# Case Notes

**ADOPTION**—IOWA CODE SECTIONS 238.26 TO 238.28 AND 600.3 COMPORT WITH THE CONSTITUTIONAL REQUIREMENTS REGARDING EQUAL PROTECTION AND PROCEDURAL DUE PROCESS CONCERNING THE RIGHTS OF THE PUTATIVE FATHER IN AN ADOPTION PROCEEDING.—*Catholic Charities v. Zulesky* (Iowa 1975).

A child was born out of wedlock to Karen Ann Cox on June 16, 1971. Defendant, Joseph Zulesky, was the natural father of this child. On June 21, 1972, Miss Cox executed a release of parental rights[1] to plaintiff, Catholic Charities, a licensed child placement agency.[2] Thereafter, Catholic Charities commenced adoption proceedings and on July 11, 1972, the adoption was finalized. Zulesky's consent to a termination of his parental rights or to the subsequent adoption was not obtained, nor was he afforded notice or opportunity to be heard in either of these related matters prior to finalization of the adoption. On November 13, 1972, Catholic Charities commenced a declaratory judgment action seeking an adjudication as to the validity of the aforesaid adoption. Zulesky filed answer by attacking *Iowa Code* sections 238.26 to 238.28 (child placement statute)[3] and section 600.3 (adoption statute)[4] as violative of the equal protection and due process clauses of the fourteenth amendment. The trial court held these statutes unconstitutional, as alleged by Zulesky, because they permit termination of the parental rights of a putative father without first requiring his consent or affording him notice and opportunity to be heard.[5] Although the instant case was determined to be moot before

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1. *See generally* IOWA CODE ch. 600 (1971).
2. *See generally* IOWA CODE ch. 238 (1971).
3. In relevant part *Iowa Code* chapter 238, particularly sections 238.26-238.28, prescribes the manner in which a voluntary termination of parental rights may be effectuated and custody of a minor transferred to a child placement agency.

Section 238.26 provides: "No person may . . . transfer to another his rights, or duties with respect to the permanent care or custody of a child . . . unless . . . the parent or parents sign a written release . . . of the . . . custody of the child to [a child placement] agency . . . ."

Section 238.27 declares: "Neither parent may sign such release without the written consent of the other unless . . . the parents are not married to each other."

Section 238.28 states: "If the parents are not married to each other, the parent having the care and providing for the wants of the child may sign the release."

4. *Iowa Code* chapter 600 prescribes procedures relative to direct adoption of a child or through a child placement agency. In relevant part section 600.3 reads:

> The consent of both parents shall be given to such adoption unless . . . the parent or parents have signed a release of the child in accordance with the statute on child placing. . . . If the child has been given by written release to a licensed child welfare agency in accordance with the statute on child placing, the consent of the agency to whom the release was made shall be necessary.

5. Decreed July 30, 1973, in Linn County District Court, 6th Judicial District of Iowa, Law No. 96953. In brief, the trial court's holding was premised on *Stanley v. Illi-*

the rendering of this decision,[6] the Iowa supreme court, *held*, reversed. *Iowa Code* section 238.26 to 238.28 and section 600.3 comport with the requirements of the fourteenth amendment regarding equal protection and due process concerning the rights of the putative father in an adoption proceeding. *Catholic Charities v. Zulesky*, 232 N.W.2d 539 (Iowa 1975).

Adoption statutes have traditionally ignored the putative father.[7] Before 1972 the putative father's consent was not required for the termination of his parental rights and the adoption of his illegitimate child in thirty-seven states.[8] In 1972 the United States Supreme Court took a precarious step toward the acknowledgment of the putative fathers' constitutional rights with the decision in *Stanley v. Illinois*.[9]

The facts in *Stanley* involved a man and a woman who had lived together intermittently for eighteen years. They had three illegitimate children born of this relationship. When the mother died the children were adjudged to be dependents of the state. The father, Peter Stanley, was provided no opportunity to be heard on the issue as to the termination of his parental rights.[10] Since he was not married to the children's mother, he was not a "parent" as defined by the Illinois statute.[11] Thus, the trial court concluded that Stanley's illegitimate children were, by definition, dependent[12] and therefore became wards of the state upon their mother's death.[13]

Stanley appealed the parent-child termination judgment to the Illinois supreme court.[14] He argued that the exclusion of unwed fathers from the

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*nois*, 405 U.S. 645 (1972), *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972), and *Vanderlaan v. Vanderlaan*, 405 U.S. 1051 (1972).

6. After the filing of the appeal both parties conceded that defendant had formally consented to the adoption. However, because the trial court's decree placed a cloud upon *Iowa Code* chapters 238 and 600 and, in effect, jeopardized all adoption proceedings whether completed or to be completed in the future, the court deemed this adjudication as to the constitutionality of the statutes as a matter of public concern that should be entertained by the court, although in the abstract. Catholic Charities v. Zulesky, 232 N.W.2d 539, 542-43 (Iowa 1975).

7. Various commentators have thoroughly examined the rights of the putative father. *See generally* Embick, *The Illegitimate Father*, 3 J. FAMILY L. 321 (1963); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAMILY L. 231 (1971); Note, *Father of an Illegitimate Child: His Right to be Heard*, 50 MINN. L. REV. 1071 (1966); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

8. For a complete listing of these state statutes, see, Reeves, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAMILY L. 115, 138-47 (1973-74).

As the Oregon statute suggests, generally the putative father played no role in his child's adoption: "The consent of the mother of the child is sufficient . . . and for all purposes relating to the adoption of the child the father of the child shall be disregarded just as if he were dead . . . ." ORE. REV. STAT. § 109.326(1) (1971).

9. 405 U.S. 645 (1972).

10. *In re* Stanley, 45 Ill. 2d 132, 133, 256 N.E.2d 814, 815 (1970).

11. ILL. REV. STAT., ch. 37, §§ 701-14 (1972). Under the Illinois Juvenile Court Act, the definition of "parents" does not include the father of an illegitimate child.

12. ILL. REV. STAT., ch. 37, §§ 702-5 (1972). "Dependent children" includes those minor children who were living without a "parent" or court appointed guardian.

13. *In re* Stanley, 45 Ill. 2d 132, 133, 256 N.E.2d 814, 815 (1970).

14. *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

statutory definition of "parent" violated equal protection. This argument was rejected. Thereupon the United States Supreme Court, having granted certiorari, reversed, holding that a proceeding which culminated in termination of an unwed father's custody of his children without notice and opportunity to be heard violated the equal protection and due process clauses of the fourteenth amendment.[15]

Against such a background of nonrecognition of the putative father's rights, this decision carried the potential of drastically altering the legal framework of the adoption process.[16] As a result of *Stanley*, state court decisions involving issues raised in *Stanley* were remanded for consideration in light of that opinion and thereupon vacated.[17] State statutes relating to the adoption process were closely scrutinized and new legislation was drafted.[18] *Stanley* "created an uncharted sea in the determination of the rights of putative fathers to their illegitimate children."[19] The test of the Iowa statute arose in the case of *Catholic Charities v. Zulesky*.

In *Catholic Charities* the Iowa supreme court first addressed itself to the question of equal protection and the rights of putative fathers under the Iowa statute. *Iowa Code* chapter 238 allows release of a child under 14 to a licensed placement agency for purpose of adoption only with the consent of both parents subject to designated exceptions. These exceptions were neither relevant nor considered in the case. Significantly, however, where the parents are not married, the parent providing for the wants of the child "may sign the

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15. The Court stated:

> We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

Stanley v. Illinois, 405 U.S. 645, 658 (1972). Thus equal protection was the sole grounds for reversal, although Justice White's majority opinion was primarily a discussion of procedural due process.

16. *See* Stanley v. Illinois, 405 U.S. 645 (1972). In his dissenting opinion C.J. Burger stated that the Court "embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible." *Id.* at 668.

17. State *ex rel.* Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.* Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972); Vanderlaan v. Vanderlaan, 126 Ill. App. 410, 262 N.E.2d 717 (1970), *vacated*, 405 U.S. 1051 (1972). *See also* Cheryl Lynn H. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972); Doe v. Department of Social Services, 71 Misc. 2d 666, 337 N.Y.S. 2d 102 (1972). *See generally In re* Adoption of Anonymous, 78 Misc. 2d 1037, 359 N.Y.S. 2d 220 (1974); *In re* M., 132 Vt. 410, 321 A.2d 19 (1974); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

18. Illinois has included the father of an illegitimate child in its statutory definition of "parents," thus conferring upon him the right to be heard in proceedings under the Juvenile Court Act. ILL. ANN. STAT. ch. 37, §§ 701-14, 701-20 (1974).

Michigan adopted a statute providing for registration of putative fathers in order to preserve their rights. MICH. COMP. LAWS § 710.33 (1974).

Iowa has also drafted a comprehensive adoption law reform bill as a result of *Stanley*. This bill is now before the Iowa Senate awaiting passage. S. 41, 66th G.A., 1st Sess. (1975). Ironically, the Iowa supreme court ruled in *Catholic Charities* that the existing Iowa law is constitutional.

19. *In re* Guardianship of Harp, 6 Wash. App. 701, 705-06, 495 P.2d 1059, 1062-63 (1972).

release."[20] A parent similarly situated may consent to a direct adoption by designated adoptive parents.[21]

As a matter of equal protection of the law it is evident that the Iowa statutes do not discriminate as in *Stanley* by drawing lines of distinction regarding consent to adoption or release of a child to an agency for such purpose on the basis of parental status. All parents, married, single, divorced, male or female, stand in like position. The only line of demarcation is between the "caring" and "non-caring" parent.[22] The determining factor under Iowa law is whether the nonconsenting parent has provided for the wants of his or her offspring.[23] Thus, the question becomes whether the statutory classification of "caring" versus "non-caring" parent is a constitutionally permissible distinction.

In answering this question the Iowa court initially observed that the various state legislatures have authority to statutorily treat different classes of persons in differing ways, provided such classification is reasonable, not arbitrary, and bears a rational relationship to a legitimate governmental interest that is the object of the legislation.[24] The promotion of the welfare and best interests of the child in an adoption proceeding is the objective sought to be advanced by the Iowa statute.[25] The state, as *parens patriae*, has a legitimate interest in this.[26] Obviously, a "caring" parent would promote the welfare and best interests of a child whereas a "non-caring" parent would not. Thus, the distinction between "caring" and "non-caring" parents does bear a rational relationship to that objective and the Iowa statutes do not violate constitutional equal protection mandates.[27]

The next issue the court turned to was whether the Iowa statute met the procedural due process requirements. In relevant part, the Iowa law provides

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20. IOWA CODE §§ 238.27, 238.28 (1971).

21. IOWA CODE § 600.3 (1971). *See generally* Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228 (1955) [hereinafter cited as Uhlenhopp].

22. *See, e.g., In re* Adoption of Clark, 183 N.W.2d 179 (Iowa 1971) (mother's consent unnecessary when she is not providing for the wants of the child). *See also* Uhlenhopp, *supra* note 21, at 246.

23. *See In re* Adoption of Keithley, 206 N.W.2d 707, 711-12 (Iowa 1973); Rubendall v. Bisterfelt, 227 Iowa 1388, 1390-91, 291 N.W. 401, 402 (1940).

24. Reed v. Reed, 404 U.S. 71, 75 (1971). See also *State v. Hall*, 227 N.W.2d 192 (Iowa 1975), wherein the court stated that "[t]he legislature is given wide discretion in defining the limits of classes when a statute involves classification of persons or things. If a classification is reasonable and operates equally upon all within the class, it is a valid classification." *Id.* at 194. And in *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973), it was noted that "the classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *Id.* at 907.

25. *In re* Adoption of Kiethley, 206 N.W.2d 707, 712 (Iowa 1973).

26. Jackson v. Hackney, 406 U.S. 535, 546-47 (1972); Stanley v. Illinois, 405 U.S. 645, 652 (1972); *In re* McDonald, 201 N.W.2d 447, 453 (Iowa 1972).

27. The Iowa court noted that had the *Stanley* decision arisen in Iowa, the Iowa law would have dealt with him in a constitutional manner. Since Stanley was a "caring" parent and his consent would have been necessary for the termination of parental rights, he would have been accorded appropriate recognition under the Iowa statutory scheme. Under the proposed Iowa statute there is no distinction between "caring" and "non-caring" parents. "A parent (whether by birth or adoption) . . . may petition the juvenile court for termination of parental rights. . . ." S. 41, § 5, 66th G.A., 1st Sess. (1975).

that "[t]he court shall provide for such hearings in adoption proceedings as may be necessary and shall prescribe notice thereof."[28] Thus, the statute leaves the mattter of notice almost entirely in the hands of the trial court and the question becomes: when is notice necessary? Should notice be given to parents whose consent is claimed to be unnecessary because of statutory exception? More specifically, should notice be given to parents who are not "caring" for the child? Previous Iowa decisions had held that notice need not be given to the parent furnishing neither substantial care nor material provision,[29] and innumerable adoptions had beeen finalized in Iowa without noticed hearings.[30] With the ruling in *Catholic Charities*, however, the Iowa court declared that the statute follow a new interpretation.

Although upholding the constitutionality of the statute, the court stated:

> [A]n effective adjudication cannot *hereafter* be entered in any proceeding involving either (1) direct adoption to designated parents or (2) adoption of a child through a child placement agency, premised upon parental release of the child for such purposes, unless an identity and address known nonconsenting putative father is accorded appropriate timely notice and opportunity to be heard. This means, absent consent to any release for or adoption of a child born out of wedlock, such known father must be accorded meaningful opportunity to show he has significantly provided for the wants of his child and is ready, willing and able to thus provide for future wants of said child before a court can effectively terminate his parental rights (emphasis added).[31]

In other words, notice and hearing must always be given to all known putative fathers before their parental rights can be terminated and an adoption finalized.[32]

The court still prescribes the manner and mode of notice. Either personal service or notice by certified mail may be deemed appropriate.[33] Of course, the manner of notice is always subject to constitutional due process requirements,[34] and any notice prescribed must be such as is reasonably calculated,

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28. Iowa Code § 600.4 (1975).
29. *See* Uhlenhopp, *supra* note 21, at 263-66.
30. *Id.*
31. Catholic Charities v. Zulesky, 232 N.W.2d 539, 546 (Iowa 1975). Since innumerable adoptions have been finalized in Iowa without noticed hearings, the court was concerned as to the retroactive versus prospective application of the holding. Realizing the chaotic effect a retroactive ruling of this type would have on many homes and the numberless adopted children, the court rejected that application. Consequently, the holding neither nullifies nor adversely affects any adoption which has been finalized or any case where the mother has released the child for adoption prior to the filing of this opinion.
32. Under the proposed Iowa law: "A termination of parental rights shall . . . be effectuated only after notice has been served on all necessary parties and these parties have been given an opportunity to be heard before the juvenile court." Living parents (whether by birth or adoption) of a child are necessary parties. S. 41, §§ 5, 6, 66th G.A., 1st Sess. (1975).
33. The proposed Iowa law provides substantially these same requirements. S. 41, § 6.4, 66th G.A., 1st Sess. (1975).
34. *See* Iowa Code §§ 232.4-.9, 232.45, 600.4 (1975); Iowa Code ch. 618 (1975); Iowa R. Civ. P. 56 (renumbered 56.1 as of July 1, 1975), 57, 58, 59 (as amended effective July 1, 1975), 59.1 (effective July 1, 1975).

under all circumstances, to apprise such known putative father regarding pendency of the adoption proceedings involved and afford him reasonable opportunity to appear and be heard.[35]

If the named father appears, he has the burden of pleading and proving that he has been and is providing for the wants of the said child.[36] If he fails to sustain this burden the adoption may be finalized without his consent.[37] If, after reasonable notice, the named father fails to appear he cannot be heard to complain.[38]

The petitioner shall always have the initial burden of pleading and proving that the named individual is the father of the subject child. Normally due process would require, at a minimum, constructive service through a notice by publication.[39] However, the Iowa court found that this was not an acceptable manner of notice within the ambit of adoption as such notice would usually be an "exercise in futility"[40] and would only result in the unnecessary embarrassment of all concerned, especially the unwed mother. In addition, it would unjustifiably violate the state policy of privacy, anonymity and confidentiality in adoption proceedings.[41] If a showing is made upon which the court can reasonably conclude that the name or address of the father of the child is unknown to the petitioner, the court may dispense with the notice requirement altogether.

It appears as if the Iowa response to *Stanley* has not had the drastic effect on the adoption process as some might have predicted. Although there are several areas of concern as to the practical consequences in the implementation of this ruling,[42] the court did not go overboard in the recognition of the putative father's rights. The result of *Catholic Charities* is to insure that each and every father is accorded due process of law relating to his rights in the custody of his children. It appears that the rights of all others concerned will be maintained and the best interests of the children will remain paramount.

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35. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

36. *In re* Adoption of Vogt, 219 N.W.2d 529 (Iowa 1974). *See also* Uhlenhopp, *supra* note 21, at 265.

37. *In re* Adoption of Clark, 183 N.W.2d 179 (Iowa 1971); *In re* Adoption of Moriarty, 260 Iowa 1279, 152 N.W.2d 218 (1967).

38. Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972).

39. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

40. *See generally* Grand River Dam Authority v. Going, 29 F. Supp. 316, 325 (N.D. Okla. 1939). *See also* Note, *The "Strange Boundaries" of Stanley v. Illinois: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 529-31 (1973).

41. *See* IOWA CODE §§ 232.27, 232.55, 232.57, 600.9 (1975). The proposed Iowa statute provides for notice by publication in the case where the name or address of the father is unknown. After the ruling in *Catholic Charities*, these provisions would probably be disregarded. S. 41, § 6.5, 66th G.A., 1st Sess. (1975).

42. Catholic Charities v. Zulesky, 232 N.W.2d 539 (Iowa 1975) (Reynoldson, J., specially concurring).