Adoption of Kelsey S.: When Does an Unwed Father Know Best

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Adoption of Kelsey S.: When Does An Unwed Father Know Best?

In America, more than four million children are born each year. The number of those children born to unwed mother's has rapidly increased over the last few decades, with out-of-wedlock births rising from 10.7 percent in 1970 to 25.7 percent in 1986. While the stigma associated with being a single mother has lessened in modern times, many children born out of wedlock will be given up for adoption before their first birthday.

The sobering reality of the above statistics is that the nature and scope of an unwed father’s rights are of tremendous practical significance. An unwed father has traditionally had virtually no

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2. Id. at 67. In 1950, four percent of all births were to unmarried women. Daniel C. Zinman, Note, Father Knows Best: The Unwed Father’s Right To Raise His Infant Surrendered For Adoption, 60 FORDHAM L. REV. 971, 973 n.18 (1992) (citing U.S. BUREAU OF THE CENSUS 66 (1985)) (discussing the effect of awarding adoptive parents custody of an infant placed for adoption pending a lawsuit).
4. U.S. BUREAU OF THE CENSUS, supra note 1, at 376. In 1986, the most recent year for which statistics are available, there were 104,088 adoptions in the United States. Id. In 1986, 24,589 children adopted by unrelated persons were less than one year old with most children who are adopted by non-relatives being born out-of-wedlock. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATION AND RESOURCES 60 (1989) (discussing the likelihood that a child placed for unrelated adoption will be an infant); CLARK, supra note 3, at 574. Approximately half of these adoptions are normally by stepparents. Id. at 567. In 1986, some 52,157 adoptions were by unrelated persons. U.S. BUREAU OF THE CENSUS, supra note 1, at 376.
5. Adoption of Kelsey S., 1 Cal. 4th 816, 830 n.6, 823 P.2d 1216, 1223 n.6, 4 Cal. Rptr. 2d 615, 622 n.6 (1992).
6. This Note will use interchangeably the terms “unwed father,” “biological father,” “natural father,” and “putative father.” See BLACK’S LAW DICTIONARY 1237 (6th ed. 1990) (defining the term “putative father” as an alleged or reputed father of a child born out of wedlock).
say in whether his child would be placed for adoption. The decision to place the child for adoption has rested entirely in the hands of the mother. In fact, until twenty-one years ago, unwed fathers were given no federal constitutional equal protection or due process rights in the adoption process.

The move toward recognizing an unwed father’s rights began with Stanley v. Illinois, where the United States Supreme Court held that an unwed father who had lived with and raised his children could not have his children taken by the State upon the death of the children’s mother. The father’s federal constitutional rights to equal protection and due process would be violated if he was not afforded an opportunity to prove his fitness to have custody of the children. Since that landmark case, the United States Supreme Court has extended the rights of unwed fathers to include situations where an out-of-wedlock child is offered for adoption. So long as the unwed father has established a relationship with his child, his federal constitutional rights to due process and equal protection permit him to maintain

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9. Id.; see Stanley, 405 U.S. at 649 (holding that under the Due Process Clause of the Federal Constitution an unwed father was entitled to a hearing as to his fitness as a parent before his children could be taken away from him); see infra notes 36-48 and accompanying text (discussing Stanley in greater detail).


11. Id. at 658.

12. Id.; see infra notes 41, 63, 67 (discussing equal protection and due process with regard to unwed fathers).

13. See Lehr v. Robertson, 463 U.S. 248, 261, 267 (recognizing that an unwed father who grasps his opportunity to develop a relationship with his child is protected by the Equal Protection and Due Process Clauses of the United States Constitution); Caban v. Mohammed, 441 U.S. 380, 388 (1979) (holding that when an unwed father has come forward to participate in the rearing of his child, any distinction by the State between unwed mothers and unwed fathers must serve an important governmental interest); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (affirming that the relationship between parent and child is protected under the Equal Protection and Due Process Clauses of the Federal Constitution); see infra notes 50-121 and accompanying text (discussing the United States Supreme Court’s decisions in Lehr, Caban, and Quilloin).
a relationship with his child.\textsuperscript{14} If such a relationship is established, the father is also given a say in any decision to place his child for adoption.\textsuperscript{15}

Therefore, the putative father who has established a relationship with his child born out-of-wedlock has found federal constitutional protection for that relationship.\textsuperscript{16} Under California law, such a father is known as a "presumed father."\textsuperscript{17} Unresolved by the United States Supreme Court, however, is the situation where the unwed mother has unilaterally prevented the putative father from having any contact with his child.\textsuperscript{18} Such action effectively blocks the father from participating in an adoption decision.\textsuperscript{19} The recent California Supreme Court case of \textit{Kelsey S.}, however, addressed this question.\textsuperscript{20}

In \textit{Kelsey S.}, the supreme court held that California Civil Code section 7004(a) and the related statutory scheme violated federal constitutional guarantees of equal protection and due process for

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\item \textsuperscript{14} \textit{Lehr}, 463 U.S. at 262 (recognizing that an unwed father who grasps his opportunity to develop a relationship with his child is protected by the Equal Protection and Due Process Clauses of the United States Constitution); see infra notes 41, 63, 67 (discussing equal protection and due process challenges to statutes denying unwed fathers the right to maintain a relationship with their children).
\item \textsuperscript{15} \textit{See Lehr}, 463 U.S. at 262 (holding that the State need not listen to the father's opinion of what would be best for the child if there is no relationship between father and child).
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} California Civil Code section 7004(a) establishes that a man is presumed to be the natural father of a child if he has married the mother or if he has received the child into his home and openly held out the child as his natural child. CAL. CIV. CODE § 7004 (West Supp. 1992). Effective January 1, 1994, the statute will appear at California Family Code section 7611. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 549 (West). Under California Civil Code section 7004(b), the presumption created by the statute is rebuttable by clear and convincing evidence, except as provided in section 621 of the Evidence Code. CAL. CIV. CODE § 7004 (West Supp. 1992). California Civil Code section 7004(b) establishes that when a wife is cohabiting with her husband, who is not impotent or sterile, the child is conclusively presumed to be a child of the marriage. CAL. EVID. CODE § 621 (West Supp. 1992). Effective January 1, 1994, section 621 will appear at California Family Code section 7500. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 546 (West).
\item \textsuperscript{18} \textit{See Adoption of Kelsey S.}, 1 Cal. 4th 816, 830, 823 P.2d 1216, 1223, 4 Cal. Rptr. 2d 615, 622 (1992) (recognizing that the United States Supreme Court had not addressed the issue facing the \textit{Kelsey S.} court).
\item \textsuperscript{19} \textit{Id.} at 830, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.
\item \textsuperscript{20} \textit{Id.} at 821-22, 823 P. 2d at 1217, 4 Cal. Rptr. 2d at 616; see infra notes 220-285 and accompanying text (discussing the \textit{Kelsey S.} case).
\end{itemize}
unwed fathers.\textsuperscript{21} The statutory scheme was unconstitutional because it permitted a mother to unilaterally preclude the natural father from becoming a presumed father.\textsuperscript{22} If the unwed father was not the presumed father in the eyes of the law, then the State could terminate the father's parental rights merely by showing it would be in the best interest of the child.\textsuperscript{23} Whether the United States Supreme Court will eventually agree with the California Supreme Court is uncertain.\textsuperscript{24} Furthermore, exactly what an unwed father will have to do to gain the protection recognized by the court is similarly uncertain.\textsuperscript{25} Nevertheless, the California Supreme Court's opinion could have both positive and negative consequences for children, adoptive parents and unwed fathers.\textsuperscript{26}

This Note examines the federal constitutional rights of putative fathers in California after \textit{Kelsey S.}. Part I discusses the emergence of federal constitutional rights for unwed fathers to develop a relationship with their children born out of wedlock.\textsuperscript{27} Part II summarizes the facts and procedural history behind \textit{Kelsey S.} and reviews the majority and concurring opinions.\textsuperscript{28} Finally, Part III considers the legal ramifications flowing from the California Supreme Court's decision.\textsuperscript{29}

\textsuperscript{21} \textit{Kelsey S.}, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635; see infra note 17 (outlining California Civil Code section 7004).

\textsuperscript{22} \textit{Kelsey S.}, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

\textsuperscript{23} \textit{Id.} Under a best interest of the child standard, the judge considers the alternative outcomes and then chooses the alternative that maximizes what is best for the child. Robert H. Mnookin, \textit{Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy}, 39 \textit{Law & Contemp. Probs.} 226, 255-68 (1975), reprinted in \textit{Robert H. Mnookin & D. Kelly Weisberg, Child, Family and State} 636-37 (2d ed. 1989). The judge might consider factors such as whether an award of custody to the parent would be detrimental to the child, whether placement to a third person is essential to avert harm to the child, and whether termination of parental rights is the least detrimental alternative. Mary G. Holbrook, \textit{Cal. Family Law Serv.} § 51:22 (Bancroft-Whitney Co. 1986).

\textsuperscript{24} See infra notes 291-303 and accompanying text (discussing whether the United States Supreme Court can be expected to adopt the logic of the California Supreme Court in \textit{Kelsey S.}).

\textsuperscript{25} See infra notes 304-343 and accompanying text (reviewing what the putative father might do to show his commitment to his parental responsibilities).

\textsuperscript{26} See infra notes 344-355 and accompanying text (discussing the possible effects of the \textit{Kelsey S.} holding on children, adoptive parents, and putative fathers).

\textsuperscript{27} See infra notes 36-219 and accompanying text.

\textsuperscript{28} See infra notes 220-285 and accompanying text.

\textsuperscript{29} See infra notes 286-355 and accompanying text.
I. LEGAL BACKGROUND

A unifying theme has emerged from United States Supreme Court cases addressing the rights of unwed fathers. The Court has recognized the biological link between a father and his child as deserving of protection under the United States Constitution, so long as the father takes advantage of his opportunity to develop a full and lasting relationship with his child. In order to appreciate the California Supreme Court's decision in Adoption of Kelsey S., it is necessary to first briefly review specific case law developed by the United States Supreme Court and by California courts.

A. The Development of Constitutional Rights for Unwed Fathers

Traditionally, the natural father of a child born out of wedlock could not legally assert parental rights if the mother wished to place the child for adoption. Only the consent of the mother was necessary to make a child available for adoption. Since 1972, however, the law affecting an unwed father's parental rights has changed drastically, as a result of several decisions of the United States Supreme Court. The first United States Supreme Court case to recognize federal constitutional due process and equal

30. See In re Raquel Marie X., 76 N.Y.2d 387, 401, 559 N.E.2d 418, 424, 559 N.Y.S.2d 855, 861 (N.Y. 1990) (recognizing that when an unwed father promptly commits himself to his parental responsibility, he is entitled to federal constitutional due process and equal protection guarantees); see also infra notes 36-148 and accompanying text (reviewing United States Supreme Court cases which establish the theme that an unwed father who develops a relationship with his child is protected by the Equal Protection and Due Process Clauses of the United States Constitution).

31. Adoption of Kelsey S., 1 Cal. 4th 816, 838, 823 P.2d 1216, 1228, 4 Cal. Rptr. 2d 615, 627 (1992); see infra notes 36-148 and accompanying text (reviewing the United States Supreme Court cases which establish the constitutional rights of unwed fathers in adoption matters).

32. CLARK, supra note 3, § 21.2, at 572-73; see Stanley v. Illinois, 405 U.S. 645, 668 (1971) (Burger, C.J., dissenting) (describing the United States Supreme Court's decision as one which embarked on an innovative concept of the natural law for unwed fathers); Kisthardt, supra note 7, at 595 (discussing the traditional position of unwed fathers in the court and that position's relationship in the expanding recognition of the constitutional rights of such fathers).


34. See infra notes 36-148 and accompanying text (discussing the United States Supreme Court cases that have helped to define the constitutionally protected rights of an unwed father).
protection rights for unwed fathers was the landmark case of Stanley v. Illinois.\textsuperscript{35}

1. The Recognition of An Unwed Father’s Due Process Rights: Stanley v. Illinois

In Stanley v. Illinois, the United States Supreme Court first made clear that unwed fathers had federal constitutional rights of equal protection and due process, at least where the mother and father had lived together with their children.\textsuperscript{36} Joan and Peter Stanley had lived together intermittently over an eighteen year period without marrying.\textsuperscript{37} During that period they had three children.\textsuperscript{38} When Joan died, Stanley’s children were taken from him in accordance with Illinois law, which required that children of unwed mothers became wards of the State upon the death of the mother.\textsuperscript{39} Stanley argued that his Fourteenth Amendment rights to due process and equal protection were violated by the Illinois statutes because he was never shown to be an unfit parent, due to his status as an unwed father.\textsuperscript{40}

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\item \textsuperscript{35} 405 U.S. 645 (1971).
\item \textsuperscript{36} See id. at 651 (recognizing the private interest of a man who has sired and raised his children must be protected absent a strong countervailing State interest).
\item \textsuperscript{37} Id. at 646.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. Under Illinois law, children were required to be wards of the State if they had no surviving parent or guardian. Id. at 649; see ILL. REV. STAT. ch. 37, §§ 702-1, 702-5 (1965) (repealed and reenacted by P.A. 85-601, effective January 1, 1988) (current version at ILL. REV. STAT. ch. 37, §§ 802-1, 803-1, 804-1, 805-1, 802-4 (1990)). Under the statutory definition, a “parent” included a mother or father of a legitimate child, or the natural mother of an illegitimate child, or adoptive parents. ILL. REV. STAT. ch. 37, §§ 701-14 (1965) (repealed and reenacted by P.A. 85-601, effective January 1, 1988) (current version at ILL. REV. STAT. ch. 37, §§ 801-3 (1990)).
\item \textsuperscript{40} Stanley, 405 U.S. at 646 (noting that married fathers and unwed mothers could lose their parental rights only on a showing of unfitness). The Fourteenth Amendment of the United States Constitution reads: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. The Due Process Clause of the Fifth Amendment restricts the actions of the federal government. U.S. CONST. amend. V; See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 374 (4th ed. 1991). The Fourteenth Amendment’s Equal Protection Clause restricts the ability of state and local governments to classify people for the allocation of benefits or burdens. Id. § 11.4, at 374-75. The Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, but the Supreme Court has held that the Due Process Clause of the Fifth Amendment has an implied equal protection guarantee which limits the federal powers of the federal government.
\end{itemize}
The United States Supreme Court held that the Illinois statute deprived Stanley of his right to procedural due process. Recognizing the importance of the family, the majority found that Stanley had an undeniable and powerful private interest in retaining custody of the children he had raised. The State had a legitimate interest in protecting the welfare of minor children, but the means of achieving that end also had to be constitutionally defensible. If Stanley was shown to be a fit father, then the State’s interest in caring for his children would be insignificant. It was insufficient to presume that Stanley was unfit merely as an administrative convenience to the State. Stanley was entitled to a hearing on his parental fitness before his children could be taken away from

government’s ability to classify persons for the allocation of benefits or burdens. Id. § 11.4, at 374; see infra notes 41, 63, 67 (discussing the protections set forth in the Due Process Clause and the Equal Protection Clause).

41. Stanley, 405 U.S. at 649; see NOWAK, supra note 40, §10.6, at 338-39 (4th ed. 1991). Under the Fifth and Fourteenth Amendments of the United States Constitution, each citizen has a right to a fair decision-making process before the government may directly impair the individual’s life, liberty or property. U.S. CONST. amends. V, XIV. In determining whether an individual has been deprived of procedural due process, a court must first determine if there is any requirement for a procedure by looking at whether life, liberty or property is being deprived. Id. § 13.8, at 525. If one of these interests is not at stake, the State may deny privileges to individuals without a hearing. Id. § 13.2, at 491. A person’s liberty has been deprived where he loses significant freedom of action or is denied a fundamental right provided by the Constitution. Id. § 13.4, at 496. If a court finds a deprivation of life, liberty, or property, it must then determine what procedures are required to provide fairness. Id. § 13.8, at 530. The court uses a three-factor balancing to ascertain which procedures are required. Id. On the side of the individual, the court looks at the importance of the individual liberty or property interest at stake and the extent to which the requested procedure may reduce the possibility of erroneous decision-making. Id. § 13.8, at 531. On the other side of the balance, the court considers the State interest in avoiding the increased administrative and fiscal burdens which are the result of increased procedural requirements. Id.

42. Stanley, 405 U.S. at 651; see Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the liberty guaranteed in the Fourteenth Amendment includes the right of an individual to establish a home and raise children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that both marriage and procreation are fundamental to “the very existence and survival of the race”); May v. Anderson, 345 U.S. 528, 533 (1953) (finding that the right to care, custody, management and companionship of minor children is more cherished than property rights); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (recognizing the traditional relations of family as being as old and as fundamental as American civilization).

43. Stanley, 405 U.S. at 652.
44. Id. at 657-58.
45. Id. at 658. The State insisted on presuming rather than proving Stanley’s unfitness because doing so was more convenient to the State. Id.
him.\textsuperscript{46} The Court held that parental unfitness had to be established on the basis of individualized proof, rather than on a presumption that unmarried fathers were unfit.\textsuperscript{47} Finally, the Court held that denying a fitness hearing to an unwed father such as Stanley while granting it to all other parents, was a violation of the Equal Protection Clause.\textsuperscript{48} Six years later, the Court clarified \textit{Stanley} by further defining the nature of the relationship between the unwed father and his child.\textsuperscript{49}


The Supreme Court further clarified the constitutional rights of unwed fathers in \textit{Quilloin v. Walcott}.\textsuperscript{50} In \textit{Quilloin}, the Court emphasized the importance of the nature of the relationship between the father and his children in determining the degree of constitutional protection to which the father was entitled.\textsuperscript{51} Leon Quilloin and Ardell Williams Walcott gave birth to a child in December 1964.\textsuperscript{52} Quilloin neither married Walcott nor lived with the mother or the child.\textsuperscript{53} In September 1967, Walcott married another man.\textsuperscript{54} Twelve years after the child's birth, Walcott consented to adoption of the child by her husband.\textsuperscript{55} Quilloin then attempted to block the adoption of his biological child.\textsuperscript{56}

\textsuperscript{46} \textit{Id.} at 649.
\textsuperscript{47} \textit{Id.} at 649-57.
\textsuperscript{48} \textit{Id.} at 658. The Court devoted only seven sentences to the equal protection aspect of its holding. \textit{Id.; see infra note 67} (discussing the manner in which a court analyzes equal protection issues).
\textsuperscript{49} \textit{See Quilloin v. Walcott, 434 U.S. 246, 255 (1978)} (holding that the relationship between parent and child is constitutionally protected); \textit{see also infra notes 50-74 and accompanying text} (discussing the United States Supreme Court's holding in \textit{Quilloin}).
\textsuperscript{50} 434 U.S. 246 (1977).
\textsuperscript{51} \textit{Id.} at 255. \textit{See generally Zinman, supra note 2, at 975-77} (reviewing \textit{Quilloin}).
\textsuperscript{52} \textit{Quilloin}, 434 U.S. at 247.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} Quilloin sought visitation rights, but did not seek custody or object to the child continuing to live with the Walcotts. \textit{Id.} Prior to his attempt to block the adoption, Quilloin had provided support only on an irregular basis. \textit{Id.} at 251. Under Georgia law, the father had a duty to
Quilloin argued Georgia's adoption laws violated his constitutional rights to due process and equal protection. Under Georgia law, the father was required to legitimize his child by marrying the mother and acknowledging the child as his own or by obtaining a court order declaring the child legitimate and capable of inheriting from the father. Quilloin claimed that the Georgia statutes denied him the rights granted to married parents and presumed unwed fathers to be unfit parents as a matter of law.

The trial court found that the proposed adoption was in the child's best interest and determined that Quilloin's constitutional claims were without merit. Therefore, the trial court granted the adoption petition without finding Quilloin to be an unfit parent. The Georgia Supreme Court affirmed the decision.

On appeal, the United States Supreme Court first held the substantive due process rights of an unwed father were not violated by application of a "best interest of the child" standard in determining if an adoption should go forward when the father had never sought custody of his child. The Court recognized both
the constitutionally protected relationship between parent and child and the legitimate interest of the State in preserving existing family units. Quilloin’s relationship with his child was not protected by the Federal Constitution’s implied fundamental right to privacy in family matters since his relationship with his child had never developed into a family relationship. Therefore, Quilloin was entitled to no greater protection than he had already received in the form of notice and an opportunity to be heard.

Quilloin's claim that he had been denied equal protection was also rejected by the Supreme Court. The Court held that

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65. Quilloin, 434 U.S. at 255. The Court noted that a right to privacy in family matters exists as one of the liberties protected under the Fourteenth Amendment’s Due Process Clause. Id. (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)). Moreover, the Court recognized that the Due Process Clause would be violated if a state forced the breakup of a natural family, over the objections of the parents and the children, unless the parents were shown to be unfit and it was in the best interest of the children to break up the family. Quilloin, 434 U.S. at 255 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). In Quilloin, however, the father had never had custody of the child and the proposed adoption would give full recognition to a family unit then in existence. Quilloin, 434 U.S. at 255. See generally Kisthardt, supra note 7, at 599 (discussing the Quilloin Court’s due process analysis).

66. Quilloin, 434 U.S. at 255. The Court held that, under the circumstances, the State was not required to find anything more than that the adoption, and the denial of legitimation, were in the child’s best interest. Id. See generally Kisthardt, supra note 7, at 599 (discussing the Quilloin Court’s due process analysis).

67. Quilloin, 434 U.S. at 255; see NOWAK, supra note 40. The right to equal protection requires that the State treat similarly situated individuals in a similar manner. Id. § 10.7, at 349. Before a law can be subjected to any form of scrutiny under the Equal Protection Clause, it must be shown that the law classifies persons in some manner. Id. § 14.4, at 591. The court then looks at whether the distinction between these individuals is a legitimate one. Id. § 10.7, at 349. In matters of general social welfare or economic legislation, the court will sustain the classification if it arguably relates to a legitimate function of government. Id. Where the court finds fundamental rights or liberties are at stake, it will apply strict scrutiny when reviewing the classification and the government will be required to demonstrate that there is a close relationship between the classification and the promotion of a compelling or overriding interest. Id. § 14.3, at 575. A strict scrutiny standard will be applied to classifications based on race, national origin, or alienage. Id. § 14.3, at 576. The United States Supreme Court has sometimes applied an intermediate level of scrutiny, particularly in classifications involving gender or illegitimacy. Id. To be upheld by the court, such a classification must be shown by the government to have a substantial relationship to an important governmental
Quilloin's interests were readily distinguishable from those of a separated or divorced father who would have usually shouldered some responsibility with respect to the day-to-day supervision, protection, or care of the child. Quilloin had never exercised any actual or legal custody over the child and had not taken on similar responsibilities in raising the child. The majority found that since the State had an interest in the welfare of the child, the State could recognize this difference in commitment by fathers under any standard of review. Therefore, the Georgia statutes did not deny Quilloin his right to equal protection.

The United States Supreme Court concluded that Quilloin's rights to due process and equal protection had not been violated because he had failed to establish an appropriate level of commitment to the child. The Court's holding illustrates that a biological connection alone is insufficient to obtain the full, constitutional rights of a parent. The unwed father must also display concern for and commitment to the child. Two years later, the Court upheld the Quilloin standards in the case of Caban v. Mohammed.

interest. Id.

68. Quilloin, 434 U.S. at 256.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id; see Kisthardt, supra note 7, at 600 (outlining the significance of Quilloin and the necessity of some relationship beyond the biological link between father and child).
75. See Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that when an unwed father has come forward to participate in the rearing of his child, any distinction between unwed mothers and unwed fathers must serve an important government interest); see also infra notes 76-89 and accompanying text (discussing the Court's holding in Caban).
In Caban, Abdiel Caban, the father, and Maria Mohammed, the mother, lived together for several years but were never married.76 The couple had two children, and Caban was listed on both birth certificates as the father.77 Together with Mohammed, Caban contributed to the support of the family.78 Eventually, he and Mohammed separated and she took the children to live with her.79 Over the next two years, Caban saw the children frequently.80 Mohammed married and she and her husband petitioned for adoption of the children; Caban and his new wife cross-petitioned for adoption.81 A hearing was held and Mohammed’s adoption petition was granted despite Caban’s refusal to consent to such an adoption.82 When the issue reached the United States Supreme Court, Caban argued that the distinction drawn in the New York statute between the adoption rights of unwed fathers and other parents violated the Equal Protection Clause of the United States Constitution.83 He also argued that his substantive due process rights had been violated by terminating his parental relationship absent a showing that he was an unfit parent.84

76. Caban, 441 U.S. at 382.
77. Id.
78. Id.
79. Id. Mohammed and the children later lived with her new husband. Id.
80. Id. While the children lived with Mohammed, Caban saw them weekly when they would visit their maternal grandmother. Id. Subsequently, Mohammed sent the children to live with her mother who was moving to Puerto Rico and both Mohammed and Caban kept in touch with them. Id. at 382-83. Approximately one year later, Caban went to visit the children in Puerto Rico and returned to New York with them after the grandmother willingly surrendered them to Caban under the impression that they would be returned to her within a few days. Id. at 383. After learning the children were with Caban, Mohammed tried to retrieve them with the help of a police officer, but she was unsuccessful. Id. Mohammed then sought and obtained temporary custody and Caban received visitation rights. Id.
81. Id. at 383.
82. Id. at 383-84.
83. Id. at 385; see N.Y. DOM. REL. LAW § 111 (McKinney 1938) (amended 1985). New York law provided that consent to adoption was required of parents of a child born in wedlock, of the mother of a child born out of wedlock, and of any person having lawful custody of the adoptive child. Id. The unwed father had no similar right under the statute to block the adoption. Id.; see also supra note 67 (discussing the United States Supreme Court’s method of analyzing equal protection issues).
84. Caban, 441 U.S. at 385; see supra note 63 (discussing the United States Supreme Court’s approach to analyzing substantive due process issues).
The United States Supreme Court first held the New York statute's distinction between unwed mothers and unwed fathers violated Caban's equal protection rights. The Court applied an intermediate standard of review which required that gender-based distinctions must serve an important governmental objective and must be substantially related to achievement of that objective. The majority held that New York's distinction between unwed mothers and unwed fathers did not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. Even where an unwed father, such as Caban, had come forward to participate in the child's rearing, the statute discriminated against him on the basis of his sex. Because the Supreme Court found the statute unconstitutional under the Equal Protection Clause, it did not review Caban's substantive due process argument.

The different outcomes in Quilloin and Caban can be attributed to the level of the relationship existing between father and child in each of these cases. In Quilloin, the Supreme Court emphasized the importance of the father's failure to participate in any aspect of the rearing of his child. In Caban, the Court found that the father had established a significant relationship with his children and had admitted his paternity. Therefore, the Court's analysis focused on the combination of biology and commitment to the

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85. *Caban*, 441 U.S. at 394.
86. *Id.* at 388; see *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives to withstand constitutional challenge).
88. *Id.* at 394.
89. *Id.* The Court stated that it had expressed no view as to whether a state could constitutionally order adoption in the absence of a determination that the parent whose rights were being terminated was unfit. *Id.*
90. *Id.* at 389 n.7. The Court noted that *Quilloin* emphasized the relationship between a father and his children. *Id.; see Quilloin v. Walcott* 434 U.S. 246, 256 (1978) (recognizing the father had never shouldered any parental responsibility).
91. *Caban*, 441 U.S. at 389 n.7.
92. *Id.* at 393.
paternal relationship. Still unanswered, however, was how the Court would decide a case involving a young child with whom the father had no opportunity to form a relationship.

3. Establishing the Unwed Father's Right to Notice of His Child's Pending Adoption: Lehr v. Robertson

In the 1983 case of Lehr v. Robertson, the United States Supreme Court considered a case in which a father had never been given an opportunity to form a relationship with his child. Jonathan Lehr and Lorraine Robertson lived together before the birth of their daughter, Jessica. Lehr and Robertson were never married, and after the birth of the child, the couple no longer lived together. Lehr was not listed on the birth certificate as the father and never had any significant custodial, personal, or financial relations with Jessica.


94. See Lehr v. Robertson, 463 U.S. 248 (1983) (holding that an unwed father who grasps his opportunity to develop a relationship with his child must be afforded federal constitutional protection). See generally Kisthardt, supra note 7, at 603-06 (considering the Lehr case and the issues facing the United States Supreme Court).


96. Id. at 249-50.

97. Id. at 252.

98. Id.

99. Id.

100. Id. at 262. Lehr contended that the mother concealed the whereabouts of herself and the child from Lehr for the two year period. Id. at 269 (White, J., dissenting). Further, he contended that he offered to provide financial assistance and to set up a trust fund for Jessica, but the mother refused. Id.
Eight months after Jessica’s birth, Lorraine married Richard Robertson, and in late 1978, the Robertsons filed an adoption petition. Lehr did not fall within the statutory definition of a putative father, and therefore, received no notice of the adoption proceeding. Coincidentally, one month after the adoption petition, Lehr filed an action for determination of paternity, an order of support, and reasonable visitation rights. Lehr first learned of the adoption proceeding when he received a change of venue order concerning his paternity suit. He attempted to have the adoption proceeding stayed, but was informed by the judge that the adoption had already been granted. Lehr’s paternity action was then dismissed on motion by the Robertsons. Lehr later filed a petition to vacate the adoption order, however, this petition was denied. The appellate division and the New York Court of Appeals affirmed the denial of Lehr’s petition. Before the United States Supreme Court, Lehr claimed that the Due Process and Equal Protection Clauses of the United States Constitution afforded him an absolute right to notice and an opportunity to be heard before his child could be adopted.

In rejecting Lehr’s arguments, the United States Supreme Court first considered the nature of the private interest threatened by the State’s procedure. The Court recognized that an unwed father had an interest in the parent-child relationship. The Court also noted a distinction between cases where the father had developed a parent-child relationship and cases where the father had only a

101. Id. at 250.
102. Id. at 250-51. New York’s statute created a “putative father registry” where a biological father could register with the State to demonstrate his intent to claim paternity of a child born out of wedlock. Id. at 251 n.4; see N.Y. SOC. SERV. LAW § 372 (McKinney 1923) (amended 1992). Once registered with the registry, the father was entitled to receive notice of any proceeding to adopt that child. Id. Lehr had not entered his name in the registry. Lehr, 463 U.S. at 250-51.
103. Id. at 252.
104. Id. at 253.
105. Id.
106. Id.
107. Id.
108. Id. at 253-54.
109. Id. at 250.
110. Id. at 256.
111. Id.
potential for a relationship. The Court held that when an unwed father demonstrated his full commitment to his parental responsibilities by participating in the rearing of his child, his interest in personal contact with the child warranted substantial protection under the Due Process Clause. The mere existence of a biological link, however, was not enough to merit equivalent constitutional protection. The New York statute protected Lehr's interest as a putative father in establishing a relationship with Jessica if he at least filed with the "putative father registry." Therefore, Lehr was not denied procedural due process protection merely because the lower court strictly complied with the notice provisions of the statute.

The Supreme Court also denied Lehr's equal protection claim. The Court noted that in order to sustain a distinction based on gender, the State needed to establish that a substantial relationship existed between that distinction and some important State purpose. The State argued it had a substantial interest in protecting the rights of children in adoption matters.

In agreeing with the State's argument, the majority held that if one parent had an established custodial relationship with the child and the other parent had either abandoned or never established a relationship, the Equal Protection Clause did not prevent a state from according the two parents different legal rights. The Court concluded that because Lehr had never established a continuous custodial responsibility for Jessica, his right to equal

112. Id. at 261.
113. Id.; see supra notes 41, 63 (discussing the United States Supreme Court's approach to analyzing due process matters).
114. Lehr, 463 U.S. at 261.
115. Id. at 265.
116. Id.
117. Id. at 267-68; see supra note 67 (discussing the United States Supreme Court's approach to analyzing equal protection matters).
118. Lehr, 463 U.S. at 265-66.
119. Id. at 266.
120. Id. at 267-68.
protection was not violated by New York's classification.\footnote{121} Following its decision in Lehr, the United States Supreme Court next focused its attention on the case of an unwed father whose child was conceived while the mother was married to another man.\footnote{122}

4. \textit{Rebutting the Marital Presumption: Michael H. v. Gerald D.}

The \textit{Michael H.} Court, in a plurality opinion, recognized that where a child is born into an existing marital family, the putative father's interest in a relationship with his child conflicts with the interests of the man who is married to the mother.\footnote{123} The plurality opinion, written by Justice Scalia, held that it was not unconstitutional for the State to give categorical preference to the mother's husband.\footnote{124} Michael H. had an affair with Carole D., resulting in the birth of Victoria D.\footnote{125} At the time, Carole D. was married to and living with Gerald D.\footnote{126} Shortly after Victoria's birth, Carole told

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\footnotetext{122.} See Michael H. v. Gerald D., 491 U.S. 110 (1989); see also Kisthardt, supra note 7, at 607 (reviewing the United States Supreme Court's cases and setting up the issue present in \textit{Michael H.}).

\footnotetext{123.} \textit{Michael H.}, 491 U.S. at 129.

\footnotetext{124.} \textit{Id.}

\footnotetext{125.} \textit{Id.} at 113.

\footnotetext{126.} \textit{Id.}
\end{footnotesize}
Michael that Victoria was probably his daughter. While the mother and daughter lived with Michael, he held Victoria out as his daughter. Subsequently, Carole left Michael, and he sought visitation and paternity rights over Victoria.

Gerald D. intervened in the action and filed a motion for summary judgment on the grounds that there was no triable issue of fact as to Victoria’s paternity. The trial court granted summary judgment based on the conclusive presumption in California Evidence Code section 621. The presumption stated that where the mother of the unwed father’s child was married to another man at the time of conception, the marital husband was conclusively presumed to be the father if he was not impotent or sterile. On appeal, Michael challenged the constitutionality of Evidence Code section 621, arguing that his procedural and substantive due process rights had been violated.

The Court of Appeal for the Second District of California upheld the denial of Michael’s claim, and the California Supreme Court denied discretionary review.

In a plurality decision, the United States Supreme Court affirmed the Court of Appeal for the Second District of

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127. Id. at 114. Blood tests showed a 98.07 percent probability Michael was Victoria’s biological father. Id.
128. Id.
129. Id.
130. Id. at 114-15. Victoria, through her court-appointed guardian, also sought visitation rights for Michael contingent upon the determination of the pending lawsuit. Id.
131. Id. Gerald argued that under California Evidence Code section 621, there was no triable issue of fact as to Victoria’s paternity since he and the mother were married at the time of the child’s birth and he was neither impotent nor sterile. Id.; see infra note 132 (summarizing California Evidence Code section 621).
132. Michael H., 491 U.S. at 115; see 1981 Cal. Stat. ch. 1180, sec. 1, at 4760 (amending CAL. EVID. CODE § 621) (establishing that the marital husband is conclusively presumed to be the father of the child when the mother is living with the marital husband who is neither impotent nor sterile). Effective January 1, 1994, the statute will appear at California Family Code section 7500. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 546 (West).
133. Michael H., 491 U.S. at 115.
134. Id. at 115-16.
135. Id. at 116.
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The Court first rejected Michael's claim that his procedural due process rights had been violated. According to the plurality, the implementation of the irrebuttable presumption contained in the California Evidence Code was not a procedural rule. Rather, it was a substantive rule of law which treated the actual circumstances of paternity as irrelevant when a child was born to a married woman. The Court said the focus was not on the adequacy of the procedures, but on whether the "fit" between the classification involved and the policy that classification served was adequate. Therefore, the Court rejected the procedural due process argument and moved on to Michael's substantive due process challenge.

Michael also claimed that his substantive due process rights had been violated by the California statute. Michael argued that because he had established a relationship with Victoria, his liberty interest in a parental relationship could not be terminated merely to protect Carole's current marital union. In addressing this argument, the plurality noted that in order for Michael's liberty interest to be fundamental, it had to be an interest traditionally protected by society. The Court looked at whether relationships

136. Id. at 132.
137. Id. at 119, 121. Michael complained that the State had terminated his liberty interest in his relationship with Victoria without affording him the opportunity to establish his paternity at an evidentiary hearing. Id. at 119; see supra notes 41, 63 (discussing the United States Supreme Court's method for evaluating due process challenges to state statutes).
139. Id: See generally Kisthardt, supra note 7, at 616 (discussing the plurality opinion of Michael H.).
140. Michael H., 491 U.S. at 121. The plurality noted that several commentators and previous cases had recognized that the Court's irrebuttable presumption cases turned on this standard. Id. at 120-21. Since the Court did not rule on the procedural due process claim, left unresolved is the issue of what types of procedures, if any, need to be given to a male who asserts that he is the biological father of an illegitimate child. NOWAK, supra note 40, at 507 (discussing the ramifications of Michael H. on due process requirements when the mother is not married at the time the child is born).
141. Michael H., 491 U.S. at 121; see supra notes 41, 63 (discussing the United States Supreme Court's test for evaluating due process challenges to state statutes).
142. Michael H., 491 U.S. at 121.
143. Id. The plurality noted that a traditional policy reason for a presumption in favor of the marital union was to protect the State's interest in promoting peace and tranquillity within the State and families. Id. at 125.
144. Id. at 122.
such as the one between Michael and Victoria had historically been treated as a protected family unit.\textsuperscript{145}

Justice Scalia, writing for the plurality, found that the marital family had traditionally been protected against a claim such as Michael’s.\textsuperscript{146} Therefore, the Court concluded that Michael did not have a protected liberty interest in a parental relationship with Victoria.\textsuperscript{147} The \textit{Michael H.} plurality established that the constitutionally protected interest of an unwed father to develop a relationship with his child could be limited when exercising that interest would conflict with the interests of a marital husband.\textsuperscript{148} In addition to the United States Supreme Court decisions outlined above, California has developed its own case law acknowledging the parental rights of unwed fathers.\textsuperscript{149}

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\item \textsuperscript{145} \textit{Id.} at 124. To distinguish \textit{Stanley, Quillen, Caban,} and \textit{Lehr}, the Supreme Court held that those cases did not rest on the notion that a biological connection plus a developed relationship created a liberty interest. \textit{Id.} at 123. Instead, the \textit{Michael H.} Court held that those prior decisions rested upon the relationships that develop in a unitary family, recognized by the plurality as being typified by the marital family. \textit{Id.} at 123 n.3. The Court acknowledged that the concept could be extended to include households of unmarried parents and children, but not a relationship such as that between Michael, Carole, and Victoria. \textit{Id.}
\item \textsuperscript{146} \textit{Id.} at 124.
\item \textsuperscript{147} \textit{Id.} at 127.
\item \textsuperscript{148} \textit{Id.} 128-29. Since Michael had in fact established a relationship with Victoria, the Court’s holding seems to contradict earlier rulings establishing a putative father’s constitutional right where the father had established a relationship with his child. \textit{See id.;} Zinman, \textit{supra} note 2, at 980 (discussing the apparent contradiction of the \textit{Michael H.} Court while implying the support of at least four Justices for the traditional rule obviates such a contradiction). Still, four Justices agreed that the biological father had a protected liberty interest in his relationship with his child. \textit{Michael H.}, 491 U.S. at 142-43 (Brennan, J., dissenting) (Justice Brennan was joined by Justices Marshall and Blackmun); \textit{Michael H.}, 491 U.S. at 159-60 (White, J., dissenting). Justice Stevens assumed that Michael had a protected interest for the purposes of the case since there was a biological connection between Michael and Victoria and Michael had established a relationship with his child. \textit{Michael H.}, 491 U.S. at 133 (Stevens, J., concurring in judgment).
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B. California Case Law Acknowledging Federal Constitutional Protection for Unwed Fathers

The California Supreme Court acknowledged that because Kelsey S. presented a federal constitutional question, the California court was required to adhere to the decisions of the United States Supreme Court. Nonetheless, the Court looked to relevant California decisions for additional guidance. The majority recognized that the California cases did not provide a clear answer to the question presented in Kelsey S., but found that the cases reflected an acknowledgement of federal constitutional protection for putative fathers.


The California Supreme Court in In re Baby Girl M. held that when a mother relinquishes custody of her child and the natural father claims custody at a hearing, a finding of detriment to the child is necessary to terminate the father's parental rights. In Baby Girl M., the mother and natural father dated for a brief period during the fall of 1980. The mother became pregnant, but the couple separated before the father was aware of the pregnancy. Following the birth, and while in the hospital, the mother requested adoption assistance and placed the child in a foster home. The father first learned of the birth two weeks later. He contacted the city's department of social welfare and expressed a desire to have the child placed in the home of a family.

150. Adoption of Kelsey S., 1 Cal. 4th 816, 839, 823 P.2d 1216, 1229, 4 Cal. Rptr. 2d 615, 628 (1992).
151. Id.
152. Id. at 839-40, 823 P.2d at 1230, 4 Cal. Rptr. 2d at 629.
154. Id. at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.
155. Id. at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.
156. Id.
157. Id.
158. Id.
he knew. Later that day, the mother formally relinquished the child for adoption and rejected the father's placement request, saying she preferred that the child be placed with a family neither she nor the father knew. A few days later, a petition was filed under California Civil Code section 7017 to terminate the father's parental rights. Despite the father's wishes, the child was placed with prospective adoptive parents about two weeks later. At the hearing required under section 7017, the father's parental rights were terminated by the trial court. Although the court found that the father could have been a good parent, it nonetheless felt it was in the child's best interest to remain with the adoptive parents. Therefore, the biological father's parental rights were severed without a finding it would be detrimental to the child for him to have custody.

The California Supreme Court held that the trial court erred in severing the father's parental rights without first looking at the possible detriment to the child. The court concluded that the State could not deny biological parents the opportunity to establish a protected custodial relationship with their children in the absence

159. Id.
160. Id.
161. Id. The written opinion does not specify who filed the petition. Id. Under California Civil Code section 7017, an adoption could not be completed, even after the mother had relinquished her child, until a petition was granted terminating the natural father's rights. Id. at 69 n.2, 688 P.2d at 920-21 n.2, 4 Cal. Rptr. 2d at 311-12 n.2. The father was entitled to notice of the hearing unless he had given a previous written waiver. Id. at 69, 688 P.2d at 920, 4 Cal. Rptr. 2d at 311. If the father appeared at the hearing and claimed custody rights, the court had to determine those rights. Id.; see 1979 Cal. Stat. ch. 752, sec. 2, at 2608-09 (amending CAL. CIV. CODE § 7017) (providing that an adoption may not be completed, even after the mother has relinquished her child, until a petition is granted terminating the natural father's rights). Effective January 1, 1994, the statute will appear at California Family Code sections 7660-7670. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 552 (West).
162. Baby Girl M., 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.
163. Id.
164. Id.
165. Id.
166. Id. at 67-68, 688 P.2d at 919-20, 207 Cal. Rptr. at 310-11. The court's statutory analysis is not particularly helpful to this Note since the Legislature amended section 7017 two years after the Baby Girl M. decision. See 1986 Cal. Stat. ch. 1370, sec. 2, at 4903 (amending CAL. CIV. CODE § 7017); Adoption of Kelsey S., 1 Cal. 4th 816, 840, 823 P.2d 1216, 1230, 4 Cal. Rptr. 2d 615, 629 (1992) (discussing the Legislature's response to Baby Girl M.). Additionally, the California Supreme Court suggested in dicta that a parental preference was required as a matter of federal constitutional law. Baby Girl M., 37 Cal. 3d at 74-75, 688 P.2d at 924-25, 207 Cal. Rptr. at 315-16.
of unfitness. In addition to decisions of the California Supreme Court addressing the rights of unwed fathers prior to Kelsey S., various California appellate courts had considered issues relating to unwed fathers' rights.

2. Decisions of the California Courts of Appeal Relating to the Rights of Unwed Fathers

In Adoption of Marie R., the Court of Appeal for the Second District of California held that at least some minimal contact between the father and his child was required for the unwed father to be a presumed father. Sheila, the mother, became pregnant after she engaged in separate acts of intercourse with two men, Charles and Scott. The child, Marie was born on January 11, 1976. Sheila and Scott were married three days before Marie's birth. Although Scott was listed as the father on Marie's birth certificate, Sheila also let Charles assume that he was the biological father. Immediately after Marie's birth, Sheila and Scott placed the child with a couple, Ronald and Jill K., with whom Marie thereafter continuously lived. Charles filed a complaint to establish paternity. Ronald and Jill subsequently filed a petition for adoption and initiated an action under Civil
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Code section 7017 to have Charles' parental rights terminated. The trial court permitted Charles to offer evidence as to paternity, but blood tests were inconclusive to prove the identity of the biological father. Additionally, the trial court found that Charles had not contributed to Sheila's prenatal support, the expense of the birth, or post-birth expenses, although he had offered to provide such support.

The trial court held that Charles had established constructive receipt of his child, and that actual receipt had been prevented by the mother. The constructive receipt argument rested on the theory that if Charles had done all that he could to receive his child into his home but had been blocked by the mother from actually receiving his child, the court should infer or imply that he had established constructive receipt. Since the trial court found that Charles had constructively received his child into his home, he had acquired the rights of a legally presumed father, and the adoption petition was not able to move forward without his consent.

Sheila and Scott appealed to the Court of Appeal for the Second District of California. In reversing the lower court, the Court of Appeal for the Second District of California held that without at least some minimal contact with the child, Civil Code section 7004 did not permit the putative father to claim he had taken the child into his home, constructively or otherwise. The Marie R. court recognized that as a result of the United States Supreme Court's

177. Id.; see 1977 Cal. Stat. ch. 207, sec. 2, at 729-30 (amending CAL. CIV. CODE § 7017) (providing that an adoption may not be completed, even after the mother has relinquished her child, until a petition is granted terminating the natural father's rights). Effective January 1, 1994, the statute will appear at California Family Code sections 7660-7670. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 552-54 (West); see also supra note 161 and accompanying text (discussing California Civil Code section 7017).


179. Id.

180. Id. at 626, 145 Cal. Rptr. at 124.

181. See id. at 630, 145 Cal. Rptr. at 126; BLACK'S LAW DICTIONARY 313 (6th ed. 1990) (defining "constructive" as something inferred or implied by legal interpretation).


183. Id. at 627, 145 Cal. Rptr. at 124.

184. See id. at 630, 145 Cal. Rptr. at 126 (holding constructive receipt was not allowed).
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holding in *Quilloin v. Walcott*, a state could draw a distinction between a statutorily presumed father and a putative father.\(^{185}\) Such a distinction allowed the court to deny the putative father the right to withhold consent to his child’s adoption.\(^{186}\) This was true even if the putative father had promptly done all he could to fulfill his responsibilities as a parent, but was prevented by the mother from actually receiving the child into his home.\(^{187}\)

In the case of *W. E. J. v. Superior Court*,\(^{188}\) the Court of Appeal for the Second District of California once again upheld a statutory distinction between natural and presumed fathers.\(^{189}\) In *W. E. J.*, the court found that a broadly worded statutory distinction between natural and presumed fathers was constitutionally valid under the Equal Protection Clause of the United States Constitution.\(^{190}\) In *W. E. J.*, the baby’s mother, Ms. G., released her child to the prospective adoptive parents the day after his birth.\(^{191}\) The biological father, F.L., was married to another woman at the time of conception and trial.\(^{192}\) He appeared at the adoption proceeding and sought custody.\(^{193}\) F.L. argued that a biological father was entitled to custody of his child born out of wedlock, both by reason of constitutional principles articulated in *Caban v. Mohammed*\(^{194}\) and in order to qualify as a presumed

\(^{185}\) *Id.* at 629, 145 Cal. Rptr. at 125; see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that the relationship between parent and child is constitutionally protected); see also supra notes 50-74 and accompanying text (discussing the *Quilloin* case).

\(^{186}\) *Marie R.*, 79 Cal. App. 3d at 629, 145 Cal. Rptr. at 125.

\(^{187}\) *Id.* at 630, 145 Cal. Rptr. at 126.

\(^{188}\) 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (2d Dist. 1979).

\(^{189}\) *Id.* at 305-06, 160 Cal. Rptr. at 864. The court of appeal noted in its decision that the entire file of the superior court had not been brought up and therefore the facts surrounding the case are vague. *Id.*

\(^{190}\) Id. at 314-15, 160 Cal. Rptr. at 869; see 1978 Cal. Stat. ch. 429, sec. 36, at 1349-50 (amending CAL. CIV. CODE § 7017) (providing that an adoption may not be completed, even after the mother has relinquished her child, until a petition is granted terminating the natural father’s rights). Effective January 1, 1994, the statute will appear at California Family Code sections 7660-7670. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 552-54 (West).

\(^{191}\) *W. E. J.*, 100 Cal. App. 3d at 306, 160 Cal. Rptr. at 864.

\(^{192}\) *Id.*

\(^{193}\) *Id.*

\(^{194}\) See *Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (holding that when an unwed father has come forward to participate in the rearing of his child, any distinction between unwed mothers and unwed fathers must serve an important governmental interest); see also supra notes 76-89 and
father under the statute.\textsuperscript{195} The trial court found he was entitled to custody, and without a finding of the child's best interest, directed the prospective adoptive parents to release the baby to F.L.\textsuperscript{196} Thereafter, the prospective adoptive parents appealed.\textsuperscript{197}

The Court of Appeal for the Second District of California ordered the lower court to vacate its decision and conduct a new hearing.\textsuperscript{198} The court identified a gender-based classification in Civil Code section 7017.\textsuperscript{199} The majority noted, however, that the statute did not discriminate between all unwed mothers and all unwed fathers.\textsuperscript{200} Instead, the statute's classification distinguished unmarried mothers from unmarried fathers who had neither married the mother nor lived with the child as a parent.\textsuperscript{201} The court found such a distinction to be based upon an actual difference in situation between the two classes since an unwed mother could not be a stranger to her child.\textsuperscript{202} The State interest involved was the protection of the child, which the court deemed to be "important."\textsuperscript{203} Applying the intermediate standard of review, the court held that the limited classification was constitutional since the distinction between natural and presumed fathers was substantially related to an important State interest.\textsuperscript{204} The court therefore concluded that the California statute was valid under the Federal Constitution.\textsuperscript{205}

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accompanying text (discussing the \textit{Caban} case in detail).

\textsuperscript{195} \textit{W. E. J.}, 100 Cal. App. 3d at 306, 160 Cal. Rptr. at 864.
\textsuperscript{196} \textit{Id.} at 306-07, 160 Cal. Rptr. at 864.
\textsuperscript{197} \textit{Id.} at 306, 160 Cal. Rptr. at 864.
\textsuperscript{198} \textit{Id.} at 315, 160 Cal. Rptr. at 870.
\textsuperscript{199} \textit{Id.} at 314, 160 Cal. Rptr. at 869.
\textsuperscript{200} \textit{Id.} The court relied on \textit{Caban v. Mohammed}, 441 U.S. 380 (1979), for the standard to be applied in gender based discrimination. \textit{W. E. J.}, at 100 Cal. App. 3d at 314, 160 Cal. Rptr. at 869; see \textit{supra} notes 76-89 and accompanying text (discussing the \textit{Caban} holding).
\textsuperscript{201} \textit{W. E. J.}, 100 Cal. App. 3d at 314, 160 Cal. Rptr. at 869.
\textsuperscript{202} \textit{Id.} at 315, 160 Cal. Rptr. at 869. The clear implication of the court is that an unwed father who has never married the mother nor lived with the child as a parent would be a stranger to the child. See \textit{id}.
\textsuperscript{203} \textit{Id.} at 314, 160 Cal. Rptr. at 869.
\textsuperscript{204} \textit{Id.} at 315, 160 Cal. Rptr. at 869; see \textit{supra} note 67 (discussing the approach of the courts in equal protection matters).
\textsuperscript{205} \textit{W. E. J.}, 100 Cal. App. 3d at 315, 160 Cal. Rptr. at 869.
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The Court of Appeal for the Third District of California reviewed a case involving the rights of an unwed father. In *Jermstad v. McNelis*, the court interpreted federal constitutional principles of due process and equal protection to hold that a state could not deny a biological parent the opportunity to establish a protected relationship with his or her child. In *Jermstad*, the putative father was a merchant marine who learned at sea that the woman he had been dating was pregnant. Upon his return, they discussed their options for handling the pregnancy. The mother wanted to place the child with adoptive parents. The father was opposed to adoption, but felt he could not gain custody because of his type of employment. The father visited the baby the day it was born and announced he would seek custody. At trial, the court determined he was the father and awarded him custody of his child.

The Court of Appeal for the Third District of California affirmed the lower court decision. The appellate court noted that a biological father had a constitutionally recognized parental preference to custody of this child where he had diligently pursued an opportunity to establish a custodial relationship. The trial court could grant sufficient custody to the father so that he could take the child into his home and establish himself as a presumed father, assuming it was in the best interest of the child.

The preceding cases represent the relevant case law discussed in the *Kelsey S.* opinion. From these cases, the *Kelsey S.* court

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207. *Id.* at 550, 258 Cal. Rptr. at 532.
208. *Id.* at 533, 258 Cal. Rptr. at 520.
209. *Id.* at 533, 258 Cal. Rptr. at 521. The couple discussed the possibilities of marriage or living together, along with the option of adoption. *Id.*
210. *Id.*
211. *Id.* The father indicated that he wanted to have custody of the child, but the mother said if he fought for custody against the proposed adoptive parents, she would keep the child herself. *Id.* The father then told the prospective adoptive parents he would not contest the adoption. *Id.*
212. *Id.* at 534, 258 Cal. Rptr. at 521.
213. *Id.* at 536-37, 258 Cal. Rptr. at 522-23.
214. *Id.* at 554, 258 Cal. Rptr. at 534.
215. *Id.* at 533, 258 Cal. Rptr. at 520.
216. *Id.* at 543, 258 Cal. Rptr. at 527.
extracted a set of guiding constitutional principles. The unifying theme which emerged was that the biological connection between a father and his child is a unique relationship which warrants federal constitutional protection. Before he receives such protection, however, the father must attempt to develop that biological connection into a full and lasting relationship. It was with such a theme in mind that the California Supreme Court granted review of Kelsey S.

II. THE CASE

A. The Factual and Procedural History

Kari S. (Kari) gave birth to Kelsey, a boy, on May 18, 1988. Kelsey's undisputed natural father was petitioner Rickie M. (Rickie), who was not married to Kari. Rickie was aware Kari wanted to place Kelsey up for adoption and objected to the decision. Two days after the child was born, Rickie filed an action in the Superior Court of California in and for the County of Santa Clara to establish his parental relationship with the child and to obtain custody. The court issued a restraining order that temporarily awarded care, custody, and control of the child to Rickie, stayed all adoption proceedings, and prohibited any contact between the child and the prospective adoptive parents.

218. Id. at 838, 820, 820, 820 P.2d at 1228, 4 Cal. Rptr. 2d at 627. The court noted that the New York Court of Appeals supported the idea of such a theme in the case of In re Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990). Id. at 838, 820, 820, 820 P.2d at 1228, 4 Cal. Rptr. 2d at 627.
219. Id.
220. Id. at 822, 820, 820, 820 P.2d at 1217, 4 Cal. Rptr. 2d at 616.
221. Id.
222. Id. Rickie wanted to raise Kelsey himself. Id.
223. Id. at 822, 820, 820, 820 P.2d at 1217-18, 4 Cal. Rptr. 2d at 616-17.
224. Id. at 822, 820, 820, 820 P.2d at 1218, 4 Cal. Rptr. 2d at 617. Although Rickie filed a copy of the order with law enforcement officials, he was unsuccessful in serving the prospective adoptive parents and never obtained custody of Kelsey. Id. Rickie claimed that the prospective adoptive parents attempted to evade service of the order by secretly removing Kelsey from their house. Id. at 823, 820, 820, 820 P.2d at 1218, 4 Cal. Rptr. 2d at 617. The adoptive parents did not directly dispute the allegations. Id.

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On May 24, 1988, Steven and Suzanne A. (Steven and Suzanne), the prospective adoptive parents, filed an adoption petition. They alleged that only the mother’s consent was needed because there was no presumed father within the definition of California Civil Code section 7004(a). On May 26, 1988, the superior court modified its May 20, 1988 order and awarded temporary custody of the child to Kari. On May 31, 1988, Steven and Suzanne filed a petition under California Civil Code section 7017 to terminate Rickie’s parental rights.

The trial court first ruled that Rickie was not a presumed father within the meaning of section 7004(a)(4). The court next held hearings to determine whether it was in Kelsey’s best interest for Rickie to retain his parental rights. On August 26, 1988, the court found by a preponderance of the evidence that it was in Kelsey’s best interest to terminate his natural father’s parental rights. As a result of the court’s judgment, Rickie was prevented from blocking the adoption by Steven and Suzanne.

Rickie appealed the lower court’s decision, claiming the lower court erred by concluding that he was not the child’s presumed father, by not allowing him to express his preference in his son’s adoption placement, and by applying a preponderance of the

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225. Id. at 822, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.
226. Id.; see 1987 Cal. Stat. ch. 192, sec. 1, at 1155-56 (amending CAL. CIV. CODE § 7004) (detailing that an unwed father is a presumed father if he has lived with the mother or taken his child into his home). Effective January 1, 1994, the statute will appear at California Family Code section 7611. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 549 (West). Since Rickie and Kari were not married and Rickie had not taken Kelsey into his home, Steven and Suzanne argued the presumption did not arise. See Kelsey S., 1 Cal. 4th at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617; see also supra note 17 (summarizing California Civil Code section 7004).
227. Kelsey S., 1 Cal. 4th at 822, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.
228. Id. at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617. The trial court allowed Rickie supervised visitation rights, and the prospective adoptive parents unsupervised visitation rights. Id.; see 1990 Cal. Stat. ch. 1363, sec. 9, at 53 (amending CAL. CIV. CODE § 7017) (AB 3532) (providing that an adoption may not be completed, even after the mother has relinquished her child, until a petition is granted terminating the natural father’s rights). Effective January 1, 1994, the statute will appear at California Family Code sections 7660-7670. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 552 (West); see also supra note 161 and accompanying text (discussing section 7017).
229. Kelsey S., 1 Cal. 4th at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.
230. Id.
231. Id.
232. Id.

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evidence standard of proof.²³³ Each of his contentions was rejected by the court of appeal which affirmed the judgment of the lower court.²³⁴ The California Supreme Court granted review.²³⁵

B. The Majority Opinion

Justice Baxter, writing for the majority in Kelsey S., reversed the trial court and remanded the case to the Superior Court of California in and for the County of Santa Clara for further proceedings consistent with the court’s opinion.²³⁶ The majority first looked at whether the language of California Civil Code section 7004 or the legislative history of the statute supported the argument that a putative father could become a statutory presumed father by virtue of constructive receipt of his child.²³⁷ The court then analyzed whether federal constitutional rights of equal protection and due process protected a putative father’s parental rights if he had demonstrated a full commitment to his parental responsibilities.²³⁸

The majority first addressed Rickie’s argument that the court should construe California Civil Code section 7004 to provide him with constructive receipt of his son where his attempts to receive Kelsey into his home had been blocked by the courts, the mother, and the adoptive parents.²³⁹ The court considered whether section 7004 supported the theory of constructive receipt, and concluded it did not.²⁴⁰ On its face, Civil Code section 7004(a) referred

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²³³ Id.
²³⁴ Id.
²³⁵ Id. at 822, 823 P.2d at 1217, 4 Cal. Rptr. 2d at 616.
²³⁶ Id. at 852, 823 P.2d at 1238, 4 Cal. Rptr. 2d at 637. Justice Baxter was joined by Chief Justice Lucas and Justices Panelli, Kennard, Arabian and George. Id. at 852, 853 P.2d at 1239, 4 Cal. Rptr. 2d at 638.
²³⁷ Id. at 825-27, 823 P.2d at 1220-21, 4 Cal. Rptr. 2d at 619-20; Constructive receipt involves the father’s unsuccessful attempt to receive his child into his home in order to be considered a presumed father. See supra note 181 and accompanying text (discussing the concept of constructive receipt of a child); see also infra notes 239-245 and accompanying text (discussing the court’s review of the constructive receipt argument).
²³⁸ Kelsey S., 1 Cal. 4th at 830-39, 823 P.2d at 1222-29, 4 Cal. Rptr. 2d at 622-28.
²³⁹ Id. at 825, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.
²⁴⁰ Id. at 826, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.
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explicitly to actual receipt of the child into the father’s home. The majority found neither explicit nor implied reference within section 7004 to an unwed father’s ability to become a presumed father by attempted or constructive receipt of his child. The court refused to insert words into the statute in order to interpret it as Rickie had argued. Justice Baxter also reviewed California case law and found little guidance on the constructive receipt theory of an unwed father seeking to be considered a presumed father by the courts. Therefore, the California Supreme Court refused to construe the statutes to provide for constructive receipt of the child as a method of becoming a presumed father.

The California Supreme Court further held that California Civil Code section 7004(a) and the related statutory scheme violated federal constitutional guarantees of equal protection and due process for unwed fathers. The statute allowed a mother to

241. *Id.;* California Civil Code section 7004 subsection (a)(4) provided a man was presumed to be the natural father of a child if, “He receives the child into his home and openly holds out the child as his natural child.” 1987 Cal. Stat. ch. 192, sec. 1, at 1155-56 (amending CAL. CIV. CODE § 7004); see supra note 17 and accompanying text (reviewing section 7004).

242. *Kelsey S.*, 1 Cal. 4th at 826, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.

243. *Id.* at 827, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619-20. The court stated that inserting the words “receives or attempts to receive” into the statute would violate the generally accepted rule that courts may not add provisions to a statute. *Id.* With the added words, California Civil Code section 7004 subsection (a) would have read: “A man is presumed to be the natural father of a child if . . . (4) He receives, or attempts to receive, the child into his home and openly holds out the child as his natural child.”

244. *Id.* at 827-29, 823 P.2d at 1221-22, 4 Cal. Rptr. 2d at 620-21.

245. *Id.* at 830, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

246. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635. The statutory scheme included California Civil Code section 7017 which required that where a mother of a child without a presumed father consents to the child’s adoption, a petition was required to be filed in the superior court to terminate the father’s parental rights. 1990 Cal. Stat. ch. 1363, sec. 9, at 53-55 (amending CAL. CIV. CODE § 7017). If a man claimed parental rights, the court was required to first determine whether he was the natural father. *Id.* If the court found he was the presumed father, then it determined if it was in the child’s best interest for the man to retain his parental rights. *Id.* If the court found he should retain his parental rights, then his consent was required for an adoption. *Id.* Under California Civil Code section 224, mothers and presumed fathers could withhold their consent to the adoption except in four narrow circumstances, including when a court declared the child free of the parent’s custody and control, when the parent had voluntarily relinquished his or her rights in a judicial proceeding, when the parent had deserted the child, and where the parent relinquished the child for adoption. 1981 Cal. Stat. ch. 714, sec. 47, at 2588-89 (amending CAL. CIV. CODE § 224) (current version at CAL. CIV. CODE § 221.20). Effective January 1, 1994, section 221.20 will appear at California Family Code sections 8604-8606. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 570-71 (West). Therefore, the statutory scheme created three classifications of parents. *Kelsey S.*, 1 Cal. 4th
unilaterally preclude the biological father from becoming a presumed father, thereby permitting the State to terminate a father’s parental rights on a mere showing of the child’s best interest.\textsuperscript{247} The court concluded that section 7004’s broad grant of discretion to trial courts violated the unwed father’s constitutional rights.\textsuperscript{248}

The California Supreme Court reasoned that the statute created a gender-based distinction between unmarried mothers and unmarried fathers and applied an intermediate standard of review for substantive due process and equal protection as articulated in \textit{Caban v. Mohammed} was applied.\textsuperscript{249} In so doing, the court questioned whether a statute which allowed the mother the ability to prevent a putative father from obtaining the same rights given to mothers and presumed fathers substantially served an important governmental interest.\textsuperscript{250} According to the court, providing for the well-being of children born out of wedlock was an important State interest.\textsuperscript{251} The more difficult question was whether this interest was substantially furthered by permitting a mother to deny the biological father an opportunity to form a relationship with his child that would give the father the same statutory rights as the mother or a presumed father.\textsuperscript{252}

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\textsuperscript{247} Kelsey S., 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
\textsuperscript{248} Id.
\textsuperscript{249} Id. The California Legislature has yet to amend California Civil Code section 7004 or to replace the section and scheme found unconstitutional. The only action taken after the Kelsey S. decision has been to codify footnote 14, excluding the extension of presumed father status to a man who impregnates a woman as a result of nonconsensual sexual intercourse. 1992 Cal. Legis. Serv. ch. 559, sec. 1, at 1753 (West) (amending CAL. CIV. CODE § 7004(b)).
\textsuperscript{250} Kelsey S., 1 Cal. 4th at 844, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632. The court examined whether the distinction served important governmental objectives and was substantially related to achievement of those objectives. \textit{Id.; see} Caban v. Mohammed, 441 U.S. 380, 388 (1979) (holding that the appropriate standard of review for cases involving gender discrimination is an intermediate standard); \textit{see also} supra notes 76-89 and accompanying text (discussing the Caban case).
\textsuperscript{251} Kelsey S., 1 Cal. 4th at 844, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632.
\textsuperscript{252} Id. at 844-45, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632.
In addressing this question, the court first noted that Steven and Suzanne, the adoptive parents, had not adequately explained how the State's interest in the well-being of the child was furthered by allowing the mother to have control over the putative father's rights. Nonetheless, the court inferred their argument to be that allowing a biological father to have the same rights to consent as an unwed mother would make adoption more difficult. The court found this reasoning flawed, however, because such a proposition would assume that the proper governmental objective was adoption, a position the court was not willing to take. There was also no evidence to support the argument that an unwed mother's decision to permit an immediate adoption of her infant was always preferable to custody by the natural father. Therefore, the court found the distinction between mothers and putative fathers had no substantial relationship to protecting the well-being of the child.

The majority held that an unwed father who had promptly come forward and demonstrated his commitment to fulfilling his parental responsibilities was entitled to protection of such a relationship under his federal constitutional rights of substantive due process and equal protection. Termination of his parental relationship was prohibited unless the father was shown to be an unfit parent. Absent such a showing, it was presumed the child's

253. Id. at 845, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632.
254. Id. The consent of both parents would be more difficult to obtain than just the consent of the mother. Id. Therefore, according to the court, Steven and Suzanne argued that allowing an unwed mother to have control over the biological father's rights furthered the State's interest in the well-being of the child. Id.
255. Id. at 845, 823 P.2d at 1234, 4 Cal. Rptr. 2d at 633.
256. Id. at 846, 823 P.2d at 1234, 4 Cal. Rptr. 2d at 633.
257. Id. at 847, 823 P.2d at 1235, 4 Cal. Rptr. 2d at 634.
258. Id. at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635. Where the unwed father had fulfilled his parental responsibilities, his parental rights were entitled to the same degree of protection as were the rights of the mother. Id. The court noted that its analysis would be the same under either due process or equal protection review. Id. at 844, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632; see supra notes 36-148 and accompanying text (reviewing the United States Supreme Court cases which illustrate how a father can demonstrate his full commitment).
259. Id. at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
well-being was best served by the continuation of the father's parental relationship.\textsuperscript{260}

The majority’s test creates a threshold test question of whether the father has demonstrated a sufficient commitment to his parental responsibilities.\textsuperscript{261} Two factors were identified for trial courts to consider when making this determination.\textsuperscript{262} First, the trial must examine the father’s conduct throughout the period since he had learned he was the biological father.\textsuperscript{263} Once the father knew or reasonably should have known of the pregnancy, he must have promptly attempted to assume his parental responsibilities as fully as the mother would have allowed and his circumstances would have permitted.\textsuperscript{264} The court can also inquire into the father’s conduct during the legal proceedings, both in the trial and appellate courts.\textsuperscript{265} In particular, the father has to have demonstrated a willingness to assume full custody of the child himself.\textsuperscript{266} It is not enough for the father merely to want to block the adoption by others.\textsuperscript{267} Second, the trial court must consider the father’s public acknowledgement of paternity, payment of pregnancy and birth

\textsuperscript{260} Id.
\textsuperscript{261} Id. The threshold question is to be addressed by a court before evaluating whether the father can be deprived of the right to withhold his consent to the adoption. Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636. Several cases have been heard by the California courts of appeal which help clarify what is required of the father to demonstrate his commitment. For more information on these cases, see In re Sarah C., 8 Cal. App. 4th 964, 973, 11 Cal. Rptr. 2d 414, 418 (4th Dist. 1992) (finding that the father had not demonstrated a sufficient commitment to his parental responsibilities where he never attempted to have the child listed as a beneficiary, only once contribute any money to the mother and child, and made little attempt to provide his child with a home); Michael M. v. Giovanna F., 5 Cal. App. 4th 1272, 1277, 7 Cal. Rptr. 2d 460, 462-63 (1st Dist. 1992) (finding an unconstitutional infringement of the father’s substantive due process rights where he had filed suit to declare paternity, had attempted to send money to the mother, and had established a bank account in the child’s name); see also infra notes 324-342 and accompanying text (discussing the California cases since Kelsey S.).
\textsuperscript{262} Kelsey S., 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
\textsuperscript{263} Id. at 849, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36.
\textsuperscript{264} Id.
\textsuperscript{265} Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
expenses commensurate with his ability to pay, and prompt legal action to seek custody of his child.\footnote{268}

If the trial court determines that the father has adequately demonstrated a commitment to his parental responsibilities, it should then inquire as to whether the father can be deprived of the right to withhold his consent to the adoption.\footnote{269} In making this determination, the trial court looks at the father's conduct and circumstances leading up to and including the trial, appellate, and remand periods.\footnote{270} The proper standard to be applied is be whether the father is fit or unfit to be a parent \textit{at the time of review} by the court.\footnote{271} A finding of unfitness would need to be supported by clear and convincing evidence.\footnote{272} If this standard cannot be met, then the father can be permitted to withhold his consent to the adoption.\footnote{273}

In sum, the majority held that an unwed father can not become a presumed father by virtue of constructive receipt of his child.\footnote{274} On the other hand, fathers are protected by due process and equal protection under the Federal Constitution if they have done all that they reasonably can to demonstrate commitment to their parental responsibilities.\footnote{275} California's statutory scheme was held unconstitutional because it permitted a mother to unilaterally preclude the natural father from becoming a presumed father.\footnote{276}

\footnote{268} Id. at 849, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636. The California Supreme Court noted that their decision afforded no protection to a man who impregnated a woman as a result of nonconsensual sexual intercourse. Id. at 849 n.14, 823 P.2d at 1237 n.14, 4 Cal. Rptr. 2d at 636 n.14. The court noted that no high court decisions had found a right to due process in such a circumstance. Id. Additionally, the father would not be entitled to equal protection with a mother or a father involved in a consensual sexual relationship since he would not be similarly situated. Id.

\footnote{269} Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.
\footnote{270} Id.
\footnote{271} Id. at 851, 823 P.2d at 1238, 4 Cal. Rptr. 2d at 637.
\footnote{272} Id. at 851, 823 P.2d at 1238, 4 Cal. Rptr. 2d at 637.
\footnote{273} Id.
\footnote{274} Id. at 829, 823 P.2d at 1222-23, 4 Cal. Rptr. 2d at 621-22.
\footnote{275} Id. at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
\footnote{276} Id.

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C. Concurring and Dissenting Opinion by Justice Mosk

Justice Mosk wrote separately and briefly, concurring only in the majority's result. He stated that his concern for children prevented him from joining in the reasoning of the majority. Justice Mosk believed that the court's decision to find Civil Code section 7004 unconstitutional would create needless uncertainty in the application of the statutory categories of presumed and natural fathers. This uncertainty would disadvantage all parties, but especially the child.

Justice Mosk felt that the majority should have looked for a more simple legal solution before reaching a constitutional question. He felt an easier solution existed if the facts could establish by a preponderance of the evidence that Rickie was the biological father and had been frustrated in his attempts to achieve presumed father status by the devious acts of the mother. The doctrine of equitable estoppel could be used by the court to prevent the mother and prospective adoptive parents from denying that Rickie had assumed the status of a presumed father. Thus, the court could permit Rickie to have a fitness hearing without creating a precedent that might produce unfortunate results in many other proceedings, including those already concluded.

277. Id. at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting).
278. Id.
279. Id.
280. Id. Justice Mosk was not specific about the disadvantages he anticipated. Id. It is conceivable, however, that Justice Mosk was anticipating delays in the adoption process would be caused by an unwed father's ability to claim he was a presumed father, even when he had not actually established a relationship with his child. See infra notes 344-355 and accompanying text (discussing the effect of the Kelsey S. decision on children and adoptive parents).
281. Kelsey S., 1 Cal. 4th at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting.) Justice Mosk referred to the California case of People v. Williams, 16 Cal. 3d 663, 667, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976), as settling the law that the court should not reach constitutional questions unless absolutely required. Id. at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting).
282. Id. at 853, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting).
283. Id.
284. Id. at 853-54, 823 P.2d at 1239-40, 4 Cal. Rptr. 2d at 638-39 (Mosk, J., concurring and dissenting). Justice Mosk offered no examples of the "unfortunate results" which might result from the majority's decision. Id.
wrote that he would have remanded the case to the trial court for factual proceedings consistent with his opinion.\textsuperscript{285}

\section*{II. LEGAL RAMIFICATIONS}

The \textit{Kelsey S.} decision addresses a question which had previously been left open by the United States Supreme Court regarding the federal constitutional rights of unwed fathers.\textsuperscript{286} The California Supreme Court rested its decision entirely on federal constitutional law and it therefore remains to be seen whether the United States Supreme Court will approve of the California court’s analysis of the federal constitutional rights of unwed fathers.\textsuperscript{287}

At the same time, the California Supreme Court’s holding fails to resolve other issues, not the least of which are whether a biological father can actually meet the constitutional threshold test developed by \textit{Kelsey S.},\textsuperscript{288} and what the effect of the \textit{Kelsey S.} threshold test will be on the adoption process.\textsuperscript{289} Additionally, inaction on the part of the California Legislature has left the California statutes in conflict with the \textit{Kelsey S.} holding.\textsuperscript{290}

\subsection*{A. Will the United States Supreme Court Agree with California’s Interpretation?}

\textit{Kelsey S.} dealt with a situation where the mother did not wish to raise the child as her own.\textsuperscript{291} Instead, she sought to unilaterally prevent the biological father from becoming a presumed father, thereby denying him any opportunity to contest the adoption.\textsuperscript{292}

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\textsuperscript{285} \textit{Id.} at 854, 823 P.2d at 1240, 4 Cal. Rptr. 2d at 639 (Mosk, J., concurring and dissenting).
\textsuperscript{286} \textit{Id.} at 849, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36; see supra notes 236-276 and accompanying text (discussing the holding of the \textit{Kelsey S.} court).
\textsuperscript{287} \textit{Kelsey S.}, 1 Cal. 4th at 839, 823 P.2d at 1229, 4 Cal. Rptr. 2d at 628.
\textsuperscript{288} \textit{Id.} at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635; see supra notes 261-268 and accompanying text (discussing the majority’s threshold test).
\textsuperscript{289} See infra notes 344-355 and accompanying text (discussing the effects of \textit{Kelsey S.} on children, adoptive parents, and unwed fathers).
\textsuperscript{290} See supra note 248 (discussing the legislative response to \textit{Kelsey S.}).
\textsuperscript{291} \textit{Kelsey S.}, 1 Cal. 4th at 849, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.
\textsuperscript{292} \textit{Id.} at 822, 823 P.2d at 1217, 4 Cal. Rptr. 2d at 616; see supra notes 220-235 and accompanying text (discussing the \textit{Kelsey S.} case).
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The California Supreme Court recognized that this issue had never been decided by the United States Supreme Court. In reaching its decision, the California majority relied solely on federal constitutional principles. If the United States Supreme Court were to review a case based on similar facts, it is uncertain whether the United States high court would agree with the California court’s analysis.

The constitutional rights of unwed fathers have been developing for the past twenty years. The United States Supreme Court’s most recent decision in *Michael H. v. Gerald D.* appears to limit the rights of unwed fathers somewhat, at least where the mother is married at the time of the child’s birth. One court has noted, however, that *Michael H.* left open the question whether the result would have been the same if the marital parents had wanted to place the child for adoption. Four justices in the *Michael H.* case continued to believe that unwed fathers have a protected liberty interest in their relationships with their children. Moreover, the *Michael H.* decision rested heavily on the State’s purported interest in preserving the family unit.

Where an unwed mother is placing the child for adoption with strangers, the biological father’s right to establish a relationship with his child may weigh more heavily since protection of a unitary family would not be at issue. Additionally, there is the
already recognized interest of an unwed father to form a relationship with his child which at least four, and perhaps five, members of the Supreme Court supported in Michael H. Of course, since the Michael H. decision the Court membership has changed slightly. Still, if the United States Supreme Court follows twenty years of precedent involving unwed fathers and their adoption rights, the Court might conclude that Kelsey S. was properly decided.

B. Can a Natural Father Cross the Constitutional Threshold?

The Kelsey S. Court established a threshold federal constitutional question to be considered by the lower courts in determining whether a natural father has demonstrated a sufficient commitment to his parental responsibilities. The first factor to be considered is the putative father’s conduct throughout the period since he had learned he was the biological father. This period includes the legal proceedings at both the trial and appellate levels. Second, the trial court is to look at the father’s public acknowledgment of paternity, financial support toward the birth expenses commensurate with his ability to pay, and prompt legal action to seek custody of his child. The potential difficulty for the father to demonstrate his parental commitment seems apparent, given the types of activities he must undertake and the potentially

301. Id. at 133 (Stevens, J., concurring in judgment); Id. at 142-43 (Brennan, J., dissenting and joined by Justices Marshall and Blackmun); Id. at 159-60 (White, J., dissenting); see supra notes 36-148 and accompanying text (reviewing the establishment of the United States Supreme Court’s rule in unwed father cases).

302. See NOWAK, supra note 40, app. at 1261 (charting the composition of the United States Supreme Court). In 1990, Justice Souter replaced Justice Brennan and in 1992 Justice Thomas replaced Justice Marshall. Id.

303. See supra notes 36-148 and accompanying text (reviewing the precedent set by the United States Supreme Court in cases involving the constitutional rights of unwed fathers).

304. Adoption of Kelsey S., 1 Cal. 4th 816, 849, 823 P.2d 1216, 1236, 4 Cal. Rptr. 2d 615, 635. If a court finds that he has demonstrated a full commitment, then a further question of the father’s fitness as a parent is raised. Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636; see supra notes 261-268 and accompanying text (reviewing the threshold question adopted by the court).

305. Kelsey S., 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

306. Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

307. Id. at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
long period of time which might pass from the beginning of legal action through any appeals and remands.

The Kelsey S. court recognized that a putative father might be restricted, both legally and as a practical matter, in his ability to demonstrate his full commitment to his child. Nonetheless, it admonished the trial court to consider whether the father had done all he reasonably could have under the circumstances. Thus, a trial judge must make a factual determination in each case as to whether the father has made a sufficient commitment to his parental responsibilities.

In the case of Kelsey S., it is questionable whether Rickie actually met the threshold test. Rickie had instituted legal proceedings to be recognized as the father, attempted to receive at least temporary custody of his child, and objected to the child’s adoption by a third party as soon as he learned Kari was pregnant. Although, the California Supreme Court recognized that the evidence of Rickie’s support was in dispute, particularly for the period prior to Kelsey’s birth, the court also stated that the Quilloin v. Walcott decision strongly suggested that Rickie’s parental rights could not be terminated without a showing of his unfitness as a father. Quoting from Lehr v. Robertson, the court emphasized that the unwed father need only make a reasonable and meaningful attempt to establish a relationship with his child. Therefore, it was not necessary for Rickie to be

308. Id. at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636; see supra notes 222-235 and accompanying text (discussing the steps Rickie took to establish his commitment and some of the difficulties he faced).

309. Kelsey S., 1 Cal. 4th at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

310. See id. at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

311. See id. at 822-23, 823 P.2d at 1217-18, 4 Cal. Rptr. 2d at 616-17 (reviewing the steps taken by Rickie to develop a relationship with Kelsey).

312. Id.

313. Id. at 833, 850, 823 P.2d at 1225, 1237, 4 Cal. Rptr. 2d at 624, 636; see Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (affirming that the relationship between parent and child is protected under the Equal Protection and Due Process Clauses of the Federal Constitution).

314. Kelsey S., 1 Cal. 4th at 837, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627; see Lehr v. Robertson, 463 U.S. 248, 262 (1983) (identifying the need for the biological father to grasp his opportunity to accept some level of responsibility for his child’s future); see also supra notes 95-121 and accompanying text (discussing the United States Supreme Court’s holding in Lehr).
successful in his attempts to take Kelsey into his home.\footnote{Kelsey S., 1 Cal. 4th at 837, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627; see Lehr, 463 U.S. at 262 (identifying the need for the biological father to grasp his opportunity to accept some level of responsibility for his child’s future); see also supra notes 95-121 and accompanying text (discussing the United States Supreme Court’s holding in Lehr).}

Nonetheless, in light of decisions by other California courts, the lower court could have found that Rickie had not done all that he could to demonstrate his parental commitment to Kelsey.\footnote{See supra notes 153-216, 261 and accompanying text (discussing the relevant decisions of several California courts).} If this assumption is accurate, then the actions taken by Rickie were not reasonable and an unwed father who wishes to block his child’s adoption must do more than that which was done by Rickie. The question is, what more must the father do? Various later decisions of California courts of appeal may shed some light on what the courts will look for in determining if the father has fulfilled his parental commitment.

In Jermstad v. McNelis,\footnote{210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (3d Dist. 1989).} the Court of Appeal for the Third District of California found that Jermstad, the father, had diligently pursued his opportunity to establish a custodial relationship with his child.\footnote{See id. at 533, 258 Cal. Rptr. at 520-21; see also supra notes 206-216 and accompanying text (reviewing the Jermstad case).} Jermstad expressed an early interest in custody of his child, first raising the subject with the mother while she was still pregnant.\footnote{Jermstad, 210 Cal. App. 3d at 533, 258 Cal. Rptr. at 521.} At the same time, he displayed maturity by recognizing that as a sailor who spent considerable periods of time at sea, he might have had difficulty obtaining custody.\footnote{Id. at 534, 258 Cal. Rptr. at 521.} Jermstad filed suit to establish his parental relationship with his child twelve days after the child was born.\footnote{Id. at 532, 258 Cal. Rptr. at 520.} Based on these facts, the court of appeal affirmed the lower court decision granting custody to Jermstad.\footnote{Id.} For the Jermstad court, the father’s actions there were sufficient to prove his commitment as a parent.\footnote{Id.}
In Michael M. v. Giovanna F., a decision that followed Kelsey S., the First District Court of Appeal also found that a biological father had taken every step open to him to form a relationship with this child. In Michael M., the father attempted to find out from the mother how her pregnancy was proceeding, but she did not respond, and in fact obtained a restraining order to keep the father away. Subsequently, the father attempted to see his son, but was refused permission. A second restraining order was then obtained by the mother. The father filed for a declaration of paternity and joint legal custody of his son. Additionally, the father sent a check to the mother for the child’s support. The check was returned to him, and he used it to establish a bank account for the child’s benefit. On the basis of these facts, the Michael M. court held that the father had established his constitutional right to have his parental interest preserved.

In In re Sarah C., the Court of Appeal for the Fourth District of California found that a father had not fulfilled his commitment to his parental responsibility. The unwed father, Paul, acknowledged to a few friends that Sarah was his daughter, but he never sought to have himself listed as the father on the birth certificate. Paul never sought to tell Mr. C., who assumed himself to be the father, that Sarah was Paul’s daughter. Additionally, Paul failed to complete paperwork with the Navy to have Sarah named as a dependent and beneficiary of any insurance. Paul did not provide a home for his daughter and he

325. Michael M., 5 Cal. App. 4th at 1277, 7 Cal. Rptr. 2d at 462.
326. Id.
327. Id.
328. Id. at 1277, 7 Cal. Rptr. 2d at 463.
329. Id.
330. Id.
331. See id. at 1280-81, 7 Cal. Rptr. 2d at 465.
333. Id. at 972-73, 11 Cal. Rptr. 2d at 418.
334. Id. at 973, 11 Cal. Rptr. 2d at 418.
335. Id. at 973, 11 Cal. Rptr. 2d at 418.
336. Id.
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only once contributed money to provide for his child’s rent, food and other expenses. Paul only lived with Sarah and her mother for a brief period before he was arrested for being absent without leave. Thereafter, he made no attempt to provide his daughter with a home. Additionally, Paul did not attempt to see Sarah or establish a relationship with her, nor did he send her any gifts, letters or photographs of himself. Paul did not attend parenting classes, obtain therapy, or have a psychological evaluation or drug test. Under these circumstances, the court of appeal found that substantial evidence supported the finding that Paul had not shown a commitment to his parental responsibility. In re Sarah C. joins Kelsey S. as an example of the father not doing enough to prove his commitment to his parental responsibilities.

The above cases illustrate that a great deal of discretion is left in the hands of the lower courts to decide if the father has met the constitutional threshold. Each case is unique and the final decision rests on whether the trial court believes that the father has acted reasonably in his attempt to show his commitment to his parental responsibilities. Leaving so much discretion in the hands of the judge makes it difficult for the unwed father to predict whether he will be successful in his attempt to prove his commitment to his parental responsibility. Nevertheless, given the important interest of protecting young children, it seems appropriate that each decision be focused on the specific facts relating to the unwed father’s actions.

If a putative father’s actions are to be held to such a strict standard of review by the court, the father must be advised by

337. Id.
338. Id.
339. Id.
340. Id. at 977, 11 Cal. Rptr. 2d at 421. In fact, Paul requested and received a photograph of Sarah from the Department of Social Services. Id. at 977 n.3, 11 Cal. Rptr. 2d at 421 n.3. The Department then suggested that Paul send a picture of himself to his daughter, but he failed to do so and later said he had no reason for not having sent one. Id.
341. Id. at 977, 11 Cal. Rptr. 2d at 421.
342. Id.
counsel to make every conceivable, but legal, effort to demonstrate his total commitment to his parental duties. To show that he is interested in an emotional commitment with his child, the natural father should file suit to establish his parental relationship with his child immediately after the child’s birth. Throughout the pregnancy, the father should express his interest in establishing parental custody. The unwed father should also publicly acknowledge that he is the natural father of the child, both during pregnancy and after birth. Making arrangements for daycare and enrolling in parenting classes would also demonstrate the father’s commitment to having custody of his child. If the child has been born and the father is not legally restrained from seeing the child, he should visit the child at the hospital immediately after her birth. To demonstrate his financial commitment to his child, the unwed father should make arrangements to pay all or part of the mother’s pregnancy expenses, based on his financial resources. Additionally, the father should continue to offer payments to the mother for his child’s benefit after the birth. In the event that the mother will not accept money from the father, either during pregnancy or after the child’s birth, then it is advised that the father establish a bank account or make a similar financial arrangement for his child’s benefit. Taking steps to ensure his employment stability will also demonstrate the unwed father’s financial commitment. If the unwed father follows at least the above-mentioned suggestions, it would seem that he would stand a good chance of meeting the Kelsey S. threshold test, thereby demonstrating his parental commitment. Nevertheless, it is once again emphasized that each case will be factually unique and it is not altogether certain how a judge will rule.

C. What Impact Will the Kelsey S. Decision Have on Children and Adoptive Parents?

Prior to the Kelsey S. decision, an adoption by third parties could have proceeded without the consent of a biological father
who was not the presumed father. Therefore, consent was generally required only of the mother, who was most likely the parent placing the child for adoption in the first place. After Kelsey S., if a putative father promptly comes forward and convinces the court of his full commitment to his parental responsibilities, then he is entitled to a hearing on his fitness. The additional step of a fitness hearing would not have been required under the statutory scheme prior to Kelsey S. If the judge makes this factual decision in a prompt manner, it is possible that the adoption process will not be significantly delayed.

If the time required for the adoption proceedings to be completed is extended, the losers would seem to be the child and the prospective adoptive parents. A delay in the process would mean that the child’s future home would be uncertain, at least temporarily. Assuming that the child is living with the adoptive parents during the court proceedings, she may have begun developing a relationship with the adoptive family. If the child is then moved to the home of his father, the postplacement change might be harmful to the child, the very person the adoption system is designed to assist.

344. See supra notes 36-148 and accompanying text (reviewing the United States Supreme Court holdings preceding Kelsey S.).
346. Kelsey S., 1 Cal. 4th at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.
347. See supra note 17 and accompanying text (outlining California Civil Code section 7004).
348. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 22 (1973) (noting that adoption allows the opportunity for the child and adoptive parents to form a psychological relationship).
349. See id. at 32-33 (recognizing that disrupting the child's environment can be detrimental to the child's development). Experts believe that removing a child from the only parents she has ever known substantially after placement with them is traumatic for the child. Id. at 31-34. Smooth growth is affected when there are upheavals in the child's external world. Id. at 32. Multiple placement has such a strong influence on the child's development that she may be beyond the reach of educational influence and behave in a way that courts consider dissocial, delinquent, or criminal. Id. at 34; see also Dickson, supra note 345, at 978 (discussing the harm to adoptive children caused by postplacement changes).
The harm to the prospective adoptive parents by prolonging the proceeding is obvious from the perspective of legal costs alone. Additionally, the adoptive parents suffer emotionally if the child is separated from them after a prolonged period. First, the adopters will have loved and cared for the infant from the time she entered their home, thereby becoming emotionally attached to the child. Second, the adoptive parents will have suffered financially from legal fees and support and medical expenses to the birthmother. On the other hand, if slowing down the procedure allows a father to realize his constitutionally protected right to form a relationship with his child, then the delay may be justifiable, at least from the point of view of the unwed father.

A solution seems apparent. By expediting adoption proceedings, particularly where the biological father is asserting his parental rights, the harm to all parties will be reduced. It is feasible for a court to expeditiously hold a hearing to determine if a putative father has met the Kelsey S. threshold test. The proof required in a Kelsey S. hearing would not be significantly more difficult for a court to manage than that in an action to sever paternity where a hearing is required within forty-five days from the filing of the petition. A hearing to determine if an unwed father has fulfilled his responsibilities to this parental commitment could be

350. See Dickson, supra note 345, at 968 (noting that adoptive parents suffer financially, partly from legal fees).
351. See id. at 978 (discussing the negative effects of uncertain custody on adoptive parents).
352. See id. (discussing the negative effects of uncertain custody on adoptive parents). The author also suggests that one parent will probably have quit work to care for the child since only 25% of surveyed companies offer adoption leave. Id. at 968 n.264.
353. See id. at 978 (referring to the negative effects of uncertain custody on adoptive parents); see also id. at 968 (quoting NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 3 (1989)). The author cites statistics showing that independent adoption costs run from $2,000 to $20,000. Id. at n.264.
354. Under the current statutory scheme, an action to terminate parental rights must be set for hearing not more than 45 days after filing of the petition and completion of service. CAL. CIV. CODE § 7017.2(a) (West Supp. 1993). Effective January 1, 1994, the statute will appear at California Family Code section 7667-68. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 554 (West). The matter then has precedence over other civil matters on the date set for trial, except proceedings to have a minor child declared free from the custody and control of either or both parents. CAL. CIV. CODE § 7017.2(b) (West Supp. 1993). A continuance may be granted by the court for good cause, but only for the period demonstrated to the court as necessary based on the evidence. Id.
held within a similar forty-five day time period. Also, since actions
to determine the existence of the father and child relationship may
normally be consolidated with a hearing to terminate the parental
relationship, the *Kelsey S.* hearing could also be consolidated.\(^{355}\)
Although local conditions might dictate how quickly a *Kelsey S.*
hearing could be placed on the court's calendar, it is feasible for
superior courts to adopt local court rules to address the need for
speedy treatment of such adoption considerations. Regardless of
delay, if the father's constitutional rights are to be protected, it
would seem that he should be allowed to fight for retention of his
parental rights where he has made a full commitment to his
parental responsibilities.

IV. CONCLUSION

The California Supreme Court, in *Kelsey S.*, extended the
federal constitutional rights of putative fathers in California.
Whether a similar extension of federal equal protection and due
process guarantees would be made by the United States Supreme
Court is somewhat unpredictable, given recent changes in the
Court's membership. Nonetheless, the United States Supreme Court
should maintain its precedent that unwed fathers are afforded
guarantees of equal protection and due process under the Federal
Constitution so long as they have established a parental relationship
with their children. Where an unwed father has done all that he
reasonably could to establish such a relationship with his child but
has been thwarted by the mother or prospective adoptive parents,
the United States Supreme Court should afford him constitutional
protection.

Since the decision as to whether the unwed father has done all
that he reasonably could to establish a parental commitment with
his child is a factual one to be made by the court, the father should
take steps to clearly demonstrate his emotional and financial

\(^{355}\) CAL. CIV. CODE § 7006 (West Supp. 1993). Effective January 1, 1994, the statute will
(West).
commitment to his child. Above all else, the father must demonstrate that he wants to take his child into his own home and raise her. It is not enough for the father merely to want to block an adoption. Where a court sees that a father wants to personally raise his child, has publicly acknowledged the child as his own, and has made living and daycare arrangements for the child after its birth, the court should find that the father has met the burden of proving his emotional commitment. Also, where the father has attempted to pay for pregnancy expenses and has planned for the child's financial support, the court should find that the unwed father has met the burden of proving his financial commitment. Unless other factors exist which strongly suggest that the father is not committed to a parental relationship, then the court should find that the father is the presumed father and should afford him appropriate constitutional and statutory protection.

Finally, any potential adverse effects on the child and the adoptive parents as a result of Kelsey S. prolonging the adoption process can be minimized if courts expedite adoption proceedings. Holding a Kelsey S. hearing within forty-five days of a petition to sever paternity is feasible and would not significantly prolong the adoption process. The Kelsey S. hearing could be easily consolidated with a hearing to terminate the parental relationship. A policy of expediting these proceedings should be written into the local rules of California's superior courts.

Kelsey S. has made it more likely that an unwed father will be permitted to establish a parental relationship with his child even where the mother wishes to place the child for adoption. Appropriately, the burden rests on the unwed father to demonstrate that he is fully committed to a parental relationship. It is significant, however, that the father at least has the right to attempt to preserve the potential father-child relationship. It is consistent with the State's interest of ensuring the health and safety of children to allow the unwed father to have custody where it is clear to a court that he is committed to his child and that it would be in the best interest of the child to place her with her father.

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