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STANLEY v. ILLINOIS: WHAT IT PORTENDS FOR ADOPTIONS IN MONTANA

Karen Townsend

INTRODUCTION

Until very recently, the putative father was ignored in most state proceedings affecting his child, including adoption proceedings which permanently terminate his parental rights.¹ Twelve states² require his consent to the adoption of his child, while the remainder do not.³ The 1972 *Stanley v. Illinois*⁴ decision, invalidating an Illinois statute which failed to provide a hearing for an unwed father prior to denying him custody of his children upon the death of their mother, signaled an end to this treatment. With this recognition by the Court of a putative father's constitutional interest in his child, adoption statutes ignoring this interest are called into question.⁵

This note will examine the *Stanley* decision and cases which followed it, will consider the present Montana adoption statutes and procedures, and will discuss a proposal which will bring them into harmony with *Stanley's* requirements.⁶

STANLEY V. ILLINOIS AND ITS AFTERMATH

The *Stanley* decision concerned Peter Stanley and his fight for two of his three children. Peter had lived off and on with Joan Stanley for eighteen years, and all three children were born of this relationship.⁷ Because Peter and Joan were unmarried, Peter was not considered a "parent" under Illinois law.⁸ Upon the death of Joan

¹See generally Reeves, Benjamin, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115 (1973).

²*Id.* at 138-139. Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Michigan, Minnesota, Nevada, Rhode Island, South Dakota, and Utah have made some provision for the putative father's consent through statutory or case law.

³*Id.* at 139-141. Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

⁴*Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 (1973).

⁶Various commentators have thoroughly examined other rights of the putative father under current state law. See generally Embick, *The Illegitimate Father*, 3 J. FAM. L. 321 (1963); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971); Note, *Father of an Illegitimate Child—His Right to Be Heard*, 50 MINN. L. REV. 1071 (1966); Note, *Domestic Relations—Putative Father's Right to Custody of His Child*, 1971 WIS. L. REV. 1262; Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

⁷*Stanley v. Illinois*, *supra* note 4 at 646.

⁸ILL. ANN. STAT. ch. 37, §§ 701-14 (Smith-Hurd—1972).

Stanley, the children were considered to be without any living parent so a dependency proceeding was instituted by the State of Illinois. As a result, the children were declared wards of the state and placed with court appointed guardians. Peter Stanley appealed claiming that since Illinois law required a hearing to determine fitness as a parent for married fathers and mothers and for unmarried mothers before children could be declared wards of the state, failure to provide such a hearing for him was a denial of equal protection as guaranteed by the Fourteenth Amendment.⁹

The Court held that:

as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁰

It is not yet clear how broadly or narrowly the *Stanley* decision should be read.¹¹ Some clues, however, are given by later cases. In the same term as the *Stanley* decision, the Supreme Court acted in two other cases which involved the rights of putative fathers in disputes over their children.¹² The Court vacated the judgment and remanded each to the state court for reconsideration "in light of *Stanley v. Illinois*."¹³

One of these two cases, *Vanderlaan v. Vanderlaan*, also arose in Illinois. In the *Vanderlaan* case, the plaintiff mother petitioned the Illinois court to modify the custody provisions of a divorce decree awarding custody to the defendant father. The couple had been divorced after five years of marriage and had one child. Following the divorce, two more children were born to the plaintiff. A court found defendant to be the father of both children, and ordered him to make support payments. Five years later, upon petition of the defendant, the court awarded custody of all three children to the father. The present action was instituted by the plaintiff to regain custody. The Illinois court looked to the public policy behind the Illinois Paternity Act and held that the Illinois legislature had determined that "a putative father should have no right to the society' of his children born out of wed-

⁹*Stanley v. Illinois*, *supra* note 4 at 646.

¹⁰*Id.* at 649.

¹¹The dissent of Mr. Chief Justice Burger in the *Stanley* case warned of the possible "strange boundaries" which might be encountered. *Id.* at 668. Various commentators have explored these limits. See generally Reeves, *supra* note 1; Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Putative Father*, *supra* note 5; Rick, *Plight of the Putative Father in California Child Custody Proceedings: A Problem in Equal Protection*, 6 U.C.D. L. REV. 1 (1973); Belvel, *Custody Rights of Unwed Fathers*, 4 PAC. L. J. 922 (1973); Bazos, *Constitutional Law—Due Process and Equal Protection—Classifications Based on Illegitimacy*, 1973 WIS. L. REV. 908.

¹²*State ex rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 240, 178 N.W.2d 56 (1970), *vacated sub. nom.*, Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated and consolidated*, 405 U.S. 1051 (1972).

¹³*Id.*

lock."¹⁴ Such a holding is difficult to reconcile with any interpretation of *Stanley*.

The second case, *Rothstein v. Lutheran Social Services*,¹⁵ involved an adoption proceeding. The putative father had petitioned the court for a writ of habeas corpus to determine who had the right to legal custody of John Thomas Lewis, a minor. The child had been born to Karen Ann Lewis, whose parental rights had been terminated with her consent one week after his birth. The child had subsequently been placed for adoption. Like the statute in the *Stanley* case, the Wisconsin law did not include unwed fathers within the meaning of the word parent. The court concluded that:

the putative father of a child born out of wedlock does not have any parental rights; and that the failure of the Wisconsin statutes to grant parental rights or notice of a hearing to a putative father prior to termination of parental rights does not constitute a violation of the state or federal constitution.¹⁶

The remand of each of these cases "in light of *Stanley*"¹⁷ does not provide precise boundaries for the extent of the *Stanley* decision.¹⁸ However, *Stanley* suggests at the very least that the putative¹⁹ father is entitled to notice of pending state proceedings, and a hearing if he so requests one.

RECENT ACTION IN OTHER STATES

Following the decision in *Stanley*, *Vanderlaan*, and *Rothstein*, the Illinois supreme court was asked to rule again on the right of a putative father in *People ex rel. Slavek v. Covenant Children's Home*.²⁰ The court held that the Illinois Adoption Act, which precluded the father of an illegitimate child from asserting any right to that child in adoption proceedings was unconstitutional.²¹ The Illinois Attorney General later issued an opinion²² on *Stanley* stating that consent to an adoption must be obtained from the unwed father, or if he is unknown, that he be made a party defendant in the proceeding. Illinois agencies have interpreted *Stanley* as requiring that *all* unwed fathers be provided notice and an opportunity to participate.²³

¹⁴*Vanderlaan v. Vanderlaan*, *supra* note 12 at 720.

¹⁵*Rothstein v. Lutheran Social Services*, *supra* note 12.

¹⁶*Id.*

¹⁷*See*, treatment of cases, *supra* note 12.

¹⁸*See generally*, cases, *supra* note 11.

¹⁹"Putative father" is used in this note to refer to the father of an illegitimate child whose identity is known and who has acknowledged paternity. The term "unwed father" is used to refer to an illegitimate child's father whose identity may or may not be known. This distinction was used by Reeves, *supra* note 1.

²⁰*People ex rel. Slavek v. Covenant Children's Home*, 50 Ill.2d 20, 284 N.E.2d 291 (1972).

²¹*Id.* at 292.

²²Reeves, *supra* note 1 *citing* 61 ILL. BAR J. 378, 379 (1973), *citing* OP. ATT'Y GEN. 543 (1972).

²³*Id.* n. 1 at 132.

A New York court has also examined the question. In its decision in *Doe v. Department of Social Services*,²⁴ the court held that the putative father had a "substantial and cognizable interest" in the proposed adoption of his illegitimate child and had status to oppose the adoption.²⁵ In looking at the New York adoption law²⁶ which required only the mother's consent to adoption where the child was born out of wedlock, the court said that the statute:

must be so construed that the mother's exclusive or sole consent suffices only where there has been no formal or unequivocal acknowledgment or recognition of paternity by the father. It is not that the father's consent is now necessary as a condition precedent to adoption, but rather that he be served with "notice" ergo, according the father an opportunity, if he is so advised, to present facts for the court's consideration in determining what is in the best interests of the child.²⁷

Such a holding suggests that adoption statutes which require only a mother's consent in adoptions of illegitimate children may be allowed to stand after *Stanley* if they are interpreted to require notice to and a hearing, if requested, for a putative father who had unequivocally acknowledged his paternity.

At least three other states²⁸ have revised their adoption laws to give some recognition to the putative father's rights in response to the *Stanley* decision.

THE LAW IN MONTANA

Adoption in Montana is governed by Title 61, chapter 2, *Revised Codes of Montana*, 1947.²⁹ Generally the statute requires that both parents consent to the adoption of a legitimate child, while the mother's consent alone is sufficient in the case of an illegitimate child.³⁰ No change has been made since the *Stanley* decision.

Although the Illinois Attorney General has found his state's adoption procedure, requires the procurement of the father's consent in all adoptions, in order to comply with *Stanley*,³¹ counsel to the Department of Social and Rehabilitation Service (S.R.S. is the state department which oversees the adoption activities of all county welfare offices) has not

²⁴*Doe v. Department of Social Services*, 71 Misc. 2d 666, 337 N.Y.S.2d 102 (1972).

²⁵*Id.* at 106.

²⁶N.Y. DOM. REL. § 111(3) (McKinney Supp. 1972).

²⁷*Doe v. Department of Social Services*, *supra* note 24 at 107.

²⁸Michigan, MICH. COMP. LAWS ANN. § 710.3a (Supp. 1973); Colorado, COLO. REV. STAT. ANN. §§ 22-1-3, 22-1-4 (Senate Bill No. 315, 1973); South Dakota, S.D. COMPILED LAWS ANN. § 25-6-4 (Supp. 1973); A detailed analysis of the Michigan statute is given in Reeves, *supra* note 1 at 132-133 and Note, *supra* note 5 at 527-531. These statutes take the same general approach as H.B. 637 set out in note 44, *infra*.

²⁹REVISED CODES OF MONTANA, §§ 61-201—61-218 (1947) [hereinafter cited as R.C.M. 1947].

³⁰R.C.M. 1947, § 61-205.

³¹Reeves, *supra* note 22.

issued any new guidelines in light of the *Stanley* decision.³² However, the procedure presently followed by county welfare departments can make allowances for the putative father. Briefly, the procedure followed by the welfare departments is as follows. First, the department institutes a hearing to have the child declared dependant, then the parental rights of each parent are terminated and legal custody with the right to consent to adoption is given to the welfare department, and finally the department consents to the child's adoption in a subsequent action.³³

Although such a procedure and its interpretation by S.R.S. offers some protection to the rights of the putative father in Montana, not all adoptions are carried out in this way. Therefore, it is necessary to see whether the statutory requirements which must be met by an adoption not handled by S.R.S. need additional safeguards. Since the statutory requirements provide for the mother's sole consent in the case of an illegitimate child, that protection must be found elsewhere. There are two possible alternatives. One is a statutory interpretation such as that suggested in *Doe v. Department of Social Service*. The other is a statutory change, the approach taken by Colorado, Michigan and South Dakota. Statutory change offers a way of dealing with the problem comprehensively.

THE KIND OF CHANGE MANDATED

In order to determine whether *Stanley* requires a substantial as opposed to a minor change in the state adoption statutes and procedures, it is necessary to plot the boundaries of the *Stanley* decision. The *Stanley* case, as well as the *Rothstein* and *Vanderlaan* decision which followed, all involved putative fathers who had openly acknowledged paternity. Because of this fact, it is possible to read *Stanley's* requirements in a more restricted fashion than has Illinois.³⁴

Although footnote nine of the *Stanley* decision speaks of "offering unwed fathers an opportunity for individualized hearings"³⁵ and thus could be read to mandate notice to *all* unwed fathers, the body of the opinion does not demand such an extensive reaction.

³²Telephone call to Mr. Tom Mahan, counsel to Department of Social and Rehabilitation Services [hereinafter called S.R.S.].

³³The procedures followed were outlined in Title 10, ch. 5, R.C.M. 1947. These statutes were repealed by the 1974 legislature, Laws of Mont. 1974, ch. 328, § 13, and replaced by R.C.M. 1947, Title 10, ch. 13. The basic procedure used by the departments did not change, however. The Montana Supreme Court held in a 1964 case that the district court's jurisdiction in such an action was conditional on the issuance of personal notice to the child's father who was a resident of the county. In the Matter of Georgia Arlene Young, 143 Mont. 230, 388 P.2d 379, 381 (1964). Mr. Mahan, S.R.S. counsel, reported that this decision has been interpreted by his department as requiring notice to the putative father in a dependency hearing.

³⁴Reeves, *supra* note 22.

³⁵*Stanley v. Illinois*, *supra* note 4 at 657.

The Court identifies the two competing interests which it balances in the *Stanley* opinion. On the one hand is the "private interest . . . of a man in the children he has sired and raised . . . [an interest] in the companionship, care, custody, and management in his children."³⁶ On the other hand is the interest of the state in protecting "the moral, emotional and physical welfare of the minor."³⁷ The Court's disapproval of the State of Illinois procedure was not based on disagreement with the fundamental interest or goal of the state, but the means employed to achieve that goal. "We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents."³⁸

In order to remain compatible with the rest of the opinion, that reference to "unwed fathers" in footnote nine cannot therefore be interpreted to refer to *all* unwed fathers. The very description of Peter Stanley's interest used by the Court implies more than a mere biological connection between father and child. Stanley had played an active role in the lives of the contested children through contributions to their economic and psychological support.³⁹ When such an interest is present, *Stanley* holds that the state must follow procedures which will protect it. If, however, that interest is not present, the state may choose its own procedures to protect its interest in the welfare of the child. It cannot be argued that the interest of the father who has given only genetic information to his child is of the same magnitude as the interest of a man who has "sired and raised his children."⁴⁰ It is therefore possible to reject the notion that Stanley mandates a hearing for *all* unwed fathers.

The Child-Welfare League, a policy setting organization for adoption agencies, suggests that a hearing be provided only for all fathers who have "either acknowledged paternity or been so adjudicated."⁴¹ Montana's adoption statutes do not meet this suggestion.⁴² Montana should, therefore, rework its adoption procedures to provide a hearing for such a putative father so that its statutes could survive a challenge based on *Stanley*.

³⁶*Id.* at 651.

³⁷*Id.* at 652.

³⁸*Id.*

³⁹*Id.* at 666.

⁴⁰*Id.* at 651.

⁴¹ THE CHILD WELFARE LEAGUE NEWSLETTER 6 (Fall-Winter 1972). The League formulated this suggestion following a meeting between members of the Child Welfare League and representatives of the American Bar Association which took place in October of 1972. The meeting was called to discuss the implications of the *Stanley* decision.

⁴²Some protection is afforded the putative father by the procedures followed by S.R.S.; but without statutory change, any private adoption would not need to concern itself with the putative father. At present three private agencies in Montana make arrangements for many adoptions: Catholic Charities, Lutheran Social Service, and Shodair Children's Hospital. In addition, attorneys in private practice handle adoptions and need follow only the statutory requirements for adoptions which do not provide for hearings or notice to a putative father.

TWO LEGISLATIVE PROPOSALS

There are at present two proposals circulating in the state for changing the adoption laws to conform to *Stanley*. The first, H.B. 637,⁴³ was introduced in the 43rd Legislative Assembly. The bill set up provisions whereby a putative father was required to file a form acknowledging paternity within thirty days of the birth of his child in order to preserve his rights in his child.⁴⁴ It is questionable whether such a procedure would have protected the rights of Peter Stanley.⁴⁵ Such a bill would mean that a putative father's rights in his child would be totally dependent on his performing the affirmative act of registering. Failure to register would result in a waiver of his parental rights in his child.⁴⁶ Although it is certainly possible to waive a right by failure to exercise it,⁴⁷ it is questionable whether a putative father should have to register in order to preserve the right to a hearing which determines his parental rights. Such a hearing was ordered for Peter Stanley by the Court because of his ongoing relationship with his children, an interest the Court recognized and protected without additional actions required of him.

A second proposal, entitled the UNIFORM PARENTAGE ACT,⁴⁸

⁴³H.B. 637 "AN ACT TO DEFINE THE RIGHTS OF A FATHER WITH RESPECT TO HIS ILLEGITIMATE CHILD AND TO CLARIFY THE STATUS OF CERTAIN ADOPTION PROCEEDINGS INVOLVING ILLEGITIMATE CHILDREN, AND AMENDING SECTIONS 61-108 AND 61-205, R.C.M. 1947, AND PROVIDING AN EFFECTIVE DATE." This particular bill was introduced by Representative Towe of Billings and passed the House but was defeated by the Senate. MONTANA HOUSE JOURNAL 205 (1974); MONTANA SENATE JOURNAL 454 (1974).

⁴⁴H.B. 637, § 3. "UNWED FATHERS, REGISTRATION OF PARENTAL RIGHTS. (1) THE FATHER OF AN ILLEGITIMATE CHILD MAY ACKNOWLEDGE HIS PATERNITY ON A FORM FURNISHED BY THE DIRECTOR OF SOCIAL AND REHABILITATION SERVICES. A FATHER FILING HIS ACKNOWLEDGEMENT AS PRESCRIBED BY THIS SECTION PRESERVES HIS RIGHTS TO CUSTODY OF THE CHILD AND TO CONSENT TO THE ADOPTION OF HIS CHILD (5) A PERSON WHO FAILS TO EXECUTE AND DELIVER A FORM TO THE DIRECTOR AS PRESCRIBED IN THE PRECEDING SECTION WITHIN THIRTY (30) DAYS OF THE BIRTH OF AN ILLEGITIMATE CHILD WAIVES THE RIGHTS TO ASSERT ANY PARENTAL RIGHTS RELATIVE TO THAT CHILD, AND FURTHER WAIVES HIS RIGHT TO CONSENT TO THE ADOPTION OF THE CHILD."

⁴⁵Although the record indicates Peter Stanley lived on and off for eighteen years with Joan Stanley and his three children and informally acknowledged his fatherhood, there is no indication he had ever had his paternity recognized legally. *Stanley v. Illinois*, *supra* note 4 at 666.

⁴⁶H.B. 637, § 3 (5).

⁴⁷*e.g.*, *Shepard v. United States*, 163 F.2d 974 (8th Cir. 1947); *Petition of Duran*, 152 Mont. 111, 448 P.2d 137 (1968).

⁴⁸This particular act was drafted by the Commissioners on Uniform State Laws in 1973 as an attempt to deal with the *Stanley v. Illinois* decision. It was considered by the Subcommittee on Judiciary along with fourteen other draft bills and resolutions for implementing the equal rights provisions of the 1972 Montana Constitution. The subcommittee recommended that further study by the full Judiciary Committee be given to this bill during the 1975 legislative session and did not recommend passage at this time. Minutes of the Subcommittee on the Judiciary meeting of October 14, 1974, state: "Although the subcommittee acknowledged that legislation repealing Montana's bastardy laws, providing for custody of illegitimate children, and regulating support and custody of children conceived by artificial insemination was needed, the members were disturbed by provisions of the act which would require the mother of

provides for a two-step process for adoptions when a mother "relinquishes or proposes to relinquish a child for adoption."⁴⁹ First, a judicial hearing is convened to determine whether parental rights of the father should be terminated.⁵⁰ The notice provisions for this hearing require the giving of personal notice to "an identified natural father" and optional notice by publication for any "unknown father".⁵¹ If the hearing terminates the father's rights, a legal guardian for the child is appointed who can be given the right to consent to adoption. If this right is given to the guardian, his or her consent is sufficient for a legal adoption.⁵²

CONCLUSION

The UNIFORM PARENTAGE ACT's provisions on adoption are similar to the procedures followed by county welfare agencies at the present time.⁵³ It offers a sound solution to the dilemma raised by *Stanley*. The hearing provisions are adequate to meet *Stanley's* requirements and the provision for notice conforms to the *Mullane* doctrine.⁵⁴

The major advantage to this proposal, however, is that it provides for the protection of the putative father's interest in his child while not unduly hampering the adoption process. The Illinois approach of requiring father's consent in all adoptions, or making him a party defendant and thus requiring notice, is an overreaction to *Stanley* which has substantially interfered with adoptions in that state and caused long delays in child placement.⁵⁵ Such long delays are not "in the best interest of the child"⁵⁶ and need not occur if the UNIFORM PARENTAGE ACT or an act with similar provisions is adopted in Montana. It is quite clear

an illegitimate child to disclose the identity of the father of the child. Senator Turnage moved that the bill be given to the Judiciary committee for further study but without recommendation, with a specific request to study procedures for citation and notification of the father. The motion was carried. *Id.* at 9.

⁴⁹UNIFORM PARENTAGE ACT, § 25.

⁵⁰UNIFORM PARENTAGE ACT, § 25-2c.

⁵¹UNIFORM PARENTAGE ACT, § 25-6: "NOTICE OF THE PROCEEDING SHALL BE GIVEN TO EVERY PERSON IDENTIFIED AS THE NATURAL FATHER OR A POSSIBLE FATHER . . . IF NO PERSON HAS BEEN IDENTIFIED AS THE NATURAL FATHER OR A POSSIBLE FATHER, THE COURT, ON THE BASIS OF ALL INFORMATION AVAILABLE, SHALL DETERMINE WHETHER PUBLICATION OR PUBLIC POSTING OF NOTICE OF THE PROCEEDING IS LIKELY TO LEAD TO IDENTIFICATION AND, IF SO, SHALL ORDER PUBLICATION OR PUBLIC POSTING AT TIMES AND IN MANNER IT DEEMS APPROPRIATE."

⁵²UNIFORM PARENTAGE ACT, § 28-3.

⁵³See discussion, *supra* note 32.

⁵⁴*Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). The *Mullane* doctrine requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

⁵⁵Reeves, *supra* note 1 at 132 n. 9.

⁵⁶In re Bad Yellow Hair, Mont., 509 P.2d 9 (1973). The Montana Supreme Court reaffirmed in this most recent case the consistently applied standard that all adoption and custody decisions must consider the "best interest of the child."

that *Stanley* does not permit a state to ignore the father's interest in his child merely for administrative operating convenience.⁵⁷ However, it is equally clear that *Stanley* does not mandate that the interests of the child in as rapid an adoption as possible be sacrificed while the state seeks to notify an elusive or unknown father.

⁵⁷*Stanley v. Illinois*, *supra* note 4 at 656.