

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1756

TITLE JONATHAN LEHR,
v. Appellant
LORRAINE ROBERTSON ET AL

PLACE Washington, D. C.

DATE December 7, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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JONATHAN LEHR, :

Appellant :

v. : No. 81-1756

LORRAINE ROBERTSON ET AL. :

-----x

Washington, D.C.

Tuesday, December 7, 1982

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

DAVID J. FREEMAN, ESQ., White Plains, N.Y.; on behalf of
the Appellant.

JAY L. SAMOFF, ESQ., Kingston, N.Y.; on behalf of the
Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Lehr against Robertson. Mr. Freeman, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID J. FREEMAN, ESQ.

ON BEHALF OF APPELLANT

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

With the Court's permission, I will first have a brief opening statement, then address myself to the question of jurisdiction, and then proceed with the balance of my argument.

On March 7th, 1979, Jonathan Lehr was deprived of the most basic and precious of all human rights, the right to maintain his status as a parent. For on that date Jessica, whom Mr. Lehr had always openly acknowledged to be his daughter, both before and after birth, was adopted by the Appellee, Richard Robertson, the husband of the natural mother.

According to New York law, as a result of that adoption Mr. Lehr's rights as a parent were forever and irrevocably extinguished. There would be no more contacts of any nature with Jessica, no visitations, no rights of inheritance.

Mr. Lehr was deprived of this child without

1 being given the opportunity of notice and the
2 opportunity to be heard, for according to the New York
3 statutory scheme then in force and effect Mr. Lehr was
4 precluded from receiving notice as those statutes were
5 construed and applied to him. What makes this lack of
6 notice even more emphatic was the fact that at the very
7 time that Mr. Lehr's rights were being stripped in the
8 adoption proceeding in Ulster County, he had commenced a
9 paternity petition in Westchester County, unbeknown to
10 him that the adoption proceedings were pending.

11 In Westchester County he asserted his rights
12 as a parent. He asked that the child be adjudicated and
13 that he be made the father, that he be given visitation
14 rights and that he be given the right to support
15 Jessica. The family court judge in Ulster County knew
16 of this petition.

17 Mr. Lehr had to assert his rights in this
18 manner because he was prevented from asserting them
19 after Jessica's birth, for after Mr. Lehr's last visit
20 at the hospital during father's visiting hours to see
21 Jessica, Lorraine, the natural mother, withheld the
22 whereabouts of Jessica for approximately six months,
23 after which Mr. Lehr had an opportunity to see Jessica
24 on a couple of weekends, and thereafter for
25 approximately 14 months before Mr. Lehr instituted these

1 paternity proceedings Lorraine Robertson withheld the
2 whereabouts of Jessica from Mr. Lehr.

3 Mr. Lehr tried desperately to find Jessica.
4 However, he was unsuccessful until right before he
5 started the paternity proceedings, at which time he
6 sought counsel and then asserted his rights as a father
7 in the paternity proceeding in Westchester County.

8 This Court has raised the question of
9 jurisdiction as to whether or not it has the right to
10 hear this appeal. Mr. Lehr claims and has claimed in
11 all three courts below that he was denied of his
12 constitutional rights of due process and equal
13 protection by virtue of the fact that the New York
14 statutory scheme as construed and applied to him denied
15 him notice and the opportunity to be heard.

16 In particular, I'm referring to Sections
17 111(a) and 111 of the New York domestic relations law.
18 By the terms and provisions of that law, in particular
19 Section 111(a), only seven categories of unwed fathers
20 were entitled to receive notice. According to the
21 record, Mr. Lehr was not one of these, although there is
22 a question as to whether or not he might have fit into
23 one of these categories, as to whether or not Lorraine,
24 the natural mother, had filed a written sworn statement
25 indicating that Mr. Lehr was the father.

1 QUESTION: Was one of those categories those
2 who register in that registry?

3 MR. FREEMAN: One of the categories is a
4 father who registers by filing a notice of intent to
5 claim paternity.

6 QUESTION: And he never did that?

7 MR. FREEMAN: No, Mr. Lehr never did.

8 QUESTION: He could have.

9 MR. FREEMAN: Mr. Lehr could have,
10 theoretically, if he knew of the registry.

11 QUESTION: Why theoretically?

12 MR. FREEMAN: Theoretically because, number
13 one, if he knew of the registry he could have registered
14 in it. Mr. Lehr indicates that he did not know of the
15 registry.

16 QUESTION: Did he have counsel?

17 MR. FREEMAN: He had counsel at the time.
18 Starting in December he had counsel.

19 QUESTION: And counsel didn't advise him he
20 might register?

21 MR. FREEMAN: No, counsel did not advise him
22 to file in the putative father registry.

23 QUESTION: Does the record show why not?

24 MR. FREEMAN: No, the record does not show why
25 not.

1 When it came time for Mr. Lehr to assert his
2 rights, the putative father registry did not have what
3 Mr. Lehr sought. The putative father registry is a mere
4 notice, an irrevocable notice by one intending to claim
5 paternity. Mr. Lehr --

6 QUESTION: Had he been registered, would he
7 not have had notice of the adoption proceeding?

8 MR. FREEMAN: Had he been registered, he would
9 have been entitled to notice of the adoption
10 proceedings. But we do not look to the state law as the
11 source of our liberty interest here. The state law has
12 construed the fact that in order to obtain a liberty
13 interest worthy of protection of the due process clause
14 of the Fourteenth Amendment, that one must be the
15 biological father and in addition that one must perform
16 one of the seven acts enumerated in Section 111(a).

17 Mr. Lehr looks at the federal Constitution for
18 the source of his liberty interest and for his
19 protection under the Constitution. It's submitted that
20 --

21 QUESTION: Do you suggest by that the state
22 has no power to place some orderly procedures in the
23 area?

24 MR. FREEMAN: No, the creation of a liberty
25 interest has two sources, the federal Constitution and

1 the state. But the state has minimum constitutional
2 standards that we felt were not met by Section 111(a).
3 If the state establishes --

4 QUESTION: I'm speaking of the statutory
5 process. Let's assume the constitutional right that you
6 choose to oppose, for a moment. Can the state put
7 procedural requirements in the exercise of that right?

8 MR. FREEMAN: The state can set up its own
9 procedural requirements, as long as they meet the
10 requirements of the Fourteenth Amendment, the due
11 process safeguards that have been established by the
12 Fourteenth Amendment. The state cannot go below those
13 minimum due process safeguards. It is our contention
14 here that the state has gone far below.

15 QUESTION: Are you suggesting that the
16 registry requirement is in conflict with the
17 constitutional right that you claim?

18 MR. FREEMAN: I'm suggesting that the registry
19 right is not necessary for us to have that
20 constitutional right. What we have here is a liberty
21 interest to maintain a status as a parent.

22 QUESTION: Yes, but one of -- as I understand
23 it, one of his grievances is that he never got notice.

24 MR. FREEMAN: That's correct.

25 QUESTION: And yet, apparently New York had a

1 procedure by which, had he registered, he would have had
2 notice of the adoption proceeding. That's true, isn't
3 it?

4 MR. FREEMAN: Pardon me?

5 QUESTION: He might have had notice of the
6 adoption proceeding merely by registering in the
7 putative father registry. Is that true?

8 MR. FREEMAN: Yes. We've indicated that
9 that's true.

10 QUESTION: Well then, why -- how is --

11 MR. FREEMAN: Because what New York State has
12 said is that before Mr. Lehr was entitled to due process
13 safeguards that he had to file in the putative father
14 registry or perform one of the other acts, and that he
15 had to be a biological father. They have two elements
16 that they require before he has a liberty interest.

17 It's suggested that Mr. Lehr's right as a
18 biological father, the fact that he's one, claiming to
19 be the biological father entitles him to due process
20 procedures. We then look to due process procedures to
21 see what process was due him, and it's contended that
22 notice and the opportunity to be heard are required
23 before Mr. Lehr's liberty interest was terminated here.

24 QUESTION: Mr. Freeman, does that mean, if you
25 rely on the biological relationship as a sufficient

1 justification for the liberty interest -- say there are
2 no statutes at all -- does that mean there could never
3 be a valid adoption carried out where a mother places a
4 child for adoption without giving notice to the parent,
5 to the father?

6 MR. FREEMAN: It's our contention, although we
7 don't fit within that category --

8 QUESTION: I know you don't.

9 MR. FREEMAN: It's our contention that notice
10 and the opportunity to be heard must be given. A
11 biological father is enough to bring in --

12 QUESTION: Is always entitled to notice and an
13 opportunity to be heard?

14 MR. FREEMAN: No, not necessarily entitled to
15 -- what I'm trying to indicate is that once a father is
16 a biological father, he is entitled to the protection of
17 the due process clause.

18 QUESTION: Well, what does that mean with
19 respect to a mother with a newborn infant who wishes to
20 place the baby for adoption in the most expeditious
21 manner possible? Does your view of the Constitution
22 require that she give notice to the father?

23 MR. FREEMAN: Absolutely.

24 QUESTION: And the state must make sure that
25 they --

1 MR. FREEMAN: The state must make reasonable
2 efforts to notify the father in accordance with due
3 process. As this Court has indicated on a number of
4 occasions where identity cannot be found and notice by
5 publication is the only means of notifying somebody,
6 then the court -- the court's permitted to notify
7 somebody and cut off the constitutional rights.

8 QUESTION: All right, even if the girl doesn't
9 identify who the father is and no one knows who the
10 father is, what -- it should be notice by publication?

11 MR. FREEMAN: There should be notice by
12 publication.

13 QUESTION: To an unknown biological father?

14 MR. FREEMAN: Pardon? An unknown biological
15 father. If the mother has not identified the father,
16 then there should be some form of notice, either notice
17 by publication, to whom it may concern --

18 QUESTION: And that would include
19 identification of the mother, of course, and her
20 predicament?

21 MR. FREEMAN: Not necessarily the
22 identification of the mother.

23 QUESTION: How would the notice -- how would a
24 publication be meaningful unless you knew who the person
25 was?

1 MR. FREEMAN: You could identify the child.
2 You could possibly, if the father knew the child --

3 QUESTION: Well, give me an example of a
4 sufficient notice by publication. Child X, born on such
5 and such a date?

6 MR. FREEMAN: We're not saying that notice by
7 publication has to be sufficient. We're saying that you
8 give what due process requires in the circumstances.

9 QUESTION: Well, what does it require if you
10 don't know the father?

11 MR. FREEMAN: It requires notice by -- some
12 form of notice by publication.

13 QUESTION: And what would the publication
14 say? Would it not have to identify the mother to have
15 any meaning at all?

16 MR. FREEMAN: Yes, but nobody says that it has
17 to have meaning. If a father has not done enough acts
18 so that he is in communication with the mother --

19 QUESTION: You're saying a meaningless notice
20 is sufficient?

21 MR. FREEMAN: Pardon me?

22 QUESTION: You're saying a meaningless notice
23 is sufficient?

24 MR. FREEMAN: In some aspects, meaningless --
25 no, we're giving him notice. The very fact -- if the

1 Court's referring to the case of Mullane, where the
2 Court indicated there you may have to give meaningless
3 notice, notice that may oftentimes be futile, knowing
4 that you're not going to get to the party with whom the
5 notice is directed. But if that's the only thing that's
6 available, then that's what's given.

7 QUESTION: Well now, the state here --

8 MR. FREEMAN: But that's not --

9 QUESTION: Excuse me. The state here in
10 effect, perhaps for the reason that published notice is
11 usually generally pretty meaningless, but in this
12 setting would be particularly so, as Justice Stevens has
13 pointed out, and to identify the mother and the child
14 would cause an embarrassment that would haunt them the
15 rest of their lives, so the state said, now, all you men
16 who want to make claims on your illegitimate children,
17 file in this registry and then you'll have all the
18 notices.

19 MR. FREEMAN: Once again, it's our position
20 that the state cannot do -- we're not looking -- the
21 state has not met its due process requirements. The due
22 process --

23 QUESTION: Well, has he met -- has he met --
24 has he given support to his claim by his failure to
25 register?

1 MR. FREEMAN: Mr. Lehr did much more than
2 register. Mr. Lehr's identity was known to all
3 concerned at this particular time. The state knew of
4 Mr. Lehr's concern.

5 QUESTION: The state didn't know. The state
6 had this statute for the purpose of identifying the
7 claimant, did it not, the putative father registry?

8 MR. FREEMAN: For the purpose of readily
9 identifiable fathers.

10 QUESTION: Well, is there something about the
11 registry that would foreclose an argument something like
12 this: Well, the state has given the putative father a
13 method of assuring that he's gotten -- that he will get
14 notice, but that doesn't mean the state shouldn't give
15 notice if they know of the identity and location of the
16 putative father by some other means. Is there something
17 about the registry that prevents that argument?

18 MR. FREEMAN: No, there's nothing about the
19 registry. The registry, as a matter of fact --

20 QUESTION: Because here he certainly made his
21 presence known. By the time the adoption proceeding was
22 final, the adoption was finalized, the court, the
23 adoption court, knew about him. They had actually given
24 him some show cause order.

25 MR. FREEMAN: No. Well, that was not

1 meaningful notice. Notice --

2 QUESTION: Well, I know, but it wasn't -- I
3 know it wasn't meaningful notice about the adoption, but
4 they knew who he was --

5 MR. FREEMAN: Oh, definitely.

6 QUESTION: -- and what his claims were.

7 MR. FREEMAN: Absolutely. The judge knew
8 about that well before he signed the order of adoption.

9 QUESTION: Is there something about the
10 registry that would say that the only way the state can
11 be given notice is through the registry?

12 MR. FREEMAN: No. It's our contention that
13 the state could be given notice in any number of ways.
14 The state --

15 QUESTION: Well then, that's a much easier
16 argument for you to make than the one you're trying to
17 make.

18 QUESTION: To follow up on that, Mr. Freeman,
19 you certainly do not have to urge this Court to require
20 that notice be given to every putative father, by
21 publication or otherwise, to win your case, do you?

22 MR. FREEMAN: I indicated that that was not
23 our case. I said we had done much more than that. We
24 were a readily identifiable father who had shown concern
25 for his child.

1 QUESTION: You should just argue that case.

2 MR. FREEMAN: Well, that's what I'm trying to
3 argue --

4 QUESTION: Good.

5 MR. FREEMAN: -- Mr. Justice Stevens.

6 QUESTION: Tell me about these registries.
7 Are they county registries?

8 MR. FREEMAN: No. This is a central registry
9 in the state.

10 QUESTION: Where, at Albany?

11 MR. FREEMAN: In Albany. And at the last
12 count, since the registry was instituted in 1977 there
13 have been 600-some odd fathers who have filed in the
14 putative father registry, despite the fact that there
15 have been maybe approximately 200,000 out of wedlock
16 births during that same period of time.

17 QUESTION: Well, is it -- could we take
18 judicial notice of the fact that such fathers are
19 ordinarily not anxious to advertise their relationship?

20 MR. FREEMAN: There's a number of reasons why
21 the fathers aren't willing to advertise their
22 relationship. Our contention is that most fathers don't
23 know about the putative father registries, and those
24 fathers that are concerned for their children --

25 QUESTION: No, I'm not talking about whether

1 they know about the registry. Assume they know about
2 it. Is it not a fact of human nature and common human
3 experience that most such fathers do not want to
4 advertise their parenthood?

5 MR. FREEMAN: In our case it was no reason --

6 QUESTION: Well, I'm not talking about your
7 case. I'm talking about the generality. And it's the
8 generality that I'm addressing.

9 MR. FREEMAN: Well, first of all, the notice
10 is a revocable notice, so that if he can file it he can
11 take it back, number one.

12 Number two, those fathers that are concerned
13 and caring for their children would have no need to file
14 in the putative father registry. They may be openly
15 living with the mother, or they may be visiting with the
16 child on a regular basis, or they may have established
17 some sort of contact with the child. They would have no
18 reason to file in the putative father registry.

19 And that was the case with Mr. Lehr. Even had
20 he known about the putative father registry, he would
21 have had no reason to file because both -- as the record
22 indicates, the natural mother knew and acknowledged to
23 others that Lehr was the father here. There was no
24 secret here. There was no right of privacy involved
25 here. Everybody knew that Mr. Lehr was the natural

1 father.

2 The Fourteenth Amendment in determining what
3 procedural safeguards must be given when a liberty
4 interest is terminated or created looks to a number of
5 factors. The first factor is the type of risk that's
6 involved, that if notice and the opportunity is not
7 given what type of risk is there that there will be an
8 erroneous termination of these parental rights?

9 What did we have in Ulster County? We had an
10 ex parte hearing. We had parties present who were
11 interested in one side of the coin. They wanted the
12 adoption of Jessica. There was nobody present to
13 cross-examine, a basic tenet of our society, that when
14 facts are relevant to the determination of an action
15 that that party have the right of cross-examination.
16 Here there was a secret one-sided determination of the
17 child's best interests.

18 QUESTION: Well, I don't think you can condemn
19 procedures of that kind. Most adoptions are carried out
20 that way. But here, of course, your position is that
21 his parenthood was known and the court knew it.

22 MR. FREEMAN: In addition, Mr. Lehr, had he
23 been made a party to these adoption proceedings, would
24 have assisted the judge in making a determination as to
25 the child's best interests. Mr. Lehr's input here would

1 have been substantial.

2 QUESTION: Mr. Freeman, you're not claiming on
3 behalf of Mr. Lehr that as a matter of substantive due
4 process he's entitled to veto the adoption, are you?

5 MR. FREEMAN: We've made that contention, and
6 we believe that Mr. Lehr does have the substantive right
7 of veto to -- the substantive right to veto the
8 adoption, in addition to other substantive rights that
9 he does have: the right to have a hearing as to the
10 child's best interests, the right to prove that he is
11 fit or unfit to exercise that very right to veto.

12 We cannot presume, nobody can presume, that
13 Mr. Lehr did not have a substantial relationship with
14 that child, say one that may have been similar to
15 Stanley. We don't know about what type of relationship
16 Mr. Lehr has until he's put in that courtroom and given
17 the opportunity to be heard.

18 Without being given this right, the court has
19 no way of knowing of the type of relationship which Mr.
20 Lehr had established and the type of relationship which
21 he intended to establish in the future.

22 QUESTION: Well, all that Mr. Lehr asks here,
23 though, is visitation rights, wasn't it?

24 MR. FREEMAN: Mr. Lehr brought on a petition
25 for visitation rights. Mr. Lehr was denied --

1 QUESTION: There's no issue of whether or not
2 he might have a veto of the adoption?

3 MR. FREEMAN: We don't know. There was no
4 hearing.

5 QUESTION: Well, but there isn't any such
6 issue in this case.

7 QUESTION: You've certainly presented that in
8 the lower courts.

9 MR. FREEMAN: Pardon me?

10 QUESTION: You certainly made that claim in
11 the lower courts, didn't you?

12 MR. FREEMAN: What claim is that, Mr.
13 Justice?

14 QUESTION: The veto, that they must have his
15 consent.

16 MR. FREEMAN: Oh. We do claim, we do claim
17 that he has the right to veto.

18 QUESTION: Sure. And that it's a denial of
19 equal protection if you don't get it.

20 MR. FREEMAN: That's correct, that's correct.

21 QUESTION: Certainly there must be some
22 substantive right that you contend for your client,
23 because otherwise to afford him this hearing, if he
24 doesn't have any claims that would have to be taken into
25 consideration at the hearing, doesn't make much sense.

1 MR. FREEMAN: Well, as I've indicated, he has
2 the right to be heard on the best interests of his
3 child. New York already provides for that. Section
4 111(a) provides that those unwed fathers who receive
5 notice of the adoption proceeding have the right to be
6 heard on the child's best interests.

7 In addition, Mr. Lehr would have been heard as
8 to whether or not the new adoptive parents were fit to
9 have an adoption. There have been New York cases which
10 have indicated that because of the history of the
11 natural mother, the emotional history of the natural
12 mother, an adoption was not permitted, irrespective of
13 the fitness of the adoptive father.

14 Mr. Lehr had substantial -- Mr. Lehr lived
15 with the natural mother here for a period of almost
16 approximately two years prior to the birth of Jessica.

17 QUESTION: So you say once you establish your
18 procedural claim New York statutes give you substantive
19 interests which you can assert at the hearing?

20 MR. FREEMAN: And New York statutes -- that's
21 correct, Mr. Justice. New York statutes provide that
22 you do have a right of hearing, to be heard as to the
23 child's best interests.

24 Now, this Court has held that where these
25 deprivations are so substantial as they are here there

1 is a need for heightened procedural due process
2 safeguards. We're basically talking about the most
3 rudimentary of all procedural due process safeguards.
4 We're not talking about a higher evidentiary burden,
5 such as clear and convincing evidence. We're talking
6 about the basic right to be heard, the basic right for a
7 citizen to have his day in court before he's deprived.

8 This Court has held on a number of occasions
9 that this basic right to be heard is given where there
10 is a loss of mere property, a mere driver's license,
11 where wages are garnished, where there's a repossession
12 of a car. Courts have given those people the right to
13 be heard. Here we have something much greater to lose.
14 We have a child to lose, and even the risk of one loss
15 is too great here, so that notice is mandatory in these
16 type of situations.

17 QUESTION: Well, what was the answer of the
18 lower courts to your claim under Caban?

19 MR. FREEMAN: The lower courts -- the family
20 court gave Caban retroactivity, but indicated that
21 because the father here hadn't established a sufficient
22 relationship with the child that Caban was
23 distinguishable. The Appellate Division denied
24 retroactivity of Caban, and the Court of Appeals
25 affirmed that view.

1 It is our claim that Caban should be applied
2 retroactively to this case, although that is not our
3 main point nor does our case rest or fall on that
4 point. Our case is basically one of notice, one of
5 procedural due process, and it is that where -- it is on
6 that issue where the case falls.

7 QUESTION: May I ask you on that, because some
8 of the other questions have indicated that your case is
9 particularly appealing because the judge knew about your
10 client before the final order of adoption was entered.
11 Would you think the case would be different if only the
12 adoptive parents knew about your client, that the judge
13 didn't know? Would that make any difference?

14 MR. FREEMAN: I think he still would have been
15 entitled to notice.

16 QUESTION: And so any time -- your position
17 really is that any time the mother knows the identity of
18 the father the father's entitled to notice?

19 MR. FREEMAN: That's correct, and that's
20 something, say, something like the Uniform Parentage Act
21 has indicated that when the mother puts the child up for
22 adoption that she -- one of the questions asked of her
23 is to identify the father. This goes to encouraging the
24 state's interest of finality.

25 Perhaps the most important state interest that

1 we have here is having an adoption proceeding that is
2 final. The very fact that the state did not give
3 Jonathan Lehr notice here is adversely -- affects that
4 state interest. We all know that to obtain finality in
5 any proceeding the idea is to get as many parties to the
6 proceeding as possible, especially where those parties'
7 rights are being adversely affected.

8 QUESTION: Does the record tell us why he
9 didn't get his name put on the birth certificate?

10 MR. FREEMAN: The record merely indicates that
11 he had assumed that his name was on the birth
12 certificate. There was no reason -- according to New
13 York --

14 QUESTION: He really had two pretty simple
15 opportunities, one to get his name on the birth
16 certificate and the other to file with this registry.

17 MR. FREEMAN: Well, we don't claim that due
18 process requires that we first know of a putative father
19 registry or that we know of Public Health Law 4135,
20 which says that you have to file an affidavit.

21 QUESTION: Do you think there's any -- do you
22 think there's any way in which a putative father could
23 waive all these rights? Supposing he just had not been
24 there at the birth or had gone to Alaska or someplace?

25 MR. FREEMAN: He would not appear at the

1 proceedings. As was indicated in a prior case of this
2 Court, Stanley versus Illinois, those fathers that do
3 not wish to appear will not appear, and their rights
4 will be constitutionally foreclosed provided that some
5 form of notice was attempted to be given to them. Those
6 are the fathers that aren't going to come forward.

7 QUESTION: What I'm trying to ask is, would
8 this case be different if he had gone away? Say he knew
9 the girl was pregnant and he left right away, came back
10 two years later and decided he now wanted to assert an
11 interest in becoming, you know, the father of the child
12 before the adoption was final? Would he have the same
13 rights?

14 MR. FREEMAN: Absolutely. He has the right to
15 be heard. We don't know -- how do we know as to whether
16 or not Mr. Lehr is going to be similarly situated to a
17 mother? What do we know his relationship was?

18 This Court has held that an unwed father can
19 be similarly situated to an unwed mother. They held
20 that in Stanley and they held that in Caban. We don't
21 know. That's the very point of this case. Mr. Lehr's
22 rights as a parent were foreclosed without the court
23 knowing anything. In fact, what the court did know was
24 that there was a very concerned father out there who
25 wanted to visit with the child and wanted to support the

1 child. That's what the court did know. Yet it didn't
2 act on this.

3 And the New York court below, the New York
4 Court of Appeals, indicated that the family court judge
5 was precluded from giving notice to Mr. Lehr, despite
6 this knowledge, because of the provisions of Section 111
7 and Section 111(a).

8 QUESTION: Has he furnished support for the
9 child since its birth?

10 MR. FREEMAN: No, he hasn't, Your Honor.

11 QUESTION: Well, that doesn't suggest any
12 great anxiety to assume that --

13 MR. FREEMAN: Once again, Mr. Lehr when the
14 child was born paid for the -- had had his mother pay
15 for the child's birth, afterwards had requested that he
16 be given the right to support, was denied by the natural
17 mother. Mr. Lehr then went to court and asked the court
18 to impose support obligations upon him. Mr. Lehr made
19 every effort to give this child support.

20 QUESTION: Well, does he need a court order to
21 send a check every month or periodically?

22 MR. FREEMAN: The natural mother indicated
23 that she would not accept it. But we can't go into the
24 nature or extent of this relationship based on
25 conflicting affidavits here.

1 QUESTION: Well, we can if we want to.

2 CHIEF JUSTICE BURGER: Yes, Mr. Chief Justice,
3 you can. But what I am saying is that in every case
4 that's been decided by this Court where they've dealt
5 with what type of relationship -- in the Quilloin case
6 the Court indicated that support was irregular, but they
7 only indicated that after there was a full evidentiary
8 hearing at which the father had the right to give any
9 and all evidence concerning his individualized interests
10 in that child, despite the fact that maybe he didn't
11 have the substantive right to veto that adoption or --
12 and continue his visitation.

13 The very mere fact that a person doesn't have
14 custody of a child doesn't mean his parental rights can
15 be terminated. I mean, he can show the court where it
16 would be in the best interests of a child to have
17 visitations and his parental rights continued beyond the
18 time that the adoption takes place. And it is
19 Appellant's contention that he was not given any
20 opportunity to advise the court as to what these best
21 interests were, and certainly the best interests of
22 Jessica could not have been fostered by the court not
23 taking these factors into consideration.

24 With the Court's permission, I'd like to use
25 the remainder of my time for rebuttal.

1 CHIEF JUSTICE BURGER: Very well.

2 Mr. Samoff.

3 ORAL ARGUMENT OF JAY L. SAMOFF, ESQ.,

4 ON BEHALF OF APPELLEES

5 MR. SAMOFF: Mr. Chief Justice and may it
6 please the Court:

7 Throughout this argument, I respectfully
8 request that the Court bear three things in mind:

9 One is that we do not and have not conceded
10 that the Appellant is in fact the father of the child.

11 Secondly, that this is a Quilloin type
12 adoption, a stepfather adoption, a stepfather who was
13 adopting his wife's child. And since there --

14 And the third point is that the Appellant
15 never had and never sought custody of the child, which
16 meant that regardless of what the Appellant said in any
17 court anywhere that child was going to continue to live
18 in the mother's household and was going to continue to
19 be the de facto child of the stepfather. And this is
20 what Judge Elwyn was faced with in family court.

21 I wish to point out a factual inaccuracy in
22 Appellant's argument --

23 QUESTION: Well, what would happen if he had
24 been on the register?

25 MR. SAMOFF: He would have gotten notice.

1 QUESTION: What for?

2 MR. SAMOFF: To provide testimony regarding
3 the child's best interests.

4 QUESTION: Well, that's a -- I thought you've
5 been arguing that it wouldn't have made much difference,
6 that the adoption would have had to go through anyway
7 because it was a stepfather adoption.

8 MR. SAMOFF: I didn't say it had to go through
9 anyway. What I did say --

10 QUESTION: Well --

11 MR. SAMOFF: No, I think the sequence of
12 events is extremely important here. What we have is an
13 adoption hearing that was held, conducted and finalized,
14 finalized with the exception of the ministerial act of
15 signing the order, on January the 15th, 1979. The
16 Appellant did not commence his paternity petition -- he
17 did not file it in the Westchester County family court
18 until January 31st, and it gave no notice to anybody
19 until the Westchester County family court served by mail
20 a summons with the petition in late February.

21 So that it is not correct to say --

22 QUESTION: Well, why did the judge issue an
23 order to show cause?

24 MR. SAMOFF: That happened in late February.

25 QUESTION: Yes, after all -- after the

1 proceeding was all over, you say.

2 MR. SAMOFF: That order to show cause was
3 requested by myself, and it was strictly a motion to
4 change the venue of the Westchester County proceeding to
5 Ulster County.

6 QUESTION: Why did you want it over there --

7 MR. SAMOFF: I didn't want to play in his
8 ballpark, Your Honor.

9 QUESTION: -- if it was irrelevant?

10 MR. SAMOFF: I did not move to have the
11 proceedings --

12 QUESTION: Well, what if it had been
13 transferred? What would you have done with it?

14 MR. SAMOFF: I would have moved -- I would
15 have done the same thing that I in fact did in
16 Westchester.

17 QUESTION: And what you're doing now, ignore
18 him.

19 MR. SAMOFF: I didn't ignore him, Your Honor.
20 I moved to dismiss his petition, and in fact it was --

21 QUESTION: Well, what if it had been
22 transferred?

23 MR. SAMOFF: I would have done the same
24 thing. It was merely a motion to change venue, not to
25 consolidate the proceedings.

1 QUESTION: But would he have then had an
2 opportunity to be heard?

3 MR. SAMOFF: No. That would be
4 discretionary. That's the safety valve here.

5 QUESTION: Mr. Samoff, what's the distance
6 between Kingston and White Plains?

7 MR. SAMOFF: Hour and a half, hour and 45
8 minutes.

9 It was merely a convenience motion for myself
10 and for any witnesses I might have to bring.

11 QUESTION: Why didn't you give notice to the
12 father?

13 MR. SAMOFF: The statute didn't provide for
14 it. Bear in mind --

15 QUESTION: That's the answer?

16 MR. SAMOFF: We don't --

17 QUESTION: Is that your only answer?

18 MR. SAMOFF: Yes, Your Honor. Well, we don't
19 admit that he's the father. That's the first thing.
20 And to give notice to somebody who had not asserted
21 rights under the statute would be to give rights to
22 somebody who is not necessarily entitled to them.

23 QUESTION: He might sue you for libel.

24 MR. SAMOFF: We did not state one way or
25 another whether he is the father. We did not say he's

1 not the father. As a matter of fact, there is a
2 statutory protection in the paternity proceeding where
3 --

4 QUESTION: Is it true that he lived with your
5 client for two and a half years?

6 MR. SAMOFF: Intermittently, yes, that's
7 true.

8 QUESTION: You knew that?

9 MR. SAMOFF: Yes.

10 QUESTION: And you knew the child was born --

11 MR. SAMOFF: We certainly --

12 QUESTION: -- while they were living
13 together?

14 MR. SAMOFF: The child -- they did not live
15 together from the time she went to the hospital to have
16 the child and thereafter.

17 QUESTION: Well, I don't see how they could.
18 He couldn't live with her in the hospital.

19 MR. SAMOFF: They did not resume living
20 together thereafter.

21 QUESTION: But they lived -- they were living
22 together when the child was conceived, and you knew it.

23 MR. SAMOFF: I don't know it, and the reason,
24 Your Honor, I don't know --

25 QUESTION: And you knew it.

1 MR. SAMOFF: The reason I don't know
2 precisely, Your Honor, is it is true that they lived
3 together over a two or two and a half year period prior
4 to the birth of the child, but it was not continuous.
5 There were breaks in this living arrangement where one
6 would move out and move back.

7 What we had was a situation where this is a
8 claimant to paternity who never provided support, who
9 never visited except on a few occasions in 1977, and
10 then he states in the joint appendix on page 30 and 31,
11 he admits that he knew precisely where they were as
12 early as August 1978 -- it's right there in his own
13 affidavit -- and that he took no steps, did absolutely
14 nothing to exhibit an interest until his attorney writes
15 a letter, I think in December, saying we want visitation
16 with your child. He doesn't even claim that it's his
17 own child.

18 He then does not put his name on the putative
19 father registry, despite the fact that he is represented
20 by counsel. He did nothing at this point, and in
21 January, at the very end of January for the very first
22 time, after we have conducted the hearing he files his
23 petition in Westchester.

24 Thereafter, a full month later goes by before
25 we even have notice about it. And as an officer of the

1 court I immediately went to Judge Elwyn and told him. I
2 also told Westchester. And the situation at this point
3 was, what was Judge Elwyn faced with?

4 Now, bear in mind Caban had not been
5 determined at this point, which meant that, assuming
6 arguendo he was the father, the sole interest that this
7 man had was to provide evidence as to what's in the best
8 interest of the child. Now, Judge Elwyn had: one,
9 conducted a hearing in which he took testimony; two, he
10 had had a social services report which indicated that
11 certainly it was in the child's best interests; and
12 three and most damningly is, in the Westchester County
13 paternity petition he specifically stated that he only
14 wanted visitation. He was virtually conceding the
15 propriety of the mother's home.

16 Well, Judge Elwyn had a discretionary right to
17 reopen the whole thing. By the way, there was no
18 application to do so at this point. It was all vague
19 and up in the air.

20 QUESTION: It was all one-sided, too, wasn't
21 it? It was you and the judge.

22 MR. SAMOFF: No, Your Honor, I don't think so,
23 because --

24 QUESTION: Well, that's what you just said.

25 MR. SAMOFF: Well, I think that the judge --

1 that there was at least a four or five-day hiatus where
2 action could have been taken, where a telephone call at
3 that point might have been made.

4 But in any and all events, Judge Elwyn
5 determined, and looking at Quilloin and the quote in
6 Quilloin: "We have little doubt that the due process
7 clause would be offended if a state were to attempt to
8 force the breakup of a natural family over the
9 objections of the parents and their children, without
10 some showing of unfitness, for the sole reason that to
11 do so was thought to be in the child's best interest.
12 But this is not a case in which the unwed father at any
13 time had or sought actual or legal custody of his
14 child. Nor is this a case in which the proposed
15 adoption would place the child with a new set of parents
16 with whom the child had never before lived. Rather, the
17 result of the adoption in this case is to give full
18 recognition to a family unit already in existence, a
19 result desired by all concerned except appellant.
20 Whatever might be required in other situations, we
21 cannot say that the state was required in this situation
22 to find anything more than that the adoption, and denial
23 of legitimation, were in the best interest of the
24 child."

25 Now, there was a safety valve here. This

1 wasn't necessarily the end of it. There were two safety
2 valves:

3 One, New York law provides that he could have
4 moved to intervene even after the signing of the order.
5 No motion was made. He filed a notice of appeal and
6 abandoned the appeal. It was dismissed by operation of
7 law. If he's contending that that is an intervention,
8 then it's res judicata; the case is decided.

9 Now, what is the other safety valve? And this
10 is what the Court of Appeals noted. There is a Section
11 114 of the domestic relations law, which says that for
12 good cause shown an application can be made to the court
13 showing why the adoption should not be set aside. This
14 was there.

15 This was known to Judge Elwyn. He said, if
16 this man wants to participate he can make his
17 application in a timely and orderly fashion. He had
18 nothing before him. The hearing had already been
19 conducted before Judge Elwyn knew of his existence.

20 A 114 application in fact was made, and at
21 that time he had an opportunity to lay bare his soul.
22 He didn't have to prove his case. All he had to do is
23 make his allegations, lay out a prima facie case as to
24 why he thought the adoption should not go through and
25 why it was not in the child's best interests. Bear in

1 mind that the scope of his participation prior to Caban
2 was strictly what is in the best interest of the child.

3 And he in fact does lay bare his soul, and
4 every court below found that he had not even touched on
5 the subject of best interests, that in fact if every
6 single solitary thing he said was true there was nothing
7 to suggest that it was not in the child's best
8 interests. So not having even made out a prima facie
9 case, there was no point even for a hearing at that
10 point.

11 QUESTION: Well, could you summarize what his
12 allegations were in the 114 proceeding?

13 MR. SAMOFF: Yes. He goes through the entire
14 history of how the Appellee mother allegedly wronged
15 him, going through her psychological distress years
16 earlier, postpartum depression and things with a
17 miscarriage that she had had. But he doesn't talk about
18 the child in any way, shape or form. All he talked
19 about was how he had been wronged at the hands of this
20 woman.

21 But what he did do is he put all his eggs in
22 one constitutional basket. Seven weeks or six weeks
23 after this court -- after the family court signed the
24 order of adoption, this Court announced Caban. He
25 seizes in his 114 application on Caban, saying it is

1 retroactive and therefore he has the right to veto, and
2 that's where his rights spring from.

3 And this is what the Court of Appeals seized
4 on. The Court of Appeals said, we are not going to hold
5 Caban retroactive and as a result we don't even reach
6 his constitutional arguments. Now, whether or not one
7 may imply that they upheld the constitutionality of the
8 New York statute, I suppose it may be implied, but for
9 the fact that the Court of Appeals itself specifically
10 stated in no uncertain terms that it wasn't addressing
11 that issue.

12 Accordingly, I suggest that this Court should
13 not and does not have jurisdiction over this case,
14 because the Court of Appeals, rightly or wrongly, said
15 because Caban is not retroactive we are not reaching his
16 constitutional arguments. And that in effect is what
17 they said.

18 QUESTION: Well, you can't avoid jurisdiction
19 here just by saying, we don't want to deal with the
20 constitutional claims, if they're properly presented.

21 MR. SAMOFF: I think that under 1257,
22 subdivision (2), there are a couple of elements: one,
23 the highest court of the state -- the constitutional
24 argument must be raised in the first instance.
25 Secondly, the highest court of the state must in fact

1 affirm the constitutionality of the statute. That
2 affirmance can be done expressly or impliedly, and it is
3 argued here that it's done impliedly.

4 Well, as I said, the implication might be
5 drawn, but for the fact that the court expressly said it
6 wasn't ruling on that issue. And if the highest court
7 of the state has not ruled on the issue, then that's not
8 --

9 QUESTION: How could it avoid it if it's
10 properly presented and might be determinative of the
11 case?

12 MR. SAMOFF: Because they found another means
13 out.

14 QUESTION: Well, so do you think it's an
15 independent state ground, is that it?

16 MR. SAMOFF: There's an independent grounds.
17 I don't know whether it's a state grounds. It's Caban.
18 They addressed it in terms of Caban. They said,
19 whatever rights he has, because that's all he raised in
20 his -- that's all the real substance that he raised in
21 his 114 --

22 QUESTION: Well, I know, but if you reject the
23 claim, if you reject the Caban claim, you have rejected
24 the federal issue. It may be, it may have rejected it
25 correctly, but that doesn't mean there's no

1 jurisdiction.

2 MR. SAMOFF: I picked up my cue, Your Honor,
3 from the Court of Appeals. When they tell me they're
4 not addressing the issue, who am I to argue with the
5 Court of Appeals when they tell me that? That's for
6 this Court to do.

7 QUESTION: I was getting ready to say, you
8 don't mind us arguing a little bit?

9 MR. SAMOFF: Not at all, Your Honor.

10 Now, I think a major point that was raised in
11 Quilloin is that this stepfather adoption is a very
12 different kind of adoption. This is not a situation
13 where the child is going to be placed in a strange home
14 --

15 QUESTION: Could I ask you, is it, in New York
16 is it inconsistent with the adoption to give visitation
17 rights?

18 MR. SAMOFF: There is no law, there is no
19 statute prohibiting it. However, New York has --

20 QUESTION: It's never done, though, is it?

21 MR. SAMOFF: No. The case law has said the
22 only instance where it has been done is with the consent
23 of the adoptive parents. As a matter of fact, that
24 issue came up in this case in the Westchester County
25 paternity proceeding, where he argued in that case, the

1 Appellant in this case argued in that case, that the
2 Westchester County family court should permit the
3 paternity proceeding to go ahead despite the fact that
4 there had been an adoption, because it would give him
5 visitation -- it might give him visitation rights, and
6 that the court had the authority to permit visitation.

7 In the argument in that case -- it was all
8 submitted. There was no oral argument.

9 QUESTION: Does a mother always have the power
10 to veto an adoption in New York?

11 MR. SAMOFF: Yes. Yes, and it's --

12 QUESTION: So if the child is living with the
13 father and always has, and the mother has departed and
14 remarries, and the father remarries and the new mother
15 wants to adopt the child, the mother can nevertheless
16 veto it?

17 MR. SAMOFF: That is an inequity that this
18 Court I think cleared up in Caban. But this is
19 pre-Caban.

20 QUESTION: Well, if this were post-Caban what
21 would you say then?

22 MR. SAMOFF: If this were post-Caban, we'd
23 have to assume for the sake of argument that he is the
24 father.

25 QUESTION: Yes, yes.

1 MR. SAMOFF: But that's strictly just for the
2 sake of argument. If he in fact is the father and if he
3 in fact did not waive his paternal rights through
4 abandonment or lack of support or whatever --

5 QUESTION: You're getting there, you're
6 getting there.

7 MR. SAMOFF: -- then under those circumstances
8 he now could also veto the adoption. That's a lot of
9 if's.

10 QUESTION: After Caban, yes.

11 MR. SAMOFF: After Caban.

12 QUESTION: Well, why shouldn't -- this is a
13 civil case. Why shouldn't we apply the law as it is in
14 an appellate court the way the law is then?

15 MR. SAMOFF: First of all, this is not a
16 direct -- this case was was not in the appellate process
17 at the time Caban came down.

18 QUESTION: This is a motion to reconsider or a
19 --

20 MR. SAMOFF: This is a separate proceeding.

21 QUESTION: To what?

22 MR. SAMOFF: To set aside the order of
23 adoption.

24 QUESTION: Well, has it got a different
25 number?

1 MR. SAMOFF: I don't think there was a
2 number.

3 QUESTION: You made a -- the motion is made in
4 this case, the same case. There's a procedure whereby
5 you can attempt to reopen the same case.

6 MR. SAMOFF: The Court of Appeals ruled on
7 this directly and determined that it is in fact a
8 separate case, that the order -- that the first case
9 ended with the filing of the order of adoption, and that
10 no appeal taken -- actually, there was an appeal taken
11 from it, which was dismissed by operation of law.

12 So that that case was over and done with.
13 This is a separate application to set it aside, which is
14 also permitted. But it is a separate case. It is a
15 post-judgment attack.

16 QUESTION: Of course, he had no way of
17 appealing the adoption.

18 MR. SAMOFF: Yes, he did. He could have moved
19 to intervene. Even post-order, he is permitted in a
20 timely fashion -- and there is no rule on it that says
21 what the timely fashion is -- he could have moved --

22 QUESTION: And that would have a different
23 consequence than this procedure he did use?

24 MR. SAMOFF: Yes, because what would happen
25 is, after Judge Elwyn signs the order he then could move

1 to intervene.

2 QUESTION: Well, it's sort of a way of
3 avoiding intervention, having to intervene. You make
4 this motion and if you have some standing you make it,
5 and the court rules on your questions on the merits.
6 You for all practical purposes are in the case.

7 MR. SAMOFF: The right to appeal and the right
8 to perpetuate --

9 QUESTION: What if the court had taken his
10 Caban claim and said, yes, it's retroactive? What would
11 they have done with it? You would have said, well, I
12 guess Caban is retroactive. Then what would have
13 happened in this case?

14 MR. SAMOFF: I could have appealed.

15 QUESTION: Well, let's assume the Court of
16 Appeals of New York said Caban is retroactive and
17 denying him the power to veto the adoption is
18 unconstitutional. What would have happened then?

19 MR. SAMOFF: I'm not sure I completely
20 understand the question, because if --

21 QUESTION: Well, what if the Court of Appeals
22 had ruled the other way on the Caban claim, namely that
23 it is retroactive. What would the court have done,
24 said, sorry, but this is a separate proceeding?

25 MR. SAMOFF: I think in order to come to that

1 conclusion they have to come to a threshold conclusion,
2 that this is in fact the same case.

3 There's another argument also, and that is
4 that the rights given under Caban, if they did exist,
5 are substantive rights. It's substantive rights that
6 lead to procedural due process rights, which gets us
7 back to the procedure of 111(a), and the procedure of
8 111(a) does in fact provide a mechanism whereby he could
9 have received notice.

10 The interesting thing is that even the
11 dissenters throughout have never said Caban is
12 retroactive, have never found that the statute is
13 infirm. What they did find was that -- I'm talking
14 about the dissenters now. The dissenters said, at most
15 there is an abuse of discretion. And I suggest to this
16 Court that there's no abuse of discretion if one
17 considers the situation Judge Elwyn was faced with and
18 the fact that there were alternatives, that this fellow
19 could have intervened and he could have appealed from a
20 denial of the intervention. If the intervention had
21 been granted it would have given him status as a party,
22 which would have given him a direct appeal in the case.
23 Plus, on top of all that he still had a 114
24 application.

25 QUESTION: Is this motion to intervene limited

1 to people who didn't have notice?

2 MR. SAMOFF: I don't think it's -- I don't
3 think it's limited in any way. I think any person
4 claiming an interest in the action could move to
5 intervene. It may not be granted.

6 QUESTION: Well, do you think somebody who was
7 a party could, he couldn't intervene?

8 MR. SAMOFF: I'm sorry, I didn't hear.

9 QUESTION: A party couldn't intervene?

10 MR. SAMOFF: If he's already a party he has no
11 need to intervene, that's correct.

12 QUESTION: That's right. So it looks to me
13 like it's for those who didn't have notice.

14 MR. SAMOFF: Either did not have notice or
15 whose interest is --

16 QUESTION: You keep mentioning it. I don't
17 see where it helps you. I think it hurts you.

18 QUESTION: Is there a period of time specified
19 under New York law in which intervention may be
20 considered?

21 MR. SAMOFF: No. No, I believe it just has to
22 be timely and reasonable time. It's -- it mostly
23 appears in Weinstein, Corn and Miller, under 2 New York
24 Civil Practice, and that's where the discussion takes
25 place. There are no time limits set in the statute

1 regarding intervention.

2 QUESTION: May I ask this question.

3 Forgetting a moment all the possible proceedings that
4 might have taken place, supposing the Court now thinks
5 that there should have been notice to the father and
6 they set aside the decree, and so you have to start all
7 over. Is it not clear that if that happens then Caban
8 will apply and then there is no way in the world you can
9 adopt without his consent?

10 MR. SAMOFF: Given the assumptions that we
11 gave before, that he is in fact the father, can
12 establish it, and that he did not otherwise abandon the
13 child --

14 QUESTION: Right.

15 MR. SAMOFF: -- that's right, this adoption is
16 dead, finished.

17 QUESTION: So that actually, although we're
18 addressing a procedural point, we may actually also
19 decide the merits inevitably?

20 MR. SAMOFF: Oh, yes. Oh, yes. That is a
21 very major -- it is a very major point of our argument,
22 is that we now have a -- we have a child who has always
23 lived in one family, we have a person who is a claimant
24 who has never sought custody, never had custody, never
25 supported the child, never done anything with respect to

1 this child, and who concedes the propriety of the
2 mother's home.

3 If this case is reversed, then there's a very
4 real potential that if he can establish he's the father
5 and hasn't abandoned, that he can veto the adoption.
6 And that is the question that Judge Elwyn was faced with
7 when this came up to him.

8 QUESTION: Well, under your state law is that
9 an absolute veto?

10 MR. SAMOFF: Yes. His consent -- it's not
11 called veto. His consent to adoption is necessary.

12 QUESTION: Just like the mother's is?

13 MR. SAMOFF: Yes, yes. And there's no
14 question about it. This Court has determined that in
15 the Caban case. By the way --

16 QUESTION: You have just said that he had
17 never done anything for the child. I understood your
18 friend to say that the Appellant here had persuaded his
19 mother to pay for the hospital bills.

20 MR. SAMOFF: That's a bit misleading. To
21 understand this fully --

22 QUESTION: Not the mother of the child, but
23 the mother of the --

24 MR. SAMOFF: Right.

25 QUESTION: -- of --

1 MR. SAMOFF: His mother, Appellant's mother.

2 My client, at a time when she was in great
3 personal distress, became the ward in fact, if not in
4 law, of Mr. Lehr's mother. She acted as her guardian,
5 and in fact that was how the Appellant and Appellee
6 met. So that she was acting as a grandmother figure
7 regardless, and that is what happened.

8 I point out that he states in one of his
9 papers that he had offered to set up a trust fund for
10 the child and that this was refused. But I point out
11 that the approval of the mother was irrelevant. He
12 could have set up a Totten trust regardless. He didn't
13 need her permission.

14 He claims that she hid from him and therefore
15 he was deprived of taking advantage of the statute, the
16 111(a) statute, the putative father registry. But he
17 didn't even have to know where she was. We of course
18 deny that she hid from him. But he didn't have to know
19 where she was. That putative father registry is open to
20 anyone and everyone. It is so broadly stated that a
21 woman claiming to be the father can be guaranteed of
22 notice. It's not even gender-based. Anybody can put
23 their name on that registry.

24 QUESTION: I'm still bothered by your absolute
25 veto provisions. Surely in New York a child can be

1 taken away from a parent under certain circumstances.

2 MR. SAMOFF: Oh, yes, abandonment.

3 QUESTION: Well then, it isn't an absolute
4 veto.

5 MR. SAMOFF: What I was responding to, I
6 believe, was Mr. Justice Stevens' question, that given
7 the givens that we had before, that he is in fact the
8 father and had not abandoned, then it is an absolute
9 veto.

10 MR. SAMOFF: It is a veto to the adoption.

11 MR. SAMOFF: A veto to the adoption.

12 QUESTION: And it's only an absolute veto
13 because the New York statute gives the mother an
14 absolute veto right.

15 MR. SAMOFF: The statute --

16 QUESTION: Caban was an equal protection
17 case. It wasn't a substantive due process.

18 MR. SAMOFF: That's correct. The statute has
19 been revised.

20 QUESTION: Yes, but a child can even be taken
21 away from a mother.

22 MR. SAMOFF: Oh, certainly.

23 QUESTION: Lassiter.

24 MR. SAMOFF: Yes.

25 QUESTION: Some of the other things are

1 examples of that.

2 MR. SAMOFF: Sure. In abuse cases, permanent
3 neglect cases like Santosky --

4 QUESTION: Vetoing the adoption or refusing to
5 consent to the adoption doesn't have anything to do with
6 custody. The child would continue to live with the
7 mother.

8 MR. SAMOFF: That is correct, that is
9 correct. But this Court has recognized in Quilloin that
10 there is a very compelling state interest and public
11 interest in legitimizing -- legitimatizing existing
12 family units --

13 QUESTION: If there wasn't an adoption, but
14 just custody by the mother, unless the father was
15 somehow disqualified he could have visitation rights and
16 could maintain some kind of a relationship with his
17 child.

18 MR. SAMOFF: That's true in every adoption
19 case there is.

20 QUESTION: Well, in this case, as I understand
21 it, all he wants is visitation, isn't that right?

22 MR. SAMOFF: Yes.

23 QUESTION: Well, that is all --

24 QUESTION: And if this decree is reversed,
25 even though there may not be an adoption, I gather the

1 mother continues, and the stepfather, with custody of
2 the child, and all that he gets are visitation rights;
3 is that right?

4 MR. SAMOFF: If he is not otherwise
5 disqualified, yes. He would still have to establish his
6 paternity and --

7 QUESTION: I appreciate that. But all -- the
8 bottom line for him if he wins on his present
9 application is only visitation rights, isn't it?

10 MR. SAMOFF: That was the status at the time
11 he filed his paternity petition.

12 QUESTION: Well, what is it now?

13 MR. SAMOFF: He could change his tune now.
14 Oh, he could change his tune. He could now seek custody
15 if he wants.

16 QUESTION: With a new petition?

17 MR. SAMOFF: Sure, with a new petition. That
18 other petition was dismissed.

19 QUESTION: But he wouldn't win unless he shows
20 the mother is unfit to have custody.

21 MR. SAMOFF: But we contend that that is
22 precisely the kind of thing that he could have shown in
23 his 114 petition and failed to do.

24 QUESTION: Mr. Samoff, are you saying or
25 conceding that as a matter of federal constitutional law

1 that if the natural father does not abandon the child
2 and doesn't consent to an adoption he can veto any
3 adoption until the child reaches majority? Perhaps this
4 Court has held that; I just hadn't realized it.

5 MR. SAMOFF: No, I didn't contend that. I
6 contend under the statute, under New York statutory
7 scheme, that could happen.

8 QUESTION: Well, all you have to do is to
9 change the law about the necessity for the mother's
10 consent, put them on an equal basis, and Caban is out
11 the window.

12 MR. SAMOFF: Well, fortunately or
13 unfortunately, New York has changed its law in response
14 to Caban and has not dispensed with the consent. It
15 adds a new category of persons whose consent is
16 required.

17 QUESTION: Which is the fathers.

18 MR. SAMOFF: Which is the father. But that is
19 a substantive right that one must establish through
20 procedural methods --

21 QUESTION: Yes.

22 MR. SAMOFF: -- to establish that he is the
23 father. And we're saying he had the procedure available
24 to him and failed to take advantage of it. He would
25 argue that what he did was even more. I suggest that

1 what he did was something other than what the statute
2 required, but not more, because if he had timely filed
3 on the putative father registry we would have known of
4 his existence in advance.

5 This putative father registry was checked
6 three times. I checked it before filing the petition,
7 the court checked it at the time of filing the petition,
8 and right up to the day we walked into the court for a
9 hearing on January 15th the court again checked it and
10 got a certificate that there was nobody on the list. At
11 this point he still hadn't even started his paternity
12 petition.

13 QUESTION: Mr. Samoff, I thought under the
14 amended New York law that the consent of the father
15 would only be required if the father had maintained a
16 substantial and continuous or repeated contact with the
17 child.

18 MR. SAMOFF: Yes. There are two other
19 provisions, also, that follow that.

20 QUESTION: Or the payment of support, or other
21 things that I would think under the facts of this case
22 would be very unlikely to be established.

23 MR. SAMOFF: If this Court is going to reverse
24 and send it back, one, we hold this child in limbo
25 through several more legal proceedings; and, based upon

1 what Your Honor has just stated, upon the face of it he
2 is disqualified, then what are we doing here?

3 QUESTION: On the face of it, would you not
4 agree that under the amended statute even if it were to
5 go back it is certainly not a foregone conclusion that
6 the father would have a so-called veto power or would
7 have to consent to the adoption?

8 MR. SAMOFF: Certainly, certainly. Starting
9 with the premise that we don't even concede he's the
10 father, there's the possibility --

11 QUESTION: All right, but assuming he
12 establishes that, it's not quite the picture you were
13 painting, is it?

14 MR. SAMOFF: No, because I do believe that in
15 any and all events he would not be entitled to notice --
16 I mean, not be entitled to notice and withhold his
17 consent, I should say, even under the new statute.

18 I see my time is up. Thank you.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further?

21 ORAL ARGUMENT OF DAVID J. FREEMAN, ESQ.

22 ON BEHALF OF APPELLANT -- REBUTTAL

23 MR. FREEMAN: Briefly, Mr. Chief Justice.
24 There's two points I'd like to point out here.

25 I'm glad that Caban point was cleared up. The

1 very fact that this case goes back does not necessarily
2 mean that this adoption will not remain or that the
3 parents will be broken up or that custody will be
4 changed. New York has a continuous relationship
5 statute, as Justice O'Connor has indicated.

6 Great mention here has been made of the fact
7 that Mr. Lehr has not shown in his affidavit sufficient
8 facts which would warrant the belief that he would have
9 any input into the best interest hearing here. Due
10 process does not say that because one -- once one is
11 entitled to notice under due process, you must wipe the
12 slate clean, as this Court has said in Armstrong versus
13 Manzo, go back to the position where he would have been
14 had he been given notice. The fact that -- the facts
15 that show that he might not be entitled to the
16 substantive relief that he may be requesting does not
17 have anything to do with his right to notice.

18 Much also has been made about this
19 intervention motion here. In substance, probably, the
20 intervention motion was made by the motion to vacate.
21 It's in fact the same type of motion, asking to be a
22 party in the proceedings.

23 QUESTION: Are you telling us there will not
24 be a reopening of the adoption hearing?

25 MR. FREEMAN: Pardon me?

1 QUESTION: Are you telling us that the
2 adoption proceedings will not be reopened if we reverse
3 here?

4 MR. FREEMAN: No, there will be a reopening of
5 the adoption proceedings.

6 QUESTION: Then they'll start de novo, won't
7 they?

8 MR. FREEMAN: There should be a starting of de
9 novo, or possibly, there is the other possibility, where
10 a hearing would be held as if the adoption had not taken
11 place, giving the Appellant all the rights that he would
12 have had had he been given notice originally.

13 All we're asking for is to be heard on
14 whatever substantive rights we may have. We don't know
15 what substantive rights we're going to have. They're
16 going to depend on our contacts with the child. The New
17 York statute now provides that one of the factors that's
18 taken into consideration is whether or not the father
19 was prevented from seeing the child by the mother. And
20 in addition, the New York statute provides that the
21 amount of support which he is required to give is
22 dependent upon his financial circumstances.

23 Getting back to the intervention motion for a
24 second --

25 QUESTION: Could I just ask one question. You

1 do object to the adoption, don't you?

2 MR. FREEMAN: Pardon me?

3 QUESTION: Does your client --

4 MR. FREEMAN: Yes, we object to the adoption
5 because it terminates our parental rights forever, and
6 we cannot see Jessica any more unless --

7 QUESTION: You do object. That's all I
8 asked.

9 MR. FREEMAN: Okay. With respect to the
10 intervention motion, what the Appellees are contending
11 is that in order to get due process one must file a
12 notice to intervene, and that of course does not follow
13 from what our Constitution says.

14 Thank you, Mr. Chief Justice.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen.
16 The case is submitted.

17 (Whereupon, at 1:58 p.m., the case in the
18 above-entitled matter was submitted.)

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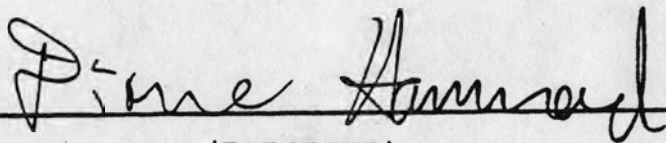
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JONATHAN LEHR, Appellant v. LORRAINE ROBERTSON ET AL # 81-1756

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BY

A handwritten signature in cursive script, appearing to read "Pine Amund", is written over a solid horizontal line.

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