Washington Law Review

Volume 49
Number 2 *Symposium: Recent Washington Legislation*

2-1-1974

The Illegitimate Children and Parental Rights Act

Andrew C. Gauen

RECENT DEVELOPMENTS

THE ILLEGITIMATE CHILDREN AND PARENTAL RIGHTS ACT

The Illegitimate Children and Parental Rights Act, signed into law March 20, 1973,[1] has substantially altered procedures relating to adoption and custody in Washington. Both parents of an illegitimate child now have *primary right* to custody of the child. The putative father now is entitled to notice of those proceedings which may permanently terminate his parental rights, including a hearing to determine the necessity of his consent to his child's adoption. In addition, a putative father now stands on an equal footing with the child's natural mother when seeking custody of his child at a filiation proceeding.

I. BACKGROUND

In *Stanley v. Illinois*[2] the Supreme Court greatly expanded the rights of putative fathers. The Court found that an Illinois statute that deprived a putative father of notice and the opportunity to establish his fitness for custody in a permanent dependency proceeding denied him due process and equal protection of the law.[3] In subsequent cases

1. Popularly known as the Illegitimate Children and Parental Rights Act, Senate Bill No. 2459, ch. 134, [1973] Wash. Laws, is actually a mixed bag of amendments and additions to existing legislation. Its provisions amend WASH. REV. CODE §§ 26.24.190 (1963) (custody in filiation proceeding); 26.32.030 (1963) (when consent to adopt is required); 26.32.040 (1963) (when consent to adopt is not required); 26.32.050 (1963) (finding of the court as to consent requirement); 26.32.080 (1963) (adoption notice, form and service) and add to WASH. REV. CODE chs. 26.32 (1963) (adoption); 26.37 (1963) (protection of orphaned, homeless or neglected children). Labeled as emergency legislation, the Act went into effect immediately.

2. 405 U.S. 645 (1972).

3. Peter Stanley, the acknowledged father of three illegitimate children, lived with Joan Stanley intermittently for 18 years. The couple never married. When Joan died, the two youngest children became wards of the state and were placed with court appointed guardians pursuant to the Juvenile Court Act, ILL. REV. STAT., ch. 37, §§ 702-05 (1972). After hearing Stanley's argument that he had not been shown to be an unfit parent and that neither married fathers nor unwed mothers could be deprived of their children without such a showing, the Illinois Supreme Court held that the statutory distinction between unwed mothers and unwed fathers was rationally related to the purposes of the Juvenile Court Act and that Stanley could properly be separated from his children on mere proof that he and the dead mother had not been married. *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

The United States Supreme Court granted *certiorari* and rendered two essentially

the Court indicated that the protections of *Stanley* were applicable to adoption proceedings and custody disputes.[4]

The *Stanley* analysis suggested that Washington's adoption statute discriminated against putative fathers on two levels. First, by expressly providing that a putative father need not consent to his child's adoption, it denied him rights guaranteed to married parents, unwed mothers and divorced parents.[5] The statute thereby deprived fathers of illegitimate children of equal protection of the law. Second, the statute *presumed* an unmarried father to be an unfit parent and therefore not entitled to notice of his child's adoption.[6] By denying a puta-

---

separable holdings. First, the Court held that Stanley had a "cognizable and substantial" (405 U.S. at 652) private interest—"that of a man in the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651. In view of the father's interest and the state's declared goals of protecting the welfare and strengthening the family ties of minors, the Supreme Court concluded that the state cannot simply *presume* that unmarried fathers are unsuitable without giving them an opportunity to establish themselves as fit parents. Under the due process clause, the state's interest in presuming rather than proving a putative father's unfitness as a parent "is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658.

Second, the Supreme Court held that since Illinois assumes custody of the children of married parents, divorced parents or unwed mothers only after a hearing and proof of neglect, the failure to provide unwed fathers with a similar hearing on fitness constitutes a denial of equal protection of the law. *Id.*

4. In Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 405 U.S. 1051 (1972) *vacating and remanding sub. nom.* State *ex rel.* Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), the Supreme Court vacated and remanded for consideration in light of *Stanley* a Wisconsin Supreme Court decision holding a putative father not entitled to notice of the adoption of his child or an opportunity to show his fitness as a parent. On remand, the Wisconsin Supreme Court vacated the adoption and placed the child in the custody of the putative father. State *ex rel.* Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan, 59 Wis. 2d 1, 207 N.W.2d 826 (1973). Other state courts have applied the reasoning of *Stanley* to adoption. *See, e.g.,* People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972); Doe v. Dept. of Social Services, 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972). In Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972), *vacating and remanding* 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), the Supreme Court vacated and remanded an Illinois custody determination to be considered in light of *Stanley*. On remand, the putative father was successful in maintaining custody of his illegitimate children. Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972).

5. WASH. REV. CODE § 26.32.030 (1963) stated that written consent to adoption need be filed prior to a hearing to adopt as follows:

(2) If the person to be adopted is of legitimate birth, or legitimized thereafter, and a minor, then by each of his parents, except as hereinafter provided;

(3) If the person to be adopted is illegitimate and a minor, then by his mother, if living.

WASH. REV. CODE § 26.32.040 (1963) adds: "No consent for the adoption of a minor shall be required as follows: . . . (5) From a father of an illegitimate child."

6. WASH. REV. CODE § 26.32.050 (1963) provides for a hearing to determine whether the consent of a parent is required pursuant to WASH. REV. CODE § 26.32.040

tive father notice and an opportunity to establish himself as a fit parent, the statute deprived him of due process of law.

One section of Washington's filiation statute also was open to attack under the rationale of *Stanley*.[7] The filiation statute gave mothers of illegitimate children an inordinate advantage in custody hearings by forcing putative fathers to bear the nearly impossible burden of proving the child's mother unsuitable. By treating unwed fathers as less suitable parents than unwed mothers, the statute denied putative fathers equal protection of the law.[8]

The Washington Court of Appeals, noting the constitutional protections of *Stanley*, recognized the problems inherent in the adoption and filiation statutes but hesitated "to unravel the complexities involved . . . ."[9] With the realization that the adoption and filiation statutes

---

(1963), *supra* note 5. The statute also states: "[T]he father of an illegitimate child shall not be entitled to notice of such hearing." WASH. REV. CODE § 26.32.080 (1963), in detailing requirements of notice, form and service of summons, continued the exclusion of putative fathers: "(5) If the court is satisfied of the illegitimacy of the child to be adopted, and so finds, no notice to the father of such child shall be made."

The Adoption Act, WASH. REV. CODE ch. 26.32 (1963), confers power to decree adoptions in the Washington Superior Court. In addition, the Juvenile Court has power to place children found to be "wards of the state" (dependent children) with approved agencies. *See* WASH. REV. CODE § 13.04.110 (1963). Although the Juvenile Court Act, WASH. REV. CODE ch. 13.04 (1963), does not expressly distinguish between married and unmarried fathers, the Juvenile Court of Washington did not extend notice to unwed fathers prior to *Stanley*.

7. WASH. REV. CODE § 26.24.190 (1963) provided that after filiation proceedings have been initiated and the father of the child identified, custody of the child shall be delivered to the mother, providing she is a "suitable person." If she is not a suitable person, "the court may deliver the care and custody of such child to any reputable person, including the accused, charitable or state institution."

It is questionable whether the courts actually did consider the possibility that the mother is unsuitable despite charges from the father to that effect. "Indeed, it is not uncommon for a court to rest its decision on the axiom that the child's welfare and the mother's right to custody are always synonymous." Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of The Unwed Father*, 11 J. FAMILY L. 231, 242 (1971).

It will be noted that WASH. REV. CODE § 26.24.190 (1963) gave a putative father no priority over other interested parties such as charitable or state institutions. Even those in the nebulous category of "any reputable person" stood on equivalent footing with putative fathers. Despite the language of the statute, the Washington Supreme Court held that when the mother of an illegitimate child dies, the putative father, if a fit and proper parent and the welfare of the child permits, has rights to custody and control over the child as against all others. *In re* Moore's Estate, 68 Wn. 2d 792, 415 P.2d 653 (1966).

8. *See* note 3 *supra*.

9. *In re* the Guardianship of Gloria Lee Harp, 6 Wn. App. 701, 704, 495 P.2d 1059, 1062 (1972). The Washington Court of Appeals stated: "Obviously, the [state's] filiation and adoption statutes are now unconstitutional insofar as they fail to recognize the newly determined constitutional rights of the putative father." *Id.*

were obviously unconstitutional came predictable judicial and administrative confusion. Although the Illegitimate Children and Parental Rights Act has effectively eliminated some areas of uncertainty, inescapable problems continue to pervade the areas of adoption and filiation. This note will explore these problems, suggest solutions, examine the scope of a putative father's new rights and discuss some additional steps the practitioner now must take to execute a valid adoption.

II. FILIATION

A filiation proceeding is a special statutory proceeding to establish paternity and the father's duty to support his illegitimate child.[10] As part of a filiation proceeding, the court awards custody of the child. The new amendment to the filiation statute removes the requirement that an unwed father seeking custody of his child demonstrate that the mother is unsuitable. The sole criterion for determining custody is the welfare of the child, the putative father now having an equal opportunity to demonstrate that he is "more fit as a parent." However, the court retains the power to find both parents unfit and to grant custody to a reputable person or public or private agency.[11]

The exact legal character of the award of custody included in a filiation judgment is uncertain. Presumably, it is a custody award similar in nature to that which occurs after dissolution of marriage. If so, a filiation judgment could terminate a putative father's legal interest in his child; if the decree awarded him no right of visitation, control or custody nor imposed on him any obligation to support his child, he would not retain his power to withhold consent to his child's adoption.[12]

This dictum is contrary to previous Washington authority. *See In re* Blake, 21 Wn. 2d 547, 151 P.2d 825 (1944).

10. BLACK'S LAW DICTIONARY 756 (4th ed. 1951).

11. Ch. 134, § 1, [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.24.190 (1963). The amendment also allows the child to be given the surname which the court in its discretion finds is in the best interests of the child. The previous unamended statute vested power in the court to order "that the surname of the accused shall henceforth be the lawful surname of such child." The amended section seems to imply that the natural mother can no longer insist that the child be given the father's surname. The court would appear still to have discretion, however, to allow an agreement between the parents to name the child after the father (or mother) provided such agreement is in the best interests of the child.

12. Under the equal protection reasoning of *Stanley, see* note 3 *supra,* a putative father who has retained some interest in his child, *see* note 13 and accompanying text *infra,* necessarily will maintain the right to petition to modify the custody

Although specifically mentioning only divorce, separate maintenance and annulment, the exception in the adoption statute requiring no consent from the parent judicially deprived of custody should logically encompass a decree of custody in a filiation proceeding. To argue that a putative father, whose rights and obligations toward his child have been terminated in a filiation proceeding, retains the right to refuse to consent to his child's adoption would be to give him a position superior to that of the divorced father, whose power to withhold consent is lost under similar circumstances.[13]

A divorced parent with visitation rights possesses sufficient interest in the child to require his consent for the child's adoption.[14] If the court interprets the filiation award of custody as being similar in nature to a divorce award of custody, the question whether the putative father has a right to visitation may become extremely important in determining the necessity of his consent prior to the adoption of the child. Visitation rights of putative fathers increasingly have been recognized where such continued contact would be in the best interests of the child.[15] Although the amendment to the filiation statute fails to provide for such visitation rights, it would not be in keeping with the spirit of the new section on filiation to fail to recognize such rights judicially.[16]

---

decree. *See, e.g.,* Holten v. Holten, 64 Wn. 2d 203, 390 P.2d 982 (1964) (custody provisions of a divorce decree may be modified as circumstances may require); State *ex rel.* Smith v. Superior Court, 23 Wn. 2d 357, 161 P.2d 188 (1945) (the welfare of the child is of paramount importance in determining who is entitled to the custody of illegitimate as well as legitimate children).

13. WASH. REV. CODE § 26.32.040(2) (1963). The court has stated that WASH. REV. CODE § 26.32.040(2) (1963) protects the rights only of a parent who has exhibited sufficient interest in his child at the time of divorce or subsequent modification to secure an affirmative grant of some right of custody, control or visitation or who has been required by decree to make support payments. Where none of the above rights and duties exist, the exception to the consent requirement is applicable. *In re* Candell, 54 Wn. 2d 276, 282, 340 P.2d 173, 177 (1959).

14. *See* note 13 *supra.*

15. *See, e.g., In re* the Guardianship of Gloria Lee Harp, 6 Wn. App. 701, 706, 495 P.2d 1059, 1063 (1972) *citing* Annot., 15 A.L.R.3d 887 (1967). *Harp* contained a rather significant comment on a putative father's right to visitation, the importance of which was overshadowed by the *Stanley* dictum, *see* note 9 and accompanying text *supra.* The court noted that the father of an illegitimate child may be granted visitation rights where custody has been awarded to the mother, provided the best interests of the child permitted.

16. If a putative father cannot secure custody during a filiation proceeding, but does not wish his child relinquished for adoption without his consent, he could ask the court to grant him a right to visitation or else to impose a nominal support judgment, preserving sufficient interest in his child to avoid the operation of WASH.

III. CONSENT TO ADOPTION

Consent to the adoption of an illegitimate child must now be secured from both natural parents.[17] The adoption statute as amended retains as exceptions from this consent requirement:[18]

> (1) [A] parent deprived of civil rights when in a hearing . . . the court finds that the circumstances surrounding the loss of said parent's civil rights were of such a nature that the welfare of the child would be best served by a permanent deprivation of parental rights;
> (2) [A] parent who has been deprived of the custody of the child . . . after notice: *Provided,* That a decree in an action for divorce, separate maintenance, or annulment, which grants to a parent any right of custody, control, or visitation of a minor child, or requires of such parent the payment of support money for such child, shall not constitute such deprivation of custody;
> (3) [A] parent who, more than one year prior to filing of a petition hereunder, has been adjudged to be mentally ill or otherwise mentally incompetent, and who has not thereafter been restored to competency by the court making such adjudication, and the court at a hearing called for such purpose . . . finds that the best interests of the child will be served by permanent deprivation of custody;
> (4) [A] parent who has been found . . . upon notice as herein provided to such parent, to have deserted or abandoned such child under circumstances showing a willful substantial lack of regard for parental obligations.

The amended statute, however, additionally provides that consent is not required:[19]

> (5) From a parent of an illegitimate child who prior to entry of the interlocutory decree of adoption has not contested the proposed adoption after having been provided with notice of a hearing on an adoption petition pursuant to the notice provisions of section 6 of this 1973 amendatory act;

REV. CODE § 26.32.040(2) (1963). If the mother died, relinquished the child for adoption or abandoned the child, the father would retain his right to establish himself as a fit parent.

17. Ch. 134, § 2, [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.32.030 (1963).

18. Ch. 134, § 3, [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.32.040 (1963).

19. *Id.*

(6) From a parent who has surrendered the child pursuant to section 7 of this 1973 amendatory act.

Subsection 5 provides for a show cause hearing prior to entry of the decree of adoption. If, after proper notice,[20] the parent of an illegitimate child fails to appear and contest the adoption, then his or her consent is no longer required.[21] Subsection 6 simply incorporates previously existing case and statutory law into a statutory consent exception.[22] These new statutory procedures create several problems.

The adoption statute as amended clearly requires a putative father's consent to his child's adoption. The statute seems designed to protect the putative father's right to obtain custody; it does not, however, address itself to the problem created when a putative father avoids waiver of his rights by coming forward and acknowledging paternity but neither asserts a right to custody nor consents to the adoption. Although the father, in such a case, might seem to have deprived his child of an expedient adoption, several solutions are possible: (1) The court might determine that the putative father had abandoned the child and his consent was, therefore, unnecessary;[23] (2) the court

20. *See* notes 37–49 and accompanying text *infra*.

21. There are several excellent justifications for using the show cause device: (1) It is in strict compliance with *Stanley*. (*Stanley* only requires notice of a hearing; it does not require acknowledgement.) (2) "[T]he passive nature of the notice would not tend to confuse the recipient . . . [nor] invite the participation of counsel." (3) "[T]he show cause nature of the proceeding would avoid the problem of the under eighteen year old mother, *i.e.*, a subsequent statutory rape charge, and would also avoid any admissions which might later be used in claims for seduction, adultery, incest, fornication, or criminal nonsupport." (4) "[T]he notice . . . would not be a bar to [paternity] suits which might later be filed by or on behalf of the mother or infant child." (5) There is no waiver of rights [except to consent to the adoption should the parent fail to appear]. "[T]he recipient is receiving only notice of a hearing, and he need not take any action if he so desires." (6) "[T]he proceeding is subject to the approval of the court, and if the adoption for any reason is not completed, the rights of all parties would remain intact." (7) "If the putative father does not appear at the hearing, then presumably his rights would be extinguished." If he does appear at the hearing, "he will retain the burden of proving his paternity." D. HOROWITZ & T. WILLHITE, WASH. ATT'Y GEN. INFORMAL REPORT, PUTATIVE FATHERS AND STANLEY V. ILLINOIS—DEPT. OF SOCIAL AND HEALTH SERVICES POLICY 12 (Oct. 4, 1972).

22. WASH. REV. CODE § 26.37.010(4) (1963); WASH. REV. CODE § 26.32.030 (5) (1963). *See also In re* Reinius, 55 Wn. 2d 117, 124, 346 P.2d 672, 675 (1959) (adoption agency stands *in loco parentis* and takes the place of the natural parents in regard to consent to an adoption, in order to safeguard the best interests of the child).

23. WASH. REV. CODE § 26.32.040(4) (1963). *See* notes 90—100 and accompanying text *infra*. *See also In re* Lybbert, 75 Wn. 2d 671, 453 P.2d 650 (1969) (father not attempting to gain custody is in a position "considerably subordinate" to that of

might sever the father's interests in the child in a deprivation action;[24] (3) the mother (or prosecuting attorney) could bring a filiation action against the putative father and secure a judgment depriving him of any right or obligation in his child and thus render his consent unnecessary.[25]

Another problem is whether a putative father who judicially has been found to be the natural father and who has consented to his child's adoption can withdraw his consent prior to the court's issuance of an order for the child's relinquishment to an adoption agency or individual. Since the mother of an illegitimate child retains the right to withdraw her consent,[26] under the equal protection reasoning of *Stanley* a putative father necessarily would retain a similar right.[27] Once the child is placed with an adoption agency pursuant to the court's approval of the father's relinquishment, however, the consenting putative father, just as a consenting natural mother, loses all rights to the child.[28]

Although the consent requirements of the new statute do not distinguish between unwed fathers and unwed mothers, the statute treats unwed parents differently than married parents in that they are denied certain technical procedural safeguards which benefit married parents. Before being deprived of rights in his child, a married parent must be found in a separate hearing to have abandoned the child, to be incarcerated under circumstances indicating that the best interests of the child require elimination of the necessity of consent,[29] to be mentally incompetent for one year or have been deprived judicially of all rights

---

a parent attempting to gain custody of his children in the context of WASH. REV. CODE § 26.32.040(4) (1963)).

24. Deprivation actions arise in the context of parental neglect or abuse and involve removing the child for its own protection from the custody of its parents. Jurisdiction to permanently deprive a parent of all rights in his or her child arises under the Juvenile Court Act, WASH. REV. CODE § 13.04.010(2)–(3) (Supp. 1972). *See In re* Russell, 70 Wn. 2d 451, 423 P.2d 640 (1967); *In re* Sickles, 42 Wn. 2d 17, 252 P.2d 1063 (1953); *In re* Hudson, 13 Wn. 2d 673, 126 P.2d 765 (1942).

25. Because of the length of time necessary to procure a filiation judgment, this method is the least desirable from the standpoint of the welfare of the child. *See* text accompanying notes 12-13 *supra*.

26. State *ex rel.* Towne v. Superior Court, 24 Wn. 2d 441, 165 P.2d 862 (1946). *See* note 28 *infra*.

27. *See* note 3 *supra*.

28. WASH. REV. CODE § 26.32.070(1) (1963). Note that this section of the Adoption Act was enacted subsequent to the *Towne* case which stated that the mother of an illegitimate child could revoke her consent any time prior to entry of the interlocutory decree. *See* note 26 *supra*.

29. *Cf. In re* Sego, 82 Wn. 2d 736, 513 P.2d 831 (1973).

and obligations to the child. An unwed parent, however, need only fail to appear at the show cause hearing.[30]

Despite these differences in procedure, the substantive rights of married and unmarried parents are essentially the same. If a married parent fails to appear at a hearing where the necessity of his consent is adjudicated, his rights will be extinguished in much the same manner as those of an unmarried parent who fails to appear at a show cause hearing. The show cause hearing as a method of eliminating the rights of a natural parent does not create any special problems because the Supreme Court in *Stanley* implied that constitutional protections afforded to putative fathers were subject to the limitations of a "powerful countervailing interest."[31] Since it is questionable whether any one of the four exceptions to the consent requirement would be found applicable in every situation, the show cause device becomes a necessary and valuable method of quickly and fairly eliminating uninterested putative fathers. Clearly the "powerful countervailing interest" of both the state and the adoptive child in facilitating valid and expeditious adoptions require such a procedure.[32]

30. *See* text accompanying notes 18–19 *supra*. The Judiciary Committee has proposed that the word "illegitimate" be stricken from Subsection (5), rendering its provisions equally applicable to married and unmarried parents. WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, § 1(4), [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.32.040(4) (1963).

31. "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." 405 U.S. at 645.

32. Practical difficulties weigh heavily against the putative father's consent being treated with the same deference as a married parent's: (1) It would be difficult to demonstrate that a putative father need not consent to his child's adoption pursuant to one of the previously existing WASH. REV. CODE § 26.32.040 (1963) consent exceptions. Although the abandonment exception would be useful in many instances, *see* notes 90-100 and accompanying text *infra*, a natural parent, unlike a married parent, cannot always be presumed cognizant of his child's existence and consequently cannot be found to have abandoned a child of whose existence he may never have been aware. (2) Proving affirmatively that a putative father was not entitled to consent because of one of the previous statutory exceptions would entail costlier and more time-consuming procedures than simply giving such a father an opportunity to assert his rights in a show cause hearing. (3) The show cause device is more practical from the standpoint of the putative father. *See* note 21 *supra*.

Besides practical problems, the interests of the child in an expedient adoption weigh heavily against treating a putative father in the same manner as a married parent. Prompt placement in an adoptive home serves the child's needs for early parental attachment and minimizes the necessity for interim foster home care. Harmful psychological effects arising from repeated and sudden changes in the environment are reduced. Since extensive delay resulting from attempts to locate and secure the consent of a putative father may cause the adoption to be postponed until the child is no longer attractive to adoptive parents and result in his relegation to a foster home or in-

IV. RELINQUISHMENT TO AGENCIES

The Illegitimate Children and Parental Rights Act adds specific provisions for relinquishing illegitimate children to adoption agencies. When only one parent seeks to surrender the child to an adoption agency, a show cause hearing and notice are required in the same manner as when the court seeks to eliminate the need for the putative father's right to consent to his child's adoption.[33] The surrendering parent must relinquish the child in writing and the petition for surrender will not be granted until the other parent also has relinquished or the show cause procedure has been observed. If a putative father or an unwed mother served with adequate notice fails to appear at the show cause hearing, the court will deem the nonappearing parent to have validly surrendered the child.[34] A putative father appearing at a show cause hearing to determine whether the relinquishment should be granted will be required to demonstrate paternity in the same manner as a putative father who appears in a show cause hearing to determine the necessity of his consent to his child's adoption.[35] Once the court determines there has been a valid surrender, the rights of the illegitimate child's natural parents cease and the agency may place the child for adoption without notice to or consent of either parent.[36]

V. NOTICE

The Court in *Stanley* noted in passing that "extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined."[37] Unfortu-

---

stitutional care, a fair but speedy method of eliminating the necessity of the putative father's consent is unquestionably more compatible with the child's best interests than prolonged and uncertain litigation involving the requirement of consent. *See* Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father,* 59 VA. L. REV. 517, 523–24 (1973) [hereinafter cited as *The "Strange Boundaries" of Stanley*].

33. Ch. 134, § 8(1), [1973] Wash. Laws, WASH. REV. CODE § 26.37.015 (Supp. 1973).

34. Ch. 134 § 7(4), [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.37.010 (1963).

35. Ch. 134, § 8(3)(a)–(b), [1973] Wash. Laws, WASH. REV. CODE § 26.37.015 (3)(a)–(b) (Supp. 1973).

36. Ch. 134, § 7(5), [1973] Wash. Laws, *amending* WASH. REV. CODE § 26.37.010 (1963).

37. 405 U.S. at 657 n.9.

nately, the Court was indulging in gross oversimplification. Extending notice to unwed fathers calls for complex and sensitive procedural mechanisms; applying these mechanisms while remaining in contact with the realities of extramarital childbirth is a difficult and delicate task.

Putative fathers now must receive notice of the show cause hearing at which the necessity of their consent will be determined.[38] The notice, addressed to the natural parent and "to all whom it may concern" must state the purpose, time and place of the hearing and contain the name of the mother and of the child.[39] When a named putative father cannot be located, notice must be sent to his last known address.[40]

Publication will be required unless a putative father acknowledges paternity[41] in writing *and* the court enters a separate finding that he is

38. Ch. 134, § 6(1), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(1) (Supp. 1973). The Section requires service of summons ten days prior to the hearing.

It has been suggested that attorneys do not schedule hearings to determine whether the putative father's consent is necessary at the same time as the hearing on the petition for adoption unless absolutely certain that the putative father will not appear and demand custody in the presence of the adoptive parents. Honeywell, *Adoptions: Illegitimate Children and Stanley v. Illinois,* 27 WASH. ST. BAR NEWS 23, 25 (May 1973) [hereinafter cited as Honeywell].

39. Ch. 134, § 6(3), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(3) (Supp. 1973).

40. Ch. 134, § 6(1)(a), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(1)(a) (Supp. 1973).

41. Is some type of formal acknowledgement necessary before a putative father is entitled to the right to notice of his child's adoption? The theory that acknowledgement is necessary derives from the fact that Peter Stanley openly admitted paternity and functioned responsibly as the father of his children. Brief for the Petitioner at 18, Stanley v. Illinois, 405 U.S. 645 (1972). Although an Illinois putative father's formal acknowledgement of paternity at a preliminary filiation hearing or at a subsequent trial may be treated by the trier of fact as conclusive of paternity in a filiation proceeding (ILL. REV. STAT., ch. 106¾, § 59 (Supp. 1972—73)), written or oral acknowledgement confers no inheritance status on an illegitimate child in Illinois unless the parents intermarry. Krupp v. Sackwitz, 30 Ill. App. 2d 450, 174 N.E.2d 877 (1961). It thus can be concluded that Stanley's oral acknowledgements in informal settings prior to the death of his common law wife carried no legal connotation other than as some evidence that he considered himself the father of the children. Since the acknowledgement in *Stanley* was only evidentiary, it is questionable whether the case should be interpreted as requiring a formal acknowledgement before rights to notice and an opportunity to be heard are extended.

In Washington, by acknowledging paternity in writing the father of an illegitimate child presumably will be legitimizing the child for purposes of intestate succession. *See* WASH. REV. CODE § 11.04.081 (Supp. 1972). If after acknowledgement the child were adopted by a third party, WASH. REV. CODE § 11.04.085 (1963) would protect a putative father's legitimate children from the illegitimate child's competing claim of intestate succession.

Acknowledgement has another adverse effect on the father's interests—exposing a

indeed the parent, or the court finds him to be the natural father in a filiation proceeding.[42] Even where the putative father has acknowledged paternity or has been found to be the child's father in a filiation proceeding, the court has additional discretion to order publication "whenever the court believes such notice might be necessary to protect the validity of adoption proceedings and decree of adoption."[43] This provision anticipates instances when publication is required despite acknowledgement or entry of a paternity judgment in order to protect adoptive parents from attempts of inadequately notified putative fathers not parties to the proceedings,[44] to vacate adoptions.[45]

---

putative father to a paternity action by a mother who later decides not to relinquish the child for adoption or to withdraw a previous relinquishment before the court has acted on it. (*See* notes 26–28 and accompanying text *supra*.) A putative father has no protection through contract since in most jurisdictions, including Washington, a mother cannot contract away her child's right to support. *See, e.g.*, Griggs v. Morgan, 4 Wn. App. 468, 481 P.2d 913 (1971). Since a mother retains the right to withdraw her consent prior to acceptance of the relinquishment, a putative father who acknowledges paternity to prevent the embarrassment of publication has no protection against a mother who later decides to keep her child and sue for filiation and support.

42. Ch. 134, § 6(2)(a)–(b), [1973] Wash. Laws, WASH. REV. CODE § 26.32 .085(2)(a)–(b) (Supp. 1973). One commentator has recommended the following:

> In a situation in which the adoptive parents know all the names and circumstances surrounding the adoption, a finding of paternity may be entered in the findings of fact at the time of the hearing on the petition. However, if the adoptive parents know nothing of the natural parents, it is suggested that a separate finding of paternity be entered in advance of the hearing on the petition for adoption. While the new legislation makes no reference to the minimum requisites for a finding of paternity . . . the notarized consent of the father containing an acknowledgement of paternity should be sufficient to support such a finding.

Honeywell, *supra* note 38, at 25.

43. Ch. 134, § 6(2), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(2) (Supp. 1973).

44. Where one putative father has been found to be the child's father, this finding could not be considered res judicata or collaterally estop another putative father who was never served with adequate notice and thus was not a party to the action. *See* RESTATEMENT OF JUDGMENTS § 14 (1942).

45. *See* note 58 *infra*. A putative father signing an acknowledgement of paternity could be one of many putative fathers. Even an uncontested paternity judgment is subject to doubt as to validity. Additional protection could be imposed by requiring a putative father acknowledging paternity to submit to a blood test. If the putative father's blood type was inconsistent with paternity of the child, publication could still be required or perhaps the mother would be induced to name the real father. Of course, while a blood test can disprove paternity, it cannot be relied upon to establish paternity conclusively. (In filiation proceedings, the great majority of courts will not admit evidence of blood tests to support a charge of paternity. C. MCCORMICK, EVIDENCE 522 (2d ed. 1972)) Consequently, where the mother has had sexual relations with more than one man, the possibility of at least one putative father not receiving adequate notice will always remain.

The possibility that more than one putative father exists is not at all farfetched. *See, e.g.*, S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 167 (4th ed. 1967) where the author cites a blood test study in New York City which found that approximately

When the court has reason to believe that another putative father will not receive adequate notice, publication is the only effective way of eliminating the possibility of such a potential father's returning subsequent to his child's placement in an adoptive home and demanding custody.[46] As the Court in *Stanley* noted, "Unwed fathers who do not promptly respond cannot complain . . . ."[47]

The Act effectively deals with complications which result when a named putative father cannot be located. In addition to notice mailed to his last known address, the Act calls for publication when "after diligent search" the father cannot be found within the state.[48] Unfor-

---

30% of those men who deny paternity and demand a blood test are not the fathers. Another study revealed that there was a high degree of perjury in paternity cases. In Chicago, 40% of female petitioners confessed to polygraphists that they had had sexual intercourse with other men besides the accused during the conception period. In Orange County, California, over one-third of female petitioners in paternity suits admitted intercourse with more than one man during the conception period. *Id.* at 484 (Supp. 1970).

46. *See* note 58 *infra*.

47. 405 U.S. at 657 n.9. The Act does not specify in which county publication is to take place. The possibilities include the county where the mother resides, the county where the putative father was last known to reside, the county where the adoptive parents reside, the county where the child is born, the county where the child is relinquished or the county where the child is conceived. The Judiciary Committee has drafted statutory language which will require:

> That the court shall inquire as to the belief that any person so sought might be found either in one or more counties within the state, and if such possibility exists, the court shall see that publication of notice under this subsection shall be made by the clerk of the court in each such county.

WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, § 8(2)(b), [1973] Wash. Laws, WASH. REV. CODE § 26.37.015(2)(b) (Supp. 1973).

48. Ch. 134, § 6(1), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(1) (Supp. 1973). The question arises whether publication will be sufficient to protect the interests of an unknown out-of-state putative father. In Armstrong v. Manzo, 380 U.S. 545 (1965), an adoption decree was rendered invalid because publication to an out-of-state father with a *known* address was not adequate notice and thus a denial of due process. Since there has been no case dealing with an unknown out-of-state father (or a known out-of-state father with no known address), dictum from Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) would seem applicable, *see* text accompanying note 69 *infra*.

However, a putative father might attack a decree of adoption on the basis that depriving a nonresident parent of custody is impermissible and the decree is void for want of jurisdiction. *See* May v. Anderson, 345 U.S. 528, 533–44 (1953), where the Court held that a decree depriving a nonresident parent of custody is not entitled to full faith and credit in the absence of the issuing court's personal jurisdiction over such parent. However, *May* dealt with a conflicts of law problem–

> full faith and credit, not jurisdiction under the due process clause . . . and . . . there is some ground for the view that adoption decrees are not entitled to full faith and credit in any case. Secondly and more importantly—there appear to be some basic distinctions between custody and adoption.
>
> All that is ordinarily necessary for an award of custody . . . is proof that the welfare of the child will be better served by such an arrangement . . . custody

tunately, the scope of the "diligent search" required is unknown, but presumably will have to be decided according to the unique circumstances of each case. It is apparent, however, that time and treasure expended on potentially futile searches for missing fathers are subject to the limitations of practicality and the best interests of the child.[49]

VI. MOTHERS' RIGHT TO PRIVACY AND THE DETERRENT EFFECT

Since an unwed mother cannot be required to name her child's father,[50] the framers of the Bill faced an unfortunate dilemma. All potential fathers are entitled to notice; it must be assumed that there may be more than one putative father, and he (they) have no knowledge of the relinquishment of the child to an agency or its placement with adoptive parents. If the father is not named and the mother's name does not appear in the published notice, the father cannot identify the child as his own. Consequently, the publication requirements are strict. The published notice must state the name of the father (if known), the name of the mother, the child's name and the purpose, time and place of the hearing.[51]

Unfortunately, publishing a mother's name in a local newspaper in a manner which indicates she has given birth to an illegitimate child may be embarrassing to her and a source of disgrace in her community. Fear of such publication may even influence a mother to keep

---

decrees are usually modifiable upon proof of changed circumstances; and it has been suggested that the real rationale of May v. Anderson was the refusal to countenance Ohio's denial of modification of a prior sister-state custody decree.

On the other hand, an adoption decree is final.

Baade, *Interstate and Foreign Adoptions in North Carolina,* 40 N.C. L. REV. 691, 703–04 (1962) (footnotes omitted).

49. For discussion, *see* note 32 *supra,* second paragraph.

50. *But see* note 68 *infra.*

51. Ch. 134, § 6(3), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(3) (Supp. 1973) (sample notice form). Publishing notice "to whom it may concern" as well as any named putative fathers eliminates the possibility that the unnamed true father will later challenge the adoption. *See* Note, 61 ILL. B.J. 380 (Mar. 1973).

The Judiciary Committee has proposed that the mother's or father's (when he has relinquished and the whereabouts of the mother are unknown) name be left off the published notice. In place of the parent's name will be the date of the child's birth, the name of the hospital and the city and county of the child's birth. WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, § 6(3), [1973] Wash. Laws, WASH. REV. CODE § 26.32.085(3) (Supp. 1973). This type of notice raises obvious constitutionality questions.

the child when its best interests would be furthered by adoption.[52] In small communities, where published notice would be more conspicuous, the rate of relinquishments might show a significant decline[53] and produce as an undesirable byproduct an increase in private and black market adoptions.[54]

The publication requirement may have another consequence. In many instances mothers of illegitimate children will leave the state to escape unwanted publicity. The mother's "escape" will often be successful, and she will procure an adoption for her illegitimate child in a state where notice requirements are still nonexistent.[55] An "escape" adoption, however, can be vacated by a putative father who ascertains the state where the adoptive parents reside.[56] Since the Act's publica-

52. The Wall Street Journal, July 9, 1973, at 1, col. 1. The executive director of California's largest private adoption agency has stated that several mothers have kept their children rather than name the fathers. *Id.*

53. The new complications have hit the adoption field at a time when it appeared that the number of children under state care and in foster homes might at last be sharply reduced. Liberalized abortion laws, increased use of birth control methods and a growing trend among unwed mothers to keep their children have produced a dramatic drop in the number of babies available for adoption. Meanwhile, an increasing number of couples are willing to adopt.

Id. See also D. HOROWITZ & T. WILLHITE, WASH. ATT'Y GEN. INFORMAL REPORT, PUTATIVE FATHERS AND STANLEY V. ILLINOIS—DEPT. OF SOCIAL AND HEALTH SERVICES POLICY 10 (Oct. 4, 1972).

54. The Wall Street Journal, July 9, 1973, at 1, col. 1. *See also The "Strange Boundaries" of Stanley, supra* note 32, at 526–27. Private placements are often criticized because they may lead to the child's being placed but not legally adopted, they fail to provide needed follow-up services to the adoptive parents, there is no guarantee that the child has been placed in a suitable home and they encourage the sale of babies for profit in the black market. With the increase in demand for adoptable children, there are signs that the black market adoptions are increasing and the publication requirement may become a factor in maintaining a dangerously high rate of baby sales, consequently perpetuating black market placements.

Black market adoptions which place children without normal procedures can cost adoptive parents anywhere from $3,000 to $21,000. Counsel for several Chicago adoption agencies stated: "The Supreme Court's decisions are a blessing to these doctors and lawyers who don't ask embarrassing questions." The Wall Street Journal, July 9, 1973, at 1, col. 1.

WASH. REV. CODE § 26.36.010 (1963) strictly prohibits the black marketing of children:

> It shall be unlawful for any person, partnership, society, association, or corporation, except the parents, to assume the permanent care, custody or control of any minor child unless authorized to do so by a written order of the superior court of the state.

55. Many states have not adopted the notice provisions of *Stanley*. Officials say they are waiting for new statutes or judicial decisions to clarify the implications of the decision. The Wall Street Journal, July 9, 1973, at 1, col. 1.

56. The factual situation in *Rothstein* involved a mother who relinquished her child in a different state from that in which the child was conceived. *See* note 4 *supra* and note 64 *infra*.

tion requirements simply embody a putative father's constitutional right to notice,[57] failure to comply with them nullifies a state's jurisdiction over the child; attempts to change the child's status are therefore void *ab initio*.[58]

Some "escape" adoptions may be inevitable. An out of state adoption is so unlikely to be vacated by an attacking putative father that a natural mother may not be deterred by such an attenuated possibility. Ironically, use of publication to satisfy the notice requirement may encourage natural mothers to cross state lines, putting in jeopardy the very goal—giving a putative father notice and an opportunity to assert his right to custody—that the Act so rigorously had sought to protect. Where "escape" relinquishments are successful, the putative father will not receive notice; where ineffective and the putative father is later able to ascertain the residence of his child, extended litigation may result in further disruption of the child's life.[59]

Although the publication requirement may produce unwanted consequences, there is no other reasonable alternative, given the requirement of notice. It has been suggested that a "subsisting relationship" between the parent and the child should be a prerequisite to the right to notice.[60] This assertion would limit *Stanley* to its facts[61] and assumes that most putative fathers will not have established a subsisting relationship with the child, rendering publication unnecessary. Under this theory, it is only those few identifiable putative fathers who have

57. *See* note 3 *supra*.

58. Proper notice is a jurisdictional prerequisite. Failure to extend expressly required notice renders an adoption void *ab initio*. *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545 (1965); *In re* Hope, 30 Wn. 2d 185, 191 P.2d 289 (1948); State *ex rel.* Le Brook v. Wheeler, 43 Wash. 183, 86 P. 394 (1906).

The question arises as to how a void *ab initio* decree of adoption rendered by a court with improper jurisdiction can be shielded from attack by a putative father who can prove paternity. The answer lies in the policy recognized by the new statute that at some point in time (*see* notes 77–87 and accompanying text *infra*), the interests of the child in "situation stability" must prevail over the interests of the putative father. The decree, although void *ab initio*, will be shielded from attack in order to protect the best interests of the child.

59. *See* note 32 *supra*. The possibility of detrimental effects on the personality development of the child should weigh heavily. "Psychologists caution against severing a child from his father and mother images, once formed or re-formed, and the courts today accept by judicial notice that this is detrimental to the child." Comment, *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 U. ILL. L.F. 232, 233 (footnotes omitted).

60. *See* Wolverton, *Whom does new adoption law protect?*, The Seattle Times, June 19, 1973, at C4, col. 5.

61. Peter Stanley had lived with his wife and children for many years prior to her death. *See* note 3 *supra*.

demonstrated parental responsibility that are entitled to notice and an opportunity to demand custody.[62]

This theory fails, however, when subjected to close analysis. First, "[t]o make entitlement to constitutional rights depend upon the strength of social ties is to necessitate either difficult case-by-case factual determinations or the drawing of wholly arbitrary lines."[63] Second, subsequent United States Supreme Court *per curiam* and state supreme court decisions have disregarded the absence of a subsisting relationship.[64] Third, such a requirement would ignore the central question in adoption proceedings—"a father's interest in the *future* companionship and enjoyment of his children."[65] This interest is independent of how the child is conceived and separable from the father's apparent previous lack of concern for the child.[66] The only effective method of protecting both the interests of the child and the interests of the putative father is to base the father's right to notice on his biological relationship with the child. Any other basis invites arbitrary categorization and constitutionally questionable presumptions.[67]

By requiring notice in all cases, Washington has accepted the biological relationship rather than the subsisting relationship as the basis

62. "Subsisting relationship" could be defined as "providing reasonable support" (Letter from the Honorable Carl L. Loy, Judge of the Superior Court of the State of Washington for the County of Yakima to Orris L. Hamilton, Chief Justice of the Supreme Court of Washington, June 14, 1972, on file with the Washington State Judicial Council, University of Washington School of Law, No. 72-3-11) or "[having] had no continuing parental relationship with the child for a period of more than one year . . . ." (House Bill No. 755, § 2(d)(1973)).

63. *The "Strange Boundaries" of Stanley, supra* note 32, at 522.

64. In Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan (*see* note 4 *supra*), the parents had lived with each other for approximately three months, during which time the child was conceived. Months later, long after the parents had separated, the child was born. When the father learned of the existence of the child and the mother's relinquishment to adoptive parents, he petitioned for custody seeking to vacate the decree of adoption. The putative father did not at any time have custody of his child and did not at any time maintain a relationship with the child that might be considered "subsisting." Brief of the Appellant at 6 & Appendix B-1, 405 U.S. 1051 (1972). In Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972), the decision of the Illinois Supreme Court did not mention the concept of a subsisting relationship and it would appear that the father had never lived with mother or child.

65. *The "Strange Boundaries" of Stanley, supra* note 32, at 522 (emphasis added).

66. *Id.*

67. The Court in *Stanley* cautioned against the dangers of presuming unwed fathers to be unfit parents:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to

for establishing a putative father's right to notice. Because the biological relationship often leads to uncertainty when a putative father cannot be located or is unnamed,[68] notice by publication is unavoidable. Under existing requirements of due process "resort to publication . . . in the case of persons missing or unknown, [although] indirect, and even . . . probably futile . . . is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."[69] Publication, although fraught with difficulties, is still the best possible notice.

Assuming, however, that a natural mother has an "expectation of privacy,"[70] and that "the web of norms and values"[71] of society make

---

past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

405 U.S. at 656–57.

Michigan has attempted to circumvent the publication problem by use of a paternal registration scheme. If a putative father has sustained the burden of registering prior to the birth of his child, he will be entitled to notice of its adoption. Unfortunately, the statute, while providing a solution to the practical problems of giving notice, ignores problems caused by interstate adoptions, "burdens the unwed father with a confusing and inconvenient registration system" and presupposes that the child is or should be aware of his child's impending birth. *The "Strange Boundaries" of Stanley, supra* note 32, at 527–28.

In Gomez v. Perez, 409 U.S. 535 (1973), the Court offered some indication that merely a biological relationship establishes a putative father's right to notice of proceedings which may permanently deprive him of custody of his illegitimate child. The Court held that a Texas law that denied illegitimate children the right to seek support from putative fathers, while permitting the same rights to children of married parents, was a denial of equal protection. By recognizing the *obligation* of a "biological father" to support his illegitimate child, the Court by necessary inference may also have recognized the converse *right* of a "biological father" to notice of those proceedings which may permanently deprive him custody of his illegitimate child.

68. It is an open question whether a state could require a natural mother to identify a putative father. *See* Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed,* 396 U.S. 488 (1970) (denial of equal protection for a state to require the mother of an illegitimate child registering for AFDC to divulge the name of the child's father). *But see* Doe v. Norton, 2 Pov. L. Rep. ¶ 17.591 (D. Conn. 1973) (statute requiring all unwed mothers to name the father of their child or be subject to imprisonment for civil contempt does not deny equal protection because it affects both AFDC and non-AFDC mothers equally).

69. Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).

70. Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring):

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

By requiring the mother of an illegitimate child to either name the child's father or fill in "none named" in the appropriate blank, Wash. Rev. Code § 70.58.080 (1963) makes a child's illegitimacy a matter of public record. Does the state requirement prevent the mother's expectation of privacy from being reasonable?

71. Comment, *The Concept of Privacy and the Fourth Amendment,* 6 U. Mich. J.L. Ref. 154, 179 (1972).

such an expectation reasonable, the issue of whether publication invades her right to privacy must be resolved. The right to privacy may be waived by naming the putative father or relinquishing the child for adoption.[72] If not, as with most issues of constitutional dimension, a balancing of interests is necessary.[73] Against the mother's interests must be weighed the interests of the putative father as defined by *Stanley*,[74] the potential interests of the child in being in the care and custody of its natural father[75] and the interests of the state in providing secure and unassailable adoptions. Although these interests are important, a natural mother's right to privacy may be more worthy of protection. Decisions to date, however, do not adequately support the concept of a natural mother's right to privacy, nor are policy considerations underlying right to privacy decisions relevant to parents of illegitimates.[76]

72. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). If a mother can waive her right to privacy, questions as to what would constitute such a waiver arise. By naming a putative father who cannot be found, has she consented to publication of notice "to whom it may concern" so that all rights of all putative fathers are eliminated? By attempting to relinquish the child for adoption to a public or private agency, has she voluntarily consented to whatever method of notice is necessary to eliminate a putative father's rights? If certain specific acts of a natural mother do constitute a waiver of her right to privacy, are *Miranda* type warnings necessary before her waiver is valid? *See* Miranda v. Arizona, 384 U.S. 436 (1966).

73. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973). In *Roe*, the Court stated that only "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in [the] guarantee of personal privacy." *Id.* at 152. To date, at least one court has found that a natural mother's right "to keep secret the name of her child's father was not so 'fundamental' or 'implicit in the concept of ordered liberty' as to require constitutional protection." Doe v. Norton, 2 Pov. L. Rep. ¶ 17,591 (D. Conn. 1973).

74. *See* note 3 *supra*.

75. *See* note 145 *infra*.

76. At the heart of the Court's recent privacy decisions is the policy that where privacy encourages family stability or other socially desirable goals, it should not be invaded absent a convincing state need. *See generally* Brodie, *Privacy: The Family and the State*, 1972 U. Ill. L.F. 743. *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, privacy reinforced the integrity of the family (381 U.S. at 485), and in *Eisenstadt*, privacy encouraged individual freedom of procreation (405 U.S. at 453). Neither consideration is pertinent to the natural mother's rights being violated by publication. *But see* Wyman v. James, 400 U.S. 309 (1971). The Court in *Wyman* held that an AFDC mother could not on privacy grounds refuse to allow a caseworker into her home. The Court stated that such an intrusion was not an unreasonable search, forbidden by the fourth amendment:

> The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs . . . to a position secondary to what the mother claims as her rights.

400 U.S. at 318. As with *Wyman*, the question of whether the requirement of pub-

VI. PRIMARY RIGHTS AND POST ADOPTION PROCEDURES

Section 9 of the Act contains two separate concepts: the recognition of a general *primary right* of natural parents to custody and the limitation of that right when adoptive parents have had custody for one year. The juxtaposition of these concepts has already created confusion. Both appear in a single paragraph, which is not separated into subsections. Therefore, the entire paragraph might be misread as indicating that the natural parent has a *primary right* to custody of his or her child which continues indefinitely after the child's adoption and is always a factor in deciding custody disputes between natural and adoptive parents. This clearly was not the legislative intent.

Rather, the first part of Section 9 is intended to provide new general guidelines for determining custody of illegitimate children. It states the general policy that a natural parent now retains the *primary right* to the custody of the child.[77] The first part of the Section 9 also states that "between the [natural] parents of an illegitimate child," the parent who can better further the interests of the child will have a "superior right to custody."[78]

The second part of Section 9, a last minute addition,[79] specifically limits the *primary right* of natural parents who have received inadequate notice of adoption to a period of one year after the child has been placed with adoptive parents. Its essential provisions are that inadequately notified natural parents who attack the validity of an adoption will forfeit their primary right if (1) the adoptive parents have had actual custody of the child for at least one year; (2) they have custody pursuant to a court order or placement by a state or private agency; and (3) the adoptive parents have initiated adoption proceedings.[80] If the above provisions are satisfied the court will place the

---

lication violates the mother's right to privacy must be answered with an eye to the best interests of the child.

77. Ch. 134, § 9, [1973] Wash. Laws, WASH. REV. CODE § 26.28.110 (Supp. 1973).

78. *Id.*

79. Introduced by Representative Eikenberry, the amendment was supposed to offer "firm language for the courts to use in judging those difficult human cases when a natural parent seeks to take custody of a child from an adoptive home." Seattle Times, Mar. 1, 1973, at A12, col. 1–3.

80. Although the requirements are numbered "(1)" and "(2)," a careful reading of the Section reveals that there are actually three requirements. Ch. 134, § 9, [1973] Wash. Laws, WASH. REV. CODE § 26.28.110 (Supp. 1973).

child with the person who is best fit to advance his welfare, weighing heavily the child's need for "situation stability."[81]

The putative father who receives inadequate notice is not barred from attacking the adoption after the adoptive parents have had custody for one year, but having forfeited his primary right, he will find it extremely difficult to successfully vacate the decree and secure custody. He or she will have to demonstrate: (1) That he or she received improper notice;[82] (2) he or she is indeed the biological parent;[83] and (3) the child's best interests, weighing heavily the factor of situation stability, require that it be removed from the adoptive parents' home.[84] Demonstrating the third element will require showing: (1) The natural parent is a fit parent for custody; (2) the adoptive parent is less suitable as a parent; and (3) removing the child from the adoptive parents' home will not be detrimental to his welfare.

Although natural parents who promptly assert their rights by appearing at a show cause hearing or who, in the event of improper notice, attack the adoption decree before the adoptive parents have had custody for one year will maintain their primary right, those who do not receive notice and consequently do not attack the decree until after the adoptive parents have had custody for one year probably will not gain custody of their child. A natural parent who does receive proper notice but fails to appear at the show cause hearing to determine the necessity of his consent, forfeits his primary right immediately,[85] as do parents who have been permanently deprived of custody[86] or found to have abandoned their child.[87]

The following hypothetical illustrates how the Section may operate: *C* is an illegitimate child six months old living with his mother, *M*. *C*'s natural father, *F*, lives in the same city, is aware of *C*'s existence but does not visit or support *C* or *M*. *M* is killed in an automobile accident.

---

81. *Id.*
82. If there was proper notice, by publication or otherwise, judgment at the show cause hearing will extinguish the rights of the natural parents. *See* notes 19–22 and 33–36 and accompanying text *supra*.
83. If a putative father appears at a show cause hearing held to determine whether his consent is necessary for adoption or relinquishment to an agency, the Act requires a finding of paternity. Ch. 134, § 6(2)(a)–(b), [1973] Wash. Laws, WASH. REV. CODE §26.32.085 (2)(a)–(b) (Supp. 1973).
84. Ch. 134, § 9, [1973] Wash. Laws, WASH. REV. CODE § 26.28.110 (Supp. 1973).
85. *See* notes 19–22 and 33–36 and accompanying text *supra*.
86. *See* notes 126–130 and accompanying text *infra*.
87. *See* notes 90–100 and accompanying text *infra*.

G, the grandmother of *C* and mother of *M*, takes care of the child but neglects to petition for guardianship or adoption. One year later, after talking to the family attorney *A*, *G* decides to petition for the adoption of *C*. *A* purposefully fails to notify *F* fearing that *F* might be uncooperative. Instead, *A* publishes notice in the *Beacon Hill News*[88] and stipulates that the putative father is unknown. An interlocutory decree of adoption is granted. Fourteen months later, *F*, having married and settled down, decides he would like custody of his child and approaches *G*. After finding that *G* has adopted *C*, *F* brings suit in superior court seeking to vacate the adoption; vacation is denied. *F*, although successful in demonstrating that he received less than the best possible notice contemplated by the statute and successful in proving paternity, nevertheless lost his primary right to custody because the adoptive parent, *G*, had custody pursuant to a decree of adoption for a period of one year.

Changing the facts somewhat can illustrate problems which the framers of Section 9 probably never contemplated. If 11 months after *G* had secured an interlocutory decree *F* sought to vacate the decree, he probably would be successful. *G* would not have had custody for a one year period pursuant to a court order, and hence *F* would still maintain primary right to his child even though the child had been in the grandmother's custody for one year and 11 months. (Note that *G* had custody of *C* for one year prior to petitioning for adoption.) By negative implication the statute subordinates the welfare of the child to the primary right of the natural parent as long as the natural parent attacks within one year *after the court order*.

This inflexible one year rule obviously can work a great deal of mischief in the context of adoption.[89] It is questionable whether such a delicate area as parental rights should be subject to such rigid guidelines. Although a putative father's right to custody should be protected

88. King County has managed to subtract substance from what is already ephemeral. Constructive notice to unwed fathers and other interested parties prior to a permanent dependency or deprivation hearing is published in what are unquestionably not generally circulated newspapers in the Seattle area, *e.g.*, The Beacon Hill News.

As lax as this publication standard seems, it satisfies notice requirements of WASH. REV. CODE § 12.04.080 (1963). Whether it satisfies constitutional requirements of due process is an entirely different question. *See* Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

89. The one year limitation on primary rights does conform with WASH. R. CIV. P. 60(b), allowing certain judgments, including those involving minors, to be set aside within one year for specified legal and equitable deficiencies.

whenever possible, practical and equitable considerations militate against strict compliance with statutory requirements in all circumstances. The situation begs for a solution which somehow preserves needed judicial discretion.

An opportunity for flexibility might be found in a provision of the adoption statute left unchanged by the 1973 amendments: No consent for a child's adoption is required when a parent, *after proper notice,* has been found by a court to have deserted or abandoned the child "under circumstances showing a willful substantial lack of regard for parental obligations."[90] This abandonment subsection has been interpreted liberally in Washington and has been used to separate parents from their offspring where fairness and the welfare of the child demand.[91] The rationale of abandonment is that a parent who is derelict in his duty to support and protect the child forfeits his right to the child's custody;[92] therefore, he cannot be heard to complain about losing his right to take custody of his child since no right of his has been adversely affected. A showing of objective intent to abandon is not required; the intent may be inferred from the actions of the abandoning parent.[93] A showing of circumstances which would lead a reasonable person to know of the child's existence, such as knowledge of

90. WASH. REV. CODE § 26.32.040(4) (1963). For complete text of Subsection (4), see text accompanying note 18 *supra.*

91. In an early case, the Washington court stated that abandonment does not necessarily mean that a parent has no interest in the child's welfare, but that the parent had withdrawn from or neglected parental duties and withheld care and protection, and sympathy and affection. *In re* Potter, 85 Wash. 617, 620, 149 P. 23, 24 (1915). More recent cases have underscored the objective nature of abandonment. *See In re* Lybbert, 75 Wn. 2d 671, 674, 453 P.2d 650, 653 (1969) ("parental obligations . . . entail these minimum attributes: (1) express love and affection for the child; (2) express personal concern over the health, education, and general well being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domocile; and (5) the duty to furnish social and religious guidance."). *See also In re* Maypole, 4 Wn. App. 672, 483 P.2d 878 (1971) (under *Lybbert* definition of "parental obligations," a teenage mother had abandoned her child "under circumstances showing a willful substantial lack of regard for parental obligations" when she allowed her mother's neighbor to take custody of the child and visited it only infrequently over a three year period).

92. [T]he "right" to custody stems from the obligation to support, educate, and protect the child. These are reciprocal rights and obligations that are dependent upon each other and do not exist separately. Traditionally, this reasoning has been used when courts cut off the parental custody rights of abandoned children. When a parent abandons his duty to support and protect the child, he forfeits his right to the child's custody.

Comment, *Disposition of the Illegitimate Child–Father's Right to Notice,* 1968 U. ILL. L.F. 232, 233.

93. *In re* Hancasty, 66 Wn. 2d 680, 404 P.2d 762 (1965).

the pregnancy of the mother coupled with actions which indicate no interest in the child, also might be the basis for inferring an intention to abandon the child.

Furthermore, even if a putative father has received inadequate notice of his child's adoption, was not aware of the existence of the child, and the circumstances would not lead a reasonable man to gain such awareness, abandonment proceedings still might be initiated as soon as the putative father learned of the existence of the child and gave evidence of his knowledge by attacking an existing decree of adoption. However, in order to find abandonment under these circumstances, the courts will be required to interpret the words of the abandonment statute, "under circumstances showing a willful . . . lack of regard for parental obligations,"[94] as including the circumstance of an absent and unnotified father who was unaware of the existence of his child at the time of the original relinquishment proceeding. Factors which might be considered in inferring the required intent include the length of time the adoptive parents have had custody of the child prior to the father's attempt to recover custody, the father's fitness as a parent, the exact form of notice the father received (inadequate or nonexistent) and whether the father was dilatory in asserting his rights to the child.

Such an interpretation of the abandonment statute may be permissible under the reasoning of *Stanley* for two reasons: (1) *Stanley* involved statutory presumptions and not case by case determinations.[95] Putative fathers who are subjected to this *ex post facto*[96] type of abandonment proceeding are not presumed to have abandoned their child; the question of abandonment depends upon the facts of each case; (2) the best interests of the child in *Stanley* were furthered by giving custody to the natural parent.[97] When adoptive parents have had custody

94. WASH. REV. CODE § 26.32.040(4) (1963). For complete text of Subsection (4), see text accompanying note 18 *supra*.

95. *See* notes 3 and 67 *supra*.

96. Abandonment is by necessity an *ex post facto* determination in the setting of a putative father's attempt to vacate an existing decree of adoption. The question of whether the child was abandoned must of necessity be litigated subsequent to the actual abandonment. Providing notice and an opportunity to be heard on the abandonment issue is no obstacle when a father appears to contest his child's adoption. (As a practical matter, personal service on an abandoning parent at the time of abandonment is a contradiction in terms. Baade, *Interstate and Foreign Adoptions in North Carolina*, 40 N.C.L. REV. 691, 704 (1962)).

97. *See* note 145 *infra*.

of the child for a significant period of time, the child's interests may be furthered by remaining in their custody, and these interests may outweigh the rights of the putative father. Although the original decree of adoption which the putative father attacked might be void *ab initio*[98] because of failure to extend proper notice, the finding of abandonment eliminates all the putative father's rights in the child including his right to take custody, and a new decree may be rendered in favor of the adoptive parents without disturbing their custody of the child.

98. *See* note 58 and accompanying text *supra.*

A recent Superior Court of Spokane County case, *In re* Baby Girl Lisa, Civil No. 95323 (Spokane County, 1973), which was initiated prior to the enactment of the Illegitimate Children and Parental Rights Act, might indicate that the abandonment exception to the consent requirement *cannot* be applied to a putative father who receives improper notice and returns subsequent to his child's adoption to seek custody.

In *Baby Girl Lisa,* the parents had lived together intermittently prior and subsequent to the birth of the child. When the father temporarily moved to Seattle, the mother relinquished the child to Children's Home Society of Washington. The court accepted the relinquishment without notice to the putative father. The child was placed with foster parents. Several weeks later, Children's Home Society became cognizant of the implications of *Stanley* and contacted the putative father in Seattle, seeking his consent to the pending adoption and, if he refused to consent, notifying him to appear at a hearing to show cause why he should not be found to have abandoned the child. The father immediately contacted Legal Services which moved to set aside the order to show cause. The Legal Services motion was denied but because of the extensive fact finding required, the show cause hearing was set on the trial calendar. Prior to the date of trial, Legal Services moved for summary judgment to vacate the order of relinquishment.

At the hearing on the motion for summary judgment Children's Home Society argued that the putative father's consent *initially was not required* because WASH. REV. CODE § 26.37.010(2) (1963) confers authority on a parent to surrender a child for adoption when the other parent has abandoned the child. Children's Home Society argued that the express terms of the statute do not call for notice to the abandoning parent, therefore the mother's relinquishment was sufficient and the father had no right to custody. Interview with Dan Wershow, former Attorney for Spokane Legal Services, in Seattle, Jan. 10, 1973.

Summarized, Legal Services arguments were as follows: (1) WASH. REV. CODE § 26.37.010(2) (1963) has been limited expressly by State *ex rel.* LeBrook v. Wheeler, 43 Wash. 183, 86 P. 394 (1906), which held that notice was required to establish statutory jurisdiction under § 26.37.010(2) or the relinquishment was void *ab initio;* (2) on its face, WASH. REV. CODE § 26.37.010(2) (1963) violates the requirements of due process by failing to provide notice and an opportunity to be heard pursuant to the requirements of *Stanley* (*see* note 3 *supra)* and Armstrong v. Manzo, 380 U.S. 545 (1965). Children's Home Society had gained custody of the child by constitutionally defective procedures; therefore, the order of relinquishment was void *ab initio. In re* Baby Girl Lisa, Respondent's Memorandum, Civil No. 95323 (Spokane County, 1973).

The court granted the motion for summary judgment and awarded custody to the putative father. Although *Baby Girl Lisa* might be cited as authority that a court cannot find a putative father to have abandoned his child in an *ex post facto* proceeding, a careful examination of the facts will indicate otherwise. First, the abandonment issue was never tried; the only issue decided was whether the order of relinquish-

Because of the practical difficulties which agencies and professionals will encounter in locating putative fathers,[99] the courts must be prepared to find an extra legal foothold to avoid the vacation of an adoption to the detriment of the best interests of the child; the abandonment statute may provide this foothold. Although notice and an opportunity to be heard are required in any determination of abandonment, the court in such a proceeding should be free to weigh the relevant factors and arrive at a solution which best protects the welfare of the child.[100]

VII. JUDICIARY COMMITTEE DRAFT AMENDMENTS

Because of the confusion generated by the positioning of the two separate concepts of Section 9[101] and the potential mischief of the one year limitation on primary rights, the Senate Judiciary Committee has drafted a suggested amendment to Section 9. The suggested amendment eliminates all references to illegitimacy, presumably making its custody provisions applicable to married as well as unmarried parents. The two mandates of the previous Section 9 are still present, but its reference to the one-year limitation on primary rights is absent. In place of the one-year limitation, the suggested amendment states:[102]

> In any dispute between the natural *parent (or* parents*)* of *a* child and person *(*or persons*)* who have (1) commenced adoption proceedings or who have been granted an order of adoption, and (2) pursuant to court

---

ment could be issued without notice to the putative father pursuant to WASH. REV. CODE § 26.37.010(2) (1963). Assuming such a decree *is* invalid, the court is not prevented from finding the father to have abandoned the child in a subsequent proceeding *with proper notice*. Second, there was no offsetting interest of the child in situation stability. The child had not been placed with adoptive parents but continued in the custody of the foster parents during the entire proceedings. Regardless of the outcome, the child would have been removed from the foster parents' custody.

99. *See* Wolverton, *New Law leads to Confusion in adoptions,* The Seattle Times. June 17, 1973, at G2, col. 1.

100. The abandonment criteria of *In re* Lybbert, *supra* note 91, offer a great deal more flexibility than the one year primary right rule in the Illegitimate Children and Parental Rights Act.

101. *See* notes 77–87 and accompanying text *supra*.

102. WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, § 9 [1973] Wash. Laws, WASH. REV. CODE § 26.28.110 (Supp. 1973). Note the suggested draft removes all references to illegitimacy. The present language of Section 9 can be interpreted to exclude children placed for adoption by married parents, thereby raising equal protection questions under the reasoning of *Stanley* (*see* note 3 *supra*).

> order or placement by the department of social and health services or licensed agency have had actual custody of the child before court action is commenced by the natural parent (or parents), the court shall consider *above all other considerations* the best welfare and interests of the child, including the child's need for situation stability, in determining the matter of custody, and the *natural* parent *(or parents)* or person *(or persons)* who is more fit shall have the superior right to custody.

This draft amendment wisely indicates that the best interests of the child should determine who takes custody rather than an arbitrary one year period, and it instills needed judicial discretion into all proceedings to vacate adoptions initiated by natural parents.

The Senate Judiciary Committee has suggested adding another section which would conclusively presume any natural parent who fails to declare parenthood prior to his child becoming eight months old to have wilfully abandoned the child and thereafter be permanently deprived of all parental rights.[103] This proposed section would bar a natural parent, regardless of inadequacy of notice, from attacking the decree of adoption when his child is more than eight months old. Because such an irrefutable presumption of abandonment would affect natural parents whose children have not been placed with adoptive parents in the same manner as those whose children have been placed with adoptive parents, this statute is overbroad and cannot be justified as protecting the best interests of the child. Furthermore, by presuming certain natural parents to be unfit and denying them notice

103. Notwithstanding any other provision of law, any child eight months of age or older, and having a parent who since such child's birth has made no legal declaration of parenthood therefore, shall be deemed to have been wilfully abandoned by such parent under circumstances showing a willful substantial lack of regard for parental obligations; and to insure the welfare of the child is best served, such parent shall thereafter be permanently deprived of any parental rights as to such child: PROVIDED, That nothing in this section shall impair liability for family desertion or nonsupport under chapter 26.20 RCW.

WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, [1973] Wash. Laws, WASH. REV. CODE ch. 26.32 (Supp. 1973). The eight month time period is considered desirable since most children are placed with adoptive parents pursuant to a six month interlocutory decree when they are approximately two months old, and the child's eight month birthday will roughly coincide with the finalization of the adoption. *See* WASH. REV. CODE § 26.32.120(3) (1963).

Besides presenting constitutional issues under the reasoning of *Stanley*, an eight month automatic abandonment period provision might produce detrimental delay in some adoptions, since by waiting eight months after the child is born, an agency or natural parent might avoid the necessity of publication.

and an opportunity to be heard, the new section may give rise to the same due process questions as in *Stanley*.[104]

VIII. LIABILITY AND BONDS—THE HIGH PRICE OF PARENTHOOD

Child custody for the unwed father does not come cheaply. Section 11 of the Act requires the putative father to post one hundred dollars bond for each month the adoptive parents have had custody of the child prior to a trial on the merits of his claim.[105] If the putative father or natural mother is successful in overturning the adoption, Section 10 imposes on the natural parents liability for "direct and indirect costs" of supporting the child, including "the value of services rendered by the adoptive parents in caring for the child."[106]

By limiting the availability of a hearing required by the fourteenth amendment to only those who can afford the high cost of a compensatory bond, the Legislature has embarked on a course of questionable constitutionality.[107] The framers apparently were terrified by the remote possibility of hordes of unwed fathers flooding the courts with demands for custody of their long adopted children. To protect the judicial system from all but the "most deserving," the statutory scarecrows embodied in the economic barriers of Sections 10 and 11 were erected; they stand as a monument to unjustified trepidation by the legislature when faced with the necessity of constitutionally mandated reform.

---

104. *See* note 3 *supra*.

105. Ch. 134, § 11, [1973] Wash. Laws, WASH. REV. CODE § 26.32.310 (Supp. 1973).

106. Ch. 134, § 10, [1973] Wash. Laws, WASH. REV. CODE § 26.32.300 (Supp. 1973).

107. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); *cf.* United States v. Kras, 409 U.S. 434 (1973). *See also* Bowman v. Waldt, 9 Wn. App. 562, 513 P.2d 559 (1973). Governor Evans item vetoed Section 11 stating in a letter to the state senate:

> Section eleven clearly discriminates against those persons who have insufficient resources to obtain the bond, preventing those persons from even getting into a court to test the merits of their claim. The random impact of such a provision, denying only those who have limited resources full access to the courts, deters the basic function of the judicial system, to decide the issues of a law suit on its merits.

Letter from Daniel J. Evans, Governor of the State of Washington, to the Senate of the State of Washington, March 20, 1973, on file with the Washington State Judicial Council, University of Washington School of Law, No. 72-3-11. The Senate subsequently overrode Governor Evans' veto.

IX. SPECIAL PROBLEMS

A. Underage Parents

Although the Act does not provide guidelines, existing statutory authority sufficiently deals with problems peculiar to underage parents. Where one or both parents of an illegitimate child are under eighteen years of age, the court is required to appoint a guardian ad litem to investigate the competency of the person, father or mother, giving the consent and to "certify that the consent was voluntarily made and for the best interests of the child."[108] Since a putative father or natural mother may be subject to charges of carnal knowledge if the other parent is underage,[109] a special immunity should be adopted to encourage an underage parent to acknowledge parenthood, consent to the child's adoption and consequently remove the necessity for publication.[110] If the father of an illegitimate child then wishes to consent to his child's adoption or to seek custody of his child, he will be able to do so without fear of prosecution. If he seeks custody and is unfit as a parent, his rights may be eliminated through deprivation, during filiation or by a finding of abandonment.[111]

B. Soldiers and Sailors

The Soldiers and Sailors Civil Relief Act of 1940 requires a plaintiff seeking a default judgment to file an affidavit stating that the defendant is not in the military service.[112] If the defendant is in the military service, and he does not receive actual notice of the judicial action, a

108. WASH. REV. CODE § 26.32.070(2) (1963). The wording of the Subsection does not distinguish between unwed mothers and unwed fathers. The equal protection reasoning of *Stanley, see* note 3 *supra,* requires that unwed fathers as well as unwed mothers have the benefit of a guardian ad litem.

109. WASH. REV. CODE § 9.79.020 (1963).

110. Such a statute might state: "Where the minor parent of an illegitimate child has relinquished the child in writing, the other parent of the child may acknowledge parenthood with immunity from prosecution under R.C.W. 9.79.020."

111. *See* notes 10–13 and 90–100 and accompanying text *supra* and 126–130 and accompanying text *infra.*

112. 50 U.S.C. § 520(1) (1970). *Id.,* § 3 also states:

> In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him . . . . But no attorney appointed under this Act . . . shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

default judgment rendered in his absence is voidable.[113] The Soldiers and Sailors Civil Relief Act of 1940 probably applies to a putative father who fails to appear at an adoption show cause hearing to determine the necessity of his consent.[114] Should an adoption decree be rendered without his consent, the decree may be open to attack unless the putative father has waived his rights under the Act,[115] vested full power of representation with his attorney,[116] has no meritorious defense[117] or was not prejudiced in defending the action because of his military service.[118]

If the putative father receives actual notice by personal service and has an opportunity but fails to appear, his rights can be extinguished.[119] Should he receive only constructive notice,[120] the decree will probably remain subject to attack until the adoptive parents have had custody for one year and the primary right of the natural parent no longer exists.[121] Once notified, the putative father or natural mother may be granted a stay in the proceedings until a more convenient opportunity to appear is available.[122] Long delays, however, need not be tolerated if harmful to the best interests of the child.[123]

113. *See* Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551 (1947) (default judgment rendered in serviceman's absence is voidable but not void).

114. *In re* Adoption of a Minor, 155 F.2d 870 (D.C. Cir. 1946); *In re* Adoption of a Minor, 136 F.2d 790 (D.C. Cir. 1943).

115. McMahon v. McMahon, 70 Cal. App. 2d 126, 160 P.2d 892 (1945) (defendant waived all rights under the Act and stipulated action might be heard as a default).

116. *See, e.g.*, Sanders v. Sanders, 63 Wn. 2d 709, 388 P.2d 942 (1964). *See also* note 112 *supra*.

117. 50 U.S.C. § 520(4) (1970) (default judgment rendered in serviceman's absence may be reopened within 90 days after termination from the service providing it appears that such person was prejudiced in making his defense and had a meritorious or legal defense to the action).

118. *Id.*

119. *Id.*

120. *Id. Cf.* Melotti v. Melotti, 44 D. & C. 514, 5 Fay. L.J. 117, 4 Monroe L.R. 56, 11 Som. 51, 56 York 76 (Pa. 1942) (under Soldiers and Sailors Relief Act, a divorce will not be granted on service by publication unless the record contains facts showing the respondent is not in the military service).

121. *See* note 125 *infra*.

122. 50 U.S.C. § 521 (1970).

123. Trevino v. Trevino, 193 S.W.2d 254 (Ct. of Civ. App. Tex. 1946); *In re* Stromberg's Adoption, 58 N.E.2d 88 (Ct. App. Ohio 1944).

The services maintain centralized personnel locators making the task of determining whether a named putative father is presently in the military and if so, where he is stationed, somewhat less burdensome. United States Army: World Wide Locator, Chief A. G., Personnel Systems Branch, P.O. Box 7867, Rincon Annex, (Presidio) San Francisco, Calif. 94119, ph. 415-561-5018. United States Air Force: Airforce World Wide Locator, Randolph Airforce Base, Texas 78148, ph. 512-652-5774. United

A difficult situation arises when the mother of an illegitimate child refuses to name or cannot name a putative father who is known to be in the military. If published notice fails to reach the father and he later becomes cognizant of his child, he may be successful in vacating the decree of adoption rendered in his absence. A finding of abandonment may provide some protection to adoptive parents,[124] but the Act's one-year limitation on primary rights is a more impenetrable shield.[125] Until the adoptive parents have had custody for the required year, however, adoptions of illegitimate children of unknown military personnel will be somewhat more tentative than normal adoptions.

C. *Deprivation and Permanent Dependency*

The Act does not expressly apply to a permanent deprivation or permanent dependency action brought pursuant to the Juvenile Court Act.[126] The Supreme Court's holding in *Stanley* clearly indicates, however, that *both* parents of an abandoned illegitimate child are entitled to all rights of due process and equal protection.[127] Consequently, where the state seeks to have an illegitimate child previously determined a ward of the court declared *permanently* dependent,[128] both unwed fathers and unwed mothers must receive notice and an opportunity to demonstrate that the child is not dependent. Furthermore, where one parent is found unfit and *permanently* deprived of custody,[129] the other parent still retains *primary right* to possession of the child.[130]

States Navy: Dept. of Navy, Bureau of Personnel, Enlisted Locator, Airlington Annex, Washington D.C. 20370, ph. (last names beginning with A–Gn) 202-694-2925, (Go-N) 202-694-1527, (O–Z) 202-694-2072.

124. *See* notes 90—100 and accompanying text *supra.*

125. *See* notes 77—87 and accompanying text *supra. But see* 50 U.S.C. § 525 (1970) and Zitomer v. Holdsworth, 449 F.2d 724 (3d Cir. 1971) (statute of limitations tolled by military service). However, the one year limitation on the putative father's primary right is not a statute of limitations. The one year limitation affects a putative father's status but not his right to bring suit. The change of the putative father's status vis-à-vis the child derives from the presumption that the child's interest in stability has greatly increased after it has been with adoptive parents for one year. It does not deprive the putative father of rights nor attempt to bar him from attacking the decree; it merely deprives him of any presumption that the child's best interests lie in his custody.

126. WASH. REV. CODE ch. 13.04 (1963).

127. *See* note 3 *supra.*

128. *See* WASH. REV. CODE § 13.04.010 (1963).

129. *See* note 24 *supra.*

130. *See* notes 77—87 and accompanying text *supra.*

The primary right can only be removed when the state successfully demonstrates the remaining unmarried parent unfit.

D. Bogeymen—Rapists, Adulterers and Artificial Inseminators

The question of whether a mother who has been impregnated by a rapist is required to publish notice to an unknown putative father continually arises in commentary about the Act.[131] The issue requires little attention. First, in reality the question will seldom arise. Even those mothers whose religious or moral beliefs generally forbid morning-after birth control or abortion are likely to find it morally permissible to use one of these methods to escape a pregnancy resulting from rape. If a natural mother should prefer to give birth to the child of her assaulter and relinquish it for adoption, a police report or a report from a rape relief organization dated contemporaneously with the child's probable conception period and indicating that the mother was the victim of rape would certainly suffice as evidence for dispensing with the requirement of notice to the putative father.[132] It safely can be assumed that neither *Stanley* nor the Act were addressed to protecting the interests of rapists. Furthermore, it strains the imagination to conceive of a rapist appearing at a show cause hearing only to be arrested and taken into custody.

Another unlikely issue stems from artificial insemination. A child resulting from artificial insemination might be treated by the courts as illegitimate.[133] If so, the biological father's consent may be required should the donee parents attempt to adopt and legitimize the child. Requiring a donor to consent in advance to the adoption of the child will eliminate the necessity of notice during adoption proceedings subsequent to the birth of the child. When a donor father has not consented in advance, his consent no doubt can be implied from the act of donation and the notice requirement deemed to be waived. Should a donor father attack an existing decree, implied consent, the one-year

131. *See* Wolverton, *Whom does new adoption law protect?*, The Seattle Times, June 19, 1973, at C4, col. 7. *See also* Honeywell, *supra* note 38, at 26.

132. Because of the great potential for abuse, some evidence, other than the mother's word, is necessary to verify that she has been raped. A report from police files or from the files of a rape relief organization is undisputable.

133. *See* Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963) (dictum). *But see* People v. Sorensen, 68 Cal. 2d 280, 66 Cal. Rptr. 7, 437 P.2d 495 (1968) (dictum). *See generally* Annot., 25 A.L.R.3d 1103 (1969).

limitation on primary rights[134] or an *ex post facto* finding of abandonment[135] may protect the adoptive parents and child. It should be noted, however, that in the unlikely event a donor father decides to seek custody of his child, the anonymity which physicians and sperm banks maintain will normally preclude him from determining the whereabouts of the child and attacking the decree.

Another nonissue arises when a married mother gives birth to an illegitimate child. Although the common law presumes that such children are legitimate,[136] the Act may require that they be treated as illegitimate for the purposes of adoption.[137] As with artificial insemination and rape, the issue probably will seldom arise. When married parents relinquish a child for adoption, an acknowledgment of paternity signed by the mother's husband along with his consent should be sufficient to establish the presumption that a putative father is not lurking in the background. If the husband refuses to sign the acknowledgement, the child should be treated as illegitimate and the mother asked to name the real father or publish notice.[138]

134. *See* notes 77–87 and accompanying text *supra*.

135. *See* notes 90–100 and accompanying text *supra*.

136. *In re* a Minor, 29 Wn. 2d 759, 189 P.2d 458 (1948).

137. Although the Act is presently silent on the issue (*but see* note 138 *infra* for Judiciary Committee draft amendment), a putative father who impregnates a married woman should not be deprived of notice of his child's adoption. The natural father of the illegitimate child of a married mother retains his primary right to custody of his child. *See* ch. 134, § 9, [1973] Wash. Laws, WASH. REV. CODE § 26.28.110 (Supp. 1973). Consequently he retains the right to prove paternity and attack a decree of adoption, even though he is denied notice and an opportunity to be heard by the presumption of ligitimacy. Although no statistics are available, it can be assumed that a significant proportion of children relinquished by married parents are illegitimate. By presuming these children to be legitimate, the purposes of the Illegitimate Children and Parental Rights Act—extending notice to putative fathers and protecting adoptions from subsequent attacks from putative fathers—will be defeated.

Absent an affirmative acknowledgement of paternity by the married father, use of the presumption of legitimacy is of questionable constitutional propriety. By requiring an unmarried mother to produce a written acknowledgement from a putative father to avoid publication but neglecting to require the married mother to do the same, the presumption discriminates against unmarried mothers. It also discriminates against illegitimate children relinquished by married mothers in that it denies them both access to their putative father prior to the adoption and a safe and unassailable adoption once the decree is rendered. Furthermore, use of the presumption of legitimacy has the effect of presuming all putative fathers who impregnate married women to be unfit for custody and thus not entitled to notice of the adoption of their children; they consequently are denied due process and equal protection under the reasoning of *Stanley*. *See* note 3 *supra*.

138. The Judiciary Committee has proposed that "the biological father of a child whose biological mother is married to some other person at the time of conception and/or birth . . ." should not be entitled to rights of notice under the Act "if the legal presumption of parenthood has not been overcome, unless such a biological

Should a putative father appear after the child has been relinquished pursuant to the husband's acknowledgment, he will have the burden of rebutting the presumption of legitimacy in a filiation proceeding.[139] If he is successful in proving his paternity and is not found to have abandoned the child,[140] and the adoptive parents have not had custody for more than one year,[141] the decree of adoption may be vacated and custody awarded to the natural father. It is extremely unlikely, however, that a putative father will risk prosecution for adultery or a tort action brought by the mother's husband for criminal conversation[142] by proving paternity in a filiation proceeding and then successfully transgress the nearly impossible obstacle course of vacating an adoption to gain custody of his child.

X. STRANGE BOUNDARIES, AS YET UNDISCERNIBLE

The Act may be the most controversial piece of legislation to be passed in 1973. Although many critics of the Act concede that the father of an illegitimate child who has contributed to the child's support and served in a paternal role should be accorded the right to custody, few are willing to extend published notice to all biological fathers. Citing the Act as an example of "legislative overkill,"[143] critics contend that by applying notice requirements to adoption and cus-

father has been adjudicated the natural father in a filiation proceeding, or has in writing, acknowledged his parenthood." WASHINGTON STATE JUDICIARY COMMITTEE, suggested draft for amending ch. 134, [1973] Wash. Laws, WASH. REV. CODE ch. 26.32 (Supp. 1973). This suggested language suffers from the same maladies as the presumption of legitimacy (*see* note 137 *supra*).

139. It is only when a putative father asserts paternity when the married father has already acknowledged, that the presumption of legitimacy should have some relevancy. A putative father should have to prove paternity under these circumstances by "clear and convincing evidence," presumably more than by a conflicting acknowledgement of paternity. *In re* a Minor, 29 Wn. 2d 759, 764, 189 P.2d 458, 460 (1948). Consequently a filiation proceeding is the most appropriate forum to present evidence and obtain the necessary judicial decree to rebut the presumption of legitimacy.

140. *See* notes 90–100 and accompanying text *supra*.

141. *See* notes 77–87 and accompanying text *supra*.

142. *See* WASH. REV. CODE § 9.79.110 (1963) (adultery is punishable by imprisonment for up to two years or by a fine of not more than $2,000). In Washington, however, prosecutions for adultery have been infrequent and no adultery case has reached the state supreme court since 1923. L. RIEKE, DOMESTIC RELATIONS 148 (1972-73). Note that a putative father who is successful in proving paternity is exposing himself to alienation of affection or criminal conversation actions brought by the mother's husband. *See* Bernier v. Kochopulos, 37 Wn. 2d 305, 223 P.2d 205 (1950) (defining alienation of affections and criminal conversation).

143. Brown, *Rights in illegitimacy cases debated,* The Seattle Times, April 29, 1973, at A19, col. 4.

tody, the Act goes farther than the factual situation in *Stanley*[144] merits and sacrifices the interests of the child, the interests of the adoption agencies and the interests of the unwed mother to the frequently nonexistent interests of unfit putative fathers.

Proponents argue that the interests of adoption agencies are irrelevant, that the notice requirements of the Act are constitutionally necessary, that the child's best interests are served by secure and unassailable adoptions rendered in conformity with all requirements of due process (including notice and an opportunity to be heard), that natural mothers have no right to privacy which is invaded by publication, and that the best interests of the child may even be furthered by giving custody to the natural father.[145]

It may be useful to clear the air surrounding these issues. First, the Act is legally sound. There is some latitude to argue that *Stanley* applies only to dependency and deprivation and not to adoption and custody,[146] but until the Court decides these issues on the merits, the

144. *See* note 3 *supra*.

145. If *Stanley* is examined in the context of the child's best interests, a different pattern emerges. The case is more than an explicit delimitation of the rights of putative fathers; it is an implicit recognition that the best interests of a child are often served by being in the custody of its natural parents. The Court did not state this directly but its language necessitates the implication:

> For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . ." 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? *We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.* (emphasis added)

405 U.S. at 652-53. By implicitly recognizing the doctrine of parental preference and applying it to unwed fathers, the Court has embarked on a highly controversial course. For a discussion of parental preference as applied to unwed fathers in California, see Comment, *Custody Rights of Unwed Fathers*, 4 PACIFIC L.J. 922, 932 (1973). *See also* Comment, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C.D. L. REV. 1, 19–20 (1973).

A finding that an illegitimate child's best interests is with its natural father in the same manner that a legitimate child's best interests is presumed to be with its legal father would be consistent with the Supreme Court's recent equal protection holdings involving illigitimacy. *See, e.g.*, Levy v. Louisianna, 391 U.S. 73 (1968); Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968); Weber v. Aetna Casualty & Surity Co., 406 U.S. 164 (1972); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); *but see* Labine v. Vincent, 401 U.S. 532 (1971).

146. *See* note 3 *supra*. Stanley's children were found permanently dependent pursuant to provisions of the Illinois Juvenile Court Act, ILL. REV. STAT., ch. 37 (1965).

better view, based on subsequent United States Supreme Court per curiam decisions and state supreme court decisions,[147] is that the notice requirements of *Stanley* are also applicable to adoption and custody. Because the effects of an incorrect interpretation of *Stanley* could place hundreds of adoptions in jeopardy, it is wiser to engage in legislative overkill than to risk a determination which might affect detrimentally the welfare of adopted children. Second, assuming the Court's reasoning in *Stanley* is applicable to adoptions, the interests of the adoption agencies are totally irrelevant. The additional cost of notifying putative fathers is simply a necessary element of securing a valid adoption. In *Stanley,* similar interests were weighed by the Supreme Court, and the father's right to custody found to be worth the additional expense.[148]

Third, no decision to date has recognized a natural mother's right to privacy. If such a privacy right exists, it will have to be weighed against the potential right of a putative father. Fourth, there is no evidence that putative fathers who seek custody of their children are less fit than natural mothers who seek custody of their children. Those putative fathers who are unfit may be deprived of custody just as may unfit natural mothers.

The only issue which requires serious examination involves the effects of notice by publication on the best interests of the child. If time is crucial to the well being of the adoptive child[149] and if locating putative fathers or requiring publication causes an additional delay; if by

147. *See* notes 4 and 64 *supra.*

148. The Supreme Court rejected the administrative convenience argument as applied to putative fathers in *Stanley:*

> [T]he establishment of prompt efficacious procedures to achieve legitimate ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

405 U.S. at 656–57.

149. Prompt placement serves both the child's need for early parental care and the natural desire of the adoptive parents to begin caring for the child soon after birth. In addition, by reducing the necessity of interim foster care facilities in either private homes or institutions, early placement minimizes the chances of detrimental psychological effects on the child arising from repeated and sudden changes in the environment.

The "Strange Boundaries" of Stanley, supra note 32, at 517.

requiring notice by publication, natural mothers are motivated to leave the state and jeopardize the validity of their child's adoption; if the number of private and black market adoptions is increased as a result of publication; and if mothers who would otherwise relinquish are being motivated to keep their children when the best interests of the child lie with adoption, then the necessity of notice must be reexamined. To date, there is no evidence that the statute is adding a significant amount of additional time to the adoptive process[150] and there is no evidence of a decrease in relinquishments[151] or an increase in escape or black market and private adoptions; however, these variables must continually be reexamined and marginal infringements on the welfare of the child treated with deference. Time will be the ultimate judge of the wisdom of the policies behind the Illegitimate Children and Parental Rights Act and of the "strange boundaries, as yet undiscernible"[152] of *Stanley v. Illinois*.

Andrew C. Gauen

150. If a putative father who is unfit as a parent appears at a show cause hearing, a delay of several months may result while the court or agency seeks to permanently deprive him of his rights to the child. If a putative father who is a fit parent appears at a show cause hearing, then the Act is operating as intended; however, some delay must be anticipated before the putative father receives custody.

151. Any statistics showing a decrease in relinquishments will be clouded because of the trend, beginning prior to *Stanley*, of more and more unwed mothers keeping their children instead of relinquishing them for adoption and because of the declining birth rate. D. HOROWITZ & T. WILLHITE, WASH. ATT'Y GEN. INFORMAL REPORT, PUTATIVE FATHERS AND STANLEY V. ILLINOIS—DEPT. OF SOCIAL AND HEALTH SERVICES POLICY 10 (Oct. 4, 1972).

152. 405 U.S. at 668 (Burger & Blackmun, J.J., dissenting).