10-1977

Quilloin v. Walcott

Lewis F. Powell Jr.

Response is on 5/24/77

Discuss (Probably DWSFQ as in

Appellant, illegitimate father, claims const. right to an adversary hearing before ~~the~~ his child is adopted by a 3rd party with mother's consent. Ga S/Ct, applying Ga statute, held to contrary. Appellant claims equal rts. in child as mother.

We DWSFQ an identical case

PRELIMINARY MEMORANDUM

May 26 ~~April 15~~, 1977
List 4, Sheet 1

No. 76-6372 ASX

Appeal from Georgia Supreme Ct. (~~Hill for the Court~~; Undercofler, Gunter, dissenting)

QUILLOIN (father)

v.

WALCOTT (mother)   State/Civil   Timely

Discuss to consider a Note

1. SUMMARY: Appellant challenges the Georgia statute that gives the mother of an illegitimate child sole right to consent or refuse consent to adoption. The father is not entitled to a hearing, but appellant received one. The case is virtually indistinguishable from Orsini v. Blasi, DWSFQed 423 U.S. 1042 (1976) (Justices Brennan and White on the record to note).

2. FACTS: Appellant fathered an illegitimate child. The child was born in 1964 and has lived with his maternal grandmother or his mother all of his life, although he visited with his father on occasions. The primary support has been from the grandmother and mother. The father provided some support and occasional presents. In 1967, the mother married another man, and in 1976 the stepfather filed a petition to adopt the child. The mother's consent to such adoption was attached to the petition. The father then filed an objection to the adoption and a writ of habeas corpus to establish visitation rights. He also filed a petition to legitimate the child.

Ga. Code Ann. § 74-203 provides:

> The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power.

Ga. Code Ann. § 74-403(3)[adoption] provides in relevant part:

> (3) Illegitimate children-- If the child be illegitimate, the consent of the mother alone shall suffice. . . .

Appellant amended his actions to challenge these statutes as unconstitutional. All claims were consolidated.

The trial judge stated that consolidation was ordered:

> "[F]or the purpose of allowing the biological father (respondent in the adoption matter and movant in the other said matter to be heard with respect to any issue or other thing upon which he desired to be heard, including his fitness as a parent . . ."

After consideration of the evidence, briefs, and arguments, the trial judge found, inter alia, that "The proposed adoption

of the child by [the stepfather] is in the best interests of said child," and that "The proposed legitimation of the child by [appellant] is not in the best interests of the child, nor is the granting of the Habeas Corpus relief seeking visitation rights in the best interests of the child [appellant did not seek custody]." Juris. Stat. App. C, p.3.

As Conclusions of Law, the judge announced:

> (1) The child in question, being illegitimate, the consent of the mother alone to the adoption is sufficient. Ga. Code 74-403(3).
> (2) The biological father, Leon Webster Quilloin, has no standing to object to the proposed adoption, the mother having the right to possession of the child and she being the only recognized parent with the right to exercise all the paternal power. Ga. Code 74-203.

Appellant appealed, claiming denials of equal protection and due process. The Ga. Supreme Ct. held that there was no denial of equal protection in the scheme: In the case of illegitimates, most frequently there is no father to raise the child, and it is reasonable to place full responsibility on the mother, who is present. The father can chose to join the family or legitimate the child. Were the scheme otherwise, the father might refuse consent to adoption without accepting the responsibility of fatherhood, and the state could be required to sever his relationship before the adoption could proceed. Finally, since the father "has already shown his lack of interest by his failure to legitimate the child," there would be a danger of profit-seeking by the father in withholding consent. The Court stated that the facts here supported these interests.

The Court also held that the Georgia statutes did not take away appellant's interests without due process of law. It distinguished Stanley v. Illinois, 405 U.S. 645 (1971), as a case in which "the father was a de facto member of the family unit, and the mother had died. Either of these factual differences would be sufficient to distinguish Stanley from the case before us." Juris. Stat. App. A, p.6.

The dissent argued that the majority's distinction of Stanley was in error. Stanley held that a natural father has a right to a hearing on his fitness as a parent before his parental rights are terminated. That due process right derives from the biological fact of paternity. It is a denial of equal protection to deny fathers of illegitimates that due process right while granting it to other fathers. The dissent therefore concluded that § 74-403(3) (consent to adoption) was unconstitutional. It distinguished § 74-203 (parental rights in mother), however, on the ground that it is rational (citing Labine v. Vincent, 401 U.S. 432) and does not deprive the father of all parental rights.

3. CONTENTIONS: Appellant repeats his contentions here.

4. DISCUSSION: There are a number of state and federal cases finding due process or equal protection problems in adoption laws similar to the one involved here. See Miller v. Miller, 504 F.2d 1067 (CA9 1974); State ex rel. Lewis v. Lutheran Social Services, 207 N.W.2d 826 (Wisc. 1973); People ex rel. Slawek v. Covenant Children's Home, 284 N.E.2d 291 (Ill. 1972); Willmot v. Decker, 541 P.2d 13 (Hawaii 1975).

To the extent that the issue is the notice to be provided the father of an illegitimate and his right to appear and object to the adoption, that issue is not presented here. Appellant knew of the proposed adoption and presented his objections. Appellant argues that his appearance was for naught because the trial judge, in holding that appellant had no standing to object, clearly refused to give any weight to appellant's arguments. I think that the trial judge did consider the arguments, but appellant is correct insofar as the opinion is indeed ambiguous. I note that a reading of the Ca. Supreme Ct. opinion would not lead one to the conclusion that appellant received a hearing on the merits. Indeed, I would read it to imply (incorrectly), that no such hearing was given (it is ambiguous). A DWSFQ may therefore be confusing on the notice and hearing issues.

There is a square conflict over whether the father of an illegitimate is entitled to the same parental rights as the mother of the illegitimate. Compare cases cited p.4, supra, with this case and Orsini v. Blasi, 331 N.E.2d 486 (N.Y. 1975), DWSFQed 423 U.S. 1042 (1976). Subsumed in this conflict there probably is also a conflict over the inherent "rights" of the father of an illegitimate. This case presents those issues in that the rights of the natural father could be terminated through adoption without a "termination of parental rights" proceeding, while such could not have been done with regard to the mother. I believe, however, that Orsini also presented that question.

I view the Georgia Supreme Court's equal protection holding as extremely questionable. All of the same state policies could be served and the rigid mother/father distinction eliminated if the State adopted the system used in Iowa, wherein the control over consent to adoption of an illegitimate rests with the parent "providing for the wants of the child." See Catholic Char. of Arch. of Dubuque v. Zalesky, 232 N.W.2d 539 (Iowa 1975). The question of what "rights" inhere in a parent as parent is more difficult, but may not be necessary to decision of this case. The case is, of course, complicated by the fact that appellant was not the primary support of the child, and by the trial court's explicit findings on the best interests of the child.

There is no motion to dismiss or affirm. Trial & SC ops in petn.

4-7-77 Block

MAY 26 1977

Court Ga. Sup. Ct.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 76-6372

LEON WEBSTER QUILLOIN, Appellant

vs.

ABDELL WILLIAMS WALCOTT, ET AL.

3/11/77 - Appeal

Brennan shifted to vote after first vote to dismiss

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT NOTE	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT REV	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.				✓									
Rehnquist, J.						✓							
Powell, J.						✓							
Blackmun, J.						✓							
Marshall, J.									Join 3				
White, J.				✓		✓							
Stewart, J.						✓							
Brennan, J.				✓									
Burger, Ch. J.						✓							

lfp/ss 9/13/77

Father of illegitimate

September 13, 1977

76-6372 Quilloin v. Walcott

This is a brief memorandum on a case that I now think we should dismiss as having been improvidently granted.

The case is here on appeal from the Supreme Court of Georgia, which sustained - 4 to 3 - Georgia adoption laws that classify biological fathers of illegitimate children differently from fathers of legitimate children. The relevant provisions follow:

Section 74-203 provides that the "mother of an illegitimate child shall be entitled to the possession of the child unless the father shall legitimate him" as provided by Georgia law. As the only recognized parent in the absence of legitimation, the mother may "exercise all parental power".

Section 74-403(3) provides that if "the child be illegitimate, the consent of the mother [to adoption] alone shall suffice . . . ."

Appellant was the father of an illegitimate child whom he recognized but made no effort to legitimate until after adoption proceedings were initiated. The child's mother married, and some nine years later - when the child was 11

years of age - the stepfather filed a petition for adoption. Both the mother and child approved of the adoption.

The biological father filed an objection to the adoption and a writ of habeas corpus. He also filed a belated petition to legitimate. All pending proceedings were consolidated by consent. After a trial, at which appellant apparently was allowed fully to participate, the court made detailed findings of fact and conclusions of law. Among the latter were holdings that under Georgia law the "consent of the mother alone" is sufficient; and that the "biological father . . . has no standing to object".

The Georgia Supreme Court majority found no denial either of due process or equal protection rights under Georgia law.

New Georgia Statute

Although apparently not known to us (certainly not known to me) at the time this case was noted, the Georgia legislature in the spring of 1977 adopted an entirely new set of adoption provisions. Appellant, who argues that Stanley v. Illinois, 405 U.S. 645, is controlling in his favor on the equal protection issue, apparently agrees that the new Georgia statute - if applicable - gives him all rights he desires. His brief states:

> The new statute gives to the father of an illegitimate child the procedural and substantive rights dictated by Stanley. . . . (Br. 13)

The threshold question, therefore, is whether the new statute - effective January 1, 1978 - governs this case? Appellee apparently agrees that the new statute will moot the constitutional issues. (Br. 24, 25). Appellee agrees that, as a general rule, this Court applies existing law rather than that which existed at the time of the decision below. See Kremmens v. Bartley, 431 U.S. _ ; my decision in Fusari. But appellee argues with considerable force that we should apply the exception to the general rule where this is necessary to prevent manifest injustice. See Green v. United States, 376 U.S. 149.

Although is not entirely clear to me ~~as to~~ the effect of a retroactive application of the new statute, appellee states - without reasons - that the adoption "will not take place". (Br. 25).

My Tentative Views

Although the constitutional issues under the old statute are not insubstantial (and at one point I favored noting the case), I voted to dismiss it because it is wholly unmeritorious on its facts. Appellant provided only sporadic and irregular contributions to the child's support; the mother, with whom the child lived except when he was with

his maternal grandparents, provided the "principal or primary support"; the child was well cared for; he has lived with his mother and stepfather for the greater period of their marriage (i.e. from 1967 to the date of this litigation); the stepfather, who proposed to adopt the child, is "a fit and proper person"; the "adoption of the child [by the stepfather] is in the best intersts of the child"; the "legitimation by Leon Webster Quilloin (the appellant) is not in the best intersts of the child; and appellant made no effort to legitimate the child during the 11 years prior to the adoption petition; nor did he make any effort to obtain regular visitation rights.

All of the foregoing findings were made by the trial court and are not challenged. (Appellee's brief 2,3; App. 70)

It also appears that appellant is in the whiskey business and operates a night club; and when the child visited him he was kept in the nightclub.

Finally, as to due process, this appellant was afforded a full opportunity to contest the adoption.

Under any set of adoption laws, this appellant would be a sure loser.

I would dismiss the case as improvidently granted, but this on an appeal.

L.F.P., Jr.

ss

There is a response. Response first tries - ineffectively - to distinguish Stanley. Response points out that a new Ga. statute, effective Jan 1, 1978, gives the father notice of a proposed adoption and 30 days within which to file a petn to legitimate the child. Response otherwise tracks the majority below.

The State of Ga. has filed a brief in support of the motion to dismiss. The State notes that under current Ga. law (ie, effective until Jan 1, 1978) the mother's full parental rights* cannot be diminished even by the filing of a subsequent legitimation petn by the father or by subsequent marriage of the mother and father. State of Ga. also argues that the case is controlled by Orsini.

* That is, her consent to adoption.

Reversed 11/10

Good memo. Suggests

1. Remand, after Jan 1st, for state courts to determine effect of change in Ga. law. MO/E not Wabash Ry v. Public Service Comm 273 U.S. 126.

2. On merits, Stanley v Ill is quite close & will be difficult to distinguish.

In my view, it makes no sense to give either parent a veto over adoption. Let Unit D/P requires full opportunity to be heard. But there is E/P issue.

BENCH MEMO

To: Mr. Justice Powell November 7, 1977

From: Jim Alt

No. 76-6372, Quilloin v. Walcott

This appeal challenges on due process and equal protection grounds Georgia laws that require the consent of parents of a legitimate child, and of the mother of an illegitimate child, for the child's adoption, but that do not require the consent of the father of an illegitimate child.

I. STATUTORY PROVISIONS.

Ga. Code §74-203 provides: "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being

the only recognized parent, she may exercise all the paternal power." §74-403(1) provides that except as provided in the following two subsections, no adoption shall be permitted without the written consent of the child's living parents. §74-403(2) provides that such consent is not required if the child has been abandoned or if parental custody has been terminated. §74-403(3) provides that, "If the child be illegitimate, the consent of the mother alone shall suffice."

The biological father of an illegitimate child can legitimate the child either by marrying the mother and recognizing the child as his, §74-101, or by petitioning the Superior Court for an order of legitimization, §74-103. A legitimazation order under the latter section declares the "child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

If a child is legitimated under §74-103, then the biological father's consent to an adoption is required under §74-403(1). Under current Georgia case law, however, a biological father's petition to legitimate is considered time-barred if it is filed after an adoption petition containing the mother's consent has been filed. Smith v. Smith, 224 Ga. 442 (1968).

Under amendments to Georgia law that were passed after the Georgia Supreme Court's decision in this case and that will become effective on January 1, 1978, the latter rule will be modified. New §74-406(a) provides that if the identity and

location of the putative father of an illegitimate child are known or are reasonably ascertainable, he shall be notified of the mother's consent to the adoption of the child. The father then will have 30 days to file a petition to legitimate the child under §74-103. If the child is legitimated, the biological father's consent to the adoption will be required. An exception to this rule is built into new §74-405(a), however, which provides that consent will not be required under §74-403 from a parent "who has failed significantly for a period of one year or longer immediately prior to the filing of the petition for adoption (1) to communicate, or to make a bona fide attempt to communicate with the child or (2) to provide for the care and support of the child as required by law or judicial decree."

II. FACTS AND PROCEEDINGS BELOW.

The child in this case was born on Christmas Day, 1964. His father, Leon Quillion, and mother, Ardell Williams, never have been married to each other. Leon Quillóin acknowledged the child in writing at birth, and the child was named Darrell Quilloin. The state trial court made the following findings of fact with respect to Darrell's custody and support since his birth:

> (2) The mother has had possession and custody of said child and the child has lived solely or principally with the mother or maternal grandparents all of the child's life, although the child has visited with the father and the paternal grandparents on many occasions.

(3) The father has provided support for the child irregularly, in the form of medical attention, food, clothing, gifts and toys from time to time.
(4) The principal or primary source of support, on a regular basis, has been the mother or the maternal grandmother.
(5) Overall, the child has been well cared for and has never been in an abandoned or deprived condition.

App. 71. Darrell's mother married Randall Wolcott on September 16, 1967, and in 1969 she had a child by this marriage. The same year, Darrell was moved from his maternal grandmother's household into his mother and stepfather's household. App. 22-23. Darrell's stepfather filed a petition to adopt Darrell in 1976, and Darrell's mother filed a consent.

The biological father, whom Darrell had visited periodically up through 1975, learned of the petition and filed an objection to the adoption; a petition for habeas corpus for establishing visitation privileges; a petition to legitimate Darrell; and a complaint seeking a declaration that the Georgia laws that require only the consent of an illegitimate child's mother to an adoption be declared unconstitutional under the equal protection and due process clauses.

The state court held a consolidated hearing on the adoption petition and all the objections listed above. The court found as facts that Darrell expressed a desire to be adopted and to change his name, as well as to continue to visit the biological father from time to time; that the biological father had made no effort to legitimate or to obtain regular visitation rights before the adoption petition was filed; that

in the instant proceedings the biological father did not seek custody of Darrell but did object to his adoption and did seek visitation rights; that the mother objected to legitimization and to visitation rights; that adoption would be in the best interests of the child; and that the "proposed legitimization of the child by Leon Webster Quilloin is not in the best interests of the child at this late date, nor is the granting of the Habeas Corpus relief seeking visitation rights in the best interests of the child, and both should be denied." App. 72. As conclusions of law, the court held that the biological father's consent to the adoption was not required under Georgia law, and that that law was not unconstitutional. The Georgia Supreme Court affirmed over two dissents.

III. CHANGE IN STATE LAW.

Under the new state law, appellant would have the right to file a petition to legitimate Darrell even though an adoption petition with the mother's consent already had been filed. The "threshhold question" in this case, then, is whether, if the Court does not decide the case before January 1, 1978, the case should be remanded to the Georgia Supreme Court for consideration of the effect of the new statute.

The question has two possible components: first, whether this Court is required to take the new law into account; and second, whether the Georgia Supreme Court would be required to apply the new law. The general rule in this Court is that

" 'an appellate court must apply the law in effect at the time it renders its decision,' " Bradley v. Richmond School Board, 416 U.S. 696, 714 (1974), quoting Thorpe v. Housing Authority, 393 U.S. 268, 281 (1969), "even where the intervening law does not explicitly recite that it is to be applied to pending cases." 416 U.S., at 715. There is an exception to this rule, however, where "manifest injustice" would result from applying the new rule. See id. at 716-717.

Appellees contend that this is a case where "manifest injustice" would result from applying the new law, and that the Court therefore should not consider a remand to the Georgia Supreme Court. I think, however, that this Court need not decide whether the new law applies to this case. Because it is a state law, the state courts should decide whether it applies to cases pending. Bradley and the cases upon which it relied all involved changes in federal law, where it was appropriate for federal courts to decide whether the new law should apply to pending cases. But I think the Court's path here should be guided by Missouri ex rel. Wabash Ry. Co. v. Public Service Comm'n, 273 U.S. 126 (1927), which, like this case, involved a change in state law after the state supreme court had decided the case. This Court thought that the question of "the effect of this [new] statute upon the [Public Service] Commission's order, the judgment of the state Supreme Court and upon action taken pursuant to them" was one of state law, 273 U.S., at 130-131,

and it remanded to the state courts for decision on this question:

> The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this Court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. [citation] In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered.

273 U.S., at 131.

There is no guarantee, of course, that the Georgia Supreme Court would apply the new law to this case. If it does not, the case will come back. But if it does, then the Court will have avoided, on quite justifiable grounds, making a difficult constitutional decision. I would not go so far as to advocate sitting on the case until the first of the year; but if the decision does not come down before then, I think this kind of remand would be appropriate.

IV. MERITS.

On the merits, appellant's best argument is this: Current Georgia law requires that the consent of the parents of a legitimate child, and the consent of the mother of an illegitimate child, be obtained before a child can be adopted. The Legislature has recognized, however, that there are cases in which these parents have so attenuated an interest in the child that they should not be able to veto an adoption that otherwise would be in the child's best interest. Specifically, it has decided

that consent should not be required where the parent has abandoned the child, or where parental custody has been terminated - presumably, either for parental unfitness, or as part of a divorce decree.

But Georgia law requires no such determination in order to bar the father of an illegitimate child from having a voice in the adoption decision. The law simply presumes that no father has any interest in his illegitimate child, and that presumption cannot be overcome even if the father has lived with the child, or visited him frequently, or contributed to his support. It is true that there will be cases where the father of an illegitimate child does not have a strong enough interest to justify giving him a voice in the adoption decision - just as there will be cases where the parents of a legitimate child, or the mother of an illegitimate child, do not. But due process requires that those cases be identified on a case-by-case basis.

In this sense, the case is a great deal like Stanley v. Illinois, 405 U.S. 645 (1972). There, Illinois law provided that a parent's custody of a child could not be terminated except after a hearing at which it was determined that the parent was unfit. The law defined "parent" as the parent of a legitimate child or the mother of an illegitimate child. 405 U.S., at 650. Stanley, however, was the father of an illegitimate child, so that his custody was terminated with

no hearing and no determination of whether he was a fit parent. This, the Court held, violated due process.

Stanley's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S., at 651. It is true that the state has an interest in making sure children are in the custody of a fit parent. And it "may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents .... But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." 405 U.S., at 654. It is argued "that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's .... But the Constitution recognizes higher values than speed and efficiency." Id. at 656.

This decision will not cause undue disruption and delay of state custody proceedings. "If unwed fathers, in the main, do not care about the disposition of their children, they will not ... demand hearings." Id. at 657 n.9. Moreover, the state may provide for notice by publication, so that the decision "creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not" inclined to contest custody. Ibid. But the Illinois scheme, as it stands now, not only violates due process; it also denies equal protection. "[D]enying such a [fitness] hearing to Stanley and others like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." Id. at 658.

Here, as in Stanley, the biological father may have an interest in the love and well-being of his children. Here, as there, the state recognizes that there may be justifications for denying a parent a voice in or control over his child's upbringing. But here, as there, the state should be required to make an individualized determination as to the presence or absence of those justifications in the case of all parents. If most fathers of illegitimate children have no interest in their children, then a finding of abandonment or a failure to respond to notice will terminate their rights to object to adoption. But in a case like this one, the biological father has taken as much interest in his child as many divorced fathers take in theirs. It is irrational to give the divorced father a voice in the adoption decision, but not the father who never married.

Moreover, this appellant cannot be faulted for not legitimating Darrell or obtaining visiting privileges before the adoption petition was filed. He acknowledged Darrell at birth and let him take his name. He has had frequent contact with Darrell since he was born, and Darrell has visited him often. Appellant had no reason to go to court when, in practice, his relationship with his son was satisfactory. Stanley was not penalized for not legitimating his children by marrying the mother, over the dissent's complaint that he "did not seek the burdens when he could have freely assumed them." 405 U.S., at

664 (Burger, C.J., dissenting). Appellant should fare no worse.

That this is the correct view is strongly intimated by this Court's remand of State ex rel. Lewis v. Lutheran Social Services, 47 Wis.2d 420 (1970), for reconsideration in light of Stanley. 405 U.S. 1051 (1972). On remand the Wisconsin Supreme Court reversed its prior decision and held that, "Consent of both the unwed mother and the unwed father, or consent of one parent with proper termination of the parental rights of the other, is necessary" under an adoption statute structured like Georgia's. 59 Wis.2d, at 9.

Appellee's reply must be that this case differs from Stanley in a number of crucial particulars. First, the biological father's interest in the child is considerably weaker, if not nonexistent, where the father has not lived with and cared for the child the way Stanley did. Second, here, unlike Stanley, permitting the unwed father to assert the claimed right is not necessarily in the best interest of the child. In Stanley, the state's interest in providing the child with a suitable home and Stanley's interest in showing he could provide a suitable home coincided. Here, on the other hand, giving the biological father a "veto" may prevent formation of a suitable home; and that, with no showing that the biological father can contribute anything more to his child's welfare than a few hours of his time a year - just enough to prevent a

finding of abandonment. Here, unlike Stanley, the biological father can block the adoption out of spite, or for extortion, or for no reason at all.

Given all these differences, the least the state should be able to ask is that a father of an illegitimate child has shown a pre-existing interest in the child by legitimating him before an adoption petition is filed. Indeed, in this case the requirement is less burdensome than legitimation would have been in Stanley; for there, legitimization could have been accomplished only through marriage, while here it would have taken only the filing of a legitimization petition in court. The Court should follow Orsini v. Blasi, 36 N.Y. 568 (1975), appeal dismissed for want of a substantial federal question, 96 S.Ct. 765 (1976), which held that a law like Georgia's did not violate equal protection, and that the fact that the biological father was permitted to argue the adoption was not in the best interest of the child satisfied his due process rights.

My own feeling is that this case is not easily distinguished from Stanley. Although the Stanley Court may have been influenced by the fact that Stanley had actually lived with and cared for his children, its holding granted the right to a hearing to all unwed fathers whether they lived with their children or not. Thus, whatever interest Stanley had in the children must have been based on his biological parenthood, and not on his subsequent care.

It would be tempting to distinguish Stanley on the ground that

there, the biological father sought actual custody, while here the biological father expressly disclaims such a desire. Stanley's real interest, it could be argued, was in the "raising," not the "siring," of his children. I would have difficulty with this line of argument because what appellant here does want is visitation rights, which will be cut off if the adoption goes through. Although appellant's love for his son may not seem as strong as Stanley's, I think it does exist.

In addition, there undoubtably will be cases where the Georgia scheme will seem as cruel as the Illinois scheme did in Stanley. It is not difficult to imagine a case where the unwed parents have lived together for a period of years before the mother decides to put the child up for adoption. See the facts of Orsini v. Blasi, supra. Although this is not that case, it will decide that one.

The argument that allowing the unwed father a veto will lead to extortion or to arbitrary withholding of consent is troubling, since it may describe the real world too well. The answer to the argument can only be that the same evils may result in the case of parents who are, or were, married; yet that does not prevent the state from allowing the veto. The state has identified those cases where it would be unjust or dangerous to allow the veto, and it is free to apply the same standards to unwed fathers that it does to all other parents.

The fact that the biological father easily could have legitimated Darrell cuts strongly the other way, of course.

This really is not much for the state to ask. In fact, it seems to me unlikely to prevent the evils the state fears if this appellant wins. But if the state thinks that prior legitimization demonstrates sufficient interest in the child to satisfy its concerns, perhaps that judgment should be respected. This is not a strong ground for distinguishing Stanley, though.

But

One argument that could dispose at least of this case is the one that was made in Orsini, supra. That is that this biological father's interest in the well-being of his child was sufficiently vindicated because the father was given an opportunity to participate in the adoption hearing and to argue that adoption was not in the best interest of the child. Here, too, the father participated in the adoption hearing, although he did not try to show that the mother and stepfather would provide an unsuitable home. Perhaps due process, as distinguished from state law, should require only a voice, not a veto.

Another way to dispose of the case might be to emphasize the trial court's findings of fact, rather than its conclusions of law. The court found that neither legitimization nor visitation rights would be in the best interest of the child. Perhaps that in itself sufficiently answers this appellant's claim that he be given visitation rights. (But this still would not answer, under state law, the claim of any other kind

of parent.)

One other consideration in dealing with Stanley is that it probably can be read as an "irrebutable presumption" case. Because that line of cases has fallen out of fashion, it might not be difficult to refuse to extend it here.

In sum, though, I think the Court will have to work hard to get around Stanley. I also wonder whether there will not be cases where the unwed father will have as good a claim on the right to block an adoption as other parents. But I do not think the state is asking much in requiring prior legitimization.

JA

father of illegitimate

76-6372 QUILLOIN v. WALCOTT Argued 11/9/77

Appeal from Ga S/Ct involving rights of biological father of illegitimate child w/respect to adoption of child. Ga statute, sustained by Ga Ct, required consent to adoption only by mother. Father has no standing. (Ga. law has been changed effective Jan 1, 1978 F. Under new law appellee says appellant would have a "veto" over adoption.)

Skinner (for Appellant)

(Made ~~no~~ better argument than in brief)

Jones (for appellee)

Appellant had right to legitimate her child at any time & then he could have "~~voted~~ divested" her adoption.

illegitimate

There are two classes: fathers who have ~~adopted~~ legitimated child & those who have not. This classification furthers a valid state interest.

WQB says that whether new statute applies in Ga Court — not for us.

Cited by counsel for Appellant
230 Ga 692, 694

Affirmed - 7
Remand (or Assembly Rec.) - 1
Passed - 1

76-6372 QUILLOIN v. WALCOTT Conf. 11/11/77

The Chief Justice Affirm

Father could legitimate child at any time.

Mr. Justice Brennan 1st vote: Passed

Mr. Justice Stewart Affirm

Q re validity of Ga law: no adoption permitted w/o consent of mother of child in illegitimate. Fathers are classified differently & have no standing to object. This is ~~a~~ not an irrational statute.

On D/P claim, father had a full opp. to be heard.

Stanley went well beyond this case

Mr. Justice White Affirm

The discrimination vs unwed father would be a violation of E/P but for legitimation. Under Ga. law must legitimate before mother given consent. But even legitimating may not give same rts. as mother. We shouldn't have granted case.

Mr. Justice Marshall Affirm

Stanley doesn't reach this case.

Mr. Justice Blackmun ~~First vote - Dismiss for want of SFQ~~

~~2nd vote - Remand in view of Ga. statute~~

~~3 - [illegible]~~

Affirm

Classification is rational

Mr. Justice Powell

1st Vote - Remand re new Ga statute

[redacted]

3. If we reach merits, I have enough doubt as to validity of old Ga law to cast tentative vote to Reverse — on E/P grounds

Mr. Justice Rehnquist 1st vote - Affirm re merits

2nd Dissent for WANT

3. Would not remand to [redacted] state court - we should just instruct [redacted] on state ct. what to do.

Mr. Justice Stevens Affirm.

A DFWSFQ would be appropriate after argument - but if Ga statute is read to provide no hearing it would be invalid.

But have there was a hearing - can [redacted] on that ground.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 8, 1977

Re: 76-6372 - Quilloin v. Walcott

Dear Thurgood:

Please join me.

Respectfully,

Mr. Justice Marshall

Copies to the Conference

P. 10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: DEC 9 1977

1st DRAFT

Recirculated: _____

Reviewed 2 7 P 12/11

TM has written this narrowly as an "as applied to facts of this case" basis. Ga law is construed to focus on "best interest of child". Here unwed father's interest - never asserted for eleven yrs - was too attenuated to support entitlement to relief on D/P or E/P grounds

SUPREME COURT OF THE UNITED STATES

No. 76-6372

Leon Webster Quilloin, Appellant,
v.
Ardell Williams Walcott et al.
} On Appeal from the Supreme Court of Georgia.

[January —, 1978]

Father received notice & hearing

I think I can join this

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is the constitutionality of Georgia's adoption laws as applied to deny an unwed father authority to prevent adoption of his illegitimate child. The child was born in December 1964 and has been in the custody and control of his mother, appellee Ardell Williams Walcott, for his entire life. The mother and the child's natural father, appellant Leon Webster Quilloin, never married each other or established a home together, and in September 1967 the mother married Randall Walcott.[1] In March 1976, she consented to adoption of the child by her husband, who immediately filed a petition for adoption. Appellant attempted to block the adoption and to secure visitation rights although he did not seek custody or object to the child's continuing to live with appellees. Although appellant was not found to be an unfit parent, the adoption was granted over his objection.

In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), this Court held that the State of Illinois was barred as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent. The Court

[1] The child lived with his maternal grandmother for the initial period of the marriage, but moved in with appellees in 1969 and lived with them thereafter.

concluded, on the one hand, that a father's interest in the "companionship, care, custody and management" of his children is "cognizable and substantial," *id.*, at 651–652, and, on the other hand, that the State's interest in caring for the children is "*the opposite*" if the father is in fact a fit parent, *id.*, at 657–658. *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.

I

Generally speaking, under Georgia law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent.[1] Even where the child's parents are divorced or separated at the time of the adoption proceedings, either parent may veto the adoption. In contrast, only the consent of the mother is required for adoption of an illegitimate child. Ga. Code Ann. § 74-403 (3) (1973).[2]

[1] See Ga. Code Ann. §§ 74-403 (1), (2) (1973). Section 74-403 (1) sets forth the general rule that "no adoption shall be permitted except with the written consent of the living parents of a child." Section 74-403 (2) provides that consent is not required from a parent who (1) has surrendered rights in the child to a child-placing agency or to the adoption court; (2) is found by the adoption court to have abandoned the child, or to have willfully failed for a year or longer to comply with a court-imposed support order with respect to the child; (3) has had his or her parental rights terminated by court order, see Ga. Code Ann. § 24A-3201 (4) is insane or otherwise incapacitated from giving consent; or (5) cannot be found after a diligent search has been made.

[2] Section 74-403 (3), which operates as an exception to the rule stated in § 74-403 (1), see n. 2, *supra*, provides:

"Illegitimate children.—If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the Department of Human Resources."

Sections of Ga. Code Ann. (1973) will hereinafter be referred to merely by their numbers.

To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, § 74–101, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father, § 74–103.[4] But unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, § 74–203,[5] including the power to veto adoption of the child.

Appellant did not petition for legitimation of his child at any time during the 11 years between the child's birth and the filing of Randall Walcott's adoption petition.[6] However, in response to Walcott's petition, appellant filed an application for a writ of habeas corpus seeking visitation rights, a petition

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[4] Section 74–101 provides in full:

"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, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

[5] Section 74–203 states:

"The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the parental [sic] power."

In its opinion in this case, the Georgia Supreme Court indicated that the word "parental" in these code sections of this provision is the result of a misprint, and was instead intended to read "parental." *See Quilloin* v. *Walcott*, 238 Ga. 230, 231–232 S. E. 2d 246, 247 (1977).

[6] It does appear that appellant consented to entry of his name on the child's birth certificate. *See* §§88–1709 (b) (12). The adoption petition gave the name of the child as "Darrell Webster Quilloin," and appellant alleges in his brief that the child has always been known by that name. *See* Brief of Appellant, at 11.

for legitimation, and an objection to the adoption.[3] Shortly thereafter, appellant amended his pleadings by adding the claim that §§ 74-203 and 74-403 (3) were unconstitutional as applied to his case, insofar as they denied him the rights granted to married parents, and presumed unwed fathers to be unfit as a matter of law.

The petitions for adoption, legitimation, and writ of habeas corpus were consolidated for trial in the Superior Court of Fulton County, Ga. The court expressly stated that these matters were being tried on the basis of a consolidated record to allow "the biological father . . . a right to be heard with respect to any issue or other thing upon which he desire[s] to be heard, including his fitness as a parent. . . ."[4] After receiving extensive testimony from the parties and other witnesses, the trial court found that, although the child had never been abandoned or deprived, appellant had provided support only on an irregular basis.[5] Moreover, while the child provi-

[3] Appellant had been notified by the State's Department of Human Resources that an adoption petition had been filed.

[4] *In re: Application of Randall Walcott for Adoption of Child*, Adoption Case No. 54761 (Ga., Super. Ct., Jul. 12, 1976), App. 70.

Sections 74-103, 74-203, and 74-403 (3) are silent as to the appropriate procedure in the event that a petition for legitimation is filed after an adoption proceeding has already been initiated. Prior to this Court's decision in *Stanley v. Illinois*, 405 U. S. 645 (1972), and without consideration of potential constitutional problems, the Georgia Supreme Court had concluded that an unwed father could not petition for legitimation after the mother had consented to an adoption. *Smith v. Smith*, 221 Ga. 442, 445–446, 145 S. E. 2d 579, 583–584 (1965). But cf. *Davis v. Bates*, 226 Ga. 687, 177 S. E. 2d 50, aff'g 122 Ga. App. 492, 177 S. E. 2d 856 (1970). However, the Georgia Supreme Court left the door open to reconsider this conclusion in light of *Stanley* and, in the face of appellee's constitutional challenge to §§ 74-203, 74-403 (3), the trial court evidently concluded that concurrent consideration of the legitimation and adoption petitions was consistent with the statutory provisions. See also Tr. of Hearing before Superior Ct., App. 34, 51; n. 12, *infra*.

[5] Under § 74-202, appellant had a duty to support his child, but, for reasons not appearing in the record, the mother never brought an action

ously had visited with appellant on "many occasions," and had been given toys and gifts by appellant "from time to time," the mother had recently concluded that these contacts were having a disruptive effect on the child and on appellees' entire family.[3] The child himself expressed a desire to be adopted by Randall Walcott and to take on Walcott's name,[4] and the court found Walcott to be a fit and proper person to adopt the child.

On the basis of these findings, as well as findings relating to appellees' marriage and the mother's custody of the child for all of the child's life, the trial court determined that the proposed adoption was in the "best interests of [the] child." The court concluded, further, that granting either the legitimation or the visitation rights requested by appellant would not be in the "best interests of the child," and that both should consequently be denied. The court then applied §§ 74–203 and 74-403 (3) to the situation at hand, and, since appellant had failed to obtain a court order granting legitimation, he was found to lack standing to object to the adoption. Ruling that appellant's constitutional claims were without merit, the court granted the adoption petition and denied the legitimation and visitation petitions.

Appellant took an appeal to the Supreme Court of Georgia, claiming that §§ 74–203 and 74-403 (3), as applied by the trial

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to enforce this duty. Since no court ever ordered appellant to support his child, denial of veto authority over the adoption could not have been justified on the ground of willful failure to comply with a support order. See n. 2, *supra*.

[3] In addition to Darrell, appellees' family included a son born several years after appellees were married. The mother testified that Darrell's visits with appellant were having unhealthy effects on both children.

[4] The child also expressed a desire to continue to visit with appellant on occasion after the adoption. The child's desire to be adopted, however, could not be given effect under Georgia law without divesting appellant of any parental rights he might otherwise have or acquire, including visitation rights. See § 74-111.

court to his case, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In particular appellant contended that he was entitled to the same power to veto an adoption as is provided under Georgia law to married or divorced parents and to unwed mothers, and, since the trial court did not make a finding of abandonment or other unfitness on the part of appellant, see n. 2, *supra*, the adoption of his child should not have been allowed.

Over a dissent which urged that § 74-403 (3) was invalid under *Stanley* v. *Illinois*, the Georgia Supreme Court affirmed the decision of the trial court. 238 Ga. 230, 232 S. E. 2d 240 (1977).[5] The majority relied generally on the strong state policy of rearing children in a family setting, a policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions. The Court also emphasized the special force of this policy under the facts of this case, pointing out that the adoption was sought by the child's stepfather, who was part of the family unit in which the child was in fact living, and that the child's natural father had not taken steps to support or legitimate the child over a period of more than 13 years. The Court noted in addition that, unlike the father in *Stanley*, appellant had never been a *de facto* member of the child's family unit.

Appellant brought this appeal pursuant to 28 U. S. C. § 1257 (2), continuing to challenge the constitutionality of

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[5] The Supreme Court addressed itself only to the constitutionality of the statutes as applied by the trial court and, at least for purposes of this case, accepted the trial court's construction of §§ 74-203, 74-403 (3), allowing consideration of the relevant and legitimate public interests. See n. 3, *supra*.

Subsequent to the Superior Court's decision in this case, the Georgia Legislature enacted a comprehensive revision of the State's adoption laws, to be effective January 1, 1978. [1977] Georgia Laws, p. 201. The new law expressly recognizes the right of an unwed father to petition for legitimation as a prerequisite to the filing of an adoption petition concerning his child. See Ga. Code Ann. § 74-403 (Supp. 1977).

§§ 74-203 and 74-403 (3) as applied to his case, and claiming that he was entitled 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. In contrast to appellant's somewhat broader statement of the issue in the Georgia Supreme Court, on this appeal he focused his equal protection claim solely on the disparate statutory treatment of his case and that of a married father.[1] We noted probable jurisdiction, — U. S. — (1977), and we now affirm.

II

At the outset, we observe that appellant does not challenge the sufficiency of the notice he received with respect to the adoption proceeding, see n. 7, *supra*, nor can he claim that he was deprived of a right to a hearing on his individualized interests in his child, prior to entry of the order of adoption. Although the trial court's ultimate conclusion was that appellant lacked standing to object to the adoption, this conclusion was reached only after appellant had been afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent. Had the trial court granted legitimation, appellant would have acquired the veto authority he is now seeking.

Received notice & hearing

The fact that appellant was provided with a hearing on his legitimation petition is not, however, a complete answer to his attack on the constitutionality of §§ 74-203 and 74-403 (3). The trial court denied appellant's petition, and thereby precluded him from gaining veto authority, on the ground that

[1] In the last paragraph of his brief, appellant raises the claim that the statutes make gender-based distinctions that violate the Equal Protection Clause. Since the claim was not presented in appellant's Jurisdictional Statement, we do not consider it. S. Ct. Rule 15 (1)(c); see, e. g., *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U. S. 376, 384, and n. 12 (1960).

legitimation was not in the "best interests of the child"; appellant contends that he was entitled to recognition and preservation of his parental rights absent a showing of his "unfitness." Thus, the underlying issue is whether, in the circumstances of this case and in light of the authority granted by Georgia law to married fathers, appellant's interests were adequately protected by a "best interests of the child" standard. We examine this issue first under the Due Process Clause and then under the Equal Protection Clause.

A

Appellees suggest that due process was not violated, regardless of the standard applied by the trial court, since any constitutionally protected interest appellant might have had was lost by his failure to petition for legitimation during the 11 years prior to filing of Randall Walcott's adoption petition. We would hesitate to rest decision on this ground, in light of the evidence on the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed.[9] But in any event we need not go that far, since under the circumstances of this case appellant's substantive rights were not violated by application of a "best interests of the child" standard.

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, *supra*; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose

[9] At the hearing in the trial court, the following colloquy took place between appellee's counsel and appellant:

"Q. Had you made any effort prior to this time [prior to the instant proceedings], during the eleven years of Dan-II's life to legitimate him?

"A . . . I didn't know that was process—even you—you know through [sic]." App. 38.

primary function, and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). And it is now firmly established that "freedom of personal choice in matter of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U. S. 632, 639–640 (1974).

We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families for Equality and Reform*, — U. S. —, — (1977) (STEWART, J., concurring). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody 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 had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. 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."

B

Appellant contends that even if he is not entitled to prevail as a matter of due process, principles of equal protection require that his authority to veto an adoption be measured by the same standard that would have been applied to a married father. In particular, appellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore, the State acted impermissibly in

treating his case differently. We think appellant's interests are readily distinguishable from those of a divorced father, and accordingly believe that the State could permissively give appellant less veto authority than it provides to a married father.

E/P holding

Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from those responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is of course a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.

For these reasons, we conclude that §§ 74-203, 74-403 (3), as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses. The judgment of the Supreme Court of Georgia is, accordingly,

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 9, 1977

Re: No. 76-6372 — Quilloin v. Walcott

Dear Thurgood:

I join.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 12, 1977

Re: No. 76-6372 - Quilloin v. Walcott

Dear Thurgood:

Please join me. I would appreciate it if you could see your way clear to make one change in the last sentence of footnote 12 on page 4 of the presently circulating footnote attached to the draft opinion. That sentence presently reads:

> "The new law expressly recognizes the right of an unwed father to petition for legitimation subsequent to the filing of an adoption petition concerning his child . . . ."

In order to make clear that we are not deciding a constitutional question sub silentio in a footnote, I would like to see the language changed to make clear that the "right" referred to is a statutory one; something along the following lines would suit me fine:

> "The new law expressly gives the unwed father the right to petition for legitimation . . . ."

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 13, 1977

Re: No. 76-6372, Quilloin v. Walcott

Dear Thurgood,

I agree with Bill Rehnquist's suggestion contained in his letter to you of December 12. Assuming that that small change will be made, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

To: Mr. Justice Powell December 13, 1977

From: Jim Alt

Re: 1st draft of Justice Marshall's opinion for the Court in Quilloin v. Walcott, No. 76-6372.

Because Justice Marsall's opinion emphasizes that appellant only attacks the Georgia adoption laws as applied to him, see circulation at 4, 6 n.12, 7, 10, I have fewer difficulties with the result than I had anticipated.

My problem in distinguishing Stanley v. Georgia, 405 U.S. 645 (1972), stemmed from the fact that the Court there purported to grant all unwed fathers the right to a hearing before their children could be placed in the custody of someone else - whether or not they, like Stanley, ever had had custody of the children. To grant the right to a hearing to all married parents and unwed mothers, while denying it to all unwed fathers, was thought to violate equal protection as well as due process. To the extent that Stanley addressed the issue whether unwed fathers who never had had custody were denied equal protection vis a vis married parents and unwed mothers, it treated the case as a facial challenge to the Illinois law. And, quite arguably, it spoke in dicta.

Justice Marshall's opinion here, on the other hand, explicitly treats the case as an attack on the Georgia statute only as applied to appellant. This means that the opinion does not decide whether an unwed father in Stanley's position, who had had actual custody at some point, would be denied equal

protection vis a vis married parents and unwed mothers by the Georgia law. The opinion therefore can be viewed as consistent with the result in Stanley, if not with its broad language.

It is not clear to me why it was necessary to treat Stanley as a facial, rather than as-applied, attack on the Illinois statute. In general, I think that it makes more sense to cut a narrow swath in deciding a case like this, as Justice Marshall does. I wish that Justice Marshall said something about Stanley in his equal protection discussion, see circulation at 9-10, but I can understand a reluctance to say out loud that part of Stanley was dicta.

My conclusion from all this is that, contrary to my earlier thought, this case can be reconciled with Stanley on the equal protection issue. To the extent that you were left out on a limb because of my doubts (yours was the only vote at Conference to reverse), I apologize. If the result on the facts of this case seems correct to you - as it does to me - I think you could consider joining the majority.

JA

December 14, 1977

No. 76-6372 Quilloin v. Walcott

Dear Thurgood:

Although I voted tentatively to reverse on equal protection grounds, you have written the opinion so skillfully (and narrowly) on an "as applied" basis that I am happy to join you..

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 20, 1977

Re: No. 76-6372 - Quilloin v. Illinois

Dear Thurgood:

Please join me.

Sincerely,

HAB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1977

Dear Thurgood:

Re: 76-6372 Quilloin v. Walcott

I join your December 16 draft.

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J. BRENNAN, JR.

December 28, 1977

RE: No. 76-6372 Quilloin v. Walcott

Dear Thurgood:

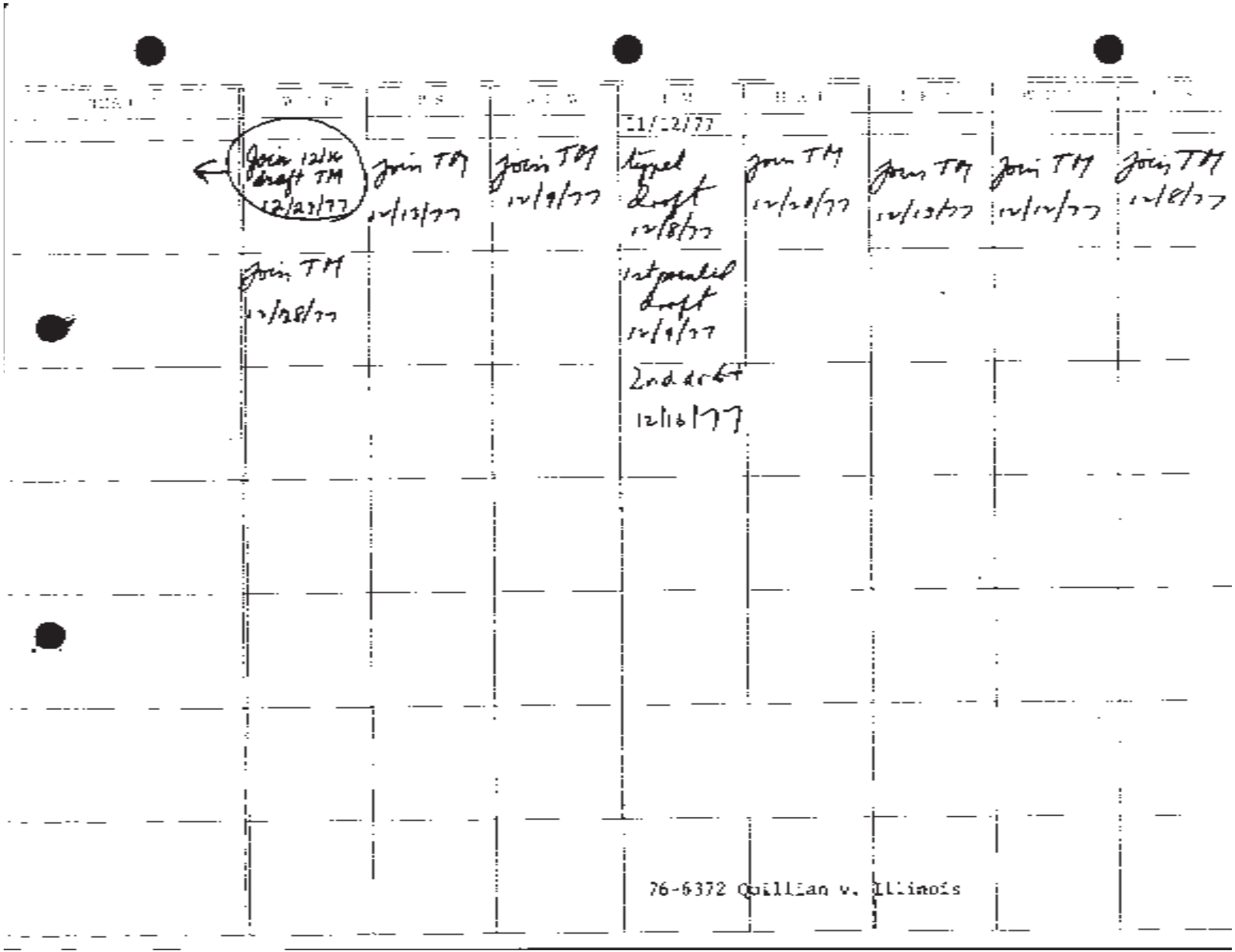
I join your December 16 draft.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference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Typed draft 12/8/77
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Join TM 12/13/77
Join TM 12/1/77
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Join TM 12/28/77
Initialed draft 12/9/77
2nd draft 12/16/77
76-6372 Quillian v. Illinois