Georgia State University Law Review

Volume 5
Issue 2 *Spring 1989*

Article 2

March 2012

The Constitutional Rights of Unwed Fathers in Georgia: In Re Baby Girl Eason

Amy S. Haney

THE CONSTITUTIONAL RIGHTS OF UNWED FATHERS IN GEORGIA: *IN RE BABY GIRL EASON*

INTRODUCTION

Prior to 1972 an unwed father's rights were virtually nonexistent. In *Stanley v. Illinois*[1] the United States Supreme Court first established that a man who has "sired and raised" his children and participated in their "companionship, care, custody, and management" had a constitutionally protected private liberty interest in his children.[2] Since 1972, the Supreme Court has refined the parameters of the constitutional rights afforded unwed fathers.[3] The scope and interpretation of these rights have been limited dramatically by the Court since *Stanley*, rendering uncertain both the nature of an unwed father's constitutional rights and the manner in which he may obtain such rights.[4] The Court appears to have delegated to individual state courts the task of developing and focusing a putative father's rights.[5]

In Georgia, an elaborate system of notice and hearing opportunities for the putative father has been mandated since the 1977 revision of the Adoption Code.[6] In the ensuing years,

---

1. 405 U.S. 645 (1972).

2. Stanley v. Illinois, 405 U.S. at 651. In *Stanley*, the Court explained that this interest is based on the historical and essential protection granted the familial relationship, noting that this protection has been extended even to family relationships not legitimized by a marriage ceremony. *Id.* at 651—2 (citing Levy v. Louisiana, 391 U.S. 68 (1968)).

3. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

4. *See, e.g.*, Note, Lehr v. Robertson: *Putting the Genie Back in the Bottle: The Supreme Court Limits the Scope of the Putative Father's Right to Notice, Hearing, and Consent in the Adoption of His Illegitimate Child*, 15 U. TOL. L. REV. 1501 (1984) (analysis of the development of putative fathers' rights in Ohio with particular emphasis on the impact of the *Lehr* decision); Note, *The Putative Father's Due Process Rights to Notice and a Hearing*: In re Baby Boy Doe, 1986 B.Y.U. L. REV. 1081 (1986) (rights of unwed fathers in Utah in wake of recent state court case) [hereinafter Note, *Due Process Rights*].

5. A putative father is the "alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 648 (5th ed. 1983). This term will be used interchangeably with "unwed father" or "natural father" throughout this Comment to indicate the father of a child born out of wedlock.

6. O.C.G.A. § 19-8-7 (1982). Prior to this revision, notice was not a requirement. *See* 1977 Ga. Laws 201.

Georgia courts have struggled to define an unwed father's rights, holding that the putative father is a recognized parent with "some parental rights"[7] though only the mother of an illegitimate child has a right to custody under Georgia's legitimation statute.[8] Nevertheless, the courts have held that a father who has not legitimated his child has no right or standing to sue for custody unless the child has been deprived[9] or the mother's rights terminated.[10] In determining the father's rights, the courts consistently have applied the "best interests of the child" test in deciding whether a child should be legitimized or adopted.[11] As a rule, courts have found the child's interests best served by adoption rather than by granting a veto right or custody to the putative father.[12]

---

7. Nelson v. Taylor, 244 Ga. 657, 658, 261 S.E.2d 579, 580 (1979). The court recognized parental rights "as well as duties." *Id.* Interestingly, even when denying an unwed father his right to legitimate his child or to veto the child's adoption, the courts have consistently expected the father to fulfill his statutory obligations of support. *See, e.g., In re* Ashmore, 163 Ga. App. 194, 196, 293 S.E.2d 457, 459 (1982) (legitimation does not affect illegitimate child's statutory right to parental support).

8. O.C.G.A. § 19-7-25 (1982). The Code section provides in part that "unless the father legitimates [the child], the mother may exercise all parental power over the child." *Id.*

A child may be legitimated under O.C.G.A. § 19-7-22 if the father files a petition, notice of which is provided to the child's mother. The court may then declare the child legitimate and capable of inheriting from the father. If the father legitimates the child he may then veto adoption of the child by strangers. O.C.G.A. § 19-8-7(e) (1982). The court has used the "best interests of the child" standard to determine whether to grant the legitimation petition. Of course, the father can always legitimate the child by marrying the mother. O.C.G.A. § 19-7-20(c) (1982).

This Comment addresses the rights of fathers who have not sought legitimation. Consequently, these fathers are not "recognized" under Georgia law.

9. To determine whether parental rights should be terminated, the courts look at a variety of factors including whether the child is deprived as defined by O.C.G.A. § 15-11-2(8) (Supp. 1988).

10. Williams v. Davenport, 159 Ga. App. 531, 532, 284 S.E.2d 45, 46 (1981) (unwed father who alleged maternal unfitness won custody in the superior court but judgment was reversed on appeal because father had neither standing to sue nor entitlement to custody).

11. The "best interests of the child" test is one in which the court compares the parties seeking adjudication regarding the child and determines which party could provide the most beneficial situation for the child. *See generally* Quilloin v. Walcott, 434 U.S. 246, 249—51 (1977) (considering the trial court's analysis of the relative fitness of the child's natural parents in an adoption proceeding opposed by the child's natural father).

12. *See In re* J.B.K., 169 Ga. App. 450, 313 S.E.2d 147 (1984) (granting custody to an unwed father who refused to support his child could not be considered in the child's best interests); *In re* Ashmore, 163 Ga. App. 194, 293 S.E.2d 457 (1982) (harm which would come to child by disrupting stable home with adoptive parents greatly exceeds any benefit the child would receive by legitimation).

In re Baby Girl Eason[13] changed the evidentiary standard applied to certain classes of putative fathers. First, this Comment outlines an unwed father's constitutional rights as established by the United States Supreme Court. Second, this Comment examines the evolution of Georgia statutes and case law regarding legitimation, custody, and adoption by focusing primarily on the changes resulting from the 1977 revision of the Adoption Code. The "opportunity interest" test, recognized by the *Eason* court as the prerequisite for an expansion of the unwed father's rights, is identified and analyzed. Finally, the Comment addresses the problems inherent in the *Eason* decision with respect to the rights of the putative father and the interests of other parties.

I. UNITED STATES SUPREME COURT CASES

A. Stanley v. Illinois

In *Stanley*, the United States Supreme Court decided for the first time that a putative father's parental rights are constitutionally protected as due process liberty interests under the fourteenth amendment of the United States Constitution.[14] Peter Stanley was an unwed father whose children were declared wards of the state of Illinois when their mother died even though he and the children's mother had an eighteen-year relationship during which he helped raise his children.[15]

Under Illinois statutory law, an unmarried father did not have a right to a fitness hearing or an opportunity to show lack of neglect before his children were declared wards of the state because he was not considered a "parent."[16] The state did not have to prove Stanley unfit in fact because unfitness was presumed at law.[17] The United States Supreme Court found this presumption constitutionally invalid because it "foreclose[d] the determinative issues of competence and care . . . [and ran] roughshod over the important interests of both parent and child."[18] Stanley was granted the right to a fitness hearing because all other Illinois parents were entitled to such a hearing and to deny the same to

13. 257 Ga. 292, 358 S.E.2d 459 (1987).

14. Stanley v. Illinois, 405 U.S. 645 (1972).

15. *Id.* at 646.

16. *Id.* at 650 (referring to ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd 1972).

17. *Stanley*, 405 U.S. at 650. The dissenting opinion disagreed with this interpretation of the state opinion, however. *Id.* at 661 (Burger, C.J., dissenting).

18. *Id.* at 657.

Stanley because he was unmarried violated his due process and equal protection rights.[19] Thus, after *Stanley* an unwed father appeared to stand on equal ground with a married father.

B. Quilloin v. Walcott

An unmarried father's rights were not recognized as readily as *Stanley* may have intimated. In the second case, *Quilloin v. Walcott*,[20] the Supreme Court upheld a Georgia statute which effectively denied a putative father the right to veto his child's adoption.[21] Leon Quilloin fathered a child but never married or lived with the child's mother. The mother married another man when the child was three years old, and eight years later she consented to the child's adoption by her husband. Quilloin did not desire custody but only wanted to block the adoption of the child by the mother's husband.[22] In *Quilloin*, the Court stressed that an unwed father's interests were "readily distinguishable from those of a separated or divorced father" and held that it was not unconstitutional to require only the mother's consent to adoption under certain circumstances.[23] Because Quilloin had never assumed any responsibility for his child and the state had a valid interest in preserving the family unit already in existence, he was denied the right to veto the adoption.[24] In *Quilloin*, the Court began to limit the scope of an unwed father's rights in relation to the amount of responsibility he was willing to assume.

C. Caban v. Mohammed

In the third case of the quartet, *Caban v. Mohammed*,[25] the Court found that a New York statute violated the equal protection clause because it treated unwed fathers and unwed mothers

---

19. *Id.* at 658.

20. 434 U.S. 246 (1977).

21. Quilloin v. Walcott, 434 U.S. at 246. The Georgia statute provided that only the consent of the mother of an illegitimate child was required for adoption. GA. CODE ANN. § 74-403(3) (Harrison 1973).

22. *Quilloin*, 434 U.S. at 246.

23. *Id.* at 256. These circumstances include situations in which the unwed father "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.*

24. The Georgia court applied the "best interests of the child" standard and the United States Supreme Court found this to be the correct application of the law. *Id.* at 255.

25. 441 U.S. 320 (1978).

dissimilarly.[26] The statute governing the adoption of an illegitimate child required the consent of the mother but not of the father.[27] Abdiel Caban, like Quilloin, sought to veto the adoption of his children by their mother's husband.[28] The state court, interpreting legislative intent, reasoned that adoptions would be jeopardized in general if an unwed father was allowed to intervene and withhold consent, and therefore the court did not allow Caban to veto the adoption.[29] The United States Supreme Court disagreed because such reasoning was based on a statute which allowed impermissible sex-based distinctions violative of the fourteenth amendment.[30] The Court emphasized that a putative father was able to have a relationship with his child "fully comparable" to that of the mother.[31] A significant difference between this case and *Quilloin* was that Caban had a firmly established relationship with his children, having lived with and supported them for five years prior to their mother's marriage to another man.[32] Caban's position was similar to the father's in *Stanley*, which may account for the similar results. The rationale for the Court's holding may be found in Caban's willingness to assume a degree of responsibility toward his children that the Court found acceptable.

D. Lehr v. Robertson

Lehr v. Robertson[33] is the most recent Supreme Court case to address the issue of an unwed father's rights. *Lehr* expands the theory that a putative father, although having the potential to obtain constitutionally protected rights to his child, must affirmatively act in order to realize that potential.[34] In *Lehr*, the mother of an illegitimate child married and gave consent for her husband to adopt the child. In order to halt the adoption, Jonathan

---

26. Caban v. Mohammed, 441 U.S. at 385.

27. *Id.* at 385 (construing N.Y. DOM. REL. LAW § 111 (McKinney 1977)). The statute provided in part that "consent to adoption shall be required . . . [o]f the parents or surviving parent, whether adults or infant, of a child born in wedlock [and] [o]f the mother, whether adult or infant, of a child born out of wedlock."

28. *Id.* at 383.

29. *Id.* at 390 (citing *In re* Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486 (1975)).

30. *Caban*, 441 U.S. at 394. The discrimination in *Caban* was gender-based unlike that in *Quilloin*, which involved a difference in treatment between unwed fathers and those who were married or divorced.

31. *Id.* at 389.

32. *Id.* at 393.

33. 463 U.S. 248 (1983).

34. Lehr v. Robertson, 463 U.S. at 260–61.

Lehr filed a paternity petition seeking to legitimate his child.[35] Nevertheless, the adoption order was granted and Lehr's motion to vacate the order was denied.[36]

The United States Supreme Court found that the denial violated neither Lehr's due process nor equal protection rights.[37] The Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection."[38] Lehr was denied the right to notice and a hearing in adoption proceedings for his child even though, as the dissent emphasized, he had attempted to establish a relationship with his child.[39] Because Lehr had not filed with the putative father registry set up in New York to protect unwed fathers' interests, the majority reasoned that there was insufficient indication of true intent to legitimate his child.[40]

In light of these cases, it appears that a putative father has some constitutional rights protecting his relationship with his child. The full scope and context of these rights, and the time when they come into existence, have not been delineated completely. In *Lehr*, however, the Court did indicate that the rights do not arise simply from siring a child. The putative father is responsible for securing and preserving his constitutional rights. The procedure undertaken to discharge this responsibility is determined primarily by the case and statutory law of the individual states.

II. GEORGIA LAW

A. The Legal Status of Unwed Fathers Before 1977

1. Statutory Provisions

It is probably safe to assume that the 1933 Adoption Code of Georgia[41] was indicative of the morality of the times. Illegitimate

35. *Id.* at 248. Legitimation under state law provides a father the right to veto his child's adoption. *See, e.g.*, O.C.G.A. § 19-8-7(e) (1982) ("If the child is legitimated by the putative father, the adoption shall not be permitted.").

36. *Lehr*, 463 U.S. at 248.

37. *Id.* at 265, 267.

38. *Id.* at 261.

39. *Id.* at 269 (White, J., dissenting).

40. *Id.* at 264. Lehr had ample opportunity to file, and by merely mailing in a postcard to the registry, he would have been eligible for notice. His act of petitioning for legitimation came only after adoption proceedings had begun. The Court apparently found this display of interest to be too little, too late. *Id.* at 248.

41. GA. CODE ANN. §§ 74-201 to -407 (Harrison 1933).

children and their parents were not necessarily entitled to the same degree of privileges as children and parents in legitimized relationships. The mother of an illegitimate child could be brought before a justice of the peace to name the father. Once the father was identified, a warrant was issued and he was required to appear before the justice of the peace and give a bond for the maintenance and education of the child until the age of fourteen, as well as for the mother's expenses for the child's birth.[42] If the mother refused to name the father, she was subject to imprisonment for up to three months.[43]

Although an unwed father had a support obligation, he was not a recognized parent and had no right to notice of the adoption proceedings or the right to consent to or veto the process. Notice of adoption was given only to next of kin, parents or guardians, and brothers and sisters.[44] Consent of the child's mother or father was required for adoption.[45] Although this would appear to include the child's natural father, a clear stipulation was made that "[t]he mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the parental power."[46] The statute currently used in Georgia remains virtually unchanged from that used in 1933.[47]

Although the 1933 Code required the mother's or father's consent to an adoption, in 1941 the adoption laws were revised to include a provision making the unwed father's participation in adoption proceedings clearly superfluous: "If the child be illegitimate, the consent of the mother alone shall suffice."[48] Because the Code then required notice of adoption proceedings to be provided only to parties whose written consent was required,[49] the revision negated any need for the father's consent and placed him among those to whom no notice was due. Thus, the putative father not only was denied the right to veto the adoption of his child, but also was not entitled to notice that

42. GA. CODE ANN. § 74-303 (Harrison 1933).
43. GA. CODE ANN. § 74-306 (Harrison 1933).
44. GA. CODE ANN. § 74-403 (Harrison 1933).
45. GA. CODE ANN. § 74-402 (Harrison 1933).
46. GA. CODE ANN. § 74-203 (Harrison 1933).
47. *See* O.C.G.A. § 19-7-25 (1982). This section reads: "Only the mother of an illegitimate child is entitled to his custody, unless the father legitimates him as provided in Code section 19-7-22. Otherwise, the mother may exercise all parental power over the child."
48. 1941 Ga. Laws 300, 301, § 3(2).
49. *Id.* at 302, § 5.

such an adoption was imminent. Under this statutory scheme, Georgia courts were not particularly responsive to putative fathers' desires to veto the adoptions of their children or to legitimate them.

2. Case Law

In *Keheley v. Koonce*,[50] an unwed mother sought to stop the adoption of her child to which she had previously consented. The natural father was not involved in the proceedings but had given his consent.[51] The adoption was ultimately denied because the court determined that the mother's consent was not freely given.[52] The Georgia Supreme Court held that because the mother of an illegitimate child was the only recognized parent, only the consent of the mother was necessary to authorize an adoption;[53] the father's consent was irrelevant.[54]

Putative fathers who sought custody of their children were seldom successful. For instance, the father in *Day v. Hatton*[55] attempted to use a Tennessee decree declaring him the child's father to veto his child's adoption and obtain custody. The Supreme Court of Georgia refused to recognize the decree,[56] holding that, in a contest between an unwed father and a third party who had the mother's consent to adopt, the party with legal rights to the child would be awarded custody unless that result was against the child's interests.[57] The court evidently found that the unwed father had no such legal rights and declined to consider his plea for custody, although he had made the effort to be declared the child's legal father.

---

50. 85 Ga. App. 893, 70 S.E.2d 422 (1952).

51. Keheley v. Koonce, 85 Ga. App. at 897—98, 70 S.E.2d at 525. The father had married the mother but it was an invalid marriage because he had not obtained a divorce from his previous wife. The parents lived together again briefly after the child was born at which point the father displayed an interest in getting the child back from the adoptive parents. Upon the natural parents' final separation, the father gave his written consent to the adoption. *Id.*

52. *Id.* at 894, 70 S.E.2d at 523. The mother gave her written consent at the hospital two days after the child's birth while she was still under medication.

53. *Id.* at 896, 70 S.E.2d at 524.

54. *See supra* text accompanying note 48.

55. 210 Ga. 749, 83 S.E.2d 6 (1954).

56. Day v. Hatton, 210 Ga. at 749, 83 S.E.2d at 6. Interestingly, the court held that an ex parte decree such as the one in question was a violation of the mother's constitutional rights.

57. *Id.* at 749, 83 S.E.2d at 7.

In *Blakemore v. Blakemore*,[58] the father of an illegitimate child was equally unsuccessful when he brought habeas corpus proceedings to determine his child's custody. The father did not contend that the mother was unfit but rather that the mother had released custody of the child to him by contract.[59] Absent proof of the father's claim or maternal unfitness, the court found that the judge "was not vested with any discretion as to which of the parties he should award custody and control of the child here involved; but in such circumstances, it was his legal duty to award custody and control of such child to her mother."[60] The Georgia Supreme Court once again reiterated its position that the control of an illegitimate child who had not been legitimated belonged exclusively to the child's mother.

The putative father in *Hall v. Hall*[61] sought custody against the child's maternal grandmother through habeas corpus proceedings brought after the death of the child's mother. Although the father had married and based his petition on several valid theories,[62] the court found he had no standing and dismissed the action. The court relied on existing law that the mother was the only recognized parent of an illegitimate child, even though the mother was no longer alive.[63]

An unwed father seeking to legitimate[64] his child and thereby become a recognized parent with exercisable rights was often

---

58. 217 Ga. 174, 121 S.E.2d 642 (1961).

59. Blakemore v. Blakemore, 217 Ga. at 175, 121 S.E.2d at 643.

60. *Id.* at 175, 121 S.E.2d at 643.

61. 222 Ga. 820, 152 S.E.2d 737 (1966).

62. Hall v. Hall, 222 Ga. at 821, 152 S.E.2d at 738. The father argued that this process was the only means of legitimating the child; that he admitted paternity; that he had an interest in the child through consanguinity; and that he had a natural devotion to it and the purest of motives.

63. *Id.* The court considered the fact that the child was with the grandparents after the mother died to be sufficient maternal consent for custody, particularly in light of the father's lack of any legal rights to his child.

64. Legitimation of a child born out of wedlock is governed by O.C.G.A. § 19-7-22 (Supp. 1988):

> A father of a child born out of wedlock may render the same legitimate by petitioning the superior court of the county of his residence, the county of residence of the child, or, if a petition for the adoption of the child is pending, the county in which the adoption petition is filed for legitimation of the child. The petition shall set forth the name, age, and sex of the child, the name of the mother, and, if the father desires the name of the child to be changed, the new name. If the mother is alive, she shall have notice of the petition for legitimation. Upon the presentation and filing of the petition, the court may pass an order declaring the child to be legitimate and to be

equally unsuccessful. The court in *Clark v. Buttry*[65] denied the father's legitimation petition and allowed the mother's elderly foster parents to adopt the child based upon the mother's written consent. Relying on the "best interests of the child" test, the Georgia Supreme Court held once again that when the mother consented to adoption and the father did not legitimate the child, the father had no standing to make objections to the adoption because the mother's consent alone was sufficient.[66] In an eloquent concurrence, Judge Eberhardt, although agreeing that the statutes and cases must be followed, found "discord in this facet of the law."[67] He found it incongruous that a father who wished to assume the statutory support obligations imposed on him by legitimizing and raising his son was not allowed to do so.[68] The concurring opinion noted that the father was married, both he and his wife held good jobs, the adoptive parents had no blood ties to the child, and at their ages it would be only two years before the breadwinner would retire and all three would become dependent on Social Security. The judge concluded, "It seems to me that there should be some recognition in our law of the father's interest beyond the imposition of an obligation to support."[69]

Best v. Acker[70] was another legitimation case heard by the Georgia Court of Appeals in which the father's petition was denied. The mother objected that the petition was not filed in good faith because the father sought legitimation in order to

---

capable of inheriting from the father in the same manner as if born in lawful wedlock and specifying the name by which he shall be known.

O.C.G.A. § 19-8-7(e) (Supp. 1988) states, "If the child is legitimated by the putative father, the adoption shall not be permitted except as provided in Code Sections 19-8-3 through 19-8-6" (upon surrender of parental rights, if necessary). The implications of these two processes—legitimation and adoption—upon each other should be obvious. If a putative father legitimates his child he becomes a recognized parent and may veto the adoption of his child. Clearly, a putative father seeking to stop his child from being adopted has a vested interest in petitioning for and being granted the right to legitimate his child.

65. 121 Ga. App. 492, 174 S.E.2d 356 (1970).

66. Clark v. Buttry, 121 Ga. App. at 494, 174 S.E.2d at 358.

67. *Id.* at 496, 174 S.E.2d at 359 (Eberhardt, J., concurring).

68. *Id.* at 496, 174 S.E.2d at 360. The statutory obligations were imposed by GA. CODE ANN. § 74-202 (now codified at O.C.G.A. § 19-7-24 (1982)), which requires each parent of an illegitimate child to provide for the child's maintenance, protection, and education until the age of majority.

69. *Id.* at 497, 174 S.E.2d at 360.

70. 133 Ga. App. 250, 211 S.E.2d 188 (1974).

obtain custody of the child for his own parents.[71] Even though the mother had waived her right to custody by consenting to adoption of the child, her objections to the legitimation petition nonetheless were permitted.[72] The court held it "must always look to the best interest and welfare of the child where there exists no absolute legal right in the applicant to the aid he seeks."[73] Apparently an unwed father in 1974 had no absolute legal right to legitimate his child.[74]

In 1976, the court of appeals also determined that an unwed father whose location was unknown had no legal right to notice other than publication before his parental rights were terminated prior to his child's adoption.[75] In a consolidation of two cases brought by the DeKalb County Department of Family and Children Services, *In re J.B.*,[76] neither father could be located, and therefore they were served process through publication.[77] The Department wished to obtain custody in order to place the children for adoption, but the trial court refused to terminate the fathers' rights absent personal service.[78] The Georgia Court of Appeals, holding that service by publication was sufficient, stated that the fathers had never married the mothers or knew of their pregnancies; never exercised parental rights over the children; never supported the mothers or children; and never "visited, guided, contacted, or even knew of the children's existence."[79] Citing the significant state interest in providing children with a stable home without delaying the adoption process indefinitely, the court found the best interests of the children were served by terminating the putative fathers' rights because those rights were secondary to the children's welfare.[80]

---

71. Best v. Acker, 133 Ga. App. at 251, 211 S.E.2d at 188.

72. *Id.* at 251, 211 S.E.2d at 189.

73. *Id.* at 252, 211 S.E.2d at 189.

74. *But see In re* Pickett, 131 Ga. App. 159, 161, 205 S.E.2d 522, 523 (1974) ("father's right to legitimate is absolute subject only to the qualification that the natural mother may object and if she shows valid reasons why the petition should not be granted, the judge may deny it").

75. *In re* J.B., 140 Ga. App. 668, 670, 231 S.E.2d 821, 823 (1976).

76. 140 Ga. App. 668, 231 S.E.2d 821 (1976).

77. *In re* J.B., 140 Ga. App. at 669, 231 S.E.2d at 822.

78. *Id.* at 670, 231 S.E.2d at 823.

79. *Id.* at 669, 231 S.E.2d at 823. The court declined to rely on GA. CODE ANN. § 24A-3202(b), which provided that a putative father who had not established paternity was not entitled to notice because "jurisdiction over such fathers is unnecessary altogether." *Id.* at 674, 231 S.E.2d at 825.

80. *Id.* at 673, 231 S.E.2d at 824–25. The court did not want to leave the adoptions open to contest should the fathers one day suddenly appear and express a desire to legitimate the children. *Id.* at 673, 231 S.E.2d at 824.

Georgia statutory and case law prior to 1977 established that unwed fathers of illegitimate children were considered legal nonentities. Statutorily, only the mother of an illegitimate child could consent to or veto an adoption; putative fathers were consistently denied that right. Unless the father legitimated his child, he apparently had no standing to litigate any issue concerning the disposition of the child.

B. The Legal Status of Unwed Fathers After 1977

1. Statutory Provisions

Following the United States Supreme Court decision in *Stanley*,[81] the Georgia General Assembly completely revised the Adoption Code in 1977.[82] One purpose of the revision was to "require that in certain cases notice be given to the putative father of a child to be adopted."[83] The new statute established a process to notify a putative father under particular circumstances.[84] The current statute, in substantially the same form as the 1977 revision, provides that a putative father whose identity and location are known be notified by mail that the mother has surrendered custody or consented to adoption.[85] If the identity or location of the putative father is not known, the court can terminate his rights after a hearing if "reasonable effort" has been made to identify and locate him and the father has made no effort to establish a relationship with the child.[86] If no reasonable effort to locate the father was made, then the hearing is continued until the petitioner, the Department of Human Resources, or the licensed adoption agency expends additional efforts to locate him and reports the results of those efforts.[87] If the court finds that the father's conduct created a familial bond with his child, the father is then entitled to notice of the surrender, consent, or

81. *See supra* notes 14—19 and accompanying text.

82. 1977 Ga. Laws 201.

83. *Id.*

84. GA. CODE ANN. § 74-406 (now codified at O.C.G.A. § 19-8-7 (1982)). If the father's identity and location are known, he is to be notified by registered or certified mail. If not known, then he must have shown some interest in the child to be entitled to notice.

85. O.C.G.A. § 19-8-7(a) (1982).

86. O.C.G.A. § 19-8-7(b)(1) (1982). Specifically, the statute requires the father to have lived with the child, contributed to the child's support, made an attempt to legitimate the child, or provided support for the mother during pregnancy.

87. *Id.*

proceeding to terminate his rights.[88] If the conduct was not sufficient to establish such a bond, the court may terminate his rights.[89] The notice advises the father that he will lose all rights to his child if he does not file a petition to legitimate and provide notice of the filing within thirty days after receiving notification of the impending adoption proceedings.[90] If the father legitimates the child, the adoption will not be granted except as provided for legitimate children.[91]

2. Case Law

In 1977, prior to the Code revision, the Georgia Supreme Court decided *Quilloin*;[92] this case eventually was affirmed by the United States Supreme Court.[93] Based on the state's interest in protecting and caring for its children, the Georgia court found that vesting the responsibility for illegitimate children with custodial parents fulfilled public policy objectives because the father could always choose to join the family unit.[94] The court therefore upheld the statutory scheme placing all parental power and the sole authority to consent to adoption with the mother.[95]

That same year the Georgia Supreme Court decided *Wojciechowski v. Allen*[96] and once again upheld the statute requiring only the mother's consent to the adoption of an illegitimate child. The court did so despite the plaintiffs' argument that public policy had changed as reflected in the revision of the Adoption Code, which recognized that natural fathers have rights in their children.[97] The parents of the child were not married at the time of the child's birth when the mother signed the consent form. Six weeks later she filed a retraction and they were

88. *Id.*

89. O.C.G.A. § 19-8-7(b)(2) (1982).

90. O.C.G.A. § 19-8-7(c) (1982).

91. O.C.G.A. § 19-8-7(e) (1982). Adoption provisions are found in O.C.G.A. §§ 19-8-3 to 19-8-6 (1982).

92. *See supra* notes 20—24 and accompanying text.

93. Quilloin v. Walcott, 434 U.S. 246 (1978).

94. Quilloin v. Walcott, 238 Ga. 230, 232, 232 S.E.2d 246, 248 (1977). The court made the assumption that if there is no marriage, there is no father to raise the child.

95. *Id.* at 233, 232 S.E.2d at 248. The court referred to GA. CODE ANN. § 74-203 (now codified at O.C.G.A. § 19-7-25 (1982)) and GA. CODE ANN. § 74-403 (now codified at O.C.G.A. § 19-8-3 (1982)). The dissent, however, contends that the majority misinterpreted *Stanley*, which recognized "due process rights of all natural fathers, not merely those who live with their families." *Id.* at 235, 232 S.E.2d at 249 (Undercoffler, J., dissenting).

96. 238 Ga. 556, 234 S.E.2d 325 (1977).

97. Wojciechowski v. Allen, 238 Ga. at 557, 234 S.E.2d at 326.

subsequently married.[98] Nevertheless, the court upheld the adoption because the revision of the Adoption Code was not scheduled to take effect until the following January.[99] However, in *Berry v. Samuels*,[100] which was decided after the revision took effect, the Georgia Court of Appeals summarily denied a putative father's attempt to object to his child's adoption. The court found that because he had never attempted to legitimize the child or provide support, he had no standing to object.[101]

The following year, in *McCary v. Department of Human Resources*,[102] an unwed father appealed a juvenile court order terminating his parental rights. The child's mother "consented to the termination of her parental rights" and offered the child for adoption.[103] The father did not petition for legitimation but appeared in court to protest termination of his rights. The trial court nevertheless ordered the Department of Human Resources to assume custody.[104] The Georgia Court of Appeals vacated and remanded the judgment but only because the trial court had applied the "best interests of the child" standard with no supporting facts to substantiate its findings.[105] The father's contention that the termination was ineffective because he did not receive notice in the manner provided by statute was without merit because that statutory provision related only to adoption of children, not to termination of parental rights, which does not require notice.[106]

---

98. *Id.* at 556, 234 S.E.2d at 325.

99. *Id.* at 557, 234 S.E.2d at 326. The natural parents raised additional enumerations of error: the child was not illegitimate, the mother's consent was invalid, and the trial court should have considered the comparative rights of both natural and adoptive parents. The court found all these arguments to be without merit and permitted the adoption to stand.

100. 145 Ga. App. 687, 244 S.E.2d 593 (1978).

101. Berry v. Samuels, 145 Ga. App. at 687, 244 S.E.2d at 593.

102. 151 Ga. App. 181, 259 S.E.2d 181 (1979).

103. McCary v. Department of Human Resources, 151 Ga. App. at 181, 259 S.E.2d at 181.

104. *Id.* at 182, 259 S.E.2d at 181—82.

105. *Id.* at 183, 259 S.E.2d at 182.

106. *Id.* at 182, 259 S.E.2d at 182. *See supra* notes 84—91 and accompanying text.

In a 1986 amendment to Title 15, Chapter 11 of the Code (Juvenile Proceedings, Parental Rights) the legislature provided a new section dealing with the termination of a putative father's rights. *See* O.C.G.A. § 15-11-83 (Supp. 1988).

If the father's location is known, he must be notified of the termination hearing. If he cannot be located through reasonable efforts, then his rights can be terminated if he has never lived with or supported the child. The court must engage in a determination almost parallel to that of the putative father notice section of the Adoption Code to decide

The court showed greater concern for an unwed father's rights later that same year when the Georgia Supreme Court recognized the validity of an unwed father's interest in his child. In *Nelson v. Taylor*[107] the court stated that "a father has some parental rights, as well as duties, in regard to his illegitimate child."[108] The court stated, "It is clear . . . that the putative father is also a parent."[109] In reversing the trial court's grant of adoption, the court found that the father as well as the mother was statutorily responsible for the maintenance, protection, and education of their illegitimate child and that the statute required that the biological father receive notice of a pending adoption.[110]

In 1980, however, the Georgia courts appeared to return to the harsher standard previously applied to unwed fathers. In *Hinkins v. Francis*[111] a putative father's appeal from an order granting adoption of his child was denied.[112] The father had filed a petition for legitimation within the required thirty days after the adoption petition was filed, but it was denied. The Georgia Supreme Court held that "[t]herefore the child was not legitimated" and the father had "no standing to challenge the trial court's order granting the adoption."[113]

---

whether such a father has established a familial bond with his child sufficient to require that notice be provided to him. The section reads:

> If the court finds from the evidence that the putative father either lived with the child, contributed to the child's support, attempted to legitimate the child, or provided support for the mother, including medical care, during her pregnancy or during her hospitalization for the birth of the child, then the court shall determine from the evidence whether such conduct by the putative father was sufficient to establish a familial bond between the putative father and the child.

O.C.G.A. § 15-11-83(d)(5)(A) (Supp. 1988). For a full history and discussion of the bill see *Selected 1986 Georgia Legislation, Juvenile Court: Termination of Parental Rights*, 2 GA. ST. U.L. REV. 171 (1986).

107. 244 Ga. 657, 261 S.E.2d 579 (1979).

108. Nelson v. Taylor, 244 Ga. at 658, 261 S.E.2d at 580 (construing GA. CODE ANN. §§ 74-202, 74-406 (now codified at O.C.G.A. §§ 19-7-24, 19-8-4 (1982)). *See supra* note 68 and accompanying text.

The mother had signed a form that released her rights to "relatives," the parents of the father, and later tried to withdraw the release as being in incorrect form because a putative father was not a recognized parent and therefore his parents could not be "relatives." *Nelson*, 244 Ga. at 658, 261 S.E.2d at 580.

109. *Nelson*, 244 Ga. at 658, 261 S.E.2d at 580.

110. *Id.*

111. 154 Ga. App. 716, 270 S.E.2d 33 (1980).

112. Hinkins v. Francis, 154 Ga. App. at 716, 270 S.E.2d at 33. No reasons were given for the denial of the legitimation petition. It often appears that the father's opportunity to legitimate is not really a "right" because his petition can so readily be denied.

113. *Id.*

A putative father again was denied legitimation in *Mabry v. Tadlock*[114] when the court, applying the "best interests of the child" standard, determined that the father had "failed to demonstrate sufficient parental and paternal interest in the children."[115] Therefore, he had no absolute right to legitimate his children for the purpose of obtaining visitation rights.[116] The *Mabry* decision began a series of cases in which the court focused on an unwed father's interactions with his child.

Again in 1982, the Georgia Supreme Court applied the "best interests of the child" standard to deny legitimation by an unwed father in *In re Ashmore*.[117] The father was informed of the mother's consent to adoption and, although he did not formally surrender his rights, told the caseworker he would not object.[118] It was only after he received official notification of the pending adoption that he decided to file his petition to legitimate.[119] Once again, the court's determination to deny legitimation was based, in part, on the father's failure to demonstrate sufficient interest in the child.[120] The court denied the petition despite the father's marriage to the mother three months after she had consented to the child's adoption and her testimony that she had not wanted to sign the release.[121]

The Georgia Court of Appeals also relied upon the "best interests" standard in 1984 in *In re J.B.K.*[122] to deny a legitimation petition. The putative father sought not only to legitimate his three-and-a-half year-old son but also to obtain visitation rights.[123]

---

114. 157 Ga. App. 257, 277 S.E.2d 688 (1981).

115. Mabry v. Tadlock, 157 Ga. App. at 258, 277 S.E.2d at 688. The father lived with the mother for two to three years during which time the children were born. The mother left and married another man and, only two months after that marriage, the father petitioned first for a divorce from the common-law marriage and then for legitimation because he wanted to "visit with the children, love them and be loved by them." These facts were apparently not sufficient because he had never attempted to marry the mother. *Id.*

116. Apparently, only a father seeking custody, not merely visitation rights, has an absolute right to legitimate. *But see In re* Pickett, 131 Ga. App. 159, 205 S.E.2d 522 (1974) (father's right to legitimate is absolute, qualified only by mother's right to object).

117. 163 Ga. App. 194, 293 S.E.2d 457 (1982).

118. *In re* Ashmore, 163 Ga. App. at 194, 293 S.E.2d at 458. The mother would not marry him and he could not support the child. *Id.*

119. *Id.*

120. *Id.* at 196, 293 S.E.2d at 460. The trial court also inquired into the father's fitness and found that he had been expelled from high school, had a history of alcohol abuse, and had no particular trade or stable income. *Id.*

121. *Id.* at 197, 293 S.E.2d at 460–61.

122. 169 Ga. App. 450, 313 S.E.2d 147 (1984).

123. *In re* J.B.K., 169 Ga. App. at 450, 313 S.E.2d at 147.

The child was conceived as the result of the only sexual encounter between the parents. Although the father offered the mother money for an abortion, he never supported either her or the child and consistently denied paternity. The child had been in the mother's continuous custody and her efforts to establish a relationship between father and child were repeatedly rebuffed.[124]

Mabry, *Ashmore*, and *J.B.K.* indicated that the establishment of some type of familial relationship between a father and his illegitimate child is a determining factor in Georgia cases. A putative father has the potential to create a parent-child relationship that has been labeled by one commentator as the "opportunity interest."[125]

Initially, the opportunity interest is based solely on the biological connection.[126] However, more is required. One commentator suggests that the Court in *Caban* indicated that the rights of an unwed father stem not only from his biological connection but also from a "willingness to admit his paternity and express some tangible interest in the child."[127] As another commentator elaborated, "the success of the opportunity claim depends on the kind of parent-child relationship the unwed father wants to or can establish."[128]

Thus, the father of an illegitimate child, by virtue of the fact that he sired the child, has the opportunity to develop a paternal bond with that child which gives rise to a constitutionally protected interest in his child. Conversely, a putative father who has never exercised his opportunity interest to establish a protected relationship with his child, either officially or because of

---

124. *Id.* at 450—51, 313 S.E.2d at 147—48. The father here, as in *Mabry*, only wanted legitimation for the purpose of visitation rights, not custody. *Id.* This reason appears to be insufficient to grant the petition for legitimation: "O.C.G.A. § 19-7-22 . . . deals exclusively with legitimation proceedings and contains no language which can be read as requiring a trial court to consider a visitation issue when determining the merits of a petition to legitimate." *Id.* at 451, 313 S.E.2d at 148.

125. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 351—53 (1984) [hereinafter Buchanan].

126. *Id.* This theory is based on Justice Stevens' statement in Lehr v. Robertson: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." Lehr v. Robertson, 463 U.S. at 262.

127. Note, *Constitutional Law - Equal Protection - New York Statute Requiring Consent of Mother, But Not of Father, As Prerequisite to Adoption of Illegitimate Child Violates the Fourteenth Amendment Because It Draws Gender-Based Distinction Which Bears No Substantial Relation to State Interest in Encouraging Adoption of Illegitimate Children* - Caban v. Mohammed, 29 EMORY L.J. 833, 854 (1980).

128. Buchanan, *supra* note 125, at 352.

circumstances beyond his control, has only a potential relationship. Therefore, it is not unconstitutional for such a father to receive no notice or hearing regarding the disposition of his child.[129] As one practitioner explained, there are

> three elements which must be present to activate the latent right of the putative father in order to raise it to the level of a constitutionally protected parent-child relationship: (1) the biological link; (2) the underlying fitness of the putative father to parent; and (3) the *full* commitment to and exercise of custodial and parental responsibility by the putative father.[130]

In April 1987, the Georgia Supreme Court decided *In re Baby Girl Eason* and adopted the opportunity interest test as a means of determining whether or not an unwed father has constitutionally protected rights in his child.[131]

III. *IN RE BABY GIRL EASON*

A. The Opportunity Interest Test Comes to Georgia

Certain facts in *Eason* were undisputed. The unwed father and mother met, dated, and maintained a sexual relationship which resulted in the conception of baby girl Eason. Upon learning of the pregnancy, the parents discussed various options including abortion and adoption. Several weeks before the child was due, the father moved from Georgia to California for reasons related to his employment, and the parents had no further contact.[132] The mother released her custody rights and placed the child for adoption with a licensed adoption agency. When a couple petitioned for adoption, the father was notified pursuant to the statutory provisions.[133]

Certain other facts relating to the degree of interest the father displayed in both mother and child were conflicting. The mother contended that the father had agreed to the adoption and had

---

129. *Id.* at 359—60. Official ways a putative father can decline to establish a relationship include: surrender of his rights in a written consent to adoption, written waiver of notice, adjudication that he is not the child's father, or adjudication terminating his interest. *Id.* at 355.

130. Amicus Curiae Brief of Child Services and Family Counseling Center, Inc. at 8, *In re* Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987) (No. 44707).

131. *In re* Baby Girl Eason, 257 Ga. at 296, 358 S.E.2d at 462.

132. *Id.* at 292, 358 S.E.2d at 460.

133. *Id. See* O.C.G.A. § 19-8-7 (1982). *See supra* text accompanying notes 85—91.

discussed selling the baby for $10,000 but never offered her any financial support. Subsequently, he departed for California leaving no forwarding address or telephone number.[134] The father countered that he did offer financial assistance, only discussed giving up the baby to test her sincerity, and could have been reached in California through friends known to the mother.[135] It was against this factual scenario that the Georgia court discussed the rights of unwed fathers.

In writing the unanimous opinion, Justice Gregory described three categories of putative fathers and the degree of their rights in their children. An unwed father who has custody and performs all duties of a parent has full constitutional rights in his child and must be treated equally with other parents; an unwed father who has never had custody or sought to establish any relationship with his child has no constitutional rights in his child; and an unwed father who has not had custody but has nonetheless developed a substantial bond with his child also has a protected interest.[136] Justice Gregory concluded that "there exists a continuum of unwed father-child relationships with assigned degrees of protection afforded rights to custody."[137]

Based on the biological link alone, an unwed father has an opportunity interest to develop a relationship with his child. If he exercises that opportunity interest, he establishes constitutional rights protected by due process of law.[138] However, these rights are not absolute and can be abandoned if not "timely pursued,"[139] but the state cannot deny the father a "reasonable" opportunity

134. *Eason*, 257 Ga. at 292–93, 358 S.E.2d at 460.
135. *Id.* at 293, 358 S.E.2d at 460.
136. *Id.* at 294, 358 S.E.2d at 460–61.
137. *Id.* at 294, 358 S.E.2d at 461.
138. *Id.* at 296, 358 S.E.2d at 462.
139. *Id.* Timing appears to be an essential element of the opportunity interest. In *Lehr*, the father was denied his rights partly because two years had elapsed in which he had not developed a relationship with his child. In *Quilloin*, the father was likewise denied his rights because eleven years had elapsed. In Doe v. Chambers, 188 Ga. App. 879, 374 S.E.2d 758 (1988), decided after *Eason*, the Georgia Court of Appeals affirmed the trial court's grant of legitimation and custody for an unwed father against the potential adoptive parents. The father did not learn of his daughter's birth until two months after the fact when he then "vigorously pursued his opportunity interest." *Id.* at 880, 374 S.E.2d at 760. In holding that the trial court "conducted the proceedings with impeccable regard for the standards established in *In re Baby Girl Eason*," the appellate court apparently reasoned that two months time was insufficient for the unwed father to lose his opportunity interest. *Id.*

to exercise his interest.[140] The adoption of the opportunity interest test is a significant clarification for those involved in adjudicating the rights of unwed fathers. More importantly, the adoption of the test necessitated the creation of a new standard by which to judge the unwed father.

B. The Evidentiary Standard

Once the putative father is deemed to have an opportunity interest in developing a bond with his child, the question then arises as to how these rights are to be evaluated. In *Eason*, the Georgia Supreme Court determined whether the father's rights should be judged according to the "best interests of the child" test as was previously applied in Georgia or whether he was entitled to a fitness test as was the unwed mother.[141]

In making that determination, the court held that "because Georgia law affords an unwed mother a fitness test or veto power under the circumstances it must also afford [the father] a fitness test or veto power, *provided he has not abandoned his opportunity interest.*"[142] The court's decision was based on a fit biological father's right to prevail over strangers who desire to adopt his child if he has pursued his opportunity interest. When such a father seeks custody of his child "[h]e is in pursuit of a recognized interest which, if obtained, places him in circumstances of a custodial unwed father,"[143] and therefore his rights prevail over those of adoptive parents. Judicial recourse is appropriate because the child has been placed with the adoptive parents pursuant to state adoption law, signifying state action.[144] To deny a father the right to develop a relationship with his child by terminating his rights prematurely without an inquiry into his degree of involvement with the child would be state action resulting in impermissible interference with his constitutional due process rights.[145]

---

140. *Eason*, 257 Ga. at 296, 358 S.E.2d at 460. If the state denies the father his opportunity to develop his interest by prematurely terminating his rights, it may be considered an interference with his constitutional rights. Buchanan, *supra* note 125, at 361—62.

141. *Eason*, 257 Ga. at 292, 358 S.E.2d at 460.

142. *Id.* at 297, 358 S.E.2d at 463.

143. *Id.* at 296, 358 S.E.2d at 463.

144. *Id.* at 297, 358 S.E.2d at 463. ("[T]he relationship here between adopting parents and child did not take place in the absence of state participation.").

145. Buchanan, *supra* note 125, at 361—62.

If an unwed father is judged by the best interests of the child test, as he has been in the past, the court compares him with a two-parent adoptive home already approved by the adoption agency as being fit. Arguably, he will always lose. His constitutionally protected rights in his child, which he now possesses by having exercised his opportunity interest, will be denied simply because the adoptive home may be judged better, applying subjective standards. *Eason* demands that a court must determine if the father is "a fit person for custody" in his own right.[146] "If he is fit, legitimation should be granted. If not, it should be denied."[147]

However, an opposing argument is that the court should consider the benefits to the child in all circumstances. The basis of this argument is that the totality of the circumstances should be examined rather than merely focusing on the putative father's fitness or lack of it: a child's best interests should not "exist in a vacuum," dependent only upon a technical determination of individual fitness.[148] The court apparently considered, and rejected, these arguments.[149]

The *Eason* court enumerated certain situations in which the best interests standard would be appropriate, but those circumstances were not present in *Eason*.[150] Although the adoptive parents had developed a relationship with baby Eason, it is precisely because this relationship existed as a result of state action that the best interests test could not be used.[151] The court held:

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

146. *Eason*, 257 Ga. at 297, 358 S.E.2d at 463.

147. *Id.*

148. Brief of Appellees, at 110—11, *In re* Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987) (No. 44709).

149. *Eason*, 257 Ga. at 297, 358 S.E.2d at 463.

150. A best interests test could be used in a divorce when each party has equal rights and a fitness test is not appropriate. The test may also be used when a custodial mother and a stepfather seek to adopt the child, because in that situation an unwed father would never have an opportunity to become a custodial parent. *Id.* at 296—97, 358 S.E.2d at 463.

151. *Id.* at 297, 358 S.E.2d at 463.

> the child is his fitness as a parent to have custody of the child. If he is fit he must prevail.[152]

The interests of the unwed father are now on equal footing with those of the unwed mother in Georgia. The unwed father must be evaluated on his merits alone to determine whether he is fit to legitimate and assume custody of his child provided he has not abandoned his opportunity interest.[153] If the father is determined to be fit, then legitimation will be granted regardless of the adoptive parent's equal fitness.[154] However, *Eason* did not definitively answer all questions arising from the new standards.

C. Unanswered Questions

1. Activation of the Interest

The *Eason* standard represents a substantial step forward in Georgia's recognition of the rights of an unwed father. There are, however, unanswered questions inherent in the decision. Because the father's rights do not become activated unless he exercises his opportunity interest, the question becomes how that interest is activated. The *Eason* court set no standards or guidelines on this issue, and prior Georgia cases are inconsistent.

Several times a putative father has been denied certain rights due either to not legitimating the child,[155] not marrying the

---

152. *Id.*

153. The fitness standard applied in determinations between parents is found in Carvalho v. Lewis, 247 Ga. 44, 274 S.E.2d 471 (1981):

> A finding of unfitness must center on the parent alone, that is, can the parent provide for the child sufficiently so that the government is not forced to step in and separate the child from the parent. A court is not allowed to terminate a parent's natural right because it has determined that the child might have better financial, educational, or even moral advantages elsewhere. Only under compelling circumstances found to exist by clear and convincing proof may a court sever the parent-child custodial relationship.

154. *Eason*, 257 Ga. at 297, 358 S.E.2d at 463.

155. *See generally* Quilloin v. Walcott, 238 Ga. 230, 233, 232 S.E.2d 246, 248 (1974) ("For eleven years the natural father took no steps to legitimate the child . . . ."); Blakemore v. Blakemore, 217 Ga. 174, 175, 121 S.E.2d 643, 643 (1961) (If a mother is fit and her child is not legitimated by the father, a court has no choice but to award custody to the mother.); Clark v. Buttry, 121 Ga. App. 492, 495, 174 S.E.2d 356, 359 (1970) (If a mother consents to adoption and her child is not legitimated by the father, he does not have standing to object to adoption.).

mother,[156] or not providing support.[157] Unwed fathers' rights also have been abridged for reasons such as "unwillingness to sacrifice any of the pleasures of single life"[158] and not shouldering significant responsibility with respect to the daily supervision, education, and protection of the child.[159] Even living with the mother has been deemed insufficient if not coupled with notification of the grandparents or preparation of the apartment for the baby's arrival.[160] Unfortunately, what becomes apparent is that no particular factors have emerged as guidelines.

Consequently, an unwed father in Georgia seeking to determine whether he has successfully exercised his opportunity interest perhaps should refer to the notice section of the Adoption Code which sets out the ways in which an unwed father can establish a familial bond. Presently, the statute provides that a bond can be established by any of the following: living with the child, contributing to the child's support, attempting to legitimate the child, and providing support for the mother during pregnancy or hospitalization for the birth of the child.[161] Some combination of these factors may be sufficient to place the putative father over the threshold and into a constitutionally protected relationship. The problem is knowing which factor or combination of factors will be successful.[162] Until guidelines are established, either statutorily or through future adjudication of this issue,

---

156. Best v. Acker, 133 Ga. App. 250, 251, 211 S.E.2d 188, 189 (1974) ("The father had not even sought to marry the child's mother.").

157. *See generally* Mabry v. Tadlock, 157 Ga. App. 257, 259, 277 S.E.2d 688, 689 (1981) ("It is apparent that no attempt at marriage or support was made until after the [mother] married another man."); Williams v. Davenport, 159 Ga. App. 531, 532, 284 S.E.2d 45, 46 (1981) (The putative father's failure to support his child should be considered in determining the child's best interests.); *In re* Ashmore, 163 Ga. App. 194, 197, 293 S.E.2d 457, 460 (1982) (The father never provided support for his child and lacked resources to raise the child.).

158. *In re* J.B.K., 169 Ga. App. 450, 451, 313 S.E.2d 147, 148 (1984) (The mother attempted to establish a paternal relationship between father and child but was rebuffed.).

159. Berry v. Samuels, 145 Ga. App. 687, 244 S.E.2d 593 (1978).

160. Wojciechowski v. Allen, 238 Ga. 556, 558, 234 S.E.2d 325, 327 (1977). These acts were considered proof "that the father had never intended to recognize [the child] as a family member." *Id.*

161. O.C.G.A. § 19-8-7(b)(1), (2) (1982).

162. Even the notice statute factors may be of limited usefulness in assessing whether the opportunity interest has been activated. Certain circumstances, such as when the child is a newborn or when the father's overtures have been rebuffed by the mother, may call for more specialized standards. Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions For Solutions*, 50 TENN. L. REV. 71, 89 (1982) (discussion of Justice Stevens' dissent in *Caban* regarding an unwed father's rights to his newborn).

determinations will apparently be made on a case-by-case basis.

2. Timeliness in Pursuing the Interest

Another matter for concern is the father's timeliness in pursuing his interest. The court in *Eason* clearly stated that the interest can be abandoned if not timely pursued, but again, gave no indication of what would be considered timely. One commentator suggests that in balancing all the interests involved

> [t]he proper allocation of [the risk of ultimate loss of rights in the child], though impossible to define rigidly, must initially favor the putative father, and shift toward the adoptive parents over time. As the biological tie loses significance, the rights of the adoptive parents—based on the fulfillment of parental duties—quickly increase. At the same time, the interests of the state in protecting unwed mothers, in affording permanent homes for illegitimate children, and in providing efficient adoption procedures all favor an early date for terminating the putative father's rights. After a time, even the putative father's diligence and good faith become irrelevant.[163]

If the courts choose to follow an analysis similar to that stated above, the putative father will be forced to move quickly to transform his potential biologically based relationship into one which will be legally enforced. "A child's need for permanence and stability, like his or her other needs, cannot be postponed. It must be provided early.... The basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely."[164] However, once the mother consents to adoption, the putative father must receive notice and should have at least a modicum of time to come forward before the state may take action to alter his relationship with his child.[165]

---

163. Note, *Due Process Rights, supra* note 4, at 1103.

164. Buchanan, *supra* note 125, at 364. The author suggests that timeliness should only be an issue when another party, such as a stepfather, has stepped in and provided the necessary stability for the child.

165. Buchanan, *supra* note 125, at 367. In Georgia, the father has thirty days after receiving notice of the adoption to take action. O.C.G.A. § 19-8-7(c) (1982). An additional problem related to timeliness is that a putative father may seldom be on notice that he must take some action to exercise his opportunity interest before it becomes too late. However, as the Court found in Lehr v. Robertson, 463 U.S. 261 (1983), ignorance of the law is insufficient reason to criticize it.

3. Balancing of the Interests

An additional problem arising from *Eason* is that of balancing the interests of each party to an adoption. An unwed father's rights now may be given more weight, but how they relate to those of the mother is unclear. The mother may have been motivated to give up her child in an effort to provide a stable home for the child but not to enable the father to assume custody. Also to be considered are the adoptive parents, who now have no idea how long they must wait in fear that the putative father may assert his rights and take the baby from them. The interests of the child are an additional concern; the child is almost certainly better off in one home permanently rather than being shuffled from place to place until all adjudication is final.

These unanswered questions are all issues the Georgia courts will need to address. The *Eason* court realized the need to reconsider these issues by remanding the case to determine how its holding would affect the particular parties and whether the father in *Eason* had properly exercised his opportunity interest.[166]

CONCLUSION

In *Eason*, the Georgia Supreme Court took a definite stance in recognizing the father's rights and interests in his illegitimate child. The remand of this case for a determination of whether or not this father exercised his opportunity interest suggests there

---

166. *Eason*, 257 Ga. at 297, 358 S.E.2d at 464. Upon remand, there was a new trial in the Superior Court of Cobb County. The seven-day nonjury trial culminated in the February 3, 1988 decision by Judge George Kreiger holding that the baby would remain with her adoptive parents. The judge found that not only did the unwed father not effectively exercise his opportunity interest but also that he was psychologically unfit as a parent.

Timeliness was apparently a vital issue as the judge stated that the father's "alleged intentions pale when compared to his failure to act and by his failure to act he lost his interest during a critical period commencing at conception." Walston, *Lawyers Disagree on Precedent in Baby Eason Ruling*, Atlanta J., Feb. 4, 1988, at 2C, col. 5. This ruling leaves open the interesting question of whether a putative father must now take affirmative action prior to the child's birth in order to have protected rights. If so, a father who is not told of the pregnancy will never be able to exercise his opportunity interest. *But see* Doe v. Chambers, 188 Ga. App. 879, 374 S.E.2d 758 (1988) (father who did not learn of child's birth until two months later did not lose his opportunity interest).

By a 6—1 vote, the Georgia Supreme Court denied the father's application for appeal in March of 1988. Walston, *High Court Won't Hear Custody Appeal by Baby Eason's Dad*, Atlanta J., Mar. 31, 1988, at 4B, col. 4. At this point, the custody battle over baby girl Eason is effectively ended unless the father pursues his final option of appeal to the United States Supreme Court.

will be a case-by-case evaluation of the conduct of a putative father both before and after his child's birth. The Georgia Supreme Court should direct its attention toward either adopting the legislative standards found in the putative father notice statute[167] or establishing its own set of guidelines conclusively listing specific ways in which a putative father may effectively exercise his opportunity interest.

There is also a need to create a time frame in which an unwed father must demonstrate his desire to move from a potential, biologically based relationship with his child to a developed, constitutionally protected one.[168] This time limitation may be based on the type of action the court is asked to take in the particular case before it, although recognition of the child's need for immediate stability should always be emphasized.

Finally, the bench, bar, and legislature need to consider carefully the competing interests of child, father, mother, adoptive parents, and state. The courts should then determine these issues in light of the new standard applied to unwed fathers, which shifts the evaluation from the best interests of the child to the parental fitness of the putative father. A balancing test that weighs these interests should be articulated in order to secure the putative father's constitutional rights.

The implications of *Eason* for adoption cases could be significant. Although the *Eason* standard is a major recognition of an unwed father's parental rights, it can also be a double-edged sword. *Eason* cuts through years of discrimination against fathers of illegitimate children by enabling them to have a constitutionally protected relationship with their children. On the other hand, however, it can sever the ties that have bound a child to the adoptive parents who may have been that child's primary caretakers since birth. Even if that extreme is not realized, the *Eason* decision may conceivably allow a putative father with no desire to obtain custody of his child to block the adoption by other people; if the father is recognized as a fit parent, he has the right to veto as well as to consent to his child's adoption.[169]

---

167. O.C.G.A. § 19-8-7 (1982).

168. It is possible that the thirty days which the father is given to file legitimation proceedings after notification of the pending adoption before losing his rights may be incorporated as a time limit on his opportunity interest rights also. *See supra* text accompanying notes 84—91.

169. This possibility was of concern to the original *Quilloin* court:

> If the consent of the natural father were also required he might refuse

Perhaps the most logical method to avoid any future difficulties would be for the legislature to recognize and address these uncertainties by revising the unwed father notice statute. This statute should include the opportunity interest test with guidelines and time limits that would provide clear rules for interested parties.

Ultimately, *Eason* could be a case of considerable precedential value. A putative father who wants to be involved in his child's life can no longer be relegated to the status of parent-in-name-only. He has the opportunity to become a recognized parent with a constitutionally protected right to have an influence on how and with whom his child is raised. It is up to the father to activate this potential relationship. The court in *Eason* opened the door for a fit biological father to have an interest in the disposition of his child fully comparable to that of the child's mother.

This new concept will affect adoption proceedings, hearings for legitimation petitions, and custody determinations throughout the state of Georgia. The courts now should seek to serve the interests of all parties, including those of the unwed father, and not just the best interests of the child.

Amy S. Haney

---

without accepting the responsibility of fatherhood, and the state could be required to sever his relationship before the adoption could proceed. In addition, since the father has already shown his lack of interest by his failure to legitimate the child, there would be a very real danger of profit seeking by the father in order to secure his consent to the adoption.

Quilloin v. Walcott, 238 Ga. 230, 233, 232 S.E.2d 246, 248 (1977). *But see Eason*, 257 Ga. at 296, 358 S.E.2d at 463: "On the other hand a fit biological father who pursues his interest in order to obtain full custody of his child must be allowed to prevail over strangers to the child who seek to adopt."