Maria Mohammed.⁵⁰ They lived together for five years, during which time Mohammed gave birth to two children by Caban.⁵¹ Caban was named as the father on both children's birth certificates.⁵² However, in December 1973, Maria Mohammed took the children and moved in with Kazin Mohammed, whom she married in January 1974.⁵³ Caban saw his children weekly for the next nine months until their maternal grandmother took them to live with her in Puerto Rico.⁵⁴ In November 1975, Caban fraudulently took the children from Puerto Rico and returned with

43. *Id.* at 256.

44. *Id.* at 255.

45. *Id.*

46. *Id.* at 256.

47. *Id.*

48. 441 U.S. 380 (1979).

49. *Quilloin v. Walcott*, 434 U.S. 246, 251 (1978).

50. *Caban*, 441 U.S. at 382.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

them to New York.⁵⁵ The family court ordered that the children be returned to the temporary custody of the Mohammeds.⁵⁶ Both Mohammed and Caban, now remarried, began adoption proceedings.⁵⁷

After losing in both the surrogate court and the appellate division, and then having his appeal to the New York Court of Appeals dismissed, Caban appealed to the United States Supreme Court on two grounds.⁵⁸ First, Caban asserted that New York's discrimination against unwed fathers violated the Equal Protection Clause of the Fourteenth Amendment.⁵⁹ Second, he argued that the Court's decision in *Quilloin v. Walcott*⁶⁰ "recognized the due process rights of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit parents."⁶¹

The Supreme Court examined the plainly worded gender distinction in New York's 1977 Domestic Relations Law section 111 to determine whether it was substantially related to an important governmental interest.⁶² The Court found, contrary to

55. *Id.* at 383.

56. *Id.*

57. *Id.*

58. *Id.* at 384-85.

59. *Id.* at 385.

60. 434 U.S. 246 (1978).

61. *Caban*, 441 U.S. at 385.

62. *Id.* at 388. N.Y. DOM. REL. LAW § 111 (McKinney 1977) permitted an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding consent. *Id.* Because the statute discriminated based on gender, it was subject to strict scrutiny to determine whether it was substantially related to a significant governmental purpose. *Caban*, 441 U.S. at 388 (citing *Craig v. Boran*, 429 U.S. 190 (1976)).

At the time of the proceedings before the Surrogate, § 111 read as follows:

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;
2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
3. Of the mother, whether adult or infant, of a child born out of wedlock;
4. Of any person or authorized agency having lawful custody of the adoptive child.

The consent shall not be required of a parent who has abandoned the child. . . . For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be

the Mohammeds' assertions, that an unwed father could have as active and affectionate a relationship with his children as an unwed mother.⁶³ The Court additionally found that the gender-based distinction "does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."⁶⁴ The Court held that the Equal Protection Clause does not protect a father who has never come forward to participate in the rearing of his child.⁶⁵ Nevertheless, the Court readily identified fathers such as Caban as having established a substantial relationship with the child and having admitted paternity.⁶⁶ Thus, the Court concluded that fathers should be afforded protection under the Fourteenth Amendment.⁶⁷

Justice Stewart, in his dissent, examined the equal protection claim in more depth:

Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination. Although the analogy to race is not perfect and the constitutional inquiry therefore somewhat different, gender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes.⁶⁸

However, Justice Stewart's ultimate conclusion was that men and women "are simply not similarly situated" to be given equal rights as parents.⁶⁹ To support this, Justice Stewart pointed to the "physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child."⁷⁰ Thus, Stewart concluded that New York's "reality" based statute, which did not favor fathers who had no

sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

N.Y. DOM. REL. LAW § 111 (McKinney 1977), *cited in Caban*, 441 U.S. at 385 n.4.

63. *Caban*, 441 U.S. at 389.

64. *Id.* at 391.

65. *Id.* at 392.

66. *Id.* at 393.

67. *Id.*

68. *Id.* at 398 (Stewart, J., dissenting).

69. *Id.*

70. *Id.* at 399.

relationship to the child, did not violate the Equal Protection Clause of the Fourteenth Amendment and was thus constitutional.⁷¹

Justice Stevens also dissented, joined by Chief Justice Burger and Justice Rehnquist.⁷² These justices acknowledged that from the time of the pregnancy, the mother has control over whether to terminate the pregnancy, whether to reveal the father, and whether she should marry the father or someone else.⁷³ In this sense, Justice Stevens agreed with Justice Stewart that New York's Domestic Relations Law did not violate the Equal Protection Clause.⁷⁴ In addition, the dissent found that since the father had notice and an opportunity to present evidence regarding the child's best interests,⁷⁵ the statute did not violate the Due Process Clause of the Fourteenth Amendment.⁷⁶

4. *Lehr v. Robertson*

The last significant constitutional decision in this area was *Lehr v. Robertson*.⁷⁷ In *Lehr*, the putative father had lived with the mother prior to the child's birth.⁷⁸ Nevertheless, *Lehr* was not named on the birth certificate as the child's father, and never provided financial support.⁷⁹ The mother married another man, Robertson, and two years later consented to Robertson's adoption of her daughter.⁸⁰ Since *Lehr* had not registered with New York's Putative Father Registry,⁸¹ he was not notified of the adoption proceedings that had begun in Ulster County, New York.⁸² He also did not qualify for notice under the then existing Domestic Relations Law section 111-a, enacted to give

71. *Id.*

72. *Id.* at 401 (Stevens, J., dissenting).

73. *Id.* at 404-05.

74. *Id.* at 407. Justice Stevens noted that "real differences [between men and women] justify a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption." *Id.*

75. *Id.* at 414.

76. *Id.* at 406 n.13.

77. 463 U.S. 248 (1983).

78. *Id.* at 252.

79. *Id.*

80. *Id.* at 250.

81. N.Y. SOC. SERV. LAW § 372-c (McKinney 1988) (establishing a registry which affords putative fathers an opportunity to be heard in the event of a legal change of custody). See also *infra* text accompanying notes 276-79.

82. *Lehr*, 463 U.S. at 250-51.

notice of termination of parental rights to unwed fathers.⁸³ After the mother and Robertson began the adoption proceeding, Lehr filed a visitation and paternity action in the Westchester County Family Court.⁸⁴ The Ulster County judge stayed the paternity proceeding until he could rule on a motion to change the venue of that proceeding to Ulster County.⁸⁵ It was then that Lehr learned of the adoption proceeding in Ulster.⁸⁶ Although the Ulster County judge was aware of the petition for paternity (since he had stayed the proceeding), he signed the adoption order because "he did not believe he was required to give notice to [the father] prior to the entry of the order of adoption."⁸⁷ On appeal to the United States Supreme Court, Lehr argued on both due process and equal protection grounds.⁸⁸

The Court first addressed the due process claim.⁸⁹ The Court balanced the state's "paramount interest in the welfare of children"⁹⁰ against the parent's liberty interest in raising his or her child.⁹¹ The differences between the already developed parent-child relationships in *Stanley* and *Caban* and the potential relationships in *Quilloin* and *Lehr* were "both clear and significant. . . . [T]he mere existence of a biological link does not merit equivalent constitutional protection."⁹² Thus, a demonstrated relationship must have developed between father and child

83. *Id.* at 251. Essentially, Lehr had not been adjudicated to be the father of the child, nor had he begun proceedings to be so named; he was not listed as the father on the child's birth certificate, was not living openly with the mother, and was not married to the child's mother. *Id.* See also *infra* note 96 and accompanying text.

84. *Lehr*, 463 U.S. at 252.

85. *Id.* at 252-53.

86. *Id.* at 253.

87. *Id.* *Caban*, 441 U.S. 380 was decided two months after the entry of the Lehr adoption order in the Ulster County Court. *Lehr*, 463 U.S. at 254 n.7. On Lehr's appeal to the appellate division, the court held that *Caban* should not be applied retroactively, thus forcing Lehr to effectively re-argue the constitutional issues already settled in *Caban*. *Id.* at 253.

88. *Id.* at 255.

89. *Id.* at 256.

90. *Id.* at 257.

91. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also *supra* note 29.

92. *Lehr*, 463 U.S. at 261.

before that relationship can be found deserving of constitutional protection.⁹³

In addressing the equal protection claim, the Court again emphasized the existence or non-existence of a substantial relationship between parent and child in evaluating the best interests of the child.⁹⁴ The Court summarily concluded that because there was no relationship to protect, the New York law was not denying *Lehr* any constitutional protection.⁹⁵ *Lehr*, therefore, initiated a two-tiered standard of analysis to determine the rights of putative fathers: (1) is the putative father deserving of notice,⁹⁶ and if so, (2) can he demonstrate fitness as a parent?⁹⁷

Justice White, joined by Justices Marshall and Blackmun, strongly dissented.⁹⁸ Adopting an entirely different reading of the "facts,"⁹⁹ the dissent concluded that *Lehr* was never afforded notice or an opportunity to be heard.¹⁰⁰ Thus, *Lehr's* due process rights had been violated.¹⁰¹ The dissenting justices concluded that the state must make a reasonable effort to determine the identity of the father and give him adequate notice.¹⁰²

93. *Id.* at 259. See discussion *supra* part II.A.2.

94. *Lehr*, 463 U.S. at 266-67.

95. *Id.* at 267.

96. *Id.* at 263-64. See *infra* note 108.

97. *Lehr*, 463 U.S. at 267. An unwed father can demonstrate fitness as a parent by showing that he has established custodial, personal or financial relationships with the child. *Id.*

98. *Id.* at 268 (White, J., dissenting).

99. *Id.* at 268-69.

100. *Id.* at 271 (questioning the quality and quantity of the factual record in the lower courts, noting that *Lehr's* legitimation proceedings were stayed and then dismissed on the mother's motions, and chiding the majority for not assuming that *Lehr's* allegations are true—that "but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections").

101. *Id.* at 276.

102. *Id.* at 272-73.

III. New York's Domestic Relations Law

A. *The Law*

After the Supreme Court's decision in *Stanley v. Illinois*,¹⁰³ and *Caban v. Mohammed*,¹⁰⁴ the New York Legislature appointed special commissions to address the issue of the putative father's due process rights.¹⁰⁵ Their function was to better protect the interests of putative fathers, while still protecting the interests of the child and the interests of the state to procure final and prompt adoptions.¹⁰⁶ The result was the enactment of Domestic Relations Law section 111-a in 1980.¹⁰⁷ The new law requires notice to seven categories of fathers who were likely to have already assumed some responsibility for the care of their children under the age of six months at the time of the adoption.¹⁰⁸ These categories include men adjudicated by a court to

103. 405 U.S. 645 (1972).

104. 441 U.S. 380 (1979).

105. *Lehr*, 463 U.S. at 263.

106. *Id.* at 263 n.20.

The measure is intended to codify the minimum protection for the putative father which *Stanley* would require. In so doing it reflects policy decisions to (a) codify constitutional requirements; (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interest of children.

Id. (quoting App. to Appellant's Brief at C-15, *Lehr v. Robertson*, 463 U.S. 248 (1983) (No. 81-1756)).

107. N.Y. DOM. REL. LAW § 111-a (McKinney 1988 & Supp. 1994). See Ch. 575, § 1, 1980 N.Y. Laws 1046 (McKinney).

108. N.Y. DOM. REL. LAW § 111-a(1)(d). Categories of persons who must be notified include:

- a) persons adjudicated by a court of New York to be a father;
 - b) persons adjudicated by another United States court to be the father, when a certified copy of the court order has been filed with the putative father registry, pursuant to § 372-c of the Social Services Law;
 - c) any person who has filed an unrevoked notice of intent to claim paternity, pursuant to § 372-c of the Social Services Law;
 - d) any person recorded on the child's birth certificate as the child's father;
 - e) any person who is openly living with the child and the child's mother at the time of the proceeding and who is holding himself out to be the child's father;
 - f) any person who has been identified as the father by the mother in a written, sworn statement;
 - g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument.
- Id.* See also *In re Adoption of Jessica XX*, 54 N.Y.2d 417, 425 n.5, 430 N.E.2d 896, 899 n.5, 446 N.Y.S.2d 20, 23 n.5 (1981).

be the father, fathers who have filed with the Putative Father Registry,¹⁰⁹ fathers named on birth certificates, and fathers who have married the mother or lived with her and their child during the six month period prior to the adoption.¹¹⁰

In response to *Caban*, the legislature amended section 111 to require the consent of unwed fathers in specific circumstances where the father was likely to have created a relationship with his child.¹¹¹ These changes supported fathers who had "unambiguously manifested . . . a substantial, continuous, meaningful family relationship,"¹¹² but prevented fathers who merely wanted to frustrate adoptions from doing so.¹¹³

109. See *supra* note 81.

110. N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1988 & Supp. 1994).

111. N.Y. DOM. REL. LAW § 111(1)(d), (e) (McKinney 1988 & Supp. 1994).

112. *In re Raquel Marie X*, 76 N.Y.2d 387, 399, 559 N.E.2d 418, 422, 559 N.Y.S.2d 855, 859 (1990).

113. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 1988). The text in relevant part states:

If the child is placed with the adoptive parents more than six months after the child's birth, the father must have maintained substantial and continuous or repeated contact with the child as manifested by:

- 1) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, *and either*
- 2) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or agency having care or custody of the child, *or*
- 3) the father's regular communication with the child or with the person or agency having custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. A father who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child.

Id. (emphasis added).

If the child was placed for adoption under the age of six months, the father's consent is required if:

- 1) [the] father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; *and*
- 2) such father openly held himself out to be the father of the child; *and*
- 3) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy.

N.Y. DOM. REL. LAW § 111(1)(e) (McKinney 1988) (emphasis added).

B. Consent

1. The Raquel Marie Two-Prong Test

New York's attempt to establish a constitutional standard for determining when a putative father's consent was necessary was declared unconstitutional in 1990 by the New York Court of Appeals in *In re Raquel Marie X*.¹¹⁴ In *Raquel Marie*, the father, Miguel, knew of his girlfriend's pregnancy and had lived with her on and off over a period of five years.¹¹⁵ Raquel Marie was their second child together.¹¹⁶ Unfortunately, Raquel Marie was born during a time when her father and mother were fighting and incompatible.¹¹⁷ Miguel tried living with his daughter and girlfriend for a week before leaving because he "didn't feel safe staying there."¹¹⁸

The New York Court of Appeals balanced the interests of the state with those of the father, noting that the "living together" requirement¹¹⁹ contributed nothing towards promoting quick, permanent adoptions, and in fact, gave the biological mother an easy way to prevent the father from interfering with her choice to give the child up for adoption.¹²⁰ Emphasizing the relationship between the father and mother, rather than the relationship between the father and child, the court also found that this requirement does not further the state's interest in determining parental responsibility for that child.¹²¹ Thus, subsection (1)(e)(i) of section 111 of the Domestic Relations Law

114. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990) [hereinafter *Raquel Marie II*]. *Raquel Marie II* is actually a consolidation of two cases: *In re Raquel Marie*, 150 A.D.2d 23, 545 N.Y.S.2d 379 (2d Dep't 1988) [hereinafter *Raquel Marie I*]; and *In re Baby Girl S.*, 141 Misc. 2d 905, 535 N.Y.S.2d 676 (Sur. Ct. N.Y. County 1988). For discussion of *In re Baby Girl S.*, see *infra* part III.B.6.

115. *Raquel Marie I*, 150 A.D.2d at 25, 545 N.Y.S.2d at 380.

116. *Id.*

117. *In re Raquel Marie X*, 173 A.D.2d 709, 713, 570 N.Y.S.2d 604, 607 (2d Dep't 1991) [hereinafter *Raquel Marie III*]. Raquel Marie's mother had gone so far as to file criminal charges against Miguel for assault and non-payment of child support. *Id.*

118. *Raquel Marie I*, 150 A.D.2d at 25, 545 N.Y.S.2d at 380.

119. N.Y. DOM. REL. LAW § 111(1)(e)(i) (McKinney 1988) (requiring that the father openly live with the child or the child's mother for a continuous period of six months prior to the adoption).

120. *Raquel Marie II*, 76 N.Y.2d at 405-06, 559 N.E.2d at 426, 559 N.Y.S.2d at 863.

121. *Id.* at 406, 559 N.E.2d at 426, 559 N.Y.S.2d at 863.

was declared unconstitutional.¹²² Additionally, the remaining two sections of subsection (1)(e) were stricken because of the court's understanding that the legislature would not want them to stand alone.¹²³ The court then developed an interim standard for determining a putative father's rights to consent to or veto an adoption.¹²⁴ First, the unwed father must be willing to assume full custody of the child himself, and not merely block the adoption.¹²⁵ At this stage, the court would consider the question of unfitness or abandonment.¹²⁶ Second, the manifestation of parental responsibility must be prompt.¹²⁷ Towards this end, the Court of Appeals adopted the six-month period prior to the adoption, prescribed in Domestic Relations Law section 111(1)(e), as the time during which parental responsibility must be demonstrated.¹²⁸ The New York Court of Appeals also advised lower courts, when considering this question in the future, to examine whether the father openly acknowledged paternity, paid pregnancy and birthing expenses, or took steps to "establish legal responsibility" for the child.¹²⁹

On remand,¹³⁰ the appellate division found that Miguel, the putative father, had *not* manifested prompt parental responsibility.¹³¹ There, the court found that Miguel's contributions to the medical expenses of Louise, the mother, were half-hearted at best.¹³² Secondly, although Miguel had filed a custody petition three days prior to Raquel Marie's placement for

122. *Id.* at 406, 559 N.E.2d at 427, 559 N.Y.S.2d at 864.

123. *Id.* at 406-07, 559 N.E.2d at 427, 559 N.Y.S.2d at 864.

124. *Id.* at 407-08, 559 N.E.2d at 427-28, 559 N.Y.S.2d at 864-65. As of the time of publication, there have been several different legislative proposals to the 1991 and 1992 legislatures; however, none have been enacted, and the interim standards are still in place. N.Y. DOM. REL. LAW § 111-a commentary at 109-10 (McKinney Supp. 1995).

125. *Raquel Marie II*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. See *supra* note 113 and accompanying text.

126. *Raquel Marie II*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

127. *Id.* See discussion *infra* parts III.B.4-5.

128. *Raquel Marie II*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

129. *Id.*

130. *Raquel Marie III*, 173 A.D.2d 709, 570 N.Y.S.2d 604.

131. *Id.* at 711, 570 N.Y.S.2d at 605.

132. *Id.* at 712-13, 570 N.Y.S.2d at 606-07. Miguel had paid most of Louise's expenses with checks from his father even though he was employed throughout the time in question. *Id.* at 712-13, 570 N.Y.S.2d at 607.

adoption, the court found that Miguel had not taken legal action to establish his paternity.¹³³ Lastly, the court examined Miguel's abusive behavior towards Louise in general,¹³⁴ and his lack of support for his other daughter by Louise.¹³⁵ The court concluded that Miguel was unwilling to accept parental responsibility for Raquel Marie.¹³⁶

2. *In re John E.: Prong One*

In the case of *In re John E.*¹³⁷ decided five months after *Raquel Marie*, the court tested the first prong of the interim standard.¹³⁸ In *John E.*, John, the petitioner and biological father, was involved in an affair with a married woman.¹³⁹ The child, Daniel, was born while the mother was living with her husband.¹⁴⁰ Daniel was placed with the respondents, the adoptive parents, for private adoption immediately after his birth.¹⁴¹ One month later, John petitioned the court for an order of filiation so that he would be recognized as Daniel's father,¹⁴² and therefore gain custody of Daniel.¹⁴³ The human leucocyte antigen (HLA) test proved John's paternity to 99.93% accuracy.¹⁴⁴ The Rockland County Family Court did not complete the "best interests" hearing until Daniel was twenty-two months old.¹⁴⁵ Despite these efforts, the appellate division found that "the best interests of Daniel would clearly be served by permitting him to remain with the only parents he had known since his birth

133. *Id.* at 711-12, 570 N.Y.S.2d at 606.

134. *Id.* at 713-14, 570 N.Y.S.2d at 607.

135. *Id.* at 714, 570 N.Y.S.2d at 607-08.

136. *Id.* at 714, 570 N.Y.S.2d at 608.

137. 164 A.D.2d 375, 564 N.Y.S.2d 439 (2d Dep't 1990).

138. *Id.*

139. *Id.* at 376, 564 N.Y.S.2d at 440.

140. *Id.*

141. *Id.*

142. Because Daniel was born while his mother was married, there was a legal presumption that his mother's husband was also Daniel's natural father. A mere plurality of the Supreme Court found this presumption to be constitutional. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (confirming the constitutionality of a California statute (CAL. EVID. CODE § 621) providing that a child born to a married woman living with her husband is presumed to be a child of the marriage and the presumption can only be rebutted by the husband or wife).

143. 164 A.D.2d at 376, 564 N.Y.S.2d at 440.

144. *Id.*; see *supra* note 9.

145. 164 A.D.2d at 376-77, 564 N.Y.S.2d at 440.

three years ago.”¹⁴⁶ The court determined that John had paid for the mother’s first visit to the obstetrician, and that John had contacts with both the natural mother and her sister after the mother’s return to her husband’s home.¹⁴⁷ Even though John had filed a request for filiation and custody one month after Daniel’s birth, the appellate division denied that he “took any steps whatever during this period to establish his legal responsibility for the child.”¹⁴⁸ The court explained this “puzzl[e]” by examining petitioner’s motive for seeking custody, and his future arrangements for Daniel.¹⁴⁹ Since John was unmarried and employed full time, he planned on placing Daniel in his adult daughter’s day care center during the day.¹⁵⁰ The court concluded that John’s “manifestation of interest in his now 3-year-old child—a child whom he has never known—was neither sufficiently prompt nor sufficiently substantial to require constitutional protection.”¹⁵¹

Unfortunately, the slow pace of the proceeding influenced the two justices who may have otherwise dissented from the *John E.* decision.¹⁵² The plurality referred to the “wrenching uprooting,”¹⁵³ the “‘devastating’ psychological effects,”¹⁵⁴ and the “serious damage” facing Daniel if removed from the home of his adoptive parents.¹⁵⁵ Had the proceeding not lasted three years, these two justices may have agreed with the dissenting justice, who vehemently attacked the plurality’s “tortured read-

146. *Id.* at 379, 564 N.Y.S.2d at 442.

147. *Id.*

148. *Id.* at 380, 564 N.Y.S.2d at 442. The court refers to the period of time provided by the New York Domestic Relations Law. This period is the six months prior to the child’s adoption when the putative father was aware of the pregnancy. *Id.*

149. *Id.* at 381, 564 N.Y.S.2d at 443-44. The “puzzle” referred to constitutes the reasons why the father did not establish paternity during the six month period prior to the child’s adoption. *Id.* Here, the father’s purported reasons for not establishing paternity were that the father himself was raised by foster parents and strongly believed that an important bonding occurs between a child and his biological parents. *Id.* The court concluded, however, that this justification was merely an attempt to block the adoption. *Id.*

150. *Id.* at 382, 564 N.Y.S.2d at 444.

151. *Id.*

152. *Id.* at 388, 564 N.Y.S.2d at 447-48 (Rosenblatt, J., concurring).

153. *Id.* at 386, 564 N.Y.S.2d at 446.

154. *Id.* at 387, 564 N.Y.S.2d at 447.

155. *Id.*

ing of the hearing testimony.”¹⁵⁶ However, the plurality was able to use the petitioner’s choice of care for Daniel as a means to deny petitioner custody under the interim standard.¹⁵⁷

3. *In re Stephen C.*

In an analogous case, *In re Stephen C.*,¹⁵⁸ the father learned of the birth of his child after the adoption proceeding had begun.¹⁵⁹ A family court order granted judgment against the father.¹⁶⁰ However, the court in *Raquel Marie* had not found the “living together” requirement unconstitutional at the time of that proceeding.¹⁶¹ On appeal, the court granted a best interests hearing since by that time the court in *Raquel Marie* had invalidated New York Domestic Relations Law section 111(1)(e)(i).¹⁶²

The father in *Stephen C.* was denied custody because he was unwilling to assume full custody himself.¹⁶³ The father did not feel that he could raise his child himself and wanted to place the child with his grandmother in Puerto Rico or his sister in Texas.¹⁶⁴ In fact, the father was in jail at the time of the hearing.¹⁶⁵ These cases, therefore, provide little hope for putative fathers seeking custody.¹⁶⁶

156. *Id.* at 391, 564 N.Y.S.2d at 450 (Thompson, J., dissenting).

157. *Id.* at 382, 564 N.Y.S.2d at 444. In contrast, at the home of Daniel’s adoptive parents, both parents were professionals. *Id.* There, the adoptive mother would care for Daniel during the day, except for two days during the week, when she worked. *Id.* During those days, a babysitter would care for Daniel. *Id.* The court’s bias is clearly evident in the choice of wording for the type of care Daniel would receive. For example, although both the adoptive parents and John planned to leave Daniel with other caregivers, the adoptive parents’ caregiver was referred to as a “babysitter,” *id.* at 382, 564 N.Y.S.2d at 444, while the natural father’s caregiver was referred to as “day care.” *Id.* at 381-82, 564 N.Y.S.2d at 444.

158. 170 A.D.2d 1035, 566 N.Y.S.2d 178 (4th Dep’t 1991).

159. *Id.* at 1036, 566 N.Y.S.2d at 179.

160. *Id.* at 1035, 566 N.Y.S.2d at 179.

161. *Id.* See *supra* text accompanying notes 119-22.

162. *Id.* at 1035-36, 566 N.Y.S.2d at 179. Domestic Relations Law section 111(1)(e)(i) requires in pertinent part that the “father openly live with the child or the child’s mother for a continuous period of six months immediately preceding the placement of the child for adoption.” N.Y. DOM. REL. LAW § 111(1)(e)(i) (McKinney 1988).

163. *Stephen C.*, 170 A.D.2d at 1035-36, 566 N.Y.S.2d at 179.

164. *Id.*

165. *Id.*

166. See, e.g., *In re John E.*, 164 A.D.2d 375, 564 N.Y.S.2d 439 (2d Dep’t 1990).

4. In re *Kiran Chandini S.: Prong Two*

If the court is satisfied that the putative father is willing to assume full custody himself, the court will then look to see if he has promptly manifested an intent to assume parental responsibility.¹⁶⁷ In *In re Kiran Chandini S.*,¹⁶⁸ a father was able to satisfy this test and receive a hearing as to the best interests of his child.¹⁶⁹ The father apparently did not appeal the decree of custody.¹⁷⁰ In addition, the record before the appellate division was insufficient to resolve the question of custody.¹⁷¹ Consequently, the case was remanded.¹⁷² Thus, the court gave this father no more than standing to seek custody of his own child.¹⁷³ The family court and the appellate division accepted the evidence that the father had offered to pay for the pregnancy and birth expenses of the mother, but she refused his offer since she had already received funds from the state.¹⁷⁴ The appellate division also affirmed the family court's finding that the father publicly acknowledged his paternity in the six months prior to the adoption.¹⁷⁵ Lastly, the court found that because the child was placed for adoption without the father's notice, the father had not abandoned his daughter.¹⁷⁶

5. In re *Robert O.*

Finally, the recent case of *In re Robert O.*¹⁷⁷ measured "promptness" in terms of the life of the child, rather than from the point of the father's knowledge of the birth.¹⁷⁸ In *Robert O.*, the father and mother were engaged to be married and were

167. *Raquel Marie II*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. See *supra* text accompanying notes 127-28.

168. 166 A.D.2d 599, 560 N.Y.S.2d 886 (2d Dep't 1990).

169. *Id.* at 601, 560 N.Y.S.2d at 888.

170. *Id.*

171. *Id.*

172. *Id.* It is interesting to note that the court remanded to determine whether there were "any 'extraordinary circumstances' which would permit an inquiry into the question of what custody arrangement would be in the child's best interests." *Id.* (citation omitted).

173. *Id.* See also discussion *infra* part III.C (discussing the best interests of the child).

174. 166 A.D.2d at 601, 560 N.Y.S.2d at 888.

175. *Id.*

176. *Id.*

177. 80 N.Y.2d 254, 604 N.E.2d 99, 590 N.Y.S.2d 37 (1992).

178. *Id.* at 264, 604 N.E.2d at 103, 590 N.Y.S.2d at 41.

living together at the time of conception.¹⁷⁹ However, because they disagreed about when to marry, the mother cancelled their engagement.¹⁸⁰ The father left their home without ever knowing of the mother's pregnancy.¹⁸¹ The mother surrendered custody without naming the father, and the court did not ask her to reveal the father's identity during the adoption proceeding.¹⁸² Eighteen months after the birth, the mother and biological father reconciled and she told him of the child.¹⁸³ In an effort to assert his parental rights, the father promptly registered with the Putative Father Registry, reimbursed the mother for all birthing expenses, and filed to vacate the adoption.¹⁸⁴

In sustaining the validity of the adoption, the court stressed the state's interest in providing permanent, stable homes for adopted children.¹⁸⁵ On appeal, the father contended that because "New York laws fail to require notice and consent from a father in his position, they den[ied] [him] a constitutional liberty interest" in raising his own child.¹⁸⁶ His proposed solution was to require a judicial determination of the identity of the biological father by requiring unwed mothers to testify as to paternity.¹⁸⁷

The Court of Appeals rejected this argument and affirmed the lower court's opinion, again emphasizing the state's concerns for: 1) prompt and certain adoption procedures, 2) the best interests of the child, and 3) protecting the rights of interested third parties like the adoptive parents, when weighing the rights of putative fathers.¹⁸⁸ The court determined that the relevant timetable of concern is the child's.¹⁸⁹ Regardless of whether the father acted promptly once he became aware of the child, the court maintained that "[p]romptness is measured in terms of the baby's life, not by the onset of the father's aware-

179. *Id.* at 259, 604 N.E.2d at 100, 590 N.Y.S.2d at 38.

180. *In re Robert O.*, 173 A.D.2d 30, 31, 578 N.Y.S.2d 594, 595 (2d Dep't 1991).

181. *Id.*

182. *Id.* at 31-32, 578 N.Y.S.2d at 595.

183. *Id.* at 32, 578 N.Y.S.2d at 595.

184. *Id.*

185. *Id.* at 35, 578 N.Y.S.2d at 597.

186. *Robert O.*, 80 N.Y.2d at 261, 604 N.E.2d at 101, 590 N.Y.S.2d at 39.

187. *Id.* at 261, 604 N.E.2d at 101-02, 590 N.Y.S.2d at 39-40.

188. *Id.* at 264, 604 N.E.2d at 103, 590 N.Y.S.2d at 41 (citing *Lehr*, 463 U.S. at 263-66).

189. *Id.* at 264-65, 604 N.E.2d at 103-04, 590 N.Y.S.2d at 41-42.

ness.”¹⁹⁰ In addition, the court recognized the state’s interests in finalizing adoptions.¹⁹¹ It stated that rearranging the lives of the adoptive family unit more than a year after the adoption became final did not promote the stability necessary for the child.¹⁹² Lastly, the majority found that while “regrettable,” petitioner’s inaction during the pregnancy was “solely attributable to him.”¹⁹³

The concurring judge disagreed with the basis for the court’s opinion, and instead favored the conclusion for public policy reasons.¹⁹⁴ The concurrence asserted that “in this age of sexual permissiveness,”¹⁹⁵ the court was imposing an “unrealistic burden” on the “multitudes of men who . . . have intimate relations with women to whom they are not married.”¹⁹⁶ He further contended that “a rule which places the onus on the man to investigate whether a woman with whom he is no longer intimate has become pregnant is simply out-of-step with modern mores and the realities of contemporary heterosexual liaisons.”¹⁹⁷ Nonetheless, the court agreed that petitioner’s constitutional interest was “slight,” though not extinguished, because of the weighty state interest in the finality of adoptions.¹⁹⁸

6. In re *Baby Girl S.*: A Case of Fraud

It is possible, as in the *Baby Girl Clausen*¹⁹⁹ case, that the natural mother of the child will commit a fraud upon the court. In *In re Baby Girl S.*,²⁰⁰ the court reversed an adoption because the adoptive parents and the natural mother schemed to prevent the family court judge from discovering the natural fa-

190. *Id.* at 264, 604 N.E.2d at 103, 590 N.Y.S.2d at 41.

191. *Id.*

192. *Id.* at 264-65, 604 N.E.2d at 104, 590 N.Y.S.2d at 42.

193. *Id.* at 265, 604 N.E.2d at 104, 590 N.Y.S.2d at 42.

194. *Id.* at 267, 604 N.E.2d at 105, 590 N.Y.S.2d at 43 (Titone, J., concurring).

195. *Id.* at 268, 604 N.E.2d at 106, 590 N.Y.S. 2d at 44.

196. *Id.* at 267-68, 604 N.E.2d at 106, 590 N.Y.S.2d at 44.

197. *Id.* at 268, 604 N.E.2d at 106, 590 N.Y.S.2d at 44.

198. *Id.* at 270, 604 N.E.2d at 107, 590 N.Y.S.2d at 45.

199. 502 N.W.2d 649 (Mich. 1993). In *Clausen*, the natural mother committed a fraud upon the court in order to proceed in the adoption of her child unhindered by the effects of giving notice to the natural father of the child or of receiving his consent. *Id.* at 652.

200. 141 Misc. 2d 905, 535 N.Y.S.2d 676 (Sur. Ct. N.Y. County 1988).

ther's existence and his resistance to the adoption.²⁰¹ The surrogate's court in *Baby Girl S.* firmly condemned any kind of fraud committed against the court.²⁰²

In *Baby Girl S.*, the natural mother prevented Gustavo, the natural father, from living with her because she was still married to another man.²⁰³ Regina, the natural mother, was concerned that her relationship with Gustavo would jeopardize her petition for the custody of her nine-year-old son in her pending divorce proceeding.²⁰⁴ Originally, Regina told Gustavo that she thought she was pregnant, but later told him that she was not, and ended their relationship.²⁰⁵ Regina learned about the adoptive parents, two attorneys, through a newspaper advertisement placed by the adoptive parents and their attorney.²⁰⁶ Not long after this, Gustavo discovered that Regina was indeed pregnant with his child.²⁰⁷ He offered to marry Regina, but she refused.²⁰⁸ Gustavo then served Regina with paternity papers.²⁰⁹ Regina discussed the allegations with the adoptive parents, who were both attorneys.²¹⁰ Either for "medical reasons," or because she was so advised, Regina did not appear in court to answer Gustavo's allegations.²¹¹ One week later, Baby Girl S. was born, and Regina signed the consent-to-adoption forms supplied to her by the adoptive parents' attorney.²¹² Regina used her maiden name on the release forms to prevent Gustavo from discovering the baby's birth in case he had filed with the Putative Father Registry.²¹³ At the court appearance to finalize the adoption, Regina did not inform the judge about Gustavo.²¹⁴ Under the technical requirements of Domestic Relations Law section 111(1)(e), still in effect at the time, Gustavo's consent

201. *Id.* at 911-12, 535 N.Y.S.2d at 680.

202. *Id.* at 912, 535 N.Y.S.2d at 680.

203. *Id.* at 908, 535 N.Y.S.2d at 678.

204. *Id.*

205. *Id.* at 908, 535 N.Y.S.2d at 678-79.

206. *Id.* at 908, 535 N.Y.S.2d at 678.

207. *Id.* at 909, 535 N.Y.S.2d at 678.

208. *Id.* at 908, 535 N.Y.S.2d at 678.

209. *Id.* at 909, 535 N.Y.S.2d at 678.

210. *Id.* at 909, 535 N.Y.S.2d at 678-79.

211. *Id.* at 909, 535 N.Y.S.2d at 679.

212. *Id.*

213. *Id.*

214. *Id.* at 910, 535 N.Y.S.2d at 679.

was not required because he had not lived with Regina for the six months preceding the adoption.²¹⁵ However, since the adoptive parents knew of Gustavo's paternity action in another jurisdiction, they had a duty to inform the court of this other "interested party."²¹⁶

The court condemned the actions of the adoptive parents, calling their actions, "a blatant attempt to make an end run around the Family Court proceedings."²¹⁷ It characterized the adoption proceeding as "permeated with fraud and misrepresentation."²¹⁸ For this reason alone, the court dismissed the adoption.²¹⁹ In dicta, the court reasoned that by initiating proceedings for custody, Gustavo held himself out to be the father.²²⁰ Also, the court found that by "seeking a declaration of his paternity of Regina's unborn child, Gustavo obligated himself to support his child."²²¹ Thus, Gustavo had satisfied two of the three criteria listed in New York's Domestic Relations Law section 111(1)(e).²²² Lastly, the court recognized Gustavo's repeated proposals of marriage, and his offer to support and gain custody of the child.²²³ It concluded that he was prevented at all times from fulfilling the final requirement of Domestic Relations Law section 111(1)(e), the "living together" requirement.²²⁴

Under today's post *Raquel Marie*²²⁵ standard, if the court had asked Regina to identify any parties deserving of notice under Domestic Relations Law section 111-a, she would have been required to name Gustavo.²²⁶ Fortunately, the court applied the "savings clause" of Domestic Relations Law section 111(1)(d) to subsection (1)(e).²²⁷ Subsection 111(1)(d), which re-

215. *Id.*

216. *Id.* at 910-11, 535 N.Y.S.2d at 679-80. The court noted the adoptive parents were attorneys but did not base the duty on that fact. *Id.*

217. *Id.* at 911, 535 N.Y.S.2d at 680.

218. *Id.* at 912, 535 N.Y.S.2d at 680.

219. *Id.*

220. *Id.* at 914, 535 N.Y.S.2d at 681.

221. *Id.*

222. *See* N.Y. DOM. REL. LAW § 111(1)(e).

223. *Baby Girl S.*, 141 Misc. 2d at 914, 535 N.Y.S.2d at 682.

224. *Id.*

225. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990).

226. N.Y. DOM. REL. LAW § 111-a(1)(d). *See supra* note 108.

227. *Baby Girl S.*, 141 Misc. 2d at 916, 535 N.Y.S.2d at 683.

quires the father to visit or live with the child or mother,²²⁸ provides fathers a legal safety net when they are "prevented from [meeting the requirements] of [section] 111(1)(d) by the person or authorized agency having lawful custody of the child."²²⁹ In applying the savings clause from subsection (1)(d) to (1)(e), the court relied on the legislative history of the statute.²³⁰ It concluded that the intent behind the savings clause was to "safeguard the constitutional rights of an unwed father who has manifested a significant continuous interest in his child but was prevented from implementing it."²³¹ Consequently, the court reached a satisfactory interpretation of the statute as a whole without finding subsection (1)(e) unconstitutional.²³²

C. "Best Interests of the Child"

The final hurdle that putative fathers must overcome before receiving custody is what is commonly called the "best interests of the child" hearing.²³³ A "best interests" hearing would theoretically be held after a father has shown a willingness to assume full custody and a prompt manifestation of parental responsibility.²³⁴ However, as has been demonstrated, it is initially difficult to meet the court's requirements for standing.²³⁵ Additionally, since the evidence for a best interests hearing would duplicate the evidence presented to show manifestation of parental responsibility, the court may not allow a separate hearing.²³⁶ Finally, the court may decide that

228. N.Y. DOM. REL. LAW §§ 111(1)(d)(ii), (iii) (McKinney 1988).

229. *Id.*

230. *Baby Girl S.*, 141 Misc. 2d at 916, 535 N.Y.S.2d at 683.

231. *Id.* at 915, 535 N.Y.S.2d at 682.

232. *Id.* at 917, 535 N.Y.S.2d at 683.

233. *See Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 825 (1976).

234. *Raquel Marie II*, 76 N.Y.2d at 401, 559 N.E.2d at 424, 559 N.Y.S.2d at 861.

235. *See supra* part II.A.

236. *See In re Female Infant F.*, 191 A.D.2d 437, 438, 594 N.Y.S.2d 303, 305 (2d Dep't 1993). Here, the father was entitled to, and given, notice of the adoption "for the purpose of allowing him to present evidence concerning the best interests of the child." *Id.* The court then rejected the contention that, after a hearing to determine whether the father's consent is required, there should be a separate best interests hearing. *Id.* The court used the language of Domestic Relations Law § 111-a itself, stating that "the 'sole purpose' of the notice provision is to enable the

even if the father is deemed fit to receive custody, it may be denied to him because of "extraordinary circumstances."²³⁷

1. Bennett v. Jeffreys

The New York Court of Appeals addressed the issue of "extraordinary circumstances" in *Bennett v. Jeffreys*.²³⁸ Although *Bennett* was decided prior to the development of most of the putative fathers' rights,²³⁹ and did not deal with fathers at all, *Bennett* was integral in defining what is called the "best interests of the child."²⁴⁰ In *Bennett*, the natural mother was a fifteen-year-old girl who allowed her mother's friend to take custody of her daughter after the child was born.²⁴¹ The friend, Mrs. Jeffreys, intended to adopt the child, but never did.²⁴² When the natural mother reached the age of twenty-three, she attempted to regain custody of her daughter, who was then eight.²⁴³ The mother was about to graduate from college, and was living with her parents, who were supportive of the child's return to their home.²⁴⁴ On the other hand, by the time of the hearing, Mrs. Jeffreys was "separated from her husband . . . employed as a domestic, and, on occasion, . . . kept the child in a motel."²⁴⁵ Since there had been no adoption, the sole issue was whether it was in the child's best interests to return her to her mother, even after a prolonged separation which had not been due to the mother's abandonment or neglect.²⁴⁶

person served to 'present evidence to the court relevant to the best interests of the child.'" *Id.* (citing N.Y. DOM. REL. LAW § 111-a(3) (McKinney 1988)).

The court also conducted such a "best interests" hearing in *In re Stephen C.*, to determine that the father's consent to the adoption was not required. 170 A.D.2d 1035, 566 N.Y.S.2d 178 (4th Dep't 1991).

237. *Bennett*, 40 N.Y.2d at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823. See also *In re Kiran Chandini S.*, 166 A.D.2d 599, 601, 560 N.Y.S.2d 886, 888 (2d Dep't 1990) (remanding for a further hearing to determine if "extraordinary circumstances" exist).

238. *Bennett*, 40 N.Y.2d at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

239. *Bennett* was decided prior to *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983). See *supra* parts II.A.2-4 for discussion of these cases.

240. *Bennett*, 40 N.Y.2d at 549, 356 N.E.2d at 283, 387 N.Y.S.2d at 826.

241. *Id.* at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

242. *Id.*

243. *Id.* at 544-45, 356 N.E.2d at 280, 387 N.Y.S.2d at 823-24.

244. *Id.* at 545, 356 N.E.2d at 280, 387 N.Y.S.2d at 823-24.

245. *Id.* at 545, 356 N.E.2d at 280, 387 N.Y.S.2d at 824.

246. *Id.* at 545, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

The court acknowledged that there had been a "shifting" in constitutional thinking, giving children rights that are at least as great in constitutional weight as those of adults.²⁴⁷ Additionally, if there was a conflict between the interests of the child in being in a stable home and the interests of the natural parent in keeping that child, the child's would be superior.²⁴⁸ Further, the court stated that "the day is long past . . . when the right of a parent to the custody of his or her child, where extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right."²⁴⁹

The question thus becomes, what are the "best interests" of the child? The court's answer rejects traditional notions of best interests in favor of a more flexible and practical approach in a custody proceeding:

The child's "best interest" is not controlled by whether the natural parent or non-parent would make a "better" parent, or by whether the parent or non-parent would afford the child a "better" background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection between the child and those who vie for its custody. Instead . . . the court is guided by principles which reflect a "considered social judgments in this society respecting family and parenthood . . . [which] do not . . . dictate that the child's custody be routinely awarded to the natural parent."²⁵⁰

In *Bennett*, the trial court named as the extraordinary circumstances the "protracted separation of mother from child."²⁵¹ The court tempered this condition by combining it with other factors: the mother's dependance on her parents for housing; the fact that she was not married; and the child's attachment to

247. *Id.* at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 825.

248. *Id.*

249. *Id.* at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 824-25. Some examples of extraordinary circumstances given by the court were surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time. *Id.* at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 824.

250. *Id.* at 549, 356 N.E.2d at 283, 387 N.Y.S.2d at 826 (citing *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971); *Benitez v. Llano*, 39 N.Y.2d 758, 759, 349 N.E.2d 876, 876, 384 N.Y.S.2d 775, 775 (1976)).

251. *Id.* at 550, 356 N.E.2d at 284, 387 N.Y.S.2d at 827.

Mrs. Jeffreys.²⁵² The Court of Appeals criticized the family court for emphasizing the fitness of the biological mother and failing to comment on the fitness of the non-parent, especially Mrs. Jeffreys's inability to adopt the child without the mother's consent or a finding of abandonment.²⁵³

The Court of Appeals also criticized the appellate division for "automatically" giving the biological parent custody without considering the "extraordinary circumstances."²⁵⁴ The Court of Appeals thus remanded the case for a full hearing into the "qualifications and background" of both the biological mother and the non-parent.²⁵⁵ It instructed the lower court to consider: the psychologists' testimony that return to the biological mother would be "traumatic" for the young girl; the length of time the child was with the non-parent; the circumstances of the non-parent and her inability to adopt; and the age of the child.²⁵⁶ Nonetheless, the Court of Appeals emphasized that the biological parent's right to raise his or her own child is paramount over the rights of non-parents.²⁵⁷ The court "[p]articularly rejected . . . the notion . . . that third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire 'rights' . . . only derivatively by virtue of the child's best interests being considered, a consideration which arises only after . . . the parent's rights and responsibilities have been displaced."²⁵⁸

2. In re *John E.*

The issue for this Comment is whether putative fathers who have not acted promptly to manifest full parental responsibilities, have chosen to "displace" their rights. *Bennett* and the best interests hearing have been applied to cases in which the mother *has* formally relinquished her parental rights to the adoptive parents without notifying the father and the father is trying to gain custody. For example, in *In re John E.*,²⁵⁹ the

252. *Id.*

253. *Id.* at 551, 356 N.E.2d at 284, 387 N.Y.S.2d at 828.

254. *Id.* at 550-51, 356 N.E.2d at 284-85, 387 N.Y.S.2d at 828.

255. *Id.* at 551, 356 N.E.2d at 285, 387 N.Y.S.2d at 828.

256. *Id.* at 552, 356 N.E.2d at 285, 387 N.Y.S.2d at 828.

257. *Id.* at 552, 356 N.E.2d at 285, 387 N.Y.S.2d at 828-829.

258. *Id.* at 552 n.2, 356 N.E.2d at 285 n.2, 387 N.Y.S.2d at 829 n.2.

259. 164 A.D.2d 375, 564 N.Y.S.2d 439 (2d Dep't 1990).

court decided that the petitioner-father did not satisfy the consent requirements under the *Raquel Marie* standard.²⁶⁰ The court then stated that the child's best interests "would clearly be served by permitting him to remain with the only parents he has known since his birth three years ago."²⁶¹ The *John E.* court took the unusual step of analyzing the child's best interests even after determining that petitioner's consent to the adoption was not required.²⁶² Income, home accommodations, psychological examinations, and day care accommodations were factors the court used to conclude that it was in the child's best interests to remain with his adoptive parents.²⁶³

The concurring justice found that the extraordinary circumstances in the case "combine[d] . . . to militate against a change in custody."²⁶⁴ In determining what was in the child's best interests, he relied heavily on the psychologist's testimony about how the change in custody could effect the child since he was then three years old.²⁶⁵ Lastly, the concurring judge relied on *Bennett* because the particular "extraordinary circumstance" in *Bennett*, time, was also the greatest factor in *John E.*²⁶⁶

The *John E.* dissent questioned the plurality's reliance on a "best interest" analysis instead of, or in addition to, the *Raquel Marie* two prong standard for determination of consent.²⁶⁷ The dissent also relied on *Bennett*, emphasizing cases which held that "[a] natural parent may not be deprived of custody of a child absent a threshold showing of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances.'" ²⁶⁸ The dissent then stated that a best interests hearing should not be held until the court determines that extraordinary circumstances exist.²⁶⁹ This would preclude a court from depriving a natural parent of his child's custody just

260. *Id.* at 379, 564 N.Y.S.2d at 442.

261. *Id.* See *supra* part III.B.2 for further discussion.

262. See 164 A.D.2d at 382-83, 564 N.Y.S.2d at 444.

263. *Id.* at 382-83, 564 N.Y.S.2d at 444-45.

264. *Id.* at 388, 564 N.Y.S.2d at 448 (Rosenblatt, J., concurring).

265. *Id.* at 386-87, 564 N.Y.S.2d at 447.

266. *Id.* at 375 n.3, 564 N.Y.S.2d at 448 n.3.

267. *Id.* at 390, 564 N.Y.S.2d at 449 (Thompson, J., dissenting).

268. *Id.* at 393, 564 N.Y.S.2d at 451 (quoting *Bennett*, 40 N.Y.2d at 544, 356 N.E.2d at 280-81, 387 N.Y.S.2d at 824).

269. *Id.*

because it believes "it has found someone better to raise the child."²⁷⁰

IV. Analysis

In the wake of the Supreme Court's decisions in *Stanley* and *Caban*, the New York legislature was faced with the need to balance the state's interest in the finality of adoptions, with the newly competing interests of the putative father. New York adopted the Supreme Court's two-tiered system of review before a father could gain custody of his child,²⁷¹ and then further defined the standards for consent.²⁷² In New York, to gain standing to veto the adoption of his child, a father must first satisfy the baseline requirements for notice by demonstrating a commitment to the child.²⁷³ Notice will be given to seven categories of fathers who are deemed to have asserted a minimum level of parental responsibility.²⁷⁴ This notice, however, does not guarantee an automatic right to veto the adoption of the child; it only allows standing to demonstrate fitness as a parent at a consent hearing.²⁷⁵ The unfairness of this legislation to those not in the seven categories was mitigated by the creation of the Putative Father Registry.²⁷⁶ The Registry was meant to be a "simple means" for unwed fathers to establish paternity, thereby giving them the opportunity to be heard in the event of a legal change of custody.²⁷⁷ Should a father know of the existence of his child, all he has to do to be afforded the registry's protection is mail a postcard to the state registry claiming paternity.²⁷⁸ The registry therefore provides a means for the father to independently establish paternity without relying on the natural mother to notify him about custody proceedings. The

270. *Id.*

271. *Lehr*, 463 U.S. 248. See *supra* part II.A.4.

272. In 1980, Domestic Relations Law § 111 was amended to require the consent of those fathers of out-of-wedlock children who had met certain statutory criteria. See *supra* notes 107-08, 113.

273. See *supra* notes 63-67 and accompanying text.

274. N.Y. DOM. REL. LAW § 111-a (McKinney 1988). See *supra* note 108 for text and corresponding discussion.

275. N.Y. DOM. REL. LAW § 111(1)(d), (e) (McKinney 1988).

276. See *Lehr v. Robertson*, 463 U.S. 248, 263 n.20 (1983). See also *supra* note 81.

277. *Lehr*, 463 U.S. at 263 n.20.

278. *Id.* at 264.

New York Legislature concluded that a more "open ended notice requirement would merely complicate the adoption process, threaten the privacy interests of the unwed mother, create the risk of unnecessary controversy, and impair the desired finality of the adoption decrees."²⁷⁹

New York's limited grant of notice was therefore never intended to give putative fathers a presumptive right to custody of their own children. Domestic Relations Law section 111-a only gives putative fathers the right to notice to be heard on the issue of what is in the best interests of their children,²⁸⁰ and then only if there has been prompt manifestation of parental responsibility.²⁸¹

Therefore, although it appears that unwed fathers have been granted an opportunity to demonstrate that they have developed a relationship with their children, that opportunity is given very slight constitutional protection.²⁸² The state has chosen to prescribe strict requirements for notice and consent and has limited the time within which they can comply.²⁸³ The result is that an unwed father, ignorant of the existence of the Putative Father Registry, can be forced to relinquish his right to a relationship with his child because he did not support that child in a consistent manner prior to the adoption, and because the mother chose not to name him on the birth certificate or at the adoption proceeding.²⁸⁴ This holds true even if the father would have supported the mother or child had he known of the pregnancy. Without notice, the father who may be trying to improve his conditions in order to provide consistent support for a

279. *Id.*

280. N.Y. DOM. REL. LAW § 111-a (McKinney 1988).

281. *Raquel Marie II*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

282. For example, in *In re John E.*, although the putative father proved paternity of his child, paid for an obstetric visit, stayed in contact with the mother, and had filed a petition for declaration of paternity and custody, the court emphasized that John had not taken *any* steps to establish legal responsibility for Daniel within the prescribed six month period. 164 A.D.2d at 380, 564 N.Y.S.2d at 442.

283. See, e.g., *In re Robert O.*, 80 N.Y.2d 254, 604 N.E.2d 99, 590 N.Y.S.2d 37 (1992). There, the court stated that a father who "promptly" complied with the terms of the statute as soon as he found out about his son's birth, was still found not to have complied because "promptness" is to be measured in terms of the baby's life, not from the time of the father's discovery of the birth. *Id.* at 264, 604 N.E.2d at 103, 590 N.Y.S.2d at 41.

284. N.Y. DOM. REL. LAW § 111-a(d), (e) (McKinney 1988).

child he knows is about to be born may never know or learn of the adoption proceeding. This father would never have the opportunity to present his interest in raising the child to the court. Society has chosen to limit these fathers' rights in favor of the greater interest in the expediency and finality of adoptions.²⁸⁵

Problems with the current statutory scheme occur when the putative father does not know of the birth of his child until after that child is over six months old, and he is then unable to demonstrate "prompt" parental responsibility. A father who does not know of the birth of his child until an adoption proceeding has commenced must overcome the surrender agreement that the natural mother has already executed. New York's Social Services Law section 384(5) provides that if the child has been placed with the adoptive parents for more than thirty days following an executed surrender agreement, then no action may be commenced by the surrendering parent to revoke the surrender or to vest the child's custody in any person other than the surrendering parent.²⁸⁶ This becomes important in a situation where the father and mother reconcile so that the mother consents to a change in custody from the adoptive parents to that of the father. If more than thirty days have elapsed following the mother's surrender agreement, neither natural parent has standing to regain custody by revoking the surrender.²⁸⁷

Once a child has been placed in an adoptive home based on a valid surrender agreement, the biological parents have no rights of custody superior to those of the adoptive parents.²⁸⁸ As a consequence, once both sets of parents are presented with the opportunity to argue their fitness, custody shall be based solely on the best interests of the child, and there is no legal presumption that either the adoptive, or the natural parents are more "fit."²⁸⁹ The reality is, however, that once a child has lived in the home of her adoptive parents during the year or more that it takes to conclude contested adoption proceedings, the more likely that the court will decline to remove the child from that

285. *In re Robert O.*, 80 N.Y.2d 254, 604 N.E.2d 99, 590 N.Y.S.2d 37 (1992). See *supra* part III.B.5.

286. N.Y. SOC. SERV. LAW § 384(5) (McKinney 1992 & Supp. 1994).

287. See *supra* note 14.

288. N.Y. SOC. SERV. LAW § 384(6) (McKinney 1992 & Supp. 1994).

289. *Id.*

home.²⁹⁰ As unfair as this seems to a biological father who has just discovered his paternity, it avoids the situation where a toddler is wrenched from the only home and place of security she has ever known.

Thus, it is ironic that the only way a putative father will receive notice of an impending adoption is if he has already manifested a parental relationship. Even notice, however, does not mean his consent is necessary unless he further fulfills the requirements of Domestic Relations Law section 111(1)(d) or the interim standards set forth in *Raquel Marie*.²⁹¹ If not, then the most the putative father will be allowed is the opportunity to present evidence relevant to the best interests of the child.²⁹²

At this time in New York, a pregnant woman has no duty to disclose the name of the father of her child unless she is receiving funds from the state.²⁹³ The mother is deemed to have a privacy interest that protects her choice not to reveal the name of the father to the court.²⁹⁴ The dichotomy is due in part to a joint federal-state program designed to provide medical care for persons "whose income and resources are insufficient to meet the costs."²⁹⁵ The Social Security Act requires states to take all reasonable means to determine the identity and liability of third parties in order to collect reimbursement for the funds expended.²⁹⁶ In New York, section 545 of the Family Court Act makes a "father," whether or not wed to the mother, liable for those medical expenses reasonably incurred by the mother dur-

290. See *In re John E.*, 164 A.D.2d 375, 564 N.Y.S.2d 439 (2d Dep't 1990). A plurality of the appellate division refused to remove a three year old from his home with his adoptive parents after considering the child's "best interests." For further discussion of *John E.*, see discussion *supra* parts III.B.2, III.C.2.

291. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990).

292. *In re Female Infant F.*, 191 A.D.2d 437, 438, 594 N.Y.S.2d 303, 305 (2d Dep't 1993).

293. See also *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973) *cert. granted*, *Roe v. Norton*, 422 U.S. 391, *vacated*, 422 U.S. 391 (1975), *on remand sub nom. Doe v. Maher*, 414 F. Supp. 1368 (D. Conn. 1976), *vacated*, 432 U.S. 526 (1977).

294. N.Y. COMP. CODES R. & REGS. tit. 18, § 369.2(b) (1993) (requiring recipients of Aid to Families with Dependant Children to provide information about the child's father's whereabouts, if known, as a condition to receiving funds). See also *Lehr v. Robertson*, 463 U.S. 248, 269 n.2 (1983).

295. 42 U.S.C. § 1396 (1988).

296. *Id.*

ing the pregnancy, and for the expenses of the child.²⁹⁷ At this time however, neither the Constitution nor the state compel disclosure under any circumstances.²⁹⁸ The court has not yet determined whether disclosure would be constitutional at all.²⁹⁹

Needless to say, a father who has never known of the birth of his child would not be able to meet the standards established by the Supreme Court. First, a father who does not know his child exists would have little reason to hold himself out as the father of the child. Secondly, his ability to demonstrate "fitness" and "relationship" are also nullified by the impossibility of spending time with a child that he does not know exists.³⁰⁰ Yet, the New York courts have chosen to treat these fathers conservatively in their willingness to give unwed fathers standing to appear in adoption proceedings. The courts' stance should not be surprising in light of the state's interest in the family,³⁰¹ and its interest in finalizing adoptions of children into intact family units quickly.

The result has been a tug-of-war between legislatively granted rights of notice and standing, and conservative interpretations by the courts of those rights granted. The practical implications of this for those who are adopting from single, unwed mothers is a fairly long period of uncertainty during which an absent biological father can show up to "reclaim" custody. The potential instability this window period can create in the home of the adoptive parents should be offset by the knowledge that, at this time, courts consider the more involved adoptive parents over a biological father who has shown little interest in the mother or child up to the date of the contest, as more "fit" for

297. See *Steuban County Dep't of Social Serv. v. Deats*, 76 N.Y.2d 451, 560 N.E.2d 760, 560 N.Y.S.2d 404 (1990). There, an unwed father objected to the court's determination that he was liable for the expenses the mother incurred during her pregnancy after a determination of filiation had been made. *Id.* at 454, 560 N.E.2d at 760, 560 N.Y.S.2d at 404.

298. *In re Robert O.*, 80 N.Y.2d at 266, 604 N.E.2d at 105, 590 N.Y.S.2d at 43.

299. *Id.*

300. For discussion of the difficulty of re-claiming custody after custody has been granted pendente lite to the adoptive parents, see Daniel C. Zinman, *Father Knows Best: The Unwed Father's Right to Raise his Infant Surrendered for Adoption*, 60 *FORDHAM L. REV.* 971 (1992).

301. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 545-46, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824 (1976) (stating that "[t]he state is parens patriae and always has been, but it has not displaced the parent in right or responsibility").

the child, assuming the requirements for standing have been met, and a fitness hearing has been held. For adoptive parents, the chances are extremely good that once a child has been released into their custody, they will be able to finalize that adoption-if only with some delay. Additionally, the father who has been very involved in the upbringing of his child is less likely to have his custody revoked by the exclusive actions of the natural mother. This promotes the state's great interest in the stability of the home and the welfare of the child.

V. Conclusion

As a consequence of this policy, if a father wishes to contest the release of his child given up immediately after birth, he must have manifested a strict level of parental responsibility prior to the child's birth. Since the mother has complete control over whether the father is named on the birth certificate, and whether she will accept money for medical expenses, the only means left for a father to demonstrate parental responsibility is to register with the Putative Father Registry, or to file a legal notice of paternity. The inaccessibility of either of these due to ignorance of these legal procedures effectively puts one more block in the path of unwed fathers.

One possible solution to this problem would be to require all women, not just those receiving state funds, to name the father (if known) at the time she files the release of custody forms with the court. This would not eradicate the problems created when the mother does not know the identity of the father, or when the mother commits a knowing fraud to conceal the identity of the father. It might, however, fill in some of the gaps left open because of the fathers' ignorance of the existence of the Putative Father Registry.

Legislation such as this would require the state to discard some of its long-held biases against unwed fathers, however attractive adoptive couples are, which the state seems reluctant to do. In terms of protecting children and providing them with stable, intact family units, the state is more likely to find well-screened adoptive families "fit" than an unwed father. However, at least those fathers are now entitled to a minimum degree of due process.

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