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# Domestic Relations - Right of a Putative Father to Visit his Illegitimate Child

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the concept of due process in the trial of criminal actions. In the instant case, the effects of the changes are relatively minor insofar as they apply to subsequent trials. In regard to criminal trials already terminated, the effects of the changes are much greater. Through lapse of time, the task of reproving the voluntariness of a confession can become difficult. It is the type of task many state courts must face as the concept of due process continues to expand.

*Patrick Agnew*

### DOMESTIC RELATIONS—RIGHT OF A PUTATIVE FATHER TO VISIT HIS ILLEGITIMATE CHILD

Joseph Stanley was born illegitimate to Mildred Stanley on March 24, 1963. In March of 1964, Mildred brought a charge of fornication and bastardy against the putative father, Walter Golembewski. Walter acknowledged that he was the child's father, and he was ordered to pay weekly support for the child. The mother thereafter informed the putative father that he could no longer visit the child. Subsequently, the father brought proceedings demanding visitation privileges. The court found that both the mother and putative father were fit persons, that the mother was to retain custody, and that the putative father was to be granted visitation privileges. On appeal, the lower court's decision was reversed, the court stating "as a matter of legal policy it is detrimental to the welfare of an illegitimate child in the mother's custody to award visitation privileges to the putative father."<sup>1</sup> *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965).

The controversial point presented for review is whether a putative father who is a fit person should be allowed to visit his illegitimate child, or must any relation whatsoever between the two be cut off.

Early common law considered an illegitimate *quasi nullius filius*.<sup>2</sup> However, a trend toward liberalization of the common law concept has resulted in the illegitimate being brought closer and closer to the status of legitimacy. These changes have occurred in three areas: inheritance, in which

<sup>1</sup> *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, —, 208 A.2d 49, 50 (1965).

<sup>2</sup> The doctrine of *quasi nullius filius* or *filius populi* made an illegitimate a child of the people and not a child of any specific parent. *In re Gibson*, 154 Mass. 378, 28 N.E. 296 (1891), (has subsequently been changed by statute); *In re Shriver's Estate*, 159 Pa. Super. 314, 48 A.2d 52 (1946). Practically speaking, the illegitimate child had a *parish* which had the same relationship with the child as natural parents have with a legitimate child. See *Horner v. Horner*, 161 Eng. Rep. 573 (1799). For a discussion of the medieval common law rules concerning illegitimacy, see Adams, *Nullius Filius*, 6 U. TORONTO L.J. 361 (1945).

an illegitimate is presently allowed to inherit from, and devise to, at least his maternal line;<sup>3</sup> adoption, in which the mother's consent to the adoption is a minimal requirement to the validity of such adoption;<sup>4</sup> and the custody of an illegitimate child, which is the focal point of this note.

Since an illegitimate was *nullius filius* at common law, neither the mother nor father had any custody privileges.<sup>5</sup> This harsh rule was modified to place exclusive custody privileges in the mother, leaving the putative father without any relationship to the child.<sup>6</sup> The prevailing view today is that the mother of an illegitimate has the primary right to custody, the putative father having a secondary right over everyone except the mother.<sup>7</sup> However, there are a minority of jurisdictions that vary from this rule and do not allow any rights of custody to the putative father.<sup>8</sup>

The rule giving the mother the primary right to custody can be easily understood, but when compounded with various other secondary problems, a mass of very detailed rules can evolve, the two largest problems being the "welfare of the child" rule and "visitation privileges" rule. The most involved intricacies arise when the mother is given the primary right to custody and that right is integrated with the "welfare of the child" rule; that is, in custody cases the best interest of the child governs who shall be awarded custody.<sup>9</sup> Protecting the welfare of the child has been applied

<sup>3</sup> PA. STAT. ANN. tit. 20, § 1.7(a) (1947); ILL. REV. STAT. ch. 3, § 12 (1963); MASS. ANN. LAWS ch. 190, § 5 (1955). For a general discussion on inheritance from illegitimates, see Annot., 48 A.L.R.2d 759 (1956).

<sup>4</sup> *Ex parte* Barents, 99 Cal. App. 2d 748, 222 P.2d 488 (1950); *Oeth v. Erwin*, 6 Ill. App. 2d 18, 126 N.E.2d 526 (1955); *Kalika v. Munro*, 323 Mass. 542, 83 N.E.2d 172 (1948). For a general discussion of the consent necessary for the adoption of an illegitimate, see Annot., 51 A.L.R.2d 497 (1957).

<sup>5</sup> See *supra* note 1.

<sup>6</sup> *Regina v. Brighton*, 121 Eng. Rep. 782 (Q.B. 1861).

<sup>7</sup> *E.g.*, *Potes' Appeal*, 106 Pa. 574 (1884); *Re Anonymous*, 12 Misc. 2d 211, 172 N.Y.S.2d 186 (1958); *In re Brennan*, 134 N.W.2d 126 (Minn. 1965); *People v. Meredith*, 272 App. Div. 79, 69 N.Y.S.2d 462, *aff'd*, 297 N.Y. 692, 77 N.E.2d 8 (1947); *Strong v. Owens*, 91 Cal. App. 2d 336, 205 P.2d 48 (1949). For a general discussion of the rule, see Annot., 37 A.L.R.2d 882 (1954) (the putative father's rights); Annot., 98 A.L.R.2d 417 (1964) (the mother's rights).

<sup>8</sup> ILL. REV. STAT. ch. 106½, § 62 (1963); *Clements v. Banks*, 159 So. 2d 892 (Fla. 1964).

<sup>9</sup> *E.g.*, *In re Brennan*, *supra* note 7; *Albee Appeal*, 189 Pa. Super. 370, 150 A.2d 563 (1959); *Corsi v. New Jersey State Board*, 96 N.J. Eq. 254, 124 Atl. 609 (1924); *Danford v. Dupree*, 272 Ala. 517, 132 So.2d 734 (1961); *Re Newell's Guardianship*, 187 Cal. App. 2d 425, 10 Cal. Rptr. 29 (1960); *Davis v. Hadox*, 145 W. Va. 233, 114 S.E.2d 468 (1960); *Bennet v. Anderson*, 129 W. Va. 671, 41 S.E.2d 241 (1946); *Doering v. Doering*, 267 Wis. 12, 64 N.W.2d 240 (1954). In all these cases, the court, when faced with the problem of who shall be awarded custody, either directly or indirectly based their decision on what would be best for the child. For cases holding the same in jurisdictions not cited above, see Annot., 98 A.L.R.2d 421 (1964).

to legitimate, as well as illegitimate children.<sup>10</sup> The strength of this rule in determining custody is overwhelming.<sup>11</sup>

In the case at hand, the question is not complete custody, but rather, visitation privileges. The rules pertaining to custody may also apply to visitation privileges, since visitation is a form of limited custody.<sup>12</sup> Thus, if the rule that the mother has the primary right to custody<sup>13</sup> would be applied rigidly, the putative father would be entirely excluded from any custody privilege including visitation.

The courts have employed numerous approaches in allowing or not allowing visitation privileges to a putative father. Such reasoning as the child was legitimized<sup>14</sup> or the child was acknowledged by the putative father<sup>15</sup> has been the basis for allowing visitation privileges. The argument that support is being paid by the putative father, and that therefore he should be entitled to visit the child, has also been presented, but has met with little success.<sup>16</sup> It is clear that the rationale the courts proceed upon is "what is best for the child." At times, the courts will state directly that they are basing their decision on the illegitimate's welfare.<sup>17</sup> In *Baker v. Baker*,<sup>18</sup> the court stated

I think it is much better for the child to have the father visit it at stated times, not only to learn of its continued welfare, but to infuse into it at an early age the natural love and affection that it should have for a parent who is interested in its well being.<sup>19</sup>

<sup>10</sup> Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949); Baker v. Baker, 81 N.J. Eq. 135, 85 Atl. 816 (1913); Doering v. Doering, *supra* note 8; Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949).

<sup>11</sup> This premise will be explored more fully below.

<sup>12</sup> People v. Ivanova, 14 App. Div. 2d 317, 221 N.Y.S.2d 75 (1961).

<sup>13</sup> See *supra* note 6.

<sup>14</sup> See Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195 (1957).

<sup>15</sup> See *Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444 (1940).

<sup>16</sup> See Commonwealth v. Spano, 68 Pa. D.&C. 248 (Ct. Common Pleas 1949); Santa Clara County v. Hughes, 43 Misc. 2d 559, 251 N.Y.S.2d 579 (1964).

<sup>17</sup> *In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186 (1958), where emphasis was placed on whether visitation by the putative father would be detrimental to the child; Mahoff v. Matsoui, 139 Misc. 2d, 247 N.Y.S. 112 (1931) where divided custody was allowed, during the week for the mother and weekends for the putative father (the court felt that this was the best procedure to insure the welfare of the child). In Commonwealth v. Spano, *supra* note 14, the court disallowed visitation privileges to the putative father, feeling such was best for the child since he might be confused by seeing that the father of his half-brothers and sisters was not his father, and that this would tend to disturb the home of the child as a whole.

<sup>18</sup> 81 N.J. Eq. 135, 85 Atl. 816 (1913). This case can be distinguished in that the mother and putative father had married, the child having been born out of wedlock. The court, however, treated the child as illegitimate and based its reasoning on the child's illegitimacy.

<sup>19</sup> *Id.* at 138, 85 Atl. at 817.

It is for these reasons that both the United States and English higher courts are reluctant to differ with a trial court's decision in custody cases, whether the child be legitimate or illegitimate,<sup>20</sup> because the appellate courts feel that the trial courts have a closer relationship with the parties involved and are more competent to determine the issue of custody and welfare of the child.<sup>21</sup> Although courts may use many different approaches in determining whether visitation privileges should be allowed, as seen above, thorough analysis reveals that courts tend to base their decisions on the child's welfare.

Hence, the elements used in determining what is best for the illegitimate are primary problems facing the courts in cases involving custody of illegitimate children. Primary factors that must be considered are the child's age, the environment he will live in, and the capabilities of the mother and the putative father as parents. Specific factors that could be detrimental may also be evaluated: will the visits upset the home of the child due to possible emotional conflicts between the parents; does the illegitimate child have half-brothers and sisters who have a different father (causing the child to have a confused state of mind); what will other people in the community (especially immediate neighbors) feel about the situation, since these feelings can be projected to the child; if the child is adopted by the husband of a subsequent marriage, will the putative father's occasional appearance disturb the adoption. There are also beneficial factors that must be considered: the putative father can ascertain if the child is being cared for properly, once the child's welfare is removed from the court's responsibility; the father's love and affection is necessary in a child's upbringing; if the child knows his natural father from an early age, he might be able to bear more easily the ignominy of his origin at a more mature age.

The aforementioned considerations are offered as a small sampling of the many sociological problems that a court may consider when confronted with a case of this nature. In the instant case, the Superior Court of Pennsylvania stated

[i]t is our view, however, *as a matter of legal policy*, that it is detrimental to the welfare of an illegitimate child in the mother's custody to award visitation privileges to the putative father.<sup>22</sup>

The trial court is allowed no discretion in deciding whether visitation privileges should be granted to the putative father. With this decision,

<sup>20</sup> *Strong v. Owens*, 91 Cal. App. 2d 336, 205 P.2d 48 (1949) (the lower court must manifestly abuse its discretion in order to overrule); *Guinn v. Watson*, 210 La. 265, 26 So. 2d. 740 (1946) (latitude must be given to the findings of the lower court). See also *Veach v. Veach*, 122 Mont. 47, 195 P.2d 697 (1948).

<sup>21</sup> *Supra* note 17.

<sup>22</sup> *Supra* note 1 at —, 208 A.2d at 50 (emphasis added).

Pennsylvania now finds itself in a very anomalous position, in that if the mother of an illegitimate child is considered a fit person for custody, the putative father cannot visit the child. If the possibility exists that the welfare of the child might be enhanced by granting the putative father visitation privileges, that possibility is now relegated to a minor status. This is certainly not within the trend of decisions that other courts have followed,<sup>23</sup> but rather is a minority position.

Majority jurisdictions, when faced with this issue, will tend to take the view that a great deal of thought should be given to the trial court's discretion as to the disposition of visitation privileges by the putative father, in that only there can it be detected whether this illegitimate child would be benefited or harmed by such visitation privileges.

*Lawrence Gabriele*

<sup>23</sup> See *supra* notes 8, 9, 15, 16, 17, and 18.

### REAL PROPERTY—TAXATION—LEASE OF EXEMPT PROPERTY TO PRIVATE PARTIES

The Illinois State Toll Highway Commission leased to Standard Oil Company certain sites along the toll road for use as restaurants and gasoline stations. The county where the property is located assessed a tax on the Standard Oil leaseholds, on the basis of Section 26 of the Illinois Revenue Act<sup>1</sup> which provides that when tax exempt real estate is leased to one not entitled to an exemption, the leasehold estate and the property attached to it are considered to be real estate of the lessee.<sup>2</sup> The Highway Commission commenced an action to enjoin the assessment, arguing that since the lease provided for a reduction in the rent by such a tax, the burden of the assessment would fall upon the Commission which is a tax-exempt body.<sup>3</sup> The trial court accepted the Commission's argument, and entered a decree enjoining the assessment. The county appealed urging that there are many decisions holding that land which is leased to private parties by tax exempt entities is taxable under Section 26, and that in the light of such decisions, the legislature showed an intention to assess such property by not amending Section 26 specifically to exempt such leaseholds. The Illinois Supreme Court upheld the decree of the trial court on the basis that the legislature intended Section 18 of the Toll Highway Act,<sup>4</sup> which exempts all prop-

<sup>1</sup> Ill. Revenue Act § 26, ILL. REV. STAT. ch. 120, § 507 (1963).

<sup>2</sup> *Ibid.*

<sup>3</sup> Toll Highways Act § 18, Ill. Rev. Stat. ch. 121, § 314 (1963).

<sup>4</sup> *Ibid.*