St. Mary's Law Journal

Volume 8 | Number 2 Article 12

6-1-1976

Father Has No Absolute Right to Legitimate Child Solely on Proof of Biological Fatherhood.

Patricia E. Swanson

whether the intent of the statute is that all accessories after the fact be included and equally punishable with those who, with perhaps a lesser degree of culpability, hinder the administration of justice.

Claude M. McQuarrie, III

FAMILY LAW—Voluntary Legitimation—Father Has No Absolute Right To Legitimate Child Solely on Proof of Biological Fatherhood

In re K,

535 S.W.2d 168 (Tex. 1976).

In April 1974, an unwed mother gave birth to a baby girl and subsequently relinquished her parental rights to the Neuces County Child Welfare Unit of the State Department of Public Welfare. In order to proceed with adoption arrangements, the Child Welfare Unit initiated legal proceedings to terminate the parent-child relationship, to afford the father an opportunity to be heard, and to have itself appointed as managing conservator of the child. The child's natural father, S.D.A., after being served with citation, filed a petition for voluntary legitimation of the baby and for his appointment as managing conservator. The trial court found the father to be unfit to act as parent of the child and denied his petition for voluntary legitimation. The Corpus Christi Court of Civil Appeals affirmed.[1] On appeal, S.D.A. contended that denial of his petition was a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. Held—*Affirmed.* An unwed father is entitled to notice of any proceeding which affects the parent-child relationship; he may file a petition to voluntarily legitimate the child and thereby acquire the opportunity to secure all parental rights and duties.[2] It is within the discretion of the trial judge, however, to deny the petition, if to do so would be in the best interests of the child.[3]

---

be specified, such as knowledge of commission of a crime, knowledge of a formal accusation, knowledge of an informal accusation, or reason to believe a crime has been committed. N.Y. PENAL LAW §§ 205.50, .60, .65 (McKinney 1975) provide an excellent example of such a refinement in this area.

1. *In re* K, 520 S.W.2d 424, 429 (Tex. Civ. App.—Corpus Christi 1975), *aff'd*, 535 S.W.2d 168 (Tex. 1976).
2. *In re* K, 535 S.W.2d 168, 169 (Tex. 1976).
3. *Id.* at 170.

At early common law an illegitimate child was said to be *filius nullius*, the child of no one,[4] and a natural parent's right to legitimate the child did not exist until more progressive cases were decided.[5] Until recently, in Texas an unwed father was under no duty to support his illegitimate offspring.[6] While an illegitimate child's constitutional right to the same substantial benefits as are given to legitimate children has been firmly established,[7] an unwed father's parental rights remain limited.[8] Prior to 1972, the majority of jurisdictions failed to recognize any special relationship between an unwed father and his illegitimate children and withheld many parental rights, such as visitation and custody.[9]

In *Stanley v. Illinois*,[10] the Supreme Court rendered a landmark decision recognizing the unwed father's right to due process with regard to proceedings concerning custody of his illegitimate children.[11] The Illinois courts had denied Stanley a hearing to determine his fitness to retain custody of his children based on their interpretation of a statutory definition of "parent" which excluded an unwed father. The statute allowed the state to circumvent neglect proceedings required to remove children from the custody of "parents" and thereby created a presumption of unfitness in unwed fathers.[12] The Supreme Court found that the father's private interest in his child warranted constitutional protection, absent a powerful countervailing state interest, and that one's right to conceive and raise children was essential, basic, and more precious than property rights; furthermore, this right was not dependent on the marital status of the parents.[13] While the Court recognized the need to preserve the state's interest in protecting the

4. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 5.1, at 155 (1968).

5. *See* Nichols v. Stewart, 15 Tex. 226, 232-33 (1855); Hartwell v. Jackson, 7 Tex. 576, 580 (1852).

6. Home of the Holy Infancy v. Kaska, 397 S.W.2d 208, 210 (Tex. 1965).

7. Gomez v. Perez, 409 U.S. 535, 538 (1973). Once a state has recognized the right of a child to receive financial support from its parents it cannot deny financial support to an illegitimate child. *Id.* at 538; *cf.* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (illegitimate children allowed to collect damages for wrongful death of their mother). The UNIFORM PARENTAGE ACT §§ 1-2 puts the illegitimate child on equal terms with the legitimate child with regard to all rights, duties, and privileges.

8. *See generally* Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAMILY L. 231, 242 (1971); Comment, *The Putative Father's Rights After Roe v. Wade*, 6 ST. MARY'S L.J. 407, 412 (1974).

9. *See, e.g.*, DePhillips v. DePhillips, 219 N.E.2d 465, 466 (Ill. 1966) (custody and visitation); Jolly v. Queen, 142 S.E.2d 592, 595-96 (N.C. 1965) (custody); Thomas v. Children's Aid Society, 364 P.2d 1029, 1031 (Utah 1961) (custody).

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

11. *See id.* at 658.

12. *Id.* at 650, *citing* ILL. REV. STAT. ch. 37, § 701-14 (1972), which defines "parents" as "the father and mother of a legitimate child . . . or the natural mother of an illegitimate child . . . ."

13. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

welfare of the minor and the best interests of the community, it held that the denial of a fitness hearing was a violation of due process and of the equal protection clause.[14] Thus, the Court was evaluating the *means* used to preserve what otherwise would have been a valid state interest.[15] Since the State had the power to remove children from the custody of unfit parents, if Stanley was found to be unfit his parental rights could also have been terminated under the neglect proceedings applicable to other Illinois parents, thereby protecting the state interests as well as his constitutional rights.[16]

In 1973, and with *Stanley* in mind,[17] the Texas Legislature gave statutory recognition to the right of unwed fathers to service of citation on the commencement of proceedings affecting the parent-child relationship.[18] Although the Texas Family Code excluded unwed fathers from the definition of "parent,"[19] a method of voluntary legitimization was provided to afford the father an opportunity to claim parental rights. Under section 13.01(b) the father may institute a suit for voluntary legitimation by filing a statement of paternity with the Welfare Department; then, on the consent of the mother, the managing conservator, or the court, a decree declaring the child to be the legitimate child of the petitioner will be entered.[20] The Code further provides a procedure for involuntary termination of the parent-child relationship, which by definition is applicable only to "parents" and apparently does not apply to unwed fathers prior to voluntary legitimation.[21]

The Texas Supreme Court held in *In re K* that the "biological father" of an illegitimate child does not have an absolute right to voluntary legitimation of his offspring.[22] In so holding, it construed the Texas Family Code as

14. *Id.* at 649, 658.

15. *Id.* at 652.

16. *See id.* at 658.

17. *See* Smith, *Texas Family Code Symposium—Title 2. Parent and Child*, 5 TEX. TECH L. REV. 389, 405 (1974).

18. Tex. Laws 1973, ch. 543, § 11.09(a)(7), at 1416, *as amended*, TEX. FAMILY CODE ANN. § 11.09(a)(7) (Supp. 1976).

19. TEX. FAMILY CODE ANN. § 11.01(3) (1975) defines "parent" as follows: "the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated."

20. Tex. Laws 1973, ch. 543, § 13.01(b), at 1421, *as amended*, TEX. FAMILY CODE ANN. § 13.21 (Supp. 1976). This section provides a method for voluntary legitimation:

> If a statement of paternity is filed with the State Department of Public Welfare, the father, the mother, or the department may institute a suit for decree establishing the child as the legitimate child of the person executing the statement. On the consent of the mother, the managing conservator, or the court, and on the filing of the statement of paternity with the petition, the court shall enter a decree declaring the child to be the legitimate child of the person executing the statement of paternity.

21. Tex. Laws 1973, ch. 543, § 15.02, at 1426-27, *as amended*, TEX. FAMILY CODE ANN. § 15.02 (Supp. 1976). This section provides for termination of the parent-child relationship "with respect to a *parent* who is not the petitioner . . . ." (emphasis added).

22. *In re* K, 535 S.W.2d 168, 170 (Tex. 1976).

providing the trial courts with discretion either to grant or deny consent to voluntary legitimation in accordance with the best interests of the child.[23] It is significant, however, that the best interests of the child are not mentioned in the section governing voluntary legitimation proceedings.[24] Eugene Smith, one of the draftsmen of the Texas Family Code,[25] stated that for the court to withhold consent to legitimation for any reason other than those specified in the termination section would amount to a refusal to recognize an unwed father as a parent and therefore would be a denial of equal protection.[26] The court in the principal case simply held that since S.D.A. was not a parent, the trial court was not required to look to the specific grounds for termination under section 15.02 in order to deny its consent to legitimation.[27]

The majority of the Texas Supreme Court took a narrow view of the decision in *Stanley*.[28] It distinguished the facts in the principal case from those in *Stanley* by noting that Stanley had "sired and raised" his children, while S.D.A. had "simply engaged in a single hit and run sexual adventure."[29] The court apparently disregarded the fact that S.D.A. was prevented from establishing a familial relationship with the baby, since the original action began only a few days after the birth of the child and while S.D.A. was confined in prison.[30] It has been suggested that the intangible concept of a father's natural love and affection for his children should also be considered in determining the unwed father's rights.[31] This concept was disregarded in S.D.A.'s case, although at trial he had demonstrated his concern, love, and affection for his child.[32] A concept which involves such

23. *Id.* at 170.

24. *See* Tex. Laws 1973, ch. 543, § 13.01(b), at 1421, *as amended*, TEX. FAMILY CODE ANN. § 13.21 (Supp. 1976). The "best interests" standard is the test used in determining questions of possession and access to the child (custody) in section 14.07. TEX. FAMILY CODE ANN. § 14.07(a) (1975). Besides specifying certain grounds for termination of parental rights based on acts or omissions of the parent, the Code has an additional requirement that termination is in the best interests of the child. Tex. Laws 1973, ch. 543, § 15.02, at 1426-27, *as amended*, TEX. FAMILY CODE ANN. § 15.02 (Supp. 1976).

25. *See* Brief for Appellant at 11, *In re* K, 535 S.W.2d 168 (Tex. 1976) (identifying Professor Smith as the principal draftsman of the code).

26. Smith, *Texas Family Code Symposium—Title 2. Parent and Child*, 5 TEX. TECH L. REV. 389, 419 (1974).

27. *In re* K, 535 S.W.2d 168, 170 (Tex. 1976).

28. *Compare* Stanley v. Illinois, 405 U.S. 645, 651-52, 658 (1972), *with In re* K, 535 S.W.2d 168, 170-71 (Tex. 1976). A similar interpretation is found in Commonwealth v. Hayes, 205 S.E.2d 644, 647 (Va. 1974). *Contra, In re* R., 119 Cal. Rptr. 475, 483 (1975) (en banc), *cert. denied*, 421 U.S. 1014 (1975).

29. *In re* K, 535 S.W.2d 168, 171 (Tex. 1976).

30. *See id.* at 168-69.

31. *In re* P., 194 N.W.2d 18, 20 (Mich. Ct. App. 1971).

32. Brief for Respondent at 13, *In re* K, 535 S.W.2d 168 (Tex. 1976), which indicates that S.D.A. wanted the child because no one else could love it as much as he.

basic rights should not have been so easily eliminated by the court.[33]

In order for a statutory classification to afford equal protection and therefore be constitutional, it must bear some rational relationship to a legitimate state interest.[34] The definition of "parents" in section 11.01 automatically establishes a classification for unwed fathers different from that established for married parents, adoptive parents, and unwed mothers.[35] Because of the state's interest in securing good homes and families for children, however, the Texas Supreme Court felt justified in making the distinction between a father who has accepted a familial commitment and one who has not.[36]

Undoubtedly, the state does have a legitimate interest in the welfare of its children in *custody* disputes.[37] But voluntary legitimation under the Texas Family Code does not necessarily involve custody, although it does establish paternity, thereby giving parental rights and duties to an unwed father.[38] The Cole also provides that a suit for legitimation can be joined with an action for termination of parental rights which would preclude any right to custody.[39] The Supreme Court of California has recognized the importance of distinguishing between custody actions and those involving a question of biological paternity.[40] Citing *Stanley*, the California court said that precluding an unwed father from establishing that he is a child's natural parent is a

33. *See In re* P., 194 N.W.2d 18, 20 (Mich. Ct. App. 1971).

34. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971).

35. TEX. FAMILY CODE ANN. § 11.01(3) (1975).

36. *In re* K, 535 S.W.2d 168, 171 (Tex. 1976). In a similar case, the Supreme Court of Virginia determined the father in question was unfit under the best interest standard. Commonwealth v. Hayes, 205 S.E.2d 644, 648 (Va. 1974). The court distinguished the facts before it from those in *Stanley* for various reasons, including the fact that Virginia had no statutory definition of "parents" which excluded unwed fathers. *Id.* at 647. There is no indication whether the court relied on the same grounds for unfitness as would have been used to determine fitness of parents of legitimate children.

37. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972); *In re* P., 194 N.W.2d 18, 20 (Mich. Ct. App. 1972); Knollhoff v. Norris, 152 Tex. 231, 235, 256 S.W.2d 79, 82 (1953). The relevant Texas statute requires the court to look to the best interest of the child in "determining questions of managing conservatorship, possession, and support of and access to the child." TEX. FAMILY CODE ANN. § 14.07(a) (1975).

38. Tex. Laws 1973, ch. 543, § 13.03(a), at 1421, *as amended*, TEX. FAMILY CODE ANN. § 13.23(a) (Supp. 1976).

39. TEX. FAMILY CODE ANN. § 13.21(d) (Supp. 1976).

40. *See In re* R., 119 Cal. Rptr. 475, 483 (1975) (en banc), *cert. denied*, 421 U.S. 1014 (1975). This case involved a dependency action by the welfare department in California. The child was presumed to be legitimate since her mother was married when she was born, but subsequent to abandonment by the mother, and during the dependency proceeding, her biological father came forward to establish that he was the natural parent. The lower courts had denied the father standing to allege parentage in light of the presumption of legitimacy. The supreme court, however, interpreted *Stanley* as requiring recognition of the natural father's constitutional right to establish paternity, despite a presumption of legitimacy. *Id.* at 477, 485.

denial of due process.[41] Furthermore, in weighing the state interest against the private interest to determine the constitutionality of a decision denying the right to establish paternity, "the balance to be struck is not obtained by measuring the minor's welfare against appellant's interests. We measure instead the state's narrower interest in precluding appellant from offering evidence of parentage against his interest in establishing that fact, and *the question of the child's welfare lies beyond the question of her parentage.*"[42] Public policy favors legitimacy;[43] thus, as the California court suggested, the state's interest in removing the stigma of illegitimacy should also be considered.[44]

In reaching its decision and concluding that a denial of S.D.A.'s petition for legitimation was in the best interests of the child, the Texas court apparently placed great emphasis on the fact that S.D.A. was currently in prison.[45] It should be noted, however, that Stanley was also not a model parent; one year after the landmark decision, his parental rights were terminated under Illinois neglect proceedings.[46] Moreover, the dissenting opinion in *Stanley* reveals that Stanley had informally relinquished custody of his children shortly after the death of their mother and was not himself seeking custody, but only wanted to prevent the Court from awarding legal custody to others.[47] Nevertheless, the Supreme Court held that he was entitled to the same constitutional right to a hearing on fitness as was granted to other Illinois parents before parental rights could be terminated.[48] The facts in *Stanley* support a broad interpretation of an unwed father's constitutional right to establish paternity, regardless of a subsequent fitness determination.[49] Whether the court in the principal case gives adequate recognition to the requirement of a "powerful countervailing interest" needed to overcome the parent's interest as set forth in *Stanley*[50] is unclear.

The dissent in *K* recognized constitutional problems in the majority holding and felt that, since the Texas Family Code had been interpreted in a

41. *Id.* at 485.
42. *Id.* at 484 (emphasis added).
43. *See* C. v. W., 480 S.W.2d 474, 476-77 (Tex. Civ. App.—Amarillo 1972, no writ); Byrd v. Travelers Ins. Co., 275 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). Courts have allowed various documents to show legitimacy. *See In re* McNamara's Estate, 183 P. 552, 558 (Cal. 1919) (birth certificate signed by father); Wall v. Altobello, 49 So. 2d 532, 533-34 (Fla. 1950) (hotel registration as father and daughter); *In re* Horne's Estate, 7 So. 2d 13, 16 (Fla. 1942) (letters referring to "my daughter").
44. *In re* R., 119 Cal. Rptr. 475, 484 (1975) (en banc), *cert. denied*, 421 U.S. 1014 (1975).
45. *In re* K, 535 S.W.2d 168, 169 (Tex. 1976).
46. H. CLARK, CASES & PROBLEMS ON DOMESTIC RELATIONS 284 (2d ed. 1974).
47. Stanley v. Illinois, 405 U.S. 645, 663 (1972) (dissenting opinion).
48. *Id.* at 658.
49. *In re* R., 119 Cal. Rptr. 475, 478, 485 (1975) (en banc), *cert. denied*, 421 U.S. 1014 (1975).
50. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

manner which treats unwed fathers differently from other parents, the decision was violative of the equal protection clause as interpreted in *Stanley*.[51] Among the differences noted were that biological parenthood is the test for maternal rights but not for paternal rights,[52] that the biological father is under a duty to support his illegitimate children but has no correlative rights, and that an unwed father's rights may be terminated for reasons other than the grounds required for termination of parental rights under section 15.02.[53] The dissenting justices believed that biological fatherhood, once established, should have entitled S.D.A. to a decree of legitimation.[54] Further, since a suit for legitimation could have been joined with a suit for termination of the parent-child relationship,[55] they believed the proper procedure would have been to legitimate the baby based on biological paternity and then to determine whether termination of parental rights was appropriate.[56] While acknowledging the fact that S.D.A. would have problems retaining parental rights, they felt this did not justify circumventing available statutory procedure.[57]

Although the result of the case was correct insofar as it denied S.D.A. custody of his child, the means used by the court should be reviewed. The court established a dangerous precedent by allowing judicial discretion in legitimation proceedings and bypassing the termination procedure required to determine the fitness of all other Texas parents.

Both *Stanley* and the principal case involved statutes which excluded the unwed father from the definition of "parent."[58] The Texas Supreme Court interpreted *Stanley* as merely requiring a hearing on fitness in accordance with the best interest standard, not as a decree that all unwed fathers have fundamental parental rights.[59] The statutory definition of "parents" in *Stanley* raised a presumption of unfitness in unwed fathers which was expressly found to be unconstitutional.[60] The Texas court's approval of the procedure followed in *K* apparently indicates that before the unwed father

51. *In re* K, 535 S.W.2d 168, 171, 175 (Tex. 1976).

52. *Id.* at 171. In 1975 the Texas Legislature amended chapter 13 of the Family Code on voluntary legitimation to include a procedure for paternity suits, which is a form of involuntary legtimation, under which the test for fatherhood is based on the biological fact of paternity rather than on his fitness as a parent. TEX. FAMILY CODE ANN. §§ 13.01-.09 (Supp. 1976). This apparently means if an unwed mother files the suit, she must show biological fatherhood, while an unwed father must withstand the best interests fitness standard.

53. *In re* K, 535 S.W.2d 168, 171-72 (Tex. 1976).

54. *Id.* at 174.

55. TEX. FAMILY CODE ANN. § 13.21(d) (Supp. 1976).

56. *In re* K, 535 S.W.2d 168, 175 (Tex. 1976) (dissenting opinion).

57. *See id.* at 172.

58. Stanley v. Illinois, 405 U.S. 645, 650 (1972); *In re* K, 535 S.W.2d 168, 169 (Tex. 1976).

59. *In re* K, 535 S.W.2d 168, 171 (Tex. 1976).

60. Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

can legitimate his child, he must prove his fitness as a parent under the "best interests" test. Since other parents are not required to prove their fitness prior to obtaining parental rights, it appears that there is a presumption of unfitness in unwed fathers in Texas which must be overcome before voluntary legitimation will be granted.[61]

In custody matters the welfare of the child is paramount, and the rights of the parents are enforced only when they are in accordance with the best interests of the child.[62] On the other hand, if there are other reasonable ways to protect state interests, a state must choose the means which least interferes with the individual's constitutionally protected rights.[63] In order to protect the rights of all parties, the Texas Family Code should be construed as requiring legitimation as a matter of law on the proof of biological fatherhood and compliance with the voluntary legitimation requirements under section 13.01. Only then should the separate issue of custody be determined under sections 14 or 15.02. The Supreme Court of Texas refused to consent to legitimation of baby K because to do so would not have been "in the best interests of the child."[64] Had the court allowed S.D.A. to legitimate the baby, it could have terminated parental rights upon proof of unfitness in the same proceeding under the termination statute. To have done so would have avoided possible constitutional violations, yet would not have jeopardized the state's interest in baby K's welfare.

Patricia E. Swanson

61. Post Argument Brief for Appellant at 7, *In re* K, 535 S.W.2d 168 (Tex. 1976) stated that: "[T]he unwed father has the *burden* to show the trial court . . . that he is not only fit to be a parent, but also that his being a parent would be in the best interest of the child. He is *ab inito* [sic] presumed unfit in the Texas scheme and must therefore obtain the "consent" of the mother, the managing conservator or the court. . . . This presumption of unfitness was specifically overruled in *Stanley*."

62. *In re* P., 194 N.W.2d 18, 20 (Mich. Ct. App. 1971).

63. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

64. *In re* K, 535 S.W.2d 168, 170 (Tex. 1976).