Golden Gate University Law Review

Volume 10
Issue 3 *Women's Law Forum*

Article 4

January 1980

The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act

Stuart A. Sutton

THE LESBIAN FAMILY: RIGHTS IN CONFLICT UNDER THE CALIFORNIA UNIFORM PARENTAGE ACT

Stuart A. Sutton*

It is estimated that there are between one and one-half and five million lesbian mothers in the United States.[1] While some lesbians are raising children of their earlier heterosexual relationships,[2] others are choosing to have and raise children as single parents or within the context of a lesbian relationship. For the lesbian who desires children, adoption and fosterage are potential non-biological avenues of motherhood.[3] However, biological means of producing children through artificial insemination or sexual intercourse are also available.[4] Two basically different sets of legal problems arise depending upon which alternative is selected. This paper will focus on the legal issues created by the

* Second year law student, Golden Gate University School of Law; M.A., San Francisco State University, 1968. The editorial staff would like to express appreciation to Donna Hitchens, directing attorney of the Lesbian Rights Project in San Francisco, who acted as advisor to the author.

1. Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691, 691 (1976).

2. For a discussion of the legal problems and possible litigation strategies for confronting the custody problems faced by lesbian mothers as a result of divorce, see Hitchens & Price, *Trial Strategy In Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1980); Hunter & Polikoff, *supra* note 1. For a useful classification of varying judicial views on nonmarital sex (including homosexuality), as affecting the best interests of the child in custody cases, see Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 654-72 (1977).

3. Consideration of adoption and fosterage as legal alternatives for lesbian parenting is beyond the scope of this article. For a discussion of the advantages and disadvantages of single parent adoptions, see Price, *Adoption and the Single Parent*, 10 MELB. U.L. REV. 1 (1975). For a general view of adoption in California, see Restani, *Adoption Agencies In California: Lack of Adequate Control*, 5 U.C.D.L. REV. 512 (1972). For California statutes governing adoptions, see CAL. CIV. CODE §§ 221-239 (West 1954). For agency regulations providing guidelines for placement, see 22 CAL. ADM. CODE §§ 30627-30663.

For recently revealed needs for foster care services sympathetic to homosexual adolescents, see SEXUAL MINORITY YOUTH SERVICE COALITION HOUSING COMMITTEE, HOUSING REPORT ON ATTITUDES AND AVAILABILITY OF PLACEMENT FOR SEXUAL MINORITY ADOLESCENTS (1979) (P.O. Box 11518, San Francisco, CA. 94110). For foster care agencies placing sexual minority youth in sexual minority homes, see *Mom's Apple Pie*, Sept./Oct. 1979, at 4, col. 2 (newsletter of the Lesbian Mothers' National Defense Fund, P.O. Box 21567, Seattle, WA. 98111).

4. *See* notes 10-13 *infra* and accompanying text.

selection of either biological alternative.

Until new technological developments make parthenogenesis[5] and cloning[6] viable alternatives for biological reproduction, the lesbian wishing to conceive a child must seek out a male participant as a donor of semen for artificial insemination or for sexual intercourse. Central to the legal issues that may arise in either context is the known identity of the father.[7] Issues of child custody, control, visitation and support may be raised if the father asserts paternal rights[8] or if the lesbian mother seeks financial support for herself and her child.[9]

---

5. Parthenogenesis is a "'[v]irgin birth' in which reproduction is effected without fertilization of the ovum; parthenogenesis has been induced artifically in a number of animals that do not naturally possess this capability." D. RORVIK, BRAVE NEW BABY 188 (1971). Science has taken the first successful step in the potential development of fatherless reproduction through the parthenogenic combining of two unfertilized mammal (mouse) eggs and the subsequent development of a 64 cell blastocyst. *No Fathers—No Sons*, SPOKESWOMAN, Sept. 1979, at 5. *See also* Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B.J. 514 (1977).

6. Cloning is a method of sexual propagation by which body cells, rather than sex cells, divide to create a new individual. Fertilization or pollination plays no role in clonal reproduction. Clonal offspring have only one parent and are genetically identical to that parent. Cloning has been achieved in certain vegetables and lower animal forms; scientists predict its use with mammals including humans. D. RORVIK, *supra* note 5, at 181. "[N]o one known to the scientific community has given public evidence of successful cloning with any vertebrate animal [however] [c]lones of domestic animals . . . are very much on the contemporary agenda of research." *The Cloning of Man: Debate Begins*, SCIENCE NEWS, Mar. 1978, at 164. *See also* R. MCKINNELL, CLONING: A BIOLOGIST REPORTS (1979); D. RORVIK, IN HIS IMAGE: THE CLONING OF A MAN (1978) (a highly controversial book documenting the author's claim that he was instrumental in arranging the first cloning of a human being).

7. *See notes* 57-97 *infra* and accompanying text.

8. *See* CAL. CIV. CODE § 7006(c) (West Supp. 1980).

9. While the focus of this article is on the unwed father's paternal interests as they impinge on the rights of the lesbian mother, a determination of a father and child relationship (paternity) is "determinative for all purposes" except non-support under the California Criminal Code. CAL. CIV. CODE § 7010(a) (West Supp. 1980). The natural mother, the child or the state can bring an action to declare the existence of the father and child relationship (paternity action). CAL. CIV. CODE § 7006(2)(c) and (g) (West Supp. 1980). If such a relationship is declared, the court may order the father to pay "reasonable expenses of pregnancy, confinement, education, support . . . [to] any other person, including a private agency, to the extent he has furnished or is furnishing these expenses." CAL. CIV. CODE § 7012(a) (West Supp. 1980). Since public policy supports "insuring that individuals rather than the government bear the responsibility for child support," Cramer v. Morrison, 88 Cal. App. 3d 873, 885, 153 Cal. Rptr. 865, 872 (1979), pressure can be brought on the mother of a child applying for state financial aid to reveal the name of the father; if the named man denies the allegation, the state may bring an action to determine paternity. CAL. CIV. CODE § 7006(g) (West Supp. 1980).

Many lesbians wishing to have children but not wanting to conceive through sexual intercourse are turning to artificial insemination.[10] Many are performing the relatively simple procedure themselves at home.[11] Frequently, though not always, the donors are male homosexuals.[12] While the lesbian community has developed methods of maintaining relative anonymity by utilizing a liaison between the donor and the prospective mother,[13] the possibility exists that the donor will seek out or otherwise discover the mother's identity. Additionally, not all home artificial inseminations being practiced in the lesbian community involve anonymous donors and may involve meetings between the prospective mother and the donor.[14]

Since 1972, United States Supreme Court decisions have developed a new body of constitutional law, establishing fourteenth amendment due process and equal protection rights of the unwed father to the custody and control of his children.[15] The California Legislature, through enactment of the California Uniform Parentage Act,[16] has embodied and extended the basic paternal rights established by the Supreme Court decisions. The lesbian mother's sole custody and control of her child and the security of her family unit can be adversely affected by the unwed father's new constitutionally protected paternal interests.

For those women who choose to have and raise their children within the context of a lesbian relationship, the establishment of paternal rights in the unwed father can have a far-

---

10. *See* LESBIAN HEALTH INFORMATION PROJECT, ARTIFICIAL INSEMINATION: AN ALTERNATIVE CONCEPTION (1979) (c/o San Francisco Women's Centers, 3543 18th St., San Francisco, CA. 94110) (hereinafter cited as ARTIFICIAL INSEMINATION PROJECT).

11. *Id.* at 9. The potential mother first charts her periods of fertility to determine the proper time for insemination. *Id.* at 4-7. The semen is placed by the donor in a small, well sealed glass jar where it will survive for several hours at room temperture while being transported to the donee by the liaison. *Id.* at 15. The semen is placed into the vagina with a needleless syringe, turkey baster, or eye dropper. *Id.* at 9. The process is generally repeated for numerous months until conception. *Id.* at 11.

12. *Id.* at 9, 15.

13. *Id.* at 14.

14. *Id.* For a discussion of the potential adverse legal consequences when the donee establishes a relationship with the donor, see text accompanying notes 108-33 *infra*.

15. *See* notes 19-50 *infra* and accompanying text. For the paternal status of an unwed father at common law, see H. CLARK, LAW OF DOMESTIC RELATIONS § 5.4 (1969); Note, *Father of an Illegitimate Child—His Right to Be Heard*, 50 MINN. L. REV. 1071 (1966).

16. CAL. CIV. CODE §§ 7000-7021 (West Supp. 1980).

reaching impact. In anticipation of her death or serious incapacitation, the lesbian mother may wish to secure the continuity of her family unit by making a testamentary appointment of her lesbian partner[17] as guardian of her child or by allowing the partner to adopt the child. Such attempts may be thwarted by the assertion of paternal rights.[18]

This paper will first delineate the parameters of the unwed father's constitutionally protected paternal interests through the examination of selected United States Supreme Court decisions. The focus will then shift to a discussion of those paternal interests in the California Uniform Parentage Act in terms of 1) the identification of the father, 2) the scope of his statutory rights to the custody and control of the child he has helped produce through either sexual intercourse or artificial insemination, and 3) his right to notification and a hearing with any change in the legal custody of his child and his ability to bar such a change. Each section will conclude with a discussion of relevant law applied to the context of a lesbian family.

With the exception of the legal issues that can arise between the child's father and the mother's lesbian partner with attempted adoptions and testamentary appointment of guardianship, many of the problems in parenting addressed here to the lesbian community are those that must be faced by any single woman, regardless of sexual orientation, who chooses to have children outside the traditional marital context and beyond a continuing relationship with a man. Her choices and the governing California law are the same—only the biases are different.

---

17. The terms "mother" and "partner" are not used to infer that only one member of a lesbian couple bears children but rather to denote legal relationships among the biological mother, the biological father and the child, and the lack of the partner's legal standing in the biological triangle. Lesbian family structures have the possibility of being far more complex than the structure delineated here since both women may have children thus mutiplying the legal tangle of relationships.

18. *See* notes 141-178 *infra* and accompanying text.

I. CONSTITUTIONAL SOURCES OF AN UNWED FATHER'S PARENTAL RIGHTS

A. Right to a Hearing on Fitness For Custody

Stanley v. Illinois[19] was before the United States Supreme Court during its 1971 term. In a landmark decision, the Court overturned a ruling by the Illinois Supreme Court and held, on both due process and equal protection grounds, that an unwed father could not be deprived of the custody of his children without notice and a hearing on his fitness as a parent.[20]

Joan and Peter Stanley had lived together intermittently for eighteen years and had never married. They had three children. Upon the death of Joan Stanley, the State of Illinois declared two of the children wards of the state through a statutory dependency proceeding and placed them with court-appointed guardians.[21]

Peter Stanley appealed claiming he had been denied equal protection of the laws guaranteed by the fourteenth amendment since he had not been found to be an unfit parent as required before a child can be removed from the custody of both married fathers and unwed mothers.[22] The Court proceeded to examine Stanley's claim on both due process and equal protection grounds.

In emphasizing the importance of maintaining the family unit, the Court determined that "[t]he private interests here, that of a man in the children he has sired and raised, undeniably

---

19. 405 U.S. 645 (1972).

20. *Id.* at 647-58.

21. *Id.* at 646.

22. Illinois provided two statutory means of removing nondelinquent children from parental custody. First, in a dependency hearing, a child was declared a ward of the state because there was no surviving parent. Ill. Rev. Stat. ch. 37, § 702-5 (West 1972). Second, in a neglect proceeding, a child is declared a ward of the state because it has been *shown* that the parent has not provided suitable care. Ill. Rev. Stat. ch. 37, § 702-4 (West 1972). By statute, Illinois defined parent to mean "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child . . . ," Ill. Rev. Stat. ch. 37, § 701-14 (West 1972), thus clearly excluding an unwed father from the definition of a parent.

Under Illinois law, while children of all parents could be taken from them in neglect proceedings only after notice, hearing and proof of unfitness, the children of an unwed father were subject to dependency proceedings and could be removed from his home on a showing that the father had not been married to the deceased mother.

warrants deference and, absent a powerful countervailing interest, protection . . . [and that] Stanley's interest in retaining custody of his children is cognizable and substantial."[23]

The Court found Illinois' stated interest in strengthening "the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal" to be a legitimate interest within the state's power, but found the means used to achieve that end constitutionally indefensible.[24] The effect of the Illinois statutory scheme was to create a conclusive presumption that unwed fathers were unfit parents and the Court found this result unacceptable.[25]

> The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.[26]

The Court concluded that Stanley was entitled as a matter of due process to a hearing on his fitness as a parent before his children were taken from him; denying him that hearing while extending such a hearing to all other parents whose custody of their children is challenged by the state constituted a denial of equal protection under the fourteenth amendment.[27]

While *Stanley* stands for the proposition that an unwed father has a protectable interest in the "companionship, care, custody, and management of his . . . children" and the right to a hearing before he is *deprived* of their custody,[28] the Court did not directly address the issue of whether rights to notice and a

---

23. 405 U.S. at 651-52.

24. "[T]he State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Id.* at 652-53.

25. For a discussion of the Supreme Court's approach to irrebuttable presumptions in custody matters between married persons, see Lauerman, *supra* note 2, at 681-89.

26. 405 U.S. at 657-58.

27. *Id.* at 658.

28. *Id.* at 649-51.

hearing attach only to unwed fathers who have established a de facto,[29] or actual relationship with their children;[30] however, many commentators and courts have interpreted the opinion to require notice and a hearing for all unwed fathers faced with a proposed change in the legal custody of their children regardless of de facto status.[31] Subsequent decisions of the Supreme Court have strongly indicated that such an interpretation is proper.[32]

In its broadest reading, therefore, *Stanley* requires notice and the opportunity to be heard for *all* unwed fathers upon a legal change in the custody of their children. Inherent in that mandate is the possibility of the father being awarded custody.

---

29. Marital status of the parents or biological parentage is irrelevant to the determination of a de facto parent relationship. De facto parenthood is dependent upon whether the person has been established as the child's psychological parent. *In re* B.G., 11 Cal. 3d 679, 692 n.18, 523 P.2d 244, 253 n.18, 114 Cal. Rptr. 444, 453 n.18 (1974). Therefore, a man might be the child's biological father and yet not have established a de facto relationship. Conversely, a de facto father might not be the child's natural father.

30. In a footnote to the *Stanley* opinion, the Court stated that:

> Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined . . . . Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

405 U.S. at 657 n.9.

31. *See* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 528-29 (1975); Reeves, *Protecting the Putative Father's Rights After* Stanley v. Illinois, 13 J. FAM. L. 115, 125-26 (1973-74) Schwartz, *Rights of a Father With Regard to His Illegitimate Child,* 36 OHIO ST. L.J. 1, 3-4 (1975). For a discussion of cases from non-California jurisdictions utilizing both narrow and broad readings, see Note, *In re* M & G: *A Misapplication of* Stanley v. Illinois, 27 MAINE L. REV. 321, 323-24 (1975). For California cases that have adopted a broad reading, see *In re* Lisa R., 13 Cal. 3d 636, 647-48, 532 P.2d 123, 130-31, 119 Cal. Rptr. 475, 482-83, *cert. denied sub nom.,* Porzuczek v. Towner, 421 U.S. 1014 (1975); Cheryl H. v. Superior Court, 41 Cal. App. 3d 273, 279, 115 Cal. Rptr. 849, 852-53 (1974).

32. During the same term as *Stanley,* the Court remanded a case of a non-de facto father seeking to be heard in adoption proceeding for reconsideration in light of *Stanley.* Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), *vacating and remanding* State v. Lutheran Soc. Serv. of Wis. & Upper Mich., 47 Wis. 2d 240, 178 N.W. 56 (1970). Again in 1978, the Court addressed a substantial part of its opinion in Quilloin v. Walcott, 434 U.S. 246 (1978), to the fact that the appellant had been given adequate notice and a hearing "on any matter he thought relevant, including his fitness as a parent," 434 U.S. at 253, even though he was not a de facto father, 434 U.S. at 247. Had the Court limited its constitutional requirement for notice and a hearing to fact situations similar to *Stanley,* the issue in *Quilloin,* which was not raised by appellant, could have passed without comment or could have been quickly dismissed by the Court. For a discussion of *Quilloin,* see notes 33-49 *infra* and accompanying text.

Thus *Stanley* represents the threshhold of paternal rights as dictated by the simple biological act of conception—all fathers, regardless of marital or de facto parent status have a protectable familial interest in the custody and control of their children that cannot be denied without a powerful countervailing interest.

B. Right to Veto an Adoption

The Supreme Court again addressed the rights of an unwed father during its 1977 term in *Quilloin v. Walcott*,[33] holding that the due process and equal protection rights of the father had not been violated. The issue before the Court was whether an unmarried father who had not established a de facto relationship with his child had the authority to veto an adoption of the child by the biological mother's husband.[34]

Appellant and the child's mother never married or established a home together. The child was in the custody and control of the mother his entire life although Quilloin had visited and provided support for the child on an irregular basis. The mother married when the child was nearly four years old and, seven years later, consented to his adoption by her husband.[35]

Under Georgia law, the consent of both living parents was necessary for adoption, but in the case of an illegitimate child, only the consent of the mother was required.[36] Although Quilloin had not petitioned for the legitimation of his child at any time during the eleven years of the child's life as provided by Georgia statute,[37] upon notification of the adoption petition, he filed for a writ of habeas seeking visitation rights, a petition for legitimation, and an objection to the adoption.[38]

---

33. 434 U.S. 246 (1978).
34. *Id.* at 247.
35. *Id.* at 253.
36. *Id.* at 248. Ga. Code § 74-403(3) (1975).
37. 434 U.S. at 247-49.

> A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, sex of such child, and also the name of the mother; and if he desires the name changed stating the new name, and praying for the legitimation of such child . . . .

Ga. Code § 74-103 (1975).
38. 434 U.S. at 249-50.

The trial court, relying on the duration of the mother's marriage, the fact that she maintained sole custody of the child throughout his life, and on the expressed wishes of the child, determined that the adoption was "in the best interests of the child" and denied Quilloin's petition for legitimation.[39] The court then proceeded to find that appellant lacked standing to object to the adoption, denied visitation rights as being against the child's best interests, and granted the adoption.[40]

After an unsuccessful appeal to the Georgia Supreme Court,[41] Quilloin petitioned the United States Supreme Court arguing that the holding in *Stanley* entitled him "as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent."[42] After noting the sufficiency of appellant's notice and the opportunity to be heard in the adoption proceeding,[43] the Court found the underlying issue to be whether in the circumstances of the case and in light of the authority granted by Georgia law to married fathers, appellant's interests were adequately protected by the "best interests of the child" standard under both the due process and equal protection clauses of the fourteenth amendment.[44]

Under the circumstances in *Quilloin*, the Court decided that the "best interests of the child" standard did not violate Quilloin's substantive rights. Had the state been attempting, over the objections of the parents and the child, to break up a natural family without a showing of unfitness, the due process clause would have been offended.[45]

> But this is not a case in which the unwed father at any time had, or sought, actual or legal custody

---

39. *Id.* at 251.

40. *Id.*

41. The Georgia Supreme Court noted that "unlike the father in *Stanley*, appellant had never been a de facto member of the child's family unit." Relying on a strong state policy supporting the raising of children in a family setting and the possibility that this policy would be thwarted by granting unwed fathers the right to veto adoptions by withholding consent, it affirmed the ruling of the trial court. *Id.* at 252. The dissent felt that GA. CODE § 74-403(3) was invalid under *Stanley*. *Id.* at 252-53.

42. *Id.* at 253.

43. *See* note 32 *supra* and accompanying text.

44. 434 U.S. at 254.

45. *Id.* at 254-55.

> of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child has never before lived. *Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence* . . . . Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption and denial of legitimation, was in the "best interests of the child."[46]

The Supreme Court dismissed Quilloin's equal protection argument by finding that where a natural father had never "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,"[47] his interests were readily distinguishable from those of a divorced or separated father; therefore, the state could permissibly deny Quilloin the veto authority it provided to married fathers.[48] The Court concluded that absent a de facto relationship and in light of a substantial countervailing state interest in maintaining the continuity of an existing family unit,[49] Leon Quilloin had no constitutionally guaranteed right to bar the adoption of his child by withholding consent.

While it is inherent in the *Stanley* decision that the unwed father has a right to seek custody of his child upon a change in legal custody, *Quilloin* and its progeny[50] stand for the proposi-

---

46. *Id.* [emphasis added].

47. *Id.* at 256.

48. *Id.* at 255-56.

49. For extensive discussions of the relationship between *Quilloin* and *Stanley* in terms of the Supreme Court's support of already existing family units, see Davis, *Illegitimacy and the Rights of Unwed Fathers In Adoption Proceedings After* Quilloin v. Walcott, 12 J. MAR. J. PRAC. & PROC. 383, 393 (1979); MacGowan, *De Facto Parenthood and the Parental Preference Doctrine in California,* 11 LINCOLN L. REV. 1, 17-18 (1979). *See also* J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as BEST INTERESTS].

50. In Caban v. Mohammed, 441 U.S. 380 (1979), the Court was faced with the issue of a natural father's right to bar an adoption absent a powerful countervailing interest. Caban, the father, had maintained a parental relationship equal to that of the mother. *Id.* at 389. Both had married following the termination of their relationship thus providing the possibility of traditional family structures within which to raise the children. Under a New York law that enables a parent to adopt his or her own child born out of wedlock, both the Cabans and the Mohammeds filed to adopt the children. *Id.* at 383. By statute, N.Y. DOM. REL. LAW § 111 (McKinney's 1977), the mother was able to block

tion that only a natural father with a de facto relationship may bar an adoption. It remains for a court to determine how involved a father must actually be in the life of his child before it will extend to him the right to veto an adoption.

II. IDENTIFYING THE FATHER-CHILD RELATIONSHIP UNDER THE CALIFORNIA UNIFORM PARENTAGE ACT

Three years after the Supreme Court decision in *Stanley v. Illinois* and three years before its decision in *Quilloin v. Walcott,* the California Legislature incorporated the California Uniform Parentage Act into the Civil Code.[51] Prior to its passage and the decision in *Stanley,* an unwed mother had an unconditional right to the custody and control of her child under California law.[52] Beginning in 1968, the United States Supreme

---

adoption by the Cabans by withholding her consent. The unwed father did not have a similar privilege and the court granted the adoption to the mother and her new husband.

Caban appealed to the Supreme Court which found that New York's gender-based distinction between unwed mothers and fathers at every phase in the child's development did not bear a substantial relation to the state's interest in promoting adoptions of illegitimate children and therefore could not stand under the fourteenth amendment. *Id.* at 391-92.

The Supreme Court rejected the state's arguments that 1) there are inherent differences in importance in paternal and maternal roles, 2) giving unwed fathers veto power would discourage the marriages of unwed mothers since the possibility would exist that their new husbands would not be able to adopt their children, and 3) that requiring the unwed father's consent to adoption would present a strong impediment due to frequent difficulties in identifying and locating the natural father. *Id.* at 388-92. The Court responded to each argument by noting that 1) any inherent differences in importance between paternal and maternal roles that *might* exist in infancy would dissipate as the child grows older, 2) unwed fathers are no more likely to block an adoption than are unwed mothers, and 3) granting veto authority need not be an impediment to adoption since *"[i]n those cases where the father never has come forward to participate in the rearing of the child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of his child." Id.* (emphasis added).

51. CAL. CIV. CODE §§ 7000-7021 (West Supp. 1980).

52. The mother is entitled to custody, services, and earnings of the child to the exclusion of the father (Civ. Code, § 200; *Guardianship of Smith,* 42 Cal. 2d 91, 93 [265 P.2d 888, 37 A.L.R. 2d 867]), and she may place the child for adoption without the father's consent. (Civ. Code, §§ 224m and 226.1; *Guardianship of Truschke,* 237 Cal. App. 2d 75, 79-80 [46 Cal. Rptr. 601].) The father may legitimate the child by marrying its mother (Civ. Code, § 215) or by publicly acknowledging it as his own, receiving it into his family, and treating it as though it were a legitimate child (Civ. Code, § 230), but the mother may effectively preclude legitimation where . . . she

Court rendered a series of decisions holding that the unequal treatment of children based on their parent's marital status was unconstitutional under the equal protection clause of the fourteenth amendment.[53] In 1975, through its Uniform Parentage Act, California eliminated all statutory references to both legitimacy and illegitimacy[54] and established criteria for determining the parent and child relationship[55] without regard to the marital status of the child's parents.[56]

The Uniform Parentage Act establishes the procedures for identifying the father and child relationship depending on the nature of the relationship between the mother and the child's natural father or between the father and the child. The means provided are: 1) the establishment of paternity through the use of statutory presumptions[57] or 2) the traditional suit brought to determine the disputed paternity of a child born out of wedlock.[58] In addition, the Act establishes criteria for determining the nature of the parental relationship between a donor of semen and a child conceived through artifical insemination.[59]

---

refuses to marry the father or relinquish custody of the child to him. (*Adoption of Irby*, 226 Cal. App. 2d 238, 242 [37 Cal. Rptr. 879]; see *Adoption of Pierce*, 15 Cal. App. 3d 244, 248-251 [93 Cal. Rptr. 171].)

Cheryl H. v. Superior Court, 41 Cal. App. 3d 273, 277-78, 115 Cal. Rptr. 849, 852 (1974).

53. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee Co., 391 U.S. 73 (1968). *See also* Uniform Parentage Act of 1973, 9A UNIFORM LAWS ANNOTATED 579 (1979) (Commissioners' Prefatory Note) [hereinafter cited as UPA ANNOTATED].

54. CAL. SUMMARY DIGEST at 344 (1975).

55. "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 relationship and the father and child relationship." CAL. CIV. CODE § 7001 (West Supp. 1980).

56. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." CAL. CIV. CODE § 7002 (West Supp. 1980).

57. *Id.* § 7004 (West Supp. 1980). *See* notes 60-64 *infra* and accompanying text.

58. CAL. CIV. CODE § 7006(c) (West Supp. 1980). *See* notes 70-80 *infra* and accompanying text.

59. CAL. CIV. CODE § 7005 (West Supp. 1980). *See* notes 81-96 *infra* and accompanying text.

A. Establishment of Paternity Through Presumption

A man alleging paternity can establish a presumption[60] that he is the natural father of the child by proof of any one of a series of clearly enumerated underlying facts.[61] While the Act draws subtle distinctions between the fact situations that give rise to a presumption that a man is a child's natural father, all but one describe variations on a marriage theme. The presumption arises that a man is the child's natural father upon proof

---

60. Except as provided in section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

CAL. CIV. CODE § 7004(b) (West Supp. 1980).

61. CAL. CIV. CODE § 7004(a) (West Supp. 1980) provides that:

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in section 621 of the Evidence Code [child born during a marriage while the parents are cohabiting and the father is neither sterile or impotent] or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

that the woman and man believed they were validly married at the time the child was conceived, or that they were *actually* married either before or after conception.[62] In this sense, the new Act echoes the legitimation laws it replaced.[63] The Act provides one non-marriage related fact situation that will give rise to a presumption that the alleging party is the child's natural father. The presumption will arise if "[h]e receives the child into his home and openly holds out the child as his natural child."[64]

Presumptive Status in the Lesbian Context

The presumption that a man is the natural father of a child can arise only through a valid marriage,[65] through a marriage that proves to be invalid[66] or through the man alleging paternity having taken the child into his home and held it out as his own.[67] Thus presumptive status would seldom arise naturally within the parameters of the fact situations being covered by this paper. While lesbian mothers bring children with them out of heterosexual relationships,[68] the focus here is upon women who choose to have children outside the traditional marital relationship. Such a choice would inherently eliminate the presumptions that arise out of marriage, cohabitation, or a similar taking of the child into the home under Civil Code section 7004(a)(4) of the Act. If the lesbian mother has neither married the child's father nor allowed him to take the child into his home and declare it as his own, the man alleging himself to be the father will be required to establish the relationship through actual proof of his paternity.[69]

B. Establishment of Paternity Through Proof

While the Act does not include any criteria for proving paternity, the Legislature probably felt that "evidentiary problems of paternity were already adequately covered by the Evidence

---

62. *Id.* (a)(1)-(3).

63. *See* note 52 *supra.* It should be noted that "acknowledgment" as a legitimation technique was dropped as a fact situation that gives rise to presumptive status.

64. Cal. Civ. Code § 7004(a)(4) (West Supp. 1980).

65. *Id.* § 7004(a) and (a)(1).

66. *Id.* § 7004(a)(3) and (a)(4).

67. *Id.* § 7004(a)(4).

68. *See* note 2 *supra* and accompanying text.

69. Cal. Civ. Code § 7006(c) (West Supp. 1980).

Code, other statutes and case law."[70] Such proof could presumably include incidence of "sexual intercourse, duration of pregnancy, [and] other medical and anthropological evidence."[71]

Commentators have interpreted California law to allow blood tests in paternity cases only when the results of the test would *exclude* the alleged father.[72] However, in two recent California appellate decisions,[73] the courts determined that the statutory exclusion of blood tests as positive proof of paternity was based on the older, less conclusive " 'standard' systems of blood groupings . . ." and that the newer, far more conclusive proof of paternity provided through the use of the Human Leucocyte Antigen Test [HLA] is not prohibited by the statute.[74]

The court concluded in *County of Fresno v. Superior Court*[75] that subject only to the laying of an adequate foundation for admission,[76] "[p]ublic policy favors the use of objective, highly accurate scientific analysis. The HLA test appears to be highly probative evidence on the issue of paternity."[77] In *Cramer v. Morrison*,[78] the court noted that the HLA test usually involved a 98% probability and, in fact, the case at bar was established at 98.3% probability.[79]

---

70. Cramer v. Morrison, 88 Cal. App. 3d 873, 883, 153 Cal. Rptr. 865, 871 (1979). For the evidentiary criteria deleted by the California Legislature from the National Act, see UPA ANNOTATED, *supra* note 53, § 12 at 602.

71. *Id.*

72. For a discussion of admissibility of blood tests as evidence of paternity under CAL. EVID. CODE § 895 (West 1966), see Cramer v. Morrison, 88 Cal. App. 3d 873, 882 n.13, 153 Cal. Rptr. 865, 869-70 n.13 (1979).

73. County of Fresno v. Superior Court, 92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (1979); Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

74. Cramer v. Morrison, 88 Cal. App. 3d 873, 879-83, 153 Cal. Rptr. 865, 868-71 (1979). The HLA testing involves the examination of a larger number of factors than the conventional Landsteiner classification of blood groups. The test is based on tissue typing of the white blood cells and is used widely in kidney transplantation. *Id.* at 877-78, 153 Cal. Rptr. at 867.

75. 92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (1979).

76. *Id.* at 136-37, 154 Cal. Rptr. at 662. The court found that it was an abuse of discretion for the trial court to deny a motion under § 893 of the California Evidence Code for an HLA test to establish parentage in a civil paternity suit. *Id.* at 137, 154 Cal. Rptr. at 662.

77. *Id.* at 138, 154 Cal. Rptr. at 663.

78. 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

79. *Id.* at 878, 153 Cal. Rptr. at 867.

Proof of Paternity in the Lesbian Context

When a man asserts that he is the natural father of a lesbian mother's child, the paternity suit under section 7006(c) of the Act would not be substantially different from any other suit in which the paternity of a child is at issue except that the lesbian context may present specific evidentiary problems for the asserting father. Assuming the lesbian mother's contact with the child's father was socially and sexually minimal, the asserting male would be seemingly limited in his proof to anthropological data.[80] This limitation could present a severe hardship for him in meeting his burden of proof if blood tests that did not exclude him, could not be entered into evidence.[81] The *Cramer* and *County of Fresno* cases, however, greatly increase the danger that the alleging father will be able to carry his burden of proof in those situations where the lesbian mother's contact with the man has been fleeting, discrete and purely sexual.

C. Establishment of Paternity Through Artificial Insemination

Prior to the passage of the Uniform Parentage Act, the California Supreme Court addressed the issue of paternity of a child born through a heterologous artificial insemination[82] to which the mother's husband had consented.[83] In *People v. Sorenson,* the husband appealed a conviction for nonsupport of the child stemming from the separation of the couple.[84] While the court concluded that the husband was the child's "legal" father and responsible for its support, it found that "[t]he anonymous donor of sperm cannot be considered the 'natural father,' as he is no more responsible for the use made of his sperm than is a do-

80. Anthropological data include comparison of the father and child's physical characteristics.

81. See note 72 *supra* and accompanying text.

82. "There are two types of artificial insemination in common use: (1) artificial insemination with the husband's semen, homologous insemination, commonly termed A.I.H. and (2) artificial insemination with semen of a third-party donor, heterologous insemination, commonly termed A.I.D. Only the latter raises legal problems of fatherhood and legitimacy . . ." People v. Sorenson, 68 Cal. 2d 280, 284 n.2, 437 P.2d 495, 498 n.2, 66 Cal. Rptr. 7, 10 n.2. For a comprehensive analysis of both types of artificial insemination, see Note, *Artificial Insemination: A Legislative Remedy,* 3 West. St. U.L. Rev. 48 (1975).

83. People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

84. The municipal court had found Sorensen guilty of violating Cal. Penal Code § 270. *Id.* at 282-83, 437 P.2d at 497, 66 Cal. Rptr. at 9.

nor of blood or a kidney."[85]

The Act's definition of the relationships among the donor, the husband of the woman artificially inseminated, and the child thereby conceived is, in effect, a codification of the findings in *Sorenson*.[86] If the husband consents in writing to a physician-supervised[87] artificial insemination of his wife, the husband will be treated in law as though he were the child's natural father[88] and the donor will be treated in law as though he were not the natural father.[89] The National Uniform Parentage Act,[90] upon which the California artificial insemination statute is modeled, was designed to cover the legal problems of paternity arising from artificial insemination only within the marital context.[91]

The artificial insemination section of the National Act was proposed verbatim to the California Legislature.[92] While leaving unchanged that section defining the husband's relationship to the child,[93] the Legislature deleted any reference to the marital status of the donee when defining the relationship of the donor to the child.[94] The Act states: "The donor of semen provided to a licensed physician for use in artificial insemination of a *woman* other than the donor's wife is treated in law as if he were not the

---

85. "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible." *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11.

86. *See* CAL. CIV. CODE § 7005 (West Supp. 1980).

87. For a discussion of the physician's liabilities in the artificial insemination process, see Note, *The Legal Status of Artificial Insemination: A Need for Policy Formulation*, 19 DRAKE L. REV. 409, 434-35 (1970); Note, *Artificial Insemination and the Law*, 1968 U. ILL. L.F. 203, 223-25. For legal forms for all parties, see 15 AM. JUR. LEGAL FORMS 2D *Physicians and Surgeons* §§ 202:81-:88 (1973). For an example of a form covering the details of an appropriate donor medical examination, see ARTIFICIAL INSEMINATION PROJECT, *supra* note 10.

88. CAL. CIV. CODE § 7005(a) (West Supp. 1980).

89. *Id.* § 7005(b).

90. See UPA ANNOTATED, *supra* note 53, at 587.

91. *Id.* § 5 (Commissioners' Comment). The Commissioners recognized that artificial insemination raised complex, serious legal problems. *Id.*

92. Cal. SB 347 (1975-76).

93. CAL. CIV. CODE § 7005(a) (West Supp. 1980) provides in pertinent part:

> If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

94. Cal. SB 347 (1975-76) (see May 8, 1975 amendment).

natural father of a child thereby conceived."[95]

The thrust of section 7005 of the California Act had been to establish parentage in the consenting husband and to relieve the innocent donor of paternal liability. The deletion of the word "married" expanded the protection afforded the donor to include actions brought by an unmarried woman asserting the donor's paternity; but, in so doing, the legislature must have realized that it was extending protection from assertions of paternal rights by the donor of semen provided to a licensed physician to the single woman.

Proof of Paternity With Home Artificial Insemination

Although section 7005 of the Act seems to apply to artificial insemination of a single woman through a licensed physician, it leaves members of the lesbian community practicing home artificial insemination without any direct statutory guidelines to define the father and child relationship of the donor. It should be noted, however, that even though a lesbian mother lacks direct statutory protection, the donor must still be able to prove paternity in any action brought to seek judicial declaration of a father and child relationship.[96] Because the donor ideally had no contact with the lesbian mother, his problems of proving paternity are compounded; however, the new developments with blood tests present a danger that the donor can meet his burden of proof, thus establishing a judicially cognizable father and child relationship.[97]

III. THE FATHER V. THE LESBIAN MOTHER: CUSTODY AND VISITATION

Once a man is determined to be the child's natural father under the California Uniform Parentage Act through proof of paternity,[98] the use of a statutory presumption[99] or by stipulation of the parties, the judgment of the court "is determinative for all purposes . . ." except for actions to establish criminal support liability "pursuant to section 270 of the California Penal

95. CAL. CIV. CODE § 7005(b) (West Supp. 1980) (emphasis added).
96. *Id.* § 7006(c). *See also* note 30 *supra.*
97. *See* notes 73-80 *supra* and accompanying text.
98. *See* notes 70-80 *supra* and accompanying text.
99. *See* notes 60-69 *supra* and accompanying text.

Code."[100]

A. THE FATHER'S RIGHT TO CUSTODY

Under California law, "[t]he 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."[101] Therefore, should the natural father achieve presumptive status under the Act, the mother is faced with the same issues in litigation concerning the child's custody as she would have faced had she been married to the child's father.[102]

However, the right to custody is not limited to presumptive fathers. If the court determines that a man is the natural father in an action brought to determine the father and child relationship,[103] the judgment of the court may contain "any other provision directed against the appropriate party to the proceeding, concerning the duty of support, *the custody and guardianship of the child,* visitation privileges with the child . . . or any other matter in the best interest of the child.[104] The father that proves his paternity *and* that granting him custody would be in the child's best interest could be awarded custody.

The Child Conceived Through Sexual Intercourse

Since "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents,"[105] the fact that the lesbian mother of a child born through sexual intercourse had not married the child's father, would not serve as a bar to his gaining custody. In a custody battle between a lesbian mother and the unwed father of her child, the mother's lesbianism would be an important issue in the court's determination of the best interests of the child. While the courts have not looked favorably on the lesbian family

---

100. CAL. CIV. CODE § 7010(a) (West Supp. 1980).

101. *Id.* § 197.

102. For litigation strategies for lesbian mothers, see Hitchens & Price, *supra* note 2.

103. *See* CAL. CIV. CODE § 7006(c) (West Supp. 1980). A man alleging himself to be the natural father may bring an action to establish a father and child relationship where there is no presumptive father.

104. *Id.* § 7010(c) (emphasis added).

105. *Id.* § 7002.

as a suitable environment for the raising of children,[106] the judicial bias is potentially surmountable through the use of expert testimony in an attempt to defuse the volatile issue of the mother's lesbianism.[107]

The Child Conceived Through Artificial Insemination

While the California Uniform Parentage Act provides a comprehensible framework in which to resolve the issues of custody between the lesbian mother, the unwed father, and the child conceived through sexual intercourse, those same relationships for a child conceived through artificial insemination remain significantly unaddressed. The Act provides protection for the non-husband donor of semen used to artificially inseminate a married woman as in *Sorenson*[108] and arguably provides statutory protection against paternal assertions by a donor of semen to a licensed physician for the artificial insemination of a single woman,[109] but it fails to address the relationships and accompanying paternal rights when the artificial insemination takes place within the context of home artificial inseminations currently being practiced within the lesbian community.[110]

Home artificial insemination may be carried out in situations that establish total anonymity between the donor and the lesbian donee through the use of a liaison[111] or situations in which the donor and the donee meet to discuss the process, its implications, their reservations and potential problems.[112] California has yet to litigate at the appellate level the issue of the donor's paternal interests beyond the *Sorensen* context or the factual confines of section 7005 of the Act. It is instructive, therefore, to turn to a recent decision of the New Jersey Superior Court[113] to examine some of the policy issues involved in

---

106. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons In the United States*, 30 HASTINGS L.J. 799 (1979).

107. *See* Hitchens & Price, *supra* note 2.

108. CAL. CIV. CODE § 7005(b) (West Supp. 1980). *See also* notes 81-91 *supra* and accompanying text.

109. CAL. CIV. CODE § 7005(b) (West Supp. 1980). *See also* notes 90-95 *supra* and accompanying text.

110. ARTIFICIAL INSEMINATION PROJECT, *supra* note 10.

111. *Id.* at 14.

112. *Id.* at 17.

113. C.M. v. C.C., 152 N.J. Super, 160, 377 A.2d 821 (1977).

determining the paternal rights of a donor of semen that is used in a home artificial insemination. The case reflects a direction California courts might take that would seriously undermine the lesbian mother's exclusive right to custody and control of her child.

In *C.M. v. C.C.*,[114] the parties to the action had been friends. After C.C. discussed her desire to have a child by home artificial insemination, C.M. asked to be the donor. Over a period of months they practiced artificial insemination and eventually C.C. conceived.[115] C.M. claimed that for the first few months of the pregnancy "he assumed he would act toward the child in the same manner as most fathers act toward their children" but C.C. asserted that he was just one of her friends and that she had not intended that C.M. maintain a paternal relationship with the child. C.M. then brought suit to acquire visitation rights.[116]

The New Jersey Superior Court agreed that C.M. was the natural father of the child and deserved visitation rights.[117] "C.M.'s consent and active participation in the procedure leading to conception should place upon him the responsibilities of fatherhood."[118] In addition to C.M.'s new-found rights to visitation, the court decided it must also consider the father's "support and maintenance of the child and payment of any expenses incurred in his birth."[119]

The court in *C.M. v. C.C.* examined the few extant artificial insemination cases it felt relevant, including *Sorensen*. Since none of the precedents relied on by the court had involved litigation between a donor and a donee the case presented "a unique factual situation with no reported legal precedents di-

---

114. *Id.*

115. *Id.* at 161, 377 A.2d at 821-22.

116. *Id.*

117. *Id.* at 168, 377 A.2d at 825. C.M. has returned to superior court twice since winning his visitation rights—first to protest alleged violations of those visitation rights and most recently to have his name listed on the baby's birth certificate as the natural father to enable him to provide medical insurance for the boy. In granting C.M.'s request to be listed, Superior Court Judge Steven Kleiner had the boy play hide-and-seek with C.M. in chambers and on the strength of the child's "joy and glee" determined that a "normal father-son relationship" existed. As a result of these later suits, C.M. was awarded expanded visitiation rights. S.F. Chronicle, Nov. 29, 1979, at 54, col. 5.

118. 152 N.J. Super. at 168, 377 A.2d at 825.

119. *Id.*

rectly on point, in [that] or any other jurisdiction."[120] The New Jersey court noted that legal issues had arisen only within the context of an artificial insemination with semen other than the husband's and there was no question that the husband was the natural father when his wife was artificially inseminated with the husband's own semen.[121]

The court arrived at its decision by finding the facts of the case to be closest to those situations in which there is no third party donor and the husband's semen was used.[122] "If conception took place by intercourse, there would be no question that the 'donor' would be the father. The issue becomes whether a man is any less a father because he provides semen by a method different than that normally used."[123] Once the court had established that C.M. was the natural father, New Jersey case law allowed for the granting of visitation rights.[124]

Because home artificial insemination as in *C.M. v. C.C.* is not covered by section 7005 of the Act, California courts could similarly conclude that the donor was the child's natural father. Thus, having established the father and child relationship, the court would have the discretion to consider the man for custody of the child.[125] However, close examination of the constitutional issues raised by *Stanley v. Illinois* and its progeny[126] indicate that even without clear statutory protection, a lesbian mother is not defenseless in the face of paternal assertions by the donor.

In *Stanley,* the Supreme Court recognized that an unmarried father has a constitutionally protectable familial interest in the "companionship, care, custody, and management of his . . . children."[127] As seen in *Quilloin v. Walcott,* those familial interests can be cut off through adoption when the state's interest in maintaining the integrity of an existing family unit is at stake.[128]

---

120. *Id.* at 160, 377 A.2d at 821.
121. *Id.* at 166, 377 A.2d at 824.
122. *Id.*
123. *Id.*
124. R. v. F, 113 N.J. Super. 396, 273 A.2d 808 (1971).
125. CAL. CIV. CODE § 7010(c) (West Supp. 1980). *See* notes 103-04 *supra* and accompanying text.
126. *See* notes 19-50 *supra* and accompanying text.
127. 405 U.S. at 651.
128. 434 U.S. 246 (1978). *See* notes 33-50 *supra* and accompanying text.

Such a denial of important interests of an unwed father does not violate his fourteenth amendment rights of equal protection and due process.[129] Additionally, it is settled law that a parent may voluntarily and irretrievably relinquish familial rights as defined in *Stanley* when s/he places a child for adoption.[130]

Had the court in *C.M. v. C.C.* not limited itself to determining the issues solely on the basis of New Jersy law, it had at its command the basic precepts of *Stanley*. The court recognized that C.M. had assumed he would be able to act like a father toward the child.[131] His *familial expectation* was that he would enjoy those interests recognized under *Stanley* as constitutionally protectable. He had expected to some degree to share in the care, custody, companionship and management of the child. In contrast, a donor under section 7005(b) gives semen to a licensed physician for use at a later date and understands that the donee and any resultant children will remain anonymous. Due to the impersonal nature of the donation to the physician and the clear understanding of anonymity, the donor has no *familial expectation* under the circumstances—he has no expectation that he will enjoy the care, custody, companionship and management of any resulting issue. It is within this context that the *Sorensen* court likened the donation of semen to that of giving blood or donating a kidney.[132]

While the donor under section 7005(b) of the Act is not considered at law to be the child's natural father, he is *in fact* the child's biological father. It would be constitutionally sound in light of *Stanley* to state that the donor's biological tie triggers *Stanley* rights, but his lack of *familial expectations* regarding any assertion of those rights under the circumstances of the donation operate both as his consent to their relinquishment and as his elimination as the child's natural father *at law*. The issue in a dispute between a donor and a single mother then becomes at what point on the factual continuum between the donation to a physician for later anonymous use and the situation in *C.M. v.*

---

129. *Id.*

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

131. *See* note 116 *supra* and accompanying text.

132. 68 Cal. 2d at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.

C.C. does a legitimate *familial expectation* arise that would support the contention that the donor did not intend to relinquish his constitutionally protected paternal rights.

By using *familial expectations* as a guide, protection against an assertion of paternal interest could be provided the lesbian mother conceiving through home artificial insemination. If the basis for terminating the donor's paternal rights under section 7005(b) is the fact that donation to a physician promotes an understanding that there will be no *familial expectations,* any donation of semen under circumstances that guarantee that no *familial expectations* have arisen should likewise support the termination of those rights.

A written agreement not to assert paternal rights would not be binding on the court.[133] Such an agreement would serve as evidence of the donor's lack of *familial expectations* at the time of the donation. Such an agreement could be coupled with efforts on the part of the potential mother, her liaison or others to structure the donation in such a way as to constitute evidentiary support for the contention that the donor has knowingly and fully relinquished paternal rights that he has been made aware exist under *Stanley.*

B. The Father's Right to Visitation

In *Griffith v. Gibson,*[134] the court determined that "[a] natural father need not be a presumptive father under Civil Code section 7004 in order to be entitled to visitation rights under Civil Code section 7010."[135] Michael Griffith and Beverly Gibson had a six year old son who was born out of wedlock. While Griffith's attempts to visit the child were thwarted by the mother, he paid support, sent Christmas and birthday cards and

133. Cal. Civ. Code § 7006(e) (West Supp. 1980) states: "Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section" (action to establish the existence of a father and child relationship). It should be noted, however, that the court may enforce a promise to furnish support: "Any promise in writing to furnish support for a child, growing out of a presumed or alleged father and child relationship, does not require consideration and is enforceable according to its terms, subject to subdivision (d) of section 7006." *Id.* at § 7016.

134. 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (1977).

135. *Id.* at 469, 142 Cal. Rptr. at 178.

conversed with the child on the telephone on several occasions.[136] It was stipulated by both parties to Griffith's action to secure visiting rights that he was the biological father but that he failed to qualify for presumptive status under the Act.[137] The court found that the existence of the biological relationship was sufficient to establish the father as a legal parent and allow visitation at the court's discretion.[138] Because California law requires that "[r]easonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child,"[139] the mother would have to demonstrate that such visitation would be detrimental.[140]

IV. THE FATHER V. THE LESBIAN MOTHER'S PARTNER: ADOPTION AND TESTAMENTARY GUARDIANSHIP

Since the California Uniform Parentage Act addresses and defines the relationship between a natural father and his child, it had to incorporate the mandates of *Stanley v. Illinois* for notice and the opportunity to be heard on the father's fitness as a parent at the time of any change in the child's legal custody.[141] The California Legislature embodied the broadest possible reading of *Stanley* into the Act by requiring that every man identified as a possible natural father be notified of any pending adoption actions proposed by the mother or the state.[142] If, after

---

136. *Id.* at 468, 142 Cal. Rptr. at 178.
137. *Id.* at 468-69, 142 Cal. Rptr. at 178.
138. *Id.* at 471, 142 Cal. Rptr. at 180.
139. CAL. CIV. CODE § 4601 (West 1970).
140. Griffith v. Gibson, 73 Cal. App. 3d 465, 474-75, 142 Cal. Rptr. 176, 182 (1977).
141. *See* notes 27-32 *supra* and accompanying text.
142. CAL. CIV. CODE § 7017(d) (West Supp. 1980). CAL. CIV. CODE § 7017(c) provides in pertinent part:

> In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any other appropriate person by the State Department of Social Services, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished . . . . The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabitating with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department

notification, he fails to come forward and assert a right to the child's custody, the father's paternal rights will be judicially terminated.[143]

Before the mother can place her child for adoption, the consent of a father with presumed status must be obtained.[144] The Act requires that the court make inquiry into the identity of any possible fathers[145] and notify them of pending adoption proceedings.[146] If, after coming forward in response to notice, the man alleging himself to be the child's natural father is able to prove any of the fact situations giving rise to the presumption of paternity,[147] he has the right to deny his consent and thus prevent adoption.[148] If the man comes forward but cannot establish that he is a presumed father under the Act, the court may issue an order that only the mother's consent is required for the adoption.[149] This parallels the Supreme Court ruling in *Quilloin v. Walcott* where the Court affirmed the state's denial of veto power over an adoption to a natural father who had not established an actual relationship with the child.[150]

However, the Act provides the court with the discretionary power to circumvent the requirement that a father have presumptive status in order to veto an adoption. "If the natural fa-

---

or licensed adoption agency shall report the findings to the court.

143. *Id.* § 7017(e).

144. CAL. CIV. CODE § 224 (West Supp. 1978).

145. *See* note 142 *supra.*

146. CAL. CIV. CODE § 7017(d) (West Supp. 1980).

147. *Id.* § 7004.

148. *Id.* § 7017(d) states in pertinent part: "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." If, however, the lesbian mother had previously been awarded custody of the child and the father "willfully fails [for one year] to communicate with and to pay for the care, support, and education of such child when able . . ." he will loose his right to object to the child's placement for adoption. CAL. CIV. CODE § 224 (West Supp. 1978); *see also* Adoption of Van Anda, 62 Cal. App. 3d 189, 193, 132 Cal. Rptr. 878, 880 (1976).

149. CAL. CIV. CODE § 7017(d) (West Supp. 1980).

150. *See* notes 33-49 *supra* and accompanying text. Under the California statutory scheme, a father like Abdeil Caban would have the right to veto a proposed adoption of his children. *See* note 50 *supra.* The fact that he had taken the children into his home and held them out to be his own would qualify him for presumptive status under § 7004(a)(4).

ther 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."[151] Arguably, the court can allow a nonpresumptive natural father to qualify for the presumption by first awarding him custody and allowing him to take the child into his home.[152] Upon qualifying as a presumed father, he would then have the authority to veto any proposed adoption.

In *In re Tricia M.*,[153] the court considered an action by a natural father seeking to bar an adoption agency attempt to terminate his paternal rights and proceed with the adoption with only the consent of the mother.[154] The trial court, upon a finding that the father did not have presumed status, terminated his rights and made the order that his consent was not needed for adoption. "No other issue was put in focus and the court specifically rejected the contention that it had before it a question which would relate to custody or what was in the best interests of the child."[155]

The court of appeals reversed with directions that the trial court reconsider the facts and strongly suggested that the appellant's fitness be considered prior to a determination of his parental status.

> Where the mother has frustrated the natural father's efforts to hold the child out as his, the court may, in a proper case, first grant him custody, allow him to complete the conduct necessary under section 7004, subdivision (a) (4) to establish himself as a presumed father, and then make the appropriate order.[156]

The *Tricia* court's reasoning was directly confronted and rejected in a recent appellate decision.[157] In *W.E.J. v. Superior*

---

151. CAL. CIV. CODE § 7017(d) (West Supp. 1980).

152. *Id.* § 7004(a)(4).

153. 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977), *cert. denied*, 435 U.S. 1000 (1978).

154. *Id.* at 127, 141 Cal. Rptr. at 556. *See also* CAL. CIV. CODE § 7017(b) (West Supp. 1980).

155. 74 Cal. App. 3d 125, 131, 141 Cal. Rptr. 554, 558 (1977), *cert. denied*, 435 U.S. 1000 (1978).

156. *Id.* at 134, 141 Cal. Rptr. at 560 (emphasis added).

157. W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 311, 160 Cal. Rptr. 862, 867

Court, the court was faced with an action brought by adoptive parents seeking to block an award of custody to a child's unwed father approximately one year after the child's birth.[158] The mother had relinquished her child to the adoptive parents immediately upon it's birth. In striking down the lower court's award of custody, the court stated that the interpretation given section 7017 of the Act by the *Tricia* court

> ignores the function of the classification which section 7017, subdivision (d), provides. *The statutory purpose is to distinguish between those fathers who have entered into some family relationship with the mother and child and those who have not.* That purpose is not served by making the child a talisman which the court may hand to a biological father pendente lite for the purpose of changing his classification.
>
> Furthermore, there is no need for this talismanic ritual. If the court finds that in fact the best interests of the child require that custody go to the biological father the court may so order, thereby forestalling the need for an adoption. This result may be accomplished without giving the father a veto power.[159]

The *W.E.J.* court concluded that section 7017 represents the legislature's resolution to the tension between paternal interests of the unwed father and the best interests of the child[160] and that the statutory resolution does not impinge upon recognized constitutional rights of the unwed father.[161] The purpose and effect, therefore, of section 7017 is to allow the court to deny custody to a biological father who has not established a relationship with his child if the court determines that a different disposition would be in the best interests of the child.[162]

(1979).

158. *Id.* at 306, 160 Cal. Rptr. 864.

159. *Id.* at 311, 160 Cal. Rptr. 867 (emphasis added).

160. *Id.* at 308, 160 Cal. Rptr. 865.

161. *Id.* at 313-15, 160 Cal. Rptr. 868-69. *See* section I *supra* for a discussion of an unwed father's constitutional rights.

162. *Id.* The powerful dissent by Associate Justice Jefferson in support of both the *Tricia* reasoning and a legislatively intended "backdoor" presumption, demonstrates that the tension between the unwed father's paternal interests and the child's best interests is far from resolved. *Id.* at 316-20, 160 Cal. Rptr. 870-72 (Jefferson, J., dissenting). Jefferson argues that without providing the opportunity for an unwed father to gain pre-

A. PRESUMPTIVE STATUS AS A THREAT TO THE CONTINUITY OF THE LESBIAN FAMILY UNIT

For the women who choose to raise their children within the context of a lesbian relationship, the existence of a man that can establish a father and child relationship through either presumption or proof of paternity constitutes a threat to the continuity of the lesbian family unit. Even in those cases where the mother has won the difficult battle for custody with the father, such a resolution remains open to modification and the possibility of controversy between the father and the mother or her lesbian partner throughout the child's minority.[163]

Because the lesbian union does not enjoy legal standing as a marital relationship,[164] in the event of the mother's death or serious incapacitation, legal custody of the child will not pass automatically to her partner, but must be provided for before the mother's death either through a private (independent) adoption of the child by the partner[165] or by a testamentary appointment

---

sumptive status at the time of an adoption proceeding, section 7017 must be declared unconstitutional as a violation of equal protection enunciated in *Stanley, Quilloin,* and *Caban* (*see* note 50 *supra*). *Id.* at 327-32, 160 Cal. Rptr. 877-80 (dissent).

163. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 17.7 (1968). CAL. CIV. CODE § 4600 (West Supp. 1980) provides in pertinent part: "In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding *or at any time thereafter,* make such order for the custody of the child during minority as may seem necessary or proper." (Emphasis added).

164. CAL. CIV. CODE § 4100 (West Supp. 1980) (amended by 1977 Cal. Stats. ch. 339, § 1) includes the words "man and woman" thus reinforcing the legislative intent that marriage and its accompanying rights be limited under law to heterosexual unions.

165. For general information on an adoption in California by the lesbian partner as a single parent, see note 3 *supra.* While an adoption by the lesbian partner would guarantee the continuity of the family unit, it requires that the child's possible inheritance from the natural father be severed and that any inheritance from the mother come through her will; therefore, if the mother were to die intestate, the child would inherit only from and through the adopting partner and her bilogical family. CAL. PROB. CODE § 257 (West 1956). *See also* Estate of Garey, 214 Cal. App. 2d 39, 29 Cal. Rptr. 98 (1963) (the court denied a claim that inheritance was not severed when the party was adopted after the death of the natural relative).

In a private or independent adoption, the natural parent must consent to the adoption by specific adoptive parents and legal custody remains with the natural mother unless and until the adoption is granted. Adoption of Driscoll, 269 Cal. App. 2d 735, 738-39, 75 Cal. Rptr. 382, 385 (1969). "This is in contrast to an agency adoption where the child is relinquished by its parents to the agency. In the latter case, that parent does not know the names of the adoptive parents nor does the parent have the right to refuse specific adoptive parents." *Id.* at 739, 75 Cal. Rptr. at 385. *See also* Adoption of Schroetter, 261 Cal. App. 2d 365. 67 Cal. Rptr. 819 (1968).

An agency investigation of the adopting parent in an independent adoption is re-

of the partner as the child's guardian.[166] Through these devices, the lesbian mother can guarantee that the child will remain with the partner who has functioned as a de facto parent.

Under the Act, however, the father with presumptive status has the power to block such an adoption and, if he is "worthy and deserving," the court can circumvent the requirement of presumptive status.[167] It is not difficult, considering the general level of homophobia on the trial bench[168] to discern how the court would view a "worthy and deserving" non-presumptive

---

quired. 22 CAL. ADM. CODE §§ 30687, 30689 (1972). Since the evaluation appears to be purely discretionary, the partner's lesbianism could conceivably become a part of the evaluation. A failure of the agency to recommend the adoption to the court or failure of the court to grant the petition for an agency approved adoption could not result in the child being placed elsewhere by the agency or the court. Adoption of Driscoll, 269 Cal. App. 2d 735, 737-39, 75 Cal. Rptr. 382, 384-85 (1969).

166. The lesbian mother can make a testamentary appointment of her partner as the child's guardian upon the death of the mother. CAL. PROB. CODE § 1403 (West Supp. 1980). Second only to a parent, guardianship of a child should be given "[t]o one who was indicated by the wishes of a deceased parent," *id.* § 1407(2) (West 1956); however,

> [i]n appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question.

Id. § 1406.

Unlike adoption by the partner, the existence of guardianship does not foreclose the possibility of a subsequent adoption of the child by one other than the partner. *See In re* Santos' Estate, 185 Cal. 127, 195 P. 1055 (1921); *In re* Minnicar's Estate, 141 Cal. App. 2d 703, 297 P.2d 105 (1956) (dictum). The California Supreme Court reasoned in *Santos* that the guardian was an arm of the court and without standing to bar an adoption; compare notes 171-182 *infra* and accompanying text for the partner's rights as a de facto parent to assert her de facto familial interest in the custody, care, management, and companionship of the child.

167. *See* notes 147-56 *supra* and accompanying text. The court in Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (1977), indicated that the strong state interest in promoting the continuity of existing family units *where the mother does not give up custody and control* would justify denying the putative father the right to veto what the court feels is an adoption that promotes the child's best interests. This continuing state and federal judicial theme in support of existing family units (discussed in Stanley v. Illinois, Quilloin v. Walcott) would seem to provide the basis for a strong argument comparing the clear similarities between the stepparent adoption and the lesbian partner adoption. Both provide support to already existing family units without disruption of the child's daily parental relationships. However, since the solicitude for the stepparent family structure is based in large part on the traditional marriage, such a comparison will not receive much favor until the lesbian family is given greater credibility.

168. *See* note 106 *supra.*

heterosexual father when pitted against a lesbian mother attempting to irretrievably sever paternal rights in order that her lesbian partner might adopt *his* child. The most meaningful balance in such a contest probably would be struck between a gay father and a lesbian mother. The father's homosexuality would lessen the weight judicial preference otherwise accords the father.[169]

The presumptive status of the father would also defeat any attempt at a shift in the child's custody to the lesbian partner through a testamentary appointment of guardianship. California law will allow such an appointment without the consent of the father only if his consent would not be required to place the child for adoption.[170]

B. The Lesbian Partner's Rights as a De Facto Parent

Should the lesbian partner find herself, at the death of the child's mother, in a custody battle with a father who has presumptive status, she is not without standing in any proceeding concerning the child's custody. The California Supreme Court has recognized in *In re B.G.*,[171] that de facto parents have the right "to appear as parties [to a custody hearing] to assert and protect their own interest in the companionship, care, custody and management of the child."[172] The court stated:

> We use the term "de facto parent" to refer to that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care. (See Goldstein, Freund, and Solnit, Beyond the Best Interests of the Child

---

169. It should be noted that the problems facing a lesbian partner are not necessarily limited to custodial assertions from the child's father but may also be the result of actions to gain custody by other members of the lesbian mother's family such as her own brothers and sisters or parents. *See* note 180 *infra*.

170. Cal. Prob. Code § 1403 (West Supp. 1980). *See In re* Joaquin's Guardianship, 168 Cal. App. 2d 99, 335 P.2d 507 (1959) in which a mother attempted a testamentary appointment of guardianship over her child. The court found that without the father's consent, the appointment of guardianship was invalid and that a father is not to be deprived of the custody of his child unless it is shown he is unfit. *Id.* at 101, 335 P.2d at 508-09.

171. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

172. *Id.* at 693, 523 P.2d at 254, 114 Cal. Rptr. at 454. For the United States Supreme Court view of foster parent standing as de facto parents in adoption proceedings, see Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

(1973) p. 98.)[173]

In its decision, the court considered California's parental preference doctrine in examining the custodial issue in a contest between a natural and a de facto parent.

> In any proceeding where there is at issue the custody of a minor child . . . [c]ustody should be awarded in the following order of preference according to the best interests of the child:
>
> (1) To both parents jointly pursuant to Section 4600.5 or to either parent.
>
> (2) *[T]o the person or persons in whose home the child has been living in a wholesome and stable environment.*
>
> . . . .
>
> (c) Before the court makes any order awarding custody to a person or persons other than a parent . . . it shall make a finding that an award of custody to a parent would be detrimental to the child and an award to a nonparent is required to serve the best interests of the child.[174]

The California Supreme Court, in reversing and remanding *In re B.G.*, stressed that the dual findings of detriment and best interests must both be established before custody can be awarded to a de facto parent. A finding by the trial court that an award to the de facto parent serves the best interests of the child is not sufficient without the additional finding that removal to the natural parent would be harmful.[175] Although the California Supreme Court did not provide the lower courts with clear guidelines concerning what constitutes "detriment,"[176] it would seem that detriment does not require a finding that the natural parent is unfit.[177]

> Moreover, in furtherance of the legislative purpose of placing the best interests of the child ahead of a parent's rights, even though a father is found to be fit in the usual sense, he nonetheless will be denied custody if it is shown that it would

---

173. 11 Cal. 3d at 692 n.18, 523 P.2d at 253 n.18, 114 Cal. Rptr. at 453 n.18.

174. CAL. CIV. CODE § 4600 (West Supp. 1980) (emphasis added).

175. 11 Cal. 3d at 699, 523 P.2d at 258, 114 Cal. Rptr. at 458.

176. *Id.* at 698, 523 P.2d at 257, 114 Cal. Rptr. at 457.

177. Guardianship of Marino, 30 Cal. App. 3d 952, 958, 106 Cal. Rptr. 655, 659 (1973).

> be harmful to place the child with him . . . . For example, if it is shown that it would be emotionally and psychologically harmful to uproot the child from the care and love of the nonparents with whom it has been living for a substantial period of time and place it with the father with whom it has never had contact, then custody must remain with the nonparents.[178]

Other courts have followed suit in focusing attention on the harm to the child in separating the child from a de facto parent when making determinations of detriment.[179]

The court in *Adoption of Michelle T.*[180] expressly stated that what is at issue in the best interest concept in child custody cases is not the consideration of "whether a particular set of circumstances is in the best interest of the child, but whether a particular set of circumstances relative to an alternative set of circumstances is in the best interest of the child."[181] This determination involves the judicial standard, recommended by some commentators, that the court should be looking for the least detrimental alternative.[182] An examination of whether remaining

---

178. *In re* Reyna, 55 Cal. App. 3d 288, 302, 126 Cal. Rptr. 138, 147 (1976). The *Reyna* court noted:

> While the statute [§ 4600] declares a strong preference for the parent over a nonparent, it also evinces a legislative policy that, if the award of custody to a parent as against the claim of a nonparent would be harmful to the child, custody must be awarded to the nonparent. (*In re B.G.* . . . 11 Cal. 3d at pp. 698-699.) Although custody may not be awarded solely on the basis of the welfare of the child, the best interest of the child is the overriding concern. (*In re B.G.* . . . 11 Cal. 3d at p. 698.)

Id. at 301, 126 Cal. Rptr. at 147.

179. *See, e.g., In re* D.L.C., 54 Cal. App. 3d 840, 126 Cal. Rptr. 863 (1976).

180. 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975).

181. *Id.* at 707, 117 Cal. Rptr. at 860.

182. *See, e.g.*, MacGowan, *supra* note 49, at 9-12.

> As in *Adoption of Michelle T.*, where the available alternatives have been continuing or according legal recognition to an existing, apparently successful, *de facto* parent-child family unit, or removing a child to an untested environment, appellate courts have selected the former even though it necessitated foreclosing the reuniting of child and biological parent (often long absent or brutal). The recent decision of the Supreme Court of the United States, *Quilloin v. Walcott*, holding for the *de facto* parents against the biological father, cannot be reconciled with paramount rights of a parent (even an unwed father) to preference in custody proceedings were it not

with the de facto parent is in the child's best interests and whether removal to the natural parent would be detrimental to the child would seem at a practical level to involve just such a comparison of the alternatives.

When the court considers whether it is in the best interest of the child to remain with the de facto lesbian parent, it makes the same evaluation of the partner's lesbianism as it would in any other custody case and the de facto parent must be prepared to confront the judicial bias.[183] There is, however, precedent for a finding that the lesbianism of a de facto parent is not sufficient reason to deny custody to a partner who has demonstrated parental caring and support in the absence of any showing that her lesbanism has had or will have an adverse affect on the child.[184]

V. CONCLUSION

Prior to *Stanley v. Illinois* and the Uniform Parentage Act, the mother of an illegitimate child under California law was solely entitled to the custody and control of her child. The emergence of constitutional and statutory rights of an unwed father have muddied the waters of the single mother's rights. While the case law has been shaping and expanding the scope of paternal rights, the continuity of family units created by single women, both homosexual and heterosexual, has been destabilized.

> considered that the alternative of giving legal sanction to an existing family unit was less detrimental to the child than the alternative of allowing a natural father who did communicate and visit with the child the right to block the child's wished-for adoption by his step-parent.

Id. at 10-11 (footnotes omitted). *See generally* BEST INTERESTS, *supra* note 49.

183. *See* note 2 *supra.*

184. *See In re* Hatzopoulos, 4 FAM. L. REP. 2075 (1977) (Colo. Juv. Ct., July 8, 1977). The court awarded custody of a child to the deceased mother's lesbian lover instead of to the mother's sister stressing the need for "continuity of life experience" and the fact that

> Donna's [the lesbian partner] sexual preference has not affected the child in the past and is not related to her ability to parent the child. Her strengths as a parent to the child are her sensitivity, her ability to empathize with the child, her warmth and her dependability. When sexual preference would become significant to the child, Donna has the ability to deal with it intelligently, openly and honestly.

Id. at 2076.

Whenever the father knows the identity of the child's mother, the potential exists for litigaton over custody and visitation. This potential exists whether the child was conceived through sexual intercourse or by artificial insemination and regardless of any written agreement that no paternal rights will be asserted. It exists whenever the mother attempts to change the legal custody of the child to provide for the future security of her family unit.

The California Uniform Parentage Act provides the framework for a determination of the father and child relationship within traditional family forms,[185] but it fails to meaningfully address paternal interests within the lesbian context. Because of the increasing incidence of single women choosing to bear children outside traditional family forms, a meaningful legislative solution is needed. Until the legislature provides for balancing the rights of the unwed mother, the best interests of the child, and the rights of the unwed father based on *familial expectation*, the single woman looking at the viable options for conceiving a child outside of marriage must be keenly aware of the potential issues that may result from a failure to maintain anonymity.

185. While the "backdoor" to presumptive status for the unwed father seems to have been slammed shut providing increased security for the unwed mother, the door may also have been closed on the constitutionality of section 7017. If the court must determine parentage—the father's presumptive status—before it can determine custodial rights, the only issues before the court will be: 1) whether the parent and child relationship exists (paternity), and 2) whether the father has presumptive status. If presumptive status is found not to exist, consent rights are severed and the father's merits as a fit parent will not be heard. Section 7017 may constitute a violation of equal protection under *Stanley* by creating an insurmountable barrier to the unwed father's right to a hearing on his fitness as a parent before severing his familial interests. *See* Associate Justice Jefferson's dissenting opinion in *W.E.J.* at note 162 *supra*.