MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519, at the Statehouse at 11:00 a.m./~~p.m.~~ on January 16, 1978.

All members were present except: All members present.

The next meeting of the Committee will be held at 11:00 a.m./~~p.m.~~, on January 17, 1978.

~~These minutes of the meeting held on , 19 were considered, corrected and approved.~~

Elwaine F. Pomeroy
Chairman

The conferees appearing before the Committee were:

Staff present:
Art Griggs - Revisor of Statutes
Paul Purcell - Legislative Research Department
Jerry Stephens - Legislative Research Department

Senate Bill No. 504 - Probate code, incapacity of person found not guilty because of insanity to take certain property. Senator Winter, the author of the bill, appeared in support of it. Discussion was had concerning Case No. 48770 in the Court of Appeals of the State of Kansas, concerning the matter of the estate of Robert Dean Shields, deceased. Copies of the opinion in that case were distributed to the members of the committee. Following his presentation in favor of the bill, discussion was had between Senator Winter and the members of the committee.

Senate Bill No. 595 - Procedures regarding district judicial nominating commissions. The chairman explained that he had introduced this bill as a result of Jerry Palmer, of Topeka, having written to Lewis Carter, Clerk of the Appellate Courts, suggesting that it was a waste of time and money to send out a list of all registered lawyers with the request for nominations to the Judicial Nominating Commissions. Mr. Carter had indicated that a minimum of $3,000 could be saved annually if this requirement were deleted. Following committee discussion, Senator Gaines moved to report the bill favorably; Senator Everett seconded the motion, and the motion carried.

The chairman then presented six recommendations from the Kansas Bar Association for committee bills. Each recommendation was discussed by the committee. Four of the recommendations were approved, and the committee bills will be introduced and referred back to an appropriate committee for consideration. The recommendation concerning arraignment of defendants in criminal actions was rejected, as was the recommendation that adopted children be prohibited from inheriting from natural parents who were not spouses of adoptive parents.

- continued

CONTINUATION SHEET

Senate Bill No. 504 - Probate code, incapacity of person found not guilty because of insanity to take certain property. Further committee discussion was had concerning this bill. Senator Simpson moved to report the bill adversely. Following further committee discussion, it was the consensus of the committee that the bill be held for further consideration. Senator Simpson withdrew his motion. Members were requested to study the Court of Appeals decision, and be prepared to take action on the bill at a later date.

The chairman called attention to the copies of the Supreme Court opinion, Quilloin vs. Walcott, dealing with the issue of concent to adoption by an illegitimate father.

The meeting adjourned.

These minutes were read and approved by the committee on 1-19-78.

1-16-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
~~Paul Johnson~~	~~121 E. 6th Topeka~~	~~Legal Aid~~
Jan Price	112 W 6th Suite 203	Am. Civil Liberties Union of Ks
Yvonne Hughes	St. Mary College Leavenworth Ks.	
Marilyn Bradt	Lawrence	League of Women Voters of Kansas
Harold Stone	Topeka	
Billy Deneul	"	Governor's Office
Charles S. Hamm	Ste H. Bldg.	SRS

1-16-78

No. 48,770

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Estate of
ROBERT DEAN SHIELDS, Deceased;
MICHAEL B. SHIELDS, Administrator,
and PATRICIA LYNN KNIGHT,
Appellees,

v.

VICTORIA ANN SHIELDS,
Appellant.

SYLLABUS BY THE COURT

1.

Where property was owned by two persons in joint tenancy and the surviving joint tenant is convicted of the felonious killing of the other joint tenant, the survivor succeeds to an undivided one-half interest in the property. K.S.A. 59-513.

Appeal from Butler district court, JOHN MICHAEL JAWORSKY, judge. Opinion filed December 2 , 1977. Reversed and remanded.

Michael G. Coash, of Bond, Bond & Coash, of El Dorado, for appellant.

James F. Richey, of Rumsey & Richey, of Wichita, for appellees.

Robert D. Hecht and Robert E. Keeshan, of Scott, Quinlan & Hecht, of Topeka, as amici curiae.

Before HARMAN, C.J., REES and SWINEHART, JJ.

REES, J.:

This is an action for determination of the distribution of the property of Robert Dean Shields, who died intestate of gunshot wounds inflicted by his wife, Victoria Ann Shields, on December 6, 1974. Victoria has been convicted of feloniously killing Robert. The two children of the couple claim that by reason of K.S.A. 59-513 Victoria has no interest in any property in which Robert had an interest. Victoria appeals from the district court ruling upholding the claim of the children.

Victoria claims she is the owner of one-half the real and personal property owned by her and Robert as joint tenants and if her claimed ownership is prevented by K.S.A. 59-513, the statute is an unconstitutional contravention of Section 12 of the Bill of Rights of the Kansas Constitution.

The pertinent part of the district court decision is as follows:

> "3. Victoria Ann Shields has no interest in the property of the estate of Robert Dean Shields, deceased, whether it be property owned by Robert Dean Shields individually or property owned jointly between Robert Dean Shields, deceased, and Victoria Ann Shields. That the statute K.S.A. 59-513 is clear in its meaning.
>
> "4. That K.S.A. 59-513 is constitutional."

Joint tenancy has been the subject of many decisions of our Supreme Court and it recently has been the subject of decisions of this court. In awareness of that case law, we

believe it proper to state the three material facts before us: (1) Real and personal property was owned by two persons in joint tenancy; (2) one joint tenant is dead; and (3) the surviving joint tenant has been convicted of the felonious killing of the deceased joint tenant. The issue before us is determination of the property interest of a joint tenant who has been convicted of the felonious killing of the other joint tenant.

L. 1970, Ch. 225, § 1 (referred to herein as K.S.A. 59-513)[1] reads as follows:

> "No person who shall be convicted of feloniously killing, or procuring the killing of another person shall inherit or take by will, by intestate succession, as a surviving joint tenant, as a beneficiary under a trust or otherwise from such other person any portion of his estate or property in which the decedent had an interest: Provided, That when any person shall kill or cause the killing of his spouse, and shall then take his own life, the estates and property of both persons shall be disposed of as if their deaths were simultaneous pursuant to the provisions of K.S.A. 58-701 to 58-705, inclusive."

Section 12 of the Bill of Rights, as amended in 1972, states:

> "No conviction within the state shall work a forfeiture of the estate."

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[1]The 1970 Session Laws set forth the statutory language as quoted. K.S.A. 59-513 contains the word "the" in the phrase "any portion of the estate or property." The change is the result of editing and cannot alter the sense, meaning or effect of the Act. K.S.A. 1976 Supp. 77-136.

The questions before us have been before the appellate courts of other states. Various and irreconcilable dispositions have resulted. We will not attempt to set forth all views which have found a following.

Some states have taken the view that a killer loses all interest in property held in joint tenancy with the victim. Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y.S. 173; Merrity v. Prudential Ins. Co. of America, 110 N.J.L. 414, 166 A. 335; Sikora v. Sikora, 160 Mont. 27, 499 P.2d 808. The position is a minority one and we find it incompatible with Section 12 of the Bill of Rights.

Several states have employed constructive trusts to limit, but not totally destroy, the killer's interest in property held in joint tenancy with the victim. A frequently adopted view is that the killer should be limited, as a matter of equity, to a life interest in one-half the earnings of the property and this is implemented by judicial imposition of a constructive trust that affords to the heirs of the deceased one-half the earnings of the property and a remainder interest that ripens into full ownership of the property upon the death of the killer. Hargrove v. Taylor, 236 Or. 451, 389 P.2d 36; Colton, et al. v. Wade, 32 Del. Ch. 122, 80 A.2d 923; Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188; 51 A.L.R. 1100; Restatement of Restitution, § 188; 4 Scott on Trusts, § 493.2 (2d ed. 1956). We do not believe the imposition of a constructive trust in the disposition of this case is possible in light of our Supreme Court's expressed opposition to constructive trusts in such circumstances. In re Estate of Pyke, 199 Kan. 1, 13-14, 427 P.2d 67.

Other states have taken the position that the killing of one joint tenant by the other joint tenant operates as a severance of the joint tenancy resulting in a tenancy in common

whereby the killer retains ownership of an undivided one-half interest in the property and the other one-half interest vests in the heirs of the victim. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464; Bradley v. Fox, 7 Ill.2d 106, 129 N.E.2d 699; Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1953); Johansen v. Pelton, 87 Cal. Rptr. 784, 8 Cal.App.3d 625.

Persuasive language for this approach appears in Johansen v. Pelton, supra, as follows:

> ". . . [T]he result to be obtained may vary depending on whether the problem is approached from the viewpoint of what the slayer had, or what the victim lost. The now generally repudiated rule that the survivor take all disregards the general principles of unjust enrichment . . . and fails to consider at all what the malefactor gained. The New York rule and that recommended in the comment in the Restatement appears to unduly weigh what the victim lost. It does so to the derrogation of what the slayer had before, equitably if not legally. The seeming anomaly that the part gained and the part lost cannot be reconciled is due to the fact that the inchoate rights--with survivorship--of the two joint tenants are in reality greater than the whole while the tenancy exists. Any solution must, therefore, at best be a compromise. For the reasons set forth above it is concluded that a solution which recognizes the slayer's preslaying inchoate right to one-half the property is most equitable." (pp. 791-792.)

A particularly relevant case is the decision of the Oklahoma Supreme Court in Duncan v. Vassaur, 550 P.2d 929 (Okla. 1976). Oklahoma has a "forfeiture of estate" prohibition in its

Constitution similar to that of Kansas. Okla. Const., Bill of Rights, Art. 2, § 15. Oklahoma also has a "slayer statute" (84 O.S. 1971, § 231) essentially the same as K.S.A. 59-513 which guided the Oklahoma court in arriving at its conclusion although it was not in effect at the time of the murder. In factual circumstances very similar to those of the present case, the court concluded that the murder of the husband by his wife severed the joint tenancy, resulting in a tenancy in common, saying in part:

> "We are of the opinion that the most equitable solution of the question is to hold that by the murder, the joint tenancy is separated and terminated and one-half of the property should go to the heirs of the deceased husband (murdered person) and the other one-half to the murderer, wife, or to her heirs, when deceased. By such holding, the joint tenancy is changed to a tenancy in common. We so hold." (p. 931.)

Pre-1970 Kansas case law, constitutional language and predecessors of K.S.A. 59-513 we consider of material relevance, in chronological order, are: Bill of Rights, § 12 (prior to amendment in 1972); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112; G.S. 1915, § 3856 (L. 1907, Ch. 193, § 1); Hamblin v. Marchant, 103 Kan. 508, 175 Pac. 678; G.S. 1939, 59-513 (L. 1939, Ch. 180, § 35); In re Estate of Foster, 182 Kan. 315, 320 P.2d 855; and In re Estate of Pyke, supra.

In Foster the joint tenants were husband and wife. The husband was convicted of the felonious killing of his wife. The statute then in effect, G.S. 1949, 59-513, provided that a slayer did not "inherit, or take by will or otherwise from [the deceased] any portion of his estate." It was held the

wife's interest in the property became no part of her estate and the husband took the whole property by the original conveyance. In Pyke the joint tenants also were husband and wife. It was found that the husband killed his wife and then committed suicide. The husband was the wife's sole heir. Obviously the husband was not convicted of felonious killing. It was held the husband's heirs succeeded to the joint tenancy property. In our view, the 1970 enactment of the present K.S.A. 59-513 was a legislative response to Foster and Pyke.

The incidents of joint tenancy and the rights of joint tenants are aptly and sufficiently described in Eastman, Administrator v. Mendrick, 218 Kan. 78, 542 P.2d 347, as follows:

> "The doctrine of joint tenancy and its application to personal as well as to real property has been recognized in this state for many years. (Malone v. Sullivan, 136 Kan. 193, 14 P.2d 647; and In re Estate of Biege, 183 Kan. 352, 327 P.2d 872, and cases cited therein.) From the many cases dealing with the doctrine certain rules have emerged which are presently recognized in this jurisdiction. Running through all of our cases, commencing with Simons v. McLain, 51 Kan. 153, 32 Pac. 919, is the concept that the grand incident of joint tenancy is survivorship, by which the entire tenancy, on the demise of any joint tenant, descends to the survivor or survivors and at length to the last survivor. This concept of joint tenancy was most recently stated in Johnson v. Capitol Federal Savings & Loan Assoc., 215 Kan. 286, 524 P.2d 1127, wherein we held:
>
> "'Survivorship is the distinctive character-

istic and the grand incidence of an estate in joint tenancy. On the death of a joint tenant the property descends to the survivor or survivors and the right of survivorship terminates only when the entire estate, without the tenants having disposed of their title or otherwise terminating the tenancy, comes into the hands of the last survivor.' (Syl. ¶ 3.)" (pp. 81-82.)

". . .[U]nder a joint tenancy agreement. . . a surviving joint tenant . . . does not take as a new acquisition from the deceased joint tenant under the laws of descent and distribution, but under the conveyance or contracts by which the joint tenancy was created, his estate merely being freed from the participation of the other. (In re Estate of Pyke, 199 Kan. 1, 427 P.2d 67; In re Estate of Foster, 182 Kan. 315, 320 P.2d 855; and Dexter v. Dexter, [10th Cir. 1973] 481 F.2d 711.) Prior Kansas decisions, dealing with the incidents of joint tenancy, are reviewed in In re Estate of Foster, supra, and it is pointed out that the rights of joint tenants become vested by the conveyance; that each holds one and the same interest; and that nothing descends to the survivor, nor does he acquire any new title or estate by virtue of the death of the other grantee, but that such survivor takes the whole estate by the original conveyance." (pp. 83-84.)

Thus we find that each joint tenant has a vested identical interest. The effect of the death of one of two joint tenants is that the survivor "takes" the interest of the deceased and the resulting interests of the survivor are freed from participation of the deceased.

K.S.A. 58-703 directs that in the event of simultaneous

death of two joint tenants the property shall be distributed one-half as if one had survived and one-half as if the other survived. This is indicative of legislative recognition that a joint tenant is the owner of an interest equal to that of each other joint tenant.

We conclude that the result of proper statutory construction is that a surviving joint tenant who is convicted of the felonious killing of the other joint tenant succeeds to an undivided one-half interest in the property. Although it may be argued that such surviving joint tenant has gained because the one-half interest has been freed of participation of the deceased, to hold otherwise would result in a taking of the survivor's vested equal interest in the property. The loss by the survivor of his or her vested interest is not imposed as a penalty for the felonious killing under our penal statutes and such penalty would, in our view, constitute a forfeiture in contravention of Section 12 of the Bill of Rights. (See Hamblin v. Marchant, supra, at 510.)

It would be unreasonable to construe K.S.A. 59-513 to direct, in cases such as the one before us, that if the surviving spouse should take his or her own life, one-half the property would be distributed to his or her devisees, legatees or heirs, but in absence of suicide there is no interest in the property subject to devise, bequest or intestate succession. Although not material to the case before us, we also believe the possibility that a convicted slayer could resurrect an interest in property previously held in joint tenancy by taking his or her own life is both unreasonable and contrary to legislative intent.

In Foster, the court looked to G.S. 1955 Supp. 58-501 (now K.S.A. 58-501), relating to the creation of tenancies in common and joint tenancies, G.S. 1949, 58-703 (now K.S.A.

58-703), relating in part to disposition of joint tenancy property upon simultaneous death of the joint tenants, and G.S. 1955 Supp. 59-2286 (now K.S.A. 59-2286), relating in part to termination of joint tenancies by death. The court said:

> "It is significant to note that in none of the mentioned statutes relating to the creation of joint tenancies, or the termination thereof by death, has the legislature seen fit to limit or restrict the right of a surviving joint tenant because of criminal conduct on his part." (182 Kan. at 320.)

As we view it, in 1970 the legislature saw fit to limit or restrict the right of such surviving joint tenant. It did not undertake to eliminate, take away or direct forfeiture of all right of such surviving joint tenant.

In our consideration of this matter, we have been guided in part by the following principles:

> ". . . The various provisions of a statute in pari materia must be construed together with a view of reconciling and bringing them into workable harmony if it is reasonably possible to do so. (Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902.) . . . In construing a statute the legislative intent is to be determined by a general consideration of the whole act. Effect should be given, if possible, to the entire statute and every part thereof. To this end it is the duty of the court, so far as practicable to reconcile the different provisions so as to make them consistent,

harmonious and sensible. (Fleming Company v. McDonald, 212 Kan. 11, 16, 509 P.2d 1162.) . . ." Farm & City Ins. Co. v. American Standard Ins. Co., 220 Kan. 325, 332-333, 552 P.2d 1363.

". . . It is the court's duty to uphold legislation rather than defeat it. It is presumed that the legislature intended to pass a valid law. If there is any reasonable way to construe legislation as constitutionally valid it should be so construed. (Parker v. Continental Casualty Co., 191 Kan. 674, 383 P.2d 937, and cases cited.)" Harris v. Shanahan, 192 Kan. 629, 635, 390 P.2d 772.

"When the constitutionality of a statute is challenged, this court is guided in its consideration by certain principles which were recently noted in Leek v. Theis, 217 Kan. 784, 792-93, 539 P.2d 304, 312-313:

"'Long-standing and well established rules of this court are that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. [cases cited.]'" Rogers v. Shanahan, 221 Kan. 221, 223, 565 P.2d 1384.

When Victoria Shields murdered her husband and was

subsequently convicted of second degree murder, the joint tenancy was severed and terminated and she became a tenant in common with the heirs of her husband. She retains an undivided one-half interest in the property. The lower court erred in depriving her of that interest.

An amicus curiae brief was filed raising issues which were not presented in the briefs of the parties and which do not appear to have been before the district court. These issues are not discussed since our rule is that an amicus curiae brief may not raise such issues. Cook v. Dobson Sheet Metal Works, 157 Kan. 576, 142 P.2d 709; State, ex rel., v. Hines, 163 Kan. 300, 182 P.2d 865; Hensley v. Board of Education of Unified School District, 210 Kan. 858, 504 P.2d 184.

Reversed and remanded for further proceedings consistent with the views expressed herein.

1-16-78

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

QUILLOIN *v.* WALCOTT ET VIR

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 76–6372. Argued November 9, 1977—Decided January 10, 1978

Under Georgia law no adoption of a child born in wedlock is permitted without the consent of each living parent (including divorced or separated parents) who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent. In contrast, §§ 74–403 (3) and 74–203 of the Georgia Code provide that only the mother's consent is required for the adoption of an illegitimate child. However, the father may acquire veto authority over the adoption if he has legitimated the child pursuant to § 74–103 of the Code. These provisions were applied to deny appellant, the father of an illegitimate child, authority to prevent the adoption of the child by the husband of the child's mother. Until the adoption petition was filed, appellant had not attempted to legitimate the child, who had always been in the mother's custody and was then living with the mother and her husband, appellees. In opposing the adoption appellant, seeking to legitimate the child but not to secure custody, claimed that §§ 74–203 and 74–403 (3), as applied to his case, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court, granting the adoption on the ground that it was in the "best interests of the child" and that legitimation by appellant was not, rejected appellant's constitutional claims, and the Georgia Supreme Court affirmed. *Held:*

1. Under the circumstances appellant's substantive rights under the Due Process Clause were not violated by application of a "best interests of the child" standard. This is not a case in which the unwed father at any time had, or sought, custody of his child or in which the proposed adoption would place the child with a new set of parents with whom the child had never lived. Rather, the result of adoption here is to give full recognition to an existing family unit. Pp. 8–9.

2. Equal protection principles do not require that appellant's authority to veto an adoption be measured by the same standard as is applied to a divorced father, from whose interests appellant's interests are readily

QUILLOIN *v.* WALCOTT

Syllabus

distinguishable. The State was not foreclosed from recognizing the difference in the extent of commitment to a child's welfare between that of appellant, an unwed father who has never shouldered any significant responsibility for the child's rearing, and that of a divorced father who at least will have borne full responsibility for his child's rearing during the period of marriage. Pp. 9–10.

238 Ga. 230, 232 S. E. 2d 246, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

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 10, 1978]

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 appellee 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, but 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 "*de minimis*" 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.[2] 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).[3]

[2] 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.

[3] 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 74–103 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 paternal [*sic*] power."

In its opinion in this case, the Georgia Supreme Court indicated that the word "paternal" in the second sentence 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 (d)(2). 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.[7] 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. . . ."[8] 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.[9] Moreover, while the child previ-

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

[8] *In re: Application of Randall Walcott for Adoption of Child*, Adoption Case No. 8466 (Ga. Super. Ct., July 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*, 224 Ga. 442, 445–446, 162 S. E. 2d 379, 383–384 (1968). But cf. *Clark* v. *Buttry*, 226 Ga. 687, 177 S. E. 2d 89, aff'g 121 Ga. App. 492, 174 S. E. 2d 356 (1970). However, the Georgia Supreme Court had not had occasion to reconsider this conclusion in light of *Stanley*, and, in the face of appellant'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*.

[9] 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.[10] The child himself expressed a desire to be adopted by Randall Walcott and to take on Walcott's name,[11] 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*.

[10] 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.

[11] 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 § 74–414.

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 246 (1977).[12] 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 11 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.

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[12] The Supreme Court addressed itself only to the constitutionality of the statutes as applied by the trial court and thus, at least for purposes of this case, accepted the trial court's construction of §§ 74–203, 74–403 (3), as allowing concurrent consideration of the adoption and legitimation petitions. See n. 8, *supra*.

Subsequent to the Supreme Court's decision in this case, the Georgia Legislature enacted a comprehensive revision of the State's adoption laws, which became effective January 1, 1978. [1977] Georgia Laws, p. 201. The new law expressly gives an unwed father the right to petition for legitimation subsequent to the filing of an adoption petition concerning his child. See Ga. Code Ann. § 74–406 (Cum. Supp. 1977). The revision also leaves intact §§ 74–103 and 74–203, and carries forward the substance of § 74–403 (3), and thus appellant would not have received any greater protection under the new law than he was actually afforded by the trial court.

Appellant brought this appeal pursuant to 28 U. S. C. § 1257 (2), continuing to challenge the constitutionality of §§ 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.[13] 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.

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

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[13] 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 this 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, 386, 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 in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed.[14] 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

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[14] At the hearing in the trial court, the following colloquy took place between appellees' counsel and appellant:

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

"A . . . I didn't know that was process even you went through [*sic*]." App. 58.

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 matters 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.

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 these 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.