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Adoption--Failure to Grant Putative Fathers an Absolute Veto Power over Adoption is Not a Denial of Due Process or Equal Protection

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RECENT DEVELOPMENTS

ADOPTION—FAILURE TO GRANT PUTATIVE FATHERS AN ABSOLUTE VETO POWER OVER ADOPTION IS NOT A DENIAL OF DUE PROCESS OR EQUAL PROTECTION. *Quilloin v. Walcott*, 98 S. Ct. 549 (1978).

On March 24, 1976, Randall Walcott filed a petition with the Superior Court of Fulton County, Georgia, to adopt the twelve year old illegitimate child of his wife of nine years. Under Georgia law, the adoption of an illegitimate child required the consent of the mother but not that of the putative father.[1] The child's natural father, Leon Quilloin, filed a writ of habeas corpus seeking visitation rights, a petition for legitimation, and an objection to the adoption. The petition for legitimation was denied, depriving the natural father of standing to object to the adoption.[2] He appealed to the Georgia Supreme Court which affirmed the trial court's findings.[3] Quilloin subsequently appealed to the United States Supreme Court on the basis that the state adoption statutes, as applied to him, violated the due process and equal protection clauses of the fourteenth amendment.[4] On January 10, 1978, the Supreme Court affirmed the decision of the Georgia Supreme Court.

In *Quilloin v. Walcott*,[5] the Court answered the unresolved question of an earlier decision, *Stanley v. Illinois*,[6] regarding "the degree of protection a State must afford to the rights of an unwed father in a

1. GA. CODE ANN. § 74-403(3) (1973) (repealed). This provision was revised to include a requirement of notice to the putative father. GA. CODE ANN. § 74-406 (Supp. 1977). It should be noted that the Georgia adoption statutes have been comprehensively revised. *See* note 16 *infra*.

2. The father of an illegitimate child could legitimate the child by petition under GA. CODE ANN. § 74-103 (1973); however, the denial of the petition rendered operative the provisions of GA. CODE ANN. § 74-403(3) (1973). *See* GA. CODE ANN. § 74-203 (1973).

3. Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977), *aff'd*, 98 S. Ct. 549 (1978).

4. The appellant also challenged the statutory provision which gave the mother of an illegitimate child the power to exercise all parental authority over that child. GA. CODE ANN. § 74-203 (1973).

5. 98 S. Ct. 549 (1978).

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

situation . . . in which the countervailing interests [of the state] are more substantial.''[7]

Stanley was an attack on an Illinois statute which failed to include an unwed father in the definition of a parent, thus subjecting his custody of his illegitimate children to termination without a hearing on his fitness as a parent.[8] In overruling the state decision, the Court found that the effect of the statute was to presume that unwed fathers were unfit parents as a matter of law.[9] The Court determined that protection of the family unit constituted a fundamental right[10] and that where an existing family unit was disrupted,[11] the due process clause of the fourteenth amendment precluded the advancement of administrative convenience[12] as a justification for the statute's lack of procedural safeguards.[13] Having found this familial right to be constitutionally protected, the Court summarily held that the denial of a hearing on the parental fitness of an unwed father, while such hearings were granted to other parents, violated the equal protection clause.[14] Left undecided was the question of at what point a compelling state interest would permit a statutory distinction between wed and unwed fathers.[15]

As in *Stanley*, the basis of the natural father's appeal in *Quilloin*

7. 98 S. Ct. at 551.

8. ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd 1972) (repealed) provided that "parent" meant the mother or father of a legitimate child, or the natural mother of a child born out of wedlock. The result was that a child living with his natural, unwed father fell within the statutory definition of a dependent minor, subject to being made a ward of the state. ILL. ANN. STAT. ch. 37, §§ 702-5 (Smith-Hurd 1972), 704-8 (Smith-Hurd 1972) (repealed). The definition of parent now appears in ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1978), and includes both parents of a child born out of wedlock. Section 704-8 now appears as ILL. ANN. STAT. ch. 37, § 704-8 (Smith-Hurd Supp. 1978) containing no major changes.

9. No such presumption arose under the Georgia statutes, as an unwed father could gain the power to veto an adoption by legitimation, during which proceeding he could enter evidence of his parental fitness. GA. CODE ANN. § 74-103 (1973). The impact of this distinction between the statutes was to remove from the Court in *Quilloin* consideration of the equal protection claim of an irrebuttable presumption, *i.e.*, the making of a statutory classification which is not universally and necessarily true. *See* notes 30-44 *infra* and accompanying text.

10. 405 U.S. at 651.

11. The fact findings in *Stanley* showed that the father had lived with the children and their mother prior to the death of the mother and had supported the children during that time. *See* note 29 *infra* and accompanying text.

12. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971), which rejected the claim that administrative convenience could justify gender-based distinctions in inheritance statutes. *But see, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971), which upheld a Louisiana statute distinguishing between legitimate and illegitimate children for the purposes of inheritance.

13. 405 U.S. at 657-58.

14. 405 U.S. at 658.

15. *See* note 26 *infra* and accompanying text.

was that the state statutes[16] which treated him differently than legitimate parents violated both the due process and the equal protection clauses. He alleged that the state's application of the "best interest of the child" standard,[17] rather than a finding of parental unfitness, inadequately protected his parental interest.[18] He further alleged that absent a finding of unfitness, the state had violated equal protection requirements by denying him the same absolute veto power over the adoption granted to legitimate parents.[19]

The method of analysis of a due process attack is determined by the type of right the offending statute purports to limit.[20] The *Stanley* court resolved that when the right involves the sanctity of the parent-child relationship, the individual's interest will "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[21] Similarly, *Quil-*

16. Georgia's adoption statutes were comprehensively revised, effective January 1, 1978. The Court in *Quilloin* noted that these revisions left the substance of the statutes, GA. CODE ANN. §§ 74-203 (1973), 74-403(3) (1973) (repealed), intact; therefore, the appellant would have received the same rights under the new provisions as he actually was granted by the trial court. 98 S. Ct. at 553 n.12.

For an analysis of the changes instituted by the recent revision, see Outman, *Georgia's New Adoption Laws*, 13 GA. ST. B.J. 172 (1977).

17. Courts have struggled with the applicability of the "fitness" and "best interest of the child" tests in child custody proceedings since the days of feudal England. For a discussion of both tests and their development, suggesting that the "fitness" test is more applicable in a custody suit between parent and nonparent, while the "best interest" test should be applied in contests between parents, see Foster and Freed, *Child Custody*, 39 N.Y.U.L. REV. 423, 615 (1964). For the view that the tests are not so easily distinguished and that the ultimate issue in custody proceedings should always be the child's best interest, see Foster, *Adoption and Child Custody: Best Interests of the Child*?, 22 BUFFALO L. REV. 1 (1973).

18. The Court noted that the legitimation proceeding before the trial court afforded the appellant the opportunity to be heard on all issues, including parental fitness. 98 S. Ct. at 552. This difference from *Stanley*, where unfitness was presumed by the state, removed from *Quilloin* the consideration of an equal protection challenge based on an irrebuttable presumption. *See* note 9 *supra*.

19. GA. CODE ANN. § 74-403(1) (1973) (repealed). It should be noted here that a major issue in *Stanley* not raised by this appellant was the lack of notice of the custody termination. For a comprehensive view of the notice problem of *Stanley*, as applied to adoptions of illegitimate children, see Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973).

20. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934), which took a deferential view toward legislative power to regulate economic rights. *But see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965), which employed a much more severe scrutiny in upholding a due process challenge to a statute which infringed on marital rights of contraception.

The basic question is the source and identity of the rights which invoke this closer judicial examination of a statute. For a discussion of the constitutional sources of noneconomic rights and due process, see Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law"*, 42 NOTRE DAME LAW. 680 (1967).

21. 405 U.S. at 651 (quoting from Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

loin found it well established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[22]

Once having defined a right as fundamental or essential,[23] the Court is supposedly still free to uphold a statutory limitation of that right against a due process challenge provided that the state has a compelling interest for the regulation and the legislative means are not overly broad.[24] While *Stanley* found such a state interest in the nurturing of a child's family ties, the Court rejected the means which severed those ties without a determination of the fitness of the parent in question.[25] Since the purpose of the state was to preserve the home unit, unless it was an unsuitable environment for the child, a law which disrupted that home without finding the parent unfit did not bear a rational relationship to that purpose.

The rationale of *Quilloin* never explicitly identifies the state interest sufficiently compelling that neither challenged statute was violative of due process.[26] Since the Court based its holding on the position of the unwed father relative to the family unit,[27] and in light of the articulations of *Stanley*,[28] it seems clear that the preservation of the family unit has been accepted as a valid means of promoting the child's best interest.

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22. 98 S. Ct. at 555 (quoting from Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 639-40 (1974)).

23. *See* note 20 *supra* and accompanying text.

24. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (which nonetheless invalidated the statute).

25. 405 U.S. at 652-53.

26. The source of the state's power to enact legislation governing the rights of its citizens is its general police power which the Court has declined to delineate other than by imposition of a requirement of reasonableness. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). The only enunciation by the Court in *Quilloin* as to the purpose for which this power has been exercised is "to give full recognition to a family unit already in existence." 98 S. Ct. at 555.

27. 98 S. Ct. at 555. This relation of the father to the family unit is the key distinction between *Stanley* and *Quilloin*. As the father's status as an actual family member, supportive of the child's needs, becomes less clear, the interest of the state in promoting the child's well-being through protection of the actual family unit increases.

28. The statutory means involved in *Stanley* did not concern the question of adoption. *See* note 8 *supra* and accompanying text. However, the purpose espoused by the state in both *Stanley* and *Quilloin* was the well-being of the child. The effect of *Stanley* on adoption of illegitimate children and the problems it has raised, such as identification of unknown putative fathers, are discussed in Hession, *Adoptions After "Stanley"—Rights for Fathers of Illegitimate Children*, 61 ILL. B.J. 350 (1973). For an examination of the effect of *Stanley* on the adoption statutes of three states, Illinois, Wisconsin and Michigan, see Freeman, *Remodeling Adoption Statutes After Stanley v. Illinois*, 15 J. FAM. L. 385 (1976). For an extensive review of the procedural ramifications of *Stanley* in custody suits, see Note, *The Impact of Stanley v. Illinois on Custody Proceedings for Illegitimate Children: Procedural Parity for Putative Fathers?*, 3 N.Y.U. REV. L. & SOC. CHANGE 31 (1973).

Seen in this respect, the effect of the Georgia statutes as applied to the appellant was to prevent the disruption of the de facto family unit. Where the child had never lived with his natural father, but had resided for nine years with his mother and step-father, the Court held that due process required only a determination that denial of legitimation and approval of the adoption served the "best interest of the child."[29] Thus, while *Stanley* held that the fitness of a parent could not be made immaterial to a statutory abridgement of the family relationship, *Quilloin* allows parental fitness to be considered as one of many factors affecting the child's best interest. To do otherwise would render parental fitness an unassailable fortress from which an unwed parent could prevent the child from ever benefitting from a permanent and stable home life.

Assuming that his parental rights had received due process through the legitimation proceeding, the appellant contended further that his power to veto the adoption should be measured by the same standard applied to married fathers, in order to satisfy the requirements of equal protection.[30] As noted previously,[31] the Court in *Stanley*, having found a fundamental right in the parent-child relationship, concluded that affording a hearing on fitness to married parents, but not to an unwed parent, prior to a disturbance of that relationship was an unquestionable denial of equal protection.[32] However, the briefly stated support for this conclusion hinders useful comparison of methods of analysis used by the Court in *Stanley* and *Quilloin*.

Looking instead to traditional notions of equal protection, the underlying concept is that equal protection bars statutory distinctions between persons similarly situated under given conditions.[33] The analytical juncture, as with due process problems, is the identification of the individual interest as an economic right or a personal liberty.[34] The significance of

29. 98 S. Ct. at 555.

30. Since GA. CODE ANN. § 74-403(1)-(2) (1973) (repealed) gave married parents an absolute veto power over adoption of their children absent a voluntary surrender of rights, abandonment, willful failure to provide for the child, or a termination of parental rights, appellant argued that the provision giving the mother of an illegitimate child the sole exercise of parental power discriminated against putative fathers to an extent prohibited by *Stanley*.

31. *See* note 14 *supra* and accompanying text.

32. 405 U.S. at 658.

33. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972), which held that such distinctions would be judged in light of the nature of the classification, the individual liberty affected, and the state interest which the classification purports to advance.

34. With respect to due process challenges, see note 20 *supra* and accompanying text, an unavoidable problem area will be the identification of the right involved, its constitutional source, and the degree of protection to be granted. In his now famous footnote to United States v. Carolene Products Co., 304 U.S. 144 (1937), Justice Stone suggested that

this classification of rights is the impact the nature of the right protected has upon judicial willingness to gainsay the legislature. Where the right impinged is economic, the Court has traditionally deferred to a legislative judgment concerning the appropriateness of the statute to the state's purpose.[35] On the other hand, where the right involved is one of personal liberty, a statutory distinction between persons similarly situated will be subject to strict judicial scrutiny[36] and will likely be voided.[37] This same close examination will be given to classifications which are considered suspect, such as race, in order to negate legislative discrimination.[38]

The question of whether illegitimacy is a suspect class has been addressed by the Court on a number of occasions;[39] however, the question is not reached by *Quilloin*.[40] Although the Court followed the *Stanley* view of the family unit as having the constitutional protection of a fundamental liberty,[41] the Georgia statute's distinction between wed and unwed fathers survived the scrutiny of the Court through a finding that, as applied to the appellant, the classifications were not of persons similarly situated.[42] The appellant had urged that he was indeed similarly situated to legitimate fathers, particularly those separated or divorced from the mother of the child. In rejecting this view, the Court noted that although he was subject to substantially the same support requirements as a married father,[43] the appellant had never shouldered actual responsibili-

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the basis for identifying rights which would be afforded the strict scrutiny of the Court was their relationship to the political processes which could act to abolish discriminatory classifications; *e.g.* peaceful assembly and political mechanisms which should be relied upon to protect minorities. *Id.* at 152 n.4.

35. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955), upholding a statute limiting the sale of optical appliances to certain persons, as violative of neither due process nor equal protection.

36. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), which declared that a poll tax infringed upon a fundamental right and must be closely scrutinized.

37. This process of definitional predestination, with the outcome of the ruling on a statute's validity turning almost solely on the classification of the right involved, has led to criticism of the two-tiered analysis of equal protection. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975).

38. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), which first noted that classifications of race by the legislature are suspect, although the classification here was upheld on the basis of a compelling national interest.

39. For the Court's most recent consideration of, and failure to find, illegitimacy as a suspect class, see Trimble v. Gordon, 97 S. Ct. 1459 (1977), which struck down an Illinois inheritance statute which distinguished between legitimate and illegitimate children. *See also* Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

40. The court also noted that the appellant had waived the claim that the statutes make gender-based classifications which violate equal protection. 98 S. Ct. at 554 n.13.

41. *Id.* at 554-55.

42. *Id.* at 555.

43. GA. CODE ANN. §§ 74-105, 74-202 (1973).

ty for the child nor did he seek custody of the child. On the other hand, even a divorced father would have borne the responsibility of supporting his children during the term of his marriage. On this basis, *Quilloin* held that the state was not barred by the equal protection clause from making this distinction based on paternal commitment.[44] Although not specifically stated by the Court, it is clear that the failure of the appellant to meet the basic requirements of an equal protection challenge was determined by the interests of the child. The Court in *Quilloin* gave judicial recognition to the concept that there can be no absolute parental right without parental responsibility.

As stated at the outset,[45] the finding of *Quilloin* that this distinction between wed and unwed fathers is valid limits the balancing of the fundamental rights of parents and the interest of the state in preserving the well-being of its children through the maintenance of a stable home life.[46] The thrust of the appellant's due process claim was that his parental authority ought not be undermined absent a forfeiture of that authority by having his unfitness as a parent duly established. This claim relied heavily on the rationale of *Stanley* that unwed fathers do have protected rights in their illegitimate children. The *Quilloin* response was that these rights have reciprocal duties, with the rights of the child invoking constitutional protection as well. Thus, where the denial of parental power acted to preserve the child's environment and to protect the state's interest in the child's welfare from the whims of nonsupporting parents, the requirements of due process were satisfied.[47] This same balancing of the rights of the parent, child, and state resulted in the *Quilloin* view that a nonsupporting unwed father is not similarly situated to legitimate fathers, and defeated a challenge to the law based on equal protection without reaching the thornier aspects of two-tiered analysis.[48] *Stanley* and *Quilloin* represent, to some extent, the alternate ends of a spectrum. The very personal and individual nature of the problem makes it probable and desirable that the middleground be defined on a case by case basis with the child's best interest always the focal point of the solution.

The Court did not deal with the issue of illegitimacy as a suspect

44. 98 S. Ct. at 555.

45. *See* note 7 *supra* and accompanying text.

46. For the view that any statutory reaction to *Stanley* which sacrifices efficient processing of adoptions in an attempt to notify ellusive putative fathers goes beyond the mandate of the Court, see Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L. Q. 527 (1975).

47. *See* notes 20-29 *supra* and accompanying text.

48. *See* notes 30-44 *supra* and accompanying text.

class[49] nor with the potential sex discrimination problems of adoption statutes such as the Georgia law.[50] These issues were not essential to the resolution of *Quilloin* and can well wait other decisions. Despite its clarification of some of the problems of *Stanley*, the *Quilloin* decision may be faulted for its lack of discussion of analytical factors for equal protection claims. While it has been suggested by both scholars[51] and the Court itself[52] that the traditional two-tiered analysis of equal protection is too rigid, the development of other criteria cannot come about absent the clear articulation of the standards applied and the goals sought in a decision such as *Quilloin*.

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49. *See* note 39 *supra* and accompanying text.
50. *See* note 40 *supra*.
51. For a discussion of the development and trends in equal protection, including views of problems arising under two-tiered analysis, see *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L. Q. 645 (1975).
52. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1972) (Marshall, J., dissenting).