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Unwed Fathers - Adoption - Foster Care Agency Seeking Permission to Consent to Child's Adoption Need Not Always Grant Child's Unwed Father Notice and Opportunity to be Heard

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UNWED FATHERS—Adoption—Foster Care Agency Seeking Permission To Consent to Child's Adoption Need Not Always Grant Child's Unwed Father Notice and Opportunity To Be Heard. *In re Kenneth M.*, 87 Misc. 2d 295, 383 N.Y.S.2d 1005 (Family Ct. 1976).

Petitioner foster-care agency, in compliance with New York Social Services Law section 384(1)(d),[1] sought appointment as the guardian of Kenneth M., a child born out-of-wedlock.[2] The agency also requested permission to consent to the child's adoption, pursuant to New York Domestic Relations Law section 111(4).[3] Respondent putative father of Kenneth received neither notice of the pending adoption proceeding nor an opportunity to be heard concerning his child's best interests.[4] The basis of this denial was the respondent's status as an unwed father.[5]

Kenneth had been born in June 1970. Two months later he was placed with foster parents who subsequently wished to adopt him.[6] Respondent had been incarcerated at the time of the child's birth but, upon his release, he attempted to locate the child. In May 1973 respondent applied to the foster-care agency for visitation rights.[7] Thereafter, the agency instituted the guardianship petition so that it could consent to the desired adoption.

The family court granted the petition of the foster-care agency.[8] Though respondent had claimed a violation of equal protection and due process, the court found that a superior interest existed in protecting the adoption process.[9]

Historically, courts have considered the relationship between children and their wed parents or unwed mothers as a fundamental one. For example, in *People ex rel. Portney v. Strasser*,[10] the mater-

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1. N.Y. Soc. Serv. Law § 384(1)(d) (McKinney 1976) awards custody to an authorized agency upon the signed, written surrender by the child's guardian: "if both parents of such child are dead, or if such child is born out of wedlock and the mother of such child is dead. . . ."

2. *In re* Kenneth M., 87 Misc. 2d 295, 383 N.Y.S.2d 1005 (Family Ct. 1976). The agency utilized N.Y. Soc. Serv. § 384(1)(d) since the natural mother had died in 1971. *Id.* at 1007.

3. N.Y. Dom. Rel. Law § 111(4) (McKinney Supp. 1975) permits adoption with the consent "of any person or authorized agency having lawful custody of the adoptive child."

4. 87 Misc. 2d at 300, 383 N.Y.S.2d at 1008.

5. *Id.*; N.Y. Soc. Serv. Law § 384(1)(d) (McKinney 1976).

6. 87 Misc. 2d at 298, 383 N.Y.S.2d at 1007.

7. *Id.*, 383 N.Y.S.2d at 1007-08.

8. *Id.* at 302, 383 N.Y.S.2d at 1010.

9. *Id.* at 300-01, 383 N.Y.S.2d at 1009-10.

10. 303 N.Y. 539, 104 N.E.2d 895 (1952).

nal grandmother attempted to obtain custody of her daughter's legitimate child, claiming that the natural mother was unfit. The lower court found it in the child's best interest to approve the custody petition. The New York Court of Appeals reversed stating:[11]

> No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person . . . since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court . . . .

A year later the court of appeals reaffirmed the holding of *Strasser* in a case involving an unwed mother. In *People ex rel. Kropp v. Shepsky*,[12] plaintiff mother had given birth and immediately placed the baby in an institution. One year later, she removed the child and brought the infant with her to New York. While she worked or looked for work, she boarded the child in various places. Finally, being unemployed and indigent, she entrusted the child to a lawyer who placed it with a family. A few days later the mother consented to the child's adoption. Subsequently, the family court issued an order of adoption but the natural mother instituted an action to vacate this order.[13] The court, citing the above language[14] from *Strasser* as determinative, vacated the adoption decree and returned the child to her natural mother.[15]

Compared to wed parents and unwed mothers, unwed fathers had virtually no rights regarding their children.[16] New York was similar to many jurisdictions in not requiring the unwed father's consent[17]

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11. *Id.* at 542, 104 N.E.2d at 896.

12. 305 N.Y. 465, 113 N.E.2d 801 (1953).

13. *Id.* at 467, 113 N.E.2d at 803.

14. *Id.* at 468, 113 N.E.2d at 803.

15. *Id.* at 471, 113 N.E.2d at 805. In another case, Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971), a child was born out-of-wedlock and given to a foster-care agency which then placed the child with foster parents. During this time the natural mother desired to maintain her relationship with the child. Two years passed and the foster parents, desiring to adopt the child, refused to return it when the natural mother rejected the proposed adoption. The court returned the child to its natural mother stating, "Child and parent are entitled to be together, unless compelling reasons stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child, or there is abandonment or surrender by the parent." *Id.* at 199, 274 N.E.2d at 432-33, 324 N.Y.S.2d at 939.

16. Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAMILY L. 231 (1971).

17. N.Y. DOM. REL. LAW § 111(3) (McKinney 1964), *as amended*, (McKinney Supp. 1975); *see* Doe v. Roe, 37 App. Div. 2d 433, 436, 326 N.Y.S.2d 421, 425 (2d Dep't 1971).

and denying him notice of the pending adoption.[18] In 1972, however, the United States Supreme Court made significant changes in this situation through its decision in *Stanley v. Illinois*.[19]

Stanley involved an Illinois statute which created a presumption that all unwed fathers were unfit to be awarded custody of their children.[20] Petitioner father had lived with the natural mother for eighteen years. During this time they sired and raised three children. Upon the death of the mother, the child automatically became a ward of the state. The father did not have the opportunity to present evidence of his fitness to be awarded custody.[21]

The Illinois Supreme Court upheld the statute in 1970.[22] Two years later, the Supreme Court of the United States reversed.[23] The statute had created an irrebuttable presumption[24] that all unwed fathers were unsuitable to have custody of their children. The Court found this unacceptable.[25] It stated that unwed fathers also possessed a "cognizable and substantial"[26] interest in maintaining the parent-child relationship. Though petitioner and most unwed fathers could be neglectful parents, "all unmarried fathers are not in this category."[27] Therefore, the Court held the denial of notice and hearing a violation of due process.[28]

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

The Court concluded that all parents were entitled "to a hearing on their fitness before their children are removed from their cus-

18. Doe v. Roe, 37 App. Div. 2d 433, 436, 326 N.Y.S.2d 421, 425 (2d Dep't 1971).

19. 405 U.S. 645 (1972), *rev'g sub nom. In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

20. ILL. ANN. STAT. ch. 4, §§ 9.1-1, 9.1-8 (Smith-Hurd Supp. 1972).

21. 405 U.S. at 646.

22. *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

23. 405 U.S. 645 (1972).

24. An irrebuttable presumption is one which is "definitely conclusive—incapable of being overcome by proof of the most positive character." *See* Carrington v. Rash, 380 U.S. 89, 96 (1965), *citing* Heiner v. Donnan, 285 U.S. 312, 324 (1932); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

25. 405 U.S. at 650.

26. *Id.* at 652.

27. *Id.* at 654.

28. *Id.* at 656-57.

tody."[29] Since only unwed fathers had been denied a hearing, the Court summarily held that the statute also violated the equal protection clause of the fourteenth amendment.[30]

Stanley was a landmark decision, but the Court neglected to resolve at least three issues. It did not expressly determine whether the relationship of unwed fathers to their children involved a fundamental right.[31] Secondly, the Court did not discuss the necessity of the unwed father's consent to the proposed adoption. Finally, it failed to consider the situations, if any, wherein notice and a best interests hearing would not be required.

The first issue remained unresolved because the Court did not explicitly label the interest involved as a fundamental one. However, it described the relationship between an unwed father and his child in language tantamount to calling it fundamental.[32] Moreover, two basic principles are discernable from the Court's analysis. These principles assist one in understanding when the fundamental

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29. *Id.* at 658.

30. *Id.*

31. Traditional equal protection analysis utilizes one of two tests. A classification having a legitimate state interest would be sustained if there were a rational basis for it. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

If the classification involved a suspect class or fundamental right, then it would be subjected to the strict scrutiny test. It would be upheld only if it served a compelling state interest and was the least restrictive means available for achieving that interest. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

In addition, there are various intermediate approaches which require more than a rational basis but less than compelling reasons. Under these approaches, the court will balance the state interest advanced against the right interfered with. These tests have been used when classifications of sex and illegitimacy have been involved. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971)(sex). Mathews v. Lucas, 96 S. Ct. 2755 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)(illegitimacy). The Supreme Court has expressly declined to label illegitimacy a suspect classification. Jimenez v. Weinberger, 417 U.S. 628, 631-32 (1974).

For a thorough discussion of the intermediate approaches, *see* Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

32. The Court labelled the interest as one which could not be abrogated "absent a powerful countervailing interest," and one which was "cognizable and substantial." 405 U.S. at 651-52.

Moreover, in Weinberger v. Salfi, 422 U.S. 749, 771 (1975), the Court interpreted *Stanley* as involving a fundamental right. *See* Monaghan, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 80 (1975). In Mathews v. Lucas, 96 S. Ct. 2755, 2761 n.8 (1976), the Court referred to *Stanley* as a case involving familial relationships.

interest is operative. First, the majority interpreted due process as requiring an individualized determination;[33] whereas the Illinois statute operated to give "procedure by presumption."[34] This need for individual determination led to the second principle. Suitability should be determined according to the fitness of each individual parent, rather than the parent's marital status. The proper approach would be to distinguish between caring and non-caring parents, rather than between wed and unwed parents.[35]

The second and third issues left unanswered by the Court in *Stanley* have been resolved differently in various states. In 1972, the Supreme Court remanded two adoption cases to state courts in light of its *Stanley* ruling.[36] One state court thereafter required the unwed father's consent to a proposed adoption;[37] the other court awarded an unwed father custody of his two sons.[38] Similar results have not been reached in every state. Various courts[39] and legislatures[40] have divided over the question of requiring the father's consent, but practically every court has required acknowledged unwed fathers to receive notice and a hearing.[41]

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33. 405 U.S. at 655-57. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974); United States Dep't of Agriculture v. Murray, 413 U.S. 508, 518 (1973)(Marshall, J., concurring).

34. 405 U.S. at 656.

35. *Id.* With the emphasis upon the classification of caring/non-caring, distinctions made according to gender would also seem to be invalid. This is particularly true in light of the Supreme Court's decisions involving sex discrimination. However, sex has never been declared a suspect classification. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971)(four justices holding sex to be suspect).

36. Rothstein v. Lutheran Soc. Servs., 405 U.S. 1051 (1972); Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972). Commentators have had no hesitation in applying *Stanley* to adoption cases. *E.g.*, Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

37. State *ex rel.* Lewis v. Lutheran Soc. Servs., 59 Wis. 2d 18-9, 207 N.W.2d 826, 830 (1973).

38. Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972).

39. Miller v. Miller, 504 F.2d 1067, 1068 (9th Cir. 1974)(consent required); State *ex rel.* Lewis v. Lutheran Soc. Servs., 59 Wis.2d 1, 8-9, 207 N.W.2d 826 (1973)(consent required); *In re* Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975)(consent not required); Commonwealth v. Hayes, 215 Va. 49, 205 S.E.2d 644 (1974)(consent not required).

40. The states have about divided evenly over whether or not an unwed father's consent is required. *See* Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAMILY L. 115, Appendix I at 138 (1973) .

41. *E.g.*, Catholic Charities of Arch. of Dubuque v. Zalesky, 232 N.W.2d 539 (Iowa 1975). At least one court has required that notice and a hearing be given to all biological fathers. *In*

In discussing the questions left unresolved by the Supreme Court, the various courts have applied *Stanley* to custody and adoption cases. Rather than taking a limited view of *Stanley*, they interpreted that decision as one involving the termination of parental rights.[42]

In *In re Malpica-Orsini*,[43] the New York Court of Appeals, for the first time, considered the three issues left unsettled in *Stanley*. Here, petitioner had cohabitated with the natural mother and their child for approximately seventeen months. In September 1972 petitioner admitted paternity and agreed to pay support. In 1973, the mother married respondent who petitioned for adoption.[44] Section 111(3) of the Domestic Relations Law[45] required for adoption purposes, the consent of only the mother of a child born out-of-wedlock. Nevertheless, the father received notice and an opportunity to be heard at the direction of the court. Although the father objected to the adoption, the court determined that the proposed adoption was in the child's best interest.[46]

The majority in *Orsini* affirmed the judgment of adoption and held section 111(3) constitutional. As in *Stanley*, the court was extremely imprecise in defining the appropriate equal protection standard. The court labelled the reasons justifying the discrimination against unwed fathers as "compelling,"[47] indicating use of the strict scrutiny test. However, the majority did not consider the second element of that test, *i.e.*, the requirement of utilizing the least restrictive means to protect the states' interests. A discussion of an intermediate[48] standard of review[49] terminated with the finding of

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re Reyna, 126 Cal. Rptr. 138, 148, 55 Cal. App. 3d 288, 303-04 (5th Dist. 1976) (custody proceeding). However, the general practice is to require acknowledgement of paternity as a "threshold prerequisite." *See, e.g., In re* Fernando F., 83 Misc. 2d 421, 373 N.Y.S.2d 755 (Family Ct. 1975).

42. *E.g.*, Department of Health & Rehab. Servs. v. Herzog, 317 So. 2d 865, 867 (Fla. App. 1975); Hammack v. Wise, 211 S.E.2d 118 (W. Va. 1975).

43. 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975).

44. *Id.* at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

45. N.Y. DOM. REL. LAW § 111(3) (McKinney Supp. 1975).

46. 36 N.Y.2d at 569-70, 331 N.E.2d at 486-87, 370 N.Y.S.2d at 512-13.

47. *Id.* at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520.

48. *See* note 31 *supra*.

49. In particular, the court followed the test used in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

compelling reasons. Ultimately, the court utilized the rational basis test in holding that there was no denial of equal protection in requiring the consent of wed fathers but not of unwed fathers.[50]

> Certainly, these facts demonstrate that the classification is reasonable, not arbitrary, and, keeping in mind the paramount consideration of a child's welfare, the legislative action is justified.

In formulating its equal protection analysis, the court in *Orsini* refused to be bound by the "tired formulations" and "stock responses" of the two-tier approach to equal protection. Instead, it decided the matter by "centering the review on the merits of the controversy at hand and by conducting a realistic examination of the conflicting policies and interests involved in the challenged statute. . . ."[51] The court believed that requiring the unwed father's consent would have a detrimental effect on the adoption process. The result would be to deny:[52]

> [H]omes to the homeless and of depriving innocent children of the other blessings of adoption. . . . At the very least, the worthy process of adoption would be severely impeded.

Orsini followed *Stanley* by attempting to implement the caring/non-caring classification. However, *Orsini* departed from *Stanley* in not requiring family courts to utilize the individualized approach in determining parental fitness. The court of appeals did not discuss cases decided after *Stanley* wherein the Supreme Court invalidated legislative classifications creating irrebuttable presumptions.[53] The court ignored the individualized approach mandated by the Supreme Court and justified its classification in light of an overriding public concern.[54]

Orsini treated the due process issue summarily. The family court had complied with the requirements of *Stanley* by giving the father notice and affording him a hearing.[55]

Judge Jones dissented vigorously.[56] While stating that utilization

50. 36 N.Y.2d at 574, 331 N.E.2d at 490, 370 N.Y.S.2d at 517.
51. *Id.* at 577-78, 331 N.E.2d at 493, 370 N.Y.S.2d at 521.
52. *Id.* at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.
53. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring).
54. 36 N.Y.2d at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520.
55. *Id.*, 331 N.E.2d at 492, 370 N.Y.S.2d at 520.
56. *Id.* at 578, 331 N.E.2d at 493, 370 N.Y.S.2d at 521.

of the intermediate equal protection test would invalidate the classification,[57] he maintained that the interest involved was fundamental and required "a higher level of constitutional protection."[58] In support of this contention, Judge Jones cited the pre-1972 New York cases of *Spence-Chapin Adoption Service v. Polk*[59] and *People ex rel. Kropp v. Shepsky*[60] which recognized a fundamental interest in the parent-child relationship. He found compelling state interests to be involved in the instant case[61] and would have invalidated the statute for not satisfying the second branch of the strict scrutiny test.[62] The requirement of utilizing the least restrictive means available to protect the state's compelling interests had not been met. Therefore, it was not necessary, in the dissent's view, to deny a hearing to *all* unmarried fathers.[63]

A year after *Orsini*, Judge Nanette Dembitz noted, in *In re Kenneth M.*,[64] that the Supreme Court had dismissed an appeal from *Orsini* "for want of a substantial federal question."[65] She thereby limited *Stanley* to custody cases and concluded that *Stanley* could "no longer be deemed controlling in any adoption case. . . ."[66] She interpreted *Orsini*, as being determinative in New York and as upholding "the laws discriminating against unwed fathers as to all adoptions of out-of-wedlock children."[67]

The family court in *Kenneth M.* considered two issues. The first was whether *Orsini* permitted or required the father's consent when the mother dies without approving the proposed adoption.[68] The court found that *Orsini* had elevated "the public interest in the adoption of out-of-wedlock children, as a class, over the claim of a

57. *Id.* at 582-83, 331 N.E.2d at 496, 370 N.Y.S.2d at 525.
58. *Id.* at 583, 331 N.E.2d at 496, 370 N.Y.S.2d at 525.
59. 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).
60. 305 N.Y. 465, 113 N.E.2d 801 (1953).
61. 36 N.Y.2d at 585, 331 N.E.2d at 498, 370 N.Y.S.2d at 528.
62. *Id.*
63. *Id.* at 586, 331 N.E.2d at 498-99, 370 N.Y.S.2d at 528-29.
64. 87 Misc. 2d 295, 296, 383 N.Y.S.2d 1005, 1006 (1976).
65. 96 S. Ct. 765 (1976). That such a dismissal must be treated as a disposition on the merits is substantiated by Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).
66. 87 Misc. 2d at 296, 383 N.Y.S.2d at 1007. Judge Dembitz read *Orsini* as limiting *Stanley's* equalization of the rights of wed and unwed fathers to custody proceedings when the father had been living with his children. *Id.* at 301, 383 N.Y.S.2d at 1010.
67. *Id.* at 297-98, 383 N.Y.S.2d at 1007.
68. *Id.*

right of veto by unwed fathers."[69] The court found the factors which justified the discrimination in *Orsini*[70] to be applicable in the instant case.[71] Here, the father of Kenneth had been incarcerated when the child was born. If the adoption proceedings were suspended until the putative father was located (in order to obtain his consent), the child would have suffered the very detriments which the *Orsini* court sought to prevent.[72]

The second issue in *Kenneth M.* concerned whether a father, in circumstances other than the father in *Orsini*, would be entitled to notice and a best interests hearing.[73] In *Orsini*, the father lived with the mother and their child for seventeen months.[74] The father of Kenneth never lived with the child. If unwed biological fathers would be entitled to a hearing at which they could prevail, adoptions would be discouraged and exposed to uncertainty and delay.[75] The court, therefore, held that notice and a hearing "should be accorded only if there is substantial justification for so burdening the adoption process."[76] The interest in *Orsini* was of an unwed father in the child he had raised. Here, "the mere biological connection of the putative father with the child"[77] was insufficient to warrant a hearing. An alleged father should be entitled to a hearing only when two prerequisites exist: (1) when he had acknowledged paternity; and (2) when he lived with the child.[78]

The court in *Kenneth M.* attempted to implement the caring/non-caring classification. It desired to advance the best interests of the child. However, as the court did in *Orsini*, Judge Dembitz

69. *Id.* at 299, 383 N.Y.S.2d at 1008.

70. 36 N.Y.2d at 572-74, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17. Included among the ten factors cited are: severely impeding the process of adoption; denying homes to the homeless; and financial and administrative burdens. *Id.*

71. 87 Misc. 2d at 298, 383 N.Y.S.2d at 1007.

72. *Id.*

73. *Id.* at 300, 383 N.Y.S.2d at 1009. Judge Dembitz construed *Orsini* to hold that under some circumstances a right to a hearing exists. *Id.* at 299-300, 383 N.Y.S.2d at 1008.

74. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513. In *Stanley*, the father lived with the mother intermittently for eighteen years during which time they raised three children. 405 U.S. at 646.

75. These are several of the factors referred to in *Orsini* as justifying the discrimination against unwed fathers. 36 N.Y.2d at 572-74, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17.

76. 87 Misc. 2d at 301, 383 N.Y.S.2d at 1009.

77. *Id.*

78. *Id.*, 383 N.Y.S.2d at 1009-10.

neglected to pay due attention to *Stanley's* emphasis on the individualized approach.

The holding of *Orsini* on the issue of consent became determinative in *Kenneth M.* once Judge Dembitz accepted the premise (without discussion) that the interest involved was not a fundamental one.[79] The overriding factor in *Orsini*, justifying the exclusion of unwed fathers, was the state interest in the adoption process. That the natural mother was alive and had consented to the adoption in *Orsini*, but had died without consenting to the adoption in *Kenneth M.*, was immaterial to the equal protection analysis. The prospective detriment to the adoption process occurs by giving the unwed father the veto power. Therefore, the inability of the natural mother to consent in the instant case did not alter the equal protection result. The unwed father was not entitled to a veto power.

Kenneth M. did depart from *Orsini*, on equal protection grounds, by not requiring notice and a hearing for unwed fathers. The court in *Orsini* viewed the family court's grant of notice and a hearing as complying with the constitutional mandate of *Stanley*.[80] Judge Dembitz, however, distinguished *Stanley* on the basis that the respondent in the case at bar did not cohabitate with the natural mother.[81] In so doing, she apparently made an irrebuttable presumption that cohabitation is a necessary prerequisite for suitability. This may be true of most unwed fathers who do not live with the natural mother. However, to presume all such unwed fathers are unsuitable repudiates the individual standard mandated by *Stanley*[82] and subsequent cases.[83] Therefore, as in *Stanley*, a statute which does not provide for notice and a hearing for *any* unwed father cannot stand. There is not a rational basis for excluding all unwed fathers.

On appeal, the appellate division should confront the fundamental interest issue. Guidelines must be established so that future

79. In *In re* Walker, 360 A.2d 603 (Pa. 1976), the Supreme Court of Pennsylvania invalidated the distinction between unwed fathers and mothers as a denial of equal protection on the basis of sex. Sex is considered a suspect classification in Pennsylvania due to that state's equal rights amendment. *Id.* at 605-06.

80. 36 N.Y.2d at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520.

81. 87 Misc. 2d at 301, 383 N.Y.S.2d at 1009-10.

82. 405 U.S. at 657.

83. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring).

courts will be able to determine what parent-child relationships involve a fundamental right. The possibilities range from the merely biological relationship to substantial interaction between parent and child.

Reviewing the approaches of various courts should be helpful in clarifying when the interest is operative. Few courts recognize the interest when it is based solely on biological parenthood.[84] However, when there has been a substantial relationship between an unwed father and his child, as in *Stanley*, the interest is recognized.[85]

Difficulty arises when the manifestation of interest by the unwed father in his child amounts to little more than a biological relationship. In order to assure that caring fathers, who have been able to manifest only minimal interest, are not excluded from adoption proceedings, the least manifestation of interest should suffice.[86] Most states require, at least, an acknowledgement of paternity.[87]

Although a fundamental interest is present, this should not automatically give the parent an arbitrary veto power. If a parent, though genuinely interested in the child is unfit, granting him an arbitrary veto would subvert the purposes of adoption laws and infringe upon the child's basic rights.

For the purpose of consent, wed parents who have apparently manifested their commitment through marriage might be presumed to be caring parents and thereby given the veto power.[88] Unwed parents, on the other hand, could be presumed to be non-caring, and thereby not entitled to the veto power. These presumptions would be constitutionally valid if they were rebuttable.[89]

For the purposes of a hearing, any parent who has met the minimal requirements to establish a fundamental relationship should be

84. *See In re* K., 535 S.W.2d 168 (Tex. 1976). Otherwise, the interest would have to apply to sperm donors and rapists. *Id.* at 171.

85. 405 U.S. at 652.

86. This approach might be preferable to demanding stringent indications of interest since concerned fathers might be by-passed due to uncontrollable circumstances. This was the situation in *Kenneth M.*

87. 61 CORNELL L. REV. 312, 312-13 n.4 (1976).

88. *See* Catholic Charities v. Zalesky, 232 N.W.2d 539, 553 (Iowa 1975) (containing a short but clear discussion of this point).

89. Rebuttable presumptions are numerous and constitutional. *E.g.*, United States v. Johnson, 466 F.2d 537, 538 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973)(inference of participation in a crime, from presence, companionship and conduct before and after the crime is committed).

entitled to a hearing. Granting a hearing on these terms complies with the individualized approach mandated by *Stanley*. Furthermore, granting such hearing is based on the assumption that only those parents who have a genuine interest in the child will spend the time and effort required to participate in the proceedings. During the adoption proceedings, the best possible result should occur when all those persons making the determination are parties intimately concerned about the child.[90]

Concern over delaying or impeding the adoption process acquires significance when discussing the requirement of notice. As to fathers whose paternity, existence, and whereabouts are unknown, notice other than notice by certified mail would be permissible.[91] For example, states could provide notice by publication or require unacknowledged unwed fathers to inform themselves of the birth of their children. In *Stanley*,[92] the Court suggested the propriety of this method of notice by stating that unwed fathers who do not promptly respond to notice cannot later complain that their rights have been violated. Moreover, laws requiring notice to all biological fathers,[93] even those who are unknown, could prove to be unconstitutional.[94]

The decision in *Kenneth M.* upholds legislation which deprives many parents of basic fourteenth amendment guarantees. In so doing, it also adversely affects the children it wishes to protect by excluding from proceedings concerning their best interests those parties who may have the most concern for them. Rather than following the lead of *Stanley* in furthering the fundamental interest involved, *Kenneth M.* attempts to achieve the same result, distinguishing between caring and non-caring parents, but fails to utilize the necessary prerequisite for achieving that result - the individualized approach. Legislatures and courts, in their struggle to balance

90. This approach is similar to other instances where termination of parental rights is at stake. *See In re* Sean B. W., 381 N.Y.S.2d 656 (Sur. Ct. 1976) (father who allegedly had abandoned his child was entitled to a hearing); *In re* Anonymous, 67 Misc. 2d 366, 323 N.Y.S.2d 358 (Sur. Ct. 1971) (father incarcerated, notice and hearing required); *In re* Ekstrom, 24 App. Div. 2d 276, 265 N.Y.S.2d 727 (3d Dep't 1965) (consent not required due to father's divorce, but father still given notice and a hearing).

91. *See* Comment, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 529-31 (1973).

92. 405 U.S. at 657 n.9.

93. *See e.g.*, WASH. REV. CODE ANN. § 26.32.085 (Supp. 1976); WIS. STAT. ANN. § 48.88 (Supp. 1975), *amending* § 48.88 (1957).

94. These statutes could prove to be unconstitutional if it were shown that such procedures severely impeded the adoption process, thereby infringing upon the rights of the child.

the competing interests of unwed parents and children born out-of-wedlock, are encumbered by confusion as to the applicable standard of review. Some of this confusion can be clarified by returning to the individualized standard enunciated in *Stanley*.

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