MEMORANDUM

TO: Diane Kunz

FROM: Laura Kaufman, clerk
Stacey Pauker, clerk

RE: Unwed fathers' rights in adoption proceedings

In general, whether an unwed father has the right to prevent the adoption of his biological child depends on whether he has established a sufficient relationship with the child and the child's mother. If such a relationship has been established, the father has both the right to give or withhold his consent to the adoption (a "veto" right) and the right to notice of the adoption proceedings. If such a relationship has not been established, the father may lose his veto right but may retain a right to notice of the adoption proceedings in order to testify as to the best interests of the child if he has filed an intent to claim paternity with the putative father registry.

In New York, prior to 1972, an unwed father had no right to be heard on the adoption of his child. By 1978, such fathers had a limited right to receive notice of adoption proceedings but could be heard only on the issue of the best interests of their children. *See Quilloin v. Walcott, 434 U.S. 246.* In 1976, Domestic Relations Law § 111 (the predecessor to the current statute) was declared unconstitutional by the Supreme Court because it provided that a nonmarital father's consent to an adoption of his child was not required, regardless of his relationship with the child, while the mother's consent was required. *See Caban v. Mohammed 441 U.S. 380*. The Supreme Court held that such an "undifferentiated distinction between unwed mothers and unwed fathers, applicable in a circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interest. *See id at 384.*

As a result of *Caban*, Domestic Relations Law § 111 was amended to include certain consent rights for unwed fathers in certain circumstances. Until 1990, New York's statute

involved one test for an unwed father's consent right where the child to be adopted was more than six months old and a different test where the child was less than six months old when placed for adoption. The standards for determining the consent rights of an unwed father where the child is over six months old focus on the father's provision of financial support and his visitation and communication with the child. Where the out-of-wedlock child is placed with adoptive parents more than six months after the child's birth, the natural father's consent is required where he has maintained substantial and continuous or repeated contact with the child as manifested by 1) the payment by the father toward the support of the child of a fair and reasonable sum, and either 2) the father's visiting the child at least monthly or 3) the father's regular communication with the child. In the case of consent rights of an unwed father where the child is less than six months old when placed, the statute required that the father meet three criteria: 1) he openly lived with the child's mother for a continuous period of six months immediately preceding the placement of the child; 2) he held himself out as the child's father during that sixth month period; and 3) he paid a fair and reasonable sum for pregnancy and birth expenses. *New York Domestic Relations § 111.*

In Matter of Raquel Marie X, 559 N.E.2d 418 (1990), cert denied, 498 U.S. 984, on remand, 570 N.Y.S.2d 604 (2nd Dept. 1991), the Court of Appeals declared the first criterion – the cohabitation requirement – unconstitutional since it would permit "adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the state as substantial, continuous and meaningful by any other standard." The Court ruled that although the latter two criteria of § 111 did pass constitutional muster, the invalidated criteria was so central to the legislation that the entire section of the statute relating to consent rights of fathers where the child is less than six months old when placed must be rewritten. The Court developed an interim standard in *Raquel Marie*

based on the father's prompt manifestation of parental responsibility, meaning his "willingness himself to assume full custody of the child – not merely to block adoption by others." The Court acknowledged the continuing relevance of the two remaining criteria – acknowledgement of paternity and financial support. The Court of Appeals openly recognized that its invalidation of § 111 was an act of "extraordinary significance." From the viewpoint of unwed fathers, *Raquel Marie* affords broader opportunities to participate in, and potentially block, adoptions pursued at the exclusive initiation of the biological mother. Despite the fact that *Raquel Marie* is over a decade old, the Legislature has not fashioned a statutory replacement, such that the interim standard developed in Raquel Marie remains in effect. The Law Revision Commission suggested legislation that would have afforded every nonmarital father a veto right, except where the father had not manifested significant parental interest. The Legislature declined to follow that suggestion out of concern that the standard would be too imprecise and subjective and that, as a result, there would be a proliferation of protracted hearings which would be determined by courts and unguided by any fixed criteria.

In the companion case to Raquel Marie, *Matter of Baby Girl S*, 141 Misc. 2d 905 (1990), the Court addressed a father's consent right where the biological father had made persistent and uniformly rebuffed expressions of concern, offers of support and requests for custody as well as legal efforts to establish paternity and secure custody prior to placement. The Court found that in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child.

Where the consent of an unwed father is a prerequisite to the adoption of a child, the right to veto the adoption includes the right to notice of adoption proceedings. However rights of notice and consent are contingent upon asserting a sufficient parental interest prior to adoption proceedings and are void if a father does not assert such rights even in the event that the father is unaware of the existence of his child prior to a finalized adoption order. In *Matter of Robert O. v. Russell K.*, 80 N.Y.2d 254 (1992) the Court held that an unwed father cannot vacate a finalized adoption on the ground that he was not informed of the pregnancy by the mother and, because of his lack of knowledge of the child, was prevented from asserting a parental interest. The case also rejected the contention that an unwed mother is under an affirmative obligation to notify the unwed father of the fact of her pregnancy.

An unwed father is entitled to notice of adoption proceedings in certain circumstances even where his consent to the adoption is not required. The purpose of notice to natural fathers whose contacts with the child are not sufficient to qualify the father for veto rights is to permit the father to present evidence relevant to the best interests of the child. Natural fathers not entitled to consent rights to the adoption may be entitled to notice of adoption proceedings if the father has been adjudicated by a court to be the father of the child, he has timely filed an unrevoked notice of intent to claim paternity of the child with the putative father registry, he is recorded on the child's birth certificate as the child's father, he is openly living with the child and the child's mother at the time the proceeding is initiated and holds himself out to be the child's father, he has been identified in writing by the mother as the child's father, or he is married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument. *New York Social Services § 372-c*. Natural fathers not

entitled to an adoption veto may not be entitled to notice if such fathers were previously given notice of any proceeding involving the child.

Thus it appears that biological fathers who have established a sufficient relationship with the child or the child's mother, or have exhibited an intent to do so, are entitled to notice and consent rights. However these rights are easily foregone where the mother fails to inform the father of the child's existence, or the father does not assert his paternity prior to adoption proceedings.

While the rights of unwed fathers in New York were broadened in the wake of *Caban* and *Raquel Marie*, other states afford unwed fathers significantly more rights in adoption proceedings. Many states require formal termination of parental rights before adoption proceedings may occur. See, e.g., *13 Del.C. §908.* New York does not require termination, since it does not recognize un-asserted paternal interests as triggering or implying a parental relationship. Eighteen states confer rights to notice or consent to presumed fathers as defined by the Uniform Parentage Act or possible or potential fathers meeting various criteria. See, e.g., *Cal. Fam. Code §§ 7664, 8604; N.M. Stat. Ann. §§ 32A-5-17, 19.* New York recognizes only those fathers who have registered as putative fathers or meet the standard of *Raquel Marie*. Conversely, as in New York, most states void these rights based on failure to meet specific contact requirements, but often by a less stringent guideline for what constitutes contact. In sum, New York lacks legislative treatment of fathers' rights and should replace the interim *Raquel Marie* standard with clear statutory language. In forming such statutory language, New York should recognize the narrow scope of rights conferred under the caselaw and consider the broader treatment allowed by other states with regard to issues of notice and consent.