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McGuire v. Farley: The West Virginia Supreme Court of Appeals Takes a Step toward Equal Protection for the Unwed Father

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McGUIRE V. FARLEY: THE WEST VIRGINIA SUPREME COURT OF APPEALS TAKES A STEP TOWARD EQUAL PROTECTION FOR THE UNWED FATHER

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I. INTRODUCTION

Historically, both the state and federal court systems have had minimal experience in domestic law cases regarding the specific issues of parental rights and parental standing. In fact, “only four opinions of the United States Supreme Court have dealt directly with the constitutional claims of unwed fathers against state action terminating their relationships with their children.”¹ “Because the father owed no legal duty to his illegitimate child at common law, it naturally followed that he should have no rights concerning the child.”² Because approximately one-third of the births in this country are the result of non-legalized relationships,³ there has been a judicial trend to broaden the parental rights of unwed fathers and to more closely scrutinize the statutory disabilities under which unwed fathers have traditionally been placed regarding their children.⁴ Furthermore, although domestic law has traditionally focused more on parents’ legal rights than on parents’ legal duties,

1. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robinson*, 45 OHIO ST. L.J. 313, 319 (1984). The cases are *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quillon v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robinson*, 463 U.S. 248 (1983).

2. Note, *The Unwed Father's Parental Rights and Obligations After S.P.B.: A Retreat in Constitutional Protection*, 60 DEN. L.J. 659, 663. According to the doctrine of *Nullius Filius*, the illegitimate child was characterized as no man's son.

3. *Id.* at 669.

4. *Id.* at 663 n.37.

such legal rights have recently become more dependent upon the performance of the respective legal duty.⁵

The United States Supreme Court decisions broadening the rights of unwed fathers, like those broadening the rights of illegitimate children, have been based on the provisions of the fourteenth amendment.⁶ Statutes which restrict such rights without a countervailing compelling state interest have been found unconstitutional as a violation of the equal protection clause and/or the due process clause.

The United States Supreme Court first confronted the issue of the custody rights of a putative father⁷ in the case of *Stanley v. Illinois*.⁸ The West Virginia Supreme Court of Appeals recently had the opportunity to hear the case of *McGuire v. Farley*,⁹ an appeal of a domestic law case in which the main issue was whether a putative father of an illegitimate child had standing to bring an action for paternity and concurrent visitation rights.

Prior to the *Stanley* decision in 1972, courts had applied a presumption in favor of maternal custody, especially in cases involving young children and infants. This presumption, known as the "tender years presumption," and the general rule favoring maternal custody have more recently been somewhat abrogated due to the ever-changing view of traditional sex roles.¹⁰ Although the "tender years presumption" has not been rejected by either case law or statute,¹¹ courts now look at the child's sex, age, and preference, as well as the fitness of the respective parents in determining what is in the child's best interest. This "best interest standard" is applied in the decision-making process involved in granting visitation rights to

5. Buchanan, *supra* note 1, at 319-20.

6. Note, *supra* note 2, at 663.

7. Comment, *Equal Protection and the Putative Father: An Analysis of Purham v. Huges and Caban v. Mohammed*, 34 Sw. L.J. 717, 718 (1981).

8. *Stanley v. Illinois*, 405 U.S. 645 (1972).

9. *McGuire v. Farley*, 370 S.E.2d 136 (W. Va. 1988).

10. Note, *The Best Interests Of The Child In Custody Controversies Between Natural Parents: Interpretations and Trends*, 18 WASHBURN L.J. 482, 489 (1979).

11. Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 CARDOZO L. REV. 431, 432 (1982). See, e.g., W. VA. CODE § 48-2-15 (1986).

noncustodial parents.¹² Judicial cognizance of visitation rights for unwed fathers has continually evolved as the parental role of the unwed father has expanded.¹³ When an unmarried father takes an active interest in his child's or children's welfare and paternity is not an issue, the United States Constitution does not allow the state to actively discriminate against the unmarried father.¹⁴ The unwed father's interest in the companionship, care, custody, and management of his children is both cognizable and substantial.

Since the decision of the United States Supreme Court in *Stanley v. Illinois*, holding that the interest of the father of an illegitimate child in retaining custody of his child is cognizable and substantial, and that to deprive him of the child's custody without a hearing as to his fitness as a parent was a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, the rights of the unwed father have come under renewed scrutiny by the courts. The result has been to broaden and liberalize the unwed father's rights through either ignoring or judicially amending or even holding unconstitutional statutes which deny or restrict his rights.¹⁵

II. STATEMENT OF THE CASE

McGuire v. Farley began when putative father McGuire filed a petition in circuit court alleging his paternity of a child born out of wedlock and seeking visitation rights with the child. The natural mother of the child, Farley, initially denied McGuire's paternity (although she later admitted to the appellant's paternity) and contended that the father lacked standing to maintain a paternity action under chapter 48A, article 6, section 1 of the West Virginia Code (hereinafter W. Va. Code).¹⁶ The family law master accepted

12. Note, *supra* note 11, at 433.

13. Martin, *Legal Rights of the Unwed Father*, 102 MIL. L. REV. 77 (1983).

14. *Id.* at 79.

15. *Pierce v. Yerkovich*, 80 Misc. 2d 613, 614-15, 363 N.Y.S.2d 403, 404 (1974).

16. W. VA. CODE § 48A-6-1 (1986), which states:

A civil action to establish the paternity of a child and to obtain an order of support for the child may be instituted, by verified complaint, in the circuit court of the county where the plaintiff, the defendant or the child resides. Such action may be brought by any of the following persons:

- (1) An unmarried woman with physical or legal custody of a child to whom she gave birth;
- (2) A married woman with physical or legal custody of a child to whom she gave birth, if the complaint alleges that:

the mother's position, and the circuit court concurred, holding that the cited statutory provision¹⁷ "[d]oes not permit a non-custodial father of an infant to bring a paternity action."¹⁸

The father appealed to the West Virginia Supreme Court of Appeals, and argued "that denying him the right to maintain a paternity action violat[e]d his constitutional right to equal protection."¹⁹ The Supreme Court of Appeals reversed the decision of the circuit court, and held that "[t]he circuit court has jurisdiction to entertain appellant's petition for visitation rights, notwithstanding that determining visitation rights also implies a determination of paternity."²⁰

III. PRIOR LAW

In reaching its decision in *McGuire*, the West Virginia Supreme Court of Appeals relied directly on its prior decision in *J.M.S. v. H.A.*,²¹ which in turn was predicated on the United States Supreme Court holding in *Stanley v. Illinois*.²² Because "the considerations and interests involved in granting visitation rights are similar to those involved in determining custody,"²³ *Stanley* represents the "starting point in examining constitutional cases [and issues] which focus on the rights of unwed fathers."²⁴

(A) Such married woman lived separate and apart from her husband for a period of one year or more immediately preceding the birth of the child;

(B) Such married woman did not cohabit with her husband at any time during such separation and that such separation has continued without interruption; and

(C) The defendant, rather than her husband, is the father of the child.

(3) Any person, including the state of West Virginia or the department of human services, who is not the mother of the child, but who has physical or legal custody of such child;

(4) The guardian or committee of such child;

(5) The next friend of such child when the child is a minor; or

(6) By such child in his own right at any time after the child's eighteenth birthday but prior to the child's twenty-first birthday.

17. *Id.*

18. *McGuire*, 370 S.E.2d at 137.

19. *Id.*

20. *Id.*

21. *J.M.S. v. H.A.*, 161 W. Va. 433, 242 S.E.2d 696 (1978).

22. *Stanley*, 405 U.S. 645.

23. Note, *supra* note 11.

24. Martin, *supra* note 13, at 77.

The facts of *Stanley*²⁵ show that Stanley lived intermittently for eighteen years with a female companion, and during that time the two became parents of three children. Upon the death of Stanley's female companion, Stanley lost custody of the three children. Following a dependency proceeding initiated by the state of Illinois, Stanley's children were declared wards of the state and were placed with court-appointed guardians. Pursuant to Illinois law, the children of an unwed father automatically became wards of the state upon the unwed mother's death.

Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the fourteenth amendment.²⁶

The Illinois Supreme Court rejected the equal protection claim, holding that Stanley lacked standing to raise the argument of parental fitness.²⁷ Stanley then pressed his equal protection claim to the United States Supreme Court.²⁸

The central question examined by the Supreme Court in *Stanley* was posed as follows: "Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?"²⁹ The court answered this question in the affirmative and "unequivocally established that a father of an illegitimate child must receive the same treatment and consideration as that received by any parent with respect to the termination of his parental rights."³⁰

In deciding the *Stanley* case, the Supreme Court was faced with an Illinois dependency statute³¹ that empowered state officials to circumvent neglect proceedings on the theory that an unwed father is not a "parent" whose existing relationship with his children must be considered.³² The state spoke of "the generic disinterest of pu-

25. *Stanley*, 405 U.S. at 646.

26. *Id.*

27. *In re Stanley*, 45 Ill.2d 132, 256 N.E.2d 814 (1970), *cert. denied*, *Stanley v. Illinois*, 400 U.S. 1020 (1971), *rev'd*, *Stanley v. Illinois*, 405 U.S. 645 (1972).

28. *Stanley*, 405 U.S. 645.

29. *Id.* at 649.

30. *J.M.S.*, 161 W. Va. at 435, 242 S.E.2d at 697.

31. ILL. REV. STAT. ch. 37, para. 701-14 (1965).

32. *Stanley*, 405 U.S. at 649, 650.

tative fathers in their children” and opined that “[i]n most instances the natural father is a stranger to his children.”³³ The court struck down the Illinois statute under which an unwed father was not included in the statutory definition of “parent;” the statute, in effect, conclusively presumed the unwed father to be neglectful and unqualified to raise his children.³⁴ The state of Illinois based its position in part on this presumption and postulated that “most unmarried fathers are unsuitable and neglectful parents.”³⁵

Although *Stanley* was technically a custody case, the implications for application to visitation rights controversies are readily apparent. “The private interest here, that of a man in the children he has sired . . . undeniably warrants deference and, absent a powerful countervailing interest, protection.”³⁶

The Supreme Court has often commented on the importance of family and has held that the rights to conceive and to raise one’s children are essential,³⁷ that these are basic civil rights of man,³⁸ and that the integrity of the family unit finds protection in the due process clause of the fourteenth amendment.³⁹ This recognized liberty embodied in the fourteenth amendment is not “defined with exactness,” but “without doubt, it denotes . . . the right of the individual to . . . establish a home and bring up children.”⁴⁰ The Supreme Court has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected;”⁴¹ therefore, heightened scrutiny should be applied to “legislation which involves one of the basic civil rights of man. Marriages and procreation are fundamental to the very existence and survival of the race.”⁴² “Nor has the law refused

33. *Id.* at 654 n.6.

34. Case comment, *Domestic Relations Parental Rights of the Putative Father: Equal Protection and Due Process Considered*, 14 MEM. ST. U. L. REV. 259 (1984).

35. *Stanley*, 405 U.S. at 654.

36. *Id.* at 651.

37. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

38. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

39. *Meyer*, 262 U.S. at 399.

40. *Id.*

41. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

42. *Skinner*, 316 U.S. at 541.

to recognize those family relationships unlegitimized by a marriage ceremony.”⁴³ It has been determined that illegitimate children are not “nonpersons;”⁴⁴ therefore, it should logically follow that the parents of illegitimate children should not be considered nonpersons.

The fourteenth amendment clearly mandates that no state shall “deny to any person within its jurisdiction the equal protection of the laws,”⁴⁵ and the equal protection clause necessarily limits the authority of a state to draw legal versus biological lines as it sees fit. “To say that the test of equal protection should be the ‘legal’ rather than the biological relationship is to avoid the issue.”⁴⁶ The real issue is whether a legislative body can transform an illegitimate child into a nonperson; obviously it cannot. If a legislature cannot transform an illegitimate child into a nonperson, then the legislative body should not be able to transform the unwed father of the illegitimate child into a similar nonperson.

“What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case?”⁴⁷ The Supreme Court decision in *Stanley* underscored the position that an unwed father’s interest in his children, including visitation therewith, is both appreciable and material. The state’s interest in caring for an unwed father’s children is minimal if the unwed father is shown to be a fit father.⁴⁸ Therefore, it follows that denying a hearing to unwed fathers while granting a hearing to other parents is “inescapably contrary to the equal protection clause.”⁴⁹ Procedure by factless presumption would always be less expensive and administratively or judicially more simplistic than an individualized determination. However, should the procedure foreclose the factually determinative issues of com-

43. *Stanley*, 405 U.S. at 651. The court makes reference to *Levy v. Louisiana*, 391 U.S. 68 (1968), which held unconstitutional a state statute that denied natural but illegitimate children a wrongful death action for the death of the mother.

44. *Levy*, 391 U.S. at 70.

45. U.S. CONST. amend. XIV, § 1.

46. *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968).

47. *Stanley*, 405 U.S. at 652.

48. *Id.* at 658.

49. *Id.*

petence and care, such procedure “needlessly risks running roughshod over the important interests of both parent and child.”⁵⁰

Subsequent to the 1972 United States Supreme Court decision in *Stanley v. Illinois*, the West Virginia Supreme Court of Appeals heard two precedent-setting domestic cases involving custody disputes. In *Hammack v. Wise*,⁵¹ a 1975 case, the court noted that

[i]t has become firmly established in this jurisdiction that a parent has a natural right to the custody of his or her infant child and that he or she cannot be deprived of that right unless upon cogent and convincing proof of misconduct, neglect, immorality, abandonment or other dereliction of duty reflecting unfitness as a parent.⁵²

“The right of a parent to have the custody of his or her child is founded on natural law and, while not absolute, such right will not be taken away unless the parent has committed an act or is guilty of an omission which proves his or her unfitness.”⁵³ Consequently, “a father of an illegitimate child must receive the same treatment and consideration as that received by any parent with respect to the termination of his parental rights.”⁵⁴

The Supreme Court of Appeals took a further step in the 1976 case of *Adams v. Bowens*.⁵⁵ The sole issue before the court in *Adams* was whether a circuit court has jurisdiction to determine custody of minor children. The court concluded that “the physical presence of the child [and all other contending parties before the

50. *Id.* at 656, 657.

51. *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).

52. *Id.* at 347, 211 S.E.2d at 121. This same position was “forcefully expressed” in the syllabus of *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d 798 (1969), as follows: A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

Id.

53. *Hammack*, 158 W. Va. at 348, 211 S.E.2d at 121. See also *State ex rel. Action v. Flowers*, 154 W. Va. 209, 174 S.E.2d 742 (1970); *Holstein v. Holstein*, 152 W. Va. 119 (1968); *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960); *Hoy v. Dooley*, 144 W. Va. 64, 105 S.E.2d 877 (1958).

54. *Hammack*, 158 W. Va. at 346, 211 S.E.2d at 120-21 (citing *J.M.S.*, 161 W. Va. at 435, 242 S.E.2d at 697, noting *Stanley*, 405 U.S. 645).

55. *Adams v. Bowens*, 159 W. Va. 882, 230 S.E.2d 481 (1976).

court] together with jurisdiction over the parties is a sufficient basis to permit a court to determine and award custody of a minor child.”⁵⁶

Following the *Adams* decision, the West Virginia Supreme Court of Appeals in 1978 held in *J.M.S.* that “[a] circuit court has jurisdiction to award or deny visitation rights to a father of an illegitimate child.”⁵⁷ The specific issue decided in *J.M.S.*, the right of visitation of one’s illegitimate offspring, was “one of first impression in [the] jurisdiction.”⁵⁸ The court made reference to the legislative recognition of the right of a parent to the custody of his or her child⁵⁹ as provided in the state statutes,⁶⁰ but made no reference to the procedural postures necessary in the establishment of paternity. The court recognized in *J.M.S.* that *Hammack* and *Adams* dealt with custody rather than visitation, yet relied on both *Hammack* and *Adams* in concluding that: “if a court has jurisdiction to grant custody, *a fortiori*, it certainly possesses jurisdiction to grant visitation rights in a proper case.”⁶¹

Rather than review and reinterpret the existing custody statutes (as the court later did in *McGuire*), the court in *J.M.S.* examined and relied on pertinent case law from other jurisdictions. The examination revealed “support for the right of the father of an illegitimate child to visit such child.”⁶²

In one such case, *R. v. F.*,⁶³ a 1971 New Jersey case, two pertinent questions were raised: 1) whether the court had jurisdiction to grant visitation rights not incidental to an order of support, and 2) whether the father of a child born out of wedlock has any right to visitation without the express or implied consent of the mother.⁶⁴

56. *Id.* at 887, 230 S.E.2d at 484, 485. Jurisdiction of the court is derived from W. VA. CONST. art. viii, § 6.

57. *J.M.S.*, syllabus of the court, 161 W. Va. at 433, 242 S.E.2d at 696.

58. *Id.* at 434, 435, 242 S.E.2d at 697.

59. *Id.* at 435, 242 S.E.2d at 697.

60. W. VA. CODE § 44-10-7 (1972). Management of Ward’s Estate; maintenance, education, custody; duration of guardianship; settlement.

61. *J.M.S.*, 161 W. Va. at 435, 242 S.E.2d at 697.

62. *Id.*

63. *R. v. F.*, 113 N.J. Super. 396, 273 A.2d 808 (1971).

64. *Id.* at 399, 273 A.2d at 809.

The court concluded that it "must consider visitation by the father to be the natural right of each child"⁶⁵ and that "visitation rights may properly be granted to the father if it is determined that such visitation would be in the best interest of the child."⁶⁶

At the time of the *R. v. F.* decision, the father of an illegitimate child in the state of New Jersey was charged by statute with the duty to support the child.⁶⁷ Either parent could enforce such obligations.⁶⁸ The court in *R. v. F.* pointed out that a father is able to obtain custody of an illegitimate child in juvenile and domestic relations court.⁶⁹ Therefore, the court concluded that "[i]f visitation can be granted to a father in [the juvenile and domestic relations] court . . . [then no reason exists] to restrict the availability of that right to support cases. . . . If [the] court can grant temporary custody, *a fortiori*, it can grant visitation in the proper case."⁷⁰

The court stated, however, that in order to enforce the aforementioned statutory obligations, "it is necessary to show that the putative father is actually the child's natural father."⁷¹ The statute in question⁷² infringed upon both the right of a child to see his or her father and the right of a father to visit his child. Consequently, the court held that the statute was unconstitutional because it con-

65. *Id.* at 402, 273 A.2d at 811.

66. *Id.* at 410, 273 A.2d at 816.

67. N.J. STAT. ANN. § 9:16-2 (West 1976).

68. N.J. STAT. ANN. § 9:16-3 (West 1976).

69. *R. v. F.*, 113 N.J. Super. at 401, 273 A.2d at 811 (citing *In re Guardianship of C.*, 98 N.J. Super 474, 237 A.2d 652 (1967)).

70. *Id.* at 402, 273 A.2d at 811.

71. *Id.* at 408, 273 A.2d at 814.

72. N.J. STAT. ANN. § 9:16-1 (West 1976), which stated:

The mother of an illegitimate child, whether married or single, shall have the exclusive right to its custody and control and the *putative* father of such child shall have no right of custody, control or access to such child without the mother's consent. If however, it is proved that the mother is unfit to have the custody of such child, the Superior Court or any other court which may have jurisdiction in the premises may make any order touching the custody or control of such child which might heretofore have been made. This section is intended to be declaratory of the existing law upon this subject and it shall, under no circumstances, be construed as an implication that the rights of such a mother have hitherto been less than as herein above defined.

stituted a violation of the protection offered by the due process clause of the fourteenth amendment.⁷³

A second case relied upon by the West Virginia Supreme Court of Appeals in *J.M.S.* was the 1974 New York case of *Pierce v. Yerkovich*.⁷⁴ In 1971, “under New York law the putative father [had] no parental rights with respect to a child born out of wedlock.”⁷⁵ However, in the 1972 case of *Doe v. Department of Social Services*,⁷⁶ a New York court nonetheless held that “in view of *Stanley*, there must now be read into [the] statute⁷⁷ that the mother’s exclusive or sole consent suffices only where there has been no formal or unequivocal acknowledgement or recognition of paternity by the father.”⁷⁸ Even so, at the time of *Pierce*, parental rights respective to the father had not been specifically established.

The *Pierce* court, which relied on the 1973 Connecticut case of *Forestiere v. Doyle*,⁷⁹ averred that in light of *Stanley*, “there can no longer be any question but that the father of an out of wedlock child has standing to be heard on the issue of visitation rights.”⁸⁰ Visitation decisions should turn on what is in “the best interests of the child,”⁸¹ and to deprive an unwed father of his interest in an illegitimate child without a hearing as to his parental fitness constitutes a breach of the equal protection clause of the fourteenth amendment.⁸²

Consequently, the notion in *Pierce* that the custodial parent should have the sole authority to determine what is in the best interest of the child, including whether the noncustodial parent should or should not be permitted association, was summarily rejected.⁸³

73. *R. v. F.*, 113 N.J. Super. at 410, 273 A.2d at 816.

74. *Pierce*, 80 Misc. 2d at 613, 363 N.Y.S.2d 403.

75. *Doe v. Roe*, 37 A.D.2d 433, 436, 326 N.Y.S.2d 421, 424 (1971).

76. *Doe v. Dep’t of Soc. Serv.*, 71 Misc. 2d 666, 337 N.Y.S.2d 102 (1972).

77. N.Y. DOM. REL. § 111(3), which provided that only the mother’s consent was necessary for the adoption of a child born out of wedlock.

78. *Doe v. Dep’t of Soc. Serv.*, 71 Misc. 2d at 671, 337 N.Y.S.2d at 107.

79. *Forestiere v. Doyle*, 30 Conn. Supp. 284, 310 A.2d 607 (1973).

80. *Pierce*, 80 Misc. 2d at 615, 363 N.Y.S.2d at 405.

81. *Id.* at 620, 363 N.Y.S.2d at 409.

82. *Id.* at 614, 363 N.Y.S.2d at 404.

83. *Id.* at 623, 363 N.Y.S.2d at 412.

IV. THE COURT'S ANALYSIS

It becomes apparent from the above discussion of prior law that the West Virginia Supreme Court of Appeals, in its analysis and decision in the instant case, was charged with following the principles set forth in the United States Supreme Court's decision in *Stanley*. Accordingly, the court began its analysis by referring to *Stanley*, noting that the United States Supreme Court "recognized the father's interest in retaining custody of his children as a substantial right," while holding "that the termination of [such] right without a hearing violated the due process clause of the Constitution."⁸⁴ The West Virginia Supreme Court of Appeals also deferred to the United States Supreme Court's finding that a "state's failure to afford the father a hearing due to his unwed status, while granting other parents a hearing, violated the equal protection clause."⁸⁵

The *McGuire* court noted that in *J.M.S.* it had held that the circuit court had "jurisdiction to award visitation rights to the father of illegitimate children."⁸⁶ In reaching its decision in *J.M.S.*, the court had relied on the line of cases flowing from the *Stanley* decision⁸⁷ and the general jurisdictional power and authority conferred upon the state circuit courts by the West Virginia Constitution.⁸⁸ It was important to the court's analysis in *McGuire* that it apply the principle articulated in *J.M.S.* that "[t]o deprive a parent of visitation rights without a hearing would constitute a denial of the due process and equal protection under our state and federal constitutions."⁸⁹

The *McGuire* court held that "the circuit court has jurisdiction to entertain petitions for visitation rights, including the necessary

84. *McGuire*, 370 S.E.2d at 137.

85. *Id.*

86. *Id.*

87. Primarily *Hammack*, *Adams*, *R. v. F.* and *Pierce*, discussed under section III, Prior Law.

88. W. VA. CONST. art. VIII, § 6. Circuit court; jurisdiction, authority, and power. "Circuit courts shall have original and general jurisdiction of all civil cases . . . all matters of . . . the appointment and qualification of . . . guardians . . . shall be vested exclusively in circuit courts or their officers . . ." *Id.*

89. *J.M.S.*, 161 W. Va. at 436, 242 S.E.2d at 697.

determination of paternity.”⁹⁰ The court concluded, quite properly, that any decision other than reversing the circuit court in the *McGuire* case would have “eviscerated” the decision in *J.M.S.* The court said that otherwise the putative father “would have a disembodied right to visit his child that he can never enjoy because he cannot establish himself as the father.”⁹¹

However, it is important to note that the court limited its holding in the *McGuire* decision. It was not the court’s intention to permit any man to “initiate a paternity action for any child,”⁹² nor was it the court’s intention to encourage third parties to initiate a paternity action.⁹³ The holding was limited to factual situations “where the child has no other legal or determined father.”⁹⁴

The court then turned its attention to the existing statute⁹⁵ which “denies standing to the father of an illegitimate child to establish paternity.”⁹⁶ Based upon prior law, the court held that the statute was unconstitutional to the extent that it denied standing to the putative father. Rather than striking the otherwise constitutional provisions of the statute, the court applied the doctrine of the least intrusive remedy.⁹⁷ The application of the doctrine⁹⁸ allowed the court to read the statute “to include the [putative father] as a person entitled to maintain a paternity action”⁹⁹ and to exercise any corollary rights. The court relied upon its application of the least intrusive remedy doctrine in *Anderson’s Paving, Inc. v. Hayes*¹⁰⁰ and *Weaver v. Shaffer*,¹⁰¹ and said, “Where a statute serves an urgent and necessary public purpose but is technically deficient

90. *McGuire*, 370 S.E.2d at 138.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. W. VA. CODE § 48A-6-1 (1986). (Action for establishment of paternity.)

96. *McGuire*, 370 S.E.2d at 138.

97. *Id.*

98. The remedy may be only so much as is required to correct the specification. The remedy may go beyond this only when there is a record of past constitutional violations and violations of past court orders. *Hoptowitz v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1983).

99. *McGuire*, 370 S.E.2d at 138.

100. *Anderson’s Paving, Inc. v. Hayes*, 295 S.E.2d 805 (1982).

101. *Weaver v. Shaffer*, 290 S.E.2d 244 (1980).

for constitutional reasons, this Court will apply the doctrine of the least intrusive remedy and give the statute, wherever possible, an interpretation which will cure its defect and save it from total invalidation."¹⁰²

V. COMPARATIVE STATUTORY PROVISIONS

To the extent the existing West Virginia statute¹⁰³ is defective, it was properly reinterpreted in *McGuire*. It would appear that the application of the least intrusive remedy doctrine not only allowed the court to grant standing to a putative father (while precluding third party standing), but it also permitted the state legislature to deal with statutory amendment in the most efficient manner. The Legislature must merely rectify the deficiency rather than redraft the entire statute. The repair of W. Va. Code § 48A-6-1 can be accomplished relatively easily by merely joining the "putative," "presumed," or "alleged" father to the already delineated listing of parties who may bring a paternity action. However, the statutory remedy remains a legislative function.

Statutory frameworks exist in other states which may serve as models for revision of West Virginia domestic law. For example, the state of California, which has adopted the Uniform Parentage Act,¹⁰⁴ provides that "a man presumed to be the child's father . . . may bring an action . . . for the purpose of declaring the existence of the father and child relationship" ¹⁰⁵ However, the presumption of fatherhood is tied to a marriage or an attempt at marriage or to the conclusory evidence of a blood test.¹⁰⁶ If the

102. *Anderson's Paving*, 295 S.E.2d at 807.

103. W. VA. CODE § 48A-6-1 (1986).

104. The Uniform Parentage Act, drafted by the National Conference of Commissioners on Uniform State Laws, provided a framework for statutory revision regarding equal treatment of legitimate and illegitimate children. The Uniform Parentage Act, the revised Uniform Reciprocal Enforcement of Support Act, the Uniform Child Custody Jurisdiction Act, and the Revised Uniform Adoption Act were all cornerstones of the comprehensive Uniform Marriage and Divorce Act. For further information on the Uniform Parentage Act, see Krause, *The Uniform Parentage Act*, 8 FAM. L. Q. 1 (Spring 1974), and for further information regarding the Uniform Marriage and Divorce Act, see the *Desk Guide to the Uniform Marriage and Divorce Act*, published by the editors of *The Family Law Reporter*.

105. CAL. CIV. CODE § 7006(a)(1) (Deering 1988).

106. CAL. EVID. CODE § 621 (Deering 1988).

child has no presumed father under the marriage or attempted marriage criteria, the action may be brought by “a man alleged or alleging himself to be the father”¹⁰⁷

Massachusetts domestic relations statutes provide that “[c]omplaints . . . to establish paternity, support, visitation or custody of a child may be commenced by . . . a person presumed to be or alleging himself to be the father”¹⁰⁸ Like California, Massachusetts links presumption of fatherhood to marriage or an attempt at marriage. Furthermore, the presumption of paternity is met when, with consent, the putative father “is named as the child’s father on the birth certificate”¹⁰⁹ It is interesting to note that the *McGuire* decision indicates that because the child carries the putative father’s name, “it is likely that the child’s birth certificate lists [the putative father] as the father, which according to [statute]¹¹⁰ is only to be done with the written consent of the mother and father.”¹¹¹

Under a New York statute, “proceedings to establish the paternity of the child . . . may be commenced . . . by a person alleging to be the father”¹¹²

This sampling of state statutes indicates that the putative father has standing to bring a paternity action when he can make the minimal showing that he is the “presumed” or “alleged” father. Of course, once the action is commenced, the respondent mother can always rebut the presumption. Factual determinations will ultimately decide the issue. Therefore, little else is needed in the statutory pre-action “putative” criteria.

VI. CONCLUSION

“Certainly, in light of *Stanley v. Illinois*, there can no longer be any question but that the father of an out of wedlock child has

107. CAL. CIV. CODE § 7006(c) (Deering 1988).

108. MASS. ANN. LAWS ch. 209C, § 5(a) (Law. Co-op. 1988).

109. MASS. ANN. LAWS ch. 209C, § 6(a)(6) (Law. Co-op. 1988).

110. W. VA. CODE § 16-5-12(e) (1986).

111. *McGuire*, 370 S.E.2d at 137 n.2.

112. N.Y. FAM. CT. ACT § 522 (McKinney 1988).

standing to be heard on the issue of visitation rights,"¹¹³ and "to deprive a parent of visitation rights without a hearing would constitute a denial of due process and equal protection under our state and federal constitutions."¹¹⁴ Yet, the putative father's right to be heard is obviously dependent upon the establishment of paternity.

Other states have begun to provide for standing of the putative father to bring paternity and related proceedings and have established the criteria for determining which, if any, putative father is permitted to bring the paternity action. Recognizing that "[e]qual protection of the laws is a pledge of the protection of equal laws,"¹¹⁵ it becomes clear that the current West Virginia paternity statute¹¹⁶ will also have to be amended to permit the putative father to bring a paternity action.

A father's rights to custody have already been identified by the West Virginia Legislature in a broad sense in other statutory provisions. For example, W. Va. Code § 44-10-7, which is entitled "Management of ward's estate; maintenance, education and custody; duration of guardianship; settlement," provides in part that "the father or mother of any minor child or children shall be entitled to the custody of the person of such child or children."¹¹⁷ Furthermore, although the jurisdictional authority of a circuit court to order custody and visitation rights is not specifically granted by state statute, the West Virginia Constitution¹¹⁸ provides circuit courts with the power and authority to handle such cases.¹¹⁹ Even so, the courts' inherent power has been usurped by the present defective statutory provision because the putative father may not initiate paternity proceedings.

The *McGuire* court has interpreted the existing paternity statute in a manner that grants the putative father of an illegitimate child the opportunity to be heard regarding his paternal rights. This in-

113. *Pierce*, 80 Misc. 2d at 615, 363 N.Y.S.2d at 405.

114. *J.M.S.*, 61 W. Va. at 436, 242 S.E.2d at 698.

115. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

116. W. VA. CODE § 48A-6-1 (1986).

117. W. VA. CODE § 44-10-7 (Repl. Vol. 1982).

118. W. VA. CONST. art. VIII, § 6.

119. *McGuire*, 370 S.E.2d at 138.

terpretation is consistent with the fourteenth amendment right to equal protection and due process. However, the trial court must determine the putative father's rights respective to the best interests of the child. For example, a court in determining a father's right to visitation of a child, legitimate or illegitimate, is charged with giving paramount consideration to the welfare of the child involved.¹²⁰ This position represents the so called "polar-star" principle: "[I]n a contest involving the custody of an infant [or child] the welfare of the child is of paramount and controlling importance and is the polar star by which the discretion of the court will be guided."¹²¹ This principle, although not always titled as such, has been applied in West Virginia since 1876.¹²²

A proper application of the "polar-star" principle is contingent upon all interested parties, including the father, being before the court. One might question how the best interests of the child could adequately be determined should the father lack standing to be a party to such a proceeding. "The fundamental prerequisite of due process of law is the opportunity to be heard,"¹²³ and in some cases the presence of the father could also be a fundamental prerequisite to the child's best interest.

The holding in the *McGuire* case is limited to circumstances "where the child has no other legal or determined father."¹²⁴ Ordinarily, a "determined father" is identified 1) in a judicial proceeding involving medical evidence, oral testimony, and/or written depositions or 2) "when both parents agree and identify the father in affidavits."¹²⁵ Unfortunately, *McGuire* offers no additional assistance by creating criteria to establish which, if any, putative father may bring a paternity action under the reinterpreted statute.

The *McGuire* case, in light of the thin history of domestic relations case law in West Virginia, is significant in that it addresses

120. *Id.*

121. *State ex. rel. Harmon v. Utterback*, 144 W. Va. 419, 428, 108 S.E.2d 521, 527 (1959).

122. *Rust v. Vanvacter*, 9 W. Va. 600 (1876).

123. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

124. *McGuire*, 370 S.E.2d at 138.

125. *Id.*

both equal protection and due process to be afforded the putative father. The case clearly stands for the proposition that “[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause.”¹²⁶

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126. *Lehr*, 463 U.S. at 261.