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Domestic Relations Law § 111(1)(e): Requirement that Unwed Parents "Live Together" as Condition to Father's Right of Consent in Adoption of Nonmarital Child Held Unconstitutional

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about the prospective interviewing thereby reducing the possibility of interviewees being duped by cunning interviewers. Thus, upon the initial contact with interviewees, interviewers should "disclose [their] representative capacity"[53] and "specify the purpose of the contact."[54] Interviewees also should be informed of their rights "to refuse to be interviewed" and "to have their own counsel present."[55] Similarly, the guidelines should proscribe certain types of inquiries. If interviewers are prohibited from inquiring into "any matters observed in the course of the employee's performance of his or her duty" to the corporation,[56] then the possibility that the employee will make binding admissions against the corporation would be reduced. In addition, guidelines that prohibit questions concerning any communication between the employee and the corporation's counsel regarding the action[57] would minimize the chance that the attorney-client privilege will be violated.

In summary, the alter ego test seems destined to defeat the expectations of the court of appeals and the bar at large since it is simply an amalgamation of problematic tests. Implementing detailed guidelines to effectuate the underlying purposes of the disciplinary rule instead of concocting tests to determine the status of employees as "parties" would minimize the potential for overreaching, while allowing attorneys to conduct *ex parte* interviews with confidence rather than with fear of violating the disciplinary rule.

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DOMESTIC RELATIONS LAW

Domestic Relations Law § 111(1)(e): Requirement that unwed parents "live together" as condition to father's right of consent in adoption of nonmarital child held unconstitutional

Prior to 1980, section 111 of the New York Domestic Relations Law ("DRL") allowed an unwed mother to place her child up for

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[53] *Suggs*, No. 86 Civ. 2774, at 24.

[54] *Id.*

[55] University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (paraphrasing *Suggs* guidelines).

[56] *Suggs*, No. 86 Civ. 2774, at 24.

[57] *See id.*

adoption without obtaining the father's consent, but granted no similar right to unwed fathers.[1] Reasoning that "an unwed father may have a relationship with his children fully comparable to that of the mother," the United States Supreme Court, in *Caban v. Mohammed*,[2] declared that this gender-based distinction between the rights of unwed fathers and mothers is unconstitutional.[3] As a result, DRL section 111 was amended to require the unwed father's consent to the adoption of his child in certain circumstances.[4] With respect to children under six months old, the amended statute gave an unwed father a right of consent regarding the adoption

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[1] *See* DRL § 111 (McKinney 1977) (current version at DRL § 111 (McKinney 1988)). This statute provided that "consent to adoption shall be required . . . [o]f the parents or surviving parent, whether adult or infant, of a child born in wedlock; [or] [o]f the mother, whether adult or infant, of a child born out of wedlock." *Id.* § 111(b)-(c).

Under New York common law, the biological father of nonmarital children had no rights with regard to their adoption. *See In re* Anonymous Adoption, 177 Misc. 683, 683, 31 N.Y.S.2d 595, 596 (Sur. Ct. Monroe County 1941) (unwed mother alone has custodial right of child; biological father has "no rights whatever"). This common-law approach was originally adopted in DRL § 111, which made no reference to the father of a child born out-of-wedlock. *See* DRL § 111 (McKinney 1977). After 1977, however, an unwed father was entitled to notice of the adoption proceedings in certain circumstances. *See* DRL § 111-a (McKinney 1988).

In contrast to the father's powerlessness, the unwed mother clearly possessed the authority to prevent the adoption of her child. *See* Caban v. Mohammed, 441 U.S. 380, 385-86 (1979). In fact, an unwed mother's right to consent to her child's adoption was absolute unless it could be shown that she had abandoned the child, relinquished her rights with respect to the child, or was adjudicated incompetent to care for the child. *Id.*

[2] 441 U.S. 380, 389 (1979).

[3] *Id.* at 394. In *Caban*, the father and mother, Abdiel and Maria, lived together out-of-wedlock for five years, during which time two children were born. *Id.* at 382. Abdiel was identified as the father on each child's birth certificate. *Id.* In addition, Abdiel supported the children while he lived with them. *Id.* After separating from Maria, he continued to keep in touch with and visit the children. *Id.* at 382-83. Both parents filed for adoption with their respective new spouses, but because the statute only required the mother's consent, her petition was granted. *Id.* at 383. On appeal, the United States Supreme Court struck down the statute on equal protection grounds. *Id.* at 394. The Court concluded that

> [t]he effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. . . . Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted, and at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.

Id.

[4] *See* Magovern, *Legislative Changes in Adoption Proceedings*, N.Y.L.J., Sept. 15, 1980, at 1, col. 2 (summarizing changes in statute). The statute was amended to provide a "reasonable, unambiguous and objective" standard to determine when a father has maintained a "substantial relationship" with his child sufficient to accord him the veto right. Memorandum of Sen. Pisani, *reprinted in* [1980] N.Y. LEGIS. ANN. 242-43.

of his nonmarital child if he (1) openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption ("living together" requirement), (2) openly acknowledged paternity of the child, and (3) paid a reasonable amount of the pregnancy and birth expenses in accordance with his means.[5] Recently, however, in *In re Raquel Marie X.*[6] (*"Raquel Marie"*), the New York Court of Appeals held that the "living together" requirement in DRL section 111(1)(e) was unconstitutional on due process and equal protection grounds.[7]

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[5] DRL § 111(1)(e) (McKinney 1988). Section 111(1)(e) provides in pertinent part that consent to adoption shall be required . . .

. . . .

(e) [o]f the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

Id.

With respect to a nonmarital child placed with adoptive parents more than six months after birth, § 111(1)(d) requires the father's consent to adoption if

[the adult or infant] father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.

Id.

[6] 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S. Ct. 517 (1990).

[7] *Id.* at 407, 559 N.E.2d at 427, 559 N.Y.S.2d at 864. The case was decided under the United States Constitution; the New York State Constitution was therefore not considered. *Id.* at 396, 559 N.E.2d at 421, 559 N.Y.S.2d at 858.

In deciding whether a gender-based classification violates the equal protection clause, the Supreme Court has held that a court must determine whether the classification serves an important governmental objective and whether the classification is substantially related to the achievement of this objective. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972) (discussing introduction of strict scrutiny test in equal protection cases). In considering adoption laws, the Supreme Court has held that a distinction on the basis of gender is not necessarily unconstitutional: "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does

Raquel Marie involved two cases on appeal, *In re Raquel Marie X.*[8] and *In re Baby Girl S.*[9] In both cases, the biological father of a nonmarital infant sought to invalidate an adoption that only the child's mother had approved.[10] Neither father, however, was able to demonstrate that he had lived with the child's mother during the requisite statutory period.[11] In *Raquel Marie X.*, the Westchester Family Court held that the relationship between the child's parents was "sufficiently continuous" to satisfy the statutory requirement,[12] but was reversed by the Appellate Division, Second Department.[13] In *Baby Girl S.*, the Appellate Division,

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not prevent a State from according the two parents different legal rights." Lehr v. Robertson, 463 U.S. 248, 267-68 (1983).

Based on the Supreme Court's decision in *Lehr*, several states have upheld even more restrictive standards than DRL § 111(1)(e). *See, e.g.*, Adoption of Baby Doe, 492 So. 2d 508, 511 (La. Ct. App.) (unwed father has right to be heard on best interests of child, but did not have the power to defeat adoption by withholding consent), *cert. denied*, 496 So. 2d 353 (La. 1986); *In re* Karen A.B., 513 A.2d 770, 772 (Del. 1986) (upholding statute allowing for determination of father's parental rights when mother refuses to disclose his identity); Shoecraft v. Catholic Social Servs. Bureau, 222 Neb. 574, 580, 385 N.W.2d 448, 452 (1986) (upholding statute requiring only mother's consent unless unwed father files notice of intent to claim paternity within five days of birth). For a discussion of the *Raquel Marie* court's constitutional analysis of DRL § 111(1)(e), see *infra* notes 15-23 and accompanying text.

[8] 150 A.D.2d 23, 545 N.Y.S.2d 379 (2d Dep't 1989), *rev'd*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S. Ct. 517 (1990).

[9] 150 A.D.2d 993, 543 N.Y.S.2d 602 (1st Dep't 1989) (per curiam), *aff'd*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S. Ct. 517 (1990).

[10] *Raquel Marie*, 76 N.Y.2d at 394-96, 559 N.E.2d at 420, 559 N.Y.S.2d at 857 (father's consent not obtained). In each case the father appeared at least arguably to have met the other two statutory requirements. *See id.* at 408-09, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. In *In re Baby Girl S.*, the surrogate found that prior to the child's birth, the father made repeated offers of support and also filed a petition to establish paternity and obtain custody. *In re* Baby Girl S., 141 Misc. 2d 905, 907, 535 N.Y.S.2d 676, 677 (Sur. Ct. N.Y. County 1988), *aff'd*, 150 A.D.2d 993, 543 N.Y.S.2d 602 (1st Dep't 1989) (per curiam), *aff'd*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S. Ct. 517 (1990). The appellate division in *Raquel Marie X.* did not give the issue full consideration, but said only that the father provided "little evidence of compliance with [the] requirements." *Raquel Marie X.*, 150 A.D.2d at 29, 545 N.Y.S.2d at 383.

[11] *Raquel Marie*, 76 N.Y.2d at 394-95, 559 N.E.2d at 419-20, 559 N.Y.S.2d at 856-57. Shortly after they were born, both children were placed up for adoption by their mothers. *Id.* at 395, 559 N.E.2d at 420, 559 N.Y.S.2d at 857. The mothers were both estranged from the fathers at the time, and neither father was consulted. *Id.*

[12] *Raquel Marie*, 76 N.Y.2d at 395, 559 N.E.2d at 420, 559 N.Y.S.2d at 857.

[13] *Raquel Marie X.*, 150 A.D.2d at 26, 545 N.Y.S.2d at 381. The appellate division characterized the couple's relationship as "turbulent," finding it to be "neither normal nor stable." *Id.* Furthermore, the court determined that the father had not satisfied the "living together" requirement and thus had no right to veto the adoption. *Id.* at 27-29, 545 N.Y.S.2d at 383. The court expressly reserved decision on the issue of whether strict compliance with DRL § 111 was required, *id.* at 27, 545 N.Y.S.2d at 382-83, but stated that "even under a relaxed interpretation," the natural father failed to establish a sufficient relation-

First Department affirmed the determination of the New York County Surrogate's Court that the "living together" requirement should be waived since the infant's mother had prevented its fulfillment by denying the father's paternity and refusing his offer of marriage.[14]

After reviewing both cases, the court of appeals concluded that the DRL's "living together" requirement was unconstitutional[15] in that it neither protected the father's interest in a paternal relationship[16] nor legitimately furthered the state's interest in adoption.[17] Writing for the court, Judge Kaye recognized that a father has a constitutionally protected right to the opportunity to develop a relationship with his newborn baby, provided that he has promptly availed himself of his chances to form "a legal and emotional bond" with the child.[18] However, the court also acknowl-

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ship. *Id.* at 29, 545 N.Y.S.2d at 383.

[14] *Baby Girl S.*, 150 A.D.2d at 993, 543 N.Y.S.2d at 602. The Surrogate's Court of New York County determined that the "living together" requirement should be read to include a "savings clause" so that a mother could not frustrate the unwed father's rights by simply refusing to live with him. *See Baby Girl S.*, 141 Misc. 2d at 915, 535 N.Y.S.2d at 682. Such a clause was included by the Legislature in DRL § 111(1)(d), which requires the father's consent for the adoption of his over-six-month-old child, provided that the father has, among other things, "visit[ed] the child at least monthly when physically and financially able to do so and *not prevented from doing so by the person or authorized agency having lawful custody of the child.*" DRL § 111(1)(d) (McKinney 1988) (emphasis added).

[15] *Raquel Marie*, 76 N.Y.2d at 407, 559 N.E.2d at 427, 559 N.Y.S.2d at 864. In declaring the statute unconstitutional, the court relied on the short line of United States Supreme Court cases that have shaped the rights of unwed fathers. *Id.* at 397-403, 559 N.E.2d at 421-25, 559 N.Y.S.2d at 858-62; *see also* Lehr v. Robertson, 463 U.S. 248, 263-64 (1983) (although biological father must be given opportunity to develop relationship with child, opportunity is limited and will be lost if father fails to act promptly); *Caban*, 441 U.S. at 393 (father who established substantial relationship with child and admitted paternity must be afforded same right to consent to child's adoption as mother); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (unwed father who never exercised legal or actual custody and never shouldered any responsibility for child is entitled to no more than notice and opportunity to be heard); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (presumption that all unwed fathers are unfit is unconstitutional).

[16] *See Raquel Marie*, 76 N.Y.2d at 405, 559 N.E.2d at 426, 559 N.Y.S.2d at 863. The *Raquel Marie* court referred to the "sense of the parental tie as a fundamental interest." *Id.* at 397, 559 N.E.2d at 421, 559 N.Y.S.2d at 858. The Supreme Court has referred to "[t]he rights to conceive and raise one's children . . . [as] 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.'" *Stanley*, 405 U.S. at 651 (citations omitted). According to the Court, an unwed father at the very least possesses an inchoate interest in the opportunity to develop a relationship with the child. *See Lehr*, 463 U.S. at 262.

[17] *See infra* notes 19-21 and accompanying text.

[18] *See Raquel Marie*, 76 N.Y.2d at 401-02, 559 N.E.2d at 424, 559 N.Y.S.2d at 861; *see also Caban*, 441 U.S. at 414 (Stewart, J., dissenting) ("relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due

edged the state's compelling interest in facilitating the prompt adoption of infants whose parents are either unwilling or unable to provide them with emotional and financial support.[19]

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process").

The United States Supreme Court has made it clear that a man does not acquire any absolute rights upon the birth of his child. *Lehr*, 463 U.S. at 261. The Supreme Court declared that "the mere existence of a biological link does not merit . . . constitutional protection," *id.*, and that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

The New York Court of Appeals acknowledged that "[t]he unwed father's protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one," *Raquel Marie*, 76 N.Y.2d at 401, 559 N.E.2d at 424, 559 N.Y.S.2d at 861, since the biological link affords a father no more than an opportunity to develop a relationship with the child. *See Lehr*, 463 U.S. at 262. *But see id.* at 271-72 (White, J., dissenting) (rejecting "peculiar notion" that biological connection offers no more than opportunity interest).

To protect his interest, the father must "grasp the opportunity" and develop a relationship with the child in order to acquire parental rights deserving constitutional protection. *See id.* at 262. An unwed father who develops and maintains a substantial and continuous relationship with the child is entitled to the same substantive rights accorded an unwed mother and thus has the right to block an adoption and object to the termination of his parental rights. *See Caban*, 441 U.S. at 389; *see also* DRL § 111(1)(d) (McKinney 1988) (such relationship is manifested by father's payments to support child *and* either visitation or communication with child).

Those fathers who fail to qualify for substantive rights under the "substantial relationship" test may still have certain due process rights under the notice provisions of DRL § 111-a (McKinney 1988). This section provides for a hearing on the "best interests of the child" and for notification of the adoption proceedings to the person identified as the father on the child's birth certificate, any person openly living with the mother and child at the time of placement who claims to be the father, any person who has registered with the putative father's registry acknowledging paternity, and any person who has filed a timely and unrevoked petition to claim paternity. *Id.*; *see also* Comment, Lehr v. Robertson: *Unwed Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN'S L.J. 265, 265 n.4 (1984) (procedural due process requirement enables father to present evidence of child's best interest).

[19] *See Raquel Marie*, 76 N.Y.2d at 406, 559 N.E.2d at 426, 559 N.Y.S.2d at 863 (state has "significant interest" in "ensuring swift, permanent placement"). The state's interest in children is that of *parens patriae*—the state fills the shoes of the child's parents and is responsible for assuring the best interests of the child. *See* Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. L. 1, 7 (1971).

The Supreme Court has said that the state has an interest in adoption because it not only provides children with stability, but also helps to remove the stigma of illegitimacy. *See Caban*, 441 U.S. at 391. Swift adoption procedures have been termed "essential" to minimize the potential for psychological harm to the child that can result from repeated changes in environment. *See* Comment, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 523-24 (1973); *see also* J. GOLDSTEIN, A. FREUD & A.J. SOLINIT, BEFORE THE BEST INTERESTS OF THE CHILD 40 (1979) (noting necessity of continuity of care for proper development of child).

For similar reasons, the state also has an interest in assuring the finality of adoption. *See* Memorandum of the Attorney General, *reprinted in* [1985] N.Y. LEGIS. ANN. 333. "Fi-

Reconciling these competing concerns, the court reasoned that while the state may impose certain "conditions" on an unwed father's right to develop his parental interest,[20] the "living together" requirement was not sufficiently related to the father-child rela-

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nality in adoption proceedings is highly desirable in order to establish stability and permanency in the lives of the children affected; as such, finality is the public policy of the State." *Id.*

One commentator concluded that "[t]he state interest in promoting the adoption procedure is highest when the child is newborn, for that is the preferred age for adoptions and the category comprising the bulk of adoptions." *See* Comment, Caban v. Mohammed: *Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95, 115 (1979) (footnote omitted) [hereinafter Comment, *Unwed Fathers*].

[20] *See Raquel Marie*, 76 N.Y.2d at 404, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. The court declared that the state may deny unwed fathers the right to consent if their attempts at assuming "parental responsibilities" are not "sufficiently prompt and substantial" to warrant constitutional protection. *Id. See generally* Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 135-37 (1980) (recommendations for recognizing constitutionally sufficient relationship).

The *Raquel Marie* court determined that the state's authority to impose conditions on an unwed father's right to establish a relationship with the child is grounded in its right "to promote its own substantial interests." *See Raquel Marie*, 76 N.Y.2d at 404, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. Since the state's interest in adoptions is strongest in the case of newborns, *see* Comment, *Unwed Fathers*, *supra* note 19, and because it is impossible to establish a "substantial" father-child relationship with a newborn, the state has the authority to distinguish the rights of unwed fathers of newborns from those of older children. *See Caban*, 441 U.S. at 392-93. In either case, however, the focus is on whether the unwed father is concerned for the child and interested in the child's development; his parental conduct is relevant in making that determination. *See* Note, *supra*, at 136.

After the Supreme Court's decision in *Caban*, it became apparent that an unwed father who had established a substantial relationship with an older child was to be afforded the same right to consent to the child's adoption as was given an unwed mother. *See Caban*, 441 U.S. at 393. However, two interpretations have emerged regarding the scope of the Court's holding in *Caban*. *See* Carrieri, *New Issues Raised in Aftermath of "Caban,"* N.Y.L.J., Aug. 2, 1979, at 1, col. 1. The first is a narrow construction that recognizes the right to consent only in the cases of unwed fathers of older children. *See Caban*, 441 U.S. at 409 (Stevens, J., dissenting); *see also id.* at 398-99 (Stewart, J., dissenting) (unwed mothers and fathers are not similarly situated with respect to newborns). The *Caban* majority lent authority to this interpretation by noting that "[e]ven if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy." *Id.* at 392 (footnote omitted). The second, broader interpretation refuses to confine the application of *Caban* to school-age children and instead extends the right of consent to all unwed fathers. *See In re* "R" Children, 100 Misc. 2d 248, 250, 418 N.Y.S.2d 741, 742 (Family Ct. N.Y. County 1979) (interpreting *Caban* as having "categorically destroyed the sex-oriented base for consent of unwed mothers in adoption[s]").

After rejecting proposals to give the right to consent equally to unwed fathers of children of all ages, the New York Legislature opted for a legislative distinction and drafted a statute with criteria for unwed fathers of newborns different from the criteria for unwed fathers of a child over six months old. *See Raquel Marie*, 76 N.Y.2d at 399, 559 N.E.2d at 422, 559 N.Y.S.2d at 859; *see also supra* note 5 (setting forth pertinent portions of DRL § 111(1)(d) & (e)).

tionship to withstand constitutional scrutiny.[21] The court feared that the requirement could easily be used to defeat the father's rights, permitting the adoption of his newborn infant despite his objections and attempts to form a "substantial, continuous, and meaningful" relationship with the child.[22] Consequently, the court, noting the significance of the "living together" requirement in the legislative plan, declared that it had "no recourse but to declare section 111(1)(e) unconstitutional in its entirety."[23]

Judge Kaye recognized the need to establish substitute criteria for determining the rights of unwed fathers in pending adoption proceedings.[24] The court thus proposed an interim standard based upon the father's manifestation of paternal responsibility during the six-month period prior to the child's placement for adoption.[25] According to the court, the unwed father must be willing to assume full custody of the child to qualify for a right of consent.[26] In addition, Judge Kaye noted that due weight should be given to the unchallenged portions of DRL section 111(1)(e), namely public acknowledgement of paternity and payment of reasonable pregnancy and birth expenses.[27]

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[21] *See Raquel Marie*, 76 N.Y.2d at 405-06, 559 N.E.2d at 426, 559 N.Y.S.2d at 863. The court believed that the "living together" requirement provided an erroneous basis for evaluating parental concern because it focused on the father-mother relationship rather than the father-child relationship. *Id.* at 406, 559 N.E.2d at 426, 559 N.Y.S.2d at 863.

[22] *See id.* at 405, 559 N.E.2d at 426, 559 N.Y.S.2d at 863. The court speculated that if the unwed father and mother were living together for the six months preceding the birth, a conflict over the question of adoption would be unlikely. *Id.* at 406, 559 N.E.2d at 426, 559 N.Y.S.2d at 863. Impliedly, the concern is that the mother, by refusing to live with the father, could unilaterally terminate the father's rights. *Id.*

[23] *Id.* at 407, 559 N.E.2d at 427, 559 N.Y.S.2d at 864.

[24] *See id.* at 407-08, 559 N.E.2d at 428, 559 N.Y.S.2d at 864-65.

[25] *Id.* at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. Judge Kaye noted that during this interim period, "the courts will be guided by principles gleaned from Supreme Court decisions." *Id.*

[26] *See id.* In *Raquel Marie*, the court remarked that a commitment to custody signifies "provision for the [children's] physical and emotional needs . . . provision of guidance and direction . . . and living with [the] children on a day-to-day basis." *Id.* at 401, 559 N.E.2d at 424, 559 N.Y.S.2d at 861 (quoting Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 350 (1984)). When this type of relationship exists between an unwed father and his child, the father is entitled at least to the same treatment as is accorded to unwed mothers who have custodial relationships with their children. *See id.* The Supreme Court has recognized that when an unwed father has not sought, at any time, actual or legal custody of his child, his rights to develop a relationship with that child may be denied. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

[27] *See Raquel Marie*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. The court also stated that courts should consider "steps taken [by the unwed father] to establish legal responsibility for the child, and other factors evincing a commitment to the child." *Id.*

Faced with a difficult decision in a sensitive area of the law, the *Raquel Marie* court reached an equitable result and has provided unwed fathers with greater opportunity to establish a paternal relationship with their nonmarital children.[28] As a practical matter, however, declaring DRL section 111(1)(e) unconstitutional in its entirety will likely cause unreasonable delays in adoption proceedings because of the inevitable struggles by courts and child welfare agencies in determining whether an unwed father's consent is required under the interim standard.[29]

As noted by Judge Kaye, it is "the prerogative of the Legislature, not the courts," to promulgate a new standard for assessing an unwed father's rights.[30] Efforts must therefore be directed towards urging legislators to move quickly in drafting a replacement statute containing clear and objective criteria. In amending section 111(1)(e), the New York Legislature should preserve those portions of the statute that the court of appeals endorsed: (1) whether the

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It should be noted that, in applying the interim standard to the facts of *Baby Girl S.*, the court found that the unwed father's consent was required in the adoption of his nonmarital child. *See id.* at 408-09, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. Judge Kaye reasoned that the unwed father in *Baby Girl S.* sought full custody of the child "virtually from the time he learned of [the unwed mother's] pregnancy, [and] did everything possible to manifest and establish his parental responsibility." *Id.* at 409, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

However, with respect to *Raquel Marie*, the court held that the case must be "remitted to the Appellate Division for further review of the facts." *Id.* On remand, the Appellate Division, Second Department found that the record failed to show that the unwed father in *Raquel Marie X.* manifested adequate parental responsibility to establish his right to consent under the interim standard. *See In re* Raquel Marie X., 570 N.Y.S.2d 604, 605 (2d Dep't 1991). The Appellate Division therefore stated that the unwed father was "not entitled to constitutional protection" of his parental interest and that "his consent to the adoption [wa]s not needed." *Id.* at 608.

[28] *See Recent Developments—Family Law—Unwed Father's Rights—New York Court of Appeals Mandates Veto Power over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility*, 104 HARV. L. REV. 800, 803-07 (1991) (*Raquel Marie* court "achieved a sound result").

[29] *See Raquel Marie*, 76 N.Y.2d at 407, 559 N.E.2d at 427, 559 N.Y.S.2d at 864. At the time DRL § 111 was first declared unconstitutional in 1979, *see Caban*, 441 U.S. at 394, there were often long delays in adoption proceedings. *See* Letter of New York State Catholic Conf. to Governor's Counsel (June 19, 1980), *reprinted in* Legis. Bill Jacket, ch. 575, N.Y. Laws (June 26, 1980) ("confusion in the courts created by section 111 of the Domestic Relations Law being vacated by the Supreme Court has caused great delays in the adoption process for out of wedlock children"). The New York Legal Aid Society complained that the statutory void "needlessly delayed and impeded the adoption proceedings," and noted that "without legislative guidance, the courts have gone too far, requiring notice to and consent from fathers who have not manifested the slightest interest in their children." *Id.*

[30] *See Raquel Marie*, 76 N.Y.2d at 407-08, 559 N.E.2d at 427-28, 559 N.Y.S.2d at 864-65.

father is willing and able to assume legal custody of the child;[31] and (2) whether the father has paid a fair and reasonable amount of the pregnancy and birth expenses in accordance with his means.[32] In addition, the Legislature would do well to require the father to file a notice of paternity with the state department of social services within the first twenty days after the child's birth.[33] In contrast to the "living together" requirement, which focused on

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[31] *See In re* Benjamin, 93 Misc. 2d 1084, 1088, 403 N.Y.S.2d 877, 880 (Sur. Ct. N.Y. County 1978) (natural father who has not visited his child nor provided support may lose right of consent based upon finding of abandonment). Thus, as stated in *Raquel Marie*, a court deciding whether to grant a petition of adoption should consider any waiver or abandonment on the part of the unwed father, just as they would whenever custody is in issue. *See Raquel Marie*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865 (citing *In re* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976)).

It is important to note that a finding of capability to assume custody should not necessarily entail a "best interest of the child" test as applied when natural rights are not in issue (*e.g.*, custody battle between the natural parents). The "best interest of the child" test is stricter and more subjective than should be required to meet the proposed statute. *See generally In re* Anonymous, 92 Misc. 2d 25, 27-28, 399 N.Y.S.2d 418, 420 (Sur. Ct. Erie County 1977) (discussing subjectivity of "best interests of the child" test).

[32] *See Raquel Marie*, 76 N.Y.2d at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865. The *Raquel Marie* court acknowledged that the remaining requirements of DRL § 111(1)(e), unchallenged in the case, were relevant factors in the analysis of the unwed father's manifestation of parental responsibility. *Id.* These requirements should remain important yardsticks for measuring the unwed father's commitment to his child under the proposed statute.

[33] In order to facilitate the state's interest in expediting the adoption of young children, any father who fails to file timely notice of paternity should be barred from bringing any action asserting an interest to develop a relationship with the child. However, because circumstances may arise that make it impossible for the father to file notice, the statute should allow an unwed father to prove by clear and convincing evidence (1) that it was not possible for him to file within the time specified, (2) that his failure to file notice was through no fault of his own, and (3) that he filed within ten days after it became possible for him to file.

A number of states have granted the right to consent to unwed fathers on condition that they file notice of paternity within specified time limits. *See, e.g.*, NEB. REV. STAT. § 43-104.02(1) (1989) (notice must be filed within five days after birth of child); UTAH CODE ANN. § 78-30-4.8 (1991) (notice must be filed prior to time child is relinquished to adoption agency). Other states require that the unwed father have established paternity prior to the adoption proceeding if he does not have custody of the child, *see* ARK. STAT. ANN. § 9-9-206(a)(2) (1991), or simply require the consent of both natural parents. *See* ARIZ. REV. STAT. ANN. § 8-106 (1990).

Although upholding the constitutionality of Nebraska's filing requirement, the Nebraska Supreme Court cautioned that the Nebraska statute did not require "notification to the father of the birth of the child." Shoecraft v. Catholic Social Servs. Bureau, 222 Neb. 574, 578, 385 N.W.2d 448, 451 (1986). "That omission might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights." *Id.* (citing *Caban*). Unlike Nebraska's statute, DRL § 111-a requires that the father receive notice "at least twenty days prior to the [adoption] proceeding." DRL § 111-a(4) (McKinney 1988).

the father's relationship with the mother,[34] a filing requirement properly emphasizes the father's efforts to "establish legal responsibility for the child" as well as his "commitment to the child."[35] Thus, such a requirement would both further the strong state interest in promoting swift adoptions and sufficiently protect the unwed father's interest in developing a relationship with his child.[36]

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[34] *See Raquel Marie*, 76 N.Y.2d at 405, 559 N.E.2d at 425, 559 N.Y.S.2d at 862.

[35] *Id.* at 408, 559 N.E.2d at 428, 559 N.Y.S.2d at 865.

[36] *See supra* notes 19, 26-27 and accompanying text.