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## NOTES

### FATHER KNOWS BEST: THE UNWED FATHER'S RIGHT TO RAISE HIS INFANT SURRENDERED FOR ADOPTION

DANIEL C. ZINMAN

#### INTRODUCTION

Before 1972, if an unwed mother placed her child for adoption, the putative father<sup>1</sup> could not prevent the legal system in most states from extinguishing his parental rights.<sup>2</sup> Because most states required only the consent of the unwed mother for adoption,<sup>3</sup> they could permanently terminate the unwed father's relationship with his child against his will. Adoption irrevocably rescinds an unwed father's parental rights:<sup>4</sup> he is denied visitation rights, and, because adoption records are kept confidential,<sup>5</sup> he has no way of contacting his offspring. Once adopted, the child is forever lost to the unwed father.

In 1972, the Supreme Court stated for the first time that under certain circumstances, the due process requirements of the Constitution protect the parental rights of an unwed father. In *Stanley v. Illinois*,<sup>6</sup> the Court held that the custodial rights of a putative father who participated in the "companionship, care, custody, and management" of his child could not be revoked without a hearing to determine his parental fitness.<sup>7</sup>

Since *Stanley*, the Court has expanded and clarified the unwed father's rights.<sup>8</sup> According to the Court, a natural father's right to veto the adoption of his child does not derive from a biological link alone: it must be

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1. "Putative father" refers to "[t]he alleged or reputed father of a child born out of wedlock." Black's Law Dictionary 1237 (6th ed. 1990). "Unwed father," "biological father," and "natural father" will also be used interchangeably throughout this Note to indicate the father of a child born out of wedlock.

2. See H. Krause, *Illegitimacy: Law And Social Policy* 32 (1971).

3. Courts adhered to the maternal-preference doctrine because they felt that the "care, love and discipline" of mothers were of supreme importance to children. *Ullman v. Ullman*, 151 A.D. 419, 424-25, 135 N.Y.S. 1080, 1083 (1912). Many state legislatures codified the maternal-preference doctrine. See, e.g., Okla. Stat. Ann. title. 30, § 11 (West 1955) (repealed 1983); S.D. Codified Laws Ann. § 30-27-19(2) (1984); Utah Code Ann. § 30-3-10 (1989). See also R. Horowitz & H. Davidson, *Legal Rights Of Children* 234 (1984) (maternal preference statutes had been adopted by more than a dozen states by the turn of the century).

4. See H. Clark, Jr., *The Law Of Domestic Relations In The United States* 602 (1968).

5. See H. Clark, Jr., *The Law Of Domestic Relations In The United States* 694 (2d ed. 1987). Examples of statutes sealing adoption records are N.J. Stat. Ann. 9:3-52(a) (West 1991); N.Y. Dom. Rel. Law § 114 (McKinney Supp. 1992); Va. Code Ann. § 20-63.1-236 (1990 & Supp. 1991).

6. 405 U.S. 645 (1972).

7. *Id.* at 651-53.

8. See *Michael H. v. Gerald D.*, 491 U.S. 110, (1989); *Lehr v. Robertson*, 463 U.S.

accompanied by an existing parental relationship with his child.<sup>9</sup> If an unwed father has developed such a relationship, he deserves constitutional protection of his interest in maintaining a continuing role in his child's upbringing.<sup>10</sup>

Twenty years after *Stanley*, an unwed father's parental rights remain unclear. In particular, when an unwed mother surrenders her child for adoption at birth or shortly thereafter, the natural father never receives an opportunity to develop a relationship with his child and thus is unable to satisfy the Court's "biology plus" requirements.<sup>11</sup> According to one commentator, "the question that is most important to the functioning of the typical adoption process has not been answered: [none] of the earlier cases articulates the interested and responsible unmarried father's rights immediately after the child's birth."<sup>12</sup>

Recently, the New York Court of Appeals confronted this issue in *In re Raquel Marie X*.<sup>13</sup> The court held that an unwed father who is willing to assume custody of his infant and who promptly manifests parental responsibility can veto the proposed adoption of his child.<sup>14</sup> By striking down a statutory requirement that a putative father live with the mother for a portion, if not all, of the six months prior to adoption to earn the right to veto that adoption,<sup>15</sup> *Raquel Marie* enlarged the unwed father's rights by giving him a greater opportunity to demonstrate his parental commitment and receive custody of his child.<sup>16</sup>

Although *Raquel Marie* seems to provide relief to an unwed father, it ignores the realities of adoption procedures. Custody of an infant is usually granted to adoptive parents on a temporary basis pending the outcome of a custody proceeding.<sup>17</sup> Yet, *Raquel Marie* never discusses how courts can reconcile the rights of an unwed father who has been adjudi-

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248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978). For a discussion of these cases, see *infra* notes 34-84 and accompanying text.

9. See *Lehr*, 463 U.S. at 257, 261-62; *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting).

10. See *Lehr*, 463 U.S. at 261.

11. 88.8% of all children adopted in 1982 were less than one year old. See National Comm. For Adoption, *Adoption Factbook: United States Data, Issues, Regulations And Resources* 63 (1985).

Unfortunately, the National Center for Social Statistics of the U.S. Department of Health, Education, and Welfare last published its annual report on adoption statistics in 1975. In an effort to demonstrate the feasibility of collecting adoption statistics and to encourage the reinstatement of an ongoing national adoption data system, the National Committee For Adoption collected and published national adoption statistics for 1982. This is the most recent year for which statistical adoption data are available.

12. H. Krause, *Family Law In A Nutshell* 174 (2d ed. 1986).

13. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990), *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990).

14. See *id.* at 402-03, 559 N.E.2d at 424-25, 559 N.Y.S.2d at 861-62.

15. See N.Y. Dom. Rel. Law § 111(1)(e) (McKinney 1988 & Supp. 1992).

16. See *Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption For Unwed Father Who Demonstrates Parental Responsibility—In re Raquel Marie X*, 104 Harv. L. Rev. 800, 800 (1991).

17. Telephone interviews with adoption clerks of Surrogate Court in Kings County,

cated as responsible and deserving of parental rights with the best interests of his infant child who has lived with and become emotionally attached to adoptive parents and who could be psychologically traumatized by a custody change.<sup>18</sup> Courts are left with the predicament of either granting custody to a deserving putative father and risking emotional harm to his child, or approving the adoption to protect the child's well-being and depriving a putative father of his parental rights.<sup>19</sup>

This Note examines the effects of awarding adoptive parents *pendente lite*<sup>20</sup> custody of an infant placed for adoption at birth. Part I first outlines the unwed father's constitutional rights and then discusses his rights after *Raquel Marie*. Part II analyzes the consequences of granting *pendente lite* custody to adoptive parents and demonstrates that the legal system has failed to harmonize the parental rights of a responsible unwed father with the best interests of his infant nurtured by adoptive parents. Part III argues that granting *pendente lite* custody to a willing putative

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Manhattan County, and Nassau County, New York (Nov. 7, 1991). See *infra* notes 140-41 and accompanying text.

18. The repercussions of *Raquel Marie* are critical to the adoption process. Most adoptions involve infants or young children. See *supra* note 11. Moreover, the number of out-of-wedlock births has increased rapidly over the past few decades. Between 1950 and 1986, the percentage of illegitimate births grew from 4% to 23.4%. See U.S. Bureau Of The Census 66 (1985) (109th ed. 1989). See also D. Bogue, *The Population Of The United States—Historical Trends And Future Projections* 276 (1985) (recently, there has been "an unprecedented propensity to bear children out of wedlock"); *A Baby Boom on TV As Biological Clocks Cruelly Tick Away*, N.Y. Times, Oct. 16, 1991, at C15, col. 5 (unwed motherhood is increasingly common and accepted); *The Fissioning of the Nuclear Family*, N.Y. Times, June 9, 1991, § 4, at 7, col. 1 (unwed motherhood is escalating); *American Notes: Population: Hold the Wedding Bells*, Time, Dec. 16, 1991, at 39 (out-of-wedlock births are increasing). This increase has helped advance the perception of illegitimacy as socially acceptable which, in turn, has reduced the social, religious, and economic stigma once attached to illegitimacy. See generally Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 Tul. L. Rev. 585, 593 (1991) (the stigma associated with illegitimacy has diminished); *Many Teens Want Babies*, Newsday, Nov. 1, 1991, at 132, col. 3 (there is no longer any stigma to having a child out of wedlock). As a result, unmarried women are more inclined to have children, and the trend of having children out of wedlock seems likely to continue.

19. See *infra* notes 151-89 and accompanying text. Compare *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion omitted), 236 Cal. Rptr. 660, 665 (1987) (if there is risk of harm to child from custody shift to natural father, child should remain with adoptive parents), *cert. dismissed sub. nom. McNamara v. County of San Diego Dep't of Social Servs.*, 488 U.S. 152 (1988) and *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 793, 705 P.2d 362, 366, 218 Cal. Rptr. 39, 42 (1985) (awarding custody to unwed father after child has bonded with adoptive parents would disrupt emotional welfare of child) and *In re Reyna*, 55 Cal. App. 3d 288, 298, 126 Cal. Rptr. 138, 148-49 (1976) (custody must remain with adoptive parents if transferring child to natural father's care is not in the child's best interests) with *In re Baby Girl Eason*, 257 Ga. 292, 297, 358 S.E.2d 459, 463 (1987) (if natural father has not abandoned his child, he must receive custody over adoptive parents) and *Lathrop v. Scott*, 2 Kan. App. 2d 90, 95, 575 P.2d 894, 898 (1978) (unwed father's right to custody of his child must prevail over those of adoptive parents) and *John E. v. John Doe*, 164 A.D.2d, 375, 378, 564 N.Y.S.2d 439, 441 (1990) (custody shift from adoptive parents to unwed father would disturb child's psychological stability).

20. The term "pendente lite" means "[p]ending the lawsuit; during the actual progress of a suit; during litigation." Black's Law Dictionary 1134 (6th ed. 1990).

father whose infant was placed for adoption at birth will give meaning to his constitutional right to raise his child; Part III also argues that expediting the legal system's determination of the putative father's parental rights will protect the emotional welfare of his infant. Finally, this Note concludes that unless states grant an unwed father custody of his infant while his parental rights are being adjudicated, the unwed father's rights will not be adequately protected.

## I. BACKGROUND

### A. *The Unwed Father's Constitutional Rights*

The Supreme Court has decided five cases which have defined and expanded the unwed father's constitutional rights with respect to his child.<sup>21</sup> None of these decisions, however, discusses the unwed father's constitutional rights regarding an infant placed for adoption at birth.

#### 1. *Stanley v. Illinois*: Establishing the Unwed Father's Due Process Rights

The Supreme Court first addressed the putative father's equal protection and due process rights in *Stanley v. Illinois*.<sup>22</sup> Joan and Peter Stanley lived together periodically for eighteen years without marrying. During that time, they had three children.<sup>23</sup> Under Illinois law, an unwed father's children became wards of the state upon the mother's death.<sup>24</sup> When Joan Stanley died, the State of Illinois declared Peter Stanley's children wards of the state and placed them with court-appointed guardians.<sup>25</sup> Stanley argued that the State of Illinois violated his fourteenth amendment rights of due process and equal protection because, unlike unwed fathers such as himself, married fathers and unwed mothers could lose their parental rights only upon a finding of unfitness.<sup>26</sup>

The Court held that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him."<sup>27</sup> The Court recognized the legitimate interest of the

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21. Under the doctrine of *parens patriae*, the government has significant latitude in restricting the rights of parents in order to protect the welfare of children. See J. Whitehead, *Parents' Rights* 108-11 (1985).

The five Supreme Court cases that have addressed the rights of unwed fathers are *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972).

22. 405 U.S. 645 (1972).

23. See *id.* at 646.

24. See *id.*

25. See *id.* Stanley claimed that he had "loved, cared for, and supported [his] children from the time of their births until the death of their mother," *id.* at 666 (Burger, C.J., dissenting), and had never been found to be an unfit parent. See *id.* at 646.

26. See *id.*

27. *Id.* at 649.

state in protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community."<sup>28</sup> It rejected, however, the state's presumption that all putative fathers were unfit parents.<sup>29</sup> Under Illinois law, children could be removed from the custody of married parents only after notice, a hearing, and proof of unfitness.<sup>30</sup> In contrast, no hearing was necessary for unwed fathers because the state presumed that unwed fathers were unfit simply because they did not marry the mothers.<sup>31</sup>

The Court further held that denying a fitness hearing to an unwed father while granting one to all other classes of parents violated the equal protection clause.<sup>32</sup> The Court concluded that all parents were entitled to a fitness hearing before the state could deprive them of custody of their children.<sup>33</sup>

## 2. *Quilloin v. Walcott* and *Caban v. Mohammed*: The "Biology Plus" Test

While *Stanley* determined that an unwed father had some parental rights, it left the boundaries of his rights undefined. Six years later, in *Quilloin v. Walcott*,<sup>34</sup> a case originating in Georgia state court, the Court further clarified these boundaries. Leon Quilloin fathered a child but neither married the mother, Ardel Walcott, nor lived with the mother or child.<sup>35</sup> When the child was three years old, Walcott married another man.<sup>36</sup> After Walcott and her husband lived together with the child for seven years, Walcott gave permission to her husband to adopt the child.<sup>37</sup> During this period, Quilloin had provided only sporadic financial sup-

28. *Id.* at 652 (quoting Ill. Rev. Stat. ch. 37, para. 701-2).

29. *See id.* at 654. According to the Court, if Stanley had demonstrated his fitness, the state's interest could have been satisfied by allowing Stanley to keep custody of his children. *See id.* at 657-58.

30. *See id.* at 650.

31. *See id.*

32. *See id.* at 658.

33. *See id.* at 649. For a more detailed discussion of *Stanley*, see Hession, *Adoptions After "Stanley"—Rights for Fathers of Illegitimate Children*, 61 Ill. B.J. 350 (1973); Note, *Constitutional Law—Stanley v. Illinois: New Rights for Putative Fathers*, 21 De Paul L. Rev. 1036 (1972); Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. Fam. L. 115 (1973-74); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 Mich. L. Rev. 1581 (1972); Note, *The Impact of Stanley v. Illinois on Custody Proceedings for Illegitimate Children: Procedural Parity for the Putative Father?*, 3 N.Y.U. Rev. L. & Soc. Change 31 (1973); Comment, *Constitutional Law—Right of Unwed Father to a Fitness Hearing Prior to State Imposition of Wardship Over His Illegitimate Children—Stanley v. Illinois*, 405 U.S. 645 (1972), 7 Suffolk U.L. Rev. 159 (1972); Note, *Stanley v. Illinois: Constitutional Rights of a Putative Father*, 41 UMKC L. Rev. 334 (1972); Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 Va. L. Rev. 517 (1973).

34. 434 U.S. 246 (1978).

35. *See id.* at 247.

36. *See id.*

37. *See id.*

port for the child and had made infrequent visits.<sup>38</sup>

Although Quilloin neither sought custody nor objected to the child remaining with Walcott and her husband, he tried to prevent the adoption in order to receive visitation rights.<sup>39</sup> Quilloin claimed that, as a matter of due process and equal protection, an unwed father was entitled to an absolute right to veto the adoption of his child absent a finding of unfitness, just as a married or divorced father was so entitled under the law.<sup>40</sup> Pursuant to the 1975 Georgia statute in effect in *Quilloin*, an unwed mother's consent was sufficient to place the child for adoption, while an unwed father was required to legitimate the child before receiving veto power over the adoption.<sup>41</sup>

In allowing the adoption to proceed in *Quilloin*, the Court focused on the relationship that Quilloin had developed with his child.<sup>42</sup> The Court held that Quilloin was not entitled to veto the adoption because he had not supported or nurtured the child, nor had he "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>43</sup> *Quilloin* thus established that an unwed father must have more than a biological link with his child to receive constitutional protection of his parental rights—he must participate in the care of his child and accept responsibility for his child's well-being. If an unwed father is unable to display such commitment, the Court would allow the state to terminate his parental rights.<sup>44</sup>

The Court next considered a putative father's rights in *Caban v. Mohammed*.<sup>45</sup> Abdiel Caban and Maria Mohammed lived together in New York for five years and had two children.<sup>46</sup> Although the couple never married, Caban was listed as the father on both birth certificates. Caban supported the children, and he lived with them until he separated from Mohammed.<sup>47</sup> He continued to see the children regularly until they were sent to live with their maternal grandmother in Puerto Rico. With the grandmother's permission, Caban brought the children back to New

38. *See id.* at 250-51.

39. *See id.*

40. *See id.* at 248-50.

41. *See* Ga. Code Ann. §§ 74-103(3), 74-203 (1976), amended by Ga. Code Ann § 19-8-12 (1991).

42. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

43. *Id.*

44. *See id.* For a more detailed discussion of *Quilloin*, see Levy, *The Rights of Parents*, 1976 B.Y.U. L. Rev. 693; Note, *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*, 5 Fordham Urb. L.J. 175 (1976); Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After Quilloin v. Walcott*, 12 J. Marshall Prac. & Proc. 383 (1979); Note, *Family Law—Voluntary Legitimation—Father Has No Absolute Right to Legitimate Child Solely on Proof of Biological Fatherhood*, 8 St. Mary's L.J. 392 (1976); Comment, *Parental Rights: The Putative Father*, 18 Washburn L.J. 174 (1978).

45. 441 U.S. 380 (1979).

46. *See id.* at 382.

47. *See id.*

York to visit, with the understanding that the children would be returned after a few days.<sup>48</sup>

After Mohammed instituted custody proceedings, she obtained temporary custody and Caban received visitation rights. Together with her new husband, Mohammed then filed a petition to adopt the children. Caban and his new wife filed a cross petition for adoption.<sup>49</sup>

Under New York law in 1979, an unwed mother's consent alone was required for the adoption of her child.<sup>50</sup> By withholding her consent to the adoption by Caban and his wife, Mohammed was able to veto his petition. On the other hand, because New York law did not require the unwed father's consent for the adoption of his child, Caban was given only an opportunity to argue that the best interests of his children would be furthered by granting his adoption petition. The lower court granted Mohammed's petition, and the appeals court affirmed.<sup>51</sup>

The Supreme Court held that the New York statute violated the equal protection clause by treating unwed parents differently solely on the basis of gender without furthering an important state interest.<sup>52</sup> According to the Court, "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause."<sup>53</sup> In this case, the New York statute's distinction between Caban and Mohammed did not further the state's important interest because, the Court concluded, Caban had "a relationship . . . fully comparable to that of the mother."<sup>54</sup>

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48. *See id.* at 383.

49. *See id.*

50. The statute at issue was N.Y. Dom. Rel. Law § 111(1)(C) (McKinney 1977). *See id.* at 385.

51. *Kazim M. v. Abdiel C.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977), *rev'd sub nom. Caban v. Mohammed*, 441 U.S. 380 (1979).

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

53. *Id.* at 388 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). As it had in *Stanley* and *Quilloin*, the Court in *Caban* grounded the unwed father's rights in an existing and substantial relationship with his children. *See id.* at 392-93. Moreover, it is important to note Justice Stevens' dissent, wherein he cautioned that *Caban* applies only to cases where a child has had an opportunity to develop a relationship with his biological father. *See id.* at 416 (Stevens, J., dissenting). Thus, *Caban* might not apply to the unwed father of an infant because he does not yet have a meaningful relationship with his child. *See id.* at 389.

54. *Id.* at 389. For a more detailed discussion of *Caban*, see Young, *Supreme Court Report: Father of Illegitimate Wins in New York Case*, 65 A.B.A. J. 954 (1979); Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 Brooklyn L. Rev. 95 (1979); Note, *Constitutional Law—Equal Protection—Parent and Child—Adoption—Unwed Father has Equal Protection Right to Consent—Caban v. Mohammed*, 1979 B.Y.U. L. Rev. 987; Note, *Constitutional Law—Equal Protection—Gender-Based Classifications in Adoptions Found Violative. Caban v. Mohammed*, 63 Marq. L. Rev. 131 (1979); Comment, *An Analysis of the Unwed Father's Adoption Rights in Light of Caban v. Mohammed: A Foundation in Federal Law for a Necessary Redrafting of the Pennsylvania Adoption Act*, 25 Vill. L. Rev. 317 (1979-1980).



### 3. *Lehr v. Robertson*: The Unwed Father's Right to Notice

*Lehr v. Robertson*<sup>55</sup> addressed the question of what notice an unwed father is entitled to prior to an adoption proceeding. Jonathan Lehr and Lorraine Robertson lived together in New York prior to their child's birth. Lehr did not live with the mother and child after birth, he did not provide any financial support for the child, and his name did not appear on the child's birth certificate.<sup>56</sup> Lehr claimed, however, that Robertson resisted his efforts to provide for the child and hid herself and the baby from him.<sup>57</sup>

Eight months after the child's birth, Lorraine married Richard Robertson. When the child was two years old, the Robertsons filed a petition to have the step father adopt the child. Lehr, however, received no notice of the adoption petition: Lehr did not qualify as a putative father entitled to notice under the New York statute because he had not filed the required statement asserting his claim to be the father with the putative father registry.<sup>58</sup> Lehr contended that the state's failure to notify him of his child's pending adoption violated his right to due process.<sup>59</sup>

In denying Lehr's petition, the Court stated that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."<sup>60</sup> The Court further noted that due process protection only arises once a relationship has developed between father and child.<sup>61</sup> According to the Court, due process did not require a more elaborate system of notification for an unwed father who had never established a parental relationship with his child.<sup>62</sup>

The Court distinguished the parental relationships established in *Stanley* and *Caban* from those established in *Quilloin* and *Lehr*.<sup>63</sup> The putative fathers in *Stanley* and *Caban* had biological connections and emotional bonds with their children; the putative fathers in *Quilloin* and *Lehr* had only biological connections.<sup>64</sup> According to the Court:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely

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55. 463 U.S. 248 (1983).

56. *See id.* at 252.

57. *See id.* at 269 (White, J., dissenting).

58. *See id.* at 250-51. The statute at issue was N.Y. Dom. Rel. Law § 111(2)(a) (McKinney 1977) (amended 1980). *See id.* at 251, n.5.

59. *See id.* at 250.

60. *Id.* at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1980) (Stewart, J., dissenting)).

61. *See id.* (citing *Caban*, 441 U.S. at 414 (Stevens, J., dissenting)).

62. *See id.* at 261-62.

63. *See id.* at 261.

64. *See id.*

valuable contributions to the child's development.<sup>65</sup>

*Lehr* clearly indicated that an unwed father is to receive constitutional protection of his parental rights only where he has participated in the custody and care of his child.<sup>66</sup>

#### 4. *Michael H. v. Gerald D.*: The Marital Presumption

The Court's most recent decision regarding the unwed father's rights is *Michael H. v. Gerald D.*<sup>67</sup> The issue before the Court was the constitutionality of a California statute which provided that the child of a woman living with her husband be conclusively presumed to be the child of the marriage, absent a showing that the husband is either impotent or sterile.<sup>68</sup>

While married to Gerald D., Carol D. engaged in an extra-marital affair with Michael H.<sup>69</sup> Carol became pregnant shortly thereafter and gave birth to Victoria D.<sup>70</sup> Although Gerald was listed as the father on Victoria's birth certificate, Carol told Michael that he was the father.<sup>71</sup> A blood test established this with a 98.07% certainty.<sup>72</sup> After living alternately with Michael, Gerald and another man, Carol decided to stay with Gerald and refused to allow Michael to continue seeing Victoria.<sup>73</sup>

Michael commenced an action to establish his paternity and to secure visitation rights.<sup>74</sup> Gerald moved for summary judgment on the ground that, due to the marital presumption, there was no triable issue of fact.<sup>75</sup> The California state court granted Gerald's motion and concluded that, under the circumstances of this case, the presumption was not rebuttable.<sup>76</sup>

65. *Id.* at 262 (footnote omitted). This "opportunity" has subsequently been referred to as the putative father's "opportunity interest." Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L. J. 313, 351 (1984).

66. *See id.* at 262. For a more detailed discussion of *Lehr*, see Buchanan, *supra* note 65; Dembitz, *Lehr Decision Helps Out-of-Wedlock Newborns Find Homes*, 70 A.B.A. J. 124 (1984); Note, *The Grudging and Crabbed Approach to Due Process for the Unwed Father: Lehr v. Robertson*, 16 Conn. L. Rev. 571 (1984); Comment, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process is Due?*, 7 Harv. Women's L.J. 265 (1984); Note, *Putative Father's Right to Notice of Adoption Proceedings Involving His Child*, 49 Mo. L. Rev. 650 (1984); Note, *Lehr v. Robertson: A Constricted View of the Rights of Putative Fathers*, 4 Pace L. Rev. 477 (1984); Note, *Lehr v. Robertson: Putting the Genie Back in the Bottle: The Supreme Court Limits the Scope of the Putative Father's Right to Notice, Hearing, and Consent in the Adoption of His Illegitimate Child*, 15 U. Tol. L. Rev. 1501 (1984).

67. 491 U.S. 110 (1989).

68. *See id.* at 115. The statute at issue was Cal. Evid. Code § 621(a), (c)-(d) (West Supp. 1989) (amended 1990). *See id.*

69. *See id.* at 113.

70. *See id.*

71. *See id.* at 113-14.

72. *See id.* at 114.

73. *See id.*

74. *See id.*

75. *See id.* at 115.

76. *See id.* Under California law, the marital presumption may be rebutted by blood

In upholding the constitutionality of the California statute, the Supreme Court, in a plurality opinion, stated that the marital presumption is a justifiable way for the state "to promot[e] the 'peace and tranquility of States and families.'"<sup>77</sup> According to the plurality, in order for the Constitution to protect a putative father's right to maintain a relationship with his child, the right must be one that was "traditionally protected by our society."<sup>78</sup> Our society, the plurality noted, has traditionally protected the marital relationship, while it has not traditionally protected the "power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."<sup>79</sup> Importantly, the plurality conceded that they might reach a different result where the marital parents do not wish to embrace the child as their own.<sup>80</sup>

The plurality decision in *Michael H.* seems to contradict previous holdings by the Court which established that the unwed father's constitutional rights attach when a biological link and a relationship exist between father and child—neither of which was contested in this case. In fact, four dissenters found that Michael's rights deserved constitutional protection because he had demonstrated parental responsibility and had satisfied the Court's "biology plus" test.<sup>81</sup>

According to Justice Brennan's dissent, "[a]lthough an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."<sup>82</sup>

In short, over the past two decades, the Supreme Court has greatly expanded and clarified the unwed father's rights. A putative father receives constitutional protection only if he has seized his opportunity interest and participated in the care and custody of his child. According to *Lehr v. Robertson*,<sup>83</sup> parental rights do not emerge solely from a biological connection between parent and child; they "are a counterpart of the responsibilities they have assumed."<sup>84</sup>

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tests; however, a motion for blood tests may only be made by the husband, or, if the biological father has filed a paternity affidavit, by the wife. *See id.*

77. *Id.* at 125 (quoting J. Schouler, *Law of the Domestic Relations* § 225, at 304 (quoting Boullenois, *Traité des Status*, bk. 1, p. 62)).

78. *Id.* at 122.

79. *Id.* at 125.

80. *See id.* at 129 n.7.

81. *See id.* at 142-43 (Brennan, J., dissenting), 159-60 (White, J., dissenting).

82. *Id.* at 142-43 (Brennan, J., dissenting). For a more detailed discussion of *Michael H.*, see Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 Tul. L. Rev. 585 (1991); West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. Pa. L. Rev. 1373 (1991); Note, *Family Law Symposium: Michael H. v. Gerald D.: Upholding the Marital Presumption Against a Dual Paternity Claim*, 50 La. L. Rev. 1015 (1991).

83. 463 U.S. 248 (1983).

84. *Id.* at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)).

### B. *Unresolved Issues Concerning the Unwed Father's Rights*

When an infant is placed for adoption at birth, the natural unwed father can have no more than a biological link to his child. The Supreme Court has yet to rule on what this unwed father must do to protect his parental rights, effectively leaving the states free to find their own answers. This, however, has proven to be a formidable task as a recent New York Court of Appeals decision indicates.<sup>85</sup>

The court held in *In re Raquel Marie*<sup>86</sup> that New York Domestic Relations Law § 111(1)(e) is unconstitutional.<sup>87</sup> Section 111(1)(e) governed the rights of an unwed father to his infant placed for adoption before the age of six months. The statute required a putative father to satisfy three criteria before according him veto rights over an adoption: he had to (1) live with the child or mother continuously for the six continuous months immediately preceding the adoption; (2) publicly admit paternity; and (3) provide reasonable financial support for the pregnancy and birth.<sup>88</sup> Because the statute applied to an infant under six months of age, the six-month cohabitation period necessarily exceeded the child's age and could only be fulfilled if the putative father lived with the mother for a portion, if not all, of the time.<sup>89</sup> According to the court, the "living together requirement" places an inappropriate "focus on the relationship between father and mother, rather than father and child . . . [and] does not establish parental responsibility toward the child."<sup>90</sup> Even though the remaining two criteria passed constitutional muster, the court struck down § 111(1)(e) in its entirety because the invalidated criterion was essential to the legislation.<sup>91</sup>

Domestic Relations Law § 111(1)(d)-(e) represented the Legislature's attempt to bring New York law into compliance with *Caban v. Mohammed*<sup>92</sup> by giving an unwed father who could demonstrate a substantial, continuous, and meaningful relationship with his child the right to veto

85. See *infra* notes 168-89 and accompanying text for a discussion of the rights of unwed fathers in states other than New York.

86. 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990).

87. See 76 N.Y.2d at 407, 559 N.E.2d at 427, 559 N.Y.S.2d at 864.

88. § 111(1)(e) required consent to the adoption as follows:

Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such 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 (ii) such father openly held himself out to be the father of such child during such period; and (iii) 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 or with the birth of the child.

See N.Y. Dom. Rel. Law § 111(1)(e) (McKinney 1988).

89. See 76 N.Y.2d at 405, 559 N.E.2d at 426, 559 N.Y.S.2d at 863.

90. *Id.*

91. See *id.* at 405-07, 559 N.E.2d at 426-27, 559 N.Y.S.2d at 863-64.

92. 441 U.S. 380 (1979).

the adoption of his child.<sup>93</sup> The Legislature created two different standards, however, in recognition of an unwed father's inability to demonstrate an established relationship with his infant surrendered for adoption at birth or shortly thereafter. Section 111(1)(d) governs infants of putative fathers placed for adoption *after* six months of age and requires, among other things, continuous visitation and communication with the child.<sup>94</sup> Section 111(1)(e) instead relied on an unwed father's demonstration of parental concern and responsibility as indicators of his intention to establish a meaningful relationship with his child.<sup>95</sup>

*Raquel Marie* was a consolidation of two cases challenging the constitutionality of § 111(1)(e).<sup>96</sup> In the first case, *In re Raquel Marie X*, Louise and Miguel met in 1983 while attending high school.<sup>97</sup> The couple

93. See Scheinkman, *Supplementary Practise Commentaries* (1990), N.Y. Dom. Rel. Law § 111 at C:111:1 (McKinney Supp. 1992); Memorandum of Sen. Joseph R. Pisani, 1980 NY Legis. Ann. 242-43.

94. § 111(1)(d) requires consent to the adoption as follows:

Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) 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 (ii) 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 authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or 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. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, 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 for the purpose of this subdivision.

See N.Y. Dom. Rel. Law § 111(1)(d) (McKinney 1988). The Court of Appeals has expressly declined to rule on the constitutionality of § 111(1)(d). See *In re Andrew Peter H.T.*, 64 N.Y.2d 1090, 1092, 479 N.E.2d 227, 229, 489 N.Y.S.2d 882, 884 (1985).

95. According to the statute's sponsor, Senator Joseph R. Pisani, paying pregnancy and birth expenses, acknowledging paternity, and living with mother and child were "manifestat[ions] [of] a significant parental interest in the child. . . ." and were a "reasonable, unambiguous and objective standard to guide agencies and courts." Memorandum of Sen. Joseph R. Pisani, 1980 N.Y. Legis. Ann. 243 (quoting *Caban v. Mohammed*, 441 U.S. 380, 394 (1979)).

96. Previous challenges of the constitutionality of § 111(1)(e) have failed. See "Female" D. v. Carol D., 83 A.D.2d 933, 935, 442 N.Y.S.2d 575, 578, *appeal dismissed*, 55 N.Y.2d 878 (1982); *Michael Patrick C. v. Mary C.*, 83 A.D.2d 932, 932-33, 442 N.Y.S.2d 579, 580-81 (1981)

97. *In re Raquel Marie X.*, 173 A.D.2d 709, —, 570 N.Y.S.2d 604, 605 (1991).

had a child out of wedlock and made periodic attempts to cohabit.<sup>98</sup> Each effort, however, was short-lived due to their stormy relationship.<sup>99</sup> On May 26, 1988, Louise gave birth to their second child, Raquel Marie.<sup>100</sup> Miguel and Louise were still unmarried and living apart when Raquel Marie was born.<sup>101</sup> Miguel attempted to live with the mother and daughter following the child's birth but moved out after the first week because, according to him, "we were arguing, and I thought it wasn't safe to stay there at night."<sup>102</sup> On July 19, 1988, Miguel filed an action for custody.<sup>103</sup> Three days later, however, Louise executed a consent to adoption and surrendered Raquel Marie to adoptive parents.<sup>104</sup> Louise and Miguel subsequently reconciled and married on November 4, 1988.<sup>105</sup> Soon after, Louise joined Miguel in his efforts to gain custody of Raquel Marie.<sup>106</sup> They maintained that § 111(1)(e) required Miguel's consent to the adoption and that it had not been obtained.<sup>107</sup>

The lower court held that Miguel had adequately satisfied § 111(1)(e), and denied the petition for adoption.<sup>108</sup> Even though Miguel and Louise lived separately during the applicable six-month period prior to placing Raquel Marie for adoption, the court concluded that the couple had a sufficiently continuous relationship to satisfy a relaxed interpretation of the "living together" requirement.<sup>109</sup> The court also found that Miguel openly acknowledged his paternity and provided financial support for the pregnancy and birth.<sup>110</sup>

The Appellate Division reversed, however, on the grounds that Miguel did not satisfy the "living together" requirement even under a loosely construed interpretation of § 111(1)(e).<sup>111</sup> Miguel appealed from the appellate court reversal and argued that § 111(1)(e) unconstitutionally deprived him of his right to be a father.<sup>112</sup>

The second of the two consolidated cases heard by the Court of Ap-

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98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *In re Raquel Marie X.*, 150 A.D.2d 23, 25, 545 N.Y.S.2d 379, 380 (1989), *rev'd*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990).

103. *See In re Raquel Marie X.*, 173 A.D.2d 709, 570 N.Y.S.2d 604, 605 (1991).

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *In re Raquel Marie X.*, 150 A.D.2d 23, 27, 545 N.Y.S.2d 379, 381 (1989) *rev'd*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990).

109. *See id.* at 25, 545 N.Y.S.2d at 381.

110. *See In re Raquel Marie X.*, 76 N.Y.2d 387, 395, 559 N.E.2d 418, 420, 559 N.Y.S.2d 855, 857, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990).

111. *See id.*

112. *See id.*

peals was *In re Baby Girl S.*<sup>113</sup> In August of 1987, Regina, the birth mother, told Gustavo, the putative father, that she had missed her menstrual cycle. Gustavo responded, "I love you and want to marry you."<sup>114</sup> Regina, however—worried that pregnancy would threaten her pending divorce proceedings and custody fight for her nine-year-old son—ended her relationship with Gustavo and told him that she was not pregnant.<sup>115</sup> Gustavo subsequently learned from a friend that Regina was still carrying their child.<sup>116</sup> Regina admitted this but insisted that Gustavo was not the father. Furthermore, she told Gustavo that she intended to place the baby for adoption.<sup>117</sup> Gustavo, convinced that the baby was his, pleaded with Regina to keep the child and offered her \$8,000 to help pay for pregnancy expenses.<sup>118</sup> Regina remained adamant and rejected his help.<sup>119</sup>

Gustavo filed a petition to establish his paternity on March 2, 1988—53 days before the birth of Baby Girl S. on April 24.<sup>120</sup> On May 4, 1988, the adoptive parents, Jane and Ed, commenced adoption proceedings.<sup>121</sup> While Gustavo's paternity petition was pending, Regina appeared before the family court on May 18, 1988, identified her estranged husband as the father, and gave her consent to the adoption.<sup>122</sup> Regina gave the baby to the adoptive parents on June 14, 1988, the same day that Gustavo filed with the Putative Father Registry.<sup>123</sup> On July 18, 1988, the court held that Gustavo was the biological father of Baby Girl S. and scheduled a hearing to determine his parental rights.<sup>124</sup>

The Surrogate Court ruled that Gustavo had been prevented from knowing about his paternity and that, therefore, literal compliance with § 111(1)(e) was impossible.<sup>125</sup> Because Gustavo did as much as possible to satisfy the statute, including offering to marry Regina and providing financial support for the pregnancy, the court read a "savings clause" into the statute and granted Gustavo a right to veto the adoption.<sup>126</sup> The Surrogate Court also held that the adoption should fail because Regina and the adoptive parents engaged in fraud by concealing Gustavo's paternity from him.<sup>127</sup> After the Appellate Division affirmed, the adoptive parents appealed.

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113. 141 Misc. 2d 905, 535 N.Y.S.2d 676 (Sur. Ct. 1988).

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

115. *See id.*

116. *See id.* at 909, 535 N.Y.S.2d at 678.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 907, 535 N.Y.S.2d at 677.

121. *See id.* at 906, 535 N.Y.S.2d at 677.

122. *See id.*

123. *See id.* at 907, 535 N.Y.S.2d at 678.

124. *See id.* at 907-08, 535 N.Y.S.2d at 678.

125. *See id.* at 919-20, 535 N.Y.S.2d at 685.

126. *See id.* at 915, 535 N.Y.S.2d at 682.

127. *See id.* at 919-20, 535 N.Y.S.2d at 685.

In declaring § 111(1)(e) unconstitutional, the New York Court of Appeals found that the "living together" requirement was only tangentially related to the father-child relationship and did not further the state's interest in promoting quick, permanent adoption placements to ensure the well-being of the child.<sup>128</sup> Moreover, because the father had to live with the mother for some portion, if not all, of the six months preceding adoption, the biological mother could attempt to use the "living together" requirement to unilaterally terminate the father's rights by refusing to consent to cohabitation.<sup>129</sup> Additionally, the Court of Appeals found that the "living together" requirement "permits adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard."<sup>130</sup>

Pending legislative modification of § 111(1)(e), the court formulated an interim standard for lower courts to use in determining an unwed father's parental rights.<sup>131</sup> Under this standard, the father must be willing to take custody of the child—not merely try to prevent the adoption.<sup>132</sup> He must also promptly manifest his parental responsibility.<sup>133</sup> In determining an unwed father's manifestation of responsibility, courts are to contemplate such factors as "public acknowledgment of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child."<sup>134</sup>

Applying this standard, the court held in *In re Baby Girl S.* that Gustavo demonstrated sufficient parental responsibility to earn the right to veto the adoption because he sought "full custodial responsibility virtually from the time he learned of Regina's pregnancy, [and] did everything possible to manifest and establish his parental responsibility."<sup>135</sup> In *Raquel Marie*, however, the court determined that it could not decide whether Miguel appropriately manifested his parental responsibility because the Appellate Division had based its decision only on Miguel's failure to satisfy the "living together" requirement and had not gone further in its analysis.<sup>136</sup> The case, therefore, was remanded to the Appellate Division for further review of the facts to ascertain whether Miguel satisfied the new interim judicial standard.<sup>137</sup>

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128. See *In re Raquel Marie X.*, 76 N.Y.2d 387, 405-06, 559 N.E.2d 418, 426, 559 N.Y.S.2d 855, 863, cert. denied, — U.S. —, 111 S. Ct. 517 (1990).

129. See *id.* at 405, 559 N.E.2d at 426, 559 N.Y.S.2d at 863.

130. *Id.*

131. See *id.* at 407-08, 559 N.E.2d at 427, 559 N.Y.S.2d at 864.

132. See *id.* at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

133. See *id.*

134. *Id.*

135. *Id.* at 409, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

136. See *id.* at 409, 559 N.E.2d at 428-29, 559 N.Y.S.2d at 865-66.

137. See *id.* at 408, 559 N.E.2d at 429, 559 N.Y.S.2d at 866. On remand, Miguel's parental rights were terminated because the court held that he failed to satisfy *Raquel*



*Raquel Marie* is significant because it affords an unwed father greater constitutional protection. No longer are his rights contingent on the wishes of the mother.<sup>138</sup> An unwed father can now demonstrate independently that he has assumed parental responsibility, is committed to his child, and is deserving of full parental rights.<sup>139</sup> Yet *Raquel Marie* never addresses the conflict between the putative father's rights and his infant's best interests caused by granting *pendente lite* custody to adoptive parents. If an unwed father satisfies the *Raquel Marie* test, courts must still choose between granting custody to the father and risking emotional harm to his child, or approving the adoption to safeguard the child's welfare and depriving the father of his parental rights.

## II. CONSEQUENCES OF GRANTING *PENDENTE LITE* CUSTODY TO ADOPTIVE PARENTS: CONFLICTING INTERESTS OF THE UNWED FATHER AND HIS INFANT

### A. Problematic Adoption Procedures

If an unwed father is found to be responsible and deserving of parental rights, it logically follows that the judicial system should award him custody of his infant. This, however, often does not happen. In many jurisdictions, the unwed father must overcome an additional obstacle.

States often grant adoptive parents temporary custody of an infant surrendered at birth by the unwed mother until a court decides whether to finalize the adoption.<sup>140</sup> This allows the adoptive parents to provide for

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*Marie's* interim standard. See *In re Raquel Marie X.*, 170 A.D.2d 709, 570 N.Y.S.2d 604, 605 (1991). The court found that Miguel did not publicly acknowledge his paternity, provide adequate birth and pregnancy financial contributions, or promptly establish his legal responsibility for Raquel Marie. See *id.* at 605-07.

138. The unwed father's dependency on the mother is illustrated in *Baby Girl S.*, where Gustavo wished to marry Regina but could not obtain her consent. See *In re Baby Girl S.*, 141 Misc. 2d 905, 908, 535 N.Y.S.2d 676, 678 (Sur. Ct. 1988).

139. Importantly, *Raquel Marie* furthers the state's interest in expediting adoptions and ensuring that the adoption process is dependable because it sets forth unambiguous and objective criteria that can be evaluated soon after the child's birth. If a putative father does not immediately manifest significant parental responsibility once his child is born, *Raquel Marie* allows the state to deny the unwed father a right of consent and to permit the adoption to proceed.

140. See, e.g., *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion omitted), 236 Cal. Rptr. 660, 661 (1987), *cert. dismissed sub nom.* *McNamara v. County of San Diego Dep't of Social Servs.*, 488 U.S. 152 (1988) (child placed with adoptive parents five weeks after birth); *In re Baby Girl Eason*, 257 Ga. 292, 292, 358 S.E.2d 459, 460 (1987) (child placed with adoption agency three days after birth and soon after given to adoptive parents); *Lathrop v. Scott*, 2 Kan. App. 2d 90, 91, 575 P.2d 894, 895 (1978) (child was two days old when given to adoptive parents); *In re Raquel Marie X.*, 76 N.Y.2d 387, 394, 559 N.E.2d 418, 420, 559 N.Y.S.2d 855, 857, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990) (*Baby Girl S.* was given to adoptive parents two days after birth, and *Raquel Marie* was placed in an adoptive home two months after birth); *John E. v. John Doe*, 164 A.D.2d 375, 384, 564 N.Y.S.2d 439, 445 (1990) (Rosenblatt, J., concurring) (child surrendered to adoptive parents four days after birth); *In re Adoption of Kirin*, N.Y.L.J., Dec. 29, 1989, at 27, col. 6 (Sur. Ct. 1989) (child was under three months of age when placed with adoptive parents).

the child's physical and psychological needs on a daily basis during custody proceedings and to develop the kind of relationship with the child that produces strong emotional attachments. When the custody dispute is resolved, however, a conflict arises if the court adjudicates the unwed father to be responsible and deserving of parental rights. As one court has stated, "the child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child."<sup>141</sup> In short, should the court deny the adoption and risk causing emotional harm to the child, or should it grant the adoption to safeguard the child's best interests and thereby deprive the putative father of his parental rights? *Raquel Marie* offers no counsel on this predicament.

The child's best interests are a primary factor in custody disputes.<sup>142</sup> In determining the child's best interests, courts compare the parties seeking custody and favor the party who, in the court's estimation, can provide the most beneficial living environment for the child.<sup>143</sup> If a biological parent is involved, however, that biological parent should prevail<sup>144</sup> unless there exist "extraordinary circumstances [such as] . . . surrender, abandonment, persisting neglect, unfitness, and *unfortunate or involuntary disruption of custody over an extended period of time*."<sup>145</sup>

The child's best interests are most frequently at issue in custody and visitation disputes between natural parents.<sup>146</sup> Courts also use the child's

141. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 550, 356 N.E.2d 277, 284, 387 N.Y.S.2d 821, 827 (1976).

142. *See Catherine D. v. Dennis B.*, 220 Cal. App. 3d 922, 926-27, 269 Cal. Rptr. 547, 550 (1990); *Guardianship of Claralyn S. v. Gary S.*, 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646, 649 (1983); *Dorminy v. Dorminy*, 242 Ga. 326, 326, 249 S.E.2d 49, 49 (1978); *Burnworth v. Hughes*, 234 Kan. 69, 74, 670 P.2d 917, 921-22 (1983); *In re Marriage of Yarbrough*, 719 S.W.2d 412, 417 (Tex. Ct. App. 1986); *C.G.V. v. Texas Dep't of Human Resources*, 663 S.W.2d 871, 873 (Tex. Ct. App. 1983).

143. *See Quilloin v. Walcott*, 434 U.S. 246, 250-51 (1977).

144. *See Baby Boy D. v. Steven A.*, 159 Cal. App. 3d 8, 17, 205 Cal. Rptr. 361, 365 (1984); *David C. v. Ismael C.*, 152 Cal. App. 3d 1189, 1208, 200 Cal. Rptr. 115, 127 (1984); *In re S.E.H.*, 180 Ga. App. 849, 850, 350 S.E.2d 833, 834 (1986); *Sheppard v. Sheppard*, 230 Kan. 146, 152, 630 P.2d 1121, 1127 (1981), *cert. denied*, *Sumner v. Sheppard*, 455 U.S. 919 (1982); *In re Custody of J. Eden*, 216 Kan. 784, 785-86, 533 P.2d 1222, 1223 (1975).

145. *Bennett v. Jeffreys* at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 824 (emphasis added). *See also Michael Paul T. v. Thomas R.*, 124 A.D.2d 970, 971, 508 N.Y.S.2d 822, 823 (1986) ("prolonged separation of parent and child for most of child's life" is an extraordinary circumstance); *La Croix v. Deyo*, 88 A.D.2d 1077, 1078, 452 N.Y.S.2d 726, 727 (1982) (same), *appeal dismissed*, 57 N.Y.2d 759, 440 N.E.2d 1336, 454 N.Y.S.2d 989 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 436 N.E.2d 1260, 1262-63, 451 N.Y.S.2d 658, 651 (1982) (same); *Dickson v. Lascaris*, 53 N.Y.2d 204, 208, 423 N.E.2d 361, 363, 440 N.Y.S.2d 884, 886 (1981) (same).

146. *See Mock v. Mock*, 258 Ga. 407, 407, 369 S.E.2d 255, 255 (1988); *Hart v. Hart*, 236 Kan. 856, 856, 695 P.2d 1285, 1285-86 (1985); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 169, 436 N.E.2d 1260, 1261, 451 N.Y.S.2d 658, 659 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 91, 432 N.E.2d 765, 766, 447 N.Y.S.2d 893, 894 (1982); *Villarreal v. Villarreal*, 684 S.W.2d 214, 216 (Tex. Ct. App. 1984).

best interests to terminate a parent's rights in cases involving a biological parent and a non-biological parent. For example, courts have ruled in favor of placement with a non-biological parent due to a biological parent's neglect.<sup>147</sup> Courts have also awarded custody to a non-biological parent in order to prevent further physical abuse to a child.<sup>148</sup>

The child's best interests become an issue in cases involving unwed fathers because of the prolonged disruption of custody caused by granting *pendente lite* custody to the adoptive parents.<sup>149</sup> Courts have held that this extended separation between father and child may require the adoptive parents to retain custody of the infant in order to protect the child's best interests.<sup>150</sup>

### B. *Consequences of Granting Pendente Lite Custody to Adoptive Parents in New York*

Because *Raquel Marie* never explicitly addressed the effects of award-

147. See, e.g., *In re Adoption of Hobson*, 8 Kan. App. 2d 772, 777, 667 P.2d 911, 915 (1983) (father had no contact with children for almost three years); *In re Michael M.*, 172 A.D.2d 152, —, 567 N.Y.S.2d 693, 694 (1991) (mother "failed to maintain suitable contact with or plan for the future of the child"); *In re Travis Lee G.*, 169 A.D.2d 769, 770, 565 N.Y.S.2d 136, 137 (1991) (mother sexually abused child); *In re Lee Ann "N."*, 110 A.D.2d 979, 980, 487 N.Y.S.2d 891, 892 (1985) (mother subjected children to sexual abuse of her paramour and failed to address her alcohol addiction); *In re Jennifer VV.*, 99 A.D.2d 882, 883, 472 N.Y.S.2d 478, 480 (1984) (parents failed to provide for child's future even though they were financially and physically able to do so); *Jordan v. Hancock*, 508 S.W.2d 878, 880-81 (Tex. Civ. App. 1974) (natural father abandoned his children for a period of two years).

148. See, e.g., *In re Elizabeth D.*, 139 A.D.2d 66, 70, 530 N.Y.S.2d 397, 400 (1988) (father committed sexual acts with child), *appeal dismissed*, 73 N.Y.2d 871, 534 N.E.2d 334, 537 N.Y.S.2d 495 (1989); *In re Alyne E.*, 113 Misc. 2d 307, 310, 448 N.Y.S.2d 984, 986 (Fam. Ct. 1982) (father physically assaulted child and withheld psychiatric assistance from child); *In re Shane T.*, 115 Misc. 2d 161, 164-66, 453 N.Y.S.2d 590, 593-94 (Fam. Ct. 1982) (father verbally assaulted child by repeatedly questioning his sexuality, without mother ever interceding on behalf of child, to the point where child became physically ill).

149. See *supra* notes 140-41 and accompanying text. See, e.g., *In re Raquel Marie X.*, 76 N.Y.2d 387, 394-95, 559 N.E.2d 418, 420, 559 N.Y.S.2d 855, 857, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990) (*Raquel Marie* spent approximately two years with her adoptive parents before the court determined her biological father's parental rights); *John E. v. Doe*, 164 A.D.2d 375, 384, 564 N.Y.S.2d 439, 445 (1990) (Rosenblatt, J., concurring) (Daniel spent almost three years with his adoptive parents while the judicial system adjudicated his natural father's rights); see also *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion omitted), 236 Cal. Rptr. 660, 669 (1987) (court determined biological father's parental rights over six years after child was placed with adoptive parents), *cert. dismissed sub nom. McNamara v. County of San Diego Dep't of Social Servs.*, 488 U.S. 152 (1988); *Lathrop v. Scott*, 2 Kan. App. 2d 90, 91, 575 P.2d 894, 895 (1978) (court decided natural father's rights to custody one and a half years after child was placed with adoptive parents).

150. See *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion omitted), 236 Cal. Rptr. at 669; *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 793, 705 P.2d 362, 366, 218 Cal. Rptr. 39, 42 (1985); *John E. v. Doe*, 164 A.D.2d 375 at 379, 564 N.Y.S.2d at 442; *In re Baby Girl S.*, 628 S.W.2d 261, 262 (Tex. Ct. App. 1982), *vacated sub nom. Kirkpatrick v. Christian Homes of Abilene, Inc.*, 460 U.S. 1074 (1983).

ing *pendente lite* custody to adoptive parents, lower courts in New York have had to determine for themselves how to resolve the resulting conflict between the biological father's parental rights and his infant's best interests.<sup>151</sup> The appellate court's splintered decision in *John E. v. Doe*<sup>152</sup> illustrates the varying opinions which have emerged in New York.<sup>153</sup>

The plurality in *John E.* held that the putative father did not satisfy the *Raquel Marie* standard and, therefore, had no right to prevent the adoption of his son, Daniel.<sup>154</sup> Yet the court seemed so worried about the effects of uprooting the child from the adoptive parent's *pendente lite* home<sup>155</sup> that it incorrectly factored Daniel's best interests into its determination that the putative father had not established his parental responsibility under *Raquel Marie*.<sup>156</sup> Relying on expert psychological testimony, the plurality concluded that the putative father should not receive custody of Daniel because "a warm, intimate bonding" had formed between Daniel and his adoptive parents, and that removal from their care would have "a devastating psychological effect" on Daniel."<sup>157</sup>

The concurrence, taking a somewhat different approach, concluded that the prolonged separation between father and child amounted to "extraordinary circumstances"<sup>158</sup> which also required a finding against a

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151. Before *Raquel Marie* declared § 111(1)(e) unconstitutional, there was no practical need for concern over the effects on an infant of a change in custody from the adopting parents to the biological father because unwed fathers rarely prevailed. See *In re Baby Girl B.*, 161 A.D.2d 1201, 1201, 558 N.Y.S.2d 875, 875 (1990); *In re "Female" D.*, 83 A.D.2d 933, 935, 442 N.Y.S.2d 575, 578-79 (1981); *Michael Patrick C. v. Mary C.*, 83 A.D.2d 932, 932, 442 N.Y.S.2d 579, 580 (1981); *A.F. v. Spence Chapin Agency*, 142 Misc. 2d 412, 420, 537 N.Y.S.2d 752, 757 (Fam. Ct. 1989); *In re Adoption of Emily Ann*, 137 Misc. 2d 726, 731, 522 N.Y.S.2d 786, 789 (Fam. Ct. 1987); *In re Adoption of Carmen Lydia S.*, 106 Misc. 2d 770, 774, 435 N.Y.S.2d 645, 648 (Sur. Ct. 1981). One notable exception was *In re Adoption of Female F. D.*, 105 Misc. 2d 866, 433 N.Y.S.2d 318 (Sur. Ct. 1980). Here, the biological father did manage to satisfy § 111(1)(e). Rather than granting custody to the biological father, however, the case was remanded to the lower court to determine if "the abrupt termination of Susan's relationship with the [adopting parents] might prove disastrous for Susan's well-being." *Id.* at 873, 433 N.Y.S.2d at 324. *Female F.D.* exemplifies the problem that a growing number of unwed fathers could confront: granting custody *pendente lite* to adopting parents may effectively result in termination of a responsible unwed father's parental rights in order to protect the child's best interests.

152. 164 A.D.2d 375, 564 N.Y.S.2d 439 (1990).

153. See *infra* notes 168-89 and accompanying text for a discussion of how other states have attempted to reconcile the parental rights of unwed fathers with the best interests of their infants.

154. See *John E. v. Doe* at 376, 564 N.Y.S.2d at 440.

155. By the time the court rendered its decision, Daniel had lived with his adoptive parents for almost all of his three years. See *id.* at 382, 564 N.Y.S.2d at 444.

156. See *id.* at 379, 382-83, 564 N.Y.S.2d at 442, 444-45. The dissent contended that the plurality's "two-pronged analysis . . . run[s] contrary to the criteria established in *Matter of Raquel Marie X.*" *Id.* at 390, 564 N.Y.S.2d at 449 (Thompson, J., dissenting).

157. *Id.* at 383, 564 N.Y.S.2d at 444.

158. *Id.* at 388, 564 N.Y.S.2d at 448.

shift in custody in order to protect the child's best interests.<sup>159</sup> According to the concurrence,

the change in custody portends disaster for Daniel. The psychologist who testified at the hearing spoke of the "devastating" psychological effects that await Daniel if his parental bond is to be exploded, while the psychiatrist described the "serious damage" facing Daniel, including the impairment of his cognitive and intellectual functions.<sup>160</sup>

Under the concurrence's view, even if the putative father had satisfied the *Raquel Marie* requirements, the prolonged separation of father and child would still necessitate a finding against a custody change. In effect, the concurrence would only award *standing* to an unwed father who satisfied *Raquel Marie* and whose child was placed in the care of adoptive parents *pendente lite*; the unwed father would then have the burden of demonstrating that a shift in custody would not impair his child's welfare.<sup>161</sup>

A strongly worded dissent in *John E.* found the plurality's "two-pronged analysis" alarming and argued that the court was "bound to apply the criteria adopted in [*Raquel Marie*]." <sup>162</sup> The dissent found that

<sup>159.</sup> *See id.*

<sup>160.</sup> *Id.* at 387, 564 N.Y.S.2d at 447 (Rosenblatt, J., concurring).

<sup>161.</sup> Interestingly, the concurrence felt that had the lower court found the putative father to be responsible, no harm would have come to the infant by a shift in custody at that stage of the litigation. At that point, "[n]o bond of any duration would have developed between Daniel and his adoptive parents, certainly not the powerful three-year tie that has been forged." *Id.* at 388, 564 N.Y.S.2d at 447-48. Yet, the lower court stated that Daniel "had very clearly bonded with the proposed adoptive parents and that it would be a wrenching and emotional experience if the child's custody were transferred to [the putative father] whom he had never seen and did not know." *Erickson v. Doe*, 145 Misc. 2d 557, 561, 547 N.Y.S.2d 807, 810 (Fam. Ct. 1989).

A similar approach to the concurrence's approach in *John E.* was taken in *In re Kiran Chandini S.*, 166 A.D.2d 599, 560 N.Y.S.2d 886 (1990) where the natural father prevailed under the *Raquel Marie* test. The baby in this case was older than two and a half years when the appellate court rendered its verdict. The court held that the unwed father "demonstrated sufficient parental responsibility as to establish his right to 'veto' the adoption." *Id.* at 601, 560 N.Y.S.2d at 888. Instead of granting custody to the putative father, however, the appellate division remanded the case to the lower court for "an inquiry into whether there exist 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).

A natural father also passed the *Raquel Marie* test in *In re Baby Girl S.*, 141 Misc. 2d 905, 535 N.Y.S.2d 676 (Sur. Ct. 1988), *aff'd*, *In re Raquel Marie X.*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, — U.S. —, 111 S. Ct. 517 (1990). The court, however, found that the adoptive parents fraudulently withheld knowledge of paternity from the court; thus, the court never discussed whether remaining with the adoptive parents was in the best interests of the child. *See id.* at 919-20, 535 N.Y.S.2d at 685.

Courts have denied most unwed fathers their parental rights under the *Raquel Marie* criteria. *See In re Raquel Marie X.*, 173 A.D.2d 709, —, 570 N.Y.S.2d 604, 605 (1991); *In re Stephen C.*, 170 A.D.2d 1035, 1035-36, 566 N.Y.S.2d 178, 179 (1991); *In re Jessica*, N.Y.L.J., Sept. 3, 1991, at 25, col. 5 (Fam. Ct. 1991); *In re Anonymous*, N.Y.L.J., Jan. 9, 1991, at 28, col. 3 (Sur. Ct. 1991).

<sup>162.</sup> *John E. v. Doe*, 164 A.D.2d 375, 390-91, 564 N.Y.S.2d 439, 449 (1990) (Thompson, J., dissenting).

the putative father had satisfied the standard set forth by the Court of Appeals and saw no reason why "[this] concerned and fit father [should be] deprived of custody of his child."<sup>163</sup>

The dissent also disagreed with the concurrence's reasoning and stated that a separation between father and son caused by the state and the slow pace of the legal system should not amount to "extraordinary circumstances . . . [and] trigger a best interests analysis."<sup>164</sup> According to the dissent,

The fact that the child, who is now three years old, has no established relationship with the [putative father], should not be raised as a ground for denying him custody. This period of separation between the child and his natural father may not be attributed to any lack of interest on the [putative father's] part. Rather it is due to the unfortunate pace of these court proceedings to establish his right to custody even though there is no dispute as to his paternity or as to his ability to assume his role as a parent.<sup>165</sup>

One commentator has opined that the Court of Appeals' silence in

163. *Id.* at 394, 564 N.Y.S.2d at 452.

164. *See id.* at 394, 564 N.Y.S.2d at 451-52 (citations omitted).

165. *Id.* at 394, 564 N.Y.S.2d at 451. One year later, a majority of the same court awarded custody to an unwed father of his infant whom the mother had surrendered shortly after birth to the Nassau County Department of Social Services. *See Alfredo S. v. Nassau County Dep't of Social Servs.*, 172 A.D.2d 528, —, 568 N.Y.S.2d 123, 127 (1991). Although the father and child had been separated for two years, the court held that "[t]he period of separation is in large measure attributable to the pace of the instant proceedings, a circumstance over which the petitioner could exercise virtually no control." *Id.* at —, 568 N.Y.S.2d at 125. Importantly, the court never discussed the possible effects on the child of the required custody transfer from the Department of Social Services to the father's home. *See id.* at —, 568 N.Y.S.2d at 128 (Miller, J., dissenting). This child, however, had been placed in the impersonal confines of a state agency, rather than the intimate setting of an adoptive parent's home.

Other courts have ruled that a biological parent's primary right to custody should not be defeated because a nonparent has become a child's emotional provider for an extended period of time. For instance, in *In re Margarita Monegro Yard*, a biological mother who surrendered her daughter to a foster home at birth in order to overcome a drug addiction was awarded custody of her child seven years later even though the child had lived with a foster family for the entire time. *See N.Y.L.J.*, Dec. 13, 1991, at 22, col. 6 (Fam. Ct. 1991). According to this court,

while *Matter of Bennett v. Jeffreys* . . . held that a parent's 'abandonment' of a child may be a circumstance leading to the abrogation of a parent's right to the return of a child, a similar lack of contact by a parent seeking the child's return, even though the contact between the parent and child would be the same, has been held not to be sufficient to overcome a parent's primary right to the return of the child.

*Id.* at 24, col. 3; *See also In re Adoption of Male Infant L.*, 61 N.Y.2d 420, 428-29, 462 N.E.2d 1165, 1169-70, 474 N.Y.S.2d 447, 452 (1984) (separation between natural parent and child not attributable to lack of concern or interest by parent is not sufficient to deprive parent of custody of his or her child); *Dickson v. Lascaris*, 53 N.Y.2d 204, 209-10, 423 N.E.2d 361, 364, 440 N.Y.S.2d 884, 887 (1981) (separation between biological parent and child due to lawful efforts to regain custody will not defeat parent's custody claim); *Sanjivini K. v. Rockland County Dep't of Social Servs.*, 47 N.Y.2d 374, 381, 391 N.E.2d 1316, 1320, 418 N.Y.S.2d 339, 343 (1979) (same).

*Raquel Marie* on the issue of the child's best interests implies that an unwed father who passes the *Raquel Marie* test is entitled to full custody of his child.<sup>166</sup> Under this view,

[t]he simple explanation for the court omitting discussion of this issue is that the court treated the child's best interest as irrelevant in assessing the scope of parental rights. Its unspoken premise was that the state cannot withhold the father's rights improperly for a period of time and then rely on reference to the child's best interests to terminate those rights completely.<sup>167</sup>

In sum, the multiple opinions expressed in *John E.* represent the diverging views that remain among the New York courts. Each of these three approaches—the plurality's errant consideration of the child's best interests in determining the putative father's satisfaction of the *Raquel Marie* standard, the concurrence's focus on the "extraordinary circumstances" arising due to prolonged separation, and the dissent's strict application of the *Raquel Marie* test—either protects the infant's best interests or the unwed father's rights. Yet, none of them adequately safeguards both. Specifically, if *Raquel Marie* gives an unwed father standing only to contest the adoption of his child and an opportunity to argue that the child's best interests will not be damaged by a shift in custody, then it clearly falls short of protecting the putative father's rights. By granting custody *pendente lite* to adoptive parents, the state is, in effect, predetermining the child's best interests by stacking the deck against the putative father from the beginning and substantially reducing its burden in terminating his rights. If, however, *Raquel Marie* allows courts to consider the child's best interests in determining whether the unwed father should be granted parental rights, giving temporary custody to adoptive parents will again unfairly reduce the father's chances of receiving custody. Finally, and conversely, if *Raquel Marie* grants full custody to an unwed father who sufficiently satisfies its criteria, an infant who has developed an emotional attachment to his adoptive parents may suffer emotional harm.

### C. *Consequences of Granting Pendente Lite Custody to Adoptive Parents in Jurisdictions Outside New York*

Other states have had an equally difficult time trying to balance the rights of a responsible unwed father with the best interests of his infant who has been nurtured by adoptive parents. In states that emphasize the child's best interests,<sup>168</sup> courts protect an infant from being psychologi-

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166. See *Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption For Unwed Father Who Demonstrates Parental Responsibility—In re Raquel Marie X.*, 104 Harv. L. Rev. 800, 806 (1991).

167. *Id.*

168. Examples of child-focused jurisdictions are California, see, e.g., *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion omitted), 236 Cal. Rptr. 660, 666 (1987) (best interests of child is applicable standard), *cert. dismissed sub nom. McNamara v. County of San*

cally traumatized by a custody change. This approach, however, obstructs the unwed father's "opportunity interest" in developing a relationship with his child. Courts in other states safeguard the putative father's "opportunity interests" in establishing a relationship with his child<sup>169</sup> but provide few precautions for an infant who has emotionally bonded with his adoptive parents.

Georgia has applied both the "child-focused" and the "parent-focused" approach. In *In re Ashmore*,<sup>170</sup> for instance, a mother surrendered her baby for adoption two days after birth. In determining the unwed father's rights, the Georgia Court of Appeals focused on the child's welfare and ruled that the child's interests would be best served by permitting adoption rather than granting custody to the putative father.<sup>171</sup> The court concluded that "harm would come to this child by granting [the putative father's] request and thereby disrupting the child's stable family unit greatly and such exceeds any benefits which might flow to the child and will greatly outweigh any harm which will come to the biological Father."<sup>172</sup> Georgia's concern with the child's best interests, of course, did little to protect the putative father.

Five years later, however, the Georgia courts reversed their position and held that an unwed father of an infant surrendered for adoption is entitled to a fitness test, as is the unwed mother, in determining his parental rights. In *In re Baby Girl Eason*,<sup>173</sup> the court rejected the best-interests test because it was presumptively unfair to compare the putative father with the adoptive parents who have nurtured and cared for the child most of its life.<sup>174</sup> The court held that:

Only the state can alter its action to prevent the development of a parent-child relationship with adopting parents until the unwed father's rights are resolved. Thus we conclude if [the father] has not abandoned his opportunity interest, the standard which must be used to determine his rights to legitimate the child is his fitness as a parent

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Diego County Dep't of Social Servs., 488 U.S. 152 (1988), and Texas, see, e.g., *In re Baby Girl S.*, 628 S.W.2d 261, 262 (Tex. Civ. App. 1982) (same), *vacated sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074 (1983). See *infra* notes 179-88 and accompanying text.

169. Examples of parent-focused jurisdictions are Georgia, see, e.g., *In re Baby Girl Eason*, 257 Ga. 292, 296-97, 358 S.E.2d 459, 463 (1987) (if putative father has not abandoned his opportunity interest, standard to determine his right to custody is his fitness as a parent, rather than child's best interests), Kansas, see, e.g., *Lathrop v. Scott*, 2 Kan. App. 2d 90, 575 P.2d 894 (1978) (same), and Louisiana, see, e.g., *Durr v. Blue*, 454 So. 2d 315 (La. Ct. App. 1984) (in a dispute for custody between a parent and a nonparent, the parent has the superior right to custody unless proven to be unfit or to have forfeited his parental rights), *cert. denied*, 461 So. 2d 304 (La. 1984). See *infra* notes 170-78 and accompanying text.

170. 163 Ga. App. 194, 293 S.E.2d 457 (1982).

171. *Id.* at 198, 293 S.E.2d at 461.

172. *Id.* at 196, 293 S.E.2d at 460.

173. 257 Ga. 292, 358 S.E.2d 459 (1987).

174. See *id.* at 297, 358 S.E.2d at 463.



to have custody of the child. If he is fit he must prevail.<sup>175</sup>

In Kansas, the rights of a responsible unwed father also prevail. In *Lathrop v. Scott*,<sup>176</sup> for example, an unmarried mother placed her child with adoptive parents two days after birth. By the time the Kansas Court of Appeals decided the putative father's custody claim, the child had lived in the adoptive home for more than a year and a half.<sup>177</sup> Yet the court held that the unwed father "has parental rights to the custody of his child and . . . those rights must be given preference and will prevail over those of the adoptive parents due to the parental preference rule."<sup>178</sup>

California has witnessed an ongoing debate on this issue.<sup>179</sup> Recently, the state legislature and courts have gravitated toward the child-focused view. The current state statute<sup>180</sup> distinguishes between a "presumed" father and a natural father.<sup>181</sup> California "presumes" that the husband of the mother at birth is the biological father and affords him rights equal to those of the mother to veto an adoption of his child.<sup>182</sup> An unwed father, on the other hand, receives no veto rights and is granted only an opportunity to be heard on the best interests of the child before his rights are terminated. An unwed father may become a "presumed" father and obtain a veto right only if he "receives the child into his home and openly holds out the child as his natural child."<sup>183</sup>

175. *Id.*

176. 2 Kan. App. 2d 90, 575 P.2d 894 (1978).

177. *See id.* at 91, 575 P.2d at 895.

178. *Id.* at 95, 575 P.2d at 898.

179. *See In re Baby Girl M.*, 9 Fam. L. Rep. (BNA) 2403 (Ct. App. 1983); *Detrich v. Sheldon G.*, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (Ct. App. 1977); *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976).

180. Cal. Civ. Code § 7000-7021 (West 1983 & Supp. 1992). This is California's version of the Uniform Parentage Act (hereinafter referred to as the "UPA"). Seventeen other states have also adopted the UPA: *See* Alabama (Ala. Code §§ 26-17-1 to 26-17-21 (1986)); Colorado (Colo. Rev. Stat. §§ 19-6-101 to 19-6-129 (1986 & Supp. 1991)); Delaware (Del. Code Ann. tithe. 13 §§ 801-819 (Supp. 1990)); Hawaii (Haw. Rev. Stat. §§ 584-1 to 584-26 (1985 & Supp. 1990)); Illinois (Ill. Rev. Stat. ch. 40, para. 2501-2526 (Supp. 1991)); Kansas (Kan. Stat. Ann. §§ 38-1110 to 38-1129 (1986 & Supp. 1990)); Minnesota (Minn. Stat. Ann. §§ 257.51 to 257.74 (West 1982 & Supp. 1992)); Missouri (Mo. Ann. Stat. §§ 210.817 to 210.852 (Vernon Supp. 1992)); Montana (Mont. Code Ann. §§ 40-6-101 to 40-6-135 (1991)); Nevada (Nev. Rev. Stat. Ann. §§ 126.011 to 126.391 (Michie 1986 & Supp. 1991)); New Jersey (N.J. Stat. Ann. §§ 9:17-38 to 9:17-59 (West Supp. 1991)); New Mexico (N.M. Stat. Ann. §§ 40-11-1 to 40-11-23 (1989)); North Dakota (N.D. Cent. Code §§ 14-17-01 to 14-17-26 (1991)); Ohio (Ohio Rev. Code Ann. §§ 3111.01 to 3111.19 (Anderson 1989 & Supp. 1990)); Rhode Island (R.I. Gen. Laws §§ 15-8-1 to 15-8-27 (1988)); Washington (Wash. Rev. Code Ann. §§ 26.26.010 to 26.26.905 (1986 & Supp. 1990-1991)); and Wyoming (Wyo. Stat. §§ 14-2-101 to 14-2-120 (1986 & Supp. 1991)). *See generally* Uniform Parentage Act of 1973, 9B U.L.A. 287 (Master ed. 1987 & Supp. p.2 1991).

181. Cal. Civ. Code § 7004(A)(1)-(4) (West 1983). *E.g.*, *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 790-92, 705 P.2d 362, 364-65, 218 Cal. Rptr. 39, 41-42 (1985).

182. *See* Cal. Civ. Code § 7004(a)(1) (West 1983 & Supp. 1992).

183. *Id.* at § 7004(a)(4). Of the eighteen states which have adopted the UPA, eight have enacted statutes similar to the California Act and grant veto power over an adoption only to a natural mother. *See* Haw. Rev. Stat. § 584-24 (1985); Kan. Stat. Ann. § 38-

Gaining custody of the child and obtaining "presumed" father status, however, is no easy task for the unwed father in California. He must show that placing the child in his care would promote the child's best interests. In cases where the child has already been placed with adoptive parents, the unwed father has an extremely difficult burden to meet.<sup>184</sup> For example, in *In re Baby Girl M.*, an unwed mother relinquished custody of her child soon after birth to adoptive parents whose identities were unknown to the father.<sup>185</sup> The putative father learned of the existence of his child and filed for custody. Even though the court considered the unwed father to be a fit parent, the court denied his petition because it determined that the child's best interests would be best served by remaining in the only home she ever knew.<sup>186</sup>

Similarly, Texas places the child's best interests ahead of the putative father's parental rights. In *In re Baby Girl S.*, a putative father sought custody of his infant girl surrendered to adoptive parents at birth.<sup>187</sup> The Texas appellate court denied the unwed father's petition for custody because, unlike the adoptive parents, the unwed father had no "family relationship" with the child.<sup>188</sup>

In brief, a survey of other states shows that, as in New York, granting adoptive parents custody of an infant before the judicial system determines the unwed father's parental rights inevitably creates a situation where someone loses.<sup>189</sup> If the putative father is subsequently found to

1129 (1986 & Supp. 1990); Min. Stat. Ann. § 257.74 (West 1982); Mont. Rev. Code Ann. § 40-6-128 to 40-6-130 (1991); Nev. Rev. Stat. Ann. § 128.150 (Michie 1986); N.D. Cent. Code § 14-17-24 (1991); Ohio Rev. Code Ann. § 3107.06 (Anderson 1989); Wash. Rev. Code Ann. §§ 26.26.190, 26.33.120 (1986).

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the United States Supreme Court recently upheld the constitutionality of California's statutory scheme. See *id.*; *supra* notes 67-82 and accompanying text.

In New York, a putative father can rebut the presumption of legitimacy of a child born during the term of a marriage based on HLA blood test results. See *Michaela M.M. v. Abdel Monem El G.*, 98 A.D.2d 464, 470 N.Y.S.2d 659 (1984); See also *Piacenti v. Piacenti*, N.Y.L.J., July 27, 1990, at 22, col. 6 (Sup. Ct. 1990) (court has the authority to require an HLA blood test to rebut the presumption of legitimacy of a child born into an existing marriage where such legitimacy is questioned).

184. Note, *Certainly Not Child's Play: A Serious Game of Hide and Seek With the Rights of Unwed Fathers*, 40 Syracuse L. Rev. 1055, 1081 (1989).

185. 191 Cal. App. 3d 786 (opinion deleted), 236 Cal. Rptr. 660 (1987), *cert. dismissed sub nom.* *McNamara v. County of San Diego Dep't of Social Servs.*, 488 U.S. 152 (1988).

186. See also *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 793, 705 P.2d 362, 366, 218 Cal. Rptr. 39, 42 (1985) (awarding custody to unwed father after child had bonded with adoptive parents would be detrimental to child); *In re Baby Boy Reyna*, 55 Cal. App. 3d 288, 302, 126 Cal. Rptr. 138, 147 (1976) (if granting custody to a natural parent instead of to the adoptive parents is harmful to the child, custody must be awarded to the adoptive parents).

187. 628 S.W.2d 261 (Tex. Ct. App. 1982), *vacated sub nom.* *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 460 U.S. 1074 (1983).

188. *Id.* at 262. See also *In re Unnamed Baby McLean*, 697 S.W.2d 479, 481 (Tex. Ct. App. 1985) (court denies unwed father's custody request because it was not in the child's best interests).

189. Arizona statutorily provides for placement of the child with the adoptive parents

be responsible, courts must either place the child's emotional well-being in jeopardy or deprive the putative father of his parental rights.

### III. PRACTICAL SOLUTIONS

Given the diverging approaches of state courts and legislatures, a practical solution is needed to resolve the inherent tension between an unwed father's rights and the best interests of his infant held *pendente lite* by adoptive parents.

In crafting a solution, it is important to recognize that before the state intervenes, the unwed father's parental rights are not incompatible with his infant's best interests. If a responsible unwed father receives custody directly after the mother surrenders the infant for adoption, this father is fully capable of providing a stable, nurturing home in which to care for and cultivate his child's emotional development. The responsible father's rights and his infant's best interests conflict only after the state grants *pendente lite* custody to an adoptive couple and allows the child to grow psychologically attached to his "temporary" parents. The state can avoid creating this unnecessary conflict between father and child, and thereby give meaning to the parental rights of an unwed father without jeopardizing the child's best interests, by instituting a two-pronged practical solution: (1) grant *pendente lite* custody to the unwed father; and (2) expedite the adjudication of the unwed father's rights.

#### A. Award the Unwed Father *Pendente Lite* Custody of His Infant Surrendered for Adoption

States effectively predetermine the child's best interests by granting *pendente lite* custody to adoptive parents. Every day the infant remains with his adoptive parents, the more difficult it becomes to convince a court that it is in the child's best interests to disturb his caring arrangements and transfer him to a responsible putative father's home.<sup>190</sup> As a result, the adoptive parents' chances of receiving permanent custody of the infant increase, while the putative father's chances diminish.<sup>191</sup> Instead of granting custody to adoptive parents pending the outcome of an adoption proceeding, courts should award the biological father *pendente lite* custody of his infant. This would benefit the biological father, the infant, and the judicial decision-making process.

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pending the determination of the natural father's rights. See Ariz. Rev. Stat. Ann. § 8-108 (1989).

190. See Bainham, *When is a Parent Not a Parent? Reflections on the Unmarried Father and His Child in English Law*, 3 Int'l J. of L. & the Fam. 208, 233 (1989); see, e.g., *In re Baby Girl M.*, 191 Cal. App. 3d 786 (opinion deleted), 236 Cal. Rptr. 660, 662-66 (Ct. App. 1987) (best interest of five year old child who was placed with adoptive parents when she was five weeks old was to remain with adoptive parents even though court found natural father to be fit and responsible), *cert. dismissed sub nom. McNamara v. County of San Diego Dep't of Social Servs.*, 488 U.S. 152 (1988).

191. See Bainham, *supra* note 190, at 233.

If the unwed father demonstrates that he is responsible and capable of fulfilling his parental role, he has a constitutional right to raise his child. Such a putative father should not be deprived of this right simply because the state has delayed adjudicating his rights and allowed adoptive parents to care for his infant in the interim. Between adoptive parents and a biological father, only the biological father has a constitutional claim to the child at the time of delivery. The genetic bond between father and child gives them a shared heritage and a common ancestry, and it presents the biological father with a unique opportunity to develop a meaningful relationship with his own offspring. In contrast, adoptive parents have neither physiological nor emotional bonds with the child: they develop connections with the child only after the state intercedes and grants them temporary custody pending the outcome of their adoption petition.

A natural father's biological connection coupled with his active desire to raise his child should establish his primary right to custody. New York courts have held that "it has long been the rule . . . that 'the mother has the right to the custody of an illegitimate child as against the father, though the father has the right to the custody as against a stranger.'"<sup>192</sup> Indeed, as the New York Court of Appeals has stated, "[t]he mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood."<sup>193</sup> Even the United States Supreme Court has held that parents have a fundamental right to raise their children—a right which is beyond the reach of any court.<sup>194</sup> Granting a willing unwed father *pendente lite* custody of his infant surrendered for adoption will give meaning to these holdings.

Awarding *pendente lite* custody to an unwed father would also benefit his child. It is a "generally accepted view that a child's best interest is that it be raised by its parent unless that parent is disqualified by gross misconduct."<sup>195</sup> In *Lehr*, the Supreme Court considered the biological link between father and child as an opportunity possessed by no other male to "make uniquely valuable contributions to the child's

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192. *In re Adoption of Baby Girl*, 103 Misc. 2d 542, 546, 426 N.Y.S.2d 398, 401 (Fam. Ct. 1980) (citations omitted); see also *Lathrop v. Scott*, 2 Kan. App. 2d 90, 92, 575 P.2d 894,896 (1978) (in custody contest between parent and nonparent, preference should be given to parent); *Durr v. Blue*, 454 So. 2d 315, 321 (citing *Wood v. Beard*, 290 So. 2d 675 (La. 1974) and *Long v. Harris*, 420 So. 2d 1299 (La. Ct. App. 1982), *cert. denied*, 461 So. 2d 304 (La. 1984) (same).

193. *People ex. rel. Kropp v. Shepsky*, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953). See also *In re Mitchell*, 70 A.D.2d 367, 370, 421 N.Y.S.2d 443, 445 (1979) ("the natural father of an illegitimate child possesses this right no less than the father of a child born in wedlock").

194. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

195. *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 203, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971); see also *Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 144, 511 N.E.2d 75, 77, 517 N.Y.S.2d 932, 933 (1987) ("parental custody of a child may not be displaced absent grievous cause or necessity").

development."<sup>196</sup>

Furthermore, the child would benefit from developing a relationship with his biological father by learning about his genetic heritage. There is a strong psychological need for people to discover their biological identities and ancestries; this knowledge is essential for a full understanding of who we are.<sup>197</sup> According to one scholar, "the child's development 'relies on the meeting both of his needs as an individual and his need to find a place and an identity through the richness of his extended family.'"<sup>198</sup> By depriving a child of a relationship with his biological parent, and thus denying him knowledge of his heritage, the child's psychological development could be adversely affected.<sup>199</sup> The state should acknowledge that it is in a child's best interests to allow every responsible parent, including an unwed father, to exercise a parental role and participate in the development and maturation of his or her child.<sup>200</sup>

Granting a biological father *pendente lite* custody would also simplify judicial decision-making by providing judges with direct evidence of a putative father's parental competence. While factors such as payment of medical expenses and acknowledgment of paternity are helpful criteria in determining the parental responsibility of a putative father, they are at best only imprecise indicators of his ability to care for his child. The legal system could make more informed decisions of the parental responsibility of a putative father if it examined an existing relationship between father and child. Court-appointed psychologists could examine the child's mental state and the formation of an emotional bond between father and child during *pendente lite* custody. Similarly, judges could inquire into the living arrangements provided by the father. Only through such pragmatic measures can states improve the accuracy and fairness of court decisions involving an unwed father's custody rights.

### B. *Accelerate Adjudication of the Unwed Father's Parental Rights*

While granting custody *pendente lite* to a biological father would benefit the father, the child could be harmed if the father is subsequently adjudicated to be irresponsible. Presumably, such a putative father would have been providing deficient child care during court proceedings, and the required custody shift to the adoptive parents could traumatize the child. Moreover, awarding *pendente lite* custody to a putative father

196. *Lehr v. Robertson*, 463 U.S. 248, 262.

197. This could explain why many adopted people continually pressure the courts to unseal their adoption records in order to find their natural parents. *See Adoptees Want Access to Roots—Secrecy Hinders Woman's Search*, Seattle Times, May 2, 1991, at D1; *Massive Nationwide Court—Petition Drive, Rallies to Mark National 'Open My Records' Day*, PR Newswire, April 29, 1991; *Adoption—Reform Advocates Gather for New England Conference*, PR Newswire, Nov. 14, 1990.

198. Bainham, *supra* note 190, at 227 (quoting Arnon Bentovim (Bentovim, 1980)).

199. *See supra* note 197 and accompanying text.

200. *See, e.g., Dickson v. Lascaris*, 53 N.Y.2d 204, 208, 423 N.E.2d 361, 363, 440 N.Y.S.2d 884, 886 (1981) (child's best interest is to be raised by its natural parent).

might have the reverse effect of predetermining the child's best interests in favor of the putative father. The state could decrease the potential harm to the emotional welfare of the infant, however, by accelerating the adjudication of the unwed father's rights. A swift judicial process would benefit both the putative father and his infant without burdening the legal system.<sup>201</sup>

Courts can take as long as five years to determine an unwed father's parental rights.<sup>202</sup> This slow pace allows the infant to grow psychologically attached to his *pendente lite* nurturer. The state could affirmatively demonstrate its commitment to the infant's emotional well-being by giving these cases priority and expediting the decision-making process. Speedy adjudication would decrease the child's emotional attachment to his *pendente lite* parents and reduce the trauma of a custody change. The best protection the judicial system could provide for the infant's emotional state is swift placement in a permanent setting.

State legislatures should require courts to resolve the unwed father's parental rights as quickly as possible, perhaps within six months of the child's birth.<sup>203</sup> Courts, in their discretion, could institute discharge plans whereby successful adoptive parents would not immediately receive custody; this would further diminish the possibility of emotional harm to the infant. Courts could initially grant adoptive parents unsupervised visitations, and as the infant became more accustomed to them, overnight visitations would be permitted.<sup>204</sup> Full custody would be granted only after the child had become completely acclimated to his new surroundings and family.<sup>205</sup>

Giving priority to cases determining the parental rights of unwed fathers would be judicially manageable.<sup>206</sup> In the past year and a half in New York, for example, only a handful of such cases have been re-

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201. See *infra* note 203 and accompanying text.

202. See *supra* note 149 and accompanying text.

203. According to Judge Bernard E. Stanger, Family Court, Rockland County, New York, as long as the putative father is promptly notified of his parenthood, expediting the judicial process so that the father's parental rights are determined within six months of the child's birth is judicially manageable and would not overburden the court system. Telephone interview with Judge Bernard E. Stanger, Family Court, Rockland County, New York (Feb. 25, 1992). For a discussion of the unwed father's right to be notified of the birth of his child, see generally Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L.J. 949, 1009 (1987-88) ("The unilateral decision by [the mother] to deprive [the putative father] of the opportunity to know his child—without any showing of fault on the part of the [putative father] . . . would not, it is submitted, be accepted—or tolerated—in any other context.").

204. To preserve the confidentiality of the adoption record, see *supra* note 5 and accompanying text, courts could appoint a social worker to act as an intermediary between the natural father and the adoptive parents. The social worker would be advised not to disclose to the unwed father any information regarding the adoptive parents.

205. See *In re Margarita Monegro Yard*, N.Y.L.J., Dec. 13, 1991, at 22, col. 6 (Sur. Ct. 1991).

206. See *supra* note 203.

ported.<sup>207</sup> Moreover, if states consider the threat of emotional harm to infants to be of such serious concern, accelerating custody proceedings outweighs any minimal administrative burden the states might experience.

Critics may contend that giving an unwed father custody of his infant *pendente lite* could harm the adoption process by discouraging potential adoptive parents. Adoptive parents might get disheartened by the prospect of waiting for the natural father's rights to be adjudicated before they could initiate adoption proceedings. If courts later determined the unwed father to be an irresponsible parent, the infant might be left without an adoptive home.

Although encouraging adoption is important, it should not undercut the unwed father's constitutional rights. Instead, providing custody to a putative father *pendente lite* will give the state a strong incentive to alter its management of these cases. Decreasing the time it takes the judicial system to adjudicate these cases will benefit everyone involved, even the state: the child will benefit by being expeditiously placed in a permanent, stable environment; the adoptive parents and the unwed father will be spared the trauma and legal costs of protracted custody disputes; and the state will benefit by furthering its own interest in providing efficient and dependable adoption proceedings.

#### CONCLUSION

After years of discrimination, the Supreme Court finally granted parental rights to the unwed father through a series of decisions. From *Stanley*<sup>208</sup> to *Lehr*,<sup>209</sup> the Court has established that a biological connection plus an existing relationship with his child entitles an unwed father to constitutional protection of his right to a continuing parental relationship. *Raquel Marie* demonstrates a mounting effort to follow the spirit of these decisions by protecting the rights of an unwed father who has not

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207. See *In re Raquel Marie X.*, 173 A.D.2d 709, —, 570 N.Y.S.2d 604, 605 (1991); *In re Stephen C.*, 170 A.D.2d 1035, 1036, 566 N.Y.S.2d 178, 179 (1991); *In re Kiran Chandini S.*, 166 A.D.2d 599, 601, 560 N.Y.S.2d 886, 888 (1990); *In re Jessica*, N.Y.L.J., Sept. 3, 1991, at 25, col. 5 (Fam. Ct. 1991); *In re Anonymous*, N.Y.L.J., Jan. 9, 1991, at 28, col. 3 (Sur. Ct. 1991). Moreover, only a small number of putative fathers have reportedly had their rights adjudicated under N.Y. Dom Rel. Law 111 (1)(e) (McKinney 1988 & Supp. 1992) until *Raquel Marie* declared it unconstitutional, a period of ten years. See *In re Baby Girl B.*, 161 A.D.2d 1201, 1201, 558 N.Y.S.2d 875, 875 (1990); *In re "Female" D.*, 83 A.D.2d 933, 935, 442 N.Y.S.2d 575, 578-79 (1981); *Michael Patrick C. v. Mary C.*, 83 A.D.2d 932, 932, 442 N.Y.S.2d 579, 580 (1981); *A.F. v. Spence Chapin Agency*, 142 Misc. 2d 412, 420, 537 N.Y.S.2d 752, 757 (Fam. Ct. 1989); *In re Adoption of Emily Ann*, 137 Misc. 2d 726, 731, 522 N.Y.S.2d 786, 789 (Fam. Ct. 1987); *In re Adoption of Carmen Lydia S.*, 106 Misc. 2d 770, 774, 435 N.Y.S.2d 645, 648 (Sur. Ct. 1981); *In re Adoption of Female F. D.*, 105 Misc. 2d 866, 869-870, 433 N.Y.S.2d 318, 322 (Sur. Ct. 1980).

208. 405 U.S. 645 (1972).

209. 463 U.S. 248 (1983); see *supra* notes 22-66 and accompanying text for a discussion of the Supreme Court's expansion and clarification of the unwed father's parental rights.

had an opportunity to develop a relationship with his newborn infant. Yet, instead of safeguarding the parental rights of this putative father, *Raquel Marie* illustrates the inability of courts to resolve the state-created dilemma caused by granting *pendente lite* custody of his infant to adoptive parents. Not only must courts consider whether the unwed father will be a responsible parent; they must further consider whether a custody transfer would harm the infant's emotional well-being.

Awarding a biological father *pendente lite* custody of his infant who has been surrendered for adoption and expediting the adjudication of his parental rights would benefit the father, his infant, and the adoption process. Until state legislatures grant an unwed father custody of his infant while his parental rights are being determined, the judicial system will provide little more than lip service to protecting his constitutional rights.



