MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 11:00 a. m./~~p.m.~~ on February 28, 19 78.

All members were present except: Senators Steineger, Allegrucci, Gaar and Hess

The next meeting of the Committee will be held at 11:00 a. m./~~p.m.~~, on March 6, 19 78.

~~These minutes of the meeting held on [illegible]~~ were considered, corrected and approved.

Edwin G. Pomeroy
Chairman

The conferees appearing before the Committee were:

Lance Burr - Kansas Association of Realtors
John Powell - Kansas Real Estate Commission
Darrell McNeil - State Department of Administration

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Cynthia Burch - Legislative Research Department

Senate Bill 802 - Kansas real estate commission, appeal of rulings. Mr. Powell appeared in support of the bill; He requested that the committee provide a second hearing on the bill so that Mr. Tom Wright, the attorney for the board, can appear.

Lance Burr appeared in support of the bill. He stated that the board receives complaints at the rate of one per day. Considerable discussion between Mr. Burr and the committee followed. The chairman announced that the further hearing on the bill would be on Monday, March 6.

Senate Bill 932 - Garnishments to enforce court orders for support. Darrell McNeil appeared in support of the bill. He stated the bill was introduced at the request of the Department of Administration, because the matter of garnishments had been called to the attention of the department by the Division of Accounts and Reports. Materials distributed by him are attached hereto. He stated the purpose of the bill is to amend our statutes to make them comply with federal law, which has preempted the subject. Committee discussion with him followed. Senator Berman moved to adopt the amendments proposed by Mr. McNeil; Senator Mulich seconded the motion, and the motion carried. Senator Berman moved to report the bill favorably as amended; Senator Parrish seconded the motion, and the motion carried.

Copies of the Kansas Court of Appeals decision on the adoption laws were distributed to the committee members, and the chairman requested them to study the decision.

continued -

The chairman announced there would be no further committee meetings this week, because the chairman will be attending a workshop in St. Louis on "Developing Sentencing Guidelines" sponsored by the U.S. Department of Justice, and the vice chairman will be out of town, attending meetings in Washington, D.C.

The meeting adjourned.

These minutes were read and approved by the committee on 4-24-78.

2-28-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Janet Burr	1203 Tower Lawrence KS	KS Ass'n of Realtors
John Powell	535 KS Ave Topeka	Kansas Real Estate Commission
Darrell McNew	2d Floor, Statehouse	Dept of Administration
Ralph Malott	1924 Quincy Topeka	SRS
Kathleen Sebelius		KTLA

2-28-78

against the defendant, but if the claim of the plaintiff has not been reduced to judgment, the liability of the garnishee shall be limited to the judgment ultimately rendered against the defendant: *Provided, however,* Said judgments may be taken only upon written motion and notice given in accordance with K.S.A. 60-206: *Provided further, however,* If the garnishee is a public officer for the state or any instrumentality thereof and the indebtedness sought by plaintiff to be withheld from defendant is an indebtedness to defendant incurred by or on behalf of the state or any instrumentality thereof, judgment against the state or such instrumentality shall be limited to an amount for claim and costs not exceeding the total amount of the indebtedness of the state or instrumentality thereof to defendant. If the garnishee answers as required herein and no reply thereto is filed, the allegations of the answer are deemed to be confessed. If a reply is filed as herein provided, the court shall try the issues joined, the burden being upon the party filing the reply to disprove the sworn statements of the answer, except that the garnishee shall have the burden of proving offsets or indebtedness claimed to be due from the defendant to the garnishee, or liens asserted by the garnishee against property of the defendant.

Sec. 3. K.S.A. 1977 Supp. 60-2310 is hereby amended to read as follows: 60-2310. (a) *Definitions.* As used in this act and the acts of which this act is amendatory, unless the context otherwise requires, the following words and phrases shall have the meanings respectively ascribed to them herein:

(1) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise; ~~*and includes periodic payments pursuant to a pension or retirement program;*~~

(2) "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from such earnings of any amounts required by law to be withheld;

(3) "Wage garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt; and

(4) "Federal minimum hourly wage" means that wage pre-

the secretary of social and rehabilitation services made pursuant to K.S.A. 1977 Supp. 39-756.

(e) *Exceptions to restrictions on wage garnishment.* The restrictions on the amount of disposable earnings subject to wage garnishment *as provided in subsection* (a) shall not apply in the following instances: (b)

(1) Any order of any court for the support of any ~~child, or, subject to the provisions of subsection (g),~~ *person, including* any order for support in the form of alimony, *but the foregoing shall be subject to the restriction provided for in subsection (g);*

(2) Any order of any court of bankruptcy under chapter XIII of the federal bankruptcy act; and

(3) Any debt due for any state or federal tax.

(f) *Prohibition on courts.* No court of this state may make, execute or enforce any order or process in violation of this section.

(g) ~~The restrictions on the amount of disposable earnings subject to wage garnishment shall apply to an order of support in the form of alimony, but on motion of the person seeking garnishment and notice thereof to the person whose wages are to be garnished, the court after hearing thereon may order that such restriction or a portion thereof shall not apply to such order of support or a portion thereof, except that no court may order that the restrictions on the amount of disposable earnings subject to wage garnishment or a portion thereof shall not apply when a wage garnishment for child support has been made for the same pay period for which such garnishment for support in the form of alimony is sought and such garnishment for child support has taken wages in excess of restrictions provided for in subsection (b)~~ *The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:*

(1) Where such individual is supporting his or her spouse or dependent child (other than a spouse or child with respect to whose support such order is used), fifty percent (50%) of such individual's disposable earnings for that week;

(2) where such individual is not supporting such a spouse or

dependent child described in clause (1), sixty percent (60%) of such individual's disposable earnings for that week; and

(3) with respect to the disposable earnings of any individual for any workweek, the fifty percent (50%) specified in clause (1) shall be deemed to be fifty-five percent (55%) and the sixty percent (60%) specified in clause (2) shall be deemed to be sixty-five percent (65%), if an to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

and

Sec. 4. K.S.A. 61-2005 is hereby amended to read as follows: 61-2005. (a) *Form of garnishment order.* An order of garnishment, issued independently of an attachment for the purpose of attaching earnings or for the purpose of attaching other property of the defendant, and the answer of the garnishee are declared to be sufficient if substantially in compliance with the appropriate form prescribed in the appendix to this act. If such order of garnishment is issued at the written direction of the party entitled to enforce the judgment, pursuant to K.S.A. 61-2004, for the purpose of enforcing (1) an order of any court for the support of any person, (2) an order of any court of bankruptcy under chapter XIII of the federal bankruptcy act or (3) a debt due for any state or federal tax, the clerk of the court shall cause such purpose to be clearly stated on the order of garnishment and the accompanying garnishee's answer form immediately below the caption thereof. *If the garnishment is to enforce a court order for the support of any person, the garnishment shall not exceed fifty percent (50%) of an individual's disposable earnings unless the person seeking the garnishment specifies to the garnishee a greater percent to be withheld, as authorized by subsection (g) of K.S.A. 1977 Supp. 60-2310, as amended.*

(b) *Service and return.* The order of garnishment shall be served on the garnishee, together with two (2) copies of the appropriate form for the garnishee's answer prescribed in the appendix to this act, and returned by the officer making service in the same manner as an order of attachment. If the order is served prior to a judgment on the plaintiff's claim, said order shall also

Form No. 8a: GARNISHEE'S ANSWER TO ACCOMPANY ORDER OF GARNISHMENT IN FORM No. 7a

(Caption of Case)

ANSWER OF GARNISHEE

State of Kansas
County of _____ ss.

_____, being first duly sworn, say that on the ____ day of _____, 19____, I was served with an order of garnishment in the above entitled action, that I have delivered to the defendant, _____, only that portion of his or her earnings authorized to be delivered to him or her pursuant to the instructions accompanying this form and that the statements in my answer are true and correct.

INSTRUCTIONS TO GARNISHEE

The order of garnishment served upon you has the effect of attaching that portion of the defendant's earnings (defined as compensation for personal services, whether denominated as wages, salary, commission, bonus or otherwise) which is not exempt from wage garnishment. This form is provided for your convenience in furnishing the answer required of you in the order. It is designed so that you may prepare your answer in conjunction with the preparation of your payroll. Wait until the end of the normal pay period in which this order has been served upon you and apply the tests set forth in these instructions to the entire earnings of the defendant-employee during said pay period, completing your answer in accordance with these instructions. If you do not choose to use this form, your answer, under oath, shall not contain less than that prescribed herein. Your answer must be filed with the clerk of the above-named court within the time prescribed in the order of garnishment.

First, furnish the information required by paragraphs (a) through (f) of the form below. Read carefully the "Note to Garnishee" following paragraph (f). Then, if the total amount of the defendant-employee's disposable earnings are not exempt from wage garnishment, complete paragraphs (g) and (h) of the form by computing the amount of defendant-employee's disposable earnings which are to be paid over to him or her by using the following table:

I. If the defendant-employee's disposable earnings are less than
~~$48.00~~ *$79.50* for a Weekly pay period
~~$96.00~~ *$159.00* for a Bi-Weekly pay period
~~$104.00~~ *$172.25* for a Semi-Weekly pay period
~~$208.00~~ *$344.50* for a Monthly pay period
Pay the employee as if his or her pay check were not garnished.

II. If the defendant-employee's disposable earnings are
~~$48.00~~ to ~~$64.00~~ *$79.50 to $106.00* for a Weekly pay period
pay him or her ~~$48.00~~ $79.50
~~$96.00~~ to ~~$128.00~~ *$159.00 to $212.00* for a Bi-Weekly pay period
pay him or her ~~$96.00~~ $159.00
~~$104.00~~ to ~~$138.66~~ *$172.25 to $229.67* for a Semi-Monthly pay period
pay him or her ~~$104.00~~ $172.25
~~$208.00~~ to ~~$277.33~~ *$344.50 to $459.38* for a Monthly pay period
pay him or her ~~$208.00~~ $344.50

Any disposable earnings remaining after payment of the above amounts shall be retained until further order of the court.

III. If the defendant-employee's disposable earnings are more than
~~$64.00~~ *$106.00* for a Weekly pay period
pay him or her 75% of his or her disposable earnings
~~$128.00~~ *$212.00* for a Bi-Weekly pay period
pay him or her 75% of his or her disposable earnings
~~$138.66~~ *$229.67* for a Semi-Monthly pay period
pay him or her 75% of his or her disposable earnings
~~$277.33~~ *$459.38* for a Monthly pay period
pay him or her 75% of his or her disposable earnings

Any disposable earnings remaining after payment of the above amounts shall be retained until further order of the court.

IV. SUPPORT ORDERS. If the person seeking the garnishment for court ordered support desires to garnish more than fifty percent (50%) of disposable earnings, he or she may request in writing to the clerk of the court to check one of

2-28-78

STATE OF KANSAS

DEPARTMENT OF Administration

OFFICE OF THE SECRETARY

Telephone 296-3011 Statehouse Topeka, Kansas 66612

December 13, 1977

Mr. James R. Cobler, Director
Division of Accounts and Reports
1st Floor, State Office Building
Topeka, Kansas 66612

Re: Application of Public Law 95-30 to the Kansas Garnishment provisions in K.S.A. 60-2310, as amended by L. 1977, Ch. 206.

Synopsis: Recent amendments to the Federal Consumer Protection Act preempt Kansas law, K.S.A. 60-2310, as amended by L. 1977, Ch. 206, to the extent that they decrease the amount of earnings available for garnishment for the support of a child or spouse.

Dear Mr. Cobler:

Your memorandums of July 28, 1977, and October 4, 1977, question whether the new federal social security act amendments concerning garnishment limitations affect the Kansas law. The particular amendment to which you refer limits the exemption thus reducing amounts available for garnishment to enforce support orders, 15 USC § 1673(b); while garnishments for other purposes are subject to the § 1673(a) limitation of 25 percent (25%) of disposable earnings.

Kansas Senate Bill No. 308, L. 1977, Ch. 206, approved April, 1977, remains consistent with the federal 25 percent (25%) limitation, except with respect to support orders. Section (1) (e) (1) of Senate Bill No. 308 excepts garnishments in support order situations from the 25 percent (25%) limitation applicable in most other situations. In fact, the Kansas statute places no limitation on the amount of disposable earnings subject to garnishment for support orders.

~~P.L. 95-30~~, 15 USCS § 1673(b) previously provided that the 25 percent(25%) limitation did not apply in the case of any order of the court for the support of any person. However, the amendments of May, 1977, attempt to provide some protection to the debtor in such cases. Accordingly, the federal law would preempt the state law to the extent of the limitations specified in 15 USCS § 1673(b), as amended. See, Crane v. Crane, 417 F. Supp. 38 (D. C. Okl. 1976).

Attachment 4

Subsection (b) of section 303 of the Consumer Credit Protection Act (15 USC 1673(b), as amended by P.L. 95-30, requires a determination to be made as to the amount of disposable earnings available for garnishment, (i.e. fifty-five percent (55%) rather fifty percent (50%) where the defendant whose wages are garnished is supporting a spouse or dependant child, clause (A), or sixty-five percent (65%) rather than sixty (60%) where the defendant whose wages are garnished is not supporting a spouse or dependant child, clause (B)). In either case, when determining whether the greater amount of wages would be subject to garnishment, the law requires the greater amount to be withheld to the extent that the earnings to be garnished "are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek".

I suggest that the standard garnishment answer form be modified to reflect this additional step in calculating amounts available for garnishment.

If you have further questions, please let us know.

Sincerely,

Bradley J. Smoot

Bradley J. Smoot, Attorney
Department of Administration

BJS:emb

No. 49,230

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF
BABY GIRL LATHROP, a minor.

JOHN G. HERNANDEZ and SUSAN HERNANDEZ,
Appellants and Cross-Appellees,

v.

LEON SCOTT, JR.,
Appellee and Cross-Appellant.

SYLLABUS BY THE COURT

1.

The rights to conceive and raise one's children are "essential rights" protected by the due process and equal protection clauses of the Fourteenth Amendment even though the family relationship is unlegitimized by marriage.

2.

In an appeal by prospective adoptive parents from a district court order denying their petition to adopt a baby girl, held: the father of the illegitimate child who appeared and sought custody of the child and who had not been found unfit was properly granted custody as against the prospective adoptive parents.

3.

The father of an illegitimate child is an "interested party" within the meaning of K.S.A. 59-2278 and must be given notice of the pending adoption of his child.

4.

If after being given notice of the pending adoption the father appears and asserts his desire to assume parental responsibilities toward the child, his rights in the child must be given preference over those of third-party adoptive parents unless he has failed to assume parental responsibilities for the statutory period of two years or he is found to be unfit. However, if he chooses not to appear and make known his desire to care for the child, his rights are de minimis and may be terminated without his consent by finalizing the adoption.

5.

The provision of the Kansas adoption statute (K.S.A. 59-2102 [2]) which requires the consent of the unwed mother but not of the unwed father does not offend the constitutional guarantees of due process and equal protection.

Appeal from Wyandotte district court, division No. 7; WAYNE H. PHILLIPS, judge. Opinion filed February 24, 1978. Affirmed.

Hosea Ellis Sowell, of Kansas City, for the appellants and cross-appellees.

James Forrest McMahon, of Kansas City, for the appellee and cross-appellant.

Before SWINEHART, P.J., FOTH and ABBOTT, JJ.

SWINEHART, J.:

This is an appeal by prospective adoptive parents from a district court order denying their petition to adopt. The issues on appeal, both of first impression in Kansas, are whether the natural father of an illegitimate child has a paramount right over non-parents to custody of that child, and whether that portion of the Kansas adoption statute which requires the consent of the unwed mother but not the unwed father for adoption is unconstitutional. The trial court held that the natural father of an illegitimate child has a paramount right to custody as against non-parents where both the adopting parents and the natural father are found to be fit, and denied the adoption petition. The prospective adoptive parents appeal the trial court's ruling regarding this issue. The court did not address the constitutional issue; the natural father brings a cross-appeal challenging the court's refusal to resolve this question.

It is undisputed that appellee Leon Scott, Jr., and the natural mother are the biological parents of Baby Girl Lathrop, a minor. Unmarried, this couple lived together for several months in the state of Louisiana. During this period of time, the subject of this action was conceived. Several months prior to the birth of the child, the mother returned to the state of Kansas, terminating the previous living arrangements with Leon Scott, Jr. Sometime between the date of her return to Kansas and the birth of the child, Leon Scott, Jr., moved to Colorado. Baby Girl Lathrop was born in Kansas City, Wyandotte County, Kansas, on August 16, 1976. On August 18, 1976, the natural mother executed before a notary public a document entitled "Consent of Unmarried Mother to Adoption of Minor Child."

Included in that document was a waiver of further notice of the final hearing and entry of decree of adoption. She further stated therein that Leon Scott, Jr., was the natural father of Baby Girl Lathrop; that she had not received support from him; and that his whereabouts were unknown to her. Based on the mother's consent, the appellants filed a petition for adoption on August 18, 1976. By probate court order, they received custody of the subject child pending a hearing on their petition of adoption, and they have had custody of the child continuously from that date to the present time. Leon Scott, Jr., was not originally notified of the filing of the petition for adoption, nor was his consent to the adoption obtained. The record does not reveal how he learned of the birth of the child or the pending adoption. Suffice it to say, the appellee did learn of the facts and he appeared at the proceeding, filed his objection to the adoption and requested custody of the child. The appellee admits that he is the natural father of the child, and he further states that he paid some support to the child's mother, as well as medical expenses made known to him.

A hearing on the petition for adoption was conducted on October 18, 1976, in probate court. Oral testimony and briefs were presented. The probate court denied the adoption and awarded custody to Leon Scott, Jr. Petitioners appealed to the district court. The case was tried to the district court de novo on the briefs and the stipulated facts and admissions filed in the probate court. The district court found that the appellee was the natural father of the minor child; that the woman who had executed the consent was the natural mother and had legally executed the consent to adoption; that the appellee had standing to object to the proposed adoption; that the appellee had timely appeared, objected and withheld his consent to the adoption and had requested custody of said child; that appellants and appellee were fit persons to have custody of said child; that the parental preference rule was applicable to these

facts and that the appellee's rights as a natural father were paramount to those of petitioners; that appellee's rights as a parent to said child would not be terminated; and that the adoption would be denied. The court further ordered that the State of Kansas, department of vital statistics, issue a corrected birth certificate showing that Leon Scott, Jr., was the father of said child and changing the name of Baby Girl Lathrop to the surname of the natural father and first and middle names of his choice. The appellants subsequently obtained a stay of custody pending appeal of the decision.

The thrust of the appellants' argument on appeal appears to be that the natural parents, by entering an illicit relationship, waived their constitutional rights of due process and equal protection regarding custody of their child. The appellee counters that in the absence of a finding of unfitness, case law and the federal and state constitutions protect his paramount right to custody of his natural child. Disposition of the issue requires consideration of the parental preference rule in Kansas, and the recent United States Supreme Court decisions in Quilloin v. Walcott, 46 U.S.L.W. 4055 [U.S., January 10, 1978], and Stanley v. Illinois, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972).

It is well established in Kansas by statute and case law that natural parents are to be given preference as to custody of their children when such a contest occurs with a non-parent. Herbst v. Herbst, 211 Kan. 163, 505 P.2d 294; In re Armentrout, 207 Kan. 366, 485 P.2d 183; In re Marsolf, 200 Kan. 128, 434 P.2d 1010.

However, there are several ways that a parent may be deprived of his parental rights on a permanent basis. First, K.S.A. 1977 Supp. 38-824 provides a method by which a child or children may be declared

dependent and neglected and parental rights consequently severed. In re Nelson, 216 Kan. 271, 531 P.2d 48; In re Bachelor, 211 Kan. 879, 508 P.2d 862. Second, K.S.A. 60-1610 (a) authorizes a trial court hearing a divorce or separate maintenance suit to terminate parental rights of either or both parents if the court finds that they are unfit. Finally, K.S.A. 59-2103 provides that when adoption occurs the natural parent's rights in and to said child or children shall cease. There are other instances provided for parents to divest themselves of the rights to children, but the facts in this case do not necessitate their enumeration.

The issues in this case can be narrowly framed: (1) does an unwed father have parental rights, including custody, to his child which are paramount to those of third party adoptive parents due to the parental preference rule; and (2) do the Kansas statutes dealing with adoption afford an unwed father due process and equal protection?

The United States Supreme Court clearly established in its landmark decision, Stanley v. Illinois, supra, that an unwed father does have parental rights in his children and that those rights are substantial. The court there stressed that the rights to conceive and raise one's own children are essential rights, and further stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." Stanley, supra, p. 651. The Stanley decision was based on an appeal by an unwed father, challenging the constitutionality of the Illinois statute that declared illegitimate children wards of the state upon the death of their mother. Stanley had lived with the mother of the children intermittently for a period of 18 years, and during that time he had assumed parental responsibilities toward the three children that he fathered by her. Upon the death of the mother

the State of Illinois attempted to declare the three children wards of the state without affording Stanley a hearing regarding his fitness. The Supreme Court held that Stanley had parental rights which were substantial. Balanced against those important rights was a comparatively weak state interest in avoiding a complex fitness hearing. Therefore, the court ruled that due process required that he be afforded a fitness hearing before his parental rights were severed. The court also engaged in an analysis of equal protection, stating that the classification between wed and unwed fathers and unwed fathers and unwed mothers was invalid because it failed to meet the two-pronged test for a valid classification: it was not a logical and rational distinction, because unwed fathers may be as capable of being loving, nurturing parents as married fathers, or mothers, either married or unmarried; moreover, the classification did not further the enunciated state interest of placing children in a nurturing home atmosphere, even though this state interest was in itself a valid state objective.

Appellants attempt to distinguish the Stanley case, pointing out the father in Stanley had raised the children whereas the instant respondent has never had custody of his child. However, appellants ignore the import of State ex rel. Lewis v. Lutheran Social Services, 59 Wis.2d 1, 207 N.W.2d 826 (1973). That case was decided on remand from the United States Supreme Court with instructions to grant a putative father a "fitness" hearing in light of Stanley. The father in Lewis, as the father here, had not had custody of his child. The Wisconsin court found the father could not be faulted because the adoption agency and prospective adoptive parents had kept him from his child. Fitness determined, custody was given the father. See also: Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974); Vanderlaan v. Vanderlaan, 9 Ill.App.3d 260, 292 N.E.2d 145 (1972); Peo. ex rel.

Slawek v. Covenant Child. Home, 52 Ill.2d 20, 284 N.E.2d 291 (1972); and Hammack v. Wise, 211 S.E.2d 118 (W. Va. 1975).

This court has carefully considered the most recent pronouncement of the United States Supreme Court regarding the rights of a putative father in Quilloin v. Walcott, supra. That case involved the petition of a stepfather, now married to the natural mother of the child, to adopt a twelve-year-old illegitimate child. The natural father of the boy sought to prevent the adoption, arguing that under Stanley he was entitled to a fitness hearing before his parental rights could be terminated. He had never had custody of the child and had assumed only minimal responsibilities for his welfare and support. Furthermore, he was not requesting that he be given custody of the child; he only wished to prevent the adoption. The court stated, "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." (p.____.) The court emphasized the strong state interest in having children reared in a family setting, and stressed that the adoption would confirm and stabilize an already existing family unit. Balancing this strong interest against the weak interest of the father in vetoing the adoption, the court found that under the facts of the case, the natural father's rights of due process had been adequately protected by a "best interest of the child" hearing, which of course requires a lesser quantum of proof than does a fitness hearing. The natural father also advanced an equal protection argument, asserting that his interests were indistinguishable from those of a divorced or separated father or a mother no longer living with her child. The court summarily dismissed this argument, stating,"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." (p.____.) In support of

this statement, the court pointed to the difference in the extent of commitment to the support and welfare of the child.

It is clear that Quilloin does not abrogate the basic premise of the Stanley case; that is, that a putative father does in fact have parental rights in his child. The holding of the Quilloin case is actually quite narrow: the constitutional rights of an unwed father who merely seeks to veto the adoption of his child, without seeking custody of the child, are adequately protected by something less than a fitness hearing, and under the facts of that case his rights were protected by a "best interest of the child" hearing.

Applying the case and statutory law discussed above to the facts of the case at hand, we hold that Leon Scott, Jr., has parental rights to the custody of his child and under those circumstances that those rights must be given preference and will prevail over those of the adoptive parents due to the parental preference rule. Stanley establishes his parental rights and Quilloin does nothing to diminish those rights in this situation, where he appeared and asserted his desire to have the custody of his daughter soon after her birth. We agree with the Lewis court that a father like Leon Scott, Jr., who has been prevented from bestowing parental care on his child from the time of its birth by outside agencies (such as adoption agencies, or in this case, adoptive parents), cannot be faulted, nor can his parental rights be lessened by virtue of his failure to perform his parental responsibilities. We think that due process requires that a putative father who appears and asserts his desire to care for his child has rights paramount to those of non-parents, unless he is found to be an unfit father in a fitness hearing. The trial court found that he was a fit parent; therefore his right to have custody of his child is clear.

We next consider the constitutional question raised in the cross-appeal by Leon Scott, Jr.; that is, whether the parental rights of a father to his child born out of wedlock are adequately protected under existing Kansas law. We think they are.

First, K.S.A. 59-2278 provides that notice of the proposed adoption be given to all interested parties. In view of the fact that the father of an illegitimate child does have parental rights, we hold today that he is an "interested party" within the meaning of the statute, and that due process and equal protection require that he be given notice of the pending adoption of his child. Actual notice should of course be given whenever possible; and when the father's identity and whereabouts are unknown and unascertainable by due diligence, constructive notice must be given in a form reasonably calculated to actually inform him of the adoption, while at the same time duly protecting the privacy rights of the mother.

However, we do not think that due process and equal protection require that the consent of a putative father be obtained before his child is adopted. K.S.A. 59-2102 requires the consent of both living parents of a legitimate child unless a parent has failed to assume parental responsibilities for a period of two consecutive years in which case his or her consent is not required. It further provides that only the mother of an illegitimate child need give her consent to the adoption of that child.

If after being given notice of the pending adoption the father appears and asserts his desire to assume parental responsibilities toward the child, his rights in the child must be given preference over those of third-party adoptive parents, unless he has failed to assume parental responsibilities for the statutory period of two years or he is found to be unfit. However, if he chooses not to appear and make known his desire to care for the

child, his rights are de minimis and may be terminated without his consent by finalizing the adoption.

We do not think that due process requires his consent. As stated above, a father who fails to appear after being given notice has only minimal rights in his child. Balanced against these minimal rights is a strong state interest in placing children in a stable, nurturing family atmosphere. Requiring only the mother's consent when a putative father refuses to acknowledge his child by signing a consent will facilitate and expedite adoption proceedings.

Neither do we think that equal protection requires that an unwed father's consent be obtained before his child is adopted. Leon Scott, Jr., argues that the distinction between wed and unwed fathers or the distinction between unwed fathers and unwed mothers implicitly established by K.S.A. 59-2102 is constitutionally infirm. While it is true that the statute does create a classification by requiring only the consent of mothers, wed or unwed, and the consent of fathers of legitimate children (subject to the exception for those parents who fail to assume parental responsibilities for two years), we feel that the classification is not invidious. It is based on a rational and logical difference between the two groups: their respective legal relationships to the child and the accompanying difference in their responsibilities toward that child. Furthermore, the classification is logically related to and advances the legitimate state interest in facilitating the adoption of children born out of wedlock.

Under our holding today, to the extent that the father of an illegitimate child who seeks custody may veto an adoption unless he has been found unfit or has abdicated his parental responsibilities for two years, such a father is placed in the same category as the father of a legitimate child. We would emphasize that this result is based on a construction of our existing statutes which do not

clearly deal with the subject, and not on any constitutional requirement. Quilloin makes it clear that absolute equality between the two classes of fathers is not constitutionally required, and that different treatment may be justified where proper state objectives require it. Hence our holding today is not a bar to further legislative treatment of the problem so long as it recognizes the father's right to notice and an opportunity to be heard, and makes distinctions rationally related to the objectives to be achieved.

Because we find that a putative father's rights of due process and equal protection are satisfied by requiring that he be given notice as an interested party pursuant to K.S.A. 59-2278 and an opportunity to appear and assert his desire to assume parental responsibilities toward his child, we find the constitutional objections to the consent provisions of K.S.A. 59-2102 to be without merit. Therefore, the fact that the trial court did not rule on the issue does not constitute reversible error.

We think it wise to add that we will limit the effect of our decision to those adoptions, other than the case at hand, that occur after the date our opinion is issued. Strong policy considerations militate against giving this decision retroactive effect and thereby subjecting already existing adoptive family units to attack.

The temporary restraining order previously issued is hereby set aside. The cross-appeal is denied. Judgment of the trial court is affirmed.