The Rights of Fathers of Non-Marital Children to Custody, Visitation and To Consent To Adoption

This article discusses the rights of fathers of non-marital children according to the California Uniform Parentage Act. It advocates giving a natural father preference in custody disputes involving children relinquished for adoption but limiting his right to seek custody from a custodial mother. The article also advocates permitting a natural father to continue visitation after his non-marital child’s adoption. The article concludes with a discussion of the necessity of a natural father’s consent to adoption.

Society has long viewed children born outside traditional marriage bonds with an intolerant and prejudiced eye. The common law gave non-marital1 children the status of filius nullius — no one’s son.2 They were “sins turned into flesh.”3 Viewed most favorably, the doctrine of filius nullius was an attempt to encourage the birth of children into the unit most capable of nurturing them.4 One must certainly question the logic of burdening children with inferior status however when it was the parents’ behavior which resulted in their birth. As a consequence of their status as “no one’s son,” the common law gave non-marital children no right to support5 or inheritance.6 Fortunately, many states en-

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1 The term non-marital child refers to children born to parents who are not married to each other.


3 Courts have expressed this view in recent years as well. For example, in a case dealing with the termination of the parental rights of a welfare mother who had four non-marital children, the Ohio Juvenile Court stated:

   It might perhaps be mentioned that the Decalog, which is the basis of our moral code, specifically states that the sins of the fathers may be visited upon the children unto the third and fourth generation, so that the argument against making the children suffer for the mother’s wrong can be attacked on ethical grounds.

   In re Drake, 180 N.E.2d 646, 649 (Juv. Ct., Huron County, Ohio 1961).

4 Krause, supra note 2, at 1-2.

5 Krause, supra note 2, at 22-25.
acted statutes improving the status of non-marital children, particularly with regard to these rights. In addition, several United States Supreme Court decisions have struck down statutes which discriminated against non-marital children.


The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.


8See Levy v. Louisiana, 391 U.S. 68 (1968), holding that non-marital children have a right to recover damages for the wrongful death of their mother; Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968), holding that the mother of a non-marital child may sue for the wrongful death of her child; Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), holding that non-marital children may recover benefits because of their parent’s disability under worker’s compensation laws; Gomez v. Perez, 409 U.S. 535 (1973), holding that non-marital children have a right to public assistance; and Trimble v. Gordon, 430 U.S. 762 (1977), striking down an Illinois statute permitting non-marital children to inherit by intestate succession only from their mothers.

Until recently, however, the law has all but ignored the rights of natural fathers9 who desire to maintain contact with their non-marital children. It regarded the mother as a child’s “natural guardian”,10 and some states refused to permit a natural father to assert a right to custody in any case.11 Courts rarely awarded visitation privileges,12 and usually allowed a child’s adoption without the natural father’s consent.13 Then, in 1972, the United States Supreme Court decided Stanley v. Illinois,14 holding that due process of law required that a natural father receive notice and an opportunity to be heard regarding a petition to declare his non-marital children wards of the state.15 Stanley provided the impetus for substantial changes in the law regarding the rights of natural fathers. In 1975, California passed its version of the Uniform Parentage Act16 as a response, in part, to efforts to equalize the status of non-marital and marital children.17

This article deals primarily with the Uniform Parentage Act’s application to natural fathers in California. Section I discusses Stanley v. Illinois and briefly summarizes the provisions of the

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9 The term natural father refers to a man who believes he is the child’s biological father, irrespective of whether or not a court has determined paternity. A natural father must be distinguished from a presumed father, as discussed in the text accompanying notes 52-55 infra.

10 Krause, supra note 2, at 29.

11 In Wallace v. Wallace, 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965), the court denied a petition brought by a natural father in the name of the child to obtain a right to the natural father’s companionship. The court noted that Illinois law did not consider a natural father a parent and did not afford him the rights enjoyed by a father of a child born in wedlock. Id. at 303, 210 N.E.2d at 5. The court in DePhillips v. DePhillips, 35 Ill. 2d 154, 219 N.E.2d 465 (1966) reached a similar conclusion in a case where the natural father sought custody. In re Adoption of A., 226 A.2d 823 (Del. 1967) held that Delaware followed the common law doctrine of filius nullius and as an extension of that doctrine, the natural father had no rights in his non-marital child.

12 See notes 147-149 infra.

13 Krause, supra note 2, at 28-32.

14 405 U.S. 645 (1972).

15 This case is discussed at notes 27-32 infra.


Uniform Parentage Act.\textsuperscript{18} Section II discusses the Uniform Parentage Act's definition of a presumed father.\textsuperscript{19} This concept is not new, but it is the key to the scope of natural fathers' rights under the Uniform Parentage Act.\textsuperscript{20} Sections III through V deal with the natural father's right to obtain visitation, custody, and to withhold his consent to adoption.\textsuperscript{21}

I. RECOGNIZING THE RIGHTS OF NATURAL FATHERS

Prior to 1972, restrictive state laws denied natural fathers a role in decisions relating to the care and custody of their non-marital children. In the majority of states, mothers had a prima facie right to the custody of their non-marital children.\textsuperscript{22} A natural father could assert a right to custody only where the mother was proven unfit\textsuperscript{23} or had abandoned the child.\textsuperscript{24} Some states and courts absolutely proscribed a natural father's exercise of custodial rights.\textsuperscript{25} In some cases, a mother's right to custody included the right to prohibit visitation and to relinquish the child for adoption without the natural father's consent.\textsuperscript{26} Most often, a natural father had no right to notice of adoption proceedings and no right to be heard.\textsuperscript{27} The United States Supreme Court rejected

\textsuperscript{18} See notes 22-45 infra.
\textsuperscript{19} See text accompanying notes 52-55 infra.
\textsuperscript{20} See notes 52-55 and the accompanying text infra.
\textsuperscript{21} For a discussion of custody, see text accompanying notes 99-146 infra. For a discussion of visitation, see text accompanying notes 147-181 infra, and for a discussion of the natural father's right to consent to adoption see text accompanying notes 182-219 infra.
\textsuperscript{22} For a discussion of the mother's superior right to custody see Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. L. 1 (1972).
\textsuperscript{24} KRAUSE, supra note 2, at 28.
\textsuperscript{25} See note 11 supra.
\textsuperscript{26} See Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1st Dist. 1965) and Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (4th Dist. 1964). These cases are discussed at notes 62-69 and the accompanying text infra.
such a restrictive statutory scheme when it decided *Stanley v. Illinois*,\(^{28}\) which opened a new era in the rights of natural fathers.

In that case Stanley's children were declared wards of the state of Illinois upon the death of their mother, with whom Stanley had lived intermittently for eighteen years. The Illinois statute which deprived Stanley of the custody of his children provided that children of unmarried fathers could be declared wards of the state without a hearing on the natural father's fitness and without proof of neglect.\(^{29}\) The statute protected married parents from such deprivation of their children by a requirement that there be a finding of neglect prior to making the children wards of the state.\(^ {30}\)

The Supreme Court held that the due process clause of the Fourteenth Amendment entitled Stanley to a hearing on his fitness as a parent. It further held that the statutory scheme, which denied Stanley a hearing but extended the right to married fathers, denied Stanley equal protection of the law as guaranteed by the fourteenth amendment.\(^{31}\) The Court objected to the "procedure by presumption"\(^{32}\) which denied natural fathers of their cognizable and substantial interest in retaining custody of their children.\(^{33}\)

\(^{28}\) 405 U.S. 645 (1972).

\(^{29}\) The court noted that the dependency proceeding had gone forward on the presumption that Stanley was unfit to exercise parental rights. *Stanley v. Illinois*, 405 U.S. 645, 648 (1972). Under the statutes then in effect, there were two methods of declaring children wards of the state. In a dependency hearing, the state could demonstrate that the children should be wards because they had no surviving parent or guardian. ILL. REV. STAT., ch. 37, §§ 702-1, -5 (Smith-Hurd 1972). In a neglect proceeding, the state could show that the children should be wards because the parents or guardian did not provide suitable care. ILL. REV. STAT., ch. 37, §§ 702-1, -4 (Smith-Hurd 1972).

\(^{30}\) The statute made parents parties to proceedings concerning the dependency of their children. ILL. REV. STAT. ch. 37, § 701-20 (Smith-Hurd 1972). It defined parents as the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, or the adoptive parents. ILL. REV. STAT. ch. 37, § 701-14 (Smith-Hurd 1972).

\(^{31}\) 405 U.S. 645, 659 (1972).

\(^{32}\) The Court believed that a procedure which conclusively presumed natural fathers to be unfit by not considering them as parents entitled to a hearing on the issue of dependency actually contravened the declared purpose of the statute, which was to strengthen the minor's family ties whenever possible. *Stanley v. Illinois*, 405 U.S. 645, 652-653 (1972).

The California law existing at the time of that decision would have afforded Stanley a right to notice and a hearing on his fitness because he had maintained a home with his children.\textsuperscript{34} This did not mean, however, that California law was immune from constitutional attack. Soon after \textit{Stanley}, the Court remanded a Wisconsin adoption case for consideration in light of \textit{Stanley v. Illinois},\textsuperscript{35} making it clear that the \textit{Stanley} rationale extended to adoption as well as custody.\textsuperscript{36} California, like most states, gave mothers a prima facie right to custody and denied natural fathers a right to notice and a hearing in adoptions.\textsuperscript{37} This practice appeared constitutionally invalid and provided the impetus for statutory revision.

The Uniform Parentage Act was written, in part, to provide a basis for conforming state laws to the new constitutional mandates.\textsuperscript{38} According to the drafters of the Act, one of its major purposes was to provide legal equality for all children without reference to the marital status of their parents.\textsuperscript{39} An additional purpose was to resolve problems of custody and adoption arising

\textsuperscript{34} By providing a home for his non-marital children, Stanley met the requirements of the California legitimation statute. \textit{Cal. Civ. Code} § 230 (West 1954), set forth in note 47 \textit{infra}. Thus, under California law Stanley was a parent entitled to a hearing on his fitness prior to a deprivation of custody. For the text of the statute relating to the parent's right to notice of the hearing on the issue of the child's dependency see \textit{Cal. Welf. & Inst. Code} § 335 (West Cum. Supp. 1979). The same language was in effect under \textit{Cal. Welf. & Inst. Code} § 658 (West 1972).

\textsuperscript{35} \textit{Rothstein v. Lutheran Social Servs.}, 405 U.S. 1051 (1972). In this case, a father sought a hearing on his custody rights after learning that the mother relinquished his child for adoption. In a memorandum opinion, the court remanded it and a companion case, \textit{Vanderlaan v. Vanderlaan}, 405 U.S. 1051 (1972), for reconsideration in light of \textit{Stanley v. Illinois}, 405 U.S. 645 (1972). The Court ordered the lower courts to give due consideration to the fact that the child had apparently lived with the adoptive family during the pendency of the case. This indicated the Court's concern that a change in custody or a delay in achieving the proper permanent placement might be detrimental to the child.

\textsuperscript{36} Stanley laid the groundwork for the \textit{Rothstein} remand in a footnote which suggested that only notice (by publication if necessary) and an opportunity to be heard could cure the infirmity of presumptively denying fathers the opportunity to assert an interest in their children. \textit{Stanley v. Illinois}, 405 U.S. 645, 657 n.9 (1972).


in the aftermath of *Stanley v. Illinois*.\(^4\) In 1975, California passed a modified form of the Act.\(^4\)

The Uniform Parentage Act provides a procedure by which a natural father may have a parent-child relationship declared.\(^4\) The parent-child relationship is the legal relationship existing between a child and his or her natural or adoptive parents "incident to which the law confers or imposes rights, privileges, duties and obligations."\(^4\) Consistent with this section, the statute also states that an order declaring the existence of a parent-child relationship may make provisions for the payment of support, visitation privileges and custody.\(^4\) The Act also includes important sections relating to a father's right to notice and hearing where his child has been relinquished for adoption or where the mother has consented to an adoption.\(^4\) These provisions of the California Uniform Parentage Act have an important impact on a natural father's rights to custody, to visitation and to withhold his consent to adoption.

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\(^4\) *Stanley v. Illinois*, 405 U.S. 645 (1972) and its progeny, Rothstein v. Lutheran Social Services and Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972) had a tremendous impact on adoption law. After *Stanley* there was confusion as to the scope of natural fathers' rights. One view expressed was that a natural father should have to establish his interest in the child by registering a claim within a limited time following birth. Another view was that the state had a responsibility to notify natural fathers of changes in their non-marital child's custody, regardless of prior acknowledgement of paternity. For example, Wisconsin passed a statute requiring notification of natural father whenever possible, with provision being made for notice by publication. *Wis. Stat. Ann.* § 48.42 (West Cum. Supp. 1978-1979). For a discussion of the impact of *Stanley* on adoption and the problems of implementation see Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 Fam. L. Q. 527 (1975); Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975).


\(^4\) *Cal. Civ. Code* § 7010(c) (West Cum. Supp. 1979). The order may contain provisions relating to the child's support, custody or guardianship of the child, visitation privileges, or any other matter in the best interests of the child.

\(^4\) The problem of providing adequate notice and opportunity to be heard was one of the most significant problems arising after *Stanley v. Illinois*, 405 U.S. 645 (1972). See notes 35, 36 & 40 supra.
II. The Presumptive Father

Prior to the passage of the Uniform Parentage Act, the mother of a non-marital child was entitled to custody.46 In contrast, both parents of a marital child were equally entitled to custody.47 A natural father could obtain custody rights equal to those of the mother by fulfilling the requirements of the legitimation statute, Civil Code section 230.48 This statute required that the natural father publicly acknowledge the child as his own and receive it into his family.49 If these provisions were met, the child would be considered legitimate from the time of birth.50 As the father of a legitimate child, the natural father had a right to custody and the right to withhold his consent to adoption.51

47 CAL. CIV. CODE § 197 (West 1954):
   The father and mother of a legitimate unmarried minor are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.
48 CAL. CIV. CODE § 230 (West 1954)
   The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.
50 CAL. CIV. CODE § 230 (West 1954), set forth at note 48 supra.
51 CAL. CIV. CODE § 197 (West 1954), set forth at note 47 supra, made his right to custody equal to that of the mother. Legitimation under CAL. CIV. CODE § 230 (West 1954) made the consent of both parents necessary, unless they had already been judicially deprived of custody, had deserted or relinquished the child. CAL. CIV. CODE § 224 (West 1954), as amended by Act of September 12,
The Legislature struck all references to the status of "illegitimacy" when it passed the Uniform Parentage Act. It retained the concept of legitimation, however, as a rebuttable presumption.\footnote{CAL. CIV. CODE § 7004(a) (West Cum. Supp. 1979). The text of former CAL. CIV. CODE § 230 (West 1954), set forth at note 48 supra, is now found in CAL. CIV. CODE § 7004(a)(4) (West Cum. Supp. 1979). The new statute has minor changes, e.g., it no longer requires the natural father's wife's consent to the receipt of the child into the home.} There are essentially three cases where a man is rebuttably presumed to be the father of a non-marital child: (1) where he and the mother have attempted to marry each other in an invalid marriage ceremony and the child was born within 300 days of the termination of a marriage that could be declared invalid only by a court order, or within 300 days of the period of cohabitation, if the marriage was invalid without a court order;\footnote{CAL. CIV. CODE § 7004(a)(1)-7004(a)(2) (West Cum. Supp. 1979).} (2) where he had attempted to marry the mother in an invalid marriage ceremony and he was named, with his consent, as the child's father on the birth certificate or he has obligated himself by written agreement to pay for the child's support;\footnote{CAL. CIV. CODE § 7004(a)(3) (West Cum. Supp. 1979).} and (3) where he has received the child into his home and openly holds out the child as his natural child.\footnote{CAL. CIV. CODE § 7004(a)(1)-7004(a)(4) (West Cum. Supp. 1979). Presumptions of paternity may be rebutted by clear and convincing evidence. CAL. CIV. CODE § 7004(b) (West Cum. Supp. 1979). The Act retains as a conclusive presumption CAL. EVID. CODE § 621 (West Cum. Supp. 1979): "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."}

While the adoption and custody statutes no longer refer to "illegitimate" children, they do make distinctions based on whether a child has a presumed father.\footnote{It is important to keep distinct the concepts of the natural father and the presumed father. The term natural father refers only to a man who asserts he is the child's biological father. The term presumed father refers only to the man who falls within the statutory parameters enumerated in the text accompanying notes 52-55 supra.} For example, the adoption of a child who has a presumed father requires the consent of both the mother and the presumed father.\footnote{CAL. CIV. CODE § 224 (West Cum. Supp. 1979).} Further, only the mother and the presumed father are entitled to the custody of an unmarried minor.\footnote{See text accompanying notes 52-55 for the definition of a presumed father.} Thus, the scope of a natural father's rights

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may turn on whether he meets the statutory definition of a presumed father. Unless the natural father has married or attempted to marry the mother, his only opportunity to qualify as a presumed father is to receive his child into his home and acknowledge the child as his own. Because the language of this section of the Act closely parallels the language of the prior legitimation statute, case law decided under that statute remains pertinent.

Typically, the problems of interpretation of the prior legitimation statute centered on its requirement that the natural father receive the child into his home. Decisions vacillated between a strict and liberal construction of this requirement. For example, in Blythe v. Ayres, the court held that mere correspondence was sufficient to constitute legitimation. The father had never seen his child, born in England, but had exchanged letters with her and hung her picture in his home. This proved to the court his acknowledgement and receipt of the child into his home as his own.

A long line of appellate court cases followed the liberal trend of Blythe v. Ayres. In Estate of Peterson, the court held that the father had received his adult daughter into his family because


The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of section 7004, is equally entitled to the custody services and earnings of the unmarried minor. If either the father or the mother is unable or refuses to take custody or has abandoned his or her family, the other is entitled to its custody, services, and earnings.

See text accompanying notes 52-55 supra.

See note 48 supra for the language of the prior legitimation statute.

96 Cal. 532, 31 P. 915 (1892). One reason the court found that the natural father could easily satisfy the requirement that he receive the child into his family was that the natural father did not have a typical family in which to receive his child. He lived with a mistress. The court stated: "If the term 'receiving' it into his family does not necessarily mean actual reception into a real family, but may mean a constructive reception into a constructive family, then such measure is filled to the brim." Id. at 580, 915 P. at 923.

Id. at 580, 915 P. at 923.

96 Cal. 532, 31 P. 915 (1892).

214 Cal. App. 2d 258, 29 Cal. Rptr. 384 (1st Dist. 1963). The court stated that requiring her to stay with her father for a prolonged period of time would defeat the liberal interpretation courts had given the legitimation statute. Id. at 263, 29 Cal. Rptr. at 386.
she occasionally visited him in his home. Visits to the home of the mother and child by the natural father in *Estate of Maxey*65 satisfied the requirement of receiving the child into the father's family. Finally, the *Hurst v. Hurst*66 decision seemed to eliminate the requirement that the father receive the child into his family altogether. In that case, the court held that the mere renting of an apartment in the name of the father and mother as Mr. and Mrs. Hurst was sufficient to meet the statutory requirement.67

The courts did not always give the legitimation statute a liberal interpretation, however. In *Adoption of Irby*,68 the court stated that a father must strictly comply with the requirement that he receive the child into his family.69 Based on the mother's exclusive right to custody of the non-marital child,70 the court held that the

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65 257 Cal. App. 2d 391, 64 Cal. Rptr. 837 (2d Dist. 1968).
67 *Id.* at 869, 39 Cal. Rptr. at 169. The court's decision that the child was legitimated even though the father and son had never been together at either the father's or the mother's residence may have been influenced by the fact that the three lived together in a hotel for several weeks. *Id.* at 868, 39 Cal. Rptr. at 169. However, because the natural father's wife had not consented to the legitimation at the time they were staying together, as required by Cal. Civ. Code § 230 (West 1954), the child could not be considered legitimate on the basis of those facts. The court found sufficient evidence to support a finding of legitimation after the date the father's divorce became final in the rental of the apartment. *Id.* at 868-869, 39 Cal. Rptr. at 169-170. The court stated that the natural father did everything to legitimize his son that could be expected of one similarly situated, and it regarded his conduct as establishing the apartment as his home and the child and his mother as his 'family.' *Id.* at 870, 39 Cal. Rptr. at 170.
69 *Id.* at 240, 37 Cal. Rptr. at 881. In reaching this decision, the court relied on Estate of DeLaveaga, 142 Cal. 158, 75 P. 790 (1904), which had criticized the Blythe v. Ayres, 96 Cal. 532, 31 P. 915 (1892), decision. The DeLaveaga's court's strict construction of the legitimation statute seemed to rest on the idea that to fail to make distinctions between legitimate and illegitimate children would encourage immorality. Estate of DeLaveaga, 142 Cal. 158, 170, 75 P. 790, 795 (1904). Estate of Lund, 26 Cal. 2d 472, 480-82, 159 P.2d 643, 648 (1942), sharply criticized this thinking, and again stated that the statute should be liberally construed.
70 The natural father in Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (4th Dist. 1964), desired to marry the mother, had offered to pay the expenses of birth and had publicly acknowledged the child as his own. However, because the mother objected to legitimation by the natural father, the court permitted the child's adoption without his consent.

70 Prior to the Uniform Parentage Act, the mother of an illegitimate child was entitled to its custody. Cal. Civ. Code § 200 (West 1954).
mother must consent to the child’s legitimation.\textsuperscript{71} Guardianship of Truschke\textsuperscript{72} followed the strict interpretation of the Adoption of Irby\textsuperscript{73} case. The court rejected the father’s argument that the legitimation statute did not require that he physically take the child into his home.\textsuperscript{74} The court stated that the mother had full control of the child, including the power to prevent legitimation by preventing contact between father and child.\textsuperscript{75}

The California Supreme Court’s most recent discussion of legitimation appears in In re Richard M.,\textsuperscript{76} in which the court sustained a finding that the natural father had legitimated his son because he had received the child into his home for temporary visits. The court expressly rejected the mother’s argument that legitimation required her consent and voluntary relinquishment of the child.\textsuperscript{77} The court noted that California courts had almost

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  \item 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1st Dist. 1965).
  \item 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (4th Dist. 1964).
  \item Guardianship of Truschke, 237 Cal. App. 2d 75, 79, 46 Cal. Rptr. 601, (1st Dist. 1965). The parents did not live together, but the father frequently visited the mother during her pregnancy, and he saw the child prior to her placement for adoption. \textit{Id.} at 77, 46 Cal. Rptr. at 602-03. The natural father’s argument that he had legitimated his child appeared viable based on Blythe v. Ayres, 96 Cal. 532, 31 P. 915 (1892), and Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (2d Dist. 1964).
  \item Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1st Dist. 1965). The courts which strictly construed the legitimation statute were concerned that permitting a natural father to legitimate a child where the mother relinquished the child for adoption would give the father a right of first refusal and interfere with the adoption process. See Adoption of Irby, 226 Cal. App. 2d 238, 241, 37 Cal. Rptr. 879, 882 (4th Dist. 1964).
  \item 14 Cal. 3d 783, 537 P. 2d 363, 122 Cal. Rptr. 531 (1975). In this case a natural father obtained physical custody of the child over the objection of the mother. The father and mother had never married, but the father had always acknowledged the child as his own. For a month following the birth, mother and child stayed with the father in his home. The mother and child later left the home, but with the mother’s consent the father continued to visit the child in his own home and the mother’s home. After one of these visits, the father decided to keep the child because of concern about the care he was receiving in his mother’s home.
  \item The court noted that the statute contained no requirement that the mother consent to legitimation, and that such a barrier would be contrary to the policy of law favoring legitimation. \textit{Id.} at 796, 537 P. 2d at 371, 122 Cal. Rptr. at 539. The policy of law favoring legitimation represents a shift from the view that the best prevention of illegitimacy is to deny the children inheritance, support or recognition. The present view is that it is unfair to visit the sins of the parents on the child and that imposing support obligations is a more effective deterrent. See Estate of Lund, 26 Cal. 2d 472, 279-80, 169 P.2d 643, 648-69 (1945).
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always construed the legitimation statute liberally because of the disfavored status of non-marital children. In dicta, the court suggested that constructive reception would satisfy the statute's requirement that a natural father receive the child into his family, as long as the natural father did all that he could under the circumstances to acknowledge and receive his child. 

Cases dealing with the concept of legitimation after In re Richard M. have indicated that courts are not willing to apply the constructive reception theory found in In re Richard M.'s dicta to situations in which the natural father has not had physical contact with his child. In re Reyna and Adoption of Marie R.

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78 In re Richard M., 14 Cal. 3d 783, 793, 537 P.2d 363, 369, 122 Cal. Rptr. 531, 537 (1975). The court noted that the only cases strictly construing the legitimation statute were those in which the child would have been legitimated regardless of the court's decision on the issue of legitimation, as where third parties would adopt the child.

79 Id. at 794-95, 537 P.2d at 370-71, 122 Cal. Rptr. at 537. As an example of constructive reception, the Court referred to Estate of Maxey, 257 Cal. App. 2d 391, 64 Cal. Rptr. 837 (2d Dist. 1968), where the natural father had visited the mother and child in the mother's home. The Court also suggested that public and proud acknowledgements of paternity would suffice to meet the requirements of CAL. CIV. CODE § 230 (West 1954) in cases where the natural father had no settled home in which to receive his child. In re Richard M., 14 Cal. 3d at 797, 537 P.2d at 371, 122 Cal. Rptr. at 539.

80 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (5th Dist. 1976), hearing denied April 22, 1976. In In re Reyna, a mother relinquished her son to a county adoption agency when he was four days old. The child was placed with foster parents for two weeks, and then with a couple who sought to adopt him. Prior to the birth of the child, the father asked the mother to marry him, but she rebuffed him and left the area. The father learned of her whereabouts and visited, but again she refused his offer of marriage. When the child was one month old, the pre-adoptive parents began adoption proceedings. Upon learning this, the father brought a habeas corpus action to halt the adoption and secure custody for himself. The trial court concluded that the father had not legitimated his son. Thus, he was not entitled to custody. The appellate court held that a father need not legitimate his child before being awarded custody. However, because the legitimation question was important to the issue of whether or not his consent was required for adoption, the court decided that issue as well.

81 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (2d Dist. 1978). This case dealt with the issue of whether a man was a presumed father under CAL. CIV. CODE § 7004(a) (West Cum. Supp. 1979). The case involved an unusual and unfortunate set of circumstances. A man believing himself to be the father filed an action to have a parent-child relationship declared prior to the birth of the child. See CAL. CIV. CODE § 7006 (West Cum. Supp. 1979). Apparently, the mother had relationships with two men at the time of conception. Three days prior to the child's birth, she married the second man. They immediately placed the child with another couple for adoption. The court concluded that the man seeking to block the adoption was not a presumed father because he had never seen the
rejected the argument that public acknowledgements of paternity were sufficient to accomplish legitimation where the mother had frustrated the natural father's attempts to receive the child into his home. In both cases the natural father sought to block the relinquishment of his child for adoption without his consent. If the natural father had legitimated the child, his consent to the proposed adoption would have been required.\textsuperscript{62} In both cases, the court found that because there had never been physical contact between the natural father and child, there had been no legitimation.\textsuperscript{63}

Both \textit{In re Reyna} and \textit{Adoption of Marie R.} are factually distinguishable from \textit{In re Richard M.} \textit{In re Richard M.} involved a situation in which the natural father was the only party willing to legitimize the child.\textsuperscript{64} Thus, there was a need to apply the policy of law favoring legitimation to ensure that the child would have rights of inheritance and support comparable to the rights of a marital child.\textsuperscript{65} Neither \textit{In re Reyna} nor \textit{Adoption of Marie R.} required the court to liberally construe the statutory language to ensure the child's legitimation by the natural father because in both cases there was a couple waiting to adopt the child.\textsuperscript{66}


\textsuperscript{63} In re Reyna, 55 Cal. App. 3d 288, 300, 126 Cal. Rptr. 138, 146 (5th Dist. 1976); Adoption of Marie R., 79 Cal. App. 3d 624, 630, 145 Cal. Rptr. 122, 126 (2d Dist. 1978), finding that the natural father was not a presumed father.

\textsuperscript{64} The law in effect at the time of \textit{In re Richard M.}, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975), considered a child born outside marriage as "illegitimate" unless adopted by third parties or legitimated by the natural father.

\textsuperscript{65} For a discussion of the policy of law favoring legitimation see note 77 \textit{supra}. California law had long required natural fathers to support their non-marital children. CAL. CIV. CODE § 196a (West Cum. Supp. 1979). Prior to the \textit{UNIFORM PARENTAGE ACT}, the natural father had to acknowledge himself in writing as the father, marry the mother, or legitimate his non-marital child to inherit from him. See CAL. PROB. CODE § 255 (West Cum. Supp. 1979). See also \textit{In re Garcia's Estate}, 34 Cal. 2d 419, 210 P.2d 841 (1949), holding that legitimation under CAL. CIV. CODE § 230 (West 1954) qualified the non-marital child to inherit from the natural father.

\textsuperscript{66} In re Reyna, 55 Cal. App. 3d 288, 292-93, 126 Cal. Rptr. 138, 141 (5th Dist. 1976). Adoption of Marie R., 79 Cal. App. 3d 624, 629, 145 Cal. Rptr. 122, 123 (2d Dist. 1978), suggested that legitimation was an outdated concept. Such a sweeping comment seems unwarranted and inconsistent with the court's reasoning. The purpose of legitimation statutes was to give non-marital children parents so that their status would be equal to that of marital children. This is also

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adoptive parents assumed the position of biological parents and became the parties to whom the children could look for support and an inheritance.\textsuperscript{87}

*In re Reyna* and *Adoption of Marie R.* are also distinguishable from *In re Richard M.* on the basis of the amount of contact the natural father had maintained with his child.\textsuperscript{88} The dicta in *In re Richard M.* evinces a liberal approach to interpretation of the requirement that a natural father receive the child into his family.\textsuperscript{89} Because the child had visited the father many times, however, there was no need to decide the limits of constructive reception.\textsuperscript{90} The court expressly overruled cases requiring the mother’s consent to legitimation but also pointed out that in two of the cases so holding the mother had prevented any contact with the child.\textsuperscript{91} It suggested thereby that the courts could have sustained their finding that the natural fathers had not legitimated their children on that basis alone. Thus, in *In re Reyna* and *Adoption of Marie R.* the appellate court held that in order for a natural father to legitimate his child or be considered a presumed father, there must be some relationship other than purely biological.\textsuperscript{92}

\begin{footnotes}
\textsuperscript{87} Cal. Civ. Code §§ 228-229 (West 1954), set forth at notes 158-159 infra, discuss the relationship between the adoptive parents and the child.
\textsuperscript{88} See note 76 supra.
\textsuperscript{89} See note 79 and the accompanying text supra.
\textsuperscript{90} In *re Richard M.*, 14 Cal. 3d 783, 797, 537 P.2d 363, 370, 122 Cal. Rptr. 531, 539 (1975). The court noted that Blythe v. Ayres, 96 Cal. 532, 31 P. 315 (1892), holding that letter writing across a continent was sufficient for legitimation, was the most extreme case. See text accompanying notes 61-77 supra. The Court also noted that Estate of DeLaveaga, 142 Cal. 158, 75 P. 790 (1904), criticized Blythe v. Ayres. The Court failed, however, to note that Estate of Lund, 26 Cal. 2d 472, 159 P.2d 643 (1942) criticized Estate of DeLaveaga. See note 69 supra.
\textsuperscript{91} In *re Richard M.*, 14 Cal. 3d 783, 537 P. 2d 363, 122 Cal. Rptr. 531 (1975), the mother based her contention that her consent to legitimation was required on Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1st Dist. 1965), and Adoption of Irby, 226 Cal. App. 2d 298, 37 Cal. Rptr. 879 (4th Dist. 1964). In Truschke, the father saw the child once. In *Irby*, the father never saw the child. In both cases, the children were placed for adoption immediately after birth.
\textsuperscript{92} In *re Reyna*, 55 Cal. App. 3d 288, 300, 126 Cal. Rptr. 138, 143 (5th Cir. 1976). The court distinguished Blythe v. Ayres, 96 Cal. 532, 31 P. 315 (1892), as a situation in which procurement of an otherwise unobtainable benefit de-
In re Richard M. clarified the question of legitimation to the extent that it rejected a requirement that the mother consent to legitimation. It also called for liberal interpretation of the requirement that a natural father receive his child into his home.\textsuperscript{93} It did not, however, clearly define the actual degree of physical contact required between a natural father and his child. The resolution of this issue in future cases should turn on the importance to the child of having a father who meets the statutory requirements. In situations such as In re Reyna and Adoption of Marie R., the adoptive parents will satisfy the child’s need for parents.\textsuperscript{94} Thus, there is no need, from the child’s viewpoint, to construe the statute’s receipt requirement so liberally as to include a natural father who has never had meaningful physical contact with his child.\textsuperscript{95} Where a child might benefit from a finding that the natural father has conformed to the statutory requirements, a more liberal approach is appropriate and consistent with In re Richard M.\textsuperscript{96} In this situation, public acknowledge-

\textsuperscript{93} 14 Cal. 3d 783, 797, 537 P.2d 363, 371, 122 Cal. Rptr. 531, 539 (1975).

\textsuperscript{94} Since the passage of the Uniform Parentage Act natural fathers have a right to notice of a proposed adoption and the right to seek custody at that time. Cal. Civ. Code \textsection{} 7017(d) (West Cum. Supp. 1979). Thus, situations in which the mother relinquishes the child to adoptive parents without the natural father’s knowledge, as occurred in In re Reyna, 55 Cal. App. 3d 238, 126 Cal. Rptr. 138 (5th Dist. 1976), should no longer occur.

The presumed father’s consent to adoption is required. Cal. Civ. Code \textsection{} 224 (West Cum. Supp. 1979). Conceivably, a natural father who qualified as a presumed father because he received the child into his home could withhold his consent to an adoption even though he did not want custody. This would leave the child in unsatisfactory temporary placements. Because this is a situation in which there is no benefit to the child in having a presumed father, courts should require strict conformance to the statutory language. This problem in relation to the natural father who has received visitation privileges is discussed at notes 196-219 and the accompanying text infra.

\textsuperscript{95} Meaningful physical contact in this situation should mean that the natural father, mother and child lived together in a de facto family situation at one time. In some cases, extensive visitation by the natural father would satisfy the requirement of meaningful physical contact. For example, if the mother relinquishes the child to another for adoption with the primary intent of obstructing the natural father’s attempt to visit the child, the equities of the situation may require that the natural father be deemed to be a presumed father. In no case should such a father be entitled to veto an adoption if he does not desire custody of the child. See text accompanying notes 196-203 infra.

\textsuperscript{96} An example of this type of situation is the child’s right to inherit from the natural father’s estate. This requires written acknowledgement of the child or a father-child relationship presumed under Cal. Civ. Code \textsection{} 7004(a) (West Cum.
ment of the child together with a minimal amount of physical contact should suffice, particularly where the natural father made sincere attempts to communicate with or support the child. In either situation, the language of the statute and In re Richard M. require some contact between a natural father and his child.

The concept of legitimation remains important because the Uniform Parentage Act retains the language of the prior legitimation statute as a presumption of parentage. As the previous discussion illustrates, a mother who prevents the development of a father-child relationship can prevent the natural father from receiving the child into his home and becoming a presumed father. Such action in turn impacts the natural father’s rights respecting custody, visitation and adoption.

III. Custody

The Uniform Parentage Act provides natural fathers who seek custody of their non-marital children a greater probability of success than ever before. This section discusses the rights of a natural father in two situations: where the mother has relinquished the child for adoption and where the mother has retained custody of the child. Custody decisions are among the most difficult that judges must make. It is important to recognize that the claims which a natural father may assert are not always compatible with the child’s needs. Thus, the discussion of natural fathers’ rights in these two situations gives close attention to the interests of the child.

A. The Natural Father’s Right To Custody Where The Mother Has Relinquished The Child For Adoption

The Uniform Parentage Act requires that a natural father receive notice of a proposed adoption of his non-marital child when-

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78 See text accompanying note 55 supra.


100 Judges describe custody dispositions as the most sensitive, difficult and important decisions that trial courts must make. Porter & Walsh, The Evolution of California’s Child Custody Laws: A Question of Statutory Interpretation, 7 Sw. U. L. Rev. 1 (1975).
ever possible.\textsuperscript{101} He may assert a right to custody when receiving such notice.\textsuperscript{102} A recent example of this procedure is the \textit{In re Tricia M.}\textsuperscript{103} case, which involved an action brought by a County Welfare department to terminate a natural father’s parental rights and to obtain an order that the mother’s consent to adoption was sufficient.\textsuperscript{104} The natural father cross-complained for custody. The trial court held that the adoption did not require the natural father’s consent because he was not a presumed father.\textsuperscript{105} The trial court foreclosed the natural father from offering evidence on the issue of custody for the same reason.\textsuperscript{106} The appellate court overturned this decision, stating that the natural father did not have to be a presumed father to obtain custody.\textsuperscript{107} The court reached this conclusion by interpreting the statutory language which allows a court to determine parentage and custody in either order as permitting it to award custody to a natural father without deciding if he is a presumed father.\textsuperscript{108} The decision as to custody is to accord with the best interests of the child.\textsuperscript{109}

The procedure the \textit{In re Tricia M.} case provides is important

\textsuperscript{101} See note 102 infra.

\textsuperscript{102} \textsc{Cal. Civi. Code} § 7017(a)(1) (West Cum. Supp. 1979) requires that a presumed father receive notice of a proposed adoption. \textsc{Cal. Civi. Code} § 7017(c) (West Cum. Supp. 1979), discussed at note 189 infra, requires the adoption agency to attempt to locate the natural father of a child relinquished for adoption who has no presumed father.

\textsuperscript{103} 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977), \textit{hearing denied} December 15, 1977, \textit{cert. denied} 435 U.S. 996 (1978). The mother and father knew each other during the father’s stay at a military base. After discharge, the father returned to his mother’s home in Pennsylvania. Although he always acknowledged paternity, he had no desire to marry the mother. He corresponded with her, sending the child gifts and clothing. At one point he even obtained a place for them to stay near his mother’s home. When he learned of the proposed relinquishment, he obtained a lawyer to seek custody. The trial court found that the natural father was not a presumed father.

\textsuperscript{104} \textsc{Cal. Civi. Code} § 7017(b), 7017(d) (West Cum. Supp. 1979).

\textsuperscript{105} In \textit{re Tricia M.}, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554, 558 (4th Dist. 1977).

\textsuperscript{106} \textit{Id.} at 136, 141 Cal. Rptr. at 561.

\textsuperscript{107} \textit{Id.} at 134, 141 Cal. Rptr. at 560-61.

\textsuperscript{108} \textit{Id.} at 133-34, 141 Cal. Rptr. at 559-60. The statutory language the court was interpreting appears in \textsc{Cal. Civi. Code} § 7017(d) (West Cum. Supp. 1979), set forth at note 190 infra. It is clear that the drafters of the Uniform Act intended to permit courts to address custody before reaching a conclusion on parentage. However, they anticipated that courts would use this language to terminate potential paternal rights in cases where the man asserting a right to custody was clearly unfit, rather than to award custody to a man who was not a presumed father. See \textsc{Handbook} supra note 16, at 33 (1973).

\textsuperscript{109} \textit{Id.} at 137, 141 Cal. Rptr. at 562.
to natural fathers whose relationships with their non-marital children have been frustrated by uncooperative mothers.\textsuperscript{110} The adoption of a non-marital child requires the consent of the mother and the presumed father.\textsuperscript{111} To become a presumed father a natural father must marry the mother (or attempt to marry her) or receive the child into his home.\textsuperscript{112} The procedure authorized by \textit{In re Tricia M.} permits the court to award a natural father custody, regardless of whether he is a presumed father. This allows him to become a presumed father because once he takes the child into his home he has met the statute's requirement that he receive the child into his home.\textsuperscript{113} Thereafter, his consent to adoption is required.\textsuperscript{114} With a provision for obtaining custody without becoming a presumed father, an uncooperative mother will no longer be able to control the right of the natural father to obtain custody of the non-marital child she relinquished for adoption.

\textit{In re Tricia M.} there was no uncertainty as to the natural father's identity.\textsuperscript{115} This is not true in all cases, however. It is possible that a man who is not a child's biological father could receive notice of a proposed adoption and appear seeking custody of the child.\textsuperscript{116} The question of actual paternity\textsuperscript{117} is important for

\textsuperscript{110} The court expressly recognized that uncooperative mothers foreclosed many natural fathers' efforts to maintain contact with their non-marital children. \textit{Id.} at 134, 141 Cal. Rptr. at 560.


\textsuperscript{114} \textit{In re Tricia M.}, 74 Cal. App. 3d 125, 134, 141 Cal. Rptr. 554, 560 (4th Dist. 1977). \textit{In re Reyna}, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (4th Dist. 1977), reached a similar result prior to the passage of the \textsc{Uniform Parentage Act}. \textsc{Cal. Civ. Code} §§ 7000-7018 (West Cum. Supp. 1979). The court decided that custody disputes must be resolved on the basis of the best interests of the child standard, irrespective of prior legitimation. The issue of legitimation was relevant only to the issue of whether the natural father's consent to adoption was required.

\textsuperscript{115} In \textit{In re Tricia M.}, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554, (4th Dist. 1977), the court noted that both parties agreed that the man seeking custody was the child's biological father. Consequently, there was no need to resort to any of the presumptions of \textsc{Cal. Civ. Code} § 7004(a) (West Cum. Supp. 1979) to establish paternity. Since there was no doubt about paternity, the court did not have to deal with the question of an award of custody to a non-parent.

\textsuperscript{116} The adoption agency must notify each man identified as a possible father. \textsc{Cal. Civ. Code} § 7017(d) (West Cum. Supp. 1979).

\textsuperscript{117} The term paternity refers to a determination of biological fatherhood. It is now possible to make this determination with a high degree of certainty. Comment, \textit{California Evidence Code} § 621, this issue.
two reasons. First, courts may be unwilling to use the *In re Tricia M.* procedure where the child's paternity is uncertain. To support its interpretation of the statutory language, the *In re Tricia M.* court relied on a law review article which proposed only that courts should award custody to natural fathers who could prove paternity and fitness thereby allowing them to qualify as presumed fathers.\(^{118}\) If there is uncertainty as to a child's paternity, a court may address the issue of parentage first rather than the issue of custody.\(^{119}\) If the court finds that the natural father is not a presumed father, it may hold that he has no present right to custody.\(^{120}\)

The question of paternity is also important because the statute\(^{121}\) governing custody gives a child's parent\(^{122}\) preference in obtaining custody. The award of custody to a non-parent over a parent requires the court to make a specific finding that an award to the parent would be detrimental to the child.\(^{123}\) The California Supreme Court has taken a conservative approach to awards of custody to non-parents over parents. In *In re B.G.*,\(^{124}\) the court noted that the legislature did not intend to upset the judicial


\(^{119}\) This happened to the man seeking to stop the adoption in Adoption of Marie R., 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (2d Dist. 1978). See note 81 *supra*. Paternity tests were inconclusive and he was not a presumed father at the time of the petition. The adoption proceeded on the consent of the mother and a man she married three days before the child's birth.

\(^{120}\) This conclusion is consistent with the language of *Cal. Civ. Code* § 197 (West Cum. Supp. 1979), set forth at note 58 *supra*, which states that the mother and presumed father are entitled to the custody of a minor child. However, it is inconsistent with the equalitarian language of the statute, *Cal. Civ. Code* §§ 7001-7002 (West Cum. Supp. 1979), set forth at note 157 *infra*, to deny a natural father custody when the mother relinquishes the child for adoption.

\(^{121}\) *Cal. Civ. Code* § 4600 (West Cum. Supp. 1979). This statute requires that the court give preference, in descending order to either parent according to the best interests of the child, to the persons with whom the child has been living in a stable environment and finally, to any other person deemed capable of providing proper care and guidance for the child.


practice of awarding custody to non-parents over parents only in unusual and extreme circumstances. Thus, if a natural father desires custody of his non-marital child where the mother has relinquished the child, he should first establish his paternity in order to receive the benefits of this parental preference rule. This rule does not mean that he is a fortiori entitled to custody, but it should require a court to examine his claim for custody with greater scrutiny and award custody to non-parents only where it has made the requisite finding that an award to the father would be detrimental to the child.

In re Tricia M. and In re Reyna make it clear that the best interests of the child standard is applicable in custody disputes, without regard for whether the natural father is a presumed father. In the case of a father asserting his right to custody where the mother has relinquished control, the court faces a choice of placing the child with an interested parent or returning the child to await an adoption for an unknown period of time. Absent a showing that an award to the father would be detrimental to the child, courts should award the natural father custody.

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125 Id. at 698, 523 P. 2d at 257, 114 Cal. Rptr. at 457. The court stated that the trial court was unjustified in thinking that the best interests of the child standard permitted a weighing of the various alternatives for the children’s placement and that a slight tipping in favor of the foster parents seeking custody would warrant a denial of custody to the mother. Id. at 699, 523 P. 2d at 258, 114 Cal. Rptr. at 458.

126 See note 121 supra.


129 For a discussion of the best interests of the child concept see J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973) [hereinafter cited as Goldstein, Freud, & Solnit]. The best interests of the child standard gives judges broad discretion in custody dispositions. Judges can forget that children have unique concepts of time and self that make them particularly vulnerable to changes in their emotional environment. Id. at 40-49. Essential to the proper application of the best interests of the child standard is an understanding that courts have a limited capacity to predict the future. As the court in In re Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967), stated: “A juvenile court may possess no magic wand to create a replacement for a home which falls short of ideal.” For a discussion of the limitations of the best interests of the child standard in child placements resulting from an inability to predict a child’s success in alternative environments see Mnookin, Foster Care—In Whose Best Interest?, 43 Harv. Ed. Rev. 599 (1973).

130 In California, 60% of the children relinquished for adoption spend up to two years under agency care before permanent placement. California Dep’t of Health, Aid for the Adoption of Children (AAC) Relinquishment Adoptions (1977).

131 Goldstein, Freud, and Solnit, supra note 129, at 99, would consider the
B. The Natural Father's Right To Seek Custody From The Mother

The law applicable to custody disputes between a mother and natural father where the mother has retained custody and control of the child is less clear than that applicable to situations where she has relinquished control. The primary problem in this area is the issue of when a natural father should be permitted to assert a claim for custody against a custodial mother. This problem has two distinct aspects. One relates to whether there should be a statute of limitations on the natural father's right to claim parental privileges. The other relates to the status of the natural father who obtains visitation privileges. The proper resolution of these questions requires that the interests of the child be paramount in all cases.

According to the Uniform Parentage Act as enacted in California, a natural father has standing (at least where there is no presumed father) to bring an action at any time to have a parent-child relationship declared and to receive custody as part of the court's order.\(^{132}\) The National Uniform Act states that no action to declare a parent-child relationship may be brought later than three years after the birth of the child.\(^{133}\) Though the Legislature

\(^{132}\) If the child has a presumed father, only the child, the mother and the presumed father have standing to seek the declaration of a parent-child relationship presumed in those situations where the natural father has married or attempted to marry the mother. CAL. CIV. CODE § 7006(a) (West Cum. Supp. 1979). However, any interested party may bring an action to determine a father-child relationship under the presumption relating to the situation in which the man received the child into his home as his natural child. CAL. CIV. CODE § 7006(b) (West Cum. Supp. 1979). If the child has no presumed father, a man alleging himself to be the natural father has standing to seek the declaration of a parent-child relationship. CAL. CIV. CODE § 7006 (West Cum. Supp. 1979). The court can award custody when it declares a father-child relationship. CAL. CIV. CODE § 7010(c) (West Cum. Supp. 1979).

\(^{133}\) The statute of limitations applies only to children who have no presumed father. HANDBOOK, supra note 16, at 343-344. The authors of the National Uniform Act did not reveal their reasoning, but it is likely that they considered it unnecessary to extend the restriction to cases where the child has a presumed father. According to the Act, a man who merely alleges he is the child's father does not have standing to seek the declaration of a parent-child relationship as to a child who has a presumed father. CAL. CIV. CODE § 7006(a) (West Cum. Supp. 1979).
rejected this provision, such a statute of limitations is required to protect the child’s needs.

Custody disputes involving a non-marital child require prompt and relatively permanent dispositions in order to preserve the child’s and the custodial parent’s emotional well being. Psychologists recognize that frequent litigation over custody issues is an emotional hardship for all the parties involved. More importantly, there is a substantial body of evidence and opinion which suggests that interruption of a child’s attachment to a caretaker is a developmental hazard. The risks are greatest for young children, but older children suffer emotional hardships as well.

134 Apparently the State Bar Committee on Family Law thought this limitation was unnecessary and the California Legislature followed their suggestion. See Comment, supra note 17, at 206. The legislature might also have rejected the section because of its confusing second part. The section also states that an action can be brought on behalf of the child to declare a parent-child relationship until three years after the age of majority. Handbook, supra note 16, at 343. It provides, in effect, a twenty-one year, rather than a three year, statute of limitations because California defines the age of majority as eighteen. Cal. Civ. Code § 25.1 (West Cum. Supp. 1979). The drafters added the second section because they did not want to interfere with the child’s substantive right to a legal relationship with the father. The drafters could have achieved the same result by simply stating that a man asserting himself to be the child’s father has no standing to seek the declaration of a parent-child relationship for the purpose of obtaining custody for himself later than three years after the child’s birth.


136 See Goldstein, Freud & Solnit, supra note 129, at 31-34. Clinicians have done substantial work among children of divorcing parents. The loss of a parent in the divorce situation is quite analogous to the loss the child would suffer if a court awarded custody of a child who had always lived with the mother to the natural father. Psychologists observe that young children have tremendous difficulty understanding divorce and coping with the changes it brings. Kelly & Wallerstein, Brief Interventions with Children in Divorcing Families, 47 Am. J. Orthopsych. 23, 25 (1977) [hereinafter cited as Kelly]. Fear of abandonment, guilt and depression are common problems. Derdeyn, Children in Divorce: Intervention in the Phase of Separation, 60 Pediatrics 20, 21-22 (1977).
For young children, the interruption brings a painful sense of abandonment and can mean the loss of important social skills. Increases in depression and antisocial behavior are observed among older children who have been separated from a parent. A statute of limitations can avoid possible removal of a child from the custodial mother’s home several years after the child’s birth and the hazards accompanying such removal.

Concern for the child’s need for stability also requires a restriction of the rights of a natural father who requests only visitation in his initial action to declare a parent-child relationship. Under the statute as presently written, a natural father who previously obtained visitation rights can persuasively argue that receiving a child into his home for visits makes him a presumed father. He can further argue that as a presumed father he has an equal voice in the control and care of the child. If visitation rights could automatically confer the status of a presumed father, he could return to court several years later asserting that he had a right to custody. Because of the developmental hazards disruption in custody poses for the child, a father who does not seek custody in his initial request for the declaration of a parent-child relationship should not have standing to assert the claim against a fit custodial mother at a later time.

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137 Kelly, supra note 136, at 27 states that phobias, separation anxieties, and other regressive symptoms appear in many preschool children for the first time after parental separation.

138 Kelly, supra note 136, at 28. Older children sometimes experience learning difficulties for the first time after separation from a parent.

139 The statute governing custody, Cal. Civ. Code § 4600 (West Cum. Supp. 1979) requires that courts give preference to the person who has performed the caretaking role in a custody dispute. However, the concern with permitting a man who alleges he is the natural father to bring an action to declare the existence of a parent-child relationship lies as much with the detrimental effect of the litigation itself as with the impact a change in custody could have on the child. See note 135 supra.


141 Cal. Civ. Code § 197 (West Cum. Supp. 1979), set forth at note 58 supra, states that the mother and the presumed father are entitled to a child’s custody.

142 See text accompanying notes 132-137 infra.

143 The use of the best interests of the child standard in cases involving neglected and abused children has received substantial criticism. Wald, State Intervention on Behalf of ‘Neglected’ Children: Standards for Removal of Children
The conclusion that a natural father should not have an absolute right to claim custody of his non-marital child at any time is not premised on outdated sexual stereotypes. A natural father who seeks custody early should have the benefit of judicial inquiry that is free of bias against fathers. Where a natural father asserts a claim to custody of a non-marital child which the mother has relinquished for adoption, he should have preference over all others. But in the case where the natural father sought only visitation privileges, there is no compelling reason to permit him to contest the child's custody later unless the mother relinquishes or abuses the child. Each of these conclusions assumes that the child's needs for continuity and stability are paramount. They are further premised on the realization that neither judges nor social scientists can accurately predict a child's response to a new environment. Custody decisions should require accom-

from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976); Mnookin, Foster Care — In Whose Best Interest?, 43 Harv. Ed. Rev. 599, 628 (1973). Professor Mnookin proposes a legal standard for removal of a child from the home that could apply to situations where the mother has always retained control of the child. He proposes that the child should be removed only when that child cannot be protected within the home. Id. at 631. Conceivably, instead of assuming that a natural father who had obtained visitation is a presumed father with a right to custody equal to that of the mother's, the natural father could be required to show by affidavits that the child was threatened with immediate harm in order to contest the mother's custody.


See notes 127-131 and the accompanying text supra.

Many writers point out the need for more empirical data on the impact of custody dispositions on children. See generally, Ellsworth & Levy, supra note 135, and Derdeyn, supra note 136, at 171. Courts sometimes recognize their inability to make custody decisions based on how a child might react to a new environment. See Adoption of Michelle Lee T., 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1st Dist. 1975), where the court refused to remove a child from the home of adoptive parents who were considered by the county welfare department to be too old to care for a child; In re Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967), discussed at note 129 supra.
moderation of the parents’ rights and the needs of the child. The Uniform Parentage Act, with the proposed changes, provides a structure in which to strike an equitable balance.

IV. VISITATION

Visitation is an alternative available to an interested father who cannot get or does not want custody. Traditionally, visitation was almost as difficult to obtain as custody. In a majority of states, a natural father could not obtain any rights to visitation over the objection of the mother. California was among the states which awarded visitation privileges to natural fathers in some cases. The Uniform Parentage Act now provides a natural father procedural mechanisms for obtaining visitation privileges. There are indications that California courts are willing to use

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In states that permitted visitation, the right was often conditioned on the payment of support. In fact, one of the reasons courts awarded visitation privileges was the right of the natural father to see that support payments were properly spent. See Baker v. Baker, 81 N.J. Eq. 135, 85 A. 816 (1913).

149 Strong v. Owens, 91 Cal. App. 2d 446, 205 P.2d 48 (2d Dist. 1949), permitted visitation by a natural father despite the custodial mother's objection. Adoption of Pierce, 5 Cal. App. 3d 335, 85 Cal. Rptr. 104 (2d Dist. 1970), held that the natural father could continue to exercise his visitation privileges during the pendency of a proposed adoption of the child. The natural father's privileges were carefully tailored to preserve the mother's exclusive right to custody and control. See Cal. Civ. Code § 200 (West 1954), set forth at note 46 supra. The initial award of privileges prohibited visits in the natural father's home of office. Adoption of Pierce, 15 Cal. App. 3d 244, 247, 93 Cal. Rptr. 171, 173 (2d Dist. 1971). The court later modified this to permit visits anywhere and to allow a nurse to be present in place of the mother. Id. In a subsequent adoption action brought by the step-father, the court held the natural father had not legitimated the child and his consent to adoption was not required. He lost his visitation rights with the adoption.
these procedures to award privileges over the objection of the mother. An important issue which will require future resolution is the question of whether courts should allow a natural father to continue visitation after the adoption of his non-marital child. Consideration of the child's needs indicate that in some cases visitation should continue after adoption.

A. Visitation When One Parent Has Custody

The Uniform Parentage Act permits a natural father to obtain visitation privileges as a part of the court's order in an action to declare a parent-child relationship. Griffith v. Gibson, a recent Fourth District Court of Appeal decision, provides the most recent judicial interpretation of these provisions of the Act. The mother in that case argued that the natural father had no right to visitation because he was not a presumed father. She based her argument on the statutes relating to a parent's right to custody, which state that only a presumed father is entitled to custody and only a presumed father's consent to adoption is required.

The Griffith court expressly rejected the mother's argument. The court found that the purpose of the Uniform Parentage Act was to provide equality for all children in the parent-child relationship, without regard for the marital status of the parents.

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150 See text accompanying notes 152-159 infra.
151 See text accompanying notes 160-181 infra.
153 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (4th Dist. 1977), hearing denied, November 17, 1977. The natural father found visiting difficult because of a lack of cooperation on the mother's part and because his military duties kept him away. He was not a presumed father. The mother argued that this was a prerequisite to the declaration of a parent-child relationship and an award of visitation rights.
154 Id. at 471, 142 Cal. Rptr. at 178.

7001. As used in this part, 'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child
The court considered the procedure for obtaining visitation as independent of those sections relating to custody and adoption which the mother cited.158 Thus, a natural father who brings an action to establish a parent-child relationship is entitled to visitation if that is in the best interests of the child. According to Griffith v. Gibson, a mother who objects to visitation by the natural father bears the burden of proving that visitation by the natural father is harmful to the child.159

B. Visitation After Adoption

The Uniform Parentage Act does not state whether a natural father who receives visitation in an action to declare a parent-child relationship is a presumed father.160 Yet the resolution of this issue is important to a natural father who has obtained visitation rights. If he is not deemed to be a presumed father, adoption of the child could occur at a later date without his consent,161 and his visitation privileges could end with the adoption.

Typically, the adoption of a child terminates the relationship with the biological parent.162 The current statutory scheme pro-

158 Id. at 472-73, 142 Cal. Rptr. at 181. The court noted that to interpret Cal. Civ. Code § 197 (West Cum. Supp. 1979) to prohibit the exercise of visitation rights by a natural father who was not a presumed father would create an inequality in parental rights based on marital status and sex and be inconsistent with Cal. Civ. Code § 7001-7002 (West Cum. Supp. 1979). Id. at 474, 142 Cal. Rptr. at 181.

159 Id. at 475, 142 Cal. Rptr. at 182.

160 The Act states only that the establishment of a parent-child relationship is determinative for all purposes except criminal liability for support. Cal. Civ. Code § 7010(c) (West Cum. Supp. 1979). The natural father could make a cogent argument that he is a presumed father because taking the child into his home seems to satisfy the requirement of receiving the child into his home. See note 55 supra. This issue is discussed in the context of custody at the text accompanying notes 143-146 supra, and in the adoption context at text accompanying notes 196-203 infra.


162 The Anglo-Saxon adoption model has been described as intolerant “of any kind of semi-adopted status”. M. Benet, The Politics of Adoption 79 (1976): “If adoption is to exist at all in a society where possession, ownership, and materialism hold sway’it must be made absolutely total and watertight. This has been the nature of the laws in England and the United States, and their colonies throughout this century.” Id. Another reason for the conclusiveness of
vides that after adoption the child and adoptive parents shall have the legal relationships of parent and child. Adoption relieves the natural parents of all parental duties toward and of all rights in their child. Though an absolute denial of visitation privileges may sometimes be necessary, an absolute bar to the continuance of visitation after adoption may not always serve the child's best interests. This is particularly true where a child has formed a close attachment to the visiting parent.

If a child has a close attachment to the natural father, the child will likely feel the painful sense of abandonment and loss that children of divorce experience. This experience could have the repercussions for development that are observed in children of divorced parents. Researchers find that visitation by the non-custodial parent has a beneficial effect. It helps the young child cope with the feelings of blame and loss. Visitation also helps

adoption has also been suggested: "There is, thus, a dark side to the adoptive situation. It is a 'dirty little' secret about origins. The essence of that secret is the specter of illegitimacy...". Lifton, Foreward to M. Benet, The Politics of Adoption 1 (1976).

163 CAL. CIV. CODE § 228 (West 1954): "A child, when adopted, may take the family name of the adopting person. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

164 CAL. CIV. CODE § 229 (West 1954): "The parents of an adopted child, are from the time of the adoption, relieved of all parental duties towards, and all responsibilities for, the child so adopted, and have no right over it."

See text accompanying notes 173-176 infra.

See text accompanying notes 167-176 infra.

It is also possible that young children will blame themselves for the termination of the relationship in the same manner that children blame themselves for divorce. See Derdyn, supra note 136, at 21. The reaction of a child to losing contact with a visiting parent who has never been a part of a de facto family is not completely analogous to the reaction of a child who loses a parent through divorce, but research done in the field of divorce illustrates the depth of emotional trauma children can experience when a person for whom they care is lost. In many cases, non-marital children do live with their natural father for some period of time. These children's situations are analogous to the divorce situation. The reaction of a child to the loss of a parent in the context of divorce is discussed in Wallerstein, supra note 135, Kelly, supra note 136, at 25-27.

See Kelly, supra note 136, at 26-27.

169 Benedek, supra note 135, at 258-62. The authors wrote this article in part as a response to those in the social science community who advocate that a custodial parent should have an absolute right to prohibit visitation by the non-custodial parent. Id. at 263. See Goldstein, Freud & Solnit, supra note 129, at 38: "(T)he non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." Benedek, supra note 135, at 264,
the child deal with the fantasies of rendezvous with the non-custodial parent that result from their sense of loss. Furthermore, total prohibition of visitation may not be possible. Where there is an established parent-child relationship, surreptitious visiting sometimes occurs. If the visitation is court sanctioned, there is a greater opportunity to establish scheduled visits which are less disruptive to the child’s relationship with the adoptive parents.

Visitation should not continue after a child’s adoption in all cases. There are situations in which visitation does more harm than good. If the potential for contact with the natural father will cause delays in the adoption of children who are relinquished by their mothers, the opportunity for continuing visitation should be limited to step-parent adoptions.

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raises the issue that if we permit a custodial parent to go to court to enforce the right to deny visitation, we fail to protect the child from the hazards of litigation that most agree should be avoided.

170 See Benedek, supra note 135, at 261-62.

171 Surreptitious visiting by a non-custodial parent can have the undesirable effect of causing the custodial parent, who is seen as preventing the visitation, to lose credibility in the eyes of the child. Id. at 264.

172 Allowing visitation to continue after adoption also gives deserved recognition to the interests of the natural father who cares for his child enough to maintain a relationship. The interests of biological parents were recently stated succinctly: “(T)he possible termination of parental rights comes as a jolt and is seen as punishment, forfeiture of what is theirs, and as a threat to self-esteem which must be fought.” In re Barbara P., 71 Misc. 2d 965, 966, 337 N.Y.S.2d 203, 205 (Fam. Ct. 1972).

173 The Uniform Parentage Act does not prevent a natural father who has not maintained contact with his child from bringing an action at any time to declare a parent-child relationship and obtain visitation. Because the child would receive little benefit by the introduction of a stranger into the environment after adoption, the natural father should not be permitted to assert a right to visitation for the first time after the child’s adoption. For a discussion of the need for a statute of limitations in the custody context see text accompanying notes 132-139 supra.

174 Even those who strongly advocate visitation recognize that it has hazards. It has been described as the ideal avenue for sustaining hostility. Benedek, supra note 135, at 258. Where visitation results in the aggravation of angers and jealousies, some suggest that permanent or temporary termination of contact with the non-custodial parent is necessary. Wallerstein, supra note 135, at 6.

175 Commentators suggest that contact with the biological parents be permitted after the permanent placement of foster children. See Derdyn, Rogoff & Williams, Alternatives to Absolute Termination of Parental Rights After Long Term Foster-Care, 31 Vand. L. Rev. 1165 (1978). Much of the rationale supporting this suggestion applies to the extension of visitation privileges to biological parents after adoption of the non-marital child. However, a distinction does exist between the two situations. In the case of long term foster-care, there are
ence the decision whether to permit visitation to continue should include the extent of the father-child relationship, the desires of the child, and the capacity of the natural father and adoptive parents to cooperate for the benefit of the child. In those situations in which the child becomes the vehicle for conveying hostilities between the adults involved, visitation should be denied. This decision calls for fine balancing on the judge’s part, but the potential for benefits to the child makes an absolute prohibition on the continuance of visitation after adoption undesirable.\footnote{176}

de facto parents who developed an attachment to the child with the expectation of continuing contact with the biological parents. Thus, foster parents could find continued visitation more acceptable than would adoptive parents. If prospective adoptive parents find continued visitations unacceptable, adoptions will be delayed. Delays in adoptions leave children in temporary placements, which have the disadvantage of making it difficult for them to maintain the stable relationship with a caretaker necessary for proper development. See Wald, supra note 23, at 993-94; Wald, supra note 148, at 644-45, 667-72.

Commentators also suggest that visitation be permitted to continue after step-parent adoptions. See Bodenheimer, supra note 40, at 44-47. The danger that a delay in adoptions poses where neither parent desires custody is not present in this situation. The child will remain in the home of the custodial parent whether or not adopted by the step-parent. Thus, there is no justification for a total prohibition on continuing visitation by the natural father after step-parent adoptions.

It is unlikely that the potential for continuing contact with the natural father will cause a delay in adoptions, however. The character of the adoption market is changing. Because of the availability of contraception and abortion, and the decreasing stigma attached to pregnancy outside marriage, the availability of infants for adoption is decreasing. See M. BENET, supra note 162, at 178. In California in 1975, the average age of children relinquished for adoption was 5.9 years. CALIFORNIA DEPT OF HEALTH, AID FOR THE ADOPTION OF CHILDREN (AAC) RELINQUISHMENT ADOPTIONS (1977). This change creates an atmosphere in which there is greater focus by adoptive parents on needs of the child. There is more willingness to assume the care of children who traditionally were difficult to place. See A. MURRAY, NEW DIMENSIONS IN ADOPTION 2-3 (1974). In the present climate, adoptive parents willing to accept visitations by the natural father are likely available.

A group of social workers in Southern California arranged adoptive placements for non-marital children which permitted mothers to continue visiting on a regular basis. Because of their emotional attachment to their children, many mothers find it impossible to relinquish their children for adoption, even where they recognize that keeping the child is unsatisfactory. For these mothers and children, adoptive placements that permit visitation are the best solution. The social workers involved in these cases say that the placements have had some difficulties, but they have worked to everyone’s benefit because of the willingness of the mothers and the adoptive parents to cooperate for the benefit of the child. See Bara, Open Adoption, 21 Soc. Work 97, 98 (1976).

\footnote{176} There is some statutory and judicial support for continuing visitation after adoption. The visitation statute permits a court to award visitation privileges
The Uniform Parentage Act makes needed clarifications in the law regarding natural father's right to visitation. It provides a definite procedure for obtaining visitation privileges, and judicial interpretation indicates that natural fathers who do not qualify as presumed fathers can receive visitation rights. Whether a natural father who receives visitation can exercise those rights after his child's adoption is unclear. Concern for the child's well-being indicates that courts should have discretion to permit visitation to continue in proper cases. The choices courts must make involve a careful balancing of the natural father's rights against the emotional costs their assertion might entail. In all cases, the interests of the child must be paramount.

V. CONSENT TO ADOPTION

Prior to the Stanley v. Illinois decision, natural fathers generally had no right to participate in the adoption of their non-marital children. In most cases they had no right to notice of an impending adoption. This was the case in California, unless the natural father had legitimated the child. After the Stanley decision, California courts began to recognize the right of a natural

to any person interested in a child's welfare. CAL. CIV. CODE § 4601 (West 1970). This statute is applicable to visitation proceedings involving non-marital children. Griffith v. Gibson, 73 Cal. App. 3d 465, 122 Cal. Rptr. 176 (4th Dist. 1977). In Reeves v. Bailey, 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (4th Dist. 1975), the Court of Appeals held that the adoption of a child by the maternal grandparents did not automatically terminate visitation privileges previously awarded the paternal grandparents under CAL. CIV. CODE § 197.5 (West Cum. Supp. 1979). The court did not rest its holding on Civil Code § 4601, but the liberal wording of the statute influenced the court's decision. Reeves v. Bailey, 53 Cal. App. 3d 1019, 1024 126 Cal. Rptr. 51, 55 (4th Dist. 1977). The thrust of the court's decision was that a court should not undertake to deprive the child of a relationship with the natural parent or relative unless there was statutory authority requiring that result, or evidence that the adoptive relationship would be unduly hindered. Id. at 1025-26, 126 Cal. Rptr. at 56. There is no statutory authority requiring the termination of a natural father's visitation rights after adoption.

177 See text accompanying notes 149-159 supra.
180 See text accompanying notes 160-176 supra.
181 See text accompanying notes 166-176 supra.
182 405 U.S. 645 (1972).
183 Krause, supra note 2, at 32.
184 The adoption of a non-marital child requires only the mother's consent. See Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (4th Dist. 1964), discussed at text accompanying notes 68-75 supra.
father to have notice of and be heard concerning the adoption of his non-marital children. The Uniform Parentage Act makes substantial changes in the law regarding the natural father's role in adoption proceedings. These changes unfortunately leave some questions unanswered, the resolution of which requires an inquiry into basic premises of the Act and the constitutional rights of a natural father.

A. The Natural Father's Role In Adoptions

The Uniform Parentage Act provides an elaborate statutory scheme for the adoption of non-marital children. The Act requires that a presumed father receive notice of a proposed adoption and a hearing on his fitness. Unless his parental rights are terminated or he voluntarily relinquishes for or consents to adoption, the adoption may not occur. If a child has no presumed father, either the mother or the adoption agency or person to whom the child is relinquished must bring an action to terminate the natural father's parental rights. The statute requires the agency handling the adoption to make an effort to identify the natural father. If a man claiming to be the natural father appears seek-

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185 Cases recognizing a right to notice and a hearing concerning the proposed adoption of a non-marital child included: Cheryl Lynn H. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (2d Dist. 1974), where the court said that under the law then in effect the natural father could not assert a right to custody so long as the mother retained custody of the child. He had a right to notice, however, if the mother relinquished the child for adoption; Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (3d Dist. 1977), hearing denied, May 12, 1977, which held that a natural father had a right to notice and a hearing on the adoption of his non-marital child by a step-parent.


187 CAL. CIV. CODE § 7017(a) (West Cum. Supp. 1979). A presumed father's consent is not required if he is able but fails to provide support or willingly fails to communicate with his child for a period of one year. CAL. CIV. CODE § 224 (West Cum. Supp. 1979). His consent is also not required if his parental rights have been terminated because of neglect or abuse. CAL. CIV. CODE § 232 (West Cum. Supp. 1979).

188 CAL. CIV. CODE § 7017(b) (West Cum. Supp. 1979) requires a petition to terminate the parental rights of the father in every case in which a mother relinquishes or consents to the adoption of a non-marital child who has no presumed father, unless a court has previously terminated the father's rights.

189 CAL. CIV. CODE § 7017(c) (West Cum. Supp. 1979). The agency must question the mother (or any other appropriate person) concerning whether she was married or cohabiting with a man at the time of conception or any time there-
ing custody rights, the court must hear evidence on the matter. If the court finds that he is a presumed father, the court must issue an order stating that his consent to the adoption is required. If no man appears to seek custody, potential paternal rights in the child are terminated and the adoption may proceed on the mother's consent alone.

The effect of this statutory scheme is to permit interested fathers to assume custodial responsibility for their children at the time of their relinquishment. However, the Act also makes it possible to easily terminate the rights of a father who shows no interest in the child. This represents an important compromise between the extremes of a scheme that would prohibit the assertion of custodial claims at the time of adoption and one that would require the consent of any natural father.

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after, whether she received support payments or promises of support with regard to the child or her pregnancy, and whether any man has acknowledged possible paternity of the child.


If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.


If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated.

If no man is identified as a possible natural father and no person appears to claim custody, the court must terminate any unknown father's parental rights. **Cal. Civ. Code § 7017(e) (West Cum. Supp. 1979).**

The court in *In re Tricia M.*, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977), interpreted this scheme as broadly as possible. See the discussion at notes 103-114 and the accompanying text *supra*.

Such a scheme would probably violate the dictates of *Stanley v. Illinois*, 405 U.S. 645 (1972). See notes 28-37 and the accompanying text *supra*.

A scheme that required the natural father's consent in every case would make adoptions cumbersome and delay the placement of the child into perma-
B. The Right Of A Natural Father Who Has Visitation Privileges To Veto An Adoption

The Uniform Parentage Act's adoption scheme fails in one important aspect. It fails to define the status of a natural father who has received visitation privileges in a prior action to declare the existence of a parent-child relationship. If such privileges qualify a natural father as a presumed father, then the statute appears to require his consent in all cases, whether or not he desires to assume custody of his child. In effect, such a natural father would have a veto power over his child's adoption. This is highly detrimental to the child because in most cases it means placement in temporary care rather than adoption into a stable home.

An interpretation which allows fathers with visitation privileges to become presumed fathers with a veto power over adoption is not consistent with the premises of the Act. The thrust of those sections of the Act relating to adoption is to give fathers who desire custody an opportunity to receive it at the time of relinquishment for adoption. Other sections, however, make it clear that the Legislature wanted to ensure that fathers who have no interest in custody would not be able to delay or prohibit adoption. Further, in related areas the Act does not adopt a view that a natural father's rights in his child are in all respects equal with those of the mother's. The mother and natural father have co-equal custody rights only where the natural father qualifies as a presumed father. The protection of the child's best interests requires that courts adopt a strict interpretation of the definition

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188 See Wald, supra note 143, at 644-45 for a discussion of the problems of temporary placements.


of a presumed father in this situation.\textsuperscript{202} A natural father who does not want custody should have the right to veto an adoption only where he and the mother and child have at one time lived together as a de facto family.\textsuperscript{203}

This strict interpretation of the presumed father concept in the adoption context is constitutionally valid under the recent United States Supreme Court case, \textit{Quilloin v. Walcott}.\textsuperscript{204} In \textit{Quilloin}, a natural father who received notice of an adoption proceeding brought by his non-marital child’s step-father sought visitation rights and a declaration that he had legitimated his son. The father had often visited the child, who was then eleven years old, although the mother had recently tried to stop the visits. He had provided support only irregularly. After a consolidated hearing on the adoption and legitimation petitions, the trial court held that the adoption would be in the best interests of the child.\textsuperscript{205} The adoption thus required only the mother’s consent.\textsuperscript{206} The court also held that an award of visitation privileges to the natural father was not in the child’s best interests.\textsuperscript{207}

\textsuperscript{202} See text accompanying notes 93-96 supra.

\textsuperscript{203} It is difficult to put an arbitrary limit on the amount of time that the natural father, mother and child must share a home together to constitute a de facto family. Courts faced with this issue should examine the facts of each case to determine if there ever was a time in which the natural father, mother and child lived together in a situation which, but for the absence of a marriage license, appeared to be a traditional nuclear family. A natural father who lives with his non-marital child exercises the same responsibility toward his child as do many divorced father. So long as the law requires the consent of divorced fathers (absent abandonment of the child, failure to pay support, or judicial termination of parental rights), the law should require the consent of natural fathers who lived with their non-marital children.

\textsuperscript{204} 434 U.S. 246 (1978).

\textsuperscript{205} The Georgia statutes in effect at the time of the decision were very similar to the statutes in California prior to the passage of the Uniform Parentage Act. The mother of a non-marital child was the child’s only recognized parent, and she was entitled to the child’s custody. Ga. Code Ann. § 74-203 (1973). Only the mother’s consent to adoption of the non-marital child was required. Ga. Code Ann. § 74-403(1) (1973). A natural father could legitimize his children by either marrying the mother and acknowledging the child as his own, Ga. Code Ann. § 74-101 (1973), or by obtaining a court order declaring the child legitimate and capable of inheriting from him. Ga. Ann. Code § 74-103 (1973). The natural father had not legitimated the child before the adoption proceeding, but the Georgia Supreme Court assumed that the natural father could legitimize the child after the initiation of the adoption proceeding. Quilloin v. Walcott, 434 U.S. 236, 250 (1978).

\textsuperscript{206} See note 205 supra.

\textsuperscript{207} The child expressed a desire to be adopted and to continue visits with the natural father. Quilloin v. Walcott, 434 U.S. 246, 251 (1978). Unfortunately, the
The natural father claimed that his due process and equal protection rights had been violated, because the adoption had occurred without his consent in a situation where a married father’s consent was required. The Court held that the trial court had protected the natural father’s procedural due process rights because it afforded him a full hearing on his legitimation petition in which the court gave attention to his individualized interest in his child. The Court further held that application of the best interests of the child standard did not violate his substantive rights. The Court found this standard adequate when its application gave recognition to a step-family unit already in existence and where the natural father had not previously sought custody. Because the natural father was not seeking custody, the Court’s holding on the substantive due process issue essentially means that natural fathers do not have a per se right to veto the adoption of their non-marital children.

On the equal protection claim, the Court pointed out that the interests of a natural father are easily distinguishable from those of married or divorced fathers, who under the Georgia statute had a veto power over adoption. The Court stated that unlike married or divorced fathers, this natural father had never exercised actual or legal custody or shouldered the daily responsibility of supervision, protection and education of the child. The Court held that the Georgia statutory scheme would stand under any equal protection analysis because of the difference in the extent of commitment to the child’s welfare perceived as existing between the two classes of fathers.

Court did not discuss the possible award of visitation privileges that would continue after the adoption.

208 Id. at 252.
209 Id. at 253.
210 Id. at 252.
211 The Court viewed this situation, which was alluded to in Stanley v. Illinois, 405 U.S. 645 (1972), as one where countervailing forces outweighed the natural father’s cognizable and substantial interests in the care and custody of his child. Quilloin v. Walcott, 434 U.S. 465, 246, 248, 255 (1978).
213 See note 205 supra.
214 Quilloin v. Walcott, 434 U.S. 246, 256 (1978). The Court was again influenced by the fact that the natural father was not seeking custody. Id. The Court’s attachment of significance to this fact may not have been warranted. There was some indication that the natural father was trying to protect his right to visit the child. Id. at 251, 254 n.14.
215 Id. at 256.
216 Id. Although the Court’s result, i.e., that natural fathers should not have
If California courts interpret the Uniform Parentage Act as permitting adoptions to occur without the consent of a natural father who does not want custody, a natural father will have the procedural protections of notice and an opportunity to be heard but will not have a veto power over the adoption. Quillioin and that section of the statute which permits the court to award custody to the natural father and make his consent to adoption necessary\(^{217}\) utilize the same procedure.\(^{218}\) If a court decides that the


\(^{218}\) See the discussion of In re Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977), at the text accompanying notes 103-114 supra. Quillioin v. Walcott, 434 U.S. 246 (1978), did not raise the question of whether a statutory scheme that made a mother’s, but not a natural father’s, consent for adoption necessary was violative of equal protection due to gender based discrimination. Caban v. Mohammed, 99 S. Ct. 1760 (1979), decided this issue. The case arose in New York and involved a father and mother who lived together for five years, during which time two children were born. Following the parents’ separation, the mother and her new husband sought to adopt the children. The father and his new wife cross-complained for adoption. Under New York law, the adoption of a non-marital child required only the mother’s consent. N.Y. Dom. Rel. Law § 111 (McKinney’s 1977). The mother’s consent was also unnecessary if she abandoned the child or was adjudicated unfit. \textit{Id.} The mother withheld her consent to the adoption. Thus, the father was allowed to participate in the hearings, but the court considered evidence he presented only to the extent it related to the mother’s and her husband’s qualifications as adoptive parents. Caban v. Mohammed, 99 S. Ct. 1760, 1764 (1979). The adoption petition was granted. The Supreme Court held the statutory scheme violative of equal protection because the distinctions it invariably made between unmarried mothers and unmarried fathers was not substantially related to important state interests. \textit{Id.} at 1769. The state attempted to justify the statutory scheme by arguing that mothers, absent special circumstances, have closer relationships with their children and that dispensing with the natural father’s consent was necessary to promoting the adoption of non-marital children. \textit{Id.} at 1766-69. The Court rejected the first of these justifications, but found the second to be an important one. \textit{Id.} at 1767. However, the Court found the statute went too far in disallowing natural fathers who maintain close relationships with their children a means of protecting paternal rights by withholding their consent to adoption. \textit{Id.} at 1769.

California’s adoption statute requires the consent of the mother and the presumed father. Cal. Civ. Code § 224 (West Cum. Supp. 1979). This statute may be vulnerable to constitutional attack. A situation similar to that presented in Caban could arise where a mother opposes a natural father’s petition for adoption. She could prevent the adoption by withholding her consent. The natural father would not have a reciprocal right to withhold his consent unless he was a presumed father. Further, the mother may have contributed to a natural father’s inability to qualify as a presumed father by preventing contact with the
child’s best interests require an award of custody to the natural father, it may do so. A court could also permit an adoption to occur without the natural father’s consent if the child’s interests so require. In essence, this procedure permits case by case adjudication of a natural father’s rights, with the child’s interests the focus. This approach represents an important compromise between the competing interests of a natural father and child.

CONCLUSION

The Uniform Parentage Act and recent California case law take great strides toward overcoming the past presumptions that all natural fathers are uninterested and unfit to care for their non-marital children. Natural fathers desiring to maintain relationships with their non-marital children need no longer obtain the consent or cooperation of the mother. Courts and the legislature should be conscious, however, that the assertion of paternal rights may pose emotional hazards to a child. This recognition requires that the Uniform Parentage Act be amended and interpreted in such a way as to protect the child’s need for continuity and stabil-

child. To remedy this possible infirmity, the legislature should amend the statute to provide that in adoption proceedings brought by either parent, neither parent has a right to withhold consent. Resolution of the adoption question should turn on the best interests of the child standard.

A provision that neither parent has a right to withhold consent in contested cases themselves leaves the legislature free to require the consent of only presumed fathers in cases where the mother relinquishes the child for adoption. This avoids the problems associated with natural fathers who might desire to withhold consent without requesting custody and the difficulties of the need to locate absent fathers in all cases. Despite the scheme’s disparate treatment of mothers and fathers it should withstand analysis under Caban v. Mohammed, 99 S. Ct. 1760 (1979). Judicial interpretation of the Uniform Parentage Act eliminates most disparate treatment of natural fathers. In any case where the mother relinquishes a child for adoption, the natural father can seek custody and block the adoption by qualifying as a presumed father. See In re Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977). Even after Caban, the Court permits the conditioning of paternal rights on some showing of a relationship with the child. Caban v. Mohammed, 99 S. Ct. 1760, 1768 (1979). See also Parham v. Hughes, 99 S. Ct. 1742 (1979). The Court’s real concern in Caban was the fact that a natural father who had maintained a substantial relationship with his children and who sought to continue that relationship could do nothing under the statute to achieve treatment on a parity with the mother. Caban v. Mohammed, 99 S. Ct. 1760, 1768-69 (1979). California’s use of the presumed father concept to determine when and whose consent to adoption is required should be sustained (with the possible exception of contests between the mother and an admitted natural father as discussed above).

ity in relationships. The legislature should amend the Uniform Parentage Act to include a statute of limitations on a natural father's right to initiate a claim for custody against a custodial mother. Further, courts must interpret the Act so as to ensure that a natural father cannot withhold his consent to an adoption when he does not desire custody of his non-marital child. In some situations, concern for the child's emotional well being will dictate an expansion of the natural father's rights. Where a natural father has established a meaningful relationship with his child, courts should permit visitation to continue after the child's adoption. In all cases, the court must make the child's needs the focus of its decision making process.

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