LAW AND THE FAMILY

The Rights of Unwed Fathers

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WITH FATHER'S DAY fast approaching, children are preoccupied with thoughts of gifts, cards and sentimental visions. Many unwed fathers, however, do not have the rights of being a parent and, for them, obtaining those rights would be nothing short of miraculous.

The long and often arduous road of unwed fathers seeking to secure their rights began in 1972. In *Stanley v. Illinois*,[1] the United States Supreme Court held that an Illinois statute violated Due Process and Equal Protection because it conclusively presumed every father of a child born out of wedlock to be a person unfit to have custody of his children. This presumption was held invalid because it automatically eliminated any custodial relationship without giving the father an opportunity to present evidence regarding his fitness as a parent.

After *Stanley*, New York enacted legislation designed to protect an unmarried father's interest in assuming a responsible role in the future of his child.[2] The legislation provided for establishment of a putative father registry and automatic notice of adoption proceedings to eight categories of putative fathers of children born out of wedlock. Fathers in those categories were statutorily designated as likely to have assumed some responsibility for the care of their natural children.

Categories of Fathers

Domestic Relations Law §111-b lists the categories as:

(1) any person adjudicated by a court in this state to be the father of the child;

(2) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to Social Services Law §372-c;

(3) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to SSL §372-c;

(4) any person who is recorded on the child's birth certificate as the child's father;

(5) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(6) any person who has been identified as the child's father by the mother in a written, sworn statement;

(7) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to §384-b of the social services law; and

(8) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to Estates Powers and Trust Law §4-1.2.

A series of daunting challenges continued. In 1979, in *Caban v. Mohammed*,3 a father who had lived with his two out-of-wedlock children and their mother for several years, successfully challenged the constitutionality of DRL §111, which provided that children could be adopted without the father's consent, even though the mother's consent was required.4

In 1980, in an effort to bring New York's statute into compliance with *Caban,* the legislature amended DRL §111.5 It drew a distinction between the adoption of newborns and other children, setting up one test for an unwed father's veto right in the case of a child less than 6 months old, and another test for a child older.6 Under DRL §111[1][e], the father of a child born out of wedlock could veto an adoption of a child less than six months after birth, only if two conditions exist. The father must have lived openly with the child, or the child's mother, for a continuous period of six months proceeding the placement of the child for adoption. In addition, he must have openly held himself out to be the father of the child during that period and paid a fair and reasonable sum, according to his means, for the medical expenses of the mother's pregnancy and the child's birth.

Noting that both *Stanley* and *Caban* involved a "developed parent-child relationship," the United States Supreme Court in *Lehr v. Robinson,*7 affirmed a judgment of the New York Court of Appeals denying a putative father's petition to set aside an order of adoption on the ground that, among other things, that it violated his constitutional rights. The putative father did not register with the putative father registry and was not within one of the other classes of fathers entitled to notice.

The putative father contended that because he had filed a visitation and paternity petition in Westchester Family Court one month after the adoption proceeding was commenced in the Ulster County Family Court, he was constitutionally entitled to notice and a hearing. His argument was adamantly rejected by the Family Court, the Appellate Division and the Court of Appeals.

Definition of Relationships

The Supreme Court created a distinction between a "developed relationship" and a "potential relationship" between an unwed father and child:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child" his interest in personal contact with the child acquires substantial protection under the due process clause ... but the mere existence of a biological link doesnot merit equivalent constitutional protection.

Because DRL §111-a gave the putative father the right to notice if he had registered with the putative father registry, the Court held that the statute did not deny him equal protection. In contrast, the initiation of a visitation and paternity proceeding in another court did not create a right of special notice. Referring to *Caban*, the Court held that the DRL did not deny appellant equal protection because the mother and father were not similarly situated with regard to their relationship with the child.

In 1992, to further ensure the rights of unwed fathers, a position that by now enjoys popular support, the Court of Appeals in *Re Raquel Marie X.*,8 held that the requirement in DRL §111[1][e] that an unwed father openly live with the child's mother for six continuous months before the child's placement for adoption, as a condition to the father's right of consent to the adoption, "neither legitimately furthers the State's interest nor sufficiently protects the fathers" and rendered the statute unconstitutional in its entirety. The Court was painfully aware that the "living together" requirement could easily block the father's rights and that the requirement does not "establish the responsibility towards the child."

The statute permits adoption despite the father's prompt objection, even when he wishes to form or has attempted to form a stable and meaningful relationship with the child. The court pointed out that "the Legislature's intent was to accord protection to fathers who 'participated in the rearing' of the child who ... had manifested a significant paternal interest in the child ...."

The Criteria

To stem the tide in what could be a dizzying pace of cases before new legislation could be enacted, the Court of Appeals acknowledged the necessity of resolving

the cases facing it, including the two current appeals. In setting forth the criteria to be considered by the courts, in this interim period, to determine whether an unwed father has established the requisite interest for a right of consent, the Court had some sobering assessments:

> While the Legislature might ultimately adopt different criteria, in this period courts will be guided by principles gleaned from the Supreme Court decisions, which define an unwed father's right to a continued parental relationship by his manifestation of parental responsibility. In the case of newborn infants, we take this to mean that the qualifying interest of an unwed father requires a willingness himself to assume full custody of the child -- not merely to block adoption by others. In this connection, any unfitness, or waiver or abandonment on the part of the father would be considered by the courts, as they would whenever custody is in issue ....
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> An assertion of custody is not all that is required. The Supreme Court's definition of an unwed father's qualifying interest recognizes as well the importance to the child, the State and all concerned that, to be sufficient, the manifestation of parental responsibility must be prompt. In reaching this determination, courts should give due weight to the remaining portions of DRL §111(1)(e), which were directed to that same objective and are unchallenged in this litigation. Perhaps most significantly, they establish the period in which the father's manifestation of responsibility for the child is to be assessed -- the six continuing months immediately preceding the child's placement for adoption. The interim judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgement 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.

In *Robert O. v. Russell K.*,9 the Court of Appeals construed DRL §111[1][e] in light of its decision in *Marie Raquel X.* The petitioner, an unmarried father, sought to vacate a final order approving the adoption of his son. When petitioner broke up with his fiancee, she was pregnant, but she did not tell him. In 1988, she gave birth to a child and delivered him to respondent upon her discharge from the hospital. She later executed a judicial consent, and the adoption was finalized in 1989.

The mother was never asked by the adoption court to identify the father. She signed a statement pursuant to DRL §111 stating that there was no one entitled to notice of the adoption or whose consent was required. In 1990, petitioner and his fiance reconciled, and subsequently got married. Thereafter, nearly 18 months

after the birth of the child and 10 months after the completed adoption, the wife informed the petitioner of the child's birth. Petitioner reimbursed her for her medical expenses, filed with the Putative Father Registry and commenced a proceeding to vacate the adoption.

The Family Court held that petitioner had no constitutional right to notice of the adoption proceedings or to veto or consent to the adoption. The Appellate Division and the Court of Appeals affirmed. The Court of Appeals held it was bound by the findings of the courts below that there was no deception or concealment of the adoption. DRL §111(1)(e), the consent statute relevant here because the child was less than 6 months old when he was placed for adoption, did not require petitioner's consent because he had not held himself out as the father or met the other statutory requirements.

The Court held that petitioner had no constitutional "liberty interest" to notice as an "unwed unknowing" father because he had taken no prior steps to discover the child's birth. If he had, he would have enjoyed the protection of the Constitution even though the State had begun adoption proceedings. Promptness is measured in terms of the child's life, not that of the parent. Further, petitioner did not meet his burden of showing a lack of rationality in either the notice or the consent provisions of the New York law.

Notes

(1) 1972, 405 U.S. 645, 31 LEd2d 551, 92 S. Ct. 1208. The father had lived with the children all of their lives and, when the mother died, they automatically became wards of the state. The Court held that the Constitution prohibits the removal of out-of-wedlock children from their father's custody without notice and an opportunity to be heard.

(2) See Act of July 24, 1976, ch. 665, §2, (codified at SSL §372-c).

(3) (1979) 441 U.S. 380, 60 LEd2d 297, 99 S. Ct. 1760.

(4) See 441 U.S. at 392. The Court held that an adoption may proceed in the absence of consent when the parent whose consent otherwise would be required has abandoned the child.

(5) Laws of 1980, Ch 575.

(6) See DRL §111 [1][d], which now provides, in part: 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: * * * (d) 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. * * * *

(7) 1983, 463 US 248, 77 LEd2d 614, 103 S. Ct. 2985, affg 54 NY2d 417, 430 NE2d 896.

(8) *Re Raquel Marie X.* (1990) 76 NY2d 387, 559 NE2d 418, cert. den. (US) 112 LEd2d 528, 111 S. Ct. 517 and on remand (2d Dept.) 173 AppDiv2d 709.

(9) 1992, 80 NY2d 254, 604 NE2d 99.

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