

CALIFORNIA'S EXPANSION OF THE PARENTAL
RIGHTS OF UNWED FATHERS:
ADOPTION OF KELSEY S.,
823 P.2d 1216 (Cal. 1992)

Traditionally, unwed fathers have had fewer rights with regard to their children than either unmarried mothers or parents who have been married.¹ Over the past two decades, unwed fathers have used the Fourteenth Amendment to challenge the automatic termination of their parental rights when their children's mothers place their children up for adoption.² The Supreme Court has found that an unwed father has a right to constitutional protection of his parental rights when he has established a "substantial relationship" with his child.³ The Supreme Court, however, has not addressed whether a mother may unilaterally preclude a father from exercising his parental rights by preventing the father from forming such a substantial relationship with the child.⁴ In *Adoption of Kelsey S.*,⁵ the California Supreme Court resolved this issue for the State of California. The court found that a state statute violated an unwed biological father's due process and equal protection rights by allowing the child's mother to unilaterally

1. Kara L. Boucher & Ruthann M. Macolini, *The Parental Rights of Unwed Fathers: A Developmental Perspective*, 20 N.C. CENT. L.J. 45, 45-46 (1992) (explaining that, while fathers of legitimate children have increasingly been successful in custody disputes, fathers of illegitimate children continue to have few rights).

2. See *infra* notes 26-49 and accompanying text for discussion of Supreme Court cases addressing unwed fathers' constitutional right to protect their parental interest.

3. See *Stanley v. Illinois*, 405 U.S. 645, 647-58 (1972) (holding that a court may not remove a child from the custody of his unwed father absent a finding of the father's unfitness as a parent). After the Supreme Court recognized the rights of unwed fathers, both state legislatures and courts have focused on the relationship between an unwed father and his child to determine the degree of constitutional protection the father's rights are due. Boucher & Macolini, *supra* note 1, at 49.

4. This question affects a significant number of unwed fathers. The United States Census Bureau recently issued "Fertility of American Women," wherein it reported that, in the latest statistical year (July 1989 to June 1990), 913,000 of 3.9 million births, or 1 in 4, were by unwed mothers. See Robert Pear, *Larger Number of New Mothers Are Unmarried*, N.Y. TIMES, Dec. 4, 1991, at A20.

5. 823 P.2d 1216 (Cal. 1992).

hinder the father from acquiring "presumed father" status, thereby allowing the state to terminate the father's rights without a hearing as to his fitness as a parent.⁶

In *Kelsey*, an unwed mother placed her newborn baby up for adoption.⁷ The child's biological father petitioned the court to establish his parental relationship and to obtain custody.⁸ The prospective adoptive parents filed an adoption petition to terminate the father's rights.⁹ Because the father did not have "presumed" status,¹⁰ the potential adoptive parents claimed that the court only needed the child's mother's consent.¹¹ The trial court terminated the father's parental rights and permitted the adoption with only the consent of the child's mother.¹² The court found that the father was not the child's presumed father under California law and that termination of his parental rights and adoption of the child was in the child's best interest.¹³ The court of

6. *Id.* at 1236.

7. *Id.* at 1217.

8. *Id.* at 1217-18. The biological father objected to the mother's decision to place their child up for adoption. *Id.* at 1217. The same day the biological father petitioned to establish his parental rights and gain custody, the court granted the unwed father temporary custody of the child and stayed all adoption proceedings. *Id.* at 1218. Because the father was unsuccessful in serving the court order on the adoptive parents, the adoptive parents ignored the order. *Id.* The father never received actual temporary custody of the child. The court later modified the custody award and granted temporary custody to the child's mother. *Id.*

9. 823 P.2d at 1218.

10. Under California law, whether a biological father qualifies as a "presumed father" is essential in determining his parental rights. A man may be the undisputed biological father of a child, but may nevertheless fail to meet the requirements of "presumed" status. *Id.* A man may become a "presumed father" if "[h]e receives the child into his home and openly holds out the child as his natural child." *Id.* at 1220 (citing CAL. CIV. CODE § 7004(a)(4) (West 1983 & Supp. 1992)). Mothers and presumed fathers have far greater rights than natural fathers because, except under specified circumstances, California law permits either a mother or a presumed father to withhold consent to the adoption of his or her child. *Id.* at 1219 (citing CAL. CIV. CODE § 221.20 (West Supp. 1992)). In fact, a mother or presumed father must consent to an adoption unless there is a showing by clear and convincing evidence that the parent is unfit to care for the child. *Id.* On the other hand, a natural father's consent is not necessary unless the father convinces the court that retention of his parental rights would be in the best interest of the child. *Id.* The child's best interest is not a consideration with regard to a presumed father or mother. *Id.*

11. 823 P.2d at 1218.

12. Adoption of *Kelsey*, 266 Cal. Rptr. 760, 762 (Cal. Ct. App. 1990).

13. *Id.* The court came to this conclusion by using a preponderance of the evidence standard. *Id.*

appeals affirmed¹⁴ and held that a natural father who never took custody of his child, despite attempts to fulfill his parental responsibilities, does not have a constitutional right to veto an adoption to which the mother consented.¹⁵

On appeal, the California Supreme Court reversed and remanded.¹⁶ The court found that the statutory scheme, which allows a mother to preclude her child's father from gaining presumed father status and the concomitant right to withhold consent to the child's adoption, violated constitutional guarantees of equal protection and due process.¹⁷

Historically, states considered illegitimate children to be the children of only their mothers while unwed fathers had no parental rights.¹⁸ Over the past twenty years, however, courts have explored the rights of unwed fathers.¹⁹ Several Supreme Court cases have acknowledged that the Constitution protects unwed fathers' parental rights.²⁰ The Supreme Court has held that the existence and quality of a father's relationship with his child is relevant in determining when the court may terminate a father's parental rights without the father's consent.²¹ Because state law governs the realm of family law, there is a lack of

14. *Id.* at 766.

15. *Id.* at 763-64.

16. *Adoption of Kelsey S.*, 823 P.2d 1216, 1237-38. On remand, the court is to consider the father's conduct "throughout the period since he learned he was the biological father, including his conduct during the pendency of [the] legal proceeding," in order to determine whether he demonstrates the required commitment to his parental responsibilities. *Id.* at 1237.

17. *Id.* at 1236.

18. *See Boucher & Macolini*, *supra* note 1, at 45-46 (noting that legitimate children were normally treated as property of their fathers throughout history, while illegitimate children have begun to be considered children of strictly the mother).

19. *See Appeal of H.R.*, 581 A.2d 1141, 1166-77 (D.C. 1990) (analyzing the notice due to an unwed father under the due process clause and his opportunity interest in custody); *Adoption of Lathrop*, 575 P.2d 894, 898 (Kan. Ct. App. 1978) (holding that due process requires that the natural father of an illegitimate child have a paramount right over nonparents, unless the court finds the natural father to be unfit); *Adoption of N.*, 673 P.2d 864, 867-68 (Or. Ct. App. 1983) (noting that only those unwed fathers who demonstrate commitment to their parental responsibilities have parental rights protected under the due process clause).

20. For an overview of the history of Supreme Court cases addressing the constitutional protection of unwed fathers' parental rights, see *Boucher & Macolini*, *supra* note 1, at 45-49.

21. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 256 (1977) (finding that the lower court did not violate an unwed father's due process or equal protection rights by terminating his parental interests without his consent when the father had never taken any significant responsibility for his child).

uniformity among the states as to the level of constitutional protection available to unwed fathers who wish to maintain their parental rights.²² Some state courts inquire predominantly into the relationship between the father and the child.²³ Other courts focus primarily on whether the father provides financial support to the child.²⁴ In recent years, courts have expanded the parental rights of unmarried fathers by focusing on their rights under the Constitution.²⁵

In *Stanley v. Illinois*,²⁶ the Supreme Court analyzed the issue of an unwed father's constitutional rights for the first time. The Court found that an Illinois statute, which declared the children of an unwed father to be dependents of the state upon the mother's death, without a hearing as to the father's parental fitness, violated both the Due Process and Equal Protection clauses of the Constitution.²⁷ The *Stanley* Court

22. See Boucher & Macolini, *supra* note 1, at 50. States have different requirements as to the notice and consent required in terminating an unwed father's rights. Some states only require consent and notice or both after a father has acknowledged his child. See, e.g., OR. REV. STAT. § 109.092 (1991); VT. STAT. ANN. tit. 15, §§ 435, 441 (Supp. 1991). Some states require notice of adoption proceedings to unwed fathers in some circumstances, but do not require their consent for adoption. See, e.g., ALA. CODE § 26-10-3 (1986); ARK. CODE ANN. §§ 9-9-206, 9-9-207, 9-9-224 (1991). Other states provide for consent but not notice. See, e.g., DEL. CODE ANN. tit. 13, § 908 (1990) (with some exceptions); V.I. CODE ANN. tit. 16, §§ 142, 143 (1990).

23. Boucher & Macolini, *supra* note 1, at 50-51 (noting the focus of many state statutes and concluding that "[c]ourts tend to become engaged in evaluating the nature of the relationship between father and child, either through explicit statutory language or constitutional challenge to the statute").

24. See *In re Horbatenko*, 531 N.E.2d 1011, 1014 (Ill. App. Ct. 1988) (concluding that the court acted appropriately in examining an unwed father's employment and financial status during custody proceedings); *In re Adoption of R.G.C.*, 742 P.2d 471, 473 (Mont. 1987) (holding that the court did not need an unwed father's consent for adoption when the father had not provided support to the child); *In re Adoption of Strawser*, 522 N.E.2d 1105 (Ohio App. 1987) (holding that an unwed father's failure to support his child prevented him from constitutional protection of his parental rights).

25. *In re Baby Girl Eason*, 358 S.E.2d 459, 462-63 (Ga. 1987) (concluding that an unmarried father has an opportunity interest in developing a relationship with his child which is constitutionally protected, and therefore, unless he abandons that interest, he is entitled to a hearing on his fitness as a parent before a court terminates his parental rights); *In re Adoption of B.G.S.*, 556 So.2d 545, 550-51 (La. 1990) (holding that an unwed father of a newborn child who demonstrates a full commitment to the responsibilities of a parent has a constitutionally protected interest in maintaining his parental rights).

26. 405 U.S. 645 (1972).

27. *Id.* at 657-58. The Court noted that a father's interest in retaining custody of his children is substantial. *Id.* at 651. The Court found that the State had an asserted interest in protecting the well-being of illegitimate children. *Id.* at 652. It explained that removing children from the custody of their father without a hearing to determine

held that the State could not presume that unwed fathers were unfit parents.²⁸ Instead, the Court reasoned, due process required that parental fitness be judged on an individualized basis.²⁹ To deny the unwed fathers a hearing granted to all other parents violated equal protection.³⁰

The Supreme Court clarified and limited the *Stanley* decision in *Quilloin v. Walcott*.³¹ In *Quilloin*, the Court held that a father did not have a constitutional right to veto the adoption of his eleven year old child when he had never exercised actual or legal custody of the child.³² The Court upheld a Georgia statute,³³ which provided that a court did not need the consent of an unwed father for the child's adoption absent legitimation of the child.³⁴ The Court found that, because the father did not regularly contribute to the upbringing of his child, the "best interests of the child" was the main inquiry in the adoption proceedings, not the "fitness" of the unwed father.³⁵ Additionally, the

whether the father is fit to be a parent to the child does not serve the State's interest. *Id.* at 657-58. Removing a child from the care of a fit parent, in fact, directly contradicts the goal. Thus, the Court held that the State may not constitutionally remove a child from the custody of his unwed father absent a showing of his parental unfitness. *Id.* at 658.

28. 405 U.S. at 657-58.

29. *Id.* at 649-58.

30. *Id.* at 658.

31. 434 U.S. 246 (1977).

32. *Id.* at 255-56. The unwed father never petitioned to legitimate his son at any time during the 11 years between the time the child was born and the time its mother's second husband filed to adopt the child. *Id.* at 249. In fact, even after the mother's second husband filed a petition for adoption, the child's biological father never petitioned for custody. *Id.* The biological father's sole reaction was to file for visiting rights, to petition for legitimation, and to file an objection to the adoption. *Id.* at 249-50.

33. Under the Georgia statute, the courts would not permit the adoption of a child born to married parents without the consent of each living parent unless one parent had voluntarily surrendered his or her parental rights or had been found unfit. 434 U.S. at 248. In contrast, the law applicable to the adoption of children born out of wedlock required the consent of only the child's mother. *Id.* An unwed father could only veto the adoption of his child when he had "legitimated" the child by either marrying the mother or obtaining a court order. *Id.* at 249.

34. *Id.* at 254-255. The Court reiterated that the Constitution protects the relationship between parent and child. *Id.* at 255. However, the Court found that because the father never had custody of his child, he was not entitled to the right to veto the adoption of his child by the child's mother's husband with whom the child had lived for several years. *Id.*

35. *Quilloin*, 434 U.S. 254-56. The biological father argued that Georgia's statute

Court found that the Georgia Code's distinction in treatment between unwed fathers and divorced fathers did not violate the Equal Protection Clause of the Fourteenth Amendment.³⁶

The Supreme Court further defined the extent of constitutional protection available to unwed fathers in *Caban v. Mohammed*.³⁷ In *Caban*, an unwed father objected to the adoption of his minor children, with whom he had frequent contact, by the mother's husband.³⁸ The *Caban* Court held that a New York statute, which did not require an unwed father's consent for the adoption of his child, but did require the consent of an unwed mother or a married parent, violated the Fourteenth Amendment.³⁹ The Court found that the State had no substantial interest in distinguishing between unmarried mothers and unmarried fathers.⁴⁰ The Court stated in dictum, however, that noth-

violated his due process rights by terminating his parental rights without a fitness hearing, while terminating the rights of unwed mothers only upon consent. *Id.* at 253. The Court found that because the father never sought custody of the child, the fitness of the father was irrelevant, and the Court only needed to consider the best interest of the child. *Id.* at 255.

36. *Id.* at 256. The unwed father contended that he should have the same authority to veto the adoption of his child as that of a divorced father no longer living with his child. *Id.* at 255-56. In rejecting his claim, the Court found a significant difference between the parental commitment of the biological father in *Quilloin* and that of divorced fathers. *Id.* at 256. Whereas divorced or separated fathers lived with their children at one time, Quilloin never had custody of his child. *Id.* Because he had never taken on the responsibilities with regard to the care of his child, the Court found that the State could grant fewer rights to unwed fathers who are similarly uncommitted than to divorced fathers. *Id.*

37. 441 U.S. 380 (1979).

38. *Id.* at 382-83. The unwed father lived with his children and their mother for several years. *Id.* at 382. When his relationship with the children's mother ended, he continued to contribute to the children's support. The father visited his children regularly until they moved with their grandmother to Puerto Rico, and then continued to communicate with them on a regular basis. Later, each of the biological parents and their new spouses petitioned for custody of the children. *Id.* at 382-83.

39. 441 U.S. at 394. The Court found that the New York statute treated unwed parents differently according to their sex. *Id.* at 385-88. Unmarried mothers could withhold consent to the adoption of their children, while unwed fathers, no matter how significant their relationship with their children, could only prevent the termination of their parental rights by showing that the adoption would not serve their children's best interests. *Id.* at 387-88.

40. The Court rejected the argument that a closer bond between mother and child in infancy warrants a distinction at all stages of the child's life. *Id.* at 388-89. Further, the Court found that the law did not bear a substantial relationship to the state's interest in facilitating the adoption of illegitimate children. *Id.* at 391. Finally, the Court found that, while the difficulty of locating unwed fathers may warrant a distinction

ing in the Fourteenth Amendment prevents a state from allowing the adoption of a child without the consent of an unwed father who has not participated in rearing the child.⁴¹

The Supreme Court expanded the rights of unwed fathers in *Lehr v. Robertson*.⁴² The Court held that a New York statute's⁴³ disparate treatment of unwed mothers and unwed fathers who had never shouldered any significant responsibility for their children did not violate the Fourteenth Amendment.⁴⁴ The Court found that an unwed father has a constitutionally protected "opportunity interest"⁴⁵ in forming a relationship with his newborn child.⁴⁶ The constitutional protection is available, however, only if the unwed father acts in a timely manner to establish a relationship with his child.⁴⁷ Additionally, the Constitution protects the unwed father's parental rights only to the extent that the unwed father is willing to assume responsibility for his child.⁴⁸ Because the father in *Lehr*, like the father in *Quilloin*,

between unwed mothers and fathers during the child's infancy, beyond infancy such a distinction is no longer necessary. *Id.* at 392.

41. *Id.*

42. 463 U.S. 248 (1983).

43. The Court found that the New York statutory scheme at issue adequately protected the parental rights of unwed fathers. *Id.* at 264-65 (construing N.Y. DOM. REL. LAW §§ 111-a(2), 111-a(3) (McKinney 1977 & Supp. 1982-83)). The statute required that notice of a child's adoption be given to several categories of fathers, including those fathers who had listed their names on the putative father registry, those who had been adjudicated to be the father, those listed on the child's birth certificate as the father, those who live with the child and the child's mother and who hold themselves out to be the father, those identified as the father by the mother in a sworn statement, and those fathers married to the child's mother before the child was six months old. *Id.* at 250-51. No notice is required to those who do not qualify under the listed categories. *Id.*

44. *Id.* at 267-68. The unwed father in *Lehr* had never had any meaningful relationship with his daughter. *Id.* at 267. He did not provide financial, custodial, or personal support, nor did he seek to establish a legal tie to his child until two years after her birth. *Id.* at 262. The unwed father claimed that the termination of his parental rights with no notice to him or consent by him violated his due process and equal protection rights. *Id.* at 250.

45. The Court defined an opportunity interest as the right of a biological parent to form a substantial relationship with his or her child. 463 U.S. at 262.

46. *Id.* The Court recognized the unique relationship between a parent and child and explained that the biological connection for an unwed father is significant in that it offers the biological father an opportunity to develop a relationship with his child. *Id.*

47. *Lehr*, 463 U.S. at 262. The Court found that the father had never established a custodial, personal, or financial relationship with his daughter. *Id.*

48. *Id.* The Court held that if a father grasps the opportunity and accepts some responsibility for the child's future, he may enjoy the parent-child relationship. *Id.* If a

never established a substantial relationship with his child, the Court found that the New York statute at issue did not deny the father due process or equal protection.⁴⁹

The Supreme Court left unresolved the issue of whether a mother may unilaterally prevent a father from forming a substantial relationship with the child and thereby totally vitiate possibilities of his parental rights being protected.⁵⁰ State courts addressing the issue have been sympathetic to unwed fathers.⁵¹ For example, in *In re Raquel Marie X.*,⁵² the Court of Appeals of New York extended the Supreme Court's reasoning in *Lehr*,⁵³ thereby granting significant protection to unwed fathers who wished to prevent the termination of their parental rights.⁵⁴ The court acknowledged that an unwed father of a newborn,

father fails to do so, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.*

49. *Id.* at 263-68. The Court rejected the unwed father's due process claim and explained that the New York statutes adequately protected the father's interest in establishing a relationship with his child. *Id.* at 265. The father could have developed a relationship with his child or could have registered as a putative father to protect his parental rights. *Id.* at 264-65.

The Court denied the unwed father's equal protection claim using the same analysis it employed in *Quilloin*. *Id.* at 267. The Court found that when one parent had continuous custody of a child and the other parent either abandoned the child or never formed a relationship with the child, the Equal Protection Clause does not prevent a state from assigning the two parents different legal rights. *Id.* at 267-68.

50. For discussion of the many questions left unanswered by the *Lehr* decision, see Laurel J. Eveleigh, *Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers*, 40 SYRACUSE L. REV. 1055, 1069 (1989). Eveleigh cites the following examples of these unresolved issues: what the unwed father must do to assert his opportunity interest in his infant child; what the state must do to promote its interest in facilitating adoption of children while still protecting unwed father's rights; and the appropriate standard of review that courts should apply in custody contests between unwed fathers and the state. *Id.*

51. See, e.g., *In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987) (concluding that unwed fathers have an opportunity interest protected by due process of law and that if the unwed father promptly pursues this interest, the court may not terminate his parental rights absent a showing of unfitness); *In re Adoption of B.G.S.*, 556 So.2d 545 (La. 1990) (holding that when an unwed father of a newborn child demonstrates a full commitment to the responsibilities of being a father, he has a constitutionally protected interest in the child).

52. 559 N.E.2d 418 (N.Y. App. Div. 1990). For a thorough analysis of the *Raquel* case, see Recent Development, 104 HARV. L. REV. 800, 800-07 (1991).

53. See *supra* notes 42-49 and accompanying text for discussion of the *Lehr* case.

54. *Raquel*, 559 N.E.2d at 425. The court declared a New York law unconstitutional because the statute required that an unwed father live with the mother before he will have a right to veto the adoption of his child. *Id.* at 426. See *infra* note 58 for the statutory language. The court also established criteria by which courts should judge an

with whom he has not yet had an opportunity to develop a substantial relationship, is entitled to "maximum protection" of his relationship with the child.⁵⁵ The court stated that this protection attached if the unwed father promptly availed himself of any mechanisms for forming a legal and emotional bond with the child.⁵⁶

The *Raquel* court dealt with two similar cases both involving mothers who placed their newborn children up for adoption before the unwed fathers had the opportunity to develop significant relationships with the infants.⁵⁷ The court found that the New York statute, which required an unwed father to live with his newborn baby's mother in order to earn the right to veto the adoption of his child, was unconstitutional.⁵⁸ The court concluded that the State could not establish a system whereby the mother could unilaterally prevent the father from attaining constitutional protection by refusing to live with him.⁵⁹ The court reasoned that an unwed father has a legal interest in developing a

unwed father's commitment until the legislature redrafted the statute. *Id.* at 427-28. The court found that in the case of newborn babies, in order to protect his parental rights, an unwed father must demonstrate a willingness to assume full custody of his child, not merely an attempt to block adoption. *Id.* at 428.

55. *Id.* at 424.

56. *Id.*

57. *Id.* at 419-20. In each case the biological parents did not live together for a sustained length of time before the mothers placed the children up for adoption. *Id.* at 420. After the end of the relationships between the biological parents, the mothers sought adoptive homes for their children. *Id.* In both cases, the biological parents reunited soon thereafter, and the mothers supported the fathers' efforts to reclaim their children. *Id.*

58. *Raquel*, 559 N.E.2d at 426-27. The New York statute required that in order for an unmarried father to qualify for a veto right over the adoption of his under six-month-old child, the father must (1) have openly lived with the child or the mother for six months before the child was placed up for adoption, (2) have publicly acknowledged his paternity during the six month period, and (3) have paid the pregnancy and birth expenses. *Id.* at 419. The statute thus permitted the child's mother to block an unwed father's protection of his parental rights by refusing to live with him. *Id.* at 426. The statute permitted adoption "despite the father's prompt objection even when he wishe[d] to form or . . . attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard." The *Raquel* court held that the statutory provision violated the unwed father's constitutional right to equal protection. *Id.* at 427. The court concluded that the legislature would not have intended the remaining two statutory requirements to stand alone as the only measure of an unwed father's required commitment to his child, thus entitling him to veto the adoption of his child. *Id.* Consequently, the court declared the entire section unconstitutional. *Id.*

59. *Id.* at 426. The court found that the "living together" requirement added nothing to further the State's objective of ensuring the well-being of illegitimate children

relationship with his infant.⁶⁰ The unwed father who has demonstrated that he is willing to assume full responsibility for his newborn child has an interest equal to that of the child's mother in preventing the termination of his parental rights.⁶¹ Because the New York statute treated unwed fathers differently from mothers, the court found that the statute violated the Fourteenth Amendment.⁶²

In California, courts have followed the *Lehr* Court's literal analysis and found that only a "presumed father," as defined under California law, has the ability to veto an adoption.⁶³ Thus, if the child's mother prevented the child's father from having a meaningful relationship with his child, the father could totally be denied his rights. In *Adoption of Kelsey S.*,⁶⁴ the California Supreme Court addressed the issue of the constitutional rights of unwed fathers who are prevented from attaining "presumed" status.⁶⁵ The court rejected prior California courts' interpretations of the requirements necessary to achieve presumed father status, and instead followed the New York Court of Appeals' lead in expanding the rights of unwed fathers.⁶⁶ The court held that a stat-

because the statute focused on the relationship between the unwed father and the unwed mother, rather than on the relationship between the father and the child. *Id.*

60. The court expanded the Supreme Court's reasoning in *Lehr* by concluding that "the biological connection between the father and child requires the State to allow the unwed father an 'opportunity' to demonstrate his commitment to a newborn." Recent Development, *supra* note 52, at 802.

61. *Raquel*, 559 N.E.2d at 424. The court found that protection of an unwed father's interest requires that he both be a father (biologically) and behave like one. *Id.* In the case of a child placed up for adoption at birth, the father has nothing more than a biological tie to the child. He has no opportunity to establish the relationship necessary to protect his parental rights.

62. *Id.* at 426-27.

63. See *supra* note 10 for the definition of a presumed father. See also *W.E.J. v. Superior Court of Los Angeles County*, 160 Cal. Rptr. 862 (Cal. Ct. App. 1979) (holding that a biological father who had never attempted to marry the mother and who had never taken the child into his home did not fall within the statutory definition of "presumed father" and therefore his consent was not necessary for adoption).

64. 823 P.2d 1216 (Cal. 1992).

65. *Id.* at 1219. The court also examined whether "constructive receipt" of a child would suffice under California law to qualify a natural, unwed father as a "presumed father." The court concluded that only actual receipt, and not constructive receipt, of the child into the home of the father would qualify the father as a presumed father under California law. *Id.* at 1220-23.

66. See *supra* notes 52-62 and accompanying text for an analysis of the New York Court of Appeals' decision in *In re Raquel Marie X*. The court's holding in *Kelsey* is broader than that in *Raquel*. *Raquel* involved the adoption of a newborn when the mother placed the child up for adoption before the father could establish a relationship

ute violated an unwed father's constitutional rights if it enabled a child's mother to unilaterally preclude him from obtaining the same legal rights as a presumed father and consequently frustrated his ability to withhold his consent to the adoption of his child.⁶⁷

The *Kelsey* court found that the California statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁶⁸ The court examined whether the mother's ability to determine the father's rights substantially served an important governmental interest.⁶⁹ The court acknowledged the importance of the State's interest to provide for the well-being of illegitimate children.⁷⁰ However, the court determined that the statutory treatment of unwed fathers, that is those without "presumed" status, did not advance that objective.⁷¹ The court reasoned that California's system led to irrational distinc-

with the child; thus, the mother prevented the child's father from reaching presumed status. In comparison, the holding in *Kelsey* applies any time circumstances beyond the control of the unwed father prevent him from establishing a meaningful relationship with his child.

67. *Kelsey*, 823 P.2d at 1236. Under the California statute, a father may become a presumed father if he has the child at home and holds out the child as his own. *Id.* at 1220. This is primarily within the control of the child's mother. The mother can deny the father the right to come into her home or to take the child into his home. The father's only other recourse is to seek a court order granting him custody. The court found that this requirement violates the father's Fourteenth Amendment rights. *See infra* notes 68-74 and accompanying text for the court's reasoning.

68. *Kelsey*, 823 P.2d at 1233. In examining the unwed father's due process and equal protection claims, the court explored whether California's sex-based statutory distinction between mothers and fathers serves an important state interest and is substantially related to the achievement of this interest. *Id.* at 1233-36.

69. *Id.* at 1233.

70. *Id.* at 1234. The court stated that it "cannot conclude in the abstract that adoption is itself a sufficient objective to allow the state to take whatever measures it deems appropriate." *Id.* at 1234. The court explained that it could not assume that adoption is necessarily in a child's best interest. *Id.* First, the court noted that 7.7% of recent adoptions are to single parents; therefore, the assumption that an adoption will place an illegitimate child in a stable two-parent home is not accurate. *Id.* Furthermore, the court found the State's logic flawed because the statute seems to suggest that adoption is more likely to be in the best interest of a child than being in the custody of a single, biological father. *Id.* But the statute presupposes that custody by a single, biological mother better serves the interests of the child than adoptive parents. *Id.*

71. *Kelsey*, 823 P.2d at 1233-34. The court found that the State's interest in the statutory distinction between unwed mothers and fathers was to facilitate adoptions. *Id.* at 1234. Although the consent of both parents is presumably more difficult to obtain than the consent of the mother alone, the court rejected this reasoning as unsound and found that a father was no less likely than a mother to consent to the adoption of his child. *Id.*

tions⁷² and prevented a fit biological father from establishing a substantial relationship with his child.⁷³ Absent a showing of the unwed father's unfitness, the court found that the best interest of a child placed for adoption was to remain with its only other biological parent when that parent has demonstrated a full commitment to his parental responsibilities.⁷⁴

In a separate opinion, Judge Mosk concurred with the portion of the *Kelsey* decision that found that an unwed father under the particular circumstances has a right to withhold his consent to his child's adoption.⁷⁵ Mosk dissented, however, as to the majority's decision to render the California statute invalid.⁷⁶ Instead of declaring it unconstitutional, Mosk argued that the court should have avoided the issue of constitutionality and instead used the doctrine of equitable estoppel to prevent the mother from benefiting from conduct designed to frustrate a just result.⁷⁷

72. *Id.* at 1235. The court noted several irrational distinctions: (1) the State may terminate the parental rights of a father who is willing and able to take custody of his child merely by showing that the adoption would serve a child's interest; yet, a mother may be unwilling and unable to assume her parental responsibilities, but the court may only terminate her parental rights with her consent or with a showing of her unfitness as a parent; and (2) based solely on the wishes of an illegitimate child's mother, a model father may be denied presumed father status, while a mother may allow a father of questionable character to assume responsibility for their child, thus permitting the father to reach presumed status. *Id.* at 1235-36.

73. *Kelsey*, 823 P.2d at 1236. The court reiterated the finding in *Lehr*, 463 U.S. 248, 262 (1983), that the relationship between a natural parent and child is unique among all relationships the child will have in its life. *Id.* From that premise the court concluded that "[i]t therefore would be curious to conclude that the child's best interest is served by allowing the one parent (the mother) who wants to sever her legal ties to decide unilaterally that the only other such tie (the father's) will be cut as well." *Kelsey*, 823 P.2d at 1236.

74. *Id.* The court conditioned its holding on the father's prompt attempt to assume his parental responsibilities. *Id.*

75. *Id.* at 1239. The dissent considered the majority's result fair. Judge Mosk felt that an unwed father who was prevented from establishing a relationship with his child should be entitled to withhold his consent to the adoption of his child when the facts are similar to those in *Kelsey*. However, Judge Mosk emphasized that the court should make such a determination only if these unique factual circumstances are established by a preponderance of the evidence. *Id.*

76. *Id.* Judge Mosk emphasized that courts should not consider constitutional questions unless absolutely required. *Id.* The majority, he felt, declared the statute unconstitutional unnecessarily. *Id.*

77. *Id.* at 1239-40. Judge Mosk stated that the doctrine of equitable estoppel could be applied to estop an unwed mother or the proposed adoptive parents from denying that a natural father had reached presumed status. *Id.* at 1239.

The *Kelsey* court reached the correct result for several reasons. First, the court aptly noted that the rights of unwed fathers who seize their parental responsibilities are as important as the rights of mothers.⁷⁸ The court properly found that when a father attempts to assume responsibility for his child, the State may not allow the actions of the child's mother to unilaterally preclude the father from becoming a presumed father.⁷⁹ The court appropriately rejected the line of cases that determine the rights of an unwed father solely based on whether the father succeeded in establishing a relationship with his child.⁸⁰ Instead, the court's better-reasoned view acknowledges that a father's prompt attempt to assume his parental responsibilities entitles the father's parental rights to the same protection afforded the child's mother's.

Furthermore, the *Kelsey* decision is correct in recognizing a presumption that placement in the custody of a biological father is in a child's best interest when the unwed father makes an effort to establish a relationship with the child.⁸¹ As a result, *Kelsey* allows a child to remain with its natural parent. The court correctly decided that it is not within the judiciary's discretion to sever the unique bond between a child and its natural father simply because the child's mother, a parent who is relinquishing her own parental rights, decides the court should terminate the father's rights.⁸²

The *Kelsey* court properly gives an unwed father's parental rights constitutional protection. By rejecting the requirement that an unwed father essentially have the cooperation of his child's mother in order to keep his right to veto his child's adoption, the court reaffirms unwed fathers' right to due process and equal protection. Other jurisdictions

78. See *Kelsey*, 823 P.2d at 1236.

79. See *supra* notes 67-74 and accompanying text for the court's reasoning.

80. See, e.g., *In re W.E.J. v. Superior Court of Los Angeles County*, 160 Cal. Rptr. 862 (Cal. Ct. App. 1979) (finding that an unwed father did not fall within the statutory category of "presumed father" because he never married the mother nor took the child into his home); *Adoption of Marie R.*, 145 Cal. Rptr. 122 (Cal. Ct. App. 1978) (holding that a mother may, by her conduct, prevent a natural father from becoming a "presumed father").

81. See *Kelsey*, 823 P.2d at 1236. See also *supra* note 72-74 and accompanying text discussing the court's analysis.

82. See *Kelsey*, 823 P.2d at 1236. See also *supra* note 73 explaining the biological tie and the unfairness of permitting a mother to sever that relationship.

should focus on the sound reasoning of *Kelsey* and acknowledge the important parental rights of unwed fathers.

*Lori I. Bornstein**

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