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Family Law—PUTATIVE FATHER DENIED CUSTODY UNDER RESTRICTIVE INTERPRETATION OF HIS RIGHTS—*Commonwealth v. Hayes*, 215 Va. 49, 205 S.E.2d 644 (1974).

Under the common law, the illegitimate child was deemed *nullius filius*, no man's son.¹ However, our courts have gradually granted the illegitimate substantially the same rights as those afforded the legitimate child.² Unlike the child, the putative father,³ who originally was free from any obligation to his offspring,⁴ has encountered the same duties as the father of a legitimate child⁵ notwithstanding the fact that he is afforded few of the parental rights.⁶

1. W. BLACKSTONE, COMMENTARIES *152. Modern courts, consistent with Blackstone, have restricted *nullius filius* to inheritance. See, e.g., *In re Guardianship of C*, 98 N.J. Super. 474, 237 A.2d 652, 655, 657-58 (1967). Cf. *Hepburn v. Dundas*, 54 Va. (13 Gratt.) 219 (1856) (prevents inheritance from the father); VA. CODE ANN. § 64.1-5 (1973).

2. The equal protection clause of the fourteenth amendment affords illegitimates substantially the same benefits granted legitimate children. See *Jimenez v. Weinberger*, 94 S. Ct. 2496 (1974) (social security disability insurance); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (welfare benefits); *Gomez v. Perez*, 409 U.S. 535 (1973) (support from the father); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (workmen's compensation benefits); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death benefits for death of a parent); *Carroll v. Sneed*, 211 Va. 640, 179 S.E.2d 620 (1971) (wrongful death benefits for death of father to acknowledged illegitimate child). But see *Labine v. Vincent*, 401 U.S. 532 (1971) (no right to inheritance from the father). The rationale of these cases is that a disability must bear some relationship to individual responsibility therefore protecting the child's rights but not necessarily the parents'. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

3. "A putative father is the alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1402 (4th ed. 1968).

4. Under the common law, no duty to support existed in the majority of the states. 10 AM. JUR. 2d *Bastards* § 68 (1963). See, e.g., *Brown v. Brown*, 183 Va. 353, 32 S.E.2d 79 (1944). In England, there was a duty to support. W. BLACKSTONE, COMMENTARIES *159.

5. Like the father of a legitimate child, the putative father must provide support, maintenance and education for the child. 10 AM. JUR. 2d *Bastards* § 69 (1963). Generally, the putative father must admit paternity or have it adjudged pursuant to a bastardy proceeding before any duty will be imposed. See, e.g., VA. CODE ANN. § 20-61.1 (Cum. Supp. 1974). THE UNIFORM ACT OF PATERNITY, ch. 45, title 78, § 78-45a-1 (UCA 1953) provides that: "the father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock . . ." In *Gomez v. Perez*, 409 U.S. 535 (1973), the Court held that an illegitimate child has a constitutional right to support.

6. For example, the putative father in many states has no right to inherit from his child. See, e.g., VA. CODE ANN. § 64.1-5 (1973). But see UNIFORM PROBATE CODE § 2-109 (ed. 1974) (father may inherit when he openly treats the child as his). See generally Annot., 48 A.L.R.2d 759 (1956). Under the common law, the father was generally denied inheritance from his illegitimate children. 10 AM. JUR. 2d *Bastards* § 164 (1963).

The putative father also has no right to visit his child when the mother who has custody objects. Tabler, *Paternal Rights in the Illegitimate Child, Some Legitimate Complaints on*

The denial of the putative father's parental rights has been particularly apparent in custody disputes. Here the putative father's claims have always been subordinated to the mother's primary right to the child.⁷ Yet, even absent the mother's claim, his objections to an initial adoption by strangers have not been heard, either because he was excluded from participation as a parent in the initial adoption proceeding⁸ or because his consent to the child's adoption was not required.⁹ His claim was traditionally relegated to a habeas corpus proceeding.¹⁰ In recognition of his plight, the United States Supreme Court in *Stanley v. Illinois*¹¹ afforded a putative

Behalf of the Unwed Father, 11 J. FAM. L. 231 (1971). The author found only six states with a contrary position. *Id.* See generally 26 ALBANY L. REV. 335 (1962).

In Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 491-98 (1967), the author found four reasons for state legislative discrimination against the putative father: 1) an intent to discourage promiscuity; 2) protection of the family unit; 3) emphasis on the legitimate child/father relationship; and 4) the allowance of a choice to the father of the recognition of his child. In Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 8 n.3 (1969), the authors found that these statutes had little, if any, effect on promiscuity and unwanted births.

7. King v. Soper, 101 Eng. Rep. 156 (K.B. 1793); Annot., 98 A.L.R.2d 417 (1964); 3 M.J., *Bastardy*, § 8 (1949). In Virginia, a fit mother of a legitimate child is its natural custodian although there is no statutory presumption in her favor. *Compare* Portewig v. Ryder, 208 Va. 791, 794, 160 S.E.2d 789, 792 (1968) with VA. CODE ANN. § 31-15 (1973).

Historically, under the English common law, the illegitimate child was *filius populi*, a ward of the parish, and therefore the father was not entitled to custody. *Horner v. Horner*, 161 Eng. Rep. 573, 578 (1799). This doctrine was modified to recognize initially in the mother, then in the father, rights of custody. *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 27, 34 (1967). The majority of states recognize a primary right of the mother and a secondary right of the father to be subordinated if custody would not be in the best interests of the child. Annot., 45 A.L.R.3d 216 (1972); Annot., 37 A.L.R.2d 882 (1954). The putative father has no right to custody in some states. See *Toole v. Gallion*, 221 Ga. 494, 144 S.E.2d 360 (1965); *In re Klundt*, 196 N.W.2d 76 (N.D. 1972); *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965); CONN. GEN. STAT. ANN. § 45-43 (1958).

8. See, e.g., ILL. ANN. STAT. ch. 4, §§ 9.1-1, 9.1-8 (Smith-Hurd 1973). This statute has been declared unconstitutional. See *People ex rel. Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 284 N.E.2d 291 (1972). A similar statute, FLA. STAT. ANN. § 39.01 (1964), was given a constitutionally narrowing construction in *Brown v. Gray*, ___ So. ___ (Fla. 1974).

9. See, e.g., VA. CODE ANN. § 63.1-225(4) (1973), as amended, VA. CODE ANN. § 63.1-225(4) (Cum. Supp. 1974). This is presently the majority approach. See generally Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 139-41 (1973-74) (Appendix I).

10. See, e.g., *Hayes v. Strauss*, 151 Va. 136, 144 S.E. 432 (1928). 3 M.J., *Bastardy*, § 8 (1949). These proceedings since they are often brought after the child has become accustomed to the adoptive home have been generally ineffective in protecting the father's rights. Comment, *Disposition of the Illegitimate Child—Right to Notice*, 1968 ILL. L.F. 232, 235 Cf. *Stanley v. Illinois*, 405 U.S. 645, 648-49 (1972). See generally Note, *Father of an Illegitimate Child—His Right to be Heard*, 50 MINN. L. REV. 1071 n.5 (1966).

11. 405 U.S. 645 (1972) (Burger, C.J., & Blackmun, J., dissenting) (Powell & Rehnquist,

father the procedural due process safeguards of notice and a fitness hearing¹² before his parental interest could be foreclosed in a dependency proceeding.¹³

In *Commonwealth v. Hayes*,¹⁴ the Virginia Supreme Court was confronted with this custody issue but in a substantially different factual situation than that found in *Stanley*. Whereas petitioner Stanley had lived in a quasi-familial relationship with the mother of his children prior to her death, petitioner Hayes had established no familial ties with the mother of his child.¹⁵ Pursuant to notice, Hayes withheld his consent to the child being placed for adoption by the mother and a custody hearing was held. The court found that the best interests of the child would be served by the

J.J., not participating). For a discussion of *Stanley* see Hession, *Adoptions After "Stanley"—Rights for Fathers of Illegitimate Children*, 61 ILL. B.J. 350 (1973); Note, 21 DE PAUL L. REV. 1036 (1972); Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115 (1973-74); Note, *Stanley v. Illinois: Expanding the Rights of the Unwed Father*, 34 U. PITT. L. REV. 303 (1972); 7 SUFF. L. REV. 159 (1972); 4 TEX. TECH L. REV. 217 (1972-73); Comment, *The Strange Boundaries of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973). For important discussions of the putative father's right to custody prior to *Stanley* see Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

12. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court held that the failure to give the father of a legitimate child notice of an adoption proceeding constituted a denial of due process of law while recognizing that ". . . a fundamental requirement of due process is the opportunity to be heard" at the initial dependency proceeding. *Id.* at 552 (citation omitted).

13. Under Illinois law, a putative father was conclusively presumed to be unfit and was not entitled to a hearing at the initial dependency proceeding. No matter what type of relationship may have existed between parent and child, a putative father could petition the courts only as a stranger to his children after the initial adoption of his children had already commenced. In concluding that this statutory scheme was invalid, the Court, per Justice White held: ". . . 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." 405 U.S. 649 (emphasis added).

14. 215 Va. 49, 205 S.E.2d 644 (1974).

15. Stanley had lived with the mother of his three children intermittently for 18 years. The Supreme Court concluded that under these circumstances, Stanley's interest in retaining the custody of his children was "cognizable and substantial." 405 U.S. 646, 652. Justice White based this conclusion on the Court's "frequent emphasiz[ing of] the importance of the family." For example, "the rights to conceive and raise one's children have been deemed 'essential'" therefore entitling "the integrity of the family unit" to due process protection. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

On the other hand, Hayes had never seen his illegitimate daughter nor had he ever inquired about her health or status.

child remaining in the proposed adoptive home. In a de novo hearing, the circuit court reversed. The trial judge did not decide whether Hayes was entitled to a fitness hearing or to a finding that the best interests of the child would or would not be promoted by granting him custody. Rather than applying these two standards which are customarily used in parent/nonparent custody disputes,¹⁶ the court erroneously held that *Stanley* mandated granting Hayes custody upon his demand.¹⁷

The Virginia Supreme Court reversed, awarding custody to the adoptive parents, distinguishing and limiting *Stanley* to its facts, and proceeding to make an ad hoc determination that Hayes was unfit for custody of his child.¹⁸ In *Stanley*, the death of the mother had created the custody issue while in *Hayes*, the mother had voluntarily relinquished her superior right to custody.¹⁹ The relative merit in making this distinction is not evident.²⁰ *Stanley* was further distinguished in that Hayes had established no familial relationship with his child, nor had he given support.²¹

Although it is true that the primary concern of *Stanley* was the protection of a father who might unnecessarily lose the custody of children whom he had "sired and raised,"²² limiting *Stanley* to this factual situation would

16. See Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 BUFF. L. REV. 1, 2-3 (1973). Although contradictory, Virginia acknowledges both standards. See note 43 *infra*.

17. 215 Va. at 50, 205 S.E.2d at 645-46. The Virginia court interpreted the circuit court decision as indicating this application of *Stanley*.

18. *Id.* at 51-52, 205 S.E.2d at 647-48.

19. *Id.* at 52, 205 S.E.2d at 647.

20. This distinction is at best tenuous for three reasons: 1) *Stanley* is textually devoid of support for this proposition; 2) the Supreme Court in *Rothstein v. Lutheran Social Servs.* 405 U.S. 1051 (1972) applied *Stanley* to a situation where the mother had voluntarily surrendered custody; 3) ". . . the present trend of legal . . . thinking is that a willing father of an illegitimate child should have a right to custody . . . particularly where the mother has abandoned the child either actually or constructively by surrendering the child to an agency for adoption." State in Interest of M., 25 Utah 2d 101, 476 P.2d 1013, 1016 (1970) (pre-*Stanley* decision). See also *In re Shady*, 264 Minn. 222, 118 N.W.2d 449 (1962); *Wade v. State*, 39 Wash. 2d 744, 238 P.2d 914 (1951).

21. 215 Va. at 52, 205 S.E.2d at 647.

22. *Cf.* 405 U.S. at 651. The importance of a "family" relationship cannot be de-emphasized. Its evidentiary value bearing on parental fitness, capability and interest is often integral in determining the best interests of the child. See generally 14 M.J., *Parent and Child*, § 7 *et seq.* (1951, Cum. Supp. 1973). Unmarried couples may be "emotional" as well as "biological" parents, and indeed there is a greater "cognizable and substantial" relationship to be protected than when there is no real or lasting relationship. Compare *Stanley*, 405 U.S. at 650-52, 654 n.7 with Comment, *Protecting the Putative Father After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 119 n. 26 (1973-74). *Cf.* note 18 *supra*. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-49 (1973).

contravene its basic thrust. First, a thorough reading of the opinion necessitates affording to all putative fathers notice and a hearing.²³ Second, the Supreme Court has applied *Stanley* to a situation where the putative father had not established any familial ties.²⁴ The Virginia court, however, concluded that even if *Stanley* were applicable, Hayes' promiscuous behavior made him unfit which thereby precluded him from asserting his parental rights.²⁵

23. For example, footnote nine of *Stanley* speaks of extending the constitutional safeguards of notice and hearing to interested fathers, without regard to a requirement for a preexisting familial relationship. 405 U.S. at 657 n.9. Commentators and the courts have generally adhered to a broader reading. See, e.g., *State ex rel. Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

24. *State ex rel. Lewis v. Lutheran Social Servs.*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated and remanded sub nom. Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972), *rev'd on rehearing sub nom. State ex rel. Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973) [hereinafter cited as *Lewis I*, *Rothstein* and *Lewis II*]. In the *Rothstein* remand, *Stanley* was held to be applicable notwithstanding the fact that the putative father had never seen the child and had even initially denied paternity. *Lewis II*, 59 Wis. 2d 1, 207 N.W.2d at 834.

25. The court's determination of parental unfitness was grounded solely upon the fact that Hayes had sired two illegitimate children by two different mothers within a period of five months. The court relied upon the circuit court judge's statement that Hayes was "guilty of anti-social, immoral and illegal conduct" as a prior finding of unfitness. 215 Va. at 53, 205 S.E.2d at 647-48. The problem with the court's approach is that Hayes became a father which entitled him to parental rights as a consequence of his promiscuous behavior. Thus it initially appears incongruous for the court to hold that such behavior could be used as prima facie evidence for denying a putative father custody. A presumption of unfitness such as this would violate the holding of *Stanley*. However, considering that in Virginia similar promiscuous behavior by a married parent would likely result in the same finding, Hayes would not appear to be prejudiced.

In Virginia, a strong showing of extramarital activity is not required in order to foreclose any parent's right. See *Rowlee v. Rowlee*, 211 Va. 689, 179 S.E.2d 461 (1971) (father awarded custody after being granted divorce on grounds of adultery); *Clark v. Clark*, 209 Va. 390, 164 S.E.2d 685 (1968) (father awarded custody after mother had committed four acts of adultery resulting in birth of illegitimate child); *Forbes v. Haney*, 204 Va. 712, 133 S.E.2d 533 (1963) (putative father denied custody after living in cohabitation for 10 years with natural mother, having been divorced twice, and after a third and bigamous marriage, custody being awarded to maternal grandparents).

In other jurisdictions, the modern trend is to treat immorality as only one factor among many unless it otherwise constitutes neglect or corrupts the child's morals. See, e.g., *Usendek v. Usendek*, 8 Mich. App. 385, 154 N.W.2d 627 (1967); *Silverton v. Silverton*, 71 Wash. 2d 276, 427 P.2d 1001 (1967) (mother's many infidelities were not necessarily determinative of her fitness to have custody).

These jurisdictions would appear more willing to accept the proposition that the promiscuity giving rise to the putative father's status cannot constitute the criterion for the denial of his parental rights if the father is otherwise fit, and his having custody would serve the "best

The reasons why the court believed it necessary to distinguish *Stanley* are not clear. The court's approach manifests an apprehension that if *Stanley* was applied, all putative fathers would be entitled to a fitness hearing rather than the best interests hearing initially granted Hayes. For had the court believed that *Stanley* required notice and a hearing, but not necessarily a fitness hearing, there would have been no reason to distinguish *Stanley* from *Hayes*. The court, rather than resorting to its tenuous finding of Hayes' parental unfitness, could have merely affirmed that the hearing initially granted Hayes was sufficient to comply with the requirements of *Stanley*.

Under Virginia law, the court's fear is unjustified. *Stanley* requires at most that putative fathers be afforded the same guarantees as all other parents.²⁶ This proposition has been precedent in Virginia since 1928 by virtue of *Hayes v. Strauss*,²⁷ wherein the Virginia court recognized the inanity of categorizing parental rights in reference to the child's legal status and disregarded this factor.²⁸ By virtue of a 1974 amendment, Virginia statutory law now acknowledges this proposition.²⁹

Under prevailing Virginia law, Hayes was afforded sufficient constitutional safeguards.³⁰ He was granted a hearing pursuant to notice at the initial adoption proceeding. The problem is whether the standard afforded Hayes was sufficient to comply with *Stanley*. Under *Stanley*, *Strauss*, or the 1974 amendment, the putative father is entitled to the same standard afforded other parents. Absent special consideration for Hayes' unique position, Virginia law would entitle him to withhold his consent so long as it was not withheld "contrary to the best interests of the child."³¹

interests of the child." This approach might offset the tacit assumption of unfitness that appears to burden all putative fathers. Virginia does not appear so inclined. *Cf.* 7 SUFF. L. REV. 159, 163 (1972).

26. *Cf.* 405 U.S. at 647, 649, 658.

27. 151 Va. 136, 144 S.E. 432 (1928).

28. The court's rationale was that since a putative father's love for his offspring was not necessarily less because they were illegitimate, he had the same rights as the father of legitimate children. *Id.* at 141-42, 144 S.E. at 434.

29. VA. CODE ANN. § 63.1-225(2) (Cum. Supp. 1974). This amendment became effective April 8, 1974. For an analysis of this amendment *see* note 34 *infra*.

30. *Stanley* would appear to require participation of the putative father in the initial adoption proceeding. Since Hayes was given both notice and a hearing, his due process rights were amply safeguarded. *Cf.* 405 U.S. at 648, 658.

31. VA. CODE ANN. § 63.1-225(4) (1973), *as amended*, VA. CODE ANN. § 63.1-225(4) (Cum. Supp. 1974) provides in part:

If after hearing evidence the court finds that the consent of any person . . . whose consent is hereinabove required is withheld contrary to the best interests of the child, or if valid consent is unobtainable, the court may, . . . grant the petition without such consent

In the typical parent/nonparent custody dispute, the Virginia court has acknowledged a strong presumption that the "best interests of the child" are promoted by parental custody.³² Although the question of custody by

Four other jurisdictions follow a comparable "best interests" approach. ARIZ. REV. STAT. § 8-106(c) (Supp. 1974); D. C. CODE ANN. § 16-304(e) (1973), § 16-309(b)(3) (Supp. 1974); MD. CODE ANN. art 16, § 74 (1973); MASS. GEN. LAWS ANN. ch. 210, § 3(b) (Supp. 1973).

The 1974 amendment, VA. CODE ANN. § 63.1-225(4) (Cum. Supp. 1974) makes the above standard specifically applicable to the putative father by adding the putative father to the category of those individuals whose consent is required, excepting notice when the putative father's identity is not reasonably ascertainable. Arizona appears to be the only other state which has taken the "best interests" approach and applied it to putative fathers. ARIZ. REV. STAT. § 8-106 (Supp. 1973). To date, the Arizona court has not interpreted the Arizona statute in light of *Stanley*.

The constitutionality of this statute should be upheld. First, it would be a constitutional aberration to deny the father of a legitimate child a fitness hearing while entitling the putative father to one. Second, the parental interest of the putative father ". . . undeniably warrants deference and *absent a powerful countervailing interest*, protection." *Stanley v. Illinois*, 405 U.S. at 651 (emphasis added). The "best interests of the child" is such a powerful countervailing interest that it should be sufficient to deny a putative father custody in spite of his fitness. The Wisconsin Supreme Court accepts this view of *Stanley*. Compare *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9, 23 (1974) (dissenting opinion) with *Lewis II*, 207 N.W.2d at 831.

Prior to the 1974 amendment, VA. CODE ANN. § 63.1-225(2) did not require the consent of the putative father to the adoption of his child. Although this provision was ignored by the *Hayes'* court, it would appear to be of questionable constitutional validity after *Stanley*. If the putative father has no right to withhold consent, he has no implied right to notice or to a hearing. Therefore, he is given no priority in the adoption proceedings notwithstanding the fact that all other parents would have priority. Viewed in this context, the provision would violate both the due process and equal protection holdings of *Stanley*. Compare *Stanley v. Illinois*, 405 U.S. 645, 647-48, 658 with *Doe v. Department of Social Servs.*, 71 Misc. 2d 666, 337 N.Y.S.2d 102, 104-07 (Sup. Ct. 1972).

Although the above analysis may be technically correct, this is not reflected by modern statutory law. Only fifteen states have enacted provisions which require the consent of the putative father to the adoption of his child. ALA. CODE tit. 27, § 3 (1958); ARIZ. REV. STAT. ANN. § 8-106 (1974); ARK. STAT. ANN. § 56-106 (1971); COLO. REV. STAT. ANN. §§ 22-1-3, 22-4-1 (1973); ILL. ANN. STAT. ch. 4, §§ 9.1-1, 9.1-8 (Smith-Hurd Supp. 1974); IND. ANN. STAT. § 3-120 (Supp. 1973); IOWA CODE ANN. § 600.3 (Supp. 1974); ME. REV. STAT. ANN. tit 19, § 532 (Supp. 1974), MICH. COMP. LAW ANN. § 710.3a (Supp. 1974); NEV. REV. STAT. § 127.040 (1967); N.M. STAT. ANN. § 22-2-5 (1973); R. I. GEN. LAW ANN. § 15-7-5 (Supp. 1973); S.D. COMP. LAWS ANN. § 25-6-4 (Supp. 1974); UTAH CODE ANN. § 78-30-4 (Supp. 1973); WASH. REV. CODE ANN. § 26.32 030 (Supp. 1973).

The provisions vary considerably. The Michigan statute requires that the putative father file a notice of intent to claim paternity prior to the birth of the child. MICH. COMP. LAW ANN. § 710.3a (Supp. 1974). Whereas in Illinois, no distinction is made between the notice requirements for a putative father and the father of a legitimate child. ILL. ANN. STAT. ch. 4, §§ 9.1-1, 9.1-8 (Smith-Hurd Supp. 1974).

32. See, e.g., *Judd v. Van Horn*, 195 Va. 988, 996, 81 S.E.2d 432, 436 (1954); *Szemler v. Clements*, 214 Va. 639, 643, 202 S.E.2d 880, 884 (1974) (citing *Judd* with approval). Cf.

nonparents involves considerable confusion,³³ general propositions are available. Parental rights will be either foreclosed or deluded if cogent evidence establishes: 1) parental unfitness or abandonment;³⁴ 2) prior consent to adoption;³⁵ 3) prior adverse judicial determination;³⁶ or 4) that the continuance of the relationship between parent and child would be detrimental to the child's welfare.³⁷

The problem in a *Hayes* factual situation is that these criteria (except for parental unfitness and prior consent) tacitly assume some pre-existing parent-child relationship. Although not expressly recognizing a specific standard to be applied to Hayes' unique position, the court cited with approval *Dyer v. Howell*³⁸ in finding Hayes' proposal as to the child's custody "to fraught with uncertainty to merit consideration."³⁹ The *Dyer* case is an anomaly in Virginia law in that it stands alone in not acknowledging any parental interest in a child and is also of dubious value as precedent.⁴⁰ The use of *Dyer* by the court might be construed as an attempt to relegate a putative father with no pre-existing custody to an inherently

Malpass v. Morgan, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972) (construing VA. CODE ANN. § 63.1-225 (1973) with similar but not identical reasoning).

33. There is an admitted contradiction in the standard applicable to parent/nonparent custody disputes. Compare *Judd v. Van Horn*, 195 Va. 988, 995-96, 81 S.E.2d 432, 435-36 (1954) (the natural parent is entitled to custody unless he is shown to be unfit) with *Forbes v. Haney*, 204 Va. 712, 716, 133 S.E.2d 533, 536 (1963) (the welfare of the child is the primary concern). See also *Malpass v. Morgan*, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972) (the rights of parents may not be lightly severed but are to be respected if at all consonant with the best interests of the child). The court acknowledged the contradiction in *Dyer v. Howell*, 212 Va. 453, 184 S.E.2d 789, 791 (1971), but postponed resolving it.

34. See, e.g., *Walker v. Brooks*, 203 Va. 417, 124 S.E.2d 195 (1962); 60 VA. L. REV. 718, 722-23 (1974). See also Note, *Domestic Relations, Annual Survey of Virginia Law 1971-72*, 58 VA. L. REV. 1257 (1972).

35. See, e.g., *Szemler v. Clements*, 214 Va. 639, 644-45, 202 S.E.2d 880, 885 (1974) (the adoptive nonparents need only show that the "best interests of the child" would be promoted in the adoptive home).

36. See, e.g., *Dyer v. Howell*, 212 Va. 453, 455-56, 184 S.E.2d 789, 791 (1971), as construed in *Wilkerson v. Wilkerson*, 214 Va. 395, 396-97, 200 S.E.2d 581, 582-83 (1973) (if a permanent custody decree has been issued, the adoptive parents need only show that their continued custody is in the child's best interests).

37. *Malpass v. Morgan*, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972).

38. 212 Va. 453, 184 S.E.2d 789 (1971).

39. 215 Va. 49, 54, 205 S.E.2d 644, 648 (1974).

40. In *Malpass v. Morgan*, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972), *Dyer* was interpreted as an exceptional case involving the desperate need of a child for a stable home. In *Wilkerson v. Wilkerson*, 214 Va. 395, 396-97, 200 S.E.2d 581, 583 (1973), the court restricted the application of *Dyer* to a situation where a final order of custody had previously been granted. Neither situation is applicable here.

inferior position as contrasted with other parents, thus undermining the rationale of both *Strauss* and *Stanley*.

An argument might be advanced that the court should mold the unique position of the *Hayes* father (*i.e.*, the initial detachment between parent and child) into the framework of *Stanley*, recognizing that the commencement of adoption proceedings demand prompt resolution of the custody issue.⁴¹ This is especially true considering that the best interests of the child are not served by unnecessary delay in his permanent placement.⁴² Therefore, an interested *Hayes* father, who acts promptly, could be guaranteed his rights, whereas a father who is disinterested in the welfare of the child or has made a vindictive assertion of rights could be precluded. It is submitted that had the court considered this approach, *Hayes'* parental rights would have been foreclosed.⁴³ This approach would further promote the objective of establishing positive parent-child relationships whenever possible.⁴⁴

41. In *Stanley*, the Supreme Court noted that ". . . unwed fathers who do not promptly respond cannot complain if their children are declared wards of the state." 405 U.S. 645 n.9. Cf. *In re Doe*, 478 P.2d 844 (Hawaii 1970). The Court gave no indication as to what might be considered an untimely delay, but in *Rothstein*, the Court directed that consideration should be given to completing the adoption proceeding and to the period of time that the child had lived with the adoptive parents. 405 U.S. at 1051. Under Virginia law, this would initially require that the putative father object to the adoption proceeding within twenty-one days after the mailing of a notice of the adoption proceeding to his last known address. VA. CODE ANN. § 63.1-225(2) (Cum. Supp. 1974). The putative father could also be denied custody when his unnecessary delay in asserting his rights after his initial reply would cause the child considerable emotional trauma if the child were removed from a proposed adoptive home or institution. He could also be denied custody when the court finds that he is disinterested in the welfare of the child, or made a vindictive assertion of rights which would unequivocally be "contrary to the best interests of the child." Since a child becomes "accustomed" to a new home in one to twelve months depending on the age of the child, a prompt and persistent response by the father must be required. Comment, *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 ILL. L.F. 232.

42. Comment, *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 ILL. L.F. 232. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-49 (1973).

43. Factor one: *Hayes* was disinterested - he had never offered support nor inquired about the child. He made few, if any, plans for the child's future. Factor two: *Hayes'* response was untimely. Although he was informed that the child was being placed for adoption approximately ten months before any hearing, he had not initiated any action to get custody of his child. Factor three: the child had been in an adoptive home for eight months at the time of the first hearing and was already fourteen months old. Therefore, considering the factors outlined above, *Hayes* had definitely not acted promptly so as to entitle him to rights under *Stanley*. Record pp. 29, 39, 46. *Commonwealth v. Hayes*, 215 Va. at 49-50, 52, 205 S.E.2d at 646.

44. See generally 14 M.J., *Parent and Child*, § 7 et seq. (1951).

The 1974 amendment might compel further judicial investigation into the issues raised by *Stanley* but evaded in *Hayes*. The court, however, is likely to manifest a reluctance to encounter them: for the claim of the unwed father, especially one who has established no quasi-familial relationship with the mother, is not apt to engender much compassion from the court.

R.S.P.