ORIGINAL

In the

Supreme Court of the United States

ABDIEL CABAN,

APPELLANT,

V.

KAZIM MOHAMMED AND MARIA MOHAMMED,

APPELLEES.

No. 77-6431

Washington, D. C.
November 6, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

ABDIEL CABAN, Appellant,	:	
v.	:	No. 77-6431
KAZIM MOHAMMED AND MARIA MOHAMMED, Appellees.	:	

Washington, D. C.
Monday, November 6, 1978

The above-entitled matter came on for argument at 1:39 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT H. SILK, ESQ., Suite 1701, 401 Broadway, New York, New York 10013, on behalf of the Appellant.

MORRIS SCHULSLAPER, ESQ., 16 Court Street, Brooklyn, New York 11241, on behalf of the Appellees.

IRWIN M. STRUM, ESQ., Assistant Attorney General, Two World Trade Center, New York, New York 10047, as amicus curiae in support of Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-6431, Caban against Kazim Mohammed and Maria Mohammed.

Mr. Silk, you may proceed.

ORAL ARGUMENT OF ROBERT H. SILK, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SILK: Mr. Chief Justice, and may it please the Court:

This appeal brings to this Court for review a judgment of the New York Court of Appeals. The New York Court of Appeals, by dismissing an appeal from the Appellate Division of the Court, from an order of the Surrogates Court in New York, in effect, affirmed a judgment of the lower court which terminated the parentage of Appellant to two children whom he had sired, whom he had raised, whom he had cared for, whom he had lived with, whom he had supported for more than half their lives. And did so without any proof of unfitness, did so without any particularized findings of unfitness, did so in total disregard of his parental rights as a father and effectively broke and smashed up his family relationship with these two children, whom at the time the adoption petitions were filed he had been supporting, he had been caring for, he had bought a house for, they had lived with him and whom he was fighting for their custody in another court.

They broke up the relationship of this man with his children without any finding that he did not have a family relationship with them, as is required in Quilloin v. Walcott, without any finding, without any proof at all that he was a bad father. They broke up his relationship with his children and, in effect, replaced him -- took them away from him, in effect, and replaced him with a stepfather and with a stranger upon this sole ground that he was of the male sex and not the female sex, and that being of the male sex, he was not married to the parent of the female sex.

QUESTION: Who was this stepfather, again?

MR. SILK: The stepfather was the husband of the mother.

QUESTION: That's of some significance, isn't it?

MR. SILK: I think that it is only perhaps of some significance if we at first dispose of the rights and interests of the father, himself -- of the natural father who had been raising the child.

QUESTION: Now, if these children were going to be adopted into either family, that is, the new family, that is that of the natural father and his new wife, or that of the natural mother and her new husband, if there was going to be any adoption at all as between those, the rights of one of the natural parents were going to be terminated in the drastic and dramatic way you have just described, isn't that correct?

MR. SILK: I would have to agree with Your Honor that that is what would have happened in the event of an adoption by either side.

QUESTION: The rights of one of the natural parents are going to be terminated in just the complete and dramatic way you have described, isn't that correct?

MR. SILK: There is no question about that at all.

QUESTION: Am I correct in understanding that the logical consequence of your argument would be that the only fair and, indeed, the only constitutional thing to do in a situation such as this one, is not to have any adoption at all?

MR. SILK: That is precisely what my argument is. I do not see how the father could take the child away from the mother to the point where his wife would become the adoptive mother of the child and the original mother would be left out in the cold, and I make no claim of that sort.

QUESTION: If the adoptive father had succeeded, did succeed ultimately, the child would acquire another source of support, would it not? Legally enforceable source of support.

MR. SILK: The child already had another source of support, under the New York law, because, under the New York law a stepfather is also made responsible for the support of his child, whether or not that child is adopted by the stepfather. But what the adoption would do, and did do, was to terminate the obligation of Appellant to support his child and

Appellant did have an obligation to support his child prior to the adoption, even though the child was born out of wedlock. So what the adoption did was to replace the natural father with the stepfather, to no advantage to the child except to destroy the child's relationship to his natural parent -- to their natural parent. There were two children.

QUESTION: How does it destroy that relationship? The court may place the custody wherever it is deemed best for the welfare of the child or children, may it not?

MR. SILK: That is right, but this was not a custody case.

QUESTION: But they do have the power?

MR. SILK: They must place the child, in terms of custody, with whichever parent it is in the best interest of the child to have the custody, but that does not cause the termination of parental rights. The child still sees the noncustodial parent. The noncustodial parent still retains obligations to take care of the child. The noncustodial parent still retains the opportunity to see the child and the child knows its roots.

QUESTION: Is that foreclosed if the child is adopted by the new husband?

MR. SILK: The adoption has a different effect from custody. The adoption not only --

QUESTION: My question is: Does it foreclose?

MR. SILK: Yes.

QUESTION: Do you mean the court doesn't have the power to permit visitation rights for the natural father?

MR. SILK: It does not. The adoption completely drops a blank wall between natural parent and child. Completely, totally drops a blank wall, and the only way a child can ever see his father is if the adoptive parent permits the child to do so. Because under the New York adoption law, the child has now a new set of parents, and his name is changed. Their names are placed on his birth certificate. In this case, it just means placing the name of the mother on the -- of the adoptive father on the birth certificate. It means the change of name. It means a change of identity. It means a total change for the child, so that the child's relationships with parental people are destabilized and instead of continuing on with a continuing course of a family relationship which the child has had with its natural parent, the child suddenly finds that a natural parent appears to the child to have rejected the child. And the child in this case will never know how long and how hard his father has fought to maintain his relationship with him.

QUESTION: Are you suggesting, Counsel, that these children had had a very stable relationship before the adoption proceeding?

MR. SILK: Yes, there is no question but that these

children had a stable relationship with their father and I would think probably with their mother, before the adoption proceedings took place.

QUESTION: Would you think it was something New York was constitutionally required to, say, meet the minimum standards for raising of children?

MR. SILK: I don't quite understand --

QUESTION: The shifting back and forth and the tensions that obviously existed. Didn't your client take the children back at one time and didn't your opponent's client take the children at one time?

MR. SILK: Yes, my client took his own children back from Puerto Rico, whence they had been sent by the Appellees and where they had remained for some 14 months with their grandmother. He brought them back to New York. He brought them into his home. He provided them with a home. He provided them with support. He provided them with a family and he took care of them and wanted to continue to take care of them, and made every effort to do so, until he was compelled by a temporary interim order of the Family Court, which was made only prior to a hearing and prior to a determination of the merits to turn the children over to the mother on a temporary basis, but reserved the rights of visitation to himself.

QUESTION: It sounds to me like your argument is

kind of like a joint tenancy one, that on divorce the husband gets a half right in the children and the wife gets a half right in the children. I think New York's approach here is that neither parent, necessarily, has any compelling interest in the child, that it is the children's welfare.

MR. SILK: Well, actually, that may be New York's interest, if that's what New York says, and I don't believe that it is quite what New York says. New York says, under Section 70 of the Domestic Relations law that there shall be no prima facie right to custody of a child, but custody shall always be determined in the best interest of a child.

But, again, I want to emphasize that this is not a custody case. This is a termination of all parental rights. This is a breaking up of a family case. This is a breaking up of a family and this is a substitution for a natural father of an adoptive father.

QUESTION: But the family broke up when the natural mother and natural father separated, didn't it, for all practical purposes?

MR. SILK: Not the family, between the children and their respective parents.

QUESTION: But that's two different families.

MR. SILK: Well, the family that we are concerned with here is the family of the children, and the family of the parents. And while the parents may separate --

QUESTION: Mr. Silk, this is a strange family, when the husband and wife live in separate residences in New York and the children are living in Puerto Rico. That is not a normal family.

MR. SILK: That is the situation that was created by the mother.

QUESTION: That is not a normal family, is it?

MR. SILK: No, it wasn't, and my client did everything he could to make it a normal family, by bringing the children back from Puerto Rico. And when the children came back from Puerto Rico, the matter went into the --

QUESTION: It still wasn't a normal family.

MR. SILK: Well, once the children came back from Puerto Rico, it was as normal as families of -- as divorced families by the millions are when they have children. It was a family in which the child custody --

QUESTION: Maybe I object to your saying that a divorced family is a normal family.

MR. SILK: Maybe it is more normal than we think, I am afraid, because -- I agree with Your Honor that it is not anything to be looked for, but there are, on the other hand, millions of divorced families in this country and they have managed, sometimes through the aid of family courts, to work out custody problems and visitation problems and support problems, so that the children are not shuttled back and forth.

New York has a strong policy against shuttling.

QUESTION: I think we all know that. Why not get to this case?

MR. SILK: Your Honor, what happened in this particular case is that the trial judge made a determination and he made a determination in his opinion and it has been upheld through all the New York courts.

QUESTION: That opinion was that the best interests of the child called for their being with the mother and that this adoption should proceed.

MR. SILK: That was part of it, but part of his opinion was that my client had no right to object to an adoption, that that was not a legal necessity. The prime objective -- and Your Honor is quite right and, if I may read the opinion, at page 20A of the Appendix: "The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child, but rather to determine the best interest of the child."

That is what the trial judge said. Now, what the trial judge did there was to apply the wrong legal test, because in a situation where you have a termination of parental rights, state power cannot be trusted to determine that the best interest of the child requires the replacement of his natural fit father with a stranger and a breaking up of the child's natural family ties with his natural father, without

proof of unfitness.

QUESTION: Aren't you reading the word "prime" as if it were "only" in that sentence? Prime simply means the foremost. It doesn't mean the only, does it?

MR. SILK: It might be, but in this case the judge was saying that it was the prime objective, but he had no other objective whatsoever to show. And he did say that a putative father's consent to such an adoption is not a legal necessity, on page 27 of the Appendix.

So, it is quite clear that, although he used the word --

QUESTION: That's what the statute clearly provides, isn't it? He was accurate in that statement, insofar as he was reciting the law of New York, wasn't he?

MR. SILK: He certainly was. He was truly following the New York statute, and that's why this case is coming here by appeal and not by certiorari.

QUESTION: Do you contend that the putative father, constitutionally, has an absolute right to veto an adoption like this?

MR. SILK: The putative father -- No, I would not want to call him a putative father.

QUESTION: Well, the natural father.

MR. SILK: He is the real, natural father of this child. And he is the father who has raised and supported this

child for more than half of the child's life and who was doing so at the time the adoption petitions were filed. And he was fit and he was concerned. I would say he did have a right.

QUESTION: But are you saying that all natural fathers have that right, or just your client, under these particular circumstances?

MR. SILK: I am saying all natural fathers who perform as did my client. And I am saying that all natural fathers have that right who had a relationship with his child. Now, the relationship with the child is a missing factor that was missing in Quilloin v. Walcott. In that case, this Court recently considered the constitutionality of almost an identical statute from the State of Georgia. And in that case, the Court looked very carefully at the relations that the father had with the child to find out whether the father had a protected interest with the child. And the Court, looking at these relations, found that they were skimpy and scanty, indeed. And I would have to agree that Quilloin v. Walcott lays down the law, and that is that a father who had only sired but not raised the child and has played no role in raising the child, he has not a constitutionally protected interest under Stanley v. Illinois.

Now, Stanley v. Illinois referred to a situation in which Stanley's family was being dismembered if the Illinois law were applied, in which Stanley's children whom he

had sired and raised were being taken away from him, if the Illinois law applied, without any proof of his unfitness.

QUESTION: But that was not an adoption case at all.

MR. SILK: It was a parental termination rights case, and in terms of termination --

QUESTION: Where the mother was deceased, as I recall.

MR. SILK: The mother was deceased.

QUESTION: And it was a matter of the custody rights of the natural father vis-a-vis the custody rights of the state, institutionalizing them under the aegis of the state. Am I wrong in my recollection?

MR. SILK: Well, I believe that it was a little more than that, because I believe that the child was being treated as someone who could be taken by the state, made a ward of the State of Illinois, placed for adoption, and that the father's rights were, in effect, being terminated by the proceedings that were taking place.

QUESTION: Custodial rights. It was not an adoption case. You would agree with that?

MR. SILK: It was not an adoption case, but it was a termination of parental rights case.

QUESTION: And the natural mother was dead, incidentally. That is also correct, isn't it? Relying on my

recollection.

MR. SILK: I do not see how it can be justifiably maintained that a father's relationship with his children is any less valuable and important than a mother's relationship with a child.

QUESTION: The point is in Stanley you didn't have a competition between the two because the mother was dead.

MR. SILK: Yes, that is true, but the net effect, as far as the father was concerned and the father's relationship with his children in Stanley v. Illinois and in the present case is precisely the same.

QUESTION: But the competition in Stanley was, first of all, not for adoption at all, at least at that stage, simply for custody, and, secondly, between the natural father who had not only sired but raised the children, on the one hand, and the state on the other. That's correct, isn't it?

MR. SILK: Yes, that is absolutely correct, Your Honor.

Insofar as the protectable interest of the father is concerned in his child, however, the effect of the two is exactly the same. Because in both Stanley v. Illinois and in this case, at stake was dismemberment of the father's family. At stake in Quilloin v. Walcott the father did not have a family with the children. In Stanley v. Illinois, the father had a good family with the children. He had raised

them and supported them and he had lived with them and they had lived with him.

In the present case which we have now before the Court, we have precisely the same situation. In Quilloin v. Walcott, we did not have that situation. In Quilloin v. Walcott, you had a situation in which the father's relationship with the child was wispy at best, and in which the child's relationship with the proposed adoptive stepfather was a thousand times stronger. He had lived in the same home with the adoptive proposed stepfather -- I mean with the stepfather who was the proposed adopting father. He had lived in the same home for seven years.

QUESTION: May I interrupt you for a minute? I missed something in the statute somewhere, because you are talking a great deal about the relationship of the father to the child. Does the statute say anything about that?

MR. SILK: No.

QUESTION: What would the situation under this statute be if neither parent had any relationship with the child at the time? Suppose they both deserted the child and it turned out that somebody wanted to come along and adopt, wouldn't the mother have a veto right under the New York statute, even though she hadn't seen the child for 10 years?

MR. SILK: If it had been found that the mother had abandoned the child, then the mother would have no right under

the New York statute.

QUESTION: Does the statute say that?

MR. SILK: Yes, I think it does. But anything less than abandonment, any skimpy kind of a relationship which might in New York not constitute abandonment, the skimpy kind of relationship that Mr. Quilloin had with his child, if the mother had that sort of relationship with the child in New York, that would not, under New York law, constitute abandonment.

QUESTION: In this case, relationship is really immaterial, except as sort of background, isn't it? Neither of these parents had abandoned the child.

MR. SILK: I see the relationship, in this case, to be the protected interest. The constitutionally protected interest is the right of a parent to raise, to rear, to have the company and companionship of his child. It is a relationship which is based upon the history and upon the facts of this case and it is a relationship which is protected for the mother in this case, and it is not protected for the father.

QUESTION: If you prevail here, how will these rights that you claim be protected? Who is going to decide how often he can see the child? The Domestic Relations judge, I suppose. Is that right?

MR. SILK: Yes. Insofar as custody and insofar as visitation is concerned, we are not asking this Court to make any determination.

QUESTION: I am asking you the consequence if you prevail here.

MR. SILK: The consequences if we prevail here would be that the matter would go back to the Family Court and custody would be determined and visitation would be determined and support would be determined, in the best interests of the child, and in equity and fairness to all parties.

QUESTION: Provided custody would necessarily result --

MR. SILK: No, it would not necessarily result at all. If the Family Court took the case over, the Family Court would have full power, after a hearing and after a trial, to turn over custody to the mother, with rights of visitation to the father. It would have power to turn over right of custody to the father, with rights of visitation to the mother. It would have a right to mold whatever remedy that it feels proper, in the best interest of the child.

QUESTION: Just like in divorce cases.

MR. SILK: Yes, it would be exactly like divorce cases.

QUESTION: But it is true, Mr. Silk, isn't it -- and I think perhaps I am repeating the question I asked at the outset -- that if you are correct, it would follow that at least in the situation that you allege this situation to be, that the Constitution of the United States would absolutely

prohibit and prevent the possibility of any adoption of these children, by anybody? Is that correct?

MR. SILK: It would prevent the adoption, unless the parents agree that the children should be adopted. If there is no reason --

QUESTION: But if you are correct in your constitutional claim, wouldn't it follow that the Constitution of the United States would prevent the adoption of these children by anybody so long as you and your opponents remain in a litigating posture? Now, if you decide you want to settle it and one or the other decides not to litigate, of course, the case would change. Doesn't that follow, necessarily?

MR. SILK: Adoption which would cause the replacement of a parent --

QUESTION: That's what an adoption, you have told us, inevitably does.

MR. SILK: Well, a parent might consent to it and the other parent might consent to the adoption by the other one. In other words --

QUESTION: Look, if you people had agreed on this matter, this wouldn't ever have been a lawsuit and this case wouldn't be here. I am assuming that you are going to be litigating it, and that you are not going to change your position and that your adversaries are not either.

QUESTION: That's where New York leaves divorced

parents, isn't it?

MR. SILK: That's exactly where New York leaves divorced parents.

QUESTION: Where either parent can veto,absent some finding of unfitness.

MR. SILK: Well, either parent -- If the parents are divorced, the situation would be the same as it would be here, if I should prevail in this case, yes. That is, if divorced parents treated their children as my client treated his children, then they could not be replaced by adoptive --

QUESTION: Divorced parents, as long as they haven't been found to be unfit, each of them, under New York law, can prevent the adoption?

MR. SILK: Oh, yes. Without any question whatsoever.

QUESTION: But either one of them can control the custody by exercise of any kind of a veto?

MR. SILK: If there is a dispute over custody, that will be decided in the best interest of the child.

QUESTION: The court decides it.

QUESTION: With visitation rights.

MR. SILK: With visitation rights, with parental rights preserved.

QUESTION: If the judge thinks visitation rights are

good for the child.

MR. SILK: Visitation rights are almost invariably granted to one extent or another extent in New York, depending upon the facts. Sometimes restricted visitation is allowed, but always some visitation is allowed, under the worst of circumstances, so that the children will continue to know their roots and continue to have a relationship with their natural parent. And the natural parent will continue to feel that that parent has an offspring and a child that that parent would be able to come and see and to protect and to support and care for as best as that parent could.

Now, in this particular case, we have a line drawn on the basis of sex. This line is drawn on the basis of sex to the point where it serves absolutely no purpose. It treats a mother's relationship with her child in a constitutionally protected sense. The mother, after all, was unmarried to the father, as much as the father was unmarried to the mother. The mother entered this relationship fully aware that the father had a prior undissolved relationship which prevented marriage and yet she was willing to do it. She took the father's name and she bore two children for the father, and the father and she together lived in a common home and brought these children up. Under New York law, this has given the mother a protected relationship with the children and it has given the father absolutely no protection whatsoever.

In Stanley v. Illinois, and in all of the cases which Stanley v. Illinois has cited, both parents have very important protected interests in maintaining their relationships with their children. It is cardinal with this Court and it is cardinal with us, as stated in Prince v. Massachusetts, that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder, and it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

QUESTION: But Prince was a case where the mother and father were both united against the state. Here you have a mother and father, one of whom the state supports and the other whom it doesn't support.

MR. SILK: But, again, we are not dealing with custody. We are dealing with termination and rupture of parental rights. And it isn't the mother against the father. It is a stranger against the father, because the mother is not replacing the father as a father. It is the stranger who is taking the father's place.

QUESTION: All I am saying is that your quote from Prince is in a context where the mother and father were not separated. They were united in opposing an intrusion of the state. That isn't the case here.

In Quilloin v. Walcott, we had very similar situation, in that the mother was married to the proposed adoptive father and the natural father was trying to prevent the adoption. This Court had this issue before it at that time, except that it had it in a different factual context. In the opinion of Mr. Justice Marshall for this unanimous Court, the opinion specifically limited itself to the situation before the Court. And the opinion in Quilloin did not say that because it happened to be the mother and her husband who were trying to adopt, it said that because the natural father did not have a relationship to his child, which was constitutionally protected.

QUESTION: What would be your view if you had an infant, two or three weeks old or two or three months old, just old enough to be put out for adoption. Would you take the view then -- So that no permanent relationship really could have formed yet between the natural father and the infant. In that context, would you say the natural father has an absolute veto as a matter of constitutional right?

MR. SILK: I would say that the natural father, if he had played a role, even as brief as it possibly could have been, a parental role, a parental relationship.

QUESTION: He is the natural father and he paid the hospital bills, and he objected to the person the mother wanted to place the child with for adoption. Does he have a constitutional right to object?

MR. SILK: He was barely able, although he tried, to establish some sort of connection with the child and showed concern --

QUESTION: He just doesn't want the adoption to be placed with that particular person.

MR. SILK: Yes, I would say that he did, because he had an interest in that child which was as young and as new as the child was itself. And he couldn't possibly have established a stronger relationship than he did, and he tried. And if he made the effort, then I think that the child was lucky to have a concerned father who wanted to look after the child's interests.

QUESTION: I am not talking about looking after his interests. I just said: Does he have an absolute constitutional right to object? And your answer was yes.

MR. SILK: My answer is yes. Again, depending on the facts of that particular relationship.

QUESTION: Mr. Silk, may I ask you a somewhat related question? Would you be satisfied if the New York law were amended to provide equal rights for both the mother and the father,and the rights essentially said that neither had an absolute right to veto an adoption, each would be entitled to a hearing and the decision would turn on what was found to be in the best interest of the child?

MR. SILK: No, I would not.

QUESTION: That would meet your equal protection issue, wouldn't it?

MR. SILK: It would not meet my due process issue.

QUESTION: But it would meet your equal protection issue?

MR. SILK: Well, if they are equal, at least they would be equal.

QUESTION: If it applied to marriage and divorce.

MR. SILK: It would have to apply to both. I understood the question to apply to all parents. That's the way I understood it. It would meet the equal protection argument, but it would not meet the due process argument. And the due process argument is a very important argument, because it is our contention that state power does not exist to break into the private relationships of families and of parents and children and just tear them apart because somebody happens to think it is in the best interest to replace a perfectly fit and caring father with somebody else. And the state doesn't have a right to go into this area. This is a sacred area.

QUESTION: I didn't understand the question to be that the state went in it. I understood that my brother, Powell's question was that the two parties together go into the state and ask for this.

MR. SILK: The state in this particular case has entered it, of course, through its courts and through its laws.

And, although the parties have individually invoked the assistance of the state and Appellant is now invoking the assistance of the Constitution of the United States, we are still facing state action and it is state action that has broken these children, taken these children from their parents -- from one of their parents who has loved them.

And I say that a law which provides for such discrimination of this type in this case is obsolete, that it bears no relationship to a substantive purpose which a state has any right to defend, which has any right to promote. It is not in the interest of the state to promote the adoption of children by their mothers and not by their fathers.

Thank you, Your Honor.

My time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Schulslaper.

ORAL ARGUMENT OF MORRIS SCHULSLAPER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SCHULSLAPER: Mr. Chief Justice, and may it please the Court:

If Mr. Caban appeared before the Surrogate Court of Kings County as he is portrayed today, in the adversary position compelled by Section 111 of the Domestic Relations Law, automatically because the first principle is the best interest of the child, neither the interest of the father, putative or real, or the interest of the mother, but the interest of the

child, then it is very possible that the Surrogate would have refused to allow this adoption.

If he were able to establish the substantiality that he projects now before the Court, that could have happened. If he were able to establish this to the satisfaction of the Appellate Division of the Second Department, there is little question in my mind that that department would not have held unanimously against Mr. Caban. But under the authority of Gerald J. J., and I believe the citation is 61 AD2-521, it could have reversed the Surrogate. It could have denied this adoption, not because the interests of a father were there involved but because the interests of the child were there involved. And because in Gerald, on an adversary position, they found that the father was involved, a fruitful worker, concerned, he traveled from California, he sent cards, he sent gifts, that the adoptive parent was not quite equal to those circumstances.

QUESTION: Are you telling us that the New York definition of the best interest of the child may include the concern of the natural father?

MR. SCHULSLAPER: They include all facets, all facets, any triable issue, any factor which the court, as a fact, can find would be injurious to the child. It is not a simple statement of the mother.

QUESTION: In other words, you are telling us that

there is not just an automatic veto.

MR. SCHULSLAPER: Absolutely not, Your Honor. The instant you produce the standard, the best interest of the child, Mr. Caban had the right -- and he was granted the right to be heard fully. Mrs. Maria Mohammed was required to establish that that adoption was in the best interest of the two children. But, as he is portrayed today, he was not portrayed before the Surrogate of Kings County, Your Honor. The Mr. Caban who appears today --

QUESTION: Counsel, before you go into the facts, let me just question one statement you made.

Supposing he had tried to adopt with his new wife and the court had been persuaded that it would have been in the best interest of the child to allow that adoption. Just assume that, even though I know this case, in your view, is different. It would, nevertheless, be true, would it not, that the wife had an absolute veto over such an adoption?

MR. SCHULSLAPER: The use of the word "veto" troubles me, Your Honor.

QUESTION: Well, an unqualified right to prevent the adoption from taking place.

MR. SCHULSLAPER: Could she have prevented the adoption? The answer is yes, she could have prevented the adoption, unless the facts were produced to persuade the court that she was totally, her presence, her custody was inimical

to the best interest of the child, that she had either abandoned him or, for whatever reason produced before the court on evidence on an adversary circumstance, she should not have the right to continue custody and parenthood of that child.

QUESTION: That would be only under the statute, if one of the dispensing conditions of Section 6 applied, so it would be a two-step process.

MR. SCHULSLAPER: Exactly.

QUESTION: The first step would be that one of the dispensing conditions was present.

MR. SCHULSLAPER: Exactly. Under those circumstances, or her circumstance because she has the right, or you require her consent, there is little question that you would have to produce strong evidence. And there is little question that under these circumstances the state, whether it was the State of Georgia under Quilloin or the State of New York, has the right to accept what Mr. Justice Burger said in his dissenting opinion in Stanley v. Illinois.

QUESTION: That won't help you very much, Counsel, that was a dissenting opinion.

MR. SCHULSLAPER: I quite understand it was a dissenting opinion, Your Honor, but I point out, as Mr. Justice Marshall pointed out, that this was not an adoption proceeding. This was not a circumstance between father and mother, whether

they were putative or real. This was an action against the state in the presence of a living,viable, concerned mother. Under those circumstances, your dissenting opinion holds very, very strongly in favor of Mrs. Mohammed.

The fact is that historically we have accepted that the mother is the more dependable person, and certainly against the putative father who has had the opportunity, and certainly in this case has had the opportunity to look for a divorce to sanctify the relationship that he now holds so dear before this Court. The same man who found it most convenient, on the facts, to very expeditiously obtain a divorce after, after this woman was married. This woman did no more in that relationship --

QUESTION: How important are these facts to this statute which we are talking about? Isn't it true that if this man, this very Petitioner in this case -- Appellant, rather -- was the highest pillar in his church and who loved -- the only thing he loved more than children were his own children, and he spent 99% of his money on his children, still this statute would apply to him, wouldn't it?

MR. SCHULSLAPER: That is correct, Your Honor.

QUESTION: So, what is the difference in this case? We are talking about this statute.

MR. SCHULSLAPER: That is correct, Your Honor.

However, while I don't want to go into the facts --

I've exposed them in my brief—certain factors have come up in the Appellant's reply brief, and certain declarations were made here, and I believe that it is essential for this Court's consideration to point out several factors.

He claims that he had custody of these two children for two months before the adoption. The circumstances of his so-called custody should be known to the Court. I am aware that the Court realizes that he traveled to Puerto Rico and brought the children back under the guise of parenthood. He never had it. The closest he came to an acknowledgement of parenthood was that after three months time, at the insistence of Mrs. Mohammed, he allowed his name -- or he allowed the Board of Health to record him as the father on the birth certificate.

QUESTION: Do I understand, Counsel, you are now denying paternity here?

MR. SCHULSLAPER: I am not. I am trying to point out that this man's interest was not of the great depth that he now describes.

QUESTION: A little while ago, you used the word "putative" father.

MR. SCHULSLAPER: Yes. Reputed. The reputed father.

QUESTION: You said "putative."

MR. SCHULSLAPER: That is correct, Your Honor, as I understand it, the word, by definition, is reputed.

QUESTION: Counsel, if we could get away from the facts of this case for a particular moment, what do you say -- What is the justification for a rule that treats the mother's power in an attempt by the father to -- the natural father -- to adopt differently from the father's right to object to the mother's attempt to adopt?

MR. SCHULSLAPER: This Court has so held in Quilloin v. Walcott that the father had less veto power, that Georgia had the power to give less veto power -- to use that word -- to the putative father, Leon Quilloin, than it was required to give to a father who had been once married and perhaps divorced.

QUESTION: Which opinion are you quoting now?

MR. SCHULSLAPER: That would be Quilloin v. Walcott. This Court specifically said as long as it was interested in the child's best interests, then it had the right to give less veto to the reputed or the putative father, the unmarried father or the natural father, if you will.

The State of New York has that same right in the best interest of the child. The problem now simply is: Is this a presumption? The fact is it is not an irrebuttable presumption, that this man, Caban, had the right to walk into court and over 447 pages, 375 of which are testimony, he had the right to rebut the presumption of the statute if it be so held as a presumption.

This was not concluded against him. He was simply

not wiped out of the position. He had the right to be heard. And as New York State applies it, where the right was substantiated, where his position was substantiated -- or -- forgive me -- where the father was found to be of substantial interest, the courts did not allow that adoption against the putative father to go forth. The State has that right.

Now, this Court could interfere if it found a presumption under Stanley. It cannot interfere on the basis of Quilloin, unless these facts -- and the only reason I can think of, the case being before this Court, is the challenge to the circumstance by my adversary that there was substance to his relationship. The record was before the Appellate Division, as I said, before the Court of Appeals, the very same justices who dissented in the case of Malpica-Orsini, here known as Orsini-Blossi, joined the majority. They joined --

QUESTION: That might have been because they thought that despite their previous dissent the law of New York was not established.

MR. SCHULSAPER: That might very well have been, and it might just as well have been on this record, Your Honor. I have no way of knowing that. But on this record there was no substance, and the record so shows it.

Now, he claims that he purchased a house and that, as a result of that, fighting the case before this Court and

others, he has been rendered -- he has impoverished himself. He claims that he was a married man at the time that he made application for adoption in reverse from the putative mother. Well, it is important that this Court know the facts. He took the children back to the City of New York by chicanery, using his own parents to persuade the maternal grandmother, who had lawful custody for good and valuable reason, to bring them to their home. His visitation rights were never interfered with, nor were his visitations interfered with here. When he notified Puerto Rico that he was going to go down there, the kids were made available to him. He brought these children back from Puerto Rico sometime about the 15th. He withheld these children from the mother. His woman -- subsequently his wife, Nina, actually offered to assault the mother of these children when she attempted to take the children or even talk to the children. It was not until the 25th that she was able -- she found the children on the 24th -- On the 25th of November 1975, she appeared before a Family Court. She was given a date by the Family Court to the 18th day of December -- On the 17th day of December, she gave birth to a child by her now husband. The first time she was able to regain that custody was on the 15th day of January. Mr. Caban married Nina on the 16th day of December 1975. On the 18th he was scheduled to go before the court for a hearing.

The premises he described as purchased for the need of these children he contracted for on the 29th day of the same month, December. Subsequently, one year after this case was decided against him, and I trust that the Court has the entire record from the Court of Appeals, he made application before that court to be allowed to proceed as a poor person. He claims before this Court that he was so allowed to do. He was not under the order of the court.

QUESTION: Mr. Schulslaper, do you think the Constitution of the United States requires this Court to go into all of those facts going to the substantiality of the husband's interest in these children? Maybe under Quilloin it does, but that means that under the Constitution we are required to more or less act as a domestic relations court, which I wonder if many of my colleagues signed on for when they accepted their commissions.

MR. SCHULSLAPER: Your Honor, thank you, very much. Under the circumstances, I respectfully rest on my brief. And I defer to the Attorney General of the State of New York for the balance of the time.

MR. CHIEF JUSTICE BURGER: Mr. Strum, now you are going to tell us about the law of this case, the statutes, are you?

MR. STRUM: Your Honor, I am not going to discuss the facts, that is correct.

ORAL ARGUMENT OF IRWIN M. STRUM, ESQ.,

AS AMICUS CURIAE IN SUPPORT OF APPELLEES

MR. STRUM: Mr. Chief Justice, and may it please the Court:

We have heard the attorneys for two adversaries talk about their clients' rights. Who speaks for the rights of the two children, David and Denise? Who spoke for them below?

I respectfully submit that the Surrogate of Kings County was charged with the responsibility of determining how those children should be protected. I submit the statutes of the State of New York gave him that right, and gave him the opportunity to say, "In the best interest of these children, I will permit this adoption."

I come to this Court today not to represent any litigant and not to argue on behalf of either a father or a mother, but to argue on behalf of these children and their rights, and the law of the State of New York which permits the courts to say, "In the best interest of these children, we will permit an adoption."

QUESTION: What do you have to say about the constitutional aspect of a statute which gives a different right to the natural father from the rights given to the natural mother? That's really the legal question, isn't it?

MR. STRUM: I believe that the State of New York has

the right to make a distinction between a natural mother and a natural father where a child is born out of wedlock.

This Court has time and time again approved distinctions between natural mothers and natural fathers, in a situation where the state has an interest to protect the children. I don't think the difference as provided by the New York law is very severe, because the ultimate test in all situations is the best interest of the children.

QUESTION: Are you suggesting that the state could have a law that said that the child could be removed from the care and custody of both parents, over their objection, as long as the state concluded that it was in the best interest of the child --

MR. STRUM: I would say this, Your Honor --

QUESTION: -- and without some finding of unfitness?

MR. STRUM: No, there would have to be a finding of unfitness.

QUESTION: Why doesn't there have to be some finding of unfitness for the father here?

MR. STRUM: Because I don't believe the father stands in the same shoes as the mother. I don't believe he is a member of a protected class.

QUESTION: So, you think -- If he wanted to adopt -- If the unmarried father wanted to adopt, over the objection of the mother, the state could not permit the adoption without

some finding of unfitness of the mother?

MR. STRUM: There would have to be some indication or proof. I don't know if it would have to reach as far as unfitness, Your Honor.

QUESTION: It would be the same thing, I take it, that the law is where the parents were married but are divorced.

MR. STRUM: I would say so, yes.

QUESTION: In that case, either parent has --

MR. STRUM: I wouldn't use the word "veto", but either parent, under certain circumstances, and under certain statutory --

QUESTION: Well, either parent there has more of a right than this father does.

MR. STRUM: That's correct, Your Honor, and I concede that, but I don't think --

QUESTION: Give the wife the veto and deny it to the father?

MR. STRUM: Yes.

QUESTION: You are going to get to Stanley before you quit, aren't you? Let me know when you get there.

MR. STRUM: I don't think Stanley v. Illinois has any relationship to the factual situation or the legal situation here. Here we are dealing with a situation where we have a competing interest between a mother and a father. Now, there is no doubt that these people have an interest in the child --

QUESTION: I understood that the mother wasn't adopting this child.

MR. STRUM: Yes, she was. The mother and her husband.

QUESTION: The mother and the husband?

MR. STRUM: Yes. Which would be the normal procedure in the case of a natural mother.

And I think the court has a right to say that in order to benefit the child we will allow such an adoption.

QUESTION: Are we talking about a statute that applies to any situation?

MR. STRUM: That is correct, Your Honor.

QUESTION: And there is nothing wrong with a statute that singles out simply on sex and nothing else -- You say there is nothing wrong with that statute?

MR. STRUM: It is not on the basis of sex. It is on the basis of a mother or a father, and I think, Your Honor --

QUESTION: Do you know any mothers that are fathers?

MR. STRUM: No, Your Honor. But I think there is a distinction, and I think this Court has recognized it, between natural mothers and natural fathers where they were not married. And I think that's the important factor here. I don't think that this man has any paternal rights in the child. I think the child is somebody who has to be protected. And the state,

as long as it is reasonable in doing so, can pass a law which permits such protection. I think the state can make a distinction between a natural father and a natural mother, where they are not married. And I think this Court recognized in Quilloin that a father of a child born out of wedlock does not have the same status as a father of a child born in wedlock.

QUESTION: Being unfamiliar with that case, as I understand it, left this case completely out, didn't it?

MR. STRUM: No, it really didn't leave this case out. It dealt specifically with --

QUESTION: Didn't it? You tell me.

MR. STRUM: I think very frankly, Your Honor, this case is a situation where you have a mother and a father who are not married.

QUESTION: General Strum, assume a case where a child is six years old, spent three years with the father, three years with the mother, no marriage. What is the justification for giving them different rights when they get into a battle of this kind?

MR. STRUM: I don't say that their rights are different. I say to you the test will ultimately be the same, the best interest of the child.

QUESTION: Well, I thought everyone had agreed that even if the best interest of the child might lie with the father, the mother could still -- assuming she hadn't abandoned,

and all the rest of it, she could still object.

Isn't there a difference, under the New York statute, in the position of the mother and the position of the father?

MR. STRUM: Yes, there is.

QUESTION: Assuming that equal time with the child, and all the rest of it -- six year old child -- What's the justification for the difference?

MR. STRUM: The difference is that the Legislature of the State of New York has determined that a natural mother, absent special circumstances, bears a closer relationship with her child, by the very fact of being a mother, than a father does, that there is a difference between a mother and father, vis-a-vis the relationship of the child, vis-a-vis the feelings toward the child, vis-a-vis living together and --

QUESTION: The Legislature has determined that, but what's the basis for that determination? How do you support that?

MR. STRUM: I think that's the experience of mankind.

QUESTION: I see.

MR. STRUM: As long as the statute bears a reasonable relationship, and the object of the legislation is to protect the children, and I don't think that the father is in a protected class, I don't think it is for this Court to say that the legislation is improper. I think the legislature of a

state has a right to set up these standards, make these requirements and make these rules. And I think as long as these rules and regulations, and statutes, bear a reasonable relationship to every day life and the interests of the child, I think that that is sufficient. We cannot have a perfect statute. I am not here to claim that our statute is perfect, but as long as the test is the best interest of the child I think that is all that is required. I don't think, as I have indicated before, that the mere accident of birth, that a man is the father of a child, gives him rights to control the destiny of that child where the best interests of the child call for another type of action. I don't feel that, under the circumstances, that this statute should be thrown out, merely because the man comes here and he says, "Well, I really am interested in this kid."

There was a full hearing. This was not a case where his due process --

QUESTION: Are you suggesting there were some findings made that he had abandoned the child?

MR. STRUM: I am suggesting that the Surrogate had before him all of the facts concerning the relationship --

QUESTION: Yes, but are you suggesting he made any findings about unfitness or --

MR. STRUM: I am not suggesting he made a specific finding of abandonment, no.

QUESTION: Or unfitness, or anything --

MR. STRUM: Or unfitness. I am suggesting --

QUESTION: Are you suggesting there must be facts in the record to warrant such a finding?

MR. STRUM: I am suggesting that there must be facts in the record to warrant a finding as to the best interest of the child, and all of those facts are facts which he had before him, including the relationship of this father to the child, including what had happened between the father and the child, what had happened between the father and the mother. All of this was before the court. The court weighed these facts and then determined the best interest of the child.

I see that my time is up.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon at 2:35 o'clock, p.m., the case was submitted.)