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NEW ADOPTION PROCEEDINGS IN ILLINOIS

A PRELUDE TO THE NEW LEGISLATION

Until the recent amendment of the Adoption Act, the father of an illegitimate child in Illinois was accorded a legal status almost equivalent to a non-entity. The prior Adoption Act simply ignored his existence when it defined the term parent as: "[T]he father and mother of a legitimate child, the surviving parent of a legitimate child, or the natural mother of an illegitimate child."[1] Such father was decisively by-passed in the matter of consent to the adoption of his offspring:

> A consent shall not be required from the father of an illegitimate child . . . nor shall a consent be required from the father of an illegitimate child nothwithstanding that the father of such child has been ordered to support such child in accordance with the provisions of the Paternity Act.[2]

In further eliminating the father from adoption proceedings, the prior Act specified as persons who were available for adoption, "A child to whose adoption a person authorized by law, other than his parents, has consented, or to whose adoption no consent is required pursuant to Section 8 of this Act;"[3] as quoted above, section 8 clearly did not require the consent of the father of the illegitimate child.

Several other legislative acts reenforced this attitude. While the Paternity Act recognized the father's right to adopt his own illegitimate children, in effect, it relegated him to the role of a legal stranger in such proceeding:

> A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose.[4]

The Juvenile Court Act likewise deprived the father of any natural rights in the illegitimate child by duplicating the definition of "parent" used in the Adoption Act,[5] and by defining a dependent minor as "any minor under 18 years of age (a) who is without a parent, guardian or legal custodian."[6]

In essence, when the mother of an illegitimate child died, the

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[1] ILL. REV. STAT. ch. 4, § 9.1-1 E (1971).
[2] *Id.* § 9.1-8 (e).
[3] *Id.* § 9.1-1 H (b).
[4] Paternity Act, ILL. REV. STAT. ch. 106¾, § 62 (1971).
[5] ILL. REV. STAT. ch. 37, § 701-14 (1971). The definition also includes any adoptive parent; it specifically excludes a parent whose rights in respect to the minor have been terminated in any manner provided by law.
[6] *Id.* § 702-5 (1). The definition also includes any minor under 18 years of age:

> (b) who is without proper care because of the physical or mental

child was automatically without parents. Such child could become a dependent without any hearing on the parental fitness of the unwed father, and without the proof of neglect that is required before the state can assume custody of the children of married or divorced parents and unmarried mothers. If the child was adoptable, the court was empowered to appoint a guardian authorized to consent to the adoption of the minor without any reference to the natural father.[7] If the unwed father sought the adoption, the burden fell on him to establish not only that he would be a suitable parent, but also that he would be the most suitable of *all* who might want custody of the child.[8]

Procedurally, such legislation proved efficient. To terminate her rights, the consent of the unwed mother or a declaration of her unfitness cleared the path for adoption proceedings. In the case of an agency adoption, placement by the agency was all that was needed, once the mother had surrendered the child. If a legal guardian had been appointed, his consent was sufficient. The identity or whereabouts of the unwed father was of no concern, and even in those rare instances where he claimed a right to be heard in the adoption proceeding, the unwed father was informed that he had no such legal right, at least not in Illinois.

Practically, the exclusion of the unwed father from adoption proceedings seemed equitable. The result matched the reality that few fathers of illegitimate children exhibit concern for their offspring or are willing to publicly pronounce their paternity, and fewer still have attempted to make any legal claim in a court action.[9] The concern of the Adoption Act was to protect the

disability of his parent, guardian or custodian; or

(c) who has a parent, guardian or legal custodian who with good cause, wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody, and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor. . . .

[7] *Id.* § 705-9 (2).

[8] The United States Supreme Court advanced this interpretation of the Illinois statute in Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[9] *See* Stanley v. Illinois, 405 U.S. 645, 654 (1972), referring to the state's argument that most unmarried fathers are unsuitable parents. *See also* the dissenting opinion of Justice Burger to the *Stanley* decision at 665-66, pointing out that unwed fathers rarely burden either the mother or the child with their attentions or loyalties; indeed, many unwed fathers either deny all responsibility to the illegitimate child or exhibit no interest in the child's welfare. The guardian ad litem of the Circuit Court of Cook County, who represents the interests of the minor in all adoption proceedings, notes that fathers of illegitimate children traditionally tend to disappear once they learn of the pregnancy, as the prospect of support looms over them. The guardian ad litem does not foresee a great rally by these fathers to assert their new rights under the amended Adoption Act. He notes that only about 1% of such fathers have come into court since the new requirement of the putative father's consent, and no case has been litigated since People

welfare of the child and was promoted by eliminating the often complicated and time-consuming procedure of identifying the father, finding him, and procuring his consent.

However, in 1972, the United States Supreme Court dispelled on three occasions the notion that the rights of any individual can be subordinated to procedural efficiency.

Stanley v. Illinois[10] first challenged the Illinois statutory definition of parent and the consequences which flow from it. But *Stanley* was not an adoption situation. The couple had lived together intermittently for eighteen years and had three children. During those years the unwed father had supported them. Upon the mother's death, the children were declared wards of the court after a dependency hearing under the Juvenile Court Act. Stanley claimed that married fathers and unwed mothers could not be deprived of their children under Illinois law without a showing of unfitness; he, as an unwed father, was deprived of the equal protection of the laws guaranteed by the fourteenth amendment. The United States Supreme Court agreed that the state cannot presume a father's unfitness because his children are illegitimate. The Court stated that all Illinois parents (including the father of an illegitimate child) are constitutionally entitled, under the Illinois Juvenile Court Act, to a due process hearing on unfitness, before their children can be removed from their custody.[11] The Court further concluded that state laws which deny a putative father the right to be heard in proceedings involving custody of natural born children violate equal protection principles.[12]

Two weeks after *Stanley*, the Supreme Court twice emphasized its holding. In *Vanderlaan v. Vanderlaan*,[13] as in *Stanley*, only the putative father's right to custody was involved. The couple had been granted a divorce, but resumed marital relations without remarriage. The Illinois court had awarded the father custody of two children born to the pair after their divorce. The children had lived with him for four years, during which time he supported them. The Illinois appellate court returned them to the mother under the Paternity Act, because the father of a child born out of wedlock had no right to custody or control of the child under Illinois law. The United States Supreme Court reversed and remanded for further consideration in light of *Stanley*.[14]

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ex rel. Slawek v. Covenant Children's Home, decided almost two years ago. 52 Ill. 2d 20, 284 N.E.2d 291 (1972).

[10] 405 U.S. 645 (1972).

[11] *Id.* at 657.

[12] *Id.* at 649.

[13] 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970).

[14] 405 U.S. 1051 (1972).

Any speculation as to whether *Stanley* extended to an adoption situation was settled on the same day as *Vanderlaan* by the Court's holding in *Rothstein v. Lutheran Social Services.*[15] In *Rothstein,* the illegitimate child had been placed in the adoptive parents' home within two weeks after birth. Only the parental rights of the mother had been terminated through her consent. The unwed father had not been notified of the adoption, nor did he consent to the termination of his parental rights. The Wisconsin Supreme Court had held that the relevant Wisconsin statutes granted the mother alone the power to terminate parental rights and to consent to adoption of a child born out of wedlock; the putative father had no parental rights and no right to notice of any hearing prior to such proceeding.[16] The Supreme Court reversed and remanded for further consideration in light of *Stanley,* with due consideration for the completion of the adoption proceedings and the fact that the child had apparently lived with the adopting family for the intervening period.

A month after *Vanderlaan* and *Rothstein* were decided, a pending Illinois case provided the vehicle to bring Illinois law within the dictates of *Stanley.* In *Slawek v. Covenant Children's Home,*[17] a child had been placed for adoption by a licensed adoption agency, after the mother alone consented to the adoption. The unwed father was denied habeas corpus when he sought to obtain custody of the child, claiming that the agency knew he was the father, and had finalized the adoption without notice to him and without his consent. The father also claimed that the provisions of the Adoption Act which precluded him from asserting any right to the child in adoption proceedings, as well as the provision of the Paternity Act which denied a putative father the custody of his child absent his attempt to legally adopt the child, were unconstitutional. The Illinois Supreme Court in *Slawek* agreed: "[T]he provisions of the Adoption and Paternity Acts are unconstitutional insofar as they are in conflict with *Stanley, Rothstein* and *Vanderlaan.*"[18]

The Illinois legislature, acting with surprising speed, set about erasing the defects in the existing Adoption Act, as underscored by *Stanley* and *Slawek.*[19] The changes in the Act, which became effective on October 1, 1973, clarify the concept that the father of a child sought to be adopted, whether legitimate or

[15] *Id.*
[16] 47 Wis. 2d 420, 178 N.W.2d 56 (1970).
[17] 52 Ill. 2d 20, 284 N.E.2d 291 (1972).
[18] *Id.* at 22, 284 N.E.2d at 292.
[19] Changes were made in the Adoption Act by the 1973 Illinois Legislature in S. B. 346. The legislature also amended certain sections of the Juvenile Court Act and the Paternity Act to conform to the amended Adoption Act, but these changes are not examined here.

illegitimate, must be notified of adoption proceedings, and his rights must be terminated either by his consent or through a sound declaration of unfitness by the court. This article will note the changes in the Act and will suggest some means to satisfy their requirements.

NOTICE TO THE PUTATIVE FATHER

Perhaps the simplest yet most pervasive change in the Act is in the term "parent," which is now defined as "[t]he father or mother of a legitimate or illegitimate child."[20] Each use of the term throughout the Act includes both parents, so that the same rights automatically flow to the father of an illegitimate child as were previously accorded married parents and unwed mothers.

Among these rights are notice of the adoption proceedings and a due process hearing before either party can be deprived of his parental status. Both such rights presume proper identification of the father. Section 12a has been added to the Act[21] for the purpose of establishing the father's identity with as much certainty as is possible.[22]

Section 12a should be followed strictly.[23] To best utilize it, the natural mother should be asked to name the father prior to the birth of the child, if possible. Immediately thereafter, any interested party can request in writing that notice of intention to place the child for adoption be served on the father. Interested parties include the natural mother, the person intending to adopt the child, a child welfare agency, or an attorney representing a party.[24] Upon request, the clerk of the court will serve section 12a notice to the alleged father in the same manner as summons is served in other civil proceedings, or in lieu of personal service, he will mail it to the alleged father's last known address.[25] Unlike the former requirement, section 12a specifies that "The names of adoptive parents shall not be included in the

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[20] ILL. REV. STAT. ch. 4, § 9.1-1 E (1973).

[21] *Id.* § 9.1-12a.

[22] Occasionally section 12a serves the further purpose of originally notifying the father that he is a father. The dissenting opinion in *Stanley* notes at 665 that many unwed fathers are simply not aware of their parenthood. A problem exists as to how such father can consent if he is totally oblivious to his parental status. The section enlightens him, both as to his status and to his rights.

[23] On a number of occasions, the courts have held that the Adoption Act, being in derogation of the common law, should be strictly construed. *See* Watts v. Dull, 184 Ill. 86, 90, 56 N.E. 303, 305 (1900). More recently, the court has accepted substantial compliance with the statute. Gebhardt v. Warren, 399 Ill. 196, 77 N.E.2d 187 (1948). In the absence of judicial interpretation of the amended Act, the safer procedure would seem to be a strict adherence to the new requirements.

[24] ILL. REV. STAT. ch. 4, § 9.1-12a(1) (1973).

[25] *Id.*

notice."[26] As detailed in section 12a, the notice informs the putative father that the mother intends to place the child for adoption, that he has legal rights in the child, and if he intends to keep such rights, he must file a declaration of paternity within thirty days.[27]

If the identified party is not the father, the notice informs him that he should file a disclaimer of paternity with the court, which will automatically terminate any rights he may have had and cancel any notice of further proceedings.[28] If he fails to file the declaration of paternity within the time specified, an order can be entered terminating all of his rights without further notice to him.[29] He will thereafter not be made a party to the adoption proceedings nor will he be further informed regarding them. If he files a declaration of paternity, stating that he is in fact the father and that he intends to retain his legal rights, or if he requests notice of any further proceedings, he will be informed if a proceeding is brought for the adoption of the child.[30]

To encourage him to declare his paternity, section 12a insulates the putative father against possible repercussions by stating that "All such records shall be impounded."[31] Once paternity is acknowledged, the notice form is secured in the files pertaining to the adoption and it can never be used for a purpose other than the adoption. The mother cannot use it in a separate paternity suit or in any other way against him.

In most situations, the identification of the father for purposes of notice is fairly certain, even though his name does not appear on the birth certificate or he has not been legally declared the father in a paternity suit. In some instances, however, the natural mother may disclose that one or more of several individuals may be the father of the child in question. Section 12a notice should be sent to each possible candidate. Either one name will be secured with certainty, or the rights of all the named parties will be forever terminated.

Further, the possibility that the mother might, by design or otherwise, name a party who in reality is not the father of her child, cannot be overlooked. The mother's identity is almost always positive — she is either named on the birth certificate or, if necessary, the doctor who delivered the child can testify to her maternity. But often only the mother's word exists regarding the identity of the father. Whenever any doubt arises,

[26] *Id.* § 9.1-12a(2).
[27] *Id.*
[28] *Id.*
[29] *Id.* § 9.1-12a(4).
[30] *Id.* § 9.1-12a(5).
[31] *Id.* § 9.1-12a(6).

neither the attorney nor the parties who intend to adopt the child should sign the original request that notice be sent to the putative father. While the actual notice provided by section 12a must be signed by the clerk of the court,[32] the original written request should be signed only by the mother. This procedure insures caution on her part in naming the father of the child and, if nothing more, protects all other parties from an unpleasant law suit for libel.

Section 12a solves many of the problems which followed the *Stanley* decision.[33] As indicated, the section is especially effective because it settles at an early stage the question of who must be involved in adoption proceedings, and it eliminates certain parties who might conceivably make a claim against the adoption in the future.

CONSENT

If and when the father is identified and declares his paternity, his consent to the adoption must be sought. Section 8 of the Adoption Act provides that "consents shall be required in all cases." The only exceptions to this requirement are for persons whom the court has found to be unfit.[34]

Consents can be obtained from the parents of the adoptive child, from the child's legal guardian if there is no surviving parent, from an agency if the child has been surrendered for adoption to that agency,[35] or from any person or agency that has legal custody of the child by court order when parental rights have been terminated and the court has authorized such consent.[36] The clause in the former Act — that no consent was required of the father of an illegitimate child even though he had been ordered to support the child under the Paternity Act[37] — has been stricken and, under the new definition of parent, his consent is clearly required. If either the natural father or mother of the child is the party seeking the adoption, execution and verification of the adoption petition by that parent is equivalent to his consent.[38]

Section 9B of the amended Act provides that "[n]o consent

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[32] *Id.* § 9.1-12a(2).

[33] For a discussion of the variety of problems created by *Stanley*, many of which are resolved by the amended Act, see *General Practice Newsletter*, Ill. State Bar Ass'n, vol. 2, no. 4 (April 1973).

[34] ILL. REV. STAT. ch. 4, § 9.1-8.

[35] A surrender is similar to a consent, except that the parent permanently and irrevocably entrusts the child to an agency for the purpose of adoption. Once a valid surrender is given, the agency stands in the place of the parent. The agency submits the consent when the adoptive parents become specific. This also applies to a guardian appointed by the court in a dependency or neglect proceeding, if the guardian was authorized to consent.

[36] ILL. REV. STAT. ch. 4, § 9.1-8(a)(b)(c)(d) (1973).

[37] ILL. REV. STAT. ch. 4, § 9.1-8(e) (1971).

[38] ILL. REV. STAT. ch. 4, § 9.1-8(e) (1973).

or surrender shall be taken within the 72 hour period immediately following the birth of the child."[39] While this wording varies slightly from the former provision,[40] the effect on the mother is the same — she cannot consent to her child's adoption until seventy-two hours after its birth. However, section 9C has been added as an exception for the father by stating that "A consent or a surrender may be taken from the father prior to the birth of the child."[41] This provision blends with section 12a, which allows notice to be sent to the putative father any time after the conception of the child, and it allows early removal of a possible barrier to a prompt adoption proceeding.

When the mother consents to or surrenders her child for adoption not less than seventy-two hours after its birth, her action is irrevocable.[42] But if the father has consented prior to the birth of the child, he can revoke such consent or surrender within seventy-two hours *after* the birth by notifying whoever took the consent or surrender of his revocation.[43] Unless he does so within the seventy-two hour period, his consent also becomes irrevocable.[44]

Finality of consent is subject only to section 11 of the Act,[45] which provides for revocability of consent or surrender when it has been obtained by fraud or duress, if a court of competent jurisdiction so finds. However, an amendment to section 11 narrows the scope of the fraud or duress that can affect revocability to:

> [F]raud or duress on the part of the person before whom such consent, surrender, or other documents equivalent to a surrender is acknowledged . . . or on the part of the adopting parents or their agents. . . .[46]

This clause seems to negate as fraud any pressure to give up her child which might be applied to the unwed mother by her own parents or by the unwed father. Such limitation provides added protection against future attack on the adoption, particularly where a child has been living with adoptive parents for a considerable time and the mother undergoes a change of heart regarding adoption.

When signed by a parent, a consent must be personally acknowledged by the signing parent before the presiding judge

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[39] *Id.* § 9.1-9 B.

[40] The prior clause read that "No consent or surrender shall be taken until the passage of 72 hours after the birth of the child." ILL. REV. STAT. ch. 4, § 9.1-9 (1971).

[41] ILL. REV. STAT. ch. 4, § 9.1-9 C (1973).

[42] *Id.* ch. 4, § 9.1-9 A.

[43] *Id.* § 9.1-9 C.

[44] *Id.* § 9.1-9 D.

[45] *Id.* § 9.1-11.

[46] *Id.*

of the court in which the petition for adoption has been, or is to be, filed, or before any other person designated or subsequently approved by that court.[47] Practically, the consent will be signed before the clerk of the court, unless the party signs it in another jurisdiction. In that case, he must sign the consent before a judge, and a certificate of magistry must be attached to the form.[48] Where the execution of a consent or surrender is acknowledged before someone other than a judge or clerk of a court of record, that person must have his signature acknowledged before a notary public according to the form provided by the statute.[49] Upon proper acknowledgment by the signer of the consent or surrender, the judge or other designated person will complete the certificate of acknowledgment provided in the statute, verifying that the signer appeared in person to acknowledge his free and voluntary signing of the consent or surrender, and that the irrevocable relinquishment of all his parental rights was fully explained.[50]

It should be emphasized that the sections dealing with consents must be strictly adhered to, for they will be strictly construed. While the execution of the consent pursuant to the Act is prima facie evidence of its validity, such validity will be the subject of a hearing preceding the granting of an adoption in all cases other than that of a related child, an adult or an adoption through an agency.[51]

Section 10 is generous in providing specific forms to cover almost any situation.[52] Section 10E and F repeat the former consent form for an adult adoption; all other consent and surrender forms are new and must be consulted.

Section 10A provides a final and irrevocable consent to the adoption of a *born* child, and stresses the signer's understanding of a permanent and irrevocable surrender of all parental rights. Section 10B designates a similar form for the adoption of an *unborn* child, and contains a statement by the father acknowledging his parenthood and his understanding that unless he revokes consent within seventy-two hours after birth, it is irrevocable. Section 10C covers the surrender of a born child to an agency, which is given full power to place the child with any persons it may select in its sole discretion. Section 10D adapts this form to the unborn child situation. Despite the considerable changes in procedure now required under the amended Act, the legislature has left little to the imagination regarding the vital

[47] *Id.* § 9.1-10 H.
[48] *Id.* § 9.1-10 K.
[49] *Id.*
[50] *Id.* § 9.1-10 J.
[51] *Id.* § 9.1-13 A.
[52] *Id.* § 9.1-10 A-F.

matter of consent, and the wise attorney will heed its detailed guidelines.

UNFITNESS — A SUBSTITUTE FOR CONSENT

The mandate that in every adoption the rights of both parents must somehow be terminated echoes throughout the new legislation. A disclaimer of paternity, a failure to declare paternity, or consent, equally affect termination of the rights of the father of an illegitimate child.

But occasionally such a father may choose to exercise the rights so recently bestowed upon him, and refuse to give his consent. His motives may be malicious, or they may be benevolent, especially if his first awareness of the child's existence comes through section 12a notice of his paternity and he reacts in a fatherly fashion.[53] Whenever there is any refusal to consent, whether the child to be adopted is legitimate or illegitimate, or whether it is the mother or the father who refuses to consent, if an adoption is to occur the only alternative is to seek termination of the parent's rights by a court order. The petition for adoption must allege that the non-consenting parent is an "unfit person" and it must also allege the grounds of unfitness as defined in section 1 of the Adoption Act.[54]

When an adoption petition rests on unfitness, the accused party should ask for a hearing, which will be part of the adoption proceeding itself. The burden rests on the petitioner for the adoption to show unfitness on the part of the parent, and if the parent can show a valid defense, the petition for adoption must be denied.

The court's determination of unfitness will necessarily depend on the facts in the particular case. The ground for unfitness most commonly claimed has been the abandonment of the child, since desertion has required a period of more than three months preceding the commencement of the adoption proceeding. The reported cases concern only the abandonment and desertion of the legitimate child, since before *Stanley* the father of an illegitimate had no right to the child and his unfitness was never litigated. *In re Cech,* the most recent case to focus on the subject, defines the two grounds:

> Abandonment is conduct on the part of a parent which demonstrates a settled purpose to forego all parental duties and to relinquish all parental claims to the child. Desertion, as contemplated by the Adoption Act, is any conduct on the part of a parent which indicates an intention to permanently terminate custody over the

[53] The guardian ad litem of the Circuit Court of Cook County views the frequency of the latter occurrence with skepticism, but he recognizes the possibility exists and should be considered. *See* note 9 *supra.*

[54] ILL. REV. STAT. ch. 4, § 9.1-1 D (1973).

child but not to relinquish all parental duties and claims to the child.[55]

A review of the cases reveals that the courts have been less than liberal in finding abandonment or desertion.[56] *In re Cech*[57] involved a child whose parents were divorced, with the mother being awarded custody. Both parties remarried, and the child's mother and her new husband were granted their petition for adoption. The natural father had not consented to the adoption. The Illinois appellate court reversed the granting of the adoption, emphasizing that a petition for adoption must establish that there has been a valid consent or that the person whose consent is normally required is unfit. The court in *Cech* stated that parental rights should not be terminated unless a clear and convincing case of the natural parents' unfitness has been made in strict compliance with the adoption statute. The court was far from convinced of Cech's unfitness. He had frequently seen the child at his parents' home after separation from his wife; while he had not exercised visitation rights because he did not want to confront his former wife, he continuously inquired about his son, sent him gifts, provided for his support, and maintained hospitalization insurance for him.[58]

Petition of Smith[59] involved two children, one born during a marriage which ended in divorce, and the other after the divorce while the mother was living with her former husband. After the death of the mother, the petitioners, who had taken her and the children into their home, filed for adoption. The appellate court in *Smith* affirmed both the trial court's granting of the adoption of the illegitimate child on the ground of abandonment by the father, and its refusal to grant the adoption of the legitimate child, who was returned to its father. The court stressed that intent and examination of the father's conduct toward the

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[55] 8 Ill. App. 3d 642, 644, 291 N.E.2d 21, 23 (1972).

[56] Perhaps the fact that a parent is interested enough to contest the adoption provides a clue that he has steadily shown concern for the child. Young v. Prather, 120 Ill. App. 2d 395, 256 N.E.2d 670 (1970) would seem to support this view in that the court stated that where the natural parent opposes and contests the adoption of his child, a preponderance of evidence must show that the parent is unfit before the adoption decree will be authorized.

In addition to the cases cited in the text where the court failed to find a parent unfit on the grounds of abandonment and desertion, *see also In re* Deerwater, 131 Ill. App. 2d 952, 267 N.E.2d 505 (1971) and Waldron v. Waldron, 106 Ill. App. 2d 430, 245 N.E.2d 910 (1969).

[57] 8 Ill. App. 3d 642, 291 N.E.2d 21 (1972).

[58] The case seems to end in a stalemate. The mother and her new husband cannot adopt because Cech refused his consent and was not found unfit. If Cech remarried, he and his new wife could not adopt unless the natural mother consented or was found unfit, both of which seem unlikely. The situation is not serious because the child is legitimate, but in the unique case where a father of an illegitimate will not consent and cannot be found unfit, the child could be left with an illegitimate status.

[59] 4 Ill. App. 3d 261, 280 N.E.2d 770 (1972).

child are proper areas of judicial inquiry. Today, under the new legislation, the court's finding would probably apply to the illegitimate child as well.

In *Robinson v. Neubauer*,[60] a mother died in childbirth and the father left the child with its aunt and uncle. The court in that case rejected the charge that he had abandoned his child, even though he had visited the child only occasionally and had acquiesced in the child's referring to the aunt and uncle as its parents. The court found that the father had neither consented to the adoption or intended to terminate his parental relationship, in that he had paid monthly support for the child and had placed a monthly sum in a bank account.

An adoption was also denied in *Carlson v. Oberling*[61] when a divorced wife and her new husband petitioned for adoption. Even though the natural father had paid only five months in child support in over three years, the court found there was neither abandonment nor desertion. The father had regularly visited his child, conducted himself properly in regard to the child, maintained insurance policies on her life, and, on occasion, sent her gifts. However, the court in *Houston v. Brackett*[62] did find a father to be unfit on the ground of abandonment where the father saw his two children only four times in the year following divorce and his contribution to the care and welfare of the children consisted of $45.00 and four valentines in over two years.

In *Thorp v. Thorp*,[63] an illegitimate situation, the court failed to find either abandonment or desertion where the mother of the illegitimate left the child with her uncle and aunt who later filed to adopt the child. The mother had visited and cared for the child on several occasions, had been kept informed of the baby's welfare, had taken a small life insurance policy on the child, had furnished some clothing and sent Christmas and birthday presents to the child. While the courts may have tended to favor the natural mother, even if unwed, there is yet no precedent to rely on where the father contests in a similar situation. Both *Stanley* and *Slawek* involved interested fathers,[64] so there are no cases under the new legislation to indicate where the line will be drawn if the father falls just short of the

[60] 79 Ill. App. 2d 362, 223 N.E.2d 705 (1967).
[61] 73 Ill. App. 2d 412, 218 N.E.2d 820 (1966).
[62] 38 Ill. App. 2d 463, 187 N.E.2d 545 (1963).
[63] 48 Ill. App. 2d 455, 198 N.E.2d 743 (1964). While the court did not find that the mother intended to abandon or desert her child, the case was remanded to allow the petitioners to amend the adoption petition so as to charge the mother with another ground of unfitness — depravity and open and notorious adultery or fornication.
[64] Stanley may have been interested, but on remand the trial court found him unfit and denied him custody of his children. See note 93 *infra*.

usual pattern of disappearing upon discovery of his paternity.

However, it is important to note that while section 1 D(c) of the Adoption Act retains the three month requirement for desertion,[65] section 1 D(k) has added as a separate ground for unfitness, "Failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the *first 30 days* after his birth." (emphasis added). This section effectively reduces the period of desertion to thirty days for the father of an illegitimate, closing a gap which might otherwise delay prompt hearing of the adoption petition.

While it is difficult to predict precisely what will constitute sufficient conduct for a finding of unfitness, it is suggested that, under the new legislation, three grounds should be alleged by adding the following paragraph to the petition for adoption whenever appropriate:

> That the father of the said child is an unfit person in that he has abandoned and deserted said child for a period in excess of three months prior to the filing of the adoption petition herein; and that he failed to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare.[66]

THE ADOPTION PETITION

In addition to proper termination of parental rights, which is simplified by the new legislation, due care must be given to the requirements designated in the statute for the adoption petition itself. The amended Act retains all of the elements formerly required to accomplish a valid adoption.[67] The named petitioners remain the parties who seek the Decree of Adoption. In all cases, including a related adoption, the petition must state the names, residence, and length of residence in Illinois of the petitioner. It must also state the child's name, place and date of birth, sex, and relationship, if any, to each petitioner.[68]

If a natural parent seeks to adopt his own child, whether legitimate or illegitimate, he is named as a petitioner. Otherwise, the minor child and *both* natural parents must be named as parties defendant.[69] Where the father is unknown, the petition should identify him as "unknown father of Baby (Boy's name) or (Girl's name) (Mother's Maiden Name) and all whom it may concern."[70]

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[65] ILL. REV. STAT. ch. 4, § 9.1-1 D (1973).

[66] The office of the guardian ad litem of the Circuit Court of Cook County suggests adding this paragraph to Parnell's Forms # 1 and # 1-A as well as to related adoption Forms # 6 and 10; the paragraph should also be included as a finding of the court in the Adoption Decree.

[67] ILL. REV. STAT. ch. 4, § 9.1-5 (1973).

[68] If an adoption pertains to other than that of a related child, sections 5 B(c)(g) and (h) should be specially consulted.

[69] ILL. REV. STAT. ch. 4, § 9.1-7 A (1973).

[70] The office of the guardian ad litem uses this form where the putative father cannot be identified.

Section 5f has been added[71] to provide that the names of the natural parents shall be omitted as parties defendant if their rights have been terminated by a court of competent jurisdiction, if the child has been surrendered to an agency, or if a parent who was served with section 12a notice either filed a disclaimer of paternity, failed to file a declaration of paternity, or failed to request notice of the adoption.

As already discussed in detail, the adoption petition must include the consent of any person or agency required to give consent, or an allegation that the person having authority to consent is unfit, with a statement on the ground of unfitness. The petition should likewise include a request that the court appoint a guardian ad litem to represent the child sought to be adopted; such guardian will have the power to consent to the adoption, if his consent is needed.[72] In addition, the petition should ask the court to appoint a suitable agency or person to investigate the allegations in the petition, as required in all adoptions except those involving a related child.[73]

Service of Process and Publication

Once the petition for adoption is properly filed, notice of the proceeding must be given to all parties defendant, known or unknown.[74] Section 20 of the Adoption Act specifies that the provisions of the Civil Practice Act will apply to the proceedings. Hence, if the defendants are known and can be located, they must be served either personally or by substitute service.[75] Service of process can be waived by any person over fourteen years of age, if he enters an appearance in writing.[76]

If a defendant is difficult to locate, the pursuit does not end with a "returned mail" postmark. As in any civil proceeding, due diligence and inquiry must be expended to determine his whereabouts. If a defendant cannot be located after due search, or his identity is altogether unknown, the statute allows publication of the proceeding.[77] However, the petitioner must file an affidavit with the court, indicating that the defendant resides or has gone out of the state, or on due inquiry cannot be found, or that he is concealed within the state so that process cannot be served upon him.[78] Whenever there is any doubt about the

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[71] Ill. Rev. Stat. ch. 4, § 9.1-5(f) (1973).
[72] *Id.* § 9.1-13 B(a).
[73] *Id.* § 9.1-6. The section preserves the protection afforded all investigatory reports by forbidding their inclusion in the proceeding or in any of the hearings. However, the court must inform the petitioners of any adverse findings which might defeat the adoption decree.
[74] Ill. Rev. Stat. ch. 4, § 9.1-7 (1973).
[75] Civil Practice Act, Ill. Rev. Stat. ch. 110, § 13.2 (1971).
[76] Ill. Rev. Stat. ch. 4, § 9.1-7 A (1973).
[77] *Id.*
[78] *Id.*

identity of the father, as where the mother admits to more than one paramour, notice by publication should be given, in addition to personal service to any individuals who are named. This procedure eliminates a future claim of fatherhood by some unsuspected candidate.

Publication must contain notice of the pending action, the name of the person to be adopted, the name of the defendants being served and/or "to whom it may concern," and the date of default.[79] The publication must not contain the name of the petitioners, the name of any party who has surrendered the child or given consent to its adoption, or the name of any parent whose rights were otherwise terminated by the court.[80]

Where an adoption involves a related child, a child who has been surrendered to an agency, or an adult, the court can enter a decree of adoption any time after service of process and the designated return day.[81] No investigation is necessary, unless deemed so by the court.[82]

In any other adoption, the court will temporarily commit the child to an agency or to a person it deems competent, including the petitioners, as dictated by the welfare of the child.[83] After six months, the petitioners can apply to the court for a decree of adoption, notice of which is served on the investigating agency and the guardian ad litem.[84] When the court is satisfied that the adoption is for the welfare of the child, that all consents are either valid or not required, and that parental rights have been properly terminated, the court will enter the decree.[85] The natural parents are thereby relieved of all responsibility, as well as all legal rights, to the child.[86]

The adoption decree can be appealed in the same manner as in any other civil proceeding, but, of course, no appeal can be taken more than thirty days after the decree has become final.[87]

THE WELFARE OF THE CHILD

The strict procedural routine delineated in the Adoption Act is based on one overriding concern — the welfare of a child whose fate and future are being shaped by a court determination.

In the past, the provisions of the Adoption Act generally incorporated the concept of concern for the child,[88] but lack of

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[79] *Id.*
[80] *Id.*
[81] *Id.* § 9.1-14.
[82] *Id.* § 9.1-6.
[83] *Id.* § 9.1-13 B(c).
[84] *Id.* § 9.1-14.
[85] *Id.*
[86] *Id.* § 9.1-17.
[87] *Id.* § 9.1-20.
[88] *See* ILL. REV. STAT. ch. 4, §§ 9.1-13 B(c); 9.1-14; 9.1-15, which provides for consideration of the child's religious belief, whenever possible.

precision gave the attorney little legal support for his contention that, in the final analysis, the adoption was to be decided from the child's standpoint.

The courts have not always subordinated their decisions to the child's welfare. It should be noted that the court in *In re Cech*[89] did not hesitate to overturn the adoption even though the welfare of the child might have been better served by allowing the mother and her new husband to adopt the child. The court in *Cech* stated that while the welfare of the child may be the decisive criterion in awarding custody in divorce and separate maintenance cases, it is not the sole dictate of the result in adoption proceedings. The court further stated:

> The nature of adoption necessitates an appraisal of the effect not only upon the child but also upon the natural parent. . . .
>
> Although, as an abstract proposition, the welfare of Denis might be better served by avoiding intrusion into his present home life by his natural father, the rights of the father and his readiness to support and educate his son must be respected.[90]

The new legislation remedies the statutory deficiency by isolating the issue of the child's welfare in a separate provision that "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act."[91] This legislative action reflects the concern of the United States Supreme Court exhibited in *Rothstein*, in which, despite reversal, the Court directed that due consideration be given on rehearing to the completion of the adoption proceedings and the fact that "the child has apparently lived with the adoptive family for the intervening period of time."[92]

In certain situations, the new provision in the Adoption Act will influence the outcome of a case. Where both natural parents are deceased, for example, a number of parties may seek to adopt the child, especially if there is an inheritance involved. The Illinois court should now objectively decide whether an aunt, or grandparents or any other interested party is best suited to adopt, or perhaps determine that no adoption at all is in order

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[89] 8 Ill. App. 3d 642, 291 N.E.2d 21 (1972).

[90] *Id.* at 645-46, 291 N.E.2d at 24. See also *In re* Petition of Smith, 4 Ill. App. 3d 261, 265, 280 N.E.2d 770, 773 (1972), *quoting* Jackson v. Russell, 342 Ill. App. 637, 97 N.E.2d 584 (1951) that,

> The welfare of the child is a much more appropriate yard stick in a custody case than in an adoption matter. Adoption, which affects the course of inheritance, deprives the child of a place in which it was placed by nature, and by force of law thrusts the child into another relationship, while severing forever conclusively the legal rights and interests of the natural parents, and is a very different matter from a change in custody, which could be on a temporary basis.

[91] ILL. REV. STAT. ch. 4, § 9.1-20a (1973).

[92] Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).

until the child is old enough to decide for himself. Above all, the new legislation focuses legal concern where it should be — *on the child.*

CONCLUSION

The amended Adoption Act represents the Illinois legislature's prompt response to the dictate of the United States Supreme Court in *Stanley* that the father of an illegitimate child is constitutionally entitled to the same rights as any other parent whenever custody or adoption of his children are involved.

However, while the changes in the Act afford the father substantial protection before his parental rights can be terminated, at the same time they have created certain complications. In *Stanley,* the United States Supreme Court referred almost reverently to the importance of the family and to the basic civil right to "conceive and raise one's children," and to prepare a child "for obligations which the state can neither supply or hinder."[93] The Court embraced the father of an illegitimate child in its concern for the preservation of the right. But in many cases, the reality of the father's disappearance as soon as he discovers his paternity seems to contradict the Court's concern for his abstract rights. The question emerges whether a father who has actual knowledge of the birth of his child and who has failed to demonstrate any interest in it whatsoever ought to be considered a father as far as legal rights are involved. In a strong dissenting opinion to *Stanley,* Justice Burger recognized this problem when he argued that the Equal Protection Clause is not violated when Illinois gives "full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings." Justice Burger further noted:

> Quite apart from the religious or quasi-religious connotations that marriage has — and has historically enjoyed — for a large proportion of this Nation's citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never entered such a relationship. . . . Stanley did not seek the burdens when he could have freely assumed them.[94]

The question of the wholly disinterested father of an illegitimate has not yet been fully explored, since the cases giving rise to the new legislation never disputed the father's interest and support.

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[93] Stanley v. Illinois, 405 U.S. 645, 651 (1972). The Court's somewhat edifying language seems especially inappropriate in reference to Stanley. The lower court on remand ruled that he was depraved on account of sexual advances made toward his older daughter; in a subsequent hearing the court said he was still unfit to have the two younger children.

[94] *Id.* at 663, 664.

A strong temptation persists to ignore the existence of one who has steadily rejected or ignored his right to his child, a right "far more precious than property rights."[95] Under the new legislation, this temptation clearly must be resisted.

Other considerations deserve scrutiny. The requirement that the unwed mother, about to marry another, must now contact the natural father may prove socially undesirable. Likewise, the possibility is present that the unwed mother may have to name more than one likely prospect as the father, all of whom must seemingly now consent, or at least must receive notice of her intention to place the child for adoption. The matter of rightfully identifying the father without the benefit of his name on a birth certificate or in a paternity suit presents its own problem. Caution must be exercised so that the mother alone remains liable for improper identification. Even where the father is rightfully named, if his paternity occurred outside an existing marriage, his identification can produce a disastrous impact on the marriage.

These situations will undoubtedly be debated.[96] Hopefully they will be resolved. But at the present time it is clear that if an adoption is to stand unchallenged under the new legislation, the attorney must know what changes have been made in the Adoption Act, and he must carefully follow the procedures outlined by them. The goal to be achieved is an adoption which can withstand attack, not only in the immediate proceedings, but in future ones. The new legislation provides guidelines for almost every situation that may arise. The reversal of even one established adoption because of procedural ineptness is inexcusable where the welfare and stability of a child are affected.

Imelda R. Terrazino

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[95] *Id.* at 651.

[96] *See* Hession, *Adoptions After "Stanley" — Rights for Fathers of Illegitimate Children*, 61 ILL. B.J. 350 (March 1973), which examines some of the ramifications of *Stanley*.