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Department of Health and Rehabilitative Services v. Herzog, 317 So. 2d 865 (Fla. 2d Dist. Ct. App. 1975)

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CASE COMMENTS

Constitutional Law—ADOPTION—FATHER OF AN ILLEGITIMATE CHILD IS NOT NECESSARILY ENTITLED TO NOTICE IN ADOPTION PROCEEDINGS— *Department of Health and Rehabilitative Services v. Herzog*, 317 So. 2d 865 (Fla. 2d Dist. Ct. App. 1975).

John Arthur Herzog and Marlene Herzog filed a petition for adoption in the Circuit Court for the Tenth Judicial Circuit, in and for Polk County, Florida. The minor child they planned to adopt had been born out of wedlock, and the Herzogs attached the mother's signed consent form to their petition.[1] Pursuant to a provision of Florida's adoption statute in effect at that time,[2] the Division of Family Services of the Department of Health and Rehabilitative Services (HRS), began an investigation into the adoptability of the child and the suitability of the prospective parents. As part of its investigation into the child's adoptability, HRS sought to ascertain whether the natural father had notice of the proposed adoption.[3]

Shortly thereafter the circuit court enjoined HRS "from inquiring into the identity of the natural father or otherwise into the paternity of the subject child, save and except as to his physical condition and characteristics."[4] The court offered to modify its order, however, if HRS could show that the natural father had contributed to the child's birth or support or had shown interest in the child in any other way.[5] HRS did not contend that it had evidence of support or interest, but it appealed the issuance of the injunction, asserting that failure to give notice to the natural father would violate his due process rights and leave the validity of the adoption open to attack.[6] The Second District

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1. Department of Health and Rehab. Serv's v. Herzog, 317 So. 2d 865, 866 (Fla. 2d Dist. Ct. App. 1975).

2. The provision required in part:

> Upon or prior to the filing of a petition for the adoption of any minor child, a study shall be made of all pertinent details relating to such child for the purpose of ascertaining whether he is a proper subject for adoption, and the petitioner or petitioners, to determine whether they are suitable persons to adopt such child.

Act of May 20, 1955, ch. 29674, § 1, 1955 Fla. Laws 150 (repealed 1973). The adoption statute has since been revised. It now provides in relevant part: "An investigation shall be made . . . to ascertain whether the adoptive home is a suitable home for the minor and the proposed adoption is in the best interest of the minor." FLA. STAT. § 63.122(5) (1975).

3. 317 So. 2d at 866.

4. *Id.* at 867.

5. *Id.*

6. Brief of Appellant at 10. The brief asserted:

> If the natural father does not receive legal notice, without which the court lacks jurisdiction to sever his parental rights, said natural father may enter at any time—

Court of Appeal ruled against HRS, holding that since the father of the prospective adoptive child had shown no interest in the child, the lower court "was within its authority to prohibit the appellant from trying to ferret him out."[7]

The issue was whether every putative father had to be given notice and an opportunity to be heard before the child could be adopted by strangers. Resolution of this issue required an analysis of the nature of parental rights and the proper termination of those rights, particularly in light of two recent United States Supreme Court cases: *Stanley v. Illinois*[8] and *Rothstein v. Lutheran Social Services*.[9] These two decisions caused HRS to initiate a procedure of notifying putative fathers, when possible, before certifying that illegitimate children were proper subjects for adoption.[10]

The *Stanley* case arose following the death of Joan Stanley, with whom Peter Stanley had lived for eighteen years, fathering three children. The parents never married.[11] Upon Joan's death, the children were declared wards of the court under an Illinois statute which defined *parent* of an illegitimate child as meaning only the mother.[12]

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even years hence—and question the adoption. Whether the father would succeed in a cause of this type is not the issue. The child would be put through great trauma, possibly scarring him emotionally for life by the occurrence of such a court battle.

Id. The Department's appeal did not deal with the Herzogs' suitability as adoptive parents, but questioned whether the child was, as the statute required, "a proper subject for adoption." *See* note 2 *supra*.

7. 317 So. 2d at 867, 868. Though the appellees challenged HRS on the issue of standing, the Second District Court of Appeal pointed out that then FLA. STAT. § 63.091 (1971), which assigned responsibility to HRS, also expressly gave HRS standing. *Id.* at 866.

8. 405 U.S. 645 (1972).

9. 405 U.S. 1051 (1972). The rights of Rothstein and his child were litigated in this case and in two others: Lewis v. Lutheran Social Serv's, 178 N.W.2d 56 (Wis. 1970) and Lewis v. Lutheran Social Serv's, 207 N.W.2d 826 (Wis. 1973).

10. 317 So. 2d at 866.

11. 405 U.S. at 646. No explanation is given for the identical last names of the parents.

12. The Juvenile Court Act, § 1-14, 1965 Ill. Laws 2585. The law now states, " 'Parent' means the father or mother of a legitimate child, or illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law." Act of Sept. 6, 1973, P.A. 78-531, § 1, ILL. REV. STAT. ch. 37, § 701-14 (1975). The Adoption Statute defines the parent similarly: " 'Parent' means the father or mother of a legitimate or illegitimate child." Act of Sept. 14, 1973, P.A. 78-854, § 1, ILL. REV. STAT. ch. 4, § 9.1-1 (E) (1975).

The Illinois juvenile court law now provides for notice to a putative father, as follows:

> Upon the written request to any Clerk of any Circuit Court by any interested party, including persons intending to adopt a child, a child welfare agency with whom the mother has placed or has given written notice of her intention to place a child for adoption, the mother of a child, or any attorney representing an interested party, a notice may be served on a putative father in the same

manner as Summons is served in other proceedings under this Act, or in lieu of personal service, service may be made as follows:

(a) The person requesting notice shall furnish to the Clerk an original and one copy of a notice together with an Affidavit setting forth the putative father's last known address. The original notice shall be retained by the Clerk.

(b) The Clerk forthwith shall mail to the putative father, at the address appearing in the Affidavit, the copy of the notice, certified mail, return receipt requested; the envelope and return receipt shall bear the return address of the Clerk. The recipt [*sic*] for certified mail shall state the name and address of the addressee, and the date of mailing, and shall be attached to the original notice.

(c) The return receipt, when returned to the Clerk, shall be attached to the original notice, and shall constitute proof of service.

(d) The Clerk shall note the fact of service in a permanent record.

The notice shall be signed by the Clerk, and may be served on the putative father at any time after conception, and shall read as follows:

"IN THE MATTER OF NOTICE TO _____, PUTATIVE FATHER.

You have been identified as the father of a child (born on the _____ day of _____, 19_____), or (expected to be born on or about the _____ day of _____, 19_____). The mother of said child is _____.

The mother has indicated she intends to place the child for adoption or otherwise have a judgment entered terminating her rights with respect to such child.

As the alleged father of said child, you have certain legal rights with respect to said child, including the right to notice of the filing of proceedings instituted for the termination of your parental rights regarding said child. If you wish to retain your rights with respect to said child, you must file with the Clerk of this Circuit Court of _____ County, Illinois, whose address is _____, _____, Illinois, within 30 days after the date of receipt of this notice, a declaration of paternity stating that you are, in fact, the father of said child and that you intend to retain your legal rights with respect to said child, or request to be notified of any further proceedings with respect to custody, termination of parental rights or adoption of the child.

If you do not file such a declaration of paternity, or a request for notice, then whatever legal rights you have with respect to said child, including the right to notice of any future proceedings for the adoption of said child, may be terminated without any further notice to you. When your legal rights with respect to said child are so terminated, you will not be entitled to notice of any proceeding instituted for the adoption of said child.

If you are not the father of said child, you may file with the Clerk of this Court, a disclaimer of paternity which will be noted in the Clerk's file and you will receive no further notice with respect to said child."

The names of adoptive parents, if any, shall not be included in the notice.

If the putative father files a disclaimer of paternity, he shall be deemed not to be the father of the child with respect to any adoption or other proceeding held to terminate the rights of parents as respects such child.

In the event the putative father does not file a declaration of paternity of the child or request for notice within 30 days of service of the above notice, he need not be made a party to or given notice of any proceeding brought for the adoption of the child. An Order or Judgment may be entered in such proceeding terminating all of his rights with respect to said child without further notice to him.

If the putative father files a declaration of paternity or a request for notice . . . , with respect to the child, he shall be given notice in the event any proceeding is

Stanley appealed, claiming he had a right to a hearing as to his fitness as a parent.[13] The Illinois Supreme Court denied Stanley's claim, asserting that "neither the class of prospective custodians and guardians, nor the class of 'unwed fathers,' had *any* rights to control or custody."[14] The Illinois court found the Illinois statute constitutional: "The distinction between the class of mothers and the class of fathers is rationally related to the Illinois law . . . and thus it is not constitutionally mandated that Stanley be accorded the rights which accrue to the class of natural mothers of illegitimate children."[15]

The United States Supreme Court granted certiorari[16] "to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers —whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children."[17] The answer was in the negative. The Court ruled that Stanley had a due process right to a hearing regarding his fitness as a parent before his children could be taken from him.[18] The Court further asserted that the right to have and raise children was an "essential" right, not excluded in "those family relationships unlegitimized by a marriage ceremony."[19]

Two weeks after the *Stanley* decision, the Supreme Court again dealt with the issue of notice to a putative father. In *Rothstein* the United States Supreme Court vacated the judgment and remanded to the Wisconsin Supreme Court a case involving a very different factual situation.[20] Jerry Rothstein claimed to be the father of John Thomas Lewis. One week after the baby was born, the mother surrendered her parental rights; one week later the baby was placed in the home of prospective adoptive parents. When Rothstein discovered that the

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brought for the adoption of the child or for termination of parents' rights of the child.

The Clerk shall maintain separate numbered files and records of requests and proofs of service and all other documents filed pursuant to this article. All such records shall be impounded.

Act of Sept. 6, 1973, P.A. 78-531, § 1, ILL. REV. STAT. ch. 37, § 705-9.4 (1975).

13. *In re* Stanley, 256 N.E.2d 814 (Ill. 1970).

14. *Id.* at 815 (emphasis in original).

15. *Id.*

16. Stanley v. Illinois, 400 U.S. 1020 (1971).

17. Stanley v. Illinois, 405 U.S. 645, 647 (1972). In its decision, the Supreme Court criticized the irrebuttable presumption and noted that the State of Illinois "continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings . . . ." *Id.*

18. *Id.* at 649.

19. *Id.* at 651.

20. 405 U.S. 1051 (1972), *vacating and remanding* Lewis v. Lutheran Social Serv's, 178 N.W.2d 56 (Wis. 1970).

mother had given up the child, he petitioned for a writ of habeas corpus, arguing that he had not consented to the termination of his parental rights.[21]

On first hearing the Wisconsin Supreme Court had dismissed the petition, holding that "illegitimate fathers have no right to the custody of their illegitimate children";[22] after remand from the United States Supreme Court, the Wisconsin Supreme Court ordered a factual hearing. The referee determined that Rothstein was the father, that he was a fit person for custody, "but that he should not be granted custody because it would be in the best interests of the child to remain with the 'adoptive parents.' "[23] Rothstein then filed for a denial of the referee's recommendation.[24]

Chief Justice Hallows of the Wisconsin Supreme Court had dissented from the earlier decision, asserting that the statutes which terminated parental rights without consent or notice were "unconstitutional when applied to a known father of a child born out of wedlock because they make a violation and a classification out of illegitimacy which is unreasonable and has no basis in fact excepting expediency."[25] On appeal from the referee's determination, Hallows wrote the majority opinion. Reviewing the original action, the chief justice stated unequivocally that "[c]onsent of both the unwed mother and the unwed father, or consent of one parent with proper termination of the parental rights of the other, is necessary."[26] Despite the referee's decision that the best interest of the child would be served by leaving the child with his "adoptive parents," the court ruled that the issue of parental rights "should be viewed as of the period of time when the issue should have been determined and when the petitioner's constitutional rights were denied him."[27]

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21. 178 N.W.2d at 56.

22. *Id.* at 57.

23. 207 N.W.2d at 828.

24. *Id.* As for the "adoption," the court observed:

> We point out that there was an injunction against the adoption of John Thomas Lewis while the matter was under consideration of this court, and the child was secretly adopted without notice to this court, the guardian ad litem, or the petitioner during the period in which a rehearing motion might have been made to this court. Consequently, when this matter reached the United States Supreme Court on appeal the child had been adopted with full knowledge of the pending litigation and the alleged legal infirmities involved. Under these circumstances, we cannot hold that the adoption was valid or that *Stanley* is only of academic concern and not applicable.

Id. at 829.

25. 178 N.W.2d at 65.

26. 207 N.W.2d at 830. Wisconsin statutes now reflect this view. WIS. STAT. § 48.84 (1973).

27. 207 N.W.2d at 831. This ruling attempted to rectify the inequity implicit in

Both *Stanley* and *Rothstein* grant rights to fathers of illegitimate children on the ground that due process requirements are violated when a state creates an irrebuttable presumption that the putative father is an unfit parent.[28] The *Stanley* Court asserted: "[I]t is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family."[29]

Herzog addressed essentially the same issues as *Stanley* and *Rothstein*: what are the legal rights of natural parents and how may those rights be terminated? It is important to realize that under existing Florida law parental rights are not equal for both sexes. Although a mother of an illegitimate child is accorded full parental rights unless they are surrendered or legally terminated, a father under equivalent circumstances may find that his legal rights never vested. An outline may help the reader to visualize the situation:

NATURAL PARENTS—STATUS

I. Mother
II. Father
  A. Of legitimate or legitimated child
  B. Of illegitimate child
    1. Recognized by the law
    2. Not recognized by the law
      a. Uninterested in child
      b. Unaware of child

I. Mother. Under Florida law, a mother's parental rights do not depend on the child's legitimacy. From the moment the child is born, the mother's full legal rights remain intact,[30] unless she surrenders them or is found to be an unfit parent,[31] or a court awards custody to the father in a dissolution of marriage proceeding.[32]

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the referee's decision, namely, that solely because Jerry Rothstein was delayed three and one-half years by litigation, the goal of the litigation—custody of his child—was not to be realized. The court noted: "[T]he child on November 11, 1969, had only been in the temporary custody of the foster parents for a short time. The petitioner should not be faulted because the respondent agency and the adoptive parents have kept petitioner from seeing his child pending this proceeding." *Id.* at 832.

28. *See* Vlandis v. Kline, 412 U.S. 441, 446 (1973) ("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."). *See also* Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965); Heiner v. Donnan, 285 U.S. 312 (1932).

29. 405 U.S. at 658.

30. FLA. STAT. § 744.301(1) (1975) ("The mother of a child born out of wedlock is the natural guardian of the child.").

31. FLA. STAT. §§ 39.11, 63.072 (1975).

32. FLA. STAT. § 61.13 (1975). A custody award is not equivalent to a termination

II. Father. Under the law the father's rights are restricted by consideration of his relationship to the child's mother.[33]

A. Father of legitimate or legitimated child. The father of a legitimate or legitimated[34] child has the same rights as the mother. His rights continue unless he surrenders them, they are terminated by a court in a fitness proceeding, or custody is awarded to the mother in a dissolution of marriage.[35]

B. Father of illegitimate child. At common law an illegitimate child was deemed a *nullius filius*, a son of no one; under this concept the putative father had no legal relationship to the child.[36] This has changed, and the relationship between father and child has been defined and regulated by statute.[37] Florida's Paternity Act, for example, requires the father to pay child support and the expenses "incident to the birth of such child."[38]

Several Florida cases have spoken to the parental rights of fathers of illegitimate children. In *Fielding v. Highsmith*, the Florida Supreme Court stated that a natural parent must be given the opportunity to be heard before his parental rights can be terminated; any other procedure would be "despotic in the extreme and contrary to the plainest principles of morality and justice."[39] In *Fielding* an adoption was ruled invalid because no attempt to give notice to the natural father was made even though "the father could have been located by diligent search and inquiry."[40] This 1943 case was unusual, however, in that the child was born *of*, but not *during*, the marriage. Furthermore, although the court agreed with Highsmith that he should have had notice, it remanded and ordered the lower court to award custody to the other family because Highsmith had "virtually abandoned the

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of parental rights; custody awards are open to revisions and modifications, but terminations are virtually irrevocable.

33. Even if the husband of the mother at the time of birth is not actually the father of her child, he is generally presumed to be. Eldridge v. Eldridge, 16 So. 2d 163 (Fla. 1944).

34. If the child is illegitimate at the time of birth but the father subsequently marries the mother, the child is legitimated by operation of law. FLA. STAT. § 742.091 (1975).

35. FLA. STAT. §§ 39.11, 61.13, 63.072 (1975).

36. Lewis v. Lutheran Social Serv's, 178 N.W.2d at 65. But the majority opinion also acknowledged an early common-law right of the putative father to custody as against all but the mother. *Id.* at 58. *See* Note, *Father of an Illegitimate Child–His Right To Be Heard*, 50 MINN. L. REV. 1071, 1072 (1966); Comment, *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 U. ILL. L.F. 232.

37. Note, *Father of an Illegitimate Child—His Right To Be Heard. supra* note 36, at 1073.

38. FLA. STAT. §§ 742.031, .041 (1975).

39. 13 So. 2d 208, 209 (Fla. 1943).

40. *Id.*

child" and had "allowed the child to remain in the custody of others for such a long period of time that a strong mutual attachment exists between them."[41] Highsmith forfeited his right to custody even though his right to notice was intact.

A 1964 case, *Clements v. Banks*, dealt with the adoption of an illegitimate child by the mother's subsequent husband.[42] The court ruled the natural father, who was married to another woman but had been voluntarily contributing to the child's support, had no rights to the child:

> In this cause, he [the natural father] has pointed to no statutes or decisions of this State which give him any rights in and to an illegitimate child. In fact, the statutes of this State indicate that an illegitimate father shall not have any rights to an illegitimate child, in that his consent is not necessary to an adoption . . . and for the purpose of determining the matters within the juvenile court he is not considered as a parent.[43]

Brown v. Bray[44] involved an equal protection challenge to the constitutionality of the then-named Florida Bastardy Statute,[45] on the basis that the statute denied the father of an illegitimate child the same right to custody accorded the father of a legitimate child under the Dissolution of Marriage Act.[46] The Florida Supreme Court upheld the constitutionality of the statute, saying that it *allowed*, though it did not require, the circuit courts to consider granting custody to a putative father, even as those courts were allowed to consider granting custody to the father in a dissolution of marriage proceeding.[47]

In resolving a custody contest between the mother and the putative father, the Florida Fourth District Court of Appeal in *In re R.L.G.* ruled that the putative father had no right of custody unless the mother was shown to be unfit.[48] The court asserted, "All jurisdictions recognize that within the framework of this principle [best interests of the child] the mother of an illegitimate child has a natural primary or prima facie right to the custody of a child as against a putative father

41. *Id.* at 210.
42. 159 So. 2d 892 (Fla. 3d Dist. Ct. App. 1964).
43. *Id.* at 893 (citations omitted).
44. 300 So. 2d 668 (Fla. 1974).
45. FLA. STAT. ch. 742 (1975) (as amended by ch. 75-166, §§ 5–7, 1975 Fla. Laws 298). The 1975 amendments deleted references to bastardy and changed the title of the statute to Determination of Paternity.
46. FLA. STAT. ch. 61 (1975).
47. 300 So. 2d at 670 (dictum).
48. 274 So. 2d 4 (Fla. 4th Dist. Ct. App. 1973).

unless she is proved to be an unfit person to be entrusted with such a charge."[49]

1. Recognized by the law. Pursuant to *Stanley*, the Florida Legislature amended the adoption statute in order to provide notice to certain known and legally recognized fathers of illegitimate children. Unless specifically excused by the court, the statute requires consent of the father if his paternity has been adjudicated; if "[h]e has acknowledged in writing . . . that he is the father of the minor and has filed such acknowledgment with the Bureau of Vital Statistics"; or if he has given financial support to the child "in a repetitive, customary manner."[50] By implication, if the putative father is "known" but has failed to assert or accept that status in one of the legally recognized ways, then consent from him is not statutorily required.

2. Not recognized by the law. The father of a child may be unrecognized by the law for several reasons: the mother may not know who the father is; the mother may know but not reveal the information to the "state,"[51] to anyone, or to anyone but the father. In the last instance the father has the opportunity, at least, to acknowledge and support his child, thereby bringing himself into the legally recognized category protected by statute. But if the mother withholds her knowledge, the father's rights are effectively terminated.

The *Stanley* opinions, especially the Illinois Supreme Court opinion[52] and the dissent by Chief Justice Burger in the United States Supreme Court,[53] indicate a willingness to allow termination of parental rights because the father fails to conform to the legal and social standards for a father who cares about his children. Had Peter Stanley married the mother of his children, his rights would have been protected without challenge.

The current Florida law on adoption seems to imply that if the father does not show enough concern about his child to acknowledge

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49. *Id.* at 5. All of the statutes, court decisions, agency actions, and personal actions purport to be "in the best interests of the child." In reality, often it is the best interests of others that are being met. For a creative discussion of this issue, see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

50. FLA. STAT. § 63.062(1)(b) (1975).

51. Under the 1974 Social Services Amendments, a mother receiving an Aid to Families with Dependent Children (AFDC) grant is required to cooperate with the state in its efforts to identify, locate, and collect child support payments. Her refusal to cooperate results in a decrease in the grant. 42 U.S.C. § 602(a)(26) (Supp. V 1975). For a discussion of those amendments, see Comment, *Enforcement of Child Support Obligations of Absent Parents—Social Services Amendments of 1974*, 30 SW. L.J. 625 (1976). *See also* FLA. STAT. § 409.245 (1975).

52. 256 N.E.2d 814 (Ill. 1970).

53. 405 U.S. at 659.

it and support it, then he has no claim to the child.[54] Usually, however, a mother who does not show enough concern to support her child is afforded notice and opportunity for hearing before her parental rights are severed. Parental right to consent may be waived by the court as to either parent if the court finds desertion or abandonment,[55] but this finding and waiver requires affirmative action by the court whereas failure to give notice requires only inaction. Thus, a mother's rights may be involuntarily terminated after an affirmative action by the court, but a father's may be effectively terminated in the absence of affirmative efforts by failure to identify him and give him any notice. The disparity reflects a simple biological reality. By virtue of the physical requirements of pregnancy and birth, the mother is automatically present and accounted for, facilitating compliance with the notice requirement. It is not necessary for the father to be involved after conception takes place.

It does not follow, however, that convenience afforded by anatomy should dictate construction of constitutional due process requirements. In *Herzog* the father was unknown, but not necessarily unknowable. The court enjoined HRS from even *inquiring* as to the identity of the father unless HRS could show support or interest on his part. May *Stanley* be thus construed to give due process rights only as to known and legally recognized fathers? Chief Justice Hallows of the Wisconsin Supreme Court clearly believed that *Stanley* applied to both known and unknown natural fathers:

> In *Stanley*, the supreme court decided two things: (1) That the denial of a natural father's parental rights to a child born out of wedlock based on mere illegitimacy violated his constitutional right to equal protection of the laws, and (2) that the termination of a natural father's parental rights to a child born out of wedlock without actual notice to him, if he was known, or constructive notice, if unknown, and without giving him the right to be heard on the termination of his rights denied him due process of law.[56]

Though it may well cause serious administrative inconvenience if

54. In *In re* Adoption of Wilson, 328 So. 2d 50, 52 (Fla. 2d Dist. Ct. App. 1976), the court noted that failure to pay child support, though not sufficient standing alone to obviate the necessity for the father's consent to adoption of his child, is "a relevant circumstance to be considered in granting a petition for adoption." Compare *In re* Adoption of Eddy, 487 P.2d 1362, 1367 (Okla. 1971), where the Oklahoma Supreme Court ruled that the willful failure of a natural, legitimate father to make child support payments which were required by the divorce decree "obviated the necessity of his consent" to adoption of his children by the stepfather.

55. FLA. STAT. § 63.072(1) (1975).

56. 207 N.W.2d at 828.

putative fathers must be sought out and notified of pending procedures to terminate parental rights, inconvenience alone is no excuse for denial of due process.[57] Expanding on that theme, the Supreme Court in *Vlandis v. Kline* noted that administrative ease and certainty must give way when there are "reasonable and practicable means of establishing the pertinent facts . . . ."[58]

The Second District Court of Appeal in *Herzog* was not concerned about administrative difficulty but was concerned about confidentiality and the possible misidentification of putative fathers. The consequences of "ferreting out" putative fathers could be "counterproductive." The court observed:

> Far be it from preserving the interests of a putative father, the practical effect would be more likely to penalize him. It would be difficult enough when the process server came to the home of a married man to ask about his illegitimate child, but what could be expected if the mother was mistaken or was simply being spiteful. Perhaps more significant would be the fact that pursuing such a policy would make it extremely difficult to keep the identity of adoptive parents from the natural parents, and vice versa.[59]

Mothers might, of course, be mistaken or spiteful, but the requirement that the mother name the father if she knows his identity is no more than is required under both state and federal law of mothers who apply for welfare payments.[60] Perhaps the state has a duty to protect the rights of putative fathers commensurate with its effort to impose responsibilities.[61]

Confidentiality in adoption proceedings is also a very real concern of both natural parents and adoptive parents. Florida law provides that both hearings and records be confidential and even specifies that

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57. "[T]he Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. at 656.

58. 412 U.S. at 451. *Vlandis* was not a family law case, but involved a determination of out-of-state residency for purposes of assessing student tuition and fees. If a married student had applied from an out-of-state address or if a single student had a legal address outside the state at any time during the year preceding the application for admission, the student was irrebuttably presumed to be an out-of-state student for the entire time she was in school. The Supreme Court held that the state had violated the due process clause of the fourteenth amendment by refusing to allow students who were bona fide residents of the state a chance to establish that fact. *See generally* note 28 *supra*.

59. 317 So. 2d at 867.

60. *See* note 51 *supra*.

61. The United States Supreme Court in Gomez v. Perez, 409 U.S. 535 (1973), made it clear that statutorily required child support must include support for illegitimate, as well as legitimate, children.

records regarding adoption of a minor "shall be indexed only in the name of the petitioner, and the name of the minor shall not be noted on any docket, index, or other record outside the court file."[62] The question then becomes how to balance the need for confidentiality with the need to protect the rights of all the people involved.

In *Herzog*, HRS voiced its concern about a possible future challenge to the adoption. HRS asserted that if an attempt were not made to identify the putative father and to terminate his parental rights, the adoption might be open to challenge later by the putative father. Even if the challenge were unsuccessful, the child could be injured by the uncertainty. In addition, HRS was concerned that under *Stanley* and *Rothstein* the putative father might prevail, which would bring into question the stability and security of other adoptions.[63]

Stanley and *Rothstein* are distinguishable from *Herzog*. In both, the natural father *had* shown an interest in the child, a circumstance the *Herzog* court identified as one which would prompt the court to modify its order.[64] Such judicial flexibility does not, however, respond to the possibility that the father does not know of the child but would want to provide support or even take custody of the child if he knew. As Wisconsin's Chief Justice Hallows stated the issue: "Under the present law, fathers must come forward. But how can such a father come forward if there is no notice?"[65]

Adoption should be a final and irrevocable act. Since the Florida adoption statute as construed by *Herzog* does not require an inquiry into the identity of a putative father, nor does it require that notice and opportunity to be heard be given all putative fathers, a statutory revision is needed. This writer believes that the necessary statutory change could be accomplished quite readily if chapter 63—the adoption statute—were to incorporate the notice provisions of chapter 39—the juvenile statute—or if the Florida adoption statute were to incorporate a provision similar to the Illinois statute on notice to putative fathers. The Illinois statute deals explicitly with the objection mentioned by the *Herzog* court, namely, embarrassment to a man wrongfully identified as the putative father, by setting forth a disclaimer provision.[66]

If the notice provisions of chapter 39, Florida Statutes, are utilized, the relevant portions are subsections 39.11(5) and (6), which govern

62. FLA. STAT. § 63.162(1)-(3) (1975).
63. Brief of Appellant at 10, 13.
64. 317 So. 2d at 867.
65. 178 N.W.2d at 67.
66. Act of Sept. 6, 1973, P.A. 78-531, § 1, ILL. REV. STAT. ch. 37, § 705-9.4 (1975). For the exact wording of the Notice to Putative Father provision, see note 12 *supra*.

the permanent commitment of a dependent child to a licensed child-placing agency or HRS. The first step of every adoption of a dependent child under that chapter is a complete termination of parental rights. In order to so terminate those rights, the statute provides for personal notice when possible, notice by publication when personal notice is not possible, or waiver by written surrender of the child.

Incorporation of a similar provision into chapter 63, the Florida adoption statute, would forestall cases such as *Herzog* and grant everyone involved the rights and protections necessary for the security of an adoption proceeding. By making the adoption procedure a two-step process—termination of parental rights followed by creation of parental rights—the confidentiality need could also be met.

M. CATHERINE LANNON

Criminal Law—ETHICS—PUBLIC DEFENDER'S OFFICE IS A "LAW FIRM" FOR PURPOSE OF DETERMINING WHETHER CONFLICT EXISTS IN REPRESENTATION OF CODEFENDANTS—*Turner v. State*, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976).

On July 19, 1976, Ernest W. Turner, Arthur T. Longway, and Thomas C. Hyder were charged in a single information with the offense of burglary of a structure in violation of section 810.02, Florida Statutes.[1] The public defender was appointed to represent the three codefendants after each had executed an affidavit of insolvency.[2] During a routine intake interview with Thomas Hyder, it was discovered that a conflict of interest existed among the defenses of the three men. Moreover, the assistant state attorney assigned to the prosecution of the three defendants informed both the public defender's office and the court that each defendant had made statements that implicated another codefendant. Consequently, the public defender's office moved to be relieved as counsel for Turner and Longway. The trial court relieved one assistant public defender as individual counsel for Turner and Longway, but refused to appoint private counsel to represent them on the ground that separate attorneys within the public defender's office could properly represent the three codefendants.[3]

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1. FLA. STAT. § 810.02(1) (1975) provides: " 'Burglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." The offense may be a felony of the first, second, or third degree depending on the circumstances involved.

2. *See* FLA. STAT. § 27.52 (1975).

3. The trial court stated: "[I]t appear[s] to the Court that the Public Defender