

The Burger Court Opinion Writing Database

Caban v. Mohammed

441 U.S. 380 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 13, 1978

Re: 77-6431 - Caban v. Mohammed

Dear Bill:

This will confirm our telephone discussion of the above and your assignment to Lewis.

I may well wind up in your position, but I have enough reservations so that I think it appropriate for you to assign.

The impasse that will result from our contemplated holding will reduce this to a custody and visitation case, and the state courts can handle that in due course.

Regards,

WB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 14, 1978

PERSONAL

Dear Harry:

RE: 77-6431 - Caban v. Mohammed

Are you disposed to take on a dissent
in this case?

Regards,

LRB

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 14, 1978

Dear Harry:

Re: 77-6431 Caban v. Mohammed

The "reservations" I mentioned in the November 13 memo to Bill Brennan are still there. They are enough to deter me from trying to write a dissent, but there is a greater likelihood that I will remain in the "affirm" column.

Regards,

CRB

Mr. Justice Blackmun

cc: Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1979

Re: 77-6431 - Caban v. Mohammed

Dear Potter:

I take it John's memo will bear on Caban alone. I am with two others to affirm, and if you have moved to affirm and John does the same, that will turn the Conference vote around.

Regards,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1979

Re: 77-6431 - Caban v. Mohammed

Dear John:

I join your dissent.

Regards,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1979

RE: No. 77-6431 Caban v. Mohammed

Dear Lewis:

I am happy to join your opinion in the above
as recirculated on January 19.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1979

Memorandum to the Conference

Re: 77-6431 - Caban v. Mohammed

78-3 - Parham v. Hughes

As indicated at our conference yesterday, I have vacillated a great deal in the Caban case. I have talked about it to John Stevens this morning, and he has agreed to undertake a memorandum that would uphold the New York statute.

My present tentative view in the Parham case is that the judgment should be affirmed.

Sincerely,

P.S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice [unclear]
Mr. Justice [unclear]

15 MAR 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim Mohammed and
Maria Mohammed. } On Appeal from the Court of
Appeals of New York.

[March —, 1979]

MR. JUSTICE STEWART, dissenting.

For reasons similar to those expressed in the dissenting opinion of MR. JUSTICE STEVENS, I agree that § 111 (1)(c) of the New York Domestic Relations Law is not constitutionally infirm. The State's interest in promoting the welfare of illegitimate children is of far greater importance than the opinion of the Court would suggest. Unlike the children of married parents, illegitimate children begin life with formidable handicaps. They typically depend upon the care and economic support of only one parent—usually the mother. And, even in this era of changing mores they still may face substantial obstacles simply because they are illegitimate. Adoption provides perhaps the most generally available way of removing these handicaps. See H. Clark, Law of Domestic Relations 177 (1968). Most significantly, it provides a means by which an illegitimate child can become legitimate—a fact that the Court's opinion today barely acknowledges.

The New York statute reflects the judgment that, to facilitate this ameliorative change in the child's status, the consent of only one parent should ordinarily be required for adoption of a child born out of wedlock. The mother has been chosen as the parent whose consent is indispensable. A different choice would defy common sense. But the unwed father, if he is the lawful custodian of the child, must under the statute also

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun ✓
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: 13 APR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
 v. On Appeal from the Court of
 Kazim Mohammed and Appeals of New York.
 Maria Mohammed.

[March —, 1979]

MR. JUSTICE STEWART, dissenting.

For reasons similar to those expressed in the dissenting opinion of MR. JUSTICE STEVENS, I agree that § 111 (1)(c) of the New York Domestic Relations Law is not constitutionally infirm. The State's interest in promoting the welfare of illegitimate children is of far greater importance than the opinion of the Court would suggest. Unlike the children of married parents, illegitimate children begin life with formidable handicaps. They typically depend upon the care and economic support of only one parent—usually the mother. And, even in this era of changing mores they still may face substantial obstacles simply because they are illegitimate. Adoption provides perhaps the most generally available way of removing these handicaps. See H. Clark, Law of Domestic Relations 177 (1968). Most significantly, it provides a means by which an illegitimate child can become legitimate—a fact that the Court's opinion today barely acknowledges.

The New York statute reflects the judgment that, to facilitate this ameliorative change in the child's status, the consent of only one parent should ordinarily be required for adoption of a child born out of wedlock. The mother has been chosen as the parent whose consent is indispensable. A different choice would defy common sense. But the unwed father, if he is the lawful custodian of the child, must under the statute also

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 2, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 2, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis,

Please join me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

Lewis,

I had thought that adoptions could be defeated without necessarily showing the "unfitness" of the adopting parents. But perhaps because Maria was the mother, that is the correct standard. My question relates to line 8 on p7 and line 6 on p6.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 22, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis:

Please join me.

Sincerely,


T.M.

Mr. Justice Powell

cc: The Conference

November 14, 1978

Re: No. 77-6431 - Caban v. Mohammed

Dear Chief:

This is in response to your inquiry of today. In view of the comment in your note of November 13 to Bill Brennan, I was not sure that you were still inclined to affirm. If, however, you are so still inclined, I shall be glad to undertake a dissent in this case in due course. I may wait until the dust settles in Lalli before starting.

Because Bill Rehnquist also voted to affirm, I am sending a copy of this note to him.

Sincerely,

HAB

The Chief Justice

cc: Mr. Justice Rehnquist

January 29, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Potter:

My letter to Lewis joining his third draft is self-explanatory. I remain firm, however, with my vote to reverse in Parham v. Hughes. This note comes to you because I understand you wish to know of Caban's disposition before getting too deeply involved into the preparation of the opinion in Parham.

Sincerely,

HAB

Mr. Justice Stewart

January 29, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Chief:

My letter to Lewis joining his draft number 3 is self-explanatory. In his rewriting, he has accommodated my concerns. I therefore shall not dissent as I would have done if his first draft had remained intact. I have concluded that this is not basically inconsistent with our dissenting posture in Stanley v. Illinois (although I am frank to say that I am not sure how I would vote in that case were it being presented today). Lewis' first draft, of course, was highly at odds with the dissenting position in Stanley.

Sincerely,

HAB

The Chief Justice

cc: Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 29, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis:

Please join me.

Your second and third drafts assuaged my concerns about the first draft. I think your proposed opinion does justice in this case and lays down principles that are not too hard to live with. This does not mean, of course, that there will not be further litigation in line drawing in cases of this kind. That, perhaps, will be a consequence of the decision, but it does not detract from the justice that is being done here and in like cases.

I have only one very minor suggestion to offer. Would it be worthwhile, at the end of the eighth line of page 13, to insert the word "significant," or something similar thereto, so that the phrase will read "they have manifested a significant paternal interest in the child"? I suggest this only because, in a sense, the father in Quilloin "manifested a paternal interest," albeit a tardy one.

Sincerely,



Mr. Justice Powell

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 28 DEC 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
 v. On Appeal from the Court of
 Kazim Mohammed and Appeals of New York.
 Maria Mohammed.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 2, 1979

No. 77-6431 Caban v. Mohammed

MEMORANDUM TO THE CONFERENCE:

I am contemplating making some changes in the first draft of the opinion I circulated on December 28.

I hope to recirculate within the next few days.

L. F. P.

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Brandeis
Mr. Justice Mahan
Mr. Justice Peckham
Mr. Justice Sayre
 Mr. Justice Shiras
Mr. Justice Strong
Mr. Justice B. Thompson
Mr. Justice Stevens

1, 5, 6, 7-13

From: Mr. Justice Powell

Circulated:

Recirculated: 12 JAN 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim Mohammed and
Maria Mohammed. } On Appeal from the Court of
Appeals of New York.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

三

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

8/10/11/13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

19 JAN 1979

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

—
No. 77-6431
—

Abdiel Caban, Appellant,
v. On Appeal from the Court of
Kazim Mohammed and Appeals of New York.
Maria Mohammed.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

2739/1-13

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Recirculated: 1 FEB 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
 v. Kazim Mohammed and Maria Mohammed. } On Appeal from the Court of Appeals of New York.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

NEW Fw. 6

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____
 Recirculated: 30 MAR 1979

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
 v. On Appeal from the Court of
 Kazim Mohammed and Appeals of New York.
 Maria Mohammed.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

1710

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

6th DRAFT

Recirculated: 12 APR 1979

SUPREME COURT OF THE UNITED STATES

 No. 77-6431

Abdiel Caban, Appellant,
 v.
 Kazim Mohammed and Maria Mohammed. } On Appeal from the Court of
 Appeals of New York.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman, from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

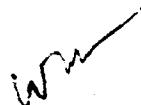
March 2, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear John:

Please join me in the second draft of your dissent in this case.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

DEC 29 1978

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 29, 1978

RE: 77-6431 - Caban v. Mohammed and Mohammed

Dear Lewis:

As you will recall from the Conference, I am on the other side of the Equal Protection issue in this case. It is therefore presumptuous of me to raise any question about your opinion. Nevertheless, because I am profoundly troubled by its potential impact on the typical adoption of the newborn infant, I would like to identify some of my concerns informally, rather than in any sort of formal writing.

It is my understanding that the most respected adoption agencies throughout the country generally make the adoption arrangements well before the child is born. In many cases involving teenage mothers, the identity of the father is either undisclosed, unknown, or even ambiguous. In a significant number of cases the father may even be unaware of the pregnancy. As a practical matter I wonder how the new constitutional requirement of either consent or a finding of unfitness of the father will work.

Even in those cases in which consent of the father is obtained, how will the adopting parents be protected against the risk that some other person will subsequently make a claim that he was the father and did not give his consent? Even when an evidentiary hearing would demonstrate that the concern was not justified, the adopting parents may nevertheless be genuinely fearful of unknown contingencies. There

Mr. Justice Powell
Page two

are no title companies guaranteeing the fatherhood of unborn illegitimate children.

If the father's consent cannot be obtained, perhaps because the mother is unwilling to reveal his identity, how can the unfitness of the father of an unborn child be demonstrated? If the failure to marry the mother is considered adequate proof, then the whole requirement of a father's consent becomes meaningless. Your opinion suggests that notice by publication would cut off subsequent challenges by unconsenting fathers or possible fathers, but what would such a notice say? It would be useless if it did not identify the mother, and if it does identify her, it would offend her privacy interests in a most outrageous fashion.

I will not burden you with further writing, but I wonder if you would give consideration to trying to develop some limitation in the opinion to minimize its impact on the adoption of infants. I realize that this may not be possible under an Equal Protection rationale--and, indeed, that is why I cannot join the analysis--but my respect for your practical wisdom prompts me at least to raise the question with you.

Respectfully,



Mr. Justice Powell

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: Feb 28 '79

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
 v. On Appeal from the Court of
 Appeals of New York.
 Kazim Mohammed and
 Maria Mohammed.

[March —, 1979]

MR. JUSTICE STEVENS, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law, the adoption of a child born out of wedlock usually requires the consent of the natural mother; it never requires that of the natural father. Appellant, the natural father of two school-aged children born out of wedlock,¹ challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this unconsented-to termination of his parental rights without proof of unfitness on his part violates the substantive component of the Due Process Clause of the Fourteenth Amendment. Secondarily, he attacks § 111 (1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

I

This case concerns the validity of rules affecting the status of the thousands of children who are born out of wedlock

¹ The children are presently aged seven and eight years old. At the time of the hearing before the Surrogate's Court, they were five and six.

pp. 1, 4, 9

1.1.1. The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

Recirculated: MAR 6 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v. On Appeal from the Court of
Kazim Mohammed and Appeals of New York.
Maria Mohammed.

[March —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law, the adoption of a child born out of wedlock usually requires the consent of the natural mother; it never requires that of the natural father. Appellant, the natural father of two school-aged children born out of wedlock,¹ challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this unconsented-to termination of his parental rights without proof of unfitness on his part violates the substantive component of the Due Process Clause of the Fourteenth Amendment. Secondarily, he attacks § 111 (1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

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¹ The children are presently aged seven and eight years old. At the time of the hearing before the Surrogate Court, they were five and six.

pp. 1, 12-14
New nn. 23+24

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Recirculated: MAR 15 1979

Abdiel Caban, Appellant,
v.
Kazim Mohammed and Maria Mohammed. } On Appeal from the Court of Appeals of New York.

[March —, 1979]

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law, the adoption of a child born out of wedlock usually requires the consent of the natural mother; it does not require that of the natural father unless he has "lawful custody." See *ante* at 5 n. 4. Appellant, the natural but noncustodial father of two school-aged children born out of wedlock,¹ challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this unconsented-to termination of his parental rights without proof of unfitness on his part violates the substantive component of the Due Process Clause of the Fourteenth Amendment. Secondarily, he attacks § 111 (1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

I

This case concerns the validity of rules affecting the status

¹ The children are presently aged seven and eight years old. At the time of the hearing before the Surrogate Court, they were five and six.