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Constitutional Law: Equal Protection: Gender-Based Classification in Adoptions Found Violative. (Caban v. Mohammed).

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V. Conclusion

Each part of the two-part rule formulated by the Court in *Parklane* has a distinct objective. The ease of joinder limitation was intended to promote judicial economy and uniformity of judgments by encouraging potential plaintiffs to join in a single action against a common defendant. This limitation, however, will most likely result in the unnecessary relitigation of issues and a greater risk of inconsistent judgments. The potential unfairness limitation was meant to protect the rights of a defendant against whom collateral estoppel is asserted. The right to a jury trial has constitutional as well as procedural significance and should be carefully guarded. The defendants in *Parklane* were precluded from relitigating before a jury those issues resolved in the prior SEC action merely because of a procedural quirk which prevented the stockholders from joining that prior action. Thus, in *Parklane,* the procedural and constitutional rights of the defendants may not have been adequately protected. Therefore, it appears that the objective of the potential unfairness limitation was not achieved. In summary, the impact of the majority opinion is best synthesized by Justice Rehnquist: "The ultimate irony of today's decision is that its potential for significantly conserving the resources of either the litigants or the judiciary is doubtful at best. [Thus, there is] . . . absolutely no reason to frustrate so cavalierly the important federal policy favoring jury decisions of disputed fact questions."[84]

David D. Wilmoth

CONSTITUTIONAL LAW — Equal Protection — Gender-Based Classifications in Adoptions Found Violative. *Caban v. Mohammed,* 99 S. Ct. 1760 (1979).

I. Introduction

In *Caban v. Mohammed,*[1] the United States Supreme Court, in a five to four split decision, held that an unwed fa-

84. 99 S. Ct. at 664 (Rehnquist, J., dissenting).

1. 99 S. Ct. 1760 (1979).

ther[2] who has established a significant parental relationship with his illegitimate child, no longer an infant, is entitled to the same right to block adoption by withholding his consent as had previously been given solely to the mother under section 111 of the New York Domestic Relations Law.[3] Unlike holdings in prior illegitimacy-related cases, the Court determined that the equal protection rights involved were violated on gender-based rather than on status-based grounds. By deciding the case on this basis, the Court nearly submerged the due process argument proffered by the appellant and in so doing, changed the focus to one of equal protection. Both the majority and minority, however, were careful to qualify the effect of *Caban* upon future adoptions by suggesting it apply only in very similar, and therefore probably rare, situations.

Abdiel Caban and Maria Mohammed lived together without benefit of marriage in New York City from 1968 to 1973. During this time, they had two children and lived together as a family. Both Caban and Mohammed contributed to the support of the children. In 1973, Maria Mohammed left with the children and took up residence with Kazim Mohammed, whom she subsequently married in 1974. The children, then aged two and four, were frequently visited by Caban, who lived near Maria Mohammed's mother. When their grandmother moved back to Puerto Rico in September 1974, she took the children with her. In November 1975, Caban went to Puerto Rico and retrieved his children. After their return, Maria Mohammed instituted custody proceedings and was successful. In January 1976, both Mohammeds filed a petition to adopt the children. In March, Caban and his new wife cross-petitioned for adoption. At a hearing before a New York Surrogate Court, the Mohammeds were granted their adoption

2. For the purposes of this paper "putative father" or "unwed father" will signify the father of an illegitimate child. This does not include a father who has subsequently married the mother, or who has later legally legitimized the child.

3. N.Y. DOM. REL. LAW § 111 (McKinney 1977). The statute provides that: "consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock . . ." (cited at 99 S. Ct. 1764-65). *See also* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (1968): "The illegitimate child's adoption is authorized by most statutes upon the consent of his mother only, reflecting the common law position that the father of the illegitimate child has no legal claim upon him." *Id.* at 625.

petition, which cut off Caban's parental rights and obligations.[4] The New York Supreme Court, Appellate Division,[5] and the New York Court of Appeals[6] affirmed, relying heavily upon *In re Malpica-Orsini,*[7] a New York Court of Appeals decision. This case held that a putative father is entitled to notice and an opportunity to be heard at all proceedings concerning his child but is not entitled to a veto power over an adoption proceeding instigated by the child's mother who had recently married.[8] Curiously, the United States Supreme Court dismissed an appeal of this case in 1977[9] for lack of a federal question.[10] They were, however, to decide a nearly identical issue in *Caban.*

II. Due Process

The *Caban* majority summarily dismissed the due process question. The appellees contended that section 111 of the New York Domestic Relations Law treats unwed fathers no differently than it does other parents since the best interests of the child are always the final consideration.[11] This argument was dismissed as specious because the questions of requisite consent and the child's best interest have been recognized by the New York Court of Appeals as distinct and separate considerations.[12] In summarily dismissing the appellees' position, the Court chose to address the equal protection argument directly rather than as an adjunct of due process, as it had done in *Stanley v. Illinois.*[13] In *Stanley,* an absolute presumption that

4. N.Y. Dom. Rel. Law § 117 (McKinney 1977) (cited at 99 S. Ct. 1764 n.2).

5. *In re* David Andrew C., 56 App. Div. 2d 627, 391 N.Y.S.2d 846 (1976).

6. *In re* David A. C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

7. 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975).

8. *Id.* at 569-70, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

9. *In re* Malpica-Orsini, *dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977).

10. 99 S. Ct. at 1767 n.9. The majority indicated that "insofar as our decision is inconsistent with our dismissal in *Orsini,* we overrule our prior decision."

11. *Id.* at 1765.

12. *In re* Corey L. v. Martin L., 45 N.Y.2d 383, 391, 380 N.E.2d 266, 270, 408 N.Y.S.2d 439, 442-43 (1978).

13. 405 U.S. 645 (1972).

> We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

Id. at 658. *See* text accompanying note 46 *infra.*

an unwed father is unfit was found to violate due process. In contrast, the *Caban* majority dismissed due process[14] by merely acknowledging that "the appellant was given due notice and was permitted to participate as a party in the adoption proceedings. . . ."[15] Further, the Court defused the appellant's substantive due process argument by noting that

> [b]ecause we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.[16]

While Justice Stewart's dissent echoes the majority's conclusion concerning *Stanley* and procedural due process,[17] he elaborates upon the substantive due process question by stating that "the absence of a legal tie with the mother provides a constitutionally valid ground for distinction [between fathers of legitimate and illegitimate children]."[18] Justice Stewart appears to limit the father's right to a fitness hearing only if he has established some kind of legal relationship either with the child by legitimation, or with the mother through marriage.[19] Justice Stevens' dissent generally agrees with Stewart's position except that Stevens views any such distinction as to the consent requirement as grounded in the "[b]est interests of the child."[20]

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14. The Court dismissed the due process argument in two footnotes: 99 S. Ct. at 1764 n.3 & 1769 n.16.

15. *Id.* at 1764 n.3.

16. *Id.* at 1769 n.16.

17. *Id.* at 1770-71 (Stewart, J., dissenting).

18. *Id.* at 1771.

19. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. *Id.*

20. In my view, such a decree may also be justified by a finding that the adoption will serve the best interests of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate the child and a further requirement such as a showing of unfitness would entirely deprive the child — and the State — of the benefits of adoption and legitimation.

Id. at 1780 (Chief Justice Burger and Justice Rehnquist joined Justice Stevens in his dissenting opinion) (footnote omitted).

III. EQUAL PROTECTION

The Court stated it was clear that section 111 treats unmarried parents differently according to their sex.[21] The issue, therefore, became whether this distinction bears a substantial relation to some important state interest so as to withstand judicial scrutiny under the equal protection clause. By stating that "a statutory 'classification "must be reasonable, not arbitrary," ' "[22] the Court suggested that it put no credence in the argument that unwed mothers a priori have greater concern for their children than do unwed fathers.[23] Hence, there is no legitimate reason to deprive unwed fathers of an equal voice in adoption proceedings, at least in circumstances where they lived with and contributed to the support of their children.

The dissenting opinions provide a more substantial challenge to the majority's equal protection position than did their due process discussion. Both Justices Stewart and Stevens agree that the state's interest in adoption is substantial enough to obviate the need for a statute which would require the consent of both parents of an illegitimate child.[24] This would, in a case like *Caban,* result in a standoff where the child would not be legitimized by an adoption. However, as in this case, where both mother and father wish to adopt the child, and not merely block the adoption by the other, the best interests of the child would seem to govern most sensibly.

Justice Stevens' argument, essentially founded in statistics and probability,[25] does raise an interesting and perhaps irresolvable question of whether the exception should invalidate the rule. He suggested that section 111 was valid when applied to a newborn,[26] a contention with which the majority would seem to agree, since it is in this instance that the majority was

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21. *Id.* at 1768.

22. *Id.* (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

23. *Id.* at 1768.

24. "If the consent of both unwed parents were required, and one withheld that consent, the illegitimate child would remain illegitimate." *Id.* at 1777 (Stewart, J., dissenting). "If both are given a veto, as the Court requires, neither may adopt and the children will remain illegitimate." *Id.* at 1779 (Stevens, J., dissenting).

25. [In the majority's] view, since the justification is not as strong for some indeterminately small part of the disadvantaged class as it is for the class as a whole, . . . the rule is invalid under the Equal Protection Clause insofar as it applied to that subclass. With this conclusion I disagree.

Id. at 1777 (Stevens, J., dissenting) (citation omitted).

26. *Id.* at 1774-75.

willing to concede that the mother has a closer tie than does the unwed father.[27] Stevens argues that when a law is arguably just in its most frequent application, "we should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid."[28] This contention seems to be the major difference between the Stevens and Stewart opinions, since Stewart takes a position which would be, by implication, closer to that of the majority. He argues that a law which justly speaks to a majority but not a totality may still violate equal protection.[29]

IV. THE STATUS-BASED CLASS — *Levy* THROUGH *Stanley*

What may be most significant about the *Caban* decision is its assertion that any distinction to be made between the rights of unwed fathers and mothers is essentially gender-based.[30] As the following lineage of illegitimacy cases will show, this is a significant reversal of the position taken prior to *Caban,* since such distinctions were fundamentally found to be status-based.

A status-based distinction focuses upon differences in roles, relationships, or positions, whether founded in law or mere convention. Hence, the rights of a legitimate child are different than those of an illegitimate one, and the rights of an unwed mother are different than those of an unwed father.

A gender-based distinction, on the other hand, looks beyond the roles of mother and father to the most basic difference between them — sex. Implicit in, yet vital to, labelling a distinction as gender-based is the notion that any status-based differences are either nonexistent or inconsequential and that differences between the rights of an unwed mother versus those given to an unwed father are *not* founded upon any innate differences in their roles as parents.

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27. *Id.* at 1768 n.11.

28. *Id.* at 1777.

29. Such laws cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class, for a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious.

Id. at 1771.

30. *Id.* at 1769.

Two watershed cases on illegitimacy rights were decided as companion cases by the United States Supreme Court in 1967, *Levy v. Louisiana*[31] and *Glona v. American Guarantee & Liability Insurance Co.*[32] *Levy* was a wrongful death action brought on behalf of five illegitimate children for the death of their mother.[33] *Glona,* also a wrongful death action, involved the claim of a mother for the death of her illegitimate son.[34]

At the lower court level, the Levy children were denied relief on the basis of their illegitimate status, and the court argued that "[d]enying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock."[35] Similarly, Mrs. Glona lost at the trial court level on the ground that the status distinction between legitimate and illegitimate offspring made by statute and case law was not unreasonable.[36]

On appeal, the Supreme Court overturned both decisions, and in doing so, raised the illegitimate child out of the vague limbo of the "nonperson."[37] In finding the Levy children entitled to recovery, the Court looked to the quality of "the biological and . . . spiritual"[38] relationship between mother and children, regardless of status, rather than to the purely legal distinction between the rights of legitimates as opposed to those of illegitimates. In *Glona,* the Court rejected the argument put forth by the Louisiana Court of Appeals based on a Louisiana statute[39] which precluded recovery by parents of illegitimate children.[40] Clearly, in restricting Louisiana's right to draw such a legal distinction the Court understood the Constitution to require something more than class distinctions

31. 391 U.S. 68 (1968).

32. 391 U.S. 73 (1968).

33. 391 U.S. at 69.

34. 391 U.S. at 73.

35. Levy v. State, 253 La. 73, 192 So. 2d 193 (1966). The court stated, "Our jurisprudence is well established that 'child' means legitimate child and that recovery is denied both to illegitimate and putative children for the wrongful death of a parent." *Id.* at ____, 192 So. 2d at 195.

36. Glona v. American Guar. & Liab. Ins. Co., 379 F.2d 545, 546 (5th Cir. 1967).

37. "We start from the premise that illegitimate children are not 'nonpersons.' " Glona v. American Guar. & Liab. Ins. Co., 391 U.S. at 70.

38. *Id.* at 72.

39. LA. CIV. CODE ANN., art. 2315 (West Supp. 1967).

40. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. at 75.

based upon mere status.[41] Much can be said of the Court's focus upon the biological relationship rather than the legal, or status-based one; nevertheless, a biological criterion creates its own set of problems.

The status-based shortcomings, which were directly addressed in *Caban,* were foreshadowed by the joint dissent to *Levy* and *Glona* by Justice Harlan.[42] He perceived the primary weakness of the *Levy* majority position to be an undue restriction of a state's legitimate legislative power.[43] He also recognized the difficulty implicit in *any* distinction "for neither a biological relationship nor legal acknowledgment is indicative of the love or economic dependence that may exist between two persons."[44] This opinion presaged the *Caban* majority's refusal to allow a status-based distinction which, given this particular familial situation, was little more than arbitrary.[45]

Stanley v. Illinois[46] involved a fact situation[47] closer to *Caban* than that in *Levy* or *Glona,* yet the Court's approach to the problem posited there sheds light on the necessity for the equal protection focus in *Caban.* In *Stanley,* appellant had lived with a woman intermittently for 18 years, during the course of which they had three children out of wedlock. Upon

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41. "But it hardly has a causal connection with the 'sin' which is, we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue." *Id.*

42. The dissent by Justice Harlan was joined by Justices Black and Stewart.

43. There is obvious justification for this decision. If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of the relationships are present. Moreover, and for many of the same reasons why a State is empowered to require formalities in the first place, a State may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof.

391 U.S. at 80 (Harlan, J., dissenting).

44. *Id.*

45. "We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development." 99 S. Ct. at 1767.

46. 405 U.S. 645.

47. Peter Stanley had three children out of wedlock with Joan Stanley, who died. Despite the father's apparent continuing care and affection for the children, they were automatically made wards of the state under Illinois law, which did not classify Stanley as a "surviving parent." *Id.* at 646-49. *See* note 50 *infra.*

her death, the children became wards of the state under Illinois law. The primary factual difference between *Caban* and *Stanley* is that the Illinois statute in *Stanley* allowed no hearing for the unwed father nor required any demonstration of neglect on his part before making his children wards of the state.[48] Curiously, *Stanley's* defense rested on equal protection rather than on due process grounds. Nevertheless, the Supreme Court raised due process and subordinated the equal protection argument by asserting that the state has a legitimate interest in protecting "the moral, emotional, mental, and physical welfare of the minor."[49] The dominant question was not whether the state ends were valid, but rather, whether the state had an interest in separating children from fathers without a fitness hearing. By considering due process and the lack of statutory authority for a hearing rather than equal protection and the presence of questionable statutory status-based discrimination,[50] the possibility was left open that, even in spite of a hearing for the unwed father, the statutory distinction between mother and father of illegitimate children made the outcome of such a hearing a foregone conclusion — which is, in fact, precisely what happened in *Caban*.[51] Given the custody statute, the hearing was purely pro forma since Caban's fitness as a parent was a foreclosed issue. So, in this respect, *Caban* is the logical heir to the unresolved problem of *Stanley*.

In many respects, *Quilloin v. Walcott*,[52] frequently cited in

48. "By use of this [more simplistic dependency] proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law." 405 U.S. at 650. Notice to the putative father is discussed in Note, *The Strange Boundaries of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973).

49. 405 U.S. at 652.

50. ILL. REV. STAT. ch. 37, §§ 702-1, -5 (1972).

51. Brief for Appellant at 16-17, Caban v. Mohammed, 99 S. Ct. 1760 (1979):

> The hearing officer, Law Assistant Renee R. Roth, professed ignorance of the substantive Due Process purpose of the hearing. (cf. *Stanley v. Illinois*, 405 U.S. 645, 658: "All . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.") Involved here was the threatened permanent removal of appellant's children from his custody, or any possibility thereof. Ms. Roth resolved her doubts by concluding that: "The purpose of this hearing is to afford the putative father with a hearing."

52. 434 U.S. 246 (1977).

Caban,[53] might have precluded the necessity for the *Caban* decision had the appellant reasonably raised the issue of gender-based, as well as status-based discrimination.[54] Although the facts in *Quilloin* are readily distinguished from those in *Caban*, the issues, equal protection and due process, are similar. In *Quilloin*, the child's father had never taken an active role in raising or supporting the child. Upon the mother's subsequent marriage and her attempt at adoption, the father tried to block the adoption without seeking custody. Interestingly, on the equal protection question, the Court pursued the status-based distinctions between unwed and married fathers and found them "readily distinguishable"[55] and therefore not subject to equal protection analysis. The appellant had "never exercised actual or legal custody over his child, and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[56] In retrospect, the perhaps rueful footnote on Quilloin's failure to argue gender-based discrimination may have been an invitation to the fray.

V. Status-Based v. Gender-Based Distinctions

For purposes of establishing parental and filial rights, a status-based distinction that differentiates between father and mother violates equal protection if the father, like the mother, has established a substantial relationship with the child. Clearly, as in *Levy* and *Glona*, in order to raise the illegitimate out of the ignominy of the "nonperson," the Court had good reason to reject a status-based distinction in order to emphasize that the mother of an illegitimate who cares for her child should, for various legal purposes, be regarded no differently than a mother who bears a child in wedlock. However, as the majority in *Caban* makes clear, what was appropriate in distinguishing between the rights of parents versus the rights of the state may not be so fitting in distinguishing between the rights of father and mother.[57] Unlike the sociological argu-

53. 99 S. Ct. at 1766 n.7, 1769 n.14 & 1779 n.25.

54. 434 U.S. at 253 n.13.

55. *Id.* at 256.

56. *Id.*

57. "We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the

ments raised by the New York Court of Appeals in *In re Malpica-Orsini,*[58] which was relied upon in precluding Caban's appeal in the state court,[59] the approach taken by the Supreme Court rejects the assertion that "a fundamental difference between maternal and paternal relations"[60] exists at least in respect to other than newborns.[61] In so rejecting the appellee's claim that granting unwed fathers veto rights would hamper the state's substantial interest in promoting the adoption of children,[62] the Court does not challenge the state's interests in adoption but rather the reasonableness of the distinction upon which the interest is based.[63] The test applied by the Court requires that the classification "rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[64] However, the Court is careful to point out in *Caban* that withholding consent rights from a father who "has never come forward or [who] has abandoned the child"[65] does not violate equal protection, and the

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State's interest in providing adoptive homes for its illegitimate children." 99 S. Ct. at 1768.

58. [T]o contend that at least some of the fathers of children born out of wedlock should be accorded the option or veto of consent is meaningless as far as ameliorating the [adoption] problem. To grant this right to those who acknowledge paternity would require a most difficult search and constant inquiry. To extend it to those who have contributed to the support of the child would be an excursion into relative values difficult of proof. To allow it for fathers adjudicated to be such in compulsory proceedings would not alleviate the situation measurably since they are likely to be resentful and their legally enforced nexus with the child bears no relationship to their entitlement. The mere possibility of a presently existing right on the part of even some fathers or one that might be acquired at a later date, no matter how restrictive the group to whom the right granted may be, is enough to discourage a wide range of prospective placements and adoptions.

36 N.Y.2d 568, 576, 331 N.E.2d 486, 492, 370 N.Y.S.2d 511, 519 (1975).

59. *See In re* David Andrew C., 56 App. Div. 2d 627, 391 N.Y.S.2d 846 (1976); *In re* David A.C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

60. 99 S. Ct. at 1766.

61. "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* at 1767-68.

62. *Id.*

63. "But the unquestioned right of the State to further these ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111." *Id.* at 1768.

64. Reed v. Reed, 404 U.S. 71, 76 (1971) (citing test of Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (cited in *Caban* at 1768).

65. 99 S. Ct. at 1768 (footnote omitted).

Court further suggests that perhaps such a distinction may be made with respect to newborns.[66]

VI. CONCLUSION

The final section of Justice Stevens' dissent[67] attempted to indicate the narrowness of this decision's impact upon future adoptions.[68] With this, there is no indication that the majority would disagree, since it is careful to exclude from its examination the issue of newborn adoption,[69] as well as those cases where the father "has never come forward to participate in the rearing of the child . . .,"[70] or where the father has abandoned the child outright.[71] Hence, the Court's holding would demand only that a statute require consent for the adoption of a child not newborn from an unwed father whose "identity is known and . . . [where the father has] manifested a significant paternal interest in the child."[72]

Hence, *Caban v. Mohammed* may be more important as precedent for future gender-based discrimination cases,[73] than as a watershed case in adoption proceedings since both majority and minority opinions suggest its limited application.[74] In *Parham v. Hughes,*[75] decided on the same day as *Caban,* a wrongful death action was brought by an unwed father for the death of his child whom he had never legitimated. In refusing to invalidate the Georgia statute[76] which precluded the father's action, the Court cites *Caban* using language which may

66. "Even 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.*

67. Justice Stevens was joined by Justice Stewart as well as by the Chief Justice and Justice Rehnquist in this final section.

68. "In short, this is an exceptional case that should have no effect on the typical adoption proceeding." 99 S. Ct. at 1781.

69. *Id.* at 1768 n.11.

70. *Id.* at 1768.

71. *Id.*

72. *Id.*

73. The precedent of *Caban* may be important because of the implication that a distinction based on sex is a suspect classification.

74. Wisconsin revised its adoption statute after *Stanley. See* WIS. STAT. § 48.84 (1973). *See also,* Note, *Domestic Relations — Putative Father's Right to Custody of His Child,* 1971 WIS. L. REV. 1262; Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation,* 13 J. FAM. L. 115 (1973-74).

75. 99 S. Ct. 1742 (1979).

76. GA. CODE § 105-1307 (1968)(repealed 1979).

prove to be the test phrase of that decision. The Court stated that in *Caban* they were rejecting the notion that a "broad, gender-based distinction . . . is required by any universal difference between maternal and paternal relations at every phase of a child's development."[77] The qualifier, "at every phase of a child's development," may well indicate the Court's reticence to grant many unwed fathers an equal voice in adoption proceedings.

RONALD R. HOFER

CRIMINAL PROCEDURE — Polygraph Evidence — Impeachment of Polygraph Examiner Testimony by Defense Experts Allowed at Admissibility Hearing. *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979). In *McLemore v. State*,[1] the Wisconsin Supreme Court held that, where a criminal defendant has stipulated to take a polygraph examination and the state has moved that those results and the testimony of the examiner be admitted into evidence, the defendant is entitled to present his own experts at the admissibility hearing, out of the presence of the jury, to impeach the testimony of the polygraph examiner and the results of the examination.

The question of whether a defendant can present his own experts to testify against the polygraph examiner was first considered in *State v. Mendoza*.[2] The court, reversing and remanding on other grounds, there held that the "defendant's expert witnesses may testify before the trial judge at a new admissibil-

77. 99 S. Ct. at 1754 (citing Caban v. Mohammed, 99 S. Ct. 1760, 1767 (1979)) (emphasis added).

EDITOR'S NOTE: After this article was prepared for publication the Wisconsin Court of Appeals was faced with the issue of whether section 956.71 of the Wisconsin statutes was unconstitutional because it categorizes fathers of children born out of wedlock and not legitimated as not being a "parent" within the meaning of this custody statute. In upholding the statute, the Wisconsin Appeals Court echoed many of the dissenting arguments in *Caban*. The court stated the interests of the state in protecting minor children were substantial reasons for distinguishing the class. *See* State v. Hill, 91 Wis. 2d 446, 283 N.W.2d 451 (Ct. App. 1979).

1. 87 Wis. 2d 739, 275 N.W.2d 692 (1979).
2. 80 Wis. 2d 122, 258 N.W.2d 260 (1977).