RIGHTS OF A FATHER WITH REGARD TO HIS ILLEGITIMATE CHILD

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Traditionally, only one basic question confronted the father of an illegitimate child — should he marry the mother or should he get out of town? The days when this simple issue was the sole consideration of the father appear to be behind us. Today, some fathers of illegitimate children have become "family men" and may wish to be heard with respect to the child's custody. They may desire to have a right to visit the child, or they may want to be heard on the question whether the child should be adopted. All this has caused problems for the courts, for the state legislatures and for unwed mothers. These groups probably long — either overtly or covertly — for the simpler days when the problem was economic pursuit of the unwed father through the medium of a bastardy suit. Nevertheless, because of the efforts of one Peter Stanley and his attorney, unwed fathers and their rights have become a legal matter to be reckoned with. The following examination of recent cases will illustrate the types of questions courts have faced when dealing with the rights of unwed fathers.

I. THE *Stanley* DECISION

It has been observed that "hard cases make bad law," and critics of the United States Supreme Court decision in *Stanley v. Illinois*[1] may find this observation applicable to that case. Under the facts of that case (as stated by Mr. Justice White), Peter Stanley, an unwed father, had lived with one Joan Stanley intermittently for 18 years during which time the couple had had three children. Although the state in which they lived, Illinois, did not have common law marriage, there is an implied suggestion in the decision of the Court that Joan and Peter Stanley had a "de facto" family. In that regard, it is interesting to note that Joan and Peter even used the same surname. According to Justice White, "When Joan Stanley died, Peter Stanley lost not only her but also his children."[2] Seldom, in his tenure on the Court has Justice White seemed so sentimental![3]

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[1] 405 U.S. 645 (1972).

[2] *Id.* at 646.

[3] Or so willing to abandon procedural technicalities. The due process issue had not been raised by Stanley's attorney in the lower courts.

Apparently, after Joan's death a dependency proceeding was instituted by the State of Illinois, and Stanley's children were declared wards of the state and placed with court-appointed guardians. As Chief Justice Burger pointed out in his dissent, the whole procedure might not have happened if Peter Stanley had continued to maintain both custody and support of his children.[4] He had, however, placed them with another couple (named Ness), and had not legally sought custody. Stanley entered into a legal dispute only when the state was about to place his children with court-appointed guardians.

Under Illinois law Mr. Stanley, the unwed father, had no standing to participate in that proceeding. Only married mothers and fathers, or unwed mothers, had that right. The state could assign the children to another guardian without showing that Stanley was an unfit parent. In effect, under Illinois law at the time, Stanley was treated, not as a parent, but as a stranger to his children. The dependency proceeding went forward on the presumption that he was "unfit" to exercise parental rights.

The Supreme Court declared the Illinois procedure unconstitutional on two grounds. First, the Court decided that Stanley had been deprived of the equal protection of the law. By denying him a hearing while allowing it for all other parents, Illinois law unconstitutionally discriminated among those who had a primary biological tie to the child. Although the Court assumed that an unmarried father might seldom be "fit" to be a proper parent, it decided that a blanket policy of unfitness could not be justified. In that regard, the Court relied on an older Michigan decision which found no

> sociological data justifying the assumption than an illegitimate child reared by his natural [unmarried] father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother. . .[5]

The state simply could not justify its procedure by the unproven but strongly asserted assumption that most unwed fathers are unfit. The Court recognized that providing an individualized hearing in each case on the fitness or lack thereof of an unwed father might be more costly to the state than the procedure it had been using. Nevertheless, the Court noted that

> [T]he incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their

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[4] 405 U.S. at 659.

[5] *Id.* at 654 n.7. Quoting from *In re* Mark T., 8 Mich.App. 122, 154 N.W.2d 27 (1967).

> children, they will not appear to demand hearings. If they do care. . .[the State of] Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceedings.[6]

As its second and perhaps more important constitutional ground for decision, the Court held that due process required that Stanley be provided a hearing on the question of his fitness as a parent. In that regard, the Court was protecting the interest of a parent in his or her children. The due process holding strongly suggests that the Illinois procedure could not be made constitutional by a law that declared both the unwed mother and unwed father presumptively to be unfit as parents.[7] In that regard, one should note the Court's statement that "The private interest here, that of a man in the children he has sired and *raised*, undeniably warrants deference and, absent a powerful countervailing interest, protection."[8]

This statement and the facts of the opinion suggest that it is only applicable to unwed fathers who have maintained an ongoing relationship with their illegitimate children—those who either have had custody of them or have supported them. Nonetheless, in a footnote to the opinion the Court spoke more broadly about, "[e]xtending opportunity for hearing to unwed fathers who desire and claim competence to care for their children . . . ."[9] The Court called for notice to the unwed fathers in the form of:

> personal service, notice by certified mail, or . . . notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern."[10]

Further, the Court noted that unwed fathers who fail to respond promptly may not complain if their children are declared wards of the state; "[t]hose who do respond carry the burden of proving their fatherhood."[11]

The possibility that the *Stanley* decision applies to all unwed fathers, not merely those who have raised their children, gained force from the fact that two weeks after that decision, the Supreme Court

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[6] *Id.* at 657 n.9.

[7] The court took a similar approach in finding that miscegenation statutes violated *both* the equal protection and due process clauses of the fourteenth amendment. *See* Loving v. Virginia, 388 U.S. 1 (1967).

[8] 405 U.S. at 651 (emphasis added).

[9] *Id.* at 657 n.9.

[10] *Id.*

[11] *Id.*

vacated and remanded an appeal wherein the unwed father sought to be heard in an adoption proceeding although he had not raised or nurtured his children.[12] Another case was similarly handled although the father had had custody for a relatively short period of time.[13]

The *Stanley* decision and those that followed in its wake made new law in many states by implicitly overruling the many state cases that had interpreted the common law as saying that the father of an illegitimate child had *no* custodial or other legal parental rights with respect to the child.[14] Clearly, it is no longer constitutionally permissible to foreclose the unwed father to that extent. Moreover, there has been a general thrust in Supreme Court decisions to treat illegitimacy *vel non* as a suspect classification.[15] Perhaps, there is an underlying assumption that illegitimacy is not prevented by imposing sanctions on parents or on the children. On the other hand, in the view of some, there is or should be a difference between the rights of a father who marries and has a "legal family" and those of the father who does not take that step.

What rights should be accorded to an unwed father in a custody or adoption proceeding? What rights, if any, should he have of child visitation? These topics will be explored herein, but let us first consider the unwed father's rights with respect to his *unborn* child.

II. UNWED FATHER'S RIGHT TO HIS UNBORN CHILD

Just a few years ago, the case of *Jones v. Smith*[16] could only have existed in the imaginative mind of a law professor bent on exploring legal fantasies. In *Jones*, a "self-alleged" unwed father sought to restrain the mother of an unborn child from obtaining an abortion. Of course, until recently abortion was illegal, and in many states unwed fathers were thought to have no rights with respect to their children.

In spite of the mind-boggling social policies at counterpoint in the case, the Florida court had little difficulty reaching a decision. The guiding star the court looked to was not *Stanley*, but the Supreme Court decisions of *Roe v. Wade*[17] and *Doe v. Bolton*.[18] The

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[12] Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972).

[13] Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972).

[14] See cases collected in Annot., 45 A.L.R.3d 216, 224-25 (1972).

[15] *See* Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). *But see* Linda R.S. v. Richard D., 410 U.S. 614 (1972); Labine v. Vincent, 401 U.S. 52 (1971).

[16] 278 So. 2d 330 (Dist. Ct. App. Fla. 1973), *cert. denied*, 415 U.S. 958 (1974).

[17] 410 U.S. 113 (1973).

[18] 410 U.S. 179 (1973).

court believed that those two cases made clear that the abortion decision and its implementation must be left to the judgment of the mother and her attending physician. Nevertheless, under the statutory law of Florida, a married woman who was living *with* her husband needed her husband's consent to have an abortion.[19] The court did not focus on the constitutionality of that statutory provision. The court decided only that the mother need not obtain consent from either her husband or any unwed father with whom she did not live on a regular basis. The court made light of the unwed father's argument that, by her failure to use birth control methods, the mother "waived" her right to "exclusively" control whether a child would be born. It also rejected the contention that the father's agreement to support the child resulted in his having an implied contractual right to prevent an abortion.

Finally, the court indicated that a decision to grant an unwed father "standing" to prevent a natural mother from terminating pregnancy would place him in a position of being able to argue successfully that he should have the right to obtain an injunction to restrain a woman he was having relations with from using contraceptives or possibly that he should have the right to compel her to bear children. While the court's "parade of horribles" was a bit farfetched, its underlying decision is based upon a premise that might be gleaned from *Roe v. Wade* and *Doe v. Bolton*: a woman has a fundamental right to determine whether she should bear a child.[20]

Recently, a Massachusetts court in *Doe v. Doe*[21] respected that exclusive right although in that case it was challenged by her lawfully wedded husband. The lawful husband is in a stronger position to be heard on the question because he is more likely to be *ready, willing,* and *able* to provide a parental role in the context of a "normal" family. Of couse, the basic issue is one of balancing the mother's right to terminate a pregnancy with the father's right to the custody of the child he helped conceive. In the Massachusetts case, two dissenting judges thought that the married father, at least, had a right to be heard on the issue.[22] Although reasonable persons might differ—as did the judges on the Massachusetts court—on the question of the rights of the *wedded* father, with regard to *unwed* fathers, the mother's right to make the decision is clearly paramount.

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[19] LAWS OF FLA. ch. 72-196, F.S.A. § 458.22 (West Supp. 1973).

[20] *See* Jones v. Smith, *supra* note 16, at 341.

[21] 43 U.S.L.W. 2029 (Sup. Jud. Ct. Mass. July 3, 1974).

[22] *Id.*

III. Basic Procedural Problems — Custody and Adoption

The *Stanley* case strongly suggests that when judicial action is taken with respect to the custody of an illegitimate child, an effort must be made to contact the father of that child unless that father's rights have been previously adjudicated.[23] When the father is known, as was the case in *Stanley*, an effort must be made to obtain personal service on him. When the father is unknown or there is some speculation about who the father is [the true situation of the "putative father"],[24] a reasonable effort must be made to locate him, utilizing notice by publication, if necessary. In that regard, it is clear that *Stanley* indicates that fathers of illegitimate children — all fathers — should be given a reasonable opportunity to be *heard* on the issue of placement of their children. This procedural approach has been molded into a workable law by the legislature of the State of Washington — that state's new "Illegitimate Children and Parental Rights Act"[25] is a worthwhile starting point for any state seeking a legislative vehicle for implementing the *Stanley* decision.

One problem not covered by the Washington act — or by law in any state — is how to handle the situation if the unwed mother knows or suspects who the father is, but refuses to name him. In this situation, should the law impose a penalty or sanction against the mother if she declines to assist the authorities? She may well be doing this because the situation would prove embarassing to the father as well as to herself. The father may be married and have another family or be a person who is totally uninterested in a parental role. Closely tied to this problem is a second question which needs further attention: how specific may notice be without embarrassing both mother and child? The basic question is how far courts or legislatures should carry *Stanley*. Of some significance in *Stanley* was the fact that the mother was dead and the father had cared for the children over many years. To compel a living mother to "reveal the name" of an apparently uninterested father extends the decision too far.

Of course the father of an illegitimate child may want his rights determined with respect to that child even though the state or other persons have not initiated the custody or adoption proceedings. In that context, a court may have to struggle to find a procedural vehicle

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[23] *See* note 9, *supra*.

[24] R. v. F., 113 N.J. Super. 396, 407, 273 A.2d 808, 814 (Juv. & Dom. Rel. Ct. 1971), construing statute to allow an unwed father who was *not* "putative" the right to visit his child.

[25] Wash. Rev. Code § 26.24.190 (1973), *amending* Wash. Rev. Code § 26.24.190 (1963). The benefits and shortcomings of the law are conscientiously evaluated in a student note. *See* 49 Wash. L. Rev. 647 (1974).

to provide relief. In some states, such as Ohio, there is a statute that permits an unwed father to legitimatize his child.[26] This may be an appropriate tool for providing the father with the relief he wants. Of course, the Ohio statute, like most others, requires the mother's "consent" as a prerequisite to legitimation. If the father has maintained an interest in the child and a willingness to support him, it is doubtful, under the *Stanley* decision, that the mother could bar absolutely the child's being declared legitimate in regard to the father. Of course, a basic social policy question is whether the child should be declared legitimate as to the mother *or* the father without a marriage between these two persons. If legitimation can be handled by the law, without marriage, then we have almost buried the traditional concept of the legal family as a practical matter. Of course, many "families" in Sweden have lived rather comfortably with this approach for a number of years!

If the state has no legitimation statute, the father may be able to obtain a declaratory judgment as to his rights with respect to the child. This was the procedure chosen by the Supreme Court of Wisconsin in *Slawek v. Stroh*,[27] a case in which the father of an illegitimate child brought an action against the mother and the child seeking a declaration that he was the father of the child and also asking that his rights and duties be determined with respect to custody, visitation and support of the child. The court noted that the requisites for a declaratory judgment proceeding were all present. These included a justiciable controversy that was ripe for determination between two persons whose interests were adverse (herein the mother and the father—in other situations a state official could be appointed to "test" the father's claim). Further, a legally protectable interest existed in the plaintiff (this was wrought by the *Stanley* case).

The Washington Illegitimate Children and Parental Rights Act has simplified the procedure by establishing a Filiation Proceeding in which the child's "name" and custody can be established as well as the non-custodial parent's visitation rights.[28]

In sum, the procedural difficulties created by *Stanley* may be less troublesome than the substantive changes left somewhat undefined by the decision. The following discussion of the substantive changes suggested by the *Stanley* decision begins with a look at the unwed father's right to custody of the child.

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[26] OHIO REV. CODE § 2105.18 (1972).

[27] 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

[28] WASH. REV. CODE § 26.24.190 (1973), *amending* WASH. REV. CODE § 26.24.190 (1963).

IV. CUSTODY

As I have indicated, the *Stanley* decision makes clear that an unwed father has a right to be heard with respect to a legal determination of the custody of his child. However, the *Stanley* decision did not suggest what *indicia* for a custody decision should be. Perhaps the most central question in formulating these indicia is what effect the father's unwed status should have. To aid in answering that question, the situation in which the mother is a contestant should be distinguished from that in which she is not.

A. *Unwed Father v. Unwed Mother*

Before *Stanley*, a number of courts had granted an unwed father a special status with respect to the custody of his child. His right was superior to that of all persons except the mother of the child.[29] *In re Mark T.*, relied on by the Supreme Court in *Stanley* for the proposition that all unwed fathers may not be unfit parents,[30] emphasized that the father's rights with respect to custody were secondary to the mother's.[31]

Subsequent to the *Stanley* decision, an Ohio court indicated that a mother was always to be deemed to have a superior right to the father unless it was shown that she was an unfit parent. In the case of *In re Brenda H.*,[32] the court awarded a child to its mother after determing that she would be a fit parent. Although the child had been in the custody of the father, the court did not permit him to present evidence of his own comparative fitness. The court appeared to say that if the mother and father of the child have lived together and established a "*parental*" relationship, the mother and the father would be treated as equals. In the situation before the court, however, the court was clear that "[t]he mother has a right of custody that is *superior* to that of the putative father."[33]

Decisions in other states have not created a special preference for the mother. In *Vanderlaan v. Vanderlaan*[34] two children had been conceived and born after the couple was divorced. The children were orginally in the custody of the mother; however, she wrote the father

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[29] *See* Annot. 45 A.L.R.3d 216, 223-24 (1972).

[30] 405 U.S. at 654 n.7.

[31] *In re* Mark T., 8 Mich.App. 122, 154 N.W.2d 27 (1967).

[32] 37 Ohio Misc. 123, 305 N.E.2d 815 (Ohio C.P. Juv. Div., Cuyahoga County 1973).

[33] 305 N.E.2d at 817 (emphasis in original). *Cf.* Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019 (1974). (Formerly wed parents, father's challenge to presumption in favor of mother on equal protection grounds was denied.)

[34] 9 Ill.App. 2d 260, 292 N.E.2d 145 (1973).

that the children would be better off with him. A year later, the mother petitioned for custody. She showed a change in circumstances in that she was about to be married and would be able to provide a good home for the children. The trial court made a determination that it was in the best interest of the children to remain with the father. The court of appeals reversed,[35] but this decision was vacated and remanded by the Supreme Court of the United States in light of *Stanley*.[36] Upon remand the Illinois court of appeals followed the original findings of the trial court and continued custody in the father.[37] No special "presumption" of legal preference was given to either party. Similarly, in setting the guidelines for a custody dispute between unwed parents, the Supreme Court in Wisconsin in the *Slawek* case[38] created no special presumption or preference for either parent. This also appears to be the approach of the new Washington Illegitimate Children and Parental Rights Act.[39]

I would agree with the approaches taken in these states. Assuming that the act of having children out of wedlock is a social wrong and one to be considered in a custody proceeding, the parties are *in pari delicto* on that issue.[40] The assumption that the father is somehow more blameworthy than the mother belongs to a prior age. The case should be treated as one between wedded parents, and the focus should be on the best interest of the child. Nevertheless, it is helpful to have a presumption operate in custody cases in order to facilitate decision-making. In this regard, if one of the parents has maintained custody of the child since birth, it seems both wise and fair to presume that he or she should maintain custody.[41] The other party would then have to show by a preponderance of the evidence that he or she would be a more able custodial parent. What then are the evidentiary factors to be considered?

A number of factors have been articulated by courts[42] in deter-

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[35] 126 Ill.App. 2d 410, 262 N.E.2d 717 (1971).

[36] 405 U.S. 1051 (1972).

[37] *See* note 34, *supra*.

[38] 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

[39] WASH. REV. CODE § 26.28.110 (1973).

[40] *Cf. Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444 (1940) (visitation).

[41] At least two reasons suggest this result. First, as a general matter of allocating burdens of proof, the law usually places the onus on the party who seeks to change the status quo. *See* E. MORGAN, SOME PROBLEMS OF PROOF 75 (1956); 9 J. WIGMORE, EVIDENCE § 2486 (3d Ed. 1940). Second, in the absence of other facts, *changing* the abode of a young child is not in his or her best interest. *See* J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (1973).

[42] *See, e.g., In re* Zink, 269 Minn. 535, 132 N.W.2d 795 (1964); *In re* Guardianship of C., 98 N.J. Super. 474, 237 A.2d 652 (1967); *In re* Interest of M., 25 Utah 2d 101, 476 P.2d 1013 (1970).

mining which parent should have custody of an illegitimate child. While a "total picture" must be developed, the following factors may be of assistance to a court in making a decision.

(1) Has the father readily acknowledged paternity under oath?
(2) Has he willingly contributed to the support of the child?
(3) Has he accepted or asked for the responsibility of maintaining the child?
(4) Is he likely to be able to provide financial support for the child in the future?
(5) Has he provided an adequate means for the child to be cared for during the day?

All of these factors — with the exception of the acknowledgment of paternity — are equally applicable to the mother.

Some of the older cases also considered whether the father was willing to "marry the girl."[43] Perhaps some inquiry into his reasons (or possibly the mother's) on this issue would be helpful, but the focus should never stray from the ultimate issue before the court: which parent would be better able to care for this particular child.

B. *Father v. Relative or Stranger*

Even before the *Stanley* decision, some courts gave the unwed father a right to custody superior to that of any person other than the mother of the child.[44] Is this a necessary or desirable approach in determining custody when a relative of the child or adoption agency is opposing the father's application?

It is a long step from *Stanley* to the creation of a special presumption in favor of an unwed father when his application for custody is being opposed by a relative or adoption agency. Even language in *Stanley* refers to a child whom the father had *raised.* My own view is that a presumption should only arise in favor of an unwed father when he *has* supported and raised the child for a period of time. The burden then should be placed on the other party to show that the father is an unfit parent. In all other cases, the focus should be solely on the child's best interest. When the father has done no more than participate in the act of conception, he has not established a sufficient

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[43] *See* Smith v. Superior Court, 23 Wash. 2d 357, 161 P.2d 188, 192 (1945).

[44] *See, e.g.*, Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966); *In re* Shady, 264 Minn. 222, 118 N.W.2d 449 (1962); Hyman v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949); *In re* Estate of Moore, 68 Wash. 2d 792, 415 P.2d 653 (1966).

The oldest case found applying the rule is Trainer v. Cooper, 8 How. Pr. 288 (N.Y. 1853) where a Black father's claim to his young daughter was deemed superior to the claim of a person who had once "owned" the child.

basis to be granted a "superior right" to other persons who may provide a better home for the child.[45]

Of course, it could be argued that because the unwed father has the same potential duty to support the child as a wedded father,[46] he should be given a special status as against all but the mother. But the duty is merely potential — when there has been no real obligation placed on the father, it has little meaning.

However, treating the unwed father the same as a "non-relative" is a position that can be subject to the same criticisms[47] that were voiced against *Painter v. Bannister*[48] in which a "best interests" test was applied to deprive a widower of his child and award the child to his grandparents. In that case, however, the child had lived with the father all his life. The combination of being a natural parent *plus* having custody is enough to create a presumption in favor of the father. In other cases, the "natural" connection is more a pleasure of the past than an indicia of responsibility for the future.

Naturally, the factors outlined in considering a custody dispute between parents are relevant here.[49] In addition there is the question whether the father's very participation in the conception of the child should be utilized against him in determining his fitness. Certainly, pre-*Stanley* cases took this factor into consideration.[50] But if we focus on the best interest of the child, the father's act should not be material unless it was part of a pattern of generally irresponsible behavior.

V. VISITATION RIGHTS

The *Stanley* decision did not speak to the question whether an unwed father should have the right to visit his illegitimate child when that child is in the custody of another person. This difficult question often arises in disputes between the father and mother of the illegitimate child, but there has been very little serious discussion of the issue elsewhere.[51] Although some prior judicial decisions indicated

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[45] *See* J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 16-17 (1973).

[46] *See* Gomez v. Perez, 409 U.S. 535 (1973) (having that effect). *But cf.* Linda R.S. v. Richard D., 410 U.S. 614 (1973).

[47] *See* Stingley v. Wesch, 77 Ill.App. 2d 472, 222 N.E.2d 505, 508 (1966). *See also* Notes, 8 ARIZ L. REV. 163 (1966); 79 HARV. L. REV. 1710 (1966); 4 HOUSTON L. REV. 131 (1966); 51 IOWA L. REV. 1114 (1966); 20 OKLA. L. REV. 203 (1967); 4 SAN DIEGO L. REV. 181 (1967); 41 TUL. L. REV. 148 (1966); 19 U. FLA. L. REV. 205 (1966).

[48] 258 Iowa 1390, 140 N.W.2d 152 (1966).

[49] *See* note 41, *supra*, and accompanying text.

[50] *See In re* Zink, 269 Minn. 535, 132 N.W.2d 795 (1964).

[51] *See* 27 OHIO ST. L.J. 738 (1966); 35 BROOKLYN L. REV. 307 (1969); Annot. 15 A.L.R.3d 887 (1967).

that the father could never have visitation rights, most courts today do not take such a firm position on the matter.[52] Rather, they indicate that they will focus on the "welfare and best interest of the child" in determining whether or not the father should be permitted to visit.[53]

Of course, the case for allowing a visit is most persuasive when the mother consents. The more difficult situation occurs when the mothers does not wish the father to visit the child. Factors that prompt courts[54] to allow visitation rights in that situation include:

(1) The amount of the father's contribution to the maintenance of the child,
(2) Whether the father and mother lived together in a relationship that approximated a legal marriage,
(3) The father's prior interest in the child's welfare and well-being, and
(4) The child's need for guidance by a mature male.

On the other hand, there are very strong general considerations that suggest that courts should be chary of permitting visitation by an unwed father where custody has been vested in the mother. First, the father's visits may create a situation which encourages a renewal of a meretricious relationship. While such a relationship might be quite acceptable to some segments of society, it is still not the equivalent of marriage under the law of any state.[55] Second, and more importantly, visits emphasize and remind neighbors and acquaintances that the child was born illegitimate. Third, and most importantly, the father's visits can be a factor that reduces the mother's likelihood of adjustment and formulation of a legal marriage and normal family relationship. As family lawyers know well, visitation can create extraordinary problems between once-married parents of legitimate children. Clearly, the potential conflicts are even greater when the parents were never married at all.[56]

These considerations may prompt the Supreme Court of the United States to hold that visitation is not a "constitutional right"

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[52] *See* Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965) (overruling prior decisions on the point).

[53] *See, e.g.*, Strong v. Owens, 91 Cal.App. 2d 336, 305 P.2d 48 (1949); Commonwealth v. Rozanski, note 52 *supra; In re* Harp, 6 Wash.App. 701, 495 P.2d 1059 (1972).

[54] *See* cases cited note 53 *supra*, note 58 *infra*, and Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Family Ct. 1968).

[55] The closest courts that have come to giving recognition can be found in the recent case of *In re* Cary, 34 Cal.App. 3d 345, 109 Cal.Rptr. 862 (1973); noted in 25 HASTINGS L. REV. 1226 (1973).

[56] The arguments against quasi-automatic allowance of visitation by unwed fathers have been made most forcefully by Justice Breitel dissenting in People *ex rel* "Francois" v. "Ivanova," 14 A.D.2d 317, 318, 221 N.Y.S.2d 75, 77 (1961).

as long as the father has had an opportunity to be heard on the issue of custody. However, in some situations contact by the child with his natural father may be helpful for the child's psychological well-being even though the mother opposes such a visit.[57] Moreover, the factors mentioned earlier favoring visitation can create a very compelling case to permit it. For example, consider a situation in which a father had lived with the mother in a relationship approximating marriage for a number of years, and had supported and developed a solid, ongoing relationship with the child.[58] In the absence of other facts, the father's request for visitation should be allowed.

But even in this situation a very careful, impartial, factual investigation is essential. In that regard, at least one New York court has taken the position that visitation should only be allowed after the state Family Counselling Unit has made an extensive investigation of the specific situation. This is to be done regardless of the parents' consent.[59] Obviously, the effectiveness of such an investigation depends on the capability of the personnel in the Family Counselling Unit. Because there is a strong social need to have courts render decisions that are truly in the best interests of children, the state should bear the cost of having qualified personnel who can assist the courts in making this very difficult determination.

VI. ADOPTION

Adoption terminates the existing relationship between parent and child and substitutes a new legal relationship with a different set of parents.[60] Therefore,once the child is adopted by another father, it is highly likely that the unwed father's rights with respect to visitation and other connections with the child will be terminated.

What are or should be the unwed father's rights when someone else seeks to adopt his child? The unwed mother's rights are relatively clear: unless she has legally abandoned her child or has been found to be an unfit parent, her consent is required before the child can be legally adopted.[61] The unwed father's consent, however, was not a prerequisite to adoption in many states, at least not prior to *Stanley*.[62]

[57] *See* M. GOLD, STATUS FORCES IN DELINQUENT BOYS 123 (1963); E. JONES, THE INTELLIGENT PARENTS' GUIDE TO RAISING CHILDREN 217-19 (1959).

[58] Cases close to this "ideal" include Mixon v. Mize, 198 So.2d 373 (Dist. Ct. App. Fla. 1967); M. v. M., 112 N.J. Super, 540, 271 A.2d 919 (Juv. & Dom. Rel. Ct. 1970).

[59] *See* Anonymous v. Anonymous, 34 A.D.2d 942, 312 N.Y.S.2d 348 (1970).

[60] *See* H. CLARK, DOMESTIC RELATIONS § 18.1 (1968).

[61] *Id.* at §§ 18.4, 18.5.

[62] *See, e.g.*, CODE OF ALA., TIT. 27, § 3 (1958); ALASKA STAT. § 20.10.020 (1962); OHIO

The view was that the process of acquiring such consent would substantially hamper the work of welfare agencies concerned with adoption.[63] Moreover, it could place all adoptions in a legally unstable position for extended periods of time.

Although the Supreme Court in *Stanley* did not focus on adoption, it vacated and remanded a decision two weeks later wherein the state court had precluded an unwed father from being heard on the issue whether his child should be adopted by others.[64] The Supreme Court said that:

> [D]ue consideration [should be given] for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time.[65]

It is important to note what the Supreme Court did not say as well as what it said. The Court did not state that an unwed father's consent was necessary in order to effectuate a legal adoption. Rather, the remand implied that unwed fathers should be given an opportunity to be heard on the general question. This is the way the decision has been interpreted by some courts in cases that have arisen after *Stanley*.[66]

On the other hand, the Supreme Court of Wisconsin, after taking the remand in *Rothstein*, may have given the father in that specific case more than the United States Supreme Court intended.[67] In that regard, the court might have been able to support a holding that in light of the period of time that had elapsed since the child had been with his "adopted parents" — here four years — the unwed father's claim must be abated. The court declined to take this approach, but rather remanded the case to the county court to determine the relative fitness of the unwed father as a custodial parent. Further, the opinion contained a bit of hornbook law that has been applied in the past to unwed mothers: "[A]s between a natural parent and a third party, the 'best interest of the child' lie with the natural parents' exercise of custodial rights."[68] Three judges on the Wisconsin supreme court

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REV. CODE § 3107.06 (1972); WIS. STAT. § 48.84 (1957). Even in Arizona where every child is deemed legitimate, the consent of the mother is sufficient for adoption. *See* ARIZ. REV. STAT. § 8-106(d) (1972) (prior acknowledgement gives father standing). *See generally*, Annot. 51 A.L.R.2d 497 (1957).

[63] *See* Thomas v. Children's Aid Soc'y, 12 Utah 2d 235, 364 P.2d 1029 (1961).

[64] Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972).

[65] *Id.*

[66] *See* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972); *In re* P., 36 Mich.App. 497, 194 N.W.2d 18 (1972); Doe v. Dep't of Social Servs., 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972).

[67] *See* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

[68] *Id.* at 832.

dissented, stating that the interests of the child clearly pointed to his remaining with his adopted parents.[69]

When the *Stanley* decision is applied to adoption cases, it may cause more problems with procedure than substance.[70] Adoption agencies and adopting parents want to know *when* the adoption will be final. Unless the state has set up a proper procedure for notice to potential unwed fathers (as has been done in the State of Washington),[71] adoptions of many illegitimate children will be placed in jeopardy. I would be inclined to let pre-*Stanley* adoptions be deemed legally consummated, unless a situation arises in which the adoptive parents have neglected the children. Aside from the *Rothstein* case itself, wherein a father fought for his rights all the way to the Supreme Court of the United States, the child's and adoptive parents' interest in a stable home situation outweigh reopening a matter long settled.[72]

With respect to future adoptions the unwed father should be treated the same as the unwed mother. Nevertheless, courts should be quite realistic in deciding whether *either* unwed parent is sutiable and fit to care for the child on a long-range basis.

VII. Conclusion

This discussion has been but an introductory exploration of the rights of the unwed father today. There are many questions of importance that have not been adverted to, especially in the area of the unwed father's economic rights with respect to his illegitimate child.[73] But from the discussion of the questions that have been explored it is apparent that the rights of the unwed father in regard to his children are drawing very close to those of the unwed mother. No doubt, in some situations in some states, a reservoir of superior power in the unwed mother remains. A period of time and study is needed to determine the effect upon children of living with unwed fathers as compared to living with unwed mothers. This information

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[69] *Id.* at 833.

[70] *See* The Wall Street Journal, June 6, 1974, at 1, col. 1, tracing the practical problems that the *Stanley* decision has created in regard to adoption.

[71] WASH. REV. CODE § 26.32.040 (1973), *amending* WASH. REV. CODE § 26.32.040 (1963).

[72] *See* J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 31-37 (1973).

[73] For example the question whether an unwed father can be automatically excluded from intestate succession has not been explored. (This would *not* seem to be constitutionally required in light of Labine v. Vincent, 401 U.S. 532 (1971).) There is also the question whether an unwed father will be deemed a beneficiary under a Federal Employee's Group Life Insurance Plan. *See* Solberg v. Metropolitan Life Ins. Co., 50 Wis. 2d 746, 185 N.W.2d 319 (1971).

may tell us whether the states that have broadened the *Stanley* decision or those that have approached it gingerly have truly had "the best interest" of the child in sight.